Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10288/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 16 October 2019	**On 11 November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR A A A A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Howard, Fountain Solicitors (Walsall)
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Sudan who claims to be a non-Arab Darfuri from the Berti tribe. That was the basis of his asylum claim before the Secretary of State made on 24 February 2018, which was rejected in a decision dated 16 August 2018. The Appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal Herwald for hearing on 28 September 2018.

2. In a decision and reasons promulgated on 16 October 2018, the judge dismissed the appeal, finding that the Appellant's account was not credible and that he was not a member of the Berti tribe.

3. Permission to appeal was sought, in time, on the basis that:

(i) firstly, the judge had erroneously failed to apply the country guidance decision in AA (Non-Arab-relocation) Sudan CG [2009] UKAIT 00056 which held that all non- Arab Darfuris are at a real persecutory risk on return to Darfur and cannot reasonably be expected to relocate and had further erred in failing to apply the country guidance decision in MM (Darfuris) Sudan CG UKUT 00010 (IAC). It was contended that following the decision in SG Iraq [2012] EWCA Civ 940 that Tribunal Judges and decision makers are required to follow country guidance decisions unless very strong grounds supported by cogent evidence are adduced justifying there not doing so;

(ii) secondly, it was submitted the judge had erred in failing to apply the country guidance decision in IM and AI [2016] UKUT 00188 at [236] in relation to the risk the Appellant faces on return to Khartoum in respect of the duty on the decision maker to build a comprehensive picture of the Claimant;

(iii) thirdly, the judge had erred at 15U in apparently accepting the Appellant had been tortured but then finding at 15T that the Appellant's account was not credible in this respect.

(iv) fourthly, that the judge had given inadequate reasoning for finding that the Appellant's account was incredible, particularly given there were two witnesses along with two letters all of which corroborated to the lower standard of proof that the Appellant was from the Berti tribe.

(v) fifthly, the judge failed to adequately consider the risk on return to Khartoum as a failed asylum seeker and whether the Appellant would be considered to have an imputed political profile that would put him at risk on return.

4. Permission to appeal was granted by First-tier Tribunal Judge Doyle in a decision dated 12 November 2018, on the basis it was arguable that the judge did not carry out sufficient analysis to justify departure from the country guidance case AF [2004] UKIAT 00284 and YC China [2018].

Hearing

5. At the hearing before the Upper Tribunal, Mr McVeety helpfully provided a copy of the recent decision of the Upper Tribunal in AAR and AA (non-Arab Darfuris-return) Sudan [2019] UKUT 00282 (IAC) where a panel of the Upper Tribunal held that the *"the situation in Sudan remains volatile after civil protests started in late 2018 and the future is unpredictable. There is insufficient evidence currently available to show that the guidance given in AA (Non-Arab Darfuris-relocation (op. cit.) and MM Darfuris Sudan requires revision. Those cases should still be followed*."

6. Due to the nature of this particular challenge, I asked Mr McVeety first to clarify the Respondent's position in the absence of a Rule 24 report. Mr McVeety accepted that, in theory, the judge had erred materially in law for the reasons set out in ground 1. However, that would only be material if it

had been established that the Appellant was indeed a member of the Berti tribe as claimed and the judge had found that he was not.

7. In light of Mr McVeety's submission, Mr Howard sought to rely essentially on ground 4 of the grounds of challenge *viz* the reasons challenge in light of the evidence that the Appellant was a member of the Berti tribe. He submitted the judge had not given sufficient reasons for rejecting the evidence of the witnesses or the documents. He submitted looking at [15] (a) to (p) that the letter from the Berti community was written by the leader of that organisation and the letter from the Darfur Union had also been written by the Secretary of that organisation.

8. In relation to the recent evidence he submitted that it was plausible that the witness can add credence to the fact the Appellant is from the Berti tribe. In relation to the fact the Appellant had coincidentally bumped into the witnesses, Mr Howard submitted that this was not unusual that they had met by accident given that as members of the same community they had attended meetings or events organised by that community in the UK.

9. In response, Mr McVeety submitted that the difficulty with that is that Mr Howard has essentially proffered an alternative explanation but this is not sufficient to establish a material error of law. He sought to rely on the decision of the Upper Tribunal in Durueke [2019] UKUT 00197 (IAC) where it was held that permission to appeal should only be granted if it can properly be said that the judge had made a decision that was irrational. Mr McVeety submitted that the Appellant's case was a disagreement with the weight that the judge had attached to the evidence but rather the judge had considered everything in the round. The Appellant had given completely contradictory evidence as to where he was born and brought up and this was not in either Darfur or Khartoum but in the east of Sudan. The judge was entitled to find that that was a major contradiction and the judge then considered the background documentary evidence.

10. Mr McVeety submitted that the judge was entitled to be concerned that the document emanating from the Berti community appeared to be a template and that he was not told what extensive enquiries that organisation had made and that there was a contradiction between that evidence and the other background evidence. Mr McVeety submitted that really ground 4 is nothing more than a challenge to the weight that was attached but this is well-established is a matter for the judge. Therefore there was no material error of law identified but rather simply a disagreement with the judge's findings of fact which were open to him on the evidence before him.

11. In reply Mr Howard submitted that whilst the weight to be attached to evidence may be a matter for the judge, in respect of the documentary evidence at [15] (k) and (l) the judge had failed to give adequate reasons for not accepting the witness evidence and that the judge had failed to explain how he reached his decision not to accept this evidence.

12. I reserved my decision with I now give with my reasons.

Findings and reasons

13. In light of the fact that the recent decision in AAR and AA (non-Arab Darfuris-return) Sudan [2019] UKUT 00282 (IAC) advises following the previous country guidance *viz AA (Non-Arab Darfuris-relocation)* CG [2009] UKAIT 00056 and *MM (Darfuris) Sudan* [2015] UKUT 00010 (IAC) the issue of whether or not the Appellant is a member of the Berti tribe is definitive of his claim.

14. The First tier Tribunal Judge rejected the Appellant's claim to be a member of the Berti tribe at [15](p), for reasons he set out in detail at [15](a)-(o). His reasons for so doing were:

(i) that in his screening interview at q 1.13 he said his ethnicity was "Alhpap" which he subsequently explained was an error as he had not understood the interpreter (a)-)b) refer;

(ii) in his screening interview the Appellant said he was born in Tokar, which is in East Sudan whereas in his asylum interview he said he was born in Al Genena, which is in Darfur and at the hearing he said due to problems his family encountered they moved to Tokar (c);

(iii) the Appellant stated he attended primary school both in Darfur and in Tokar, which is inconsistent with his statement that he stayed the whole of term time with Mr Jaafar Ali in Darfur (e);

(iv) at q 130 of his asylum interview he said that when a couple married they go off to live together, whereas according to background information cited at [31] of the refusal he wife continues to live in her parents' household for the first year of marriage and her husband visits her there periodically. The Appellant stated he did not follow the Berti traditions because he married in East Sudan, which the Judge found was grist to the mill that he is indeed not Berti (g);

(v) the first supporting witness, Mr Rani Mohamed, said that both the Appellant's maternal aunt, who was married to the witness' uncle, and the Appellant's mother were from tribes in the East of Sudan; he had met the Appellant at his wedding in the east of Sudan. The Judge found the witness assumed the Appellant is Berti because of a distant relationship between their parents (i);

(vi) the witness Mr Jaafar Ali considered the Appellant must be Berti because they share the same great grandfather; that the Appellant's mother was not Berti and that the Appellant had lived with him on and off between 1999 and 2003; they met at the Appellant's wedding and then just happened to come across each other at a party in Manchester in June 2018 (k);

(vii) he was not persuaded that the witnesses would suddenly come across the Appellant in the UK after he had only been here for a relatively short time nor that either witness could attest in full to the Appellant's ethnicity (l);

(viii) the letter from the Berti Community UK caused him disquiet as it appears to be a template where the Appellant's name has been inserted; the writer purports to have made extensive enquireies about the appellant's family background and contacted, among others, Mr Jaafar Ali and a Mr Shaikh, who confirmed he is one of the Appellant's friends and is from Darfur. He found he could place little reliance upon it in that it purports to recite an interview with the Appellant to confirm his tribal affiliations but the witness could not be cross-examined and there is no date relating to the interview (o);

(ix) as to the letter from the Union of the People of Darfur dated 8.9.18 the Appellant is purported to have been asked 9 questions and "*of course by the time the Appellant was asked such questions, he had been in this country for some time and knew what was needed, in order to persuade the decision-maker that he might be from Darfur originally.*"

15. The first part of ground 4 of the grounds of appeal asserts that the Judge had given inadequate reasoning at [15] for finding the Appellant's account incredible. This is clearly not the case given the extensive reasoning provided by the Judge for his finding that the Appellant is not a member of the Berti tribe.

16. The second part of the ground 4 asserts that the Judge has given inadequate reasoning for not accepting the evidence of the Appellant's two witnesses together with the letters from the Union of the People of Darfur and the Berti Community UK as being corroborative to the lower standard of the Appellant having Berti origin.

17. I have concluded that the judge erred materially in law in his treatment of the witness and documentary evidence in support of the Appellant's claim to be from the Berti tribe, for the following reasons:

17.1. Mr Rani Mohamed gave oral evidence before the Judge, based on his own personal knowledge, due to the fact that the Appellant's maternal aunt is married to the witness' uncle. The Judge has failed to set out the evidence given at the Tribunal nor whether his evidence was challenged by the Respondent in cross-examination and I find there is no evidential basis upon which the Judge could properly find that Mr Mohamed's evidence was based on an assumption as opposed to knowledge arising from his familial relationship;

17.2. similarly, the witness Mr Jaafar Ali and the Appellant share the same great grandfather and thus he can reasonably be expected to know the Appellant's ethnicity on the basis that their mutual great grandfather is Berti. The Judge has held against both witnesses that they met the Appellant by accident in Manchester, however, I find that there is sense in Mr Howard's submission that it was not unusual that they had met by accident given that

as members of the same community they had attended meetings or events organised by that community in the UK. I find that the Judge has failed to give sufficient reasons for disregarding Mr Ali's evidence;

17.3. I find that the Judge's finding that neither witness could attest in full to the Appellant's ethnicity (I) is based on a misapprehension of the fact that a person who is of mixed ethnicity is treated as being from his father's tribe, which in this case is Berti, his mother being from East Sudan as the witnesses consistently maintained.

17.4. I find that the Judge further erred in his reasons for rejecting the corroborative effect of the letter from the Berti Community UK as there is nothing inherently wrong in utilising a template nor in conducting extensive enquiries into the Appellant's family background, including contacting Mr Ali and a Mr Shaikh. The Judge's further reasoning is unclear but he appears to reject the letter in the basis that no date has been provided for when the Appellant was interviewed and the writer of the letter was not available for cross-examination. Whilst I find that this may reduce the weight to be attached to the document it is not sufficient reason to place little reliance upon it;

17.5. I find that the reasons provided by the Judge for rejecting the letter from the Union of the People of Darfur dated 8.9.18, which was based on an interview of 9 questions, was cynical, based on assumption and lacking in any or any proper evidential basis.

18. I find that these errors are material in that, had the Judge considered the evidence in support of the Appellant's claim to be from the Berti tribe in the round, as it was incumbent upon him to do, he may have reached a different conclusion.

Notice of Decision

I find material errors of law in the decision of First tier Tribunal Herwald. I set that decision aside and remit the appeal for a hearing *de novo* to be heard by a different Judge.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman Date 6 November 2019

Deputy Upper Tribunal Judge Chapman