Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07579/2014**

THE IMMIGRATION ACTS

Heard at : IAC Manchester	**Decision Promulgated**
On : 3 May 2016	**On 16 May 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

M A A
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Bednarek instructed by IAS (Manchester)
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sudan born on 1 August 1987. He claims to have arrived in the UK on 19 June 2014 and claimed asylum the following day. His claim was refused on 5 September 2014 and a decision was made on 15 September 2014 to remove him from the UK.

2. The appellant appealed against that decision and his appeal was heard before the First-tier Tribunal on 23 February 2015. The appeal was dismissed on asylum grounds, but allowed on humanitarian protection and human rights grounds.

3. Both parties have been granted permission to appeal against the decision of the First-tier Tribunal and are thus both appellants. However, for the purposes of this decision, I shall refer to MAA as the appellant and the Secretary of State as the respondent, reflecting their positions as they were in the appeal before the First-tier Tribunal.

The Appellant's Case

4. The appellant claims to be a member of the Bergo tribe from South Kordofan in Sudan. He claims to have experienced discrimination on the basis of his ethnicity and to have been targeted by the Janjaweed on one occasion. He lived with his grandmother when he was a child in South Kordofan and attended school there. After his schooling, his father used his connections to get him a place at Karary military academy in Khartoum, where he studied computing. When he graduated he was ranked as a sergeant. He worked as a computer engineer. At the beginning of September 2013 he was required to fight for the Sudanese government against the people of South Kordofan and was taken with others to be armed at a weapon storage building. He refused to take a weapon and be armed and was taken away for punishment. He was kicked and then locked in a cell. He was imprisoned for refusing to fight and was forced to stand in the sun each day as a form of torture. After ten days, on 24 September 2013, he managed to escape during demonstrations in which the police threw tear gas to disperse the demonstrators, which affected the guards. He took a coach to South Kordofan and when there tried to get the residents of the village to leave as he knew the Sudanese government was planning an attack. His family had fled to a neighbouring village when their village was damaged by shells from an attack on a nearby village, but he could not find his father or brother. He feared being detained by the government and could not go to Darfur as could not get any protection there and had never resided there, although his maternal and paternal uncles were from there. In February 2014 a friend put him in touch with an agent who obtained a visa for him for Turkey and he managed to leave Sudan in April 2014. He travelled to Turkey on his own passport but the agent threw his documents into the sea. He travelled by boat to Greece, where was arrested and fingerprinted, and then went to Italy and France before coming to the UK.

5. The respondent, in refusing the appellant's claim, noted various inconsistencies in his evidence and rejected his account of having studied and worked as a member of the Sudanese military, having been detained by the military, having escaped from detention and having returned to South Kordofan to hide. The respondent considered that the appellant's account of having managed to exit Khartoum Airport was inconsistent with his claim to be have been fleeing from the Sudanese authorities. It was not accepted that the Sudanese authorities were looking for him. On the basis that his credibility had been damaged in these respects the respondent rejected the appellant's account of his ethnicity. The respondent considered in any event that the appellant would not be at risk on the basis of his race as he had never claimed to have been persecuted as a result of being a non-Arab of Darfuri origin. It was considered that he did not qualify as a non-Arab Darfuri for the purposes of the country guidance in AA (Non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056.

6. The appellant appealed that decision to the First-tier Tribunal and his appeal was heard before First-tier Tribunal Judge Mulvenna. Judge Mulvenna considered the appellant's claim based on his failure to undertake military service to be lacking in credibility. He dismissed his appeal on that basis, on asylum grounds. However he considered it likely that the appellant was of Bergo descent and found that he would be at risk of being subjected to ill-treatment in breach of Articles 2 and 3 of the ECHR as a failed asylum seeker and a Darfuri. He allowed the appeal on humanitarian protection and human rights grounds.

7. Permission to appeal was sought by the respondent on the grounds that the judge's conclusions on risk on return were not adequately reasoned and that the judge had failed adequately to engage with the issue of the appellant's ethnicity.

8. Permission was also sought by the appellant on the ground that the judge had misdirected himself by failing to consider the convention ground of race and that, having found the appellant to be a member of the Darfuri non-Arabic tribe Bergo and to be at risk on return on that basis, he ought to have allowed the appeal on asylum grounds.

9. Permission to appeal was granted on 24 March 2015 to the appellant and the respondent.

Hearing and submissions

10. Mr Bednarek submitted that, contrary to the respondent's assertion in the grounds, the judge had used the correct standard of proof in assessing the appellant's ethnicity. The judge was entitled to accept that the appellant was of Bergo ethnicity given his answers to the questions put to him at his interview which the respondent had accepted as being correct. The judge's conclusions in regard to risk on return and the conditions of detention were clearly made in the context of his finding that the appellant was from the Bergo tribe and not intended to refer to all returning Sudanese asylum seekers. The only error made by the judge was in not allowing the appeal on asylum grounds on the basis of the Convention reason of race.

11. Ms Johnstone submitted that the judge had failed to deal with the respondent's concerns about the appellant's ethnicity and had failed to give adequate reasons for concluding that he was from the Bergo tribe, in particular in light of his other adverse findings. The decision contained material errors of law and needed to be re-heard.

Consideration and findings

12. I find merit in the Secretary of State's grounds. Had it been that the only challenge to the judge's findings on the appellant's ethnicity was with regard to the standard of proof, arising from his use of the word "likelihood" at [48], I would not have been inclined to consider the challenge properly made out. However, the grounds clearly go further than that. It is the case that the

outcome of the appeal lies for the most part in [48] and, as such, it would reasonably be expected that the judge would give full and comprehensible reasons for making the relevant findings that he did in that paragraph. However, the findings are not clear, they are extremely limited and they are confused by the grounds upon which the appeal was allowed at [55] and [56].

13. Firstly, it is not entirely clear if the judge allowed the appeal because he accepted that the appellant was of Bergo ethnicity and was at risk on that basis, or if he allowed it on the basis of the appellant being a failed asylum seeker who was likely to be of Bergo descent. Mr Bednarek's submission was that the judge's findings at [45] to [47] were made in the context of his finding that the appellant was from the Bergo tribe and that it was on the basis of the appellant's ethnicity that the judge therefore allowed the appeal, ie the former. However I do not agree. The fact that the judge did not allow the appeal on the asylum ground of race appears to suggest that he allowed it on the basis of the appellant being a failed asylum seeker who was likely to be of Bergo descent, ie the latter. The distinction is material, as the relevant country guidance in AA made it clear that the finding in the previous guidance in HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062, that involuntary returnees and failed asylum seekers were not, as such, at real risk on return to Khartoum, was to be preserved. That appears to be the point made by the respondent in her grounds of challenge.

14. Secondly, the judge, in concluding that there was a likelihood that the appellant was of Bergo descent, made his finding on the basis that the appellant had correctly answered relevant questions put to him in that respect. That appears to have been the sole basis for his conclusion. Although acknowledging that the respondent had reservations about the appellant's ethnicity, the judge did not appear to give any consideration to the nature of those reservations, which included the appellant's failure to mention his ethnicity or language at his screening interview, the fact that he had not claimed to be at risk of persecution for belonging to a non-Arab tribe and had not claimed to have previously experienced persecution on that basis, and that he had otherwise presented an unreliable account of his experiences in Sudan. It seems to me that those were material and relevant considerations and by failing to taken them into account he thereby erred in law.

15. Accordingly I would agree with the respondent that the judge failed to give full and proper consideration to the question of the appellant's ethnicity and failed to make clear findings in that regard and in regard to the basis of the risk that he believed the appellant to face on return to Sudan. As such his findings are not sustainable. The basis of the appellant's appeal accordingly falls away.

16. Both parties agreed that if I should find the respondent's grounds to be made out, the appropriate course would be for the case to be remitted to the First-tier Tribunal to be heard afresh. Accordingly I remit the appeal to be heard de novo, with none of the credibility findings made by Judge Mulvenna being preserved.

DECISION

17. The Secretary of State's appeal is allowed and the appellant's appeal is dismissed. The decision of the First-tier Tribunal is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Mulvenna.

Signed

Upper Tribunal Judge Kebede