



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01883/2015

THE IMMIGRATION ACTS

Heard at Liverpool
On 25 August 2017

Decision & Reasons Promulgated
On 29 August 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

KHALEEFA ABASS ADAM
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr C Holmes, Counsel instructed by Broudie Jackson & Canter
For the respondent: Mr C Bates, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal to refuse him international protection under the Refugee Convention or humanitarian protection grounds, or leave to remain on human rights grounds. The appellant is a citizen of Sudan.
2. The appellant's case is that he is a member of the Tunjur tribe who before coming to the United Kingdom was selling water in a place where a political demonstration was taking place, and became caught up in arrests of demonstrators, was detained and tortured as a perceived political opponent of the regime. The Tunjur tribe is said to come from Darfur and the appellant's case therefore is that he is a non-Arab Darfuri.

3. I bear in mind that the former country of Sudan was divided into two countries in July 2011, after the people of what is now South Sudan voted for independence. The country now known as Sudan is the northern part of the former country, and has an Arab Muslim majority.
4. The relevant country guidance on the risk to non-Arab Darfuris in Sudan is contained in three decisions of the Immigration and Asylum Tribunal and the Upper Tribunal (IAC). The earliest is *AA (non-Arab Darfuris) Sudan CG [2009] UKAIT 00056* and *MM (Darfuris) Sudan CG [2016] UKUT 10 (IAC)*. The guidance given by the Upper Tribunal in *AA (Sudan)* was as follows:

"All non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan. HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 is no longer to be followed, save in respect of the guidance summarised at (2) and (6) of the headnote to that case."

5. That was clarified further in *MM (Sudan)*:

"In the country guidance case of AA (Non-Arab Darfuris-relocation) Sudan CG [2009] UKAIT 00056, where it is stated that if a claimant from Sudan is a non-Arab Darfuri he must succeed in an international protection claim, "Darfuri" is to be understood as an ethnic term relating to origins, not as a geographical term. Accordingly, it covers even Darfuris who were not born in Darfur."

6. Finally, in *IM and AI (Risks - Beja tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 188 (IAC)* at [216]- [217], the Upper Tribunal upheld the above finding, in part on the evidence of Mr Peter Verney, who has also provided a report in the present appeal. At [234], the Tribunal held that:

"234. Where the claim is based on events in Sudan in which the claimant has come to the attention of the authorities, the nature of the claimant's involvement, the likelihood of this being perceived as in opposition to the government, his treatment in detention, the length of detention and any relevant surrounding circumstances and the likelihood of the event or the detention being made the subject of a record are all likely to be material factors."

7. That is the legal basis on which I approach this claim.

Refusal letter

8. The respondent's refusal letter is unimpressive. At [9]-[21] thereof, the respondent set out the appellant's answers to questions about his claimed home area of Bahri, near Khartoum. Bahri, and Khartoum, are not in Darfur, but the appellant's claim is based on his ethnic, not geographical origin. It is his case that Darfuris do live elsewhere in Sudan.
9. Almost all the appellant's recorded answers about Sudan generally were correct, but at [22] the respondent referred to 'negative credibility findings...no credence is given to the evidence which you have supplied in support of this aspect of your claim. It is considered that this aspect of your claim remains unsubstantiated'. In contrast, at [23],

the respondent considered that the evidence and credibility 'points in the round it is accepted you are a national of Sudan'. Mr Bates suggested that [22] was a standard paragraph left in the refusal letter in error, and I approach this appeal on the basis that [23] contains the respondent's view of the appellant's nationality evidence.

10. Moving to the question whether the appellant is a member of the Tunjur tribe, the respondent's refusal letter leans heavily on a number of research papers, the summarised evidence in which is only to be found in the respondent's 10 March 2011 Country of Origin entitled *Sudan: non-Arab Darfurian Tribes, background material, Country of Origin Evidence Information Service* (the 2011 Guidance). The 2011 Guidance classifies the Tunjur as a sub-tribe of the Zaghawa, who are a non-Arab Darfuri tribe. At 3.16.10, the 2011 Guidance said that the Tunjur were one of the 'dynastic peoples of Darfur'.
11. The research which is most heavily relied upon in the 2011 Guidance is a paper by R S O'Fahey and Jerome Tubiana: *Darfur: Historical and contemporary aspects*, undated but probably written in 2006/2007. No copy of that paper, or of the 2011 Guidance itself, was in evidence before the First-tier Tribunal. Despite repeated requests by the appellant's representatives for a copy of this document, the 2011 Guidance was not provided until today's hearing.
12. The respondent assessed the appellant's evidence about his membership of the Tunjur sub-tribe against the summary in the 2011 Guidance of passages in the O'Fahey/Tubiana paper which explained that the Tunjur had lost their original language and speak the language of the people among whom they live, Fur, Beri-a (Zaghawa) and/or Arabic, depending on where they live'. The appellant speaks only Arabic. The respondent regarded it as to the appellant's discredit that he did not know that the Tunjur, who now speak only Arabic, formerly had their own language.
13. There is also reference in the 2011 Guidance at 3.16.11-3.16.12 to a paper by Dr James Morton, dated 1985, reissued in 2005, entitled *A Darfur Compendium: A review of the Geographical, Historical and Economic Background to Development in the Region*, which said that the Tunjur claimed to be descended from the ancient Nubians, and to be centred at Fera, north-west of Kuttum, in Darfur, and also further west in Kanem. The Fur, or rather the Keira sub-tribe of the Fur, took over in Darfur from the Tunjur empire, after the latter collapsed, for reasons unknown. No copy of that paper is in evidence or was before the First-tier Tribunal.
14. Dr Morton's evidence, as summarised in the 2011 Guidance, was supported at 3.16.13 by a summary of a passage in a paper dated February 2005, by Young, Osman, Aklilu and Dale, entitled *Livelihoods under Siege, Final report*, which said that the centre of power for the Tunjur, rulers of Darfur up to the 17th century, was in Jebel Marra, where it was replaced by the Keira sub-tribe of the Fur tribe. That paper also was not provided to the First-tier Tribunal or the Upper Tribunal.
15. The appellant did not know all this historical detail when interviewed. His answers were short on detail. He did not know when the conflict began in Darfur, whether his tribe had been targeted by any group, or if so, the names of the groups. He considered that Tunjur could be found throughout, what is now Sudan and while he knew the

Tunjur had a king or *shartai*, he did not know that each *shartai* had at least five *maliks* who historically ruled certain areas. He did know that the Tunjur tribe were farmers, and the crops they grew. He did not know that they had lost almost all their crops in the last crisis.

16. The refusal letter refers to an internet link, which when followed leads to a document from the Refugee Documentation Centre of Ireland, compiled on 25 June 2010, which said that the houses of the Tunjur were 'reed-walled, conical-roofed built on hilltops or elevated ridges'. The appellant in his interview said they were covered with a type of bamboo-like straw (not a bad description of reeds, particularly via an interpreter) and had clay bricks in their walls. No reference is made in the refusal letter to a later passage in the same document which confirms that the Tunjur are 'other Darfuris of African descent [who] have come under attack by the government of Sudan and the Janjaweed'.
17. As regards the demonstration at which the appellant claimed to have been arrested, detained and tortured, the refusal letter finds it to be inconsistent that he said he had not attended it, but that was not his case: his account was of *perceived* political opinion, whereas in reality, he said he was selling water and got caught up in the demonstration. The respondent cited background information from Eric Reeves on his website *Sudan Research, Analysis and Advocacy*, for 10 October 2013, which confirmed that a demonstration had taken place at the time and place mentioned by the appellant. Again, although the link was provided in the refusal letter, the document itself is not in evidence, but is available on the internet, where I have consulted it.
18. The respondent regarded it as inconsistent that the appellant could not say why the authorities arrested him, if they did not want to ask him any questions, but that again fails to have regard to his account of being a water-seller caught up in the demonstration, not a demonstrator. On that basis, the respondent rejected the appellant's account of his detention and torture, and of his brother's arrest and his father's death during the demonstration and there is therefore no consideration of paragraph 339K of the Immigration Rules HC395 (as amended).
19. Paragraph 63 of the refusal letter deals with the Article 2 ECHR risk as though the respondent intended to return the appellant to Eritrea, not Sudan. The same is true of paragraph 64, which deals with Article 3 ECHR, and paragraph 70, which deals with Article 8 ECHR. The effect of that is that the appellant's claims under Articles 2, 3 and 8 have not been considered as advanced, that is to say, on the basis of return to Sudan.
20. The respondent refused leave to remain and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

21. The First-tier Tribunal Judge set out the standard and burden of proof correctly at [55], but then proceeded to analyse the refusal letter, paragraph by paragraph, reaching a credibility finding before [346] in which he purported to consider credibility. The Judge treated the Country Information Guidance as a country background source

document in its own right, rather than a summary of the country background evidence relied upon by the respondent in 2011, which is the correct approach.

22. The Judge relied, in particular, on the respondent's account in the refusal letter of what the 2011 Guidance said was the contents of the undated O'Fahey/Tubiana paper. The First-tier Tribunal Judge accepted that evidence and preferred it to the country expert evidence of Mr Verney. The Judge did so without seeing either the O'Fahey/Tubiana paper or even the 2011 Guidance which mentions it.
23. At [381] the Judge noted that the appellant knew the name of an historical Tunjur Sultan 'which is little known outside Darfur'. Another witness, Mr Mohammed, gave fuller evidence about the history of the Tunjur. The Judge considered that to damage, not support, the credibility of the appellant's account.
24. The Judge placed little or no weight on the expert evidence of Mr Peter Verney, which he said should not be treated as 'Gospel truth'. He considered Mr Verney's report to be insufficiently sourced, and inconsistent with 'other country background information'.
25. Neither the First-tier Tribunal Judge nor the respondent made a clear finding as to whether the appellant was a non-Arab Darfuri.
26. The appellant appealed to the Upper Tribunal.

Permission to appeal

27. Deputy Upper Tribunal Judge Chapman granted permission to appeal. She considered that the First-tier Tribunal had arguably applied too high a standard of proof in practice, failing to make any allowance for cultural differences, the use of an interpreter, the fact that the interview record was not entirely verbatim, and the appellant's level of education. She considered it arguable that the First-tier Tribunal Judge had placed too much weight on the Country Information Guidance report in preference to other country evidence before him, particularly since the documents relied upon were not disclosed at the hearing. He had, it seemed, simply taken the respondent's word for the contents of the 2011 Guidance.
28. The respondent was asked to provide a copy of that document.

Rule 24 Reply

29. The respondent's Rule 24 Reply argued that the 2011 Guidance, and in particular paragraph 3.16.07 thereof, was in the public domain and the First-tier Tribunal had not erred in giving it significant weight and preferring it to Mr Verney's evidence. The asylum interview predated the refusal letter and the respondent considered that the First-tier Tribunal had given cogent reasons for rejecting the appellant's account as to why he gave the answers he did at interview.
30. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

31. I had before me the documents before the First-tier Tribunal, and an additional bundle received by the Upper Tribunal on 18 August 2017, as well as the 2011 Guidance. There were no skeleton arguments but I heard oral submissions from the parties.
32. I take judicial notice of the 2017 Country Information Guidance, which is in the public domain (unlike the 2011 one, which seems not to be publicly available any longer).
33. For the appellant, Mr Holmes argued that the respondent was under a duty to the First-tier Tribunal to serve relevant material, in this case the 2011 Guidance, if she wished to rely upon it at the hearing.
34. Mr Bates recognised that the document in question was not available at the hearing. I did not call upon him for detailed submissions.

Discussion

35. The documents referred to in the refusal letter all pre-date the division of Sudan and South Sudan in 2011. I remind myself that Mr Verney was an accepted expert witness in all the country guidance cases mentioned above. I am satisfied that the First-tier Tribunal erred in rejecting the evidence of Mr Peter Verney in favour of the refusal letter's summary of the 2011 Guidance's summary of several very old papers, the principal one of which was undated. It is not possible to assess a document's validity without seeing it and it is irrational to prefer that putative document to the expert evidence as the Judge did.
36. The documents which featured so heavily in the refusal letter are not referred to in the 2017 Guidance. The guidance in the equivalent passage in the August 2017 Country Information Guidance does not refer to the papers relied on in 2011:

"3. Policy summary

3.1.1 The security, human rights and humanitarian situation in Darfur continues to be poor. Non-Arab Darfuris in the Darfur region are likely to face human rights violations which amount to serious harm or persecution.

3.1.2 Existing caselaw has found that non-Arab Darfuris as an ethnic group are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan, including to Khartoum.

3.1.3 The Home Office view is, however, that there is cogent evidence indicating that non-Arab Darfuris are not generally at risk of persecution or serious harm solely on the grounds of their ethnicity in Khartoum. This evidence provides strong grounds to depart from the existing caselaw of AA and MM.

3.1.4 Rather, a person's non-Arab Darfuri ethnicity is likely to be a factor which may bring them to the attention of the state and, depending on other aspects of their profile and activities, may lead to a risk of serious harm or persecution in Khartoum.

3.1.5 Darfuris in Khartoum face discrimination in accessing public services, education and employment, experience forced eviction, societal harassment from other Sudanese, and do not have access to humanitarian assistance. However, in general such treatment is not so severe that it is likely to amount to persecution but each case will need to be considered on its individual facts.

3.1.6 All returns are to Khartoum. It will generally be reasonable for a person, including those not previously resident in Khartoum, to return to that city but each case will need to be considered on its individual facts. If the person is able to demonstrate a risk of persecution or serious harm from the state in Khartoum, internal relocation to another part of Sudan will not be reasonable.

3.1.7 There is no sufficiency of protection available.”

Paragraph 3.1.3 is completely unsourced.

37. Nor did the First-tier Tribunal Judge properly seek to apply the country guidance. There is no finding in the decision as to whether the appellant is a non-Arab Darfuri, or an Arab, from Darfur or elsewhere in Sudan.
38. I am satisfied that the First-tier Tribunal Judge’s approach to the evidence of Mr Verney, and the Country Information Guidance summary of country evidence which was not before him, was perverse and *Wednesbury* unreasonable. The decision cannot stand.
39. I therefore set aside the decision of the First-tier Tribunal. Absent any finding whether this appellant is a Darfuri, and whether, if so, he is Arab or non-Arab, I cannot remake the decision, and the refusal letter is so inadequate that I cannot rely on that to assist me. Accordingly, the decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

DECISION

40. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal on a date to be fixed.

Date: 25 August 2017

Signed

Judith AJC Gleeson

Upper Tribunal Judge Gleeson