



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/10184/2017

THE IMMIGRATION ACTS

**Heard at Glasgow
on 26th October 2018**

**Decision & Reason
Promulgated
On 8th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

**WAIL [E]
(No anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Katani, Katani & Co, Solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Mozolowski dismissing an appeal on protection and human rights grounds.
2. The appellant is a national of Sudan and of Berti ethnicity. According to his account he lived near Khartoum on the farm where he was brought up and worked as a waiter in a restaurant. The

owner of the restaurant was collecting donations of food and clothing. The restaurant was visited by Sudanese intelligence officials, who arrested the appellant. The appellant was accused of being a member of a Darfuri organisation and then of belonging to an armed group. He was mistreated and tortured but released subject to conditions.

3. The judge did not believe the appellant because of inconsistencies and discrepancies in his account. The judge was not satisfied that the Sudanese authorities had any interest in the appellant because he was implicated in the separatist cause in Darfur or because of his Berti ethnicity.
4. Permission to appeal was granted on the basis that it was arguable the judge should have allowed the appeal on the basis of the appellant's tribal membership in accordance with the country guideline cases of AA (Non-Arab Darfuris: relocation) Sudan CG [2009] UKAIT 00056 and MM (Darfuris) Sudan CG [2015] UKUT 00010.
5. There was an error of law hearing on 7th September 2018 before Upper Tribunal Judge Macleman. At this hearing the respondent accepted that paragraph 15 of the decision of the Judge of the First-tier Tribunal amounted to an insufficient resolution of whether the sources of information relied upon by the Secretary of State justified departure from country guidance. In other words the judge did not give adequate reasons, or indeed any reasons, to justify not following the country guideline decisions, in terms of which, as a non-Arab Darfuri the appellant would be entitled to international protection.
6. Having found there was an error of law in the decision of the First-tier Tribunal, Judge Macleman adjourned the hearing and issued directions in preparation for a further hearing. The further hearing was to hear submissions only on the question of whether the country guideline cases should be followed in re-making the decision.
7. The hearing was listed for 26th October 2018. Unfortunately owing to unforeseen circumstances Judge Macleman was not available on this date. A transfer order was made and I heard the appeal in his place.
8. A day before the hearing an adjournment application was considered by an Upper Tribunal Judge at Field House in London. The application was made on behalf of the appellant. An expert witness, Dr Verney, engaged by the appellant to prepare a report for the resumed hearing, had been unable to complete the report owing to personal circumstances. The application was refused, largely on

the basis that the time scale for the resumed hearing had been clearly set out in the directions and adequate time had been allowed for preparation.

9. At the hearing before me Mr Katani sought to renew the application. He explained the difficulties Dr Verney had faced. I was not unsympathetic but explained that I thought an adjournment might not be necessary. I indicated that I would hear submissions and would adjourn only if I considered that the appeal could not be decided without unfairness to the appellant.
10. Although the appeal to the Upper Tribunal was brought by the appellant, I heard first from Mr Govan for the respondent. It was the respondent who was seeking to show why the country guideline decisions should not be followed in respect of this appellant. I am grateful to Mr Govan for providing me with a written submission and with a copy of the Home Office Country Policy and Information Note (CPIN) of September 2018 on Sudan: Non-Arab Darfuri. Having heard the respondent's case I did not consider it necessary to hear a detailed submission from Mr Katani.

Discussion

11. The essence of the Home Office position is that those Darfuris who reside in parts of Sudan other than Darfur itself, particularly those who reside in Khartoum and its surrounding area, are not at risk of persecution. More information about the wider position of Darfuris in Sudan is now available. The country guideline case of AA reached the finding that all Darfuris were at risk simply because there was insufficient information at that time about the risk to Darfuris outside Darfur. The position has improved since the country guideline case of MM, as reflected in IM and AI (Risks – membership of Beja Tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 00188. The Tribunal might depart from a country guideline case where there was sufficiently cogent evidence to allow new findings to be made, provided these were supported by adequate reasoning.
12. The CPIN of September 2018 has the appearance of an informative and balanced document. It addresses not only the position in Darfur but also in Khartoum. Of particular significance for the present appeal is Chapter 8, entitled “Return of rejected asylum seekers from Darfur”.
13. In the country guideline case of MM the Tribunal did not add much detail to the findings made in AA. The Tribunal which heard MM had before it, however, an expert report by Dr Verney, who was the expert chosen by the appellant in the present appeal to provide a report. One of the issues raised by Dr Verney was the risk to

failed asylum seekers of Darfuri ethnicity who were being removed to Khartoum airport. The Tribunal did not expressly adopt Dr Verney's view on this risk but it was not necessary for it to do so as it accepted all non-Arab Darfuris were at risk in Sudan. In order to justify departing from the conclusions of MM, however, it would be necessary to take into account any risk on arrival in Sudan to failed asylum seekers of non-Arab Darfuri origin.

14. It seems clear from chapter 8 of the CPIN that there is a higher risk to Sudanese nationals returning to Sudan directly from Israel than to those returning from Europe. Opinion is divided, however, on the risk to failed asylum seekers forcibly returned from Europe. The consensus view among western diplomats is that failed asylum seekers are not at risk of persecution on return unless they already have an anti-government or opposition profile. On arrival Darfuris might be treated impolitely and asked to pay a bribe but would not face "any difficulties" if they were not already flagged by the National Security Intelligence Service (NISS). It was reported that persons returning without travel documents or under escort would be subject to questioning at Khartoum airport. It was also suggested that there was an absence of independent organisations at the airport to monitor forcible returns, although IOM would be present for voluntary returns.
15. A number of NGOs are reported as taking a different view from western diplomats as to the risk faced by returning Darfuris. It is reported at 8.1.15 that testimony from a number of Sudanese repatriated from EU countries, including Italy, France and the UK, mentioned arrest, ill treatment and, in some cases, torture. According to the Home Office most of these testimonies were given by Sudanese from conflict areas or by politically active Sudanese. An organisation called "Waging Peace" described at 8.1.8 the mistreatment of five people, one of whom was a Darfuri, returned in 2015-16 from Jordan, Israel and Italy. It was pointed out that there was an absence of further testimony due to restricted access to the affected populations.
16. A number of views are set out at 8.1.11. One HRW researcher said that possible discrimination against a Darfuri at Khartoum airport would depend on the profile of the person and discrimination would be unlikely merely because the person was from Darfur. A similar view was expressed by a contact of German organisation "Bread for the World". A third source suggested treatment is highly variable and depends upon the nature of the documentation the person is carrying and whether a bribe has been paid in advance to a security official. A named independent researcher stated that on arrival at Khartoum airport a Darfuri person was likely to be interrogated by security and possibly beaten/tortured, detained and even killed.

17. A disturbing report was quoted at 8.1.12. This referred to the return around September 2016 of a group of 48 Sudanese migrants from Italy. One of the group of returnees described the migrants as seemingly having been identified by the Sudanese authorities before their departure from Italy. This particular individual was beaten so severely by the security authorities on his arrival in Khartoum that he was unable to lie down. He has since been living in hiding. He said the migrants were from Darfur.
18. In the same section an Amnesty International statement of November 2016 reported that individuals from conflict-affected areas such as Darfur are at serious risk of persecution upon repatriation, particularly from the NISS, who have often been accused of serious human rights violations, including arbitrary detention and torture. In some cases the NISS appeared to have beaten people on arrival in Khartoum, particularly people from conflict areas, under the suspicion they might be supporters of armed groups.
19. Although the Amnesty International statement refers to returnees from Darfur, rather than all returnees of non-Arab Darfuri ethnicity, there seems to be an arbitrariness about the behaviour of NISS. At 8.1.15 it is reported that according to Waging Peace not only Darfuris are at risk but also members of other ethnic groups, suggesting that it is ethnicity which gives rise to a risk, not only residence in a conflict-affected area. A number of Sudanese repatriated from the UK were reported as having been ill-treated. While several reports suggest that only those with a political profile will be at risk, it is noted at 8.1.15 that some non-governmental sources giving evidence to the Upper Tribunal stated that the mere fact of applying for asylum was enough to create a political profile.
20. I have, of course, taken account of the British Ambassador's letter of 29 September 2016 attached to the CPIN. This letter states that "neither we nor our international partners are aware of substantiated cases of returnees, including failed asylum seekers, being mistreated on return to Sudan." The difficulty with this letter is that this one brief sentence simply does not engage in any detail with the variety of accounts and sources recorded in the CPIN.
21. It is accepted by the respondent that I would require cogent evidence to depart from the conclusions of the relevant country guideline cases. The evidence in the CPIN about the treatment of returnees at Khartoum airport is far from compelling in terms of showing a low risk of serious harm to a failed Darfuri asylum seeker subject to forced removal. There is a possibility that the risk to those who are not from a conflict-affected area may be below the threshold of a reasonable likelihood of persecution. The evidence

before me, however, does not establish this, although in due course a tribunal with more evidence before it, including expert evidence, may be in a position to depart from the current country guideline cases. Given the uncertainties in the available evidence relating to the risk to returnees at Khartoum airport I do not consider that I have proper reasons to depart from the country guideline cases.

22. Having reached these conclusions in relation to the risk at Khartoum airport, it is not necessary for me to consider whether the current risk to non-Arab Darfuris residing in or around Khartoum requires departure from the current country guideline cases. This is a matter which may more appropriately be considered in due course by a tribunal convened for this purpose with access to all the available evidence.

23. So far as this appeal is concerned it remains the position that, in terms of MM, as an ethnic Darfuri the appellant faces a real risk of persecution on return. His appeal will therefore succeed on protection grounds.

Conclusions

24. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

25. The decision is set aside.

26. The decision is re-made by allowing the appeal.

Anonymity

Notwithstanding what is stated on the front page of its decision, the First-tier Tribunal did not make an anonymity direction. I see no reason of substance for doing so.

Fee award (N.B. This is not part of the decision)

No fee has been paid or is payable so no fee award is made.

M E Deans
31st October 2018
Deputy Upper Tribunal Judge