



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/10298/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Glasgow

**Decision & Reasons
Promulgated**

On 14 March 2018

On 09 April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

A S

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co,
Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Judge of the First-tier Tribunal S Gillespie dismissed this appeal on protection and human rights grounds.
2. The appellant is a national of Sudan. He claims to be of the Berti tribe and to have been detained and tortured in Sudan. He came to the attention of the authorities because he was sending money from Khartoum to help his tribe. The judge was not satisfied the appellant's evidence was credible and found the appellant would not be at risk on return to Sudan.

3. Permission to appeal was granted on the basis that the judge's credibility findings were arguably flawed. In addition it was arguable that under current country guideline cases the judge erred in not allowing the appeal on the grounds that as a member of the Berti tribe the appellant was a non-Arab Darfuri.

Submissions

4. Before me Mr Winter argued that the judge erred by failing to have regard to the country guideline cases of *AA(non-Arab Darfuris - relocation)* Sudan CG [2009] UKAIT 00056 and *MM (Darfuris)* Sudan CG [2015] UKUT 00010. Instead the judge relied on *IM & AI (risks - membership of Beja Tribe, Beja Congress & JEM)* Sudan CG [2016] UKUT 00188. In *IM & AI*, at paragraphs 216 and 217, it was made clear that the country guidance in respect of Darfuris was unchanged. The case of *MM* was in the appellant's bundle before the First-tier Tribunal. It was pointed out that the respondent had accepted and recorded in the reasons for refusal letter that the appellant was of the Awlad Almin sub-tribe of the Berti, and therefore a non-Arab Darfuri.
5. Mrs O'Brien nevertheless contended on behalf of the respondent that not all non-Arab Darfuris should be considered at risk. The country guideline case of *IM & AI* showed that the position in Sudan had altered and a more differentiated approach should be taken. She acknowledged, however, that there were concerns about the judge's credibility findings.
6. Mr Winter contended that if I were satisfied there was an error of law in the decision of the Judge of the First-tier Tribunal then I should allow the appeal on the basis that the appellant was at risk as a non-Arab Darfuri. Part of the difficulty that has arisen in this appeal, however, originates from the way the appeal was argued before the First-tier Tribunal. There the emphasis seems to have been on the appellant's alleged detention and torture rather than on his ethnicity, which was undisputed. It may have been this emphasis which led the judge to focus on the allegations of detention and torture and to disregard the question of risk arising from ethnicity.

Discussion

7. While Mr Winter pointed out that if the country guideline case of *MM* were to be followed then the appellant would succeed, the respondent's position is that even though the appellant is by ethnicity a non-Arab Darfuri not everyone in this category is now at risk. Because the issues arising from the appellant's ethnicity were not properly considered before the First-tier Tribunal, the respondent has not had the opportunity of arguing that there are exceptions to the categorisation of risk set out in *MM*. In my view before the Upper Tribunal makes a decision on the risk to the appellant as a non-Arab Darfuri, the respondent should have an

opportunity to explain why the appellant is not at risk and, whether or not the respondent succeeds in this before the First-tier Tribunal, the losing party will have the opportunity of making an application for permission to appeal. The parties were agreed that on this basis the appeal should be remitted to the First-tier Tribunal.

8. I am satisfied that the judge erred in law when considering the risk on return by not having regard to the country guideline case of *MM*, given that it is not disputed that the appellant is a non-Arab Darfuri. The appeal is remitted to the First-tier Tribunal for a hearing before a different judge with none of the contested findings by the Judge of the First-tier Tribunal preserved.

Conclusions

9. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
10. The decision is set aside.
11. The appeal is remitted to the First-tier Tribunal for hearing before a different judge.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. As the appeal is to be reheard I consider that such a direction should be made to preserve the positions of the parties until the appeal is finally determined. Unless or until a court or tribunal directs otherwise no report of these proceedings shall identify the appellant or any member of his family. This direction applies to the appellant and to the respondent. Failure to comply with this direction may lead to contempt of court proceedings.

Deputy Upper Tribunal Judge Deans
April 2018

4th

