Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02486/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 21st August 2018	**On 27th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ADAM HUSSAIN YAQOUB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss S Ashraf (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the decision of IJ Herwald, promulgated on 5th April 2018 in Manchester, following a hearing on 20th March 2018. In the decision, the judge dismissed the appeal of the Appellant, whereupon the Appellant successfully applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Sudan, and was born on 1st January 1999. He appealed against the decision of the Respondent refusing his application for asylum and for humanitarian protection under paragraph 329C of HC 395. The essence of the Appellant's claim was that he belonged to the Massaleit tribe, which was a non-Arab Darfuri tribe, and that he had been arrested, tortured, and detained for two weeks for involvement with anti-Government groups and political organisations.

The Judge's Findings

3. The judge rejected the Appellant's claim that he had been arrested or accused or tortured, or had been detained for two weeks, or that he had been involved in anti-Government activity of any kind. The judge found the Appellant to have been lacking in credibility in this respect (see paragraph 14(j)). However, the judge went on to consider the core issue in this appeal, which was that the Appellant faced ill-treatment purely on account of the fact that he was a member of the Massaleit tribe, which was a non-Arab Darfuri tribe. There were two country guidance cases to refer to. First there was **AA (Non-Arab Darfuris – relocation) Sudan CG [2009] UKAIT 00056**. Second, there was the case of **MM (Darfuris) Sudan CG [2015] UKUT 10**. Both of these, suggested that those who are non-Arab Darfuris cannot be expected to relocate to Sudan because they would be at risk of persecution to them.

4. At the hearing before Judge Herwald reliance was placed by both parties to the appeal, to the CPIN of August 2017. The refusal letter referred to paragraph 67 of this document, quoting sources at paragraphs 2.3.10 onwards. The Appellant referred to the section on "Rejected Asylum Seekers". As the judge observed "both parties seek to rely on the same document, the Respondent to persuade me to depart from the country guidance, and the Appellant to dissuade me from doing so". The reason why the Respondent asked the judge to depart from the country guidance, was that there was evidence now, particularly from the joint Danish-UK fact-finding Mission of early 2016, an Australian Government report of April 2016, and the Foreign and Commonwealth Office report, which indicated there is a significant and established population of (non-Arab) Darfuris living in Khartoum and surrounding areas. This includes people who have moved from Darfur since the conflict began in 2003, who are able to go about their business and daily lives in Khartoum. Moreover, there were people operating at the senior level in Government, in academia, and as university students.

5. For the Appellant, part reliance was placed on the fact that non-Arab Darfuris do face harassment, discrimination and generally worse treatment from the state, whenever they come into contact with the state (see e.g. paragraph 2.3.11 and paragraph 14). Moreover, non-Darfuris face a moderate risk of discrimination and violence (see paragraph 5.2.9). Sources also recounted (see paragraph 5.2.12) that it was difficult to say what was happening in Khartoum. Moreover, four sources indicated that non-Arab Darfuris could be at risk on the basis of their ethnicity alone (see

paragraph 5.2.13). There were also continued reports of returnees being mistreated on return (see paragraph 7.1.8).

6. The judge, however, for his part went on to conclude that:-

> "The evidence, when considered in its entirety, does not establish that the authorities target non-Arab Darfuris are subjected to treatment amounting to persecution simply because of their ethnicity. Rather, a person's non-Arab Darfuri ethnicity is a factor which may increase the likelihood of them coming to the attention of the authorities and, depending on their profile and activities, may then lead to treatment amounting to persecution" (see paragraph 11 (2.3.15).

The judge dismissed the appeal.

Application for Permission

7. The application for permission is based on a matter described as being of "wider significance, namely, departure from the applicable country guidance", which indicated that the return of non-Darfuris to Sudan would on the basis of ethnicity alone lead to their persecution, such that there had to be "cogent" evidence to support the contention that there should be a departure from existing country guidance practice.

8. On 3rd May 2018 permission to appeal was granted precisely on this basis, namely, "whether a non-Arab Darfuri with no political profile can still rely on the country guidance given in **AA** and **MM** to show he qualifies for protection in the light of new materials now relied on by the Respondent". It was said that this was a point that merits consideration by the Upper Tribunal. Permission was therefore granted.

Submissions

9. At the hearing before me, Miss Ashraf submitted that, although Mr McVeety for the Respondent, Secretary of State, had submitted that this matter could be adjourned in the light of the fact that the Upper Tribunal was apparently considering a case of precisely this issue, she was not agreeable to an adjournment, and would wish the issue to be resolved now, in the interests of her client. She relied upon the grounds of application.

10. She emphasised the fact that in **IM and Al (Risks – membership of Beja Tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 00188**, the point had been made that involuntary returnees and failed asylum seekers are at risk of persecution on the basis of their ethnicity (see paragraphs 216 to 217). She submitted that although the judge had reached the conclusion that he had, he had not applied the correct test, namely, whether there were very strong grounds supported by cogent evidence to depart from the country guidance cases. The judge simply referred to the evidence from the British Embassy which was suspect. It was not objective evidence.

11. For his part, Mr McVeety submitted that the judge had given very clear reasons at paragraph 13(c) as to why he would depart from the country guidance given and the decision was one that was open to him.

No Error of Law

12. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows. First, both sides are agreed that country guidance is to be followed as a starting point. Moreover, as **SG (Iraq) [2012] EWCA Civ 940** makes clear, "unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so" the decision maker is not at liberty to depart from country guidance.

13. This being so, the judge in this case was faced with the CPIN of August 2017, which was being relied upon by both parties (see paragraph 13(a)). The judge considered the evidence in considerable detail over some three pages. He then went on to apply exactly the test that he was required to before he could depart from country guidance. He makes this clear when he observes (at paragraph 13(c)) that:-

> "I am driven to the conclusion that were there to be a new country guidance case, it would have to take into account the 'cogent information' now produced in the most recent CPIN, and I vented to suggest that a higher court would reach the conclusion that, even taking into account the paragraphs from 5.2 onwards of the CPIN, matters have moved on and changed in Sudan. Thus despite examples of individuals from Darfur being targeted in Khartoum (e.g. paragraph 5.2.9) overall, the views of the British Embassy, reported above, prevail. On that basis, I am persuaded to depart from the country guidance cases …".

14. Second, insofar as reliance was placed by Miss Ashraf on the case of **IM and AI [2016] UKUT 188**, it is useful to bear in mind that the basic premise of that case was that:-

> "In order for a person to be at risk on return to Sudan there must be evidence known to the Sudanese authorities which implicates the claimant in activity which they are likely to perceive as a potential threat to the regime to the extent that, on return to Khartoum there is a risk to the claimant that he will be targeted by the authorities …" (see head note 1.).

15. That case also established that:-

> "The evidence draws a clear distinction between those who are arrested, detained for a short period, questioned, probably intimidated, possibly rough handled without having suffered (or being at risk of suffering) serious harm and those who face the much graver risk of serious harm. The distinction does not depend upon the individual being classified, for example, as a teacher or a journalist (relevant as these matters are) but is the result of a finely balanced fact-finding exercise encompassing all the information that can be gleaned about

> him. The decision maker is required to place the individual in the airport on return or back home in his community and assess how the authorities are likely to re-act on the strength of the information known to them about him" (see head note 2.).

16. This was a case where the judge had found the Appellant to be singularly lacking in credibility with respect to the claim that he had made about his political profile. As the judge made it clear:-

> "I am not persuaded that the Appellant, being non-Arab Darfuri, has any political profile in Sudan, and I am not persuaded as to the credibility of his story generally, nor of how or why he left Libya" (see paragraph 14(l)).

17. In the circumstances whilst I recognise that any future Country Guidance may take any view that is open to the Tribunal upon a consideration of the evidence, there can be no doubt that the view reached by this particular judge, on the evidence presented to him on this particular occasion, was one, which was open to him, given that he did have regard to "cogent evidence" which was based on "very strong grounds" raised by the Respondent Secretary of State.

18. There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

Notice of Decision

19. There is no material error of law in the judge's decision. The decision shall stand.

20. No anonymity direction is made.

21. This appeal is dismissed.

Signed Date

Deputy Upper Tribunal Judge Juss 25th February 2019