



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

Appeal Number: PA/05326/2018

THE IMMIGRATION ACTS

On the Papers

**Decision and Reasons
Promulgated**

On 21st October 2019

On 24th October 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**MS
(anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

DECISION AND REASONS

1. The Appellant is a national of Sudan born in 1996. He seeks international protection on the grounds that he has a well-founded fear of persecution in Sudan for reasons of his race, membership of a particular social group and imputed political opinion: he is accepted to be of the Tama tribe, and is therefore classed as a 'non-Arab Darfuri'.
2. By its decision of the 30th May 2018 the First-tier Tribunal (Judge Moxon) dismissed the Appellant's appeal. By my decision of the 8th November 2018 I set that decision aside (see 'error of law' decision attached). The hearing to re-make the decision in the appeal was adjourned awaiting new country guidance on the position of non-Arab Darfuris in Sudan.

3. By her letter of the 15th October 2019 the Secretary of State invited me to allow the Appellant's appeal on protection grounds. The reasons can be shortly stated, since they are made plain by the Upper Tribunal's decision in AAR & AA (Non-Arab Darfuris - return) Sudan [2019] UKUT 00282 (IAC). At present the Upper Tribunal holds that any non-Arab Darfuri appeal must be determined with reference to the decisions in AA (non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056 and MM (Darfuris) Sudan CG [2015] UKUT 00010. The effect of those combined authorities is that the identity of a 'non-Arab Darfuri' is to be determined with reference to the individual's ethnicity, not former place of residence, and further that such an individual is a refugee.

Anonymity Order

4. The Appellant is a refugee. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions and Directions

5. The decision of the First-tier Tribunal has been set aside for error of law.
6. The decision in the appeal is remade as follows:

“the appeal is allowed on protection grounds”.
7. There is an order for anonymity.

Upper Tribunal Judge Bruce
21st October 2019



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

Appeal Number: PA/05326/18

THE IMMIGRATION ACTS

**At: Bradford
On: 12th September 2018**

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**MS
(anonymity direction made)**

Appellant

And

Secretary of State for the Home Department

Respondent

**For the Appellant: Mr T. Hussan, Counsel instructed by Halliday
Reeves**

**For the Respondent: Mr M. Diwnycz, Senior Home Office Presenting
Officer**

DECISION AND REASONS

1. The Appellant is a national of Sudan born in 1996. He seeks international protection on the grounds that he has a well-founded fear of persecution in Sudan for reasons of his race, membership of a particular social group and imputed political opinion: he is accepted to be of the Tama tribe, and is therefore classed as a 'non-Arab Darfuri'.
2. By its decision of the 30th May 2018 the First-tier Tribunal (Judge Moxon) recognised the conclusions reached by the Upper Tribunal in the extant

country guidance AA (non-Arab Darfuris – relocation) Sudan CG [2009] UKAIT 00056 which it summarised thus: “all non-Darfuris are at risk of persecution in Sudan and cannot reasonably relocate”. It nevertheless went on to dismiss the appeal on human rights and protection grounds, having found that the Respondent had produced fresh evidence to the effect that non-Arab Darfuris are able to lead a reasonable life in Khartoum without fear of persecution.

3. The matter in issue in this onward appeal is whether the evidence produced by the Respondent was capable, as a matter of law, of displacing the clear guidance in AA (Sudan).

The Country Guidance

4. The conclusions in AA (Sudan) were reached by consent, as Upper Tribunal Judge (then Senior Immigration Judge) Allen explains in the body of the decision:

“4. It was common ground that the appeal fell to be allowed. The UK Border Agency produced an Operational Guidance Note (OGN) on Sudan on 2 November 2009. At paragraph 3.8.9 we find the following:

“3.8.9 Ordinary non-Arab Darfuris are not thought to be subject to systematic persecution outside Darfur and the courts have found that it is not unduly harsh to expect them to internally relocate to Khartoum. However, those decisions predated the developments and reports referred to at paragraph 3.9.4 to 3.9.7 below, and restrictions on the operations of NGOs – a key source of country of origin information on Sudan – have meant that we have been unable to obtain sufficient reliable information to be able to assess accurately whether there is a continued heightened risk to non-Arab Darfuris in Khartoum. In light of the fact that we do not yet have sufficient information to allay the concerns raised in the reports, case owners should not argue that non-Arab Darfuris can relocate internally within Sudan.

3.8.10 **Conclusion.** All non-Arab Darfuris, regardless of their political or other affiliations, are at real risk of persecution in Darfur and internal relocation elsewhere in Sudan is not currently to be relied upon. Claimants who establish that they are non-Arab Darfuris and who do not fall within the exclusion clauses will therefore qualify for asylum.”

5. Paragraphs 3.9.4 to 3.9.7 of the OGN summarise recent evidence on the situation in Khartoum. On 10 May 2008 JEM launched an assault on Omdurman, Khartoum as a consequence of which there were reports of arbitrary arrests by the Sudanese authorities, extrajudicial executions and ill-treatment of detainees following the attack. The Foreign and Commonwealth Office stated that following the fighting large number of non-Arab Darfuris living in Khartoum were detained. On 4 March 2009 the ICC announced

the issue of an arrest warrant against President Bashir for war crimes and crimes against humanity in Darfur. This led to the expulsion of a number of international NGOs and the closure of some local human rights organisations, which severely reduced the ability of the local human rights community to monitor and report on human rights violations. There was continued press censorship and intimidation which further increased restrictions on the freedom of expression. A UNHCR report of November 2008 refers to the use by the National Intelligence and Security Services (NISS) of arbitrary arrest against political dissidents in Khartoum which can involve ill-treatment, torture and unofficial places of detention, and it is said that Darfurians may raise the suspicion of the security forces by the mere fact of travelling from other parts of Sudan to Darfur, by having travelled abroad, or having been in contact with individuals and organisations abroad.”

5. In January 2015 the Upper Tribunal promulgated a further country guidance decision on Sudan: MM (Darfuris) Sudan CG [2015] UKUT 00010. The Tribunal found no reason to depart from the findings in AA, noting the evidence of country expert Peter Verney that the situation in Khartoum had, since 2009, in fact worsened for non-Arab Darfuris.

The First-tier Tribunal Decision

6. In this case the First-tier Tribunal directs itself to the conclusions in both AA and MM. It then records the guidance given by Elias LJ in TM (Zimbabwe) v Secretary of State for the Home Department [2010] EWCA Civ 916 to the effect that the First-tier Tribunal is bound by country guidance, and that failure to follow that guidance without good reason is likely to amount to an error of law.
7. Having so directed itself the Tribunal reviews the new evidence relied upon by the Home Office. This consisted exclusively of extracts from the August 2017 ‘Country Policy and Information Note’ *Sudan: Non-Arab Darfuris*. The passages cited in the determination are as follows:

“2.3.9 Most sources commenting on the human rights situation of non-Arab Darfuris in 2016 and 2017 report that there is discrimination of such persons but do not indicate that there is widespread, systemic targeting of these groups in Khartoum on grounds of ethnicity alone. The Home Office view is, therefore, that there is now cogent evidence which has become available since the promulgation of AA and MM establishing that in general non-Arab Darfuris are not at risk of persecution solely on the grounds of ethnicity in Khartoum.

2.3.10 Sources - primarily information obtained by a joint Danish-UK fact finding mission of early 2016, an Australian government report of April 2016, and the Foreign and Commonwealth Office - indicate that 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. Darfuris are also present in all areas and levels of society including at a senior level in government, in academia, as university students, in the security forces, and the media.

2.3.11 The government reportedly monitors the Darfuri community because of its suspected links with Darfuri rebel groups and those critical of the government and/or have a political profile, including students and political activists. There are reports of arrests, detention, harassment and torture of non-Arab Darfuris, as well as sexual abuse of women. Some sources report that Darfuris are likely to face worse treatment once in detention than other ethnic groups because they may be perceived to be rebel sympathisers, and that they are particularly vulnerable to torture and ill-treatment (see Khartoum, Treatment of non-Arab Darfuris).

2.3.12 A number of Darfuris have returned to Khartoum in recent years, largely from Israel and Jordan. Those returning from Israel are generally treated with greater suspicion those returning from other countries. While most returnees who entered Sudan are likely to be questioned, they are not likely to experience further complications, unless they are a person of interest to the authorities because of their profile or activities in opposition to the government. However, the evidence does not establish that non-Arab Darfuri returnees are ill-treated on return on grounds of their ethnicity only.

2.3.13 Sources are broadly consistent in reporting that Darfuris who have been targeted are those who have, or are perceived to have, a particular profile and to have undertaken activities opposing the government. These factors have been decisive in bringing them to the adverse attention of the state, not their ethnicity alone.

2.3.14 Darfuris generally live in the poorer areas of Khartoum and are economically disadvantaged compared to other Sudanese. They face discrimination in accessing public services, education and employment, and may face forced eviction, societal harassment from other (Arab) Sudanese, and lack access to humanitarian assistance. However, such treatment is not so severe that it is likely generally to amount to persecution or serious harm.

2.3.15 The evidence, when considered in its entirety, does not establish that the authorities target non-Arab Darfuris and subject them 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.

....

From 5.2.9: 'Overall, DFAT assesses that Darfuris in Khartoum face a moderate risk of discrimination and violence on the basis of their

ethnicity and their actual or perceived support for or association with rebel groups. DFAT assesses that Darfuris who actively criticise the Government, such as through participating in protests, face a higher risk'

5.2.16 In September 2016, the British Embassy, Khartoum, observed that 'The British Embassy is in regular contact with Darfuri groups from civil society, government and political parties. In the course of these contacts, no substantial concerns have been raised over the treatment of non-Arab Darfuris settled in regions outside of Darfur that we would consider ethnic persecution, although many face economic marginalisation having been displaced due to conflict. We are also not aware of reports of systematic targeting of Darfuris from United Nations agencies or other embassies with whom we are in contact.'

8. Having set that evidence out, the Tribunal concludes:

"Even upon consideration of the submissions and objective evidence relied upon by the Appellant, I find that there is good reason to depart from the country guidance cases, by virtue of the compelling evidence within the Home Office notes. It is clear from several sources relied upon that non-Arab Darfuri tribal members in Khartoum are liable to face discrimination but not persecution"

The determination expressly accepts that in areas outside the capital, such as Darfur itself, the situation may remain the same, but finding that conditions have improved in Khartoum it finds no risk of harm to the Appellant there. At paragraph 46 the Tribunal notes that the Appellant has been able to find work in the past and for that reason it is likely that he will be able to find work in Khartoum today. The appeal was thereby dismissed.

9. Although it is not a feature of the appeal before me, it is important to note that the Tribunal had, in addition, expressly considered and rejected the Appellant's account of past persecution for reasons of his political opinion.

The Appeal

10. The grounds of appeal are that the First-tier Tribunal erred in law in the following material respects:

- i) Failure to take material evidence into account. The Appellant had placed before the Tribunal a bundle of recent evidence relating to the position of non-Arab Darfuris in Sudan, and none of this evidence is considered in the determination. Further it is submitted that the extracts from the CPIN were selective, and that paragraphs capable of supporting the Appellant's case were ignored.
- ii) Misdirection. The First-tier Tribunal directed itself that it needed to find "good reason" to depart from AA. It is submitted that the proper test is that set out in R (Iran) [2005] EWCA Civ 982 and

reflected in the Practice Direction: “very strong grounds supported by cogent evidence”.

11. For the Respondent, Mr Diwnycz opposed the appeal on all grounds, save to accept that insofar as the First-tier Tribunal may have suggested as much at its paragraph 45, it would be an error to assume that the passage of time in itself was good reason to depart from country guidance.

Discussion and Findings

12. I begin by noting that the First-tier Tribunal decision is not clearly structured. The starting point in any protection appeal is to determine whether the claimant has a well-founded fear of persecution for a Convention reason in his home area, or the area that he will be returned to. It is only if that risk is made out will it be necessary to assess whether or not that risk pertains to the rest of the country, and if not, whether it would in all the circumstances be ‘reasonable’ for the claimant to relocate in order to avoid persecution. Although the Tribunal acknowledges, at paragraph 45, that the “situation in other areas, such as Darfur itself, remains as outlined in AA and MM” there is no clear finding on whether or not the Appellant in this case has, in his home area, a well-founded fear of persecution by virtue of his ethnicity alone. This is important because if he does, then the only question to be asked in respect of Khartoum would be whether it would be unduly harsh to expect the Appellant to relocate there.
13. It is not at all clear from paragraphs 26-37 of the determination that this was the focus of the Tribunal’s enquiry. Those paragraphs are, in very large measure, directed at the question of whether the Appellant would face *persecution* in Khartoum. I note, having regard to the CPIN, that this was the extent of the Respondent’s invitation to depart from the country guidance:

“The Home Office view is, therefore, that there is now cogent evidence which has become available since the promulgation of AA and MM establishing that in general non-Arab Darfuris are **not at risk of persecution** solely on the grounds of ethnicity in Khartoum”.

(my emphasis)

The same guidance indicated the Respondent’s view that the question of internal flight would need to be decided on a case-by-case basis.

14. Apart from the reference to the Appellant being able to get a job in Khartoum there is no evidence on the face of the determination that the First-tier Tribunal undertook a holistic internal flight assessment, for instance whether he would be able to lead a ‘relatively normal life’ in

view of the evidence on non-Arab Darfuris in the city. Even on the evidence cited in the determination it is possible that such an assessment would have been resolved in the Appellant's favour. See for instance:

"There are reports of arrests, detention, harassment and torture of non-Arab Darfuris, as well as sexual abuse of women. Some sources report that Darfuris are likely to face worse treatment once in detention than other ethnic groups because they may be perceived to be rebel sympathisers, and that they are particularly vulnerable to torture and ill-treatment [paragraph 2.3.11 of CPIN cited at paragraph 28 of the determination]

Darfuris generally live in the poorer areas of Khartoum and are economically disadvantaged compared to other Sudanese. They face discrimination in accessing public services, education and employment, and may face forced eviction, societal harassment from other (Arab) Sudanese, and lack access to humanitarian assistance. However, such treatment is not so severe that it is likely generally to amount to persecution or serious harm [2.3.14 at paragraph 31]

The evidence, when considered in its entirety, does not establish that the authorities target non-Arab Darfuris and subject them 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 [2.3.15 at paragraph 32]

15. As the grounds note, the CPIN also contained other passages which were capable of supporting the Appellant's case on internal flight, (and indeed risk):

"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 [3.1.5]

...

The DFAT assessed in its April 2016 report: 'There are [...] examples of individuals from Darfur being targeted outside of Darfur, particularly in Khartoum. There are a number of factors that influence the treatment of Darfuris in Khartoum, including their actual or perceived support for or association with rebel groups, or the criticism, particularly from students, of the implementation of the Doha Document for Peace in Darfur (which guaranteed free university education for Darfuris). For example, between late April and early July 2015 over 200 Darfuri students and their families were detained in Khartoum following protests' [5.2.9]"

16. I am for these reasons satisfied that ground (i) is made out. It perhaps follows that ground (ii) must also be made out since it cannot be said

that “very strong grounds” were found to depart from AA in circumstances where the Tribunal did not direct itself to the appropriate tests or consider all of the relevant evidence.

Anonymity Order

17. The Appellant continues to seek granted international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions and Directions

18. I have found that the Tribunal failed:
- a) to make clear findings on whether the Appellant has a well-founded fear of persecution for reasons of his ethnicity in his home area of Al-Gezira state (I note that although it is accepted that the Appellant is of the Tama tribe, a non-Arab Darfuri ethnic group, he is not himself from Darfur: Al-Gezira lies in the east of the country adjacent to the Blue Nile)
 - b) to conduct a holistic assessment of whether it would be reasonable for the Appellant to relocate to Khartoum; *and*
 - c) to take all relevant information into account in finding that there was no risk of persecution in Khartoum.
19. The decision, insofar as it relates to these three areas, must therefore be set aside and remade. The determination does however contain findings that have not been disturbed. The Appellant had advanced a case that he had been arrested and tortured in the past: this was comprehensively rejected by the Tribunal and those findings have not been challenged. I therefore do not consider it appropriate that this matter be remitted to the First-tier Tribunal. The matter will be relisted in the Upper Tribunal for re-making in due course.
20. There is an order for anonymity.

Upper Tribunal Judge Bruce
8th November 2018