



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/13574/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 31 May 2018

Decision & Reasons Promulgated  
On 18 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

[O A]  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms J Elliott-Kelly of Counsel  
For the Respondent: Mr C Avery, a Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This is an appeal by the above-named appellant against the decision of the First-tier Tribunal (FtT) to dismiss the appellant's claim to asylum and humanitarian protection, alternatively, protected human rights in the UK.

2. The appellant now seeks to appeal the decision of First-tier Judge Devittie (the Immigration Judge) who dismissed the appellant's appeal following a hearing on 26 January 2018 at Taylor House. His decision was promulgated on 5 March 2018. The appellant appealed that decision to the Upper Tribunal on 14 March 2018. First-tier Tribunal Judge Osborne gave permission to appeal on 5 April 2018 having found the grounds to be arguable. Judge Osborne pointed out in his grant of permission that the respondent had accepted in her refusal that the appellant was a non-Arab Darfuri from Jabal in Somalia. The Immigration Judge had departed from country guidance in the case of **MM (Darfuris) Sudan CG [2015] UKUT 00010 (IAC)**. The Immigration Judge had also failed to refer to Article 8 clearly but Judge Osborne noted that Article 8 had not been mentioned in the appellant's grounds of appeal. Nevertheless, he considered the judge had been obliged to consider this Article in his decision. This was an arguable error of law therefore.
3. Following the grant of permission, a notice of hearing was sent out on 4 May 2018 indicating that the Upper Tribunal would not consider evidence which was not before the First-tier Tribunal unless it is specifically decided to admit such evidence.

### **Background**

4. The appellant claims to have left Sudan clandestinely on 22 June 2015 and travelled through several European countries before allegedly arriving in the UK on 8 June 2016. The appellant claimed to be from a village called Asknita, west of Darfur and in the west of Sudan. His account of being a non-Arab Darfuri was accepted by the respondent.
5. The appellant stated to the respondent that he feared he would be arrested or killed by the government of Sudan because he was an activist in an organisation for "Justice and Equality" (question 67 at A5 of the interview). Allegedly, the appellant had only spent two weeks working for them in May of 2016. However, his father had disappeared and he was not keen on staying with his stepfather. Therefore, following a discussion with a friend (question 73 *infra*) he decided to join that organisation. The organisation was based in Jabal Moon. The appellant also claimed also to be motivated by the government's favouring of Arabs over non-Arabs.
6. The appellant claimed that whilst working for the above group he assisted with cleaning and washing of dishes and looking after the elderly. The appellant had been forced to get in a car with his cousin and another soldier called Jana. They were dropped in an area called Khor Soor. They had to walk an hour back to Selia (paragraph 15 of the grounds of appeal to the First-tier Tribunal). It seems that another movement known as the Sudan Liberation Movement/ Army attacked the government in Selia but it was defeated. He returned home to be informed by his uncle that "the government is arresting everyone who participated in any of the movements in our area". The appellant claimed to be shocked and scared and to have no choice but to run away. He felt he was an easy target for the government. Accordingly, he escaped

first to Libya and then to several European countries where over the course of many months he found his way to the UK.

### The Hearing

7. Ms Elliott-Kelly submitted that the Immigration Judge had failed to follow the country guidance cases of MM and AA. I was referred to the case of AA, which was summarised at paragraph 9, page 4 of the Immigration Judge's decision. This guidance asserts that whilst ordinary non-Arab Darfuris are not thought to be the subject to the systematic persecution outside Darfur the courts have found it not unduly harsh to expect them to internally relocate to Khartoum. The IAT had then gone on to make an assessment of the risk to the appellant on return and concluded that as a consequence of further evidence adduced the non-Arab Darfuri would be at risk on return even if they relocate to Khartoum. The Immigration Judge went on to consider the case of MM but went on to state that as a result of more recent evidence the Home Office had adduced, it was no longer the case that there was systematic targeting of these groups in Khartoum. Ms Elliott-Kelly pointed out that there was later country guidance case law which went along with these earlier cases. Ms Elliott-Kelly argued that the Immigration Judge had been unreasonable and irrational in departing from country guidance case law.
8. Her second ground of attack related to the Immigration Judge's adverse credibility finding. She said that as a non-Arab Darfuri the appellant would have a freestanding political claim based on the case of JEM [2016] UKUT 00188.
9. Ms Elliott-Kelly's final criticism related to the Immigration Judge's treatment of Article 8. She said that it was incumbent upon him to consider that article but she acknowledged this claim overlapped with the issue of internal relocation.
10. Ms Elliott-Kelly then expanded on her submissions by explaining that the appellant as a non-Arab Darfuri would be sufficiently at risk to qualify for refugee/humanitarian/human rights protection. She said that the respondent's position had changed since the country guidance cases in August 2017 when the respondent decided that non-Arab Darfuris could be safely returned to Khartoum. However, there had not been a country guidance case yet. Even if it was safe to return the appellant to Khartoum it would not be safe to return him to Darfur. There had to be cogent reasons for finding otherwise. I was then referred to the Country Policy and Information Note in relation to Sudan: "Rejected Asylum Seekers" August 2017 produced by the respondent. Ms Elliott-Kelly pointed out that under paragraph 12 of the Practice Directions of the IAC a reported determination of the Tribunal which bears the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination. Such cases were based on the evidence before the members of the Tribunal at the time, unless it has been expressly superseded or replaced by a later case or an inconsistent authority. It ought to be authoritative in any subsequent appeal.

11. Next I was referred to **ST (Ethiopia) [2007] UKAIT 0012** which pointed to the duty to give reasons based on an adequate body of evidence. She argued that the decision showed that the Immigration Judge had not given anxious scrutiny to the evidence and had not properly considered the policy guidance referred to above. She particularly took me to paragraph 11 of the decision where the Immigration Judge summarised the contents of the policy guidance but she said that although the Immigration Judge had been able to distinguish the policy guidance, he should only have done so having considered any which pointed the other way. I was invited to consider paragraph 5.2.2 of the information note accompanying the policy guidance which points out that the entry of individuals from abroad at Khartoum Airport is subject to close attention by the authorities. Such individuals are required to show their exit visa but, if they have left illegally, they will not have one. A failed asylum seeker does not obtain an exit visa prior to leaving Sudan and would be likely to be questioned by the NISS – the security service. Ms Elliott-Kelly placed particular reliance on this evidence. There was nowhere enough material change to the state in Darfur or Khartoum to justify a departure from the country guidance in her submission. It was argued that the policy note contradicted the conclusions set out in paragraph 11 which summarises the respondent's case.
12. Next I was referred to paragraph 23 of the appellant's skeleton before the FtT. There the advocate for the FtT argued that although there were sources cited in the CPIN which suggested that Khartoum is a safe place for non-Arab Darfuris to go, there is also evidence which contradicted which is quoted by the appellant in that skeleton argument. This includes the Danish Immigration Service/UK Home Office Report on Sudan: the situation for persons from Darfur, Southern Kordofan etc.
13. If I were to accept the appellant's submission that the appellant made an inappropriate departure from country guidance material in accepting that there had been a departure from country guidance without just because it was open to me to remake the decision. I was referred to an expert report at page 89 of the bundle before the FtT by Professor Mario I Aguilar, the director of the centre for the study of religion and politics at St Mary's College University of St Andrews. I was invited to take that into account before reaching any decision. Ms Elliott-Kelly notes an additional question of the Immigration Judge, stating that the determination had failed to consider a number of detailed points made by the appellant's representatives. For example, I was referred to paragraph 12 of the decision by the appellant's Counsel (wrongly referred to as the respondent's Counsel) contending that conditions affecting non-Arab Darfurians had not changed and they remained at risk in Khartoum. It was submitted that illegal exit from Sudan had been established in this case. I was also invited to conclude that it was likely the appellant had taken part in sur place activities in the UK which would put him at additional risk on return. The appellant submitted that the Immigration Judge did not even consider that issue. This is despite detailed submissions being presented on the point (at paragraphs 24-28 of the skeleton argument before the First-tier Tribunal). There was a risk of interrogation and a risk that the authorities would suspect the appellant of anti-State activities, imprison and torture him.

14. I was also referred to the Immigration Judge's findings on credibility and invited to conclude the findings he made were not adequately reasoned. In particular, I was taken to paragraphs 16-18 of the Immigration Judge's decision. Ms Elliott-Kelly pointed out that the Immigration Judge dealt with the issue of credit at paragraphs 16-18 of his decision. It seems that the Immigration Judge's principal reasons for finding the appellant incredible was that the Immigration Judge found there to have been a gap between the appellant's apprehension of danger following raids carried out shortly before his return home. It seemed, to the Immigration Judge, incredible that if arrests were taking place the appellant would adopt such a "... leisurely" approach to his departure. Secondly, the appellant's account of how he came to join the JEM did not show that he was motivated by political convictions but suggested that it was triggered by the ill-treatment that his stepfather had subjected him to. The suggestion that his decision to join the JEM was founded on political conviction was an afterthought in the judge's assessment. The Immigration Judge did not accept the evidence that the appellant had ever joined the JEM.
15. Next I was referred to page 88(a) in the appellant's bundle which was a statement from Charlene Sergeant, a social worker employed by the London Borough of Merton. Ms Sergeant pointed out that the appellant is worried that he will become destitute if he returns to Sudan. He had received a high level of support while in the UK and is keen to further his education here. Feelings of anxiety, fear and hopelessness tend to overcome him if he thinks of returning to his home country. Whilst the appellant has not had a formal diagnosis of any mental disorder, there was clear evidence that he suffered from excessive anxiety. The Immigration Judge had not properly taken into account his emotional state. Findings made in relation to this at paragraphs 18 and 19 were inadequate as was the assertion in the latter paragraph that the appellant had not taken sufficient part in online activities and sur place activities generally to bring himself to the attention of the authorities.
16. Finally, Article 8 and internal relocation were connected. Ms Elliot-Kelly said that the appellant was at risk of questioning at the airport in Khartoum, as Dr Aguilar acknowledged in his report. The appellant's home area was Darfur which everyone agreed cannot be safe to return to. Even if the Immigration Judge was entitled to find a lack of personal risk, he had to decide whether relocation was possible. The Immigration Judge had not properly engaged with the test to be applied to internal relocation. Paragraph 20 contained the clearest statement he had made, where the Immigration Judge states that the extent that the appellant would be at risk in his home area solely on account of his ethnicity (as a non-Arab Darfurian) it would not be unreasonable to expect him to relocate to Khartoum. Whilst acknowledging that Article 8 was not mentioned, this gave the Immigration Judge an additional route to finding that the appellant would be subject to unlawful interference with his protected human rights on returning to Khartoum. Internal relocation was not possible for the reasons given, in part, in paragraph 31 of the skeleton argument before the FtT. In particular, the unduly harsh test had to be satisfied. The appellant would have difficulty in obtaining employment and may have to live in slum conditions if he returned to Khartoum. Again, I was referred to paragraph 6.2 of the policy note where

it states that housing and accommodation is very limited in Khartoum and access to services for non-Arab Darfuris is very difficult. Professor Aguilar had dealt with this at paragraph 27, page 100 of his report. The Immigration Judge had not engaged with his evidence adequately or at all. There was no attempt to embark on the balancing exercise required under Article 8.

17. Mr Avery made much briefer submissions to the effect that the Immigration Judge had reached his decision for cogent reasons and had explained why he departed from country guidance case law at paragraph 11 of his decision. He had engaged with all the evidence. The appellant was simply unhappy with the outcome which had found him to be incredible. Article 8 had not been raised in the grounds and was adequately covered in any event.
18. The appellant replied by referring the Tribunal to a case called **Doody** which states that there is a duty on a Tribunal to give reasons which are clear and intelligible.
19. At paragraph 11 of the Immigration Judge's decision was a summary of the respondent's summary of the cases. It was not an analysis. The evidence did not point all one way but Miss Elliott-Kelly stated that it was not open to the FTT to ignore country guidance case law. The Immigration Judge had to give cogent reasons for doing so, which were absent. Finally, internal relocation had not been properly dealt with because it was clear reasons for a finding that internal relocation was reasonably available. Ms Elliott-Kelly reiterated her assertion that the appellant will be subject to discrimination, even persecution, in Khartoum.
20. At the end of the hearing I reserved my decision which I will later give having discussed the various issues below.

### **Discussion**

21. The appellant claims to have left Sudan clandestinely in 2015 and to have travelled to the UK via several European countries before arriving in the following year. The Immigration Judge dismissed his appeal in a lengthy and detailed decision which the appellant now says is flawed for the reasons summarised above.
22. It is unfortunate that country guidance case law is now somewhat out of date. There may well be a case in the near future which deals with the current situation particularly in Khartoum. However, **IM and AI (risks - membership of Beja tribe)** and **JEM (Sudan) CG [2016] UKUT 188**, the earlier cases of **AA** and **MM** remain good law despite the passage of time. The Upper Tribunal concluded in **JEM** that there was no legitimate basis for departing from the Tribunal's earlier assessment in the cases of **AA** and **MM**.
23. In reaching my assessment of the Immigration Judge's decision I bear in mind the appellant's young age (he is still 17). I also bear in mind that it is accepted that he is a non-Arab Darfuri - an "at-risk" category according to the case of **MM** and **AA**.

24. I also bear in mind that the Country Policy and Information Note "Sudan: Non-Arab Darfuris" from August 2017 in which it was concluded that security operations including arrest and detention by the government varied over time, in terms of its intensity.
25. Set against this background, the Immigration Judge's decision to depart from country guidance case law appears at first sight surprising. The question is whether it was justified? As Ms Elliott-Kelly has pointed out, such departure would only be justified by a First-tier Tribunal for cogent and clear reasons which must be properly reasoned. The Immigration Judge had the benefit of the most recent Country Policy and Information Note the 2017 Human Rights Watch Report which dealt in general terms with the situation from non-Arab Darfuris in southern Sudan as well as the difficulties in relocating to Khartoum. The Immigration Judge specifically rejected the appellant's expert evidence in paragraph 13 of his decision. However, the Immigration Judge found there had been a material change in circumstances for the conditions of non-Arab Darfuris in Khartoum. That is a conclusion I will look at later in this decision.
26. The reasons the Immigration Judge gave for departing from the country guidance evidence appears to be based on the joint Danish/UK Fact-Finding Report. The Immigration Judge was satisfied that, to the extent that the findings of the UK/Danish Report were in conflict with those of the appellant's expert, he preferred the UK/Danish Report. He found clearly that there had been a change in circumstances for non-Arab Darfuris in Khartoum (paragraphs 13 and 14). In my view he did not give adequate reasons for finding that the country guidance in relation to the remainder of Sudan had changed so materially as to depart from that guidance. This amounts to an error of law. The question whether that error is material?
27. The appellant's evidence was found incredible for reasons, which appear to be cogent. The Immigration Judge might have given additional reasons for so finding, for example, the fact that the appellant spent three months in France without claiming asylum. There were ample reasons here for rejecting the credibility of his account and that must inform the approach I adopt to the question: was the error of law in not considering country guidance material to the outcome of the case given the rejection of the appellant's own evidence by the Immigration Judge?
28. In my view it was not a material error for the following reasons:
  - (1) The Immigration Judge was entitled to reject the credibility of the appellant's account for the reasons he gave. The Immigration Judge concluded that the appellant had not joined the JEM at any stage before travelling to the UK. This must have the effect of reducing any risk on return.
  - (2) Secondly, the Immigration Judge was entitled to conclude that the appellant had a safe place to which he could safely internally relocate - namely Khartoum. Miss Elliott -Kelly acknowledged that the respondent's guidance in relation to that

category of persons (those of non-Arab Darfuri descent) can relocate to Khartoum was under review but that guidance had changed since the hearing before the Immigration Judge. She validly made the point that this has not since been sanctioned by the Upper Tribunal

29. The limitations on sticking too strictly to the earlier country guidance case law include the fact that the case law in this case was of some age. In my view, the Immigration Judge had well in mind the need to be careful given the seriousness of the allegations the appellant made. However, I take full account of the appellant's ethnicity but have concluded it would not be unreasonable for him to relocate to Khartoum. I bear in mind that there will be economic pressures on him and he may face discrimination that that is not the same as facing persecution there.
30. For those reasons I conclude that the appellant would not be subject to persecution in Khartoum which would be a safe place to which he could go without suffering undue hardship.
31. In relation to Article 8, this was not raised in the appellant's grounds as Ms Elliott-Kelly acknowledged. I am not persuaded if it had have been raised it would have been more fully considered by the Immigration Judge and would have led him to a different conclusion. No evidence was produced to show that the appellant suffered from PTSD or any identifiable medical condition. The assertion that he suffered from stress or emotional and psychological instability is insufficient to require the respondent to recognise this protected right to a private or family life in the UK under this article. Indeed, he was able to survive for three months in Calais, travel across Europe and showed substantial resourcefulness. These were factors which the Immigration Judge was entitled to take into account in concluding that he could safely go to Khartoum.

### **My Conclusions**

32. In conclusion:
  - (1) Departure from the country guidance case law was not justified in the absence of a thorough fact-finding exercise and cogent reasons for doing so. The guidance given by the Upper Tribunal, to the effect that non-Arab Darfuris on return to Darfur are likely to face persecution, stands.
  - (2) The Immigration Judge rejected the appellant's account because he found it to be incredible. He made that finding of the hearing the appellant gave evidence but after a thorough assessment of the case before him. The Immigration Judge's reasoning could have been fuller were I to be required to give additional reasons for rejecting his credit I would have stated that he had travelled across the whole of Europe without claiming asylum and there is a substantial point under Section 8 of the Immigration (Treatment of Claimants) Act 2004 which was taken by the respondent in her refusal letter. However, I bear in mind the respondent has not



cross-appealed so it would not be right of me to substitute additional reasons in the respondent's favour. I simply observe that the reasons given were sufficient.

- (3) There is in any event a safe place to which the appellant could return – namely Khartoum. It may be that there will need to be future country guidance case law on this but anyone that has undermined the Institute's interest based on opinion rather than, undermining the very I am content that the Immigration Judge properly considered this matter based on clear submissions which the respondent has maintained before the Upper Tribunal.
- (4) I am not persuaded that the appellant's moral and physical integrity would be so threatened by his return to Khartoum that there is a clear Article 8 point here. The Immigration Judge had in mind the poor evidence of the appellant suffering any form of ill-health and was entitled to reach the conclusion he came to.

### **Notice of Decision**

For these reasons I have concluded the appellant has not established there was a material error of law in the decision of the FtT and I dismiss his appeal to the Upper Tribunal.

An anonymity direction was made by the FtT and I continue that anonymity direction.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 17 July 2018

Deputy Upper Tribunal Judge Hanbury

### **TO THE RESPONDENT** **FEE AWARD**

No fee is payable. The Immigration Judge made no fee award and I make no fee award and I do not intend to interfere with that decision.

Signed

Date

Deputy Upper Tribunal Judge Hanbury