Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06683/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 18 October 2019	**On 11th November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

M B E A I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aziz, Lei Dat & Baig Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

11 This is the Appellant's appeal against the decision of Judge of the First-tier Tribunal Shergill dated 6 July 2018 dismissing the Appellant's appeal against the decision of the Respondent dated 13 May 2018 refusing his protection and human rights claim.

2 It is not in dispute that the Appellant is a national of Sudan and is of non-Arab Darfuri origin. Paragraph 24 of the Respondent's decision accepts that the Appellant is from Sudan and at paragraph 28 it is accepted that the Appellant is of the Berti tribe.

3 The Appellant entered the United Kingdom in or around November 2017 and claimed asylum, stating that he had left Sudan in 2013 and had travelled to various countries en route to the UK. The Appellant gave an account that he had come to the adverse attention of the authorities in Sudan due to a perceived connection with a car that was found to contain weapons, and was at risk of further serious harm upon return for that reason. He also claimed to fear serious harm merely on the basis that he was of non-Arab Darfuri origin. In that regard the Appellant sought to rely upon country guidance cases of AA (Non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056 and also MM (Darfuris) Sudan (CG) [2015] UKUT 10 (IAC).

4 The Respondent considered the Appellant's application for protection and disbelieved his account of having come to the adverse attention of the Sudanese authorities. The Respondent also relied upon a joint report of the Danish Immigration Service and the UK Home Office dated March 2016 entitled 'Sudan: Situation of Persons from Darfur, Southern Kordofan and Blue Nile in Khartoum', and took the position that the situation for persons of non-Arab Darfuri origin in Khartoum was now such that they no longer faced a real risk of serious harm and that the Appellant could safely relocate to Khartoum if necessary. The Respondent also pointed out that this particular Appellant was said to have family including an uncle resident in Khartoum.

5 The appeal came before the judge on 27 June 2018 and the Appellant gave evidence. The judge held, due to certain inconsistencies and implausible elements within the Appellant's evidence, that the Appellant had not come to the adverse attention of the Sudanese authorities.

6 The judge then considered the continuing application of the country guidance cases of AA and MM. The judge also had regard to the decision in IM and AI (Risks - membership of Beja Tribe, Beja Congress and JEM) Sudan (CG) [2016] UKUT 188 (IAC). In a detailed decision, the judge addressed his mind to the application of the existing country guidance (at paragraphs 19 to 23 of the decision) and considered at paragraph 29 onwards, under the title of "Quality of the Departure Evidence". the evidence relied upon by the Respondent to support the proposition that internal relocation to Khartoum was now safe. The judge considered the CPIN Report entitled 'Sudan – Non-Arab Darfuris' published in August 2017 and noted that it relied significantly upon the fact-finding report mentioned above. The judge also noted at [29] that the CPIN report contained various references to a document which the judge referred to as 'the Australian Report 2016 (DFAT)'. This is a reference to a report of the Australian Department of Foreign Affairs and Trade dated 'DFAT Country Information Report: Sudan', dated 27 April 2016. The judge stated that he had read the whole of the DFAT report.

7 The judge considered a particular submission made on behalf of the appellant regarding the weight to be attached to the fact-finding report, as follows:

> "31. Ms Patel criticised the anonymised sources in the CPIN. However, broadly speaking the underlying joint report is well-sourced so that this is not a fundamental flaw. Both the joint report and DFAT rely on a number of different sources which reassures me that there has been some wide consultation. These include governmental and non-governmental sources; some of them based in or with connections to Sudan, others less directly placed. There were also human rights activists and lawyers consulted.
>
> 32. I take no issue with the reliance on diplomatic sources or the lack of an NGO presence going to weight in the joint report. I noted that there is a British Embassy letter in the CPIN. Such issues have been comprehensively dealt with in IM and AI (Risks – Membership of Beja Tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 00188 (and the judge then set out a quote from paragraph 199 of that decision).
>
> 33. There is nothing fundamentally wrong with relying on either diplomatic sources or NGO's who do not have a presence in Sudan, particularly given the difficulties NGO's face there. I do not consider these issues are fundamental flaws or reduce weight.
>
> 34. I note the joint report starts off with a disclaimer:
>
> > 'This report was written in accordance with the European Asylum Support Office (AESO) Country of Origin Information (COI) reporting methodology. The report is based on approved notes from meetings with carefully selected interlocutors. Statements from all interlocutors are used in the report and all statements are referenced. This report is not a detailed or comprehensive survey of all aspects of the issues covered in the terms of reference and should be considered alongside other available Country of Origin Information on the situation of persons from Darfur and the two areas in Khartoum Sudan. The information contained in this report has been gathered and presented with utmost care. The report does not include any policy recommendations or analysis. The information in the report does not necessarily reflect the opinion of the Danish Immigration Service or the UK Home Office. Furthermore this report is not conclusive as to the determination or merit of any particular claim

> for protection which will need to be considered on its individual facts. Terminology used should not be regarded as indicative of a particular legal position.'

35. The introduction to the report sets out the methodology etc:

> '… The terms of reference for the mission were drawn up by DIS and the UK Home Office in consultation with the Danish Refugee Appeals Board as well as a Danish advisory group on COI. The terms of reference are included at Appendix C to this report.
>
> In the process of compiling the report the delegation consulted with 29 sources comprising representatives from international organisations, academics, local and international, non-governmental organisations (NGOs), western embassies, journalists, an international consultant and the Sudanese authorities. The UK Embassy in Khartoum provided assistance in identifying some interlocutors relevant to the terms of reference. The sources interviewed were selected by the delegation based on the expertise, merit and role relevant to the mission. 28 of the sources were consulted during the missions to the three countries. One of the sources the London based NGO was consulted in London. The delegation also attempted to meet Amnesty International and Human Rights Watch in Nairobi. However the HRW representative was not available at the time of the delegation's visit whilst Amnesty International declined the invitation to meet.'

36. I can only take the report at face value but what I have read satisfies me that the report has been based on sound methodology using a wide range of appropriate sources. The various opinions generally both positive and negative are set out in the joint report and a summary which had been agreed by the contributors appended to the report. I have previously read the entire 122 page report carefully."

8 The judge thereafter at [37-38] sets out various extracts from the CPIN Report. In particular, at [37], the judge quotes from paragraph 2.3.10 of the CPIN:

> "25.3.10 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."

9 At [38] the judge quotes from paragraph 5.2.16 of the CPIN report, which itself refers to a September 2016 letter from the British Embassy Khartoum. At [39] the judge sets out certain passages from the DFAT report regarding its own methodology, and states at [40]:

> "I am satisfied that there were no obvious concerns about bias or methodology flaws in the report. Whilst the report was commissioned in 2016, there is nothing to suggest that it was not conducted independently by the Australians (i.e. distinct from the joint report). I was able to attach weight to the conclusions in it; and it was another source of evidence tending to support the findings made in the joint report and commented by the British Embassy. There were therefore three broadly separate sources of information underpinning the CPIN; those sources themselves underpinned by different sources."

10 The judge then sets out at [40-41] certain extracts from the DFAT Report. The judge's ultimate conclusion is that as set out at [43]:

> "43. Looking at all of this evidence in the round it is abundantly clear that the situation in Khartoum has markedly changed from that set out in the 2009 OGN which underpinned AA. Whilst there may have been some updated evidence before the Tribunal in MM clearly that 2009 OGN was a key constituent to the decision making."

11 The judge ultimately found that there had been a material change of circumstances such that the guidance in AA and also in MM was no longer to be followed. In the absence of the Appellant having a specific adverse profile in Sudan, the judge held that it would be reasonable for him to relocate to Khartoum and that he would not be at risk of serious harm there.

12 The Appellant appealed against that decision in grounds of appeal dated 16 August 2018, which argue that the judge erred in law, in summary:

(i) in failing to address adequately the concern that the CPIN repeatedly referred to unnamed sources, supporting its conclusions, in particular within the extract of the CPIN set out in the judge's decision at [37] (Grounds, para 8); the primary source document for the CPIN (the joint Danish Immigration Service and Home Office publication), cited a significant number of anonymous sources, as was apparent from Appendix B of the Fact-Finding Mission report (set out in slightly jumbled form in the Grounds of appeal at para 11, but consideration of Appendix B of the report itself discloses that 16 of 29 sources were anonymous);

(ii) failing to direct himself in law in relation to paragraph 40 of the reported case of AAW (Expert evidence – weight) Somalia [2015] UKUT 00637 (IAC) which provided that:

> " ... if the sources are not revealed, and not even the notes kept of any conversations with those sources are produced, it is hard to see that very much weight can be afforded to views founded upon information provided by such sources."

(iii) failing to have adequate regard to other relevant evidence within the CPIN report (Grounds, para 15); and

(iv) failing to have adequate regard to other country information contained within the appellant's bundle (Grounds, incorrectly numbered paragraphs (1-3) following paragraph 24).

13 Permission to appeal was granted by Upper Tribunal Judge Canavan in a decision dated 5 December 2018 finding at paragraph 3 that:

> "3. It was at least arguable that the judge failed to take into account relevant evidence when considering whether internal relocation to Khartoum would be unduly harsh and law unreasonable [49 to 50]. The judge focused solely on the Appellant's personal characteristics without taking into account the background evidence showing continued discrimination and marginalisation of non-Arab Darfuris in Khartoum which is said to lead to poor living conditions with a lack of humanitarian support. It is arguable that the discrimination faced by non-Arab Darfuris is relevant to a proper assessment of whether the conditions will be unduly harsh.
>
> 4. Although it is not argued in the grounds a relevant point of international law might also be engaged on the facts of this case. It is arguable that a proper assessment of whether it is reasonable to expect non-Arab Darfuris to relocate to Khartoum might include the fact that deliberate forced displacement of large numbers of non-Arab Darfuris has been a key feature of the conflict in Darfur. Paragraph 4.5.1 of the CPIN Sudan Non-Arab Darfuris (August 2017) notes that the International Criminal Court issued indictments against senior officials in the regime including President Bashir. Those indictments are in the public domain and include charges relating to the crime against humanity of forcible transfer of population (Article 7(1)(d) Rome Statute). In addition to the above the question of whether internal relocation is reasonable or in the particular context of Darfur is in itself an act of persecution might be sufficiently relevant to justify more detailed consideration by the Upper Tribunal."

14 A Rule 24 reply prepared by Senior Presenting Officer Mr Bates was prepared, resisting the Appellant's appeal arguing that the judge had adequately directed himself in law, had taken all material considerations into account and had arrived at a conclusion which was open to him on the evidence available.

Submissions

15 On behalf of the Appellant Mr Aziz relied upon the grounds of appeal, principally arguing the point that the judge failed to have adequate regard to the fact that much of the evidence quoted within the joint fact-finding report had been anonymous and that the judge had thus erred in law in attaching significant weight to it. Mr Aziz had not in fact been aware of the point raised by Judge Canavan at paragraph 4 of her grant of permission to appeal, not being in possession of the actual decision granting permission. Mr Aziz argued that the point raised by Judge Canavan was a Robinson obvious one but did not expand his submissions in support of the issue.

16 Mr Tan acknowledged the recent promulgation of the Upper Tribunal's decision in the case of AAR & AA (Non-Arab Darfuris - return) Sudan [2019] UKUT 282 (IAC), but argued that the present judge had not erred in law in making the decision at the time it was made. Mr Tan argued that Judge Canavan's point at paragraph 4 of her grant of permission to appeal was not a Robinson obvious point and should not be considered by the Tribunal. In relation to the matters actually contained within the application for permission to appeal Mr Tan argued that the judge had been entitled to take into account the content of the Home Office CPIN Report and the joint Danish and British Fact-Finding Report and had come to a decision which was open to him on that evidence.

17 No copy of AAW was presented to me but both parties were content for me to have regard to it after the hearing. Both parties also indicated that they were content for me to refer to any other authority which spoke to the issue of the weight to be attached to anonymised evidence within a fact-finding report.

Discussion

18 I find, notwithstanding the otherwise conscientious and thorough manner in which the judge prepared his decision, the judge did materially err in law.

19 I have set out above the passage from AAW relied upon by the Appellant, which advises caution in attaching weight to anonymous evidence (although it is also to be recognised that within the joint fact-finding report there are notes of conversations with the interlocutors interviewed

by the fact-finding mission, set out at Annex A of the report). I have also had regard to the following authorities relevant to this issue.

20 In the case of Sufi and Elmi v the UK 8319/07 and 11449/07 the Strasbourg Court dealt as a preliminary issue with the question of what weight should be attached to country reports which primarily relied on information provided by anonymous sources. At paragraph 233 the court held that:

> "233 … where a report is wholly reliant on information provided by sources, the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the Court in assessing the weight to be attributed to their evidence. The Court recognises that where there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information. Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it."

21 Further in the case of CM (Zimbabwe) v SSHD [2013] EWCA Civ 1303 [2014] Imm AR 326 Lord Justice Laws said that in this passage the Strasbourg Court 'drew attention to what is with respect an obvious truth, namely that anonymity of information is likely to inhibit the forensic possibility of challenging it' (paragraph 16) but that was not a rule of evidence and that:

> "17. There is no general rule at common law or inspired by the European Convention on Human Rights that uncorroborated anonymous material can never be relied on in a country guidance case or any other case. Sometimes that will be the position. Whether or not it is so will depend on all the circumstances. That is the approach taken by the Upper Tribunal in this case. Generally of course the effect of anonymity will go to the weight to be attached to the material in question and care must always be taken in assessing the weight of such material."

22 Further in SSHD v MN and KY (Somalia) [2014] UKSC 30 the Supreme Court considered a decision of the Tribunal to receive a language expert report from an organisation that was identified but where the individuals who had written the report were not. Lord Carnwath described certain arguments advanced on behalf of the respondents to the appeal (Somali

nationals making protection claims) as '... statements of high authority referring to the 'fundamental principle' of judicial process that other than in exceptional circumstances, witnesses are identified whether in criminal or civil proceedings' (paragraph 41). Lord Carnwath also referred to rule 14 of the then applicable Asylum and Immigration Tribunal (Procedure) Rules 2005, which then gave the Upper Tribunal power to make orders prohibiting disclosure of information (1) likely to lead to identification of "any person whom the Upper Tribunal considers should not be identified", or (2) likely to cause "serious harm" to the person to whom it is disclosed or "some other person", and stated that this rule was 'helpful as emphasising that, in the tribunals as in the courts, openness is the norm, and that there needs to be special reason for departing from it, risk of serious personal harm being an obvious example'.

23 I find that, summarising the principles derived from the above authorities, that it remains appropriate for any decision maker, including the Tribunal, to consciously consider, when assessing anonymous evidence:

(i) any reasons given for its anonymity; and

(ii) that less weight should, potentially, be given to anonymous evidence.

24 I find that the judge erred in law in failing to consider those matters adequately.

25 At page 8 of the fact finding report, under 'Introduction', and regarding the use of anonymous evidence, is the following:

> "The sources were asked how they wished to be introduced and quoted, and all sources are introduced and quoted according to their own wishes. 13 sources are referred to by their name and/or the name of their organisation; in accordance with their own request on this matter. 16 sources requested varying degrees of anonymity given sensitivities in their working environments."

26 I find that little information is given within the report for the reason that 16 out of the 29 sources quoted were anonymous, and permitted to be so. It is questionable as to whether the assertion within the report that such sources were given varying degrees of anonymity on the basis of 'sensitivities in their working environment', demonstrates sufficiently, as per Sufi and Elmi, that there were 'legitimate security concerns'. Further, again, as per Sufi and Elmi, in the absence of any information about the nature of the sources' operations in the relevant area, 'it will be virtually impossible for the Court to assess their reliability'. The judge did not consider in any or adequate detail the reasons advanced within the report for more than half of the sources being given anonymity, or the overall effect on the weight to be given to the report that such a large proportion of interviewees were anonymous. This would have been

relevant to the judge's assessment of the weight to be attached to the conclusions within the CPIN report.

27 It is not suggested that no weight ought to be attached to the evidence of such anonymous sources, and it may well be that had the judge directed himself in law, in accordance with the principles as set out in the above authorities, that he might have reached the same opinion as to the weight to be attached overall to the contents of the CPIN and the joint fact-finding report. I am aware that the judge also referred to other evidence within the CPIN report originating from the British Embassy and from the DFAT report. However, I am satisfied that the judge's error of approach to the weight to be attached to the joint fact finding report was material to the outcome of the appeal.

28 I find as a result of the failure by the judge consider properly the reasons for anonymity, and to direct himself in law that caution ought to be applied to the giving of weight to such evidence, that he materially misdirected himself in law. I cannot be satisfied that the judge would inevitably have reached the same conclusion as to the weight to be attached to that evidence, had he directed himself in law appropriately. I therefore find that the judge's error was material to the outcome of the appeal. I therefore set aside the judge's decision. It is not necessary, in those circumstances, to consider the point raised by Upper Tribunal Judge Canavan.

Remaking

29 I am invited by Mr Aziz to immediately remake the decision applying the guidance now provided in the reported case of AAR and AA. In that decision it is clear that the Upper Tribunal had intended to treat the appeals of AAR and AA as a suitable vehicle for new country guidance on the issue of the safety of return to non-Arab Darfuris to Sudan. However, for the reasons that are set out within the decision, the Upper Tribunal noted that from the early part of 2019 the human rights situation in Sudan had been volatile and at times had deteriorated (paragraph 24). The Tribunal ultimately decided at paragraph 29 as follows:

> "29. After some discussion, in light of the volatility of the situation in Sudan, the absence of the cogent evidence needed to set aside existing Country Guidance and in light of AAR and AA having waited for an extensive period of time for a final determination of their protection claims, the Respondent conceded that a further delay was not appropriate and that the appeals should be determined on the basis of the existing Country Guidance cases. The Respondent accepted that this meant that the appeals had to be allowed where the Appellant's profiles as Darfuris brought them within the ratio of AA(Sudan) and MM(Sudan). The Tribunal allows the asylum appeals of AAR and AA on that basis.

30. The answer to the Country Guidance question that was originally asked in these appeals is as follows. The situation in Sudan remains volatile after civil protests started in late 2018 and the future is unpredictable. There is insufficient evidence currently available to show that the guidance given in AA(Non-Arab Darfuris – relocation) Sudan CG [2009] UKAIT 00056 and MM(Darfuris) Sudan CG [2015] UKUT 00010 (IAC) requires revision. These cases should still be followed."

30 Therefore in applying paragraph 30 of the decision in AAR and AA I find that the Appellant, being a Sudanese national of non-Arab Darfuri (Berti) origin, falls within the ratio of AA (Sudan) and MM (Sudan). His appeal therefore falls to be allowed.

31 Notwithstanding the findings of the Tribunal within AAR and AA, it has been necessary in the present appeal to determine whether or not Judge Shergill materially erred in law at the time that he made his decision in July 2018. This is because the Tribunal in AAR and AA does not explicitly state that AA and MM were to have been applied at all material times since their promulgation. Rather, the Tribunal states that those country guidance cases continue to apply at the present time. However, for reasons given above, I have set the judge's decision aside and I have remade the decision, and the Appellant's appeal falls to be allowed.

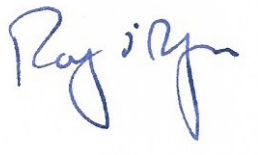
Decision

The judge's decision involved the making of a material error of law.

I set aside the judge's decision.

I remake the decision, allowing the appellant's appeal.

Signed Date 6.11.19

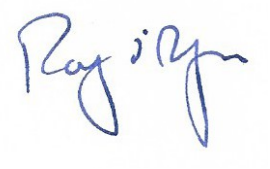


Deputy Upper Tribunal Judge O'Ryan

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 6.11.19



Deputy Upper Tribunal Judge O'Ryan