



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03084/2018

THE IMMIGRATION ACTS

Heard at Field House
On 27 September 2018

Decision & Reasons Promulgated
On 22 October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR A B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Anderson, Counsel instructed by Virgo Solicitors

For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sudan born on 16 January 1996. He is a non-Arab Darfuri. He arrived in the UK on 9 August 2017 and claimed asylum on 23 August 2017. On 20 February 2018 the respondent refused his claim for asylum and humanitarian protection. The appellant appealed and his appeal was heard in the First-tier Tribunal by First-tier Tribunal Judge Devittie. In a decision promulgated on 27 June 2018 Judge Devittie dismissed the appeal. The appellant is now appealing with permission against the decision of the First-tier Tribunal.

2. The appellant claims that he is from Darfur and a member of the non-Arab tribe of the Zhagawa. He claims that his family moved to a camp (the intifada camp) in 2003 after an attack on their village. He claims that his brother was involved with the opposition and that the authorities believe that he was also involved. He also claims that his father was beaten as a consequence of him and his brother being sought and that he fled Sudan in order to avoid being killed by the authorities. He claims that his brother remained in Sudan and joined with friends who were supporters of the opposition.

Decision of the First-tier Tribunal

3. It was accepted by the judge that the appellant is a member of the non-Arab tribe of the Zhagawa and that he lived in a camp before leaving Sudan to travel to the UK. However, the judge did not accept the appellant's account of being at risk because of an imputed political opinion and having been mistaken as a member of the opposition.
4. The judge considered whether the appellant would be reasonably likely to face persecution on account of his ethnicity if he were to relocate to Khartoum. He observed that the applicable Country Guidance cases of *MM (Darfuris) Sudan CG* [2015] UKUT 00010 (IAC) and *AA (Non-Arab Darfuris – relocation) Sudan CG* [2009] UKAIT 00056 make clear that he would. He also commented that the more recent decision of *IM and AI (Risks – membership of Beja Tribe, Beja Congress and JEM) Sudan CG* [2016] UKUT 00188 (IAC) is consistent with MM and AA.
5. The judge stated that a Tribunal may depart from Country Guidance cases if there are strong grounds supported by cogent evidence to justify such a departure. He referred to a number of sources post dating the Country Guidance cases, including a 2016 Danish-UK fact-finding mission and a 2017 Human Rights Watch report. At paragraph 12(6) he cited a letter dated 29 September 2016 from the British Ambassador to Khartoum who wrote that

“[No] substantial concerns have been raised over the treatment of non-Arab Darfuris that we would consider ethnic persecution, although many face economic marginalisation having been displaced due to conflict.”
6. The letter also states that many Darfuris, including non-Arab, are represented at senior levels in Government, academia and the security forces, the media, and in other institutions.
7. At paragraph 15 the judge stated:

“I have read closely the Danish-UK Fact Finding report. It is a comprehensive document and is supported by the letter from the UK Embassy in Khartoum which clearly outlines it's (sic) network of sources of information on the ground relating to non-Arab Darfuris including the risk they may face on return as failed asylum seekers. ... I am satisfied that this appellant would not be at risk upon his return via Khartoum airport solely on account of his being a non-Arab Darfuri who sought asylum in the UK.”

Grounds of Appeal and Submissions

8. The appellant submitted two grounds of appeal. The first ground contends that the judge adopted a mistaken approach to the Country Guidances cases of *AA* and *MM* and that the Danish UK fact-finding report taken at its highest is insufficient alone to supersede *AA* and *MM*.
9. The second ground argues that the judge erred by failing to consider that the appellant would be required to undertake national service upon return and that if he is forced to undertake national service it is unlikely that he would remain in Khartoum and therefore he would be at risk as the conclusion of the First-tier Tribunal was that it would be safe to return to Khartoum, not to other parts of Sudan.
10. Permission to appeal was granted by Judge of the First-tier Tribunal Landes. In the grant of permission Judge Landes commented that the judge only found that the appellant was not reasonably likely to be exposed to persecution in Khartoum but had not addressed the reasonableness or otherwise of his relocation to Khartoum.
11. Before me, Mr Anderson on behalf of the appellant argued firstly that the Country Guidance cases are clear that non-Arab Darfuris cannot safely be returned to Sudan. He argued that the judge had departed from the Country Guidance case law solely because of a single fact-finding report and that this was insufficient to justify deviation from the Country Guidance case law.
12. Mr Anderson also argued that the decision is fundamentally flawed because the judge failed to give any consideration to the risk arising from the likelihood that the appellant will be required to undertake national service. Mr Anderson observed that although this was raised at the hearing in the First-tier Tribunal there is no mention of the issue in the decision. He described the failure to consider the point as fatal to the decision. I asked Mr Anderson whether there was any objective evidence before the First-tier Tribunal to support the contention that the appellant would be required to undertake national service; and/or that he would be at risk of persecution as a consequence. Mr Anderson acknowledged that there was no such evidence before the First-tier Tribunal (other than the oral evidence of the appellant). However, he maintained that the respondent ought to have investigated this issue and that it was unreasonable to expect the appellant to adduce evidence on something that would not reasonably be available to him.
13. Mr Anderson also argued that the decision is deficient because reasonableness of relocation to Khartoum was not addressed. He argued that as this issue had been identified in the grant of permission to appeal there was no prejudice to the respondent in it being considered at this stage, even though it was not raised in the grounds of appeal.
14. Mr Tarlow on behalf of the respondent maintained that the judge was entitled to conclude that the Country Guidance case law could be departed from for the reasons given. With regard to military service, he argued that this was never put to the Secretary of State prior to the hearing and, in any event, the failure to deal with it was not material to the conclusions reached. As to reasonableness of relocation,

Mr Tarlow submitted that it was too late for the appellant to raise it at this time, but in any event, if there were an error, it was not material to the conclusion reached.

Analysis

15. I am satisfied that the judge was entitled to depart from the Country Guidance case law for the reasons he gave. The judge identified the relevant Country Guidance cases and correctly set out the circumstances in which he was entitled to depart from them. He considered the objective evidence post-dating the Country Guidance cases that was before him, and having done so concluded that there had been changes in the conditions affecting non-Arabs from Darfur, such that there were cogent and strong reasons to depart from the Country Guidance. Mr Anderson contends that the judge placed too much reliance on the Danish-UK Fact Finding report. I disagree. This was credible evidence that the judge was entitled to rely on. Moreover, although the judge placed significant weight on the report, this was not the only evidence upon which his decision was based. For example, it is clear that the judge had regard to a 2017 Human Rights Watch report. Having reviewed the objective evidence the judge relied on, I am satisfied that, having correctly identified the law and followed the correct approach, the judge reached a conclusion that was open to him based on that evidence.
16. I agree with Mr Anderson that the judge erred by failing to address the appellant's contention that he faces a risk because of a requirement to undertake national service. I accept that this was raised during the First tier Tribunal hearing and that it was incumbent upon the judge to make a finding in respect of the submission. However, I agree with Mr Tarlow that the error was not material. The burden of proof is on the appellant to establish his case (to the lower standard). The only evidence submitted in respect of national service was the oral evidence the appellant gave at the hearing. There was no objective evidence before the judge showing that the appellant would be required to undertake national service, or that if he were so required he would be at risk as a consequence. The fact that the appellant would, as a civilian, be at risk outside of Khartoum does not mean that he would be at risk outside of Khartoum whilst engaging in national service.
17. Mr Anderson argued that there is an absence of available evidence about the risk arising from national service and the issue should have been investigated by the respondent. The difficulty with this submission is that the burden lies with the appellant. If Mr Anderson is right, and there is no publicly available objective evidence relating to the issues raised about national service, then the appellant could have taken steps to obtain evidence, for example by instructing an expert. In the absence of objective evidence to establish a risk arising from national service, it follows that the appellant was unable to discharge the burden of proof. I therefore find that, although the judge erred, the error was not material.
18. The grounds of appeal do not contend that the judge erred by failing to address the reasonableness of relocation to Khartoum and no application was made in advance of the hearing to amend the grounds of appeal. However, as the issue was raised in the grant of permission, and therefore the respondent has not been taken by surprise, I am prepared to consider the submission.

19. Although the judge has not explicitly stated that it would be reasonable (in addition to being safe) for the appellant to relocate internally to Khartoum, it is apparent, when reading the decision as a whole, that this is the conclusion the judge reached based on his understanding of the objective evidence. The judge found that the appellant speaks the national language of Sudan and is a young adult male who has spent the majority of his formative years in the country. At paragraph 12(5) the judge stated:

“The primary source of 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-Aarb Darfuris living in Khartoum and surrounding areas. This includes people who have moved from Darfuri since the conflict began in 2003, who are able to go about their business and daily lives in Kartoum. They are present in all areas and levels of society including at a senior level in the government, in academia, as university students, in the security forces and in the media.”

20. I am satisfied that the judge was entitled, for the reasons summarised at paragraph 12(5) of the decision, to reach the view that internal relocation is reasonable.
21. Although the decision contains errors of law, I am satisfied that they were not material and that the judge reached a conclusion that was open to him based on the evidence. The decision of the First-tier Tribunal therefore stands.

Decision

22. The appeal is dismissed.
23. The decision of the First-tier Tribunal does not contain a material error of law and shall stand.

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 his 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



Deputy Upper Tribunal Judge Sheridan

Dated: 16 October 2018