



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12482/2017

THE IMMIGRATION ACTS

Heard at Bradford
on 18 July 2018

Decision promulgated
On 31 July 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AOBB
(anonymity direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sills instructed by Lei Dat & Baig Solicitors.

For the Respondent: Mrs R Pettersen Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals, with permission, a decision of First-tier Tribunal Judge Moxon promulgated on 12 January 2018 in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant is a citizen of Sudan born on 21 December 1983 who claimed asylum on 14 July 2017. The appellant claimed a fear on return to Sudan as a consequence of being falsely accused of attending anti-government demonstrations and on account of his membership of a non-Arab Darfuri tribe. The Judge notes the respondent accepts the applicants claimed ethnicity but his assertion of receiving adverse attention from the Sudanese authorities was rejected.
3. The Judge considered the evidence with the required degree of anxious scrutiny before setting out findings from [48] of the decision under challenge. The Judge considers country information which is set out in detail between [48 - 63] of the decision.
4. The Judge accepts the account given by the appellant of mistreatment on account of suspected political involvement is consistent with the objective material, which enhances his credibility, although also notes various aspects of the evidence that undermine the appellant's credibility. These are mentioned from [67] including discrepancies in the evidence which lead the Judge to find at [69] that the explanation for such discrepancies was not acceptable and that the applicant has been inconsistent as to whether he attended any demonstrations.
5. The Judge concludes at [71] that he is not satisfied the applicant has been detained or that he has a political profile in Sudan or that he would face any adverse attention from the authorities on return, despite his ethnicity and the fact he would return to Sudan as a failed asylum seeker. The Judge did not accept the appellant had proved that he left Sudan illegally.
6. The Judge notes the existence of country guidance cases relating to the risk to those of the specific relevant tribal membership and that he is bound to follow the conclusions of the Upper Tribunal unless there is good reason not to do so [73].
7. The Judge finds at [74] that there are good reasons to depart from the country guidance case in light of the compelling evidence within the Home Office Notes referred to earlier in the decision. The Judge finds it is clear from several sources that people of non-Arab Darfuri tribes in Khartoum are liable to face discrimination but not persecution unless they are perceived to be politically active against the regime. The Judge finds this is exemplified by the settlement of those from this ethnic group in the city and their position in the security services, media, government and academia and by the fact the appellant himself has not asserted any difficulties throughout his life on account of his ethnicity save for reduced finances and problems faced by his family in joining the police force. The Judge finds the appellant has been able to access education and employment and has given no account of suffering threats or actual harm, save for the purported period of detention which the Judge has rejected as not being credible.
8. Judge Moxon prefers the evidence in the Home Office Note and also takes account the fact the country guidance case of *MM* was heard in October 2014

over three years ago and that there has been sufficient time for change to be identified. The Judge notes that while significant objective evidence has been relied upon within the appellants bundle, this does not detail any harm or persecution of non-Arab Darfuri in Khartoum absent any political activities since the promulgation of the country guidance decision. The Judge finds that the situation in other areas such as Darfur itself, remains as outlined in *AA* and *MM*.

9. The Judge reminds himself that the appellant originates from Khartoum and has family who remain who will no doubt support him on return. The Judge finds the appellant will be available to work and that whilst he asserts ongoing physical problems arising from a broken hand he has not argued that this prevents him from working and nor did the Judge have medical evidence to that effect. The claim was accordingly dismissed.
10. Permission to appeal was refused by another judge of the First-tier Tribunal but granted on a renewed application by a Deputy Judge of the Upper Tribunal for the following reasons:

“I have carefully considered the grounds in the decision. It is arguable that the Judge, in departing from the country guidance cases, has relied too heavily on the Home Office Country Information and Policy Note, jointly produced with the Danish Immigration Service, without giving sufficient consideration to the evidence provided by the appellant. It is further arguable that he erred in failing to address the concern regarding unidentified sources and, in doing so, placed too much weight on this report.”

Submissions

11. On behalf of the appellant Mr Sills argued that the question of risk to non-Arab Darfuri is an important issue. Mr Sills was not sure if there is a pending country guidance case, which does not appear to be so. Mr Sills submitted the report relied upon by the Judge presents a mixed picture. It is argued that the country guidance case together with the respondent’s own policy recognises the difficulties in obtaining evidence from Sudan.
12. Mr Sills referred to the decision of the Upper Tribunal in *AA (Non-Arab Darfuris-relocation) Sudan CG [2009] UKAIT 00056* where the Upper Tribunal followed the respondent’s own policy. At [4] the Upper Tribunal in that decision wrote:

“It was common ground that the appeal fell to be allowed. The UK Border Agency produced an Operational Guidance Note (AGN) on Sudan on 2 November 2009. 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 paragraph 3.9.4 to 3.9.7 below, and restrictions on the operations of NGO’s - 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 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 Darfuri and who do not fall within the exclusion clauses will therefore qualify for asylum”.

13. It is submitted that in *MM (Darfuris) Sudan CG [2015] UKUT 00010(IAC)* at [13] the Upper Tribunal found:

13. In such circumstances the appellant is entitled to succeed in his asylum appeal unless it can be shown that since AA there is now cogent new evidence casting a different light on the situation of the Berti and/or non-Arab Darfuri. On the contrary, we find:-

(a) That the respondent has maintained word for word the position set out in her 2009 OGN. In the latest version (V.17.0 updated August 2012), the same wording is now contained 3.9.12 and at 3.10.1 it is stated that applicants can base their claim on membership of the Mussaleit, Zaghawa, Fur “all the other ethnic groups from Darfur States”.

(b) The expert evidence from Mr Verney considers that the current situation in terms of risk for non-Arab Darfuri (including the Berti) has worsened. As already noted, Ms Holmes did not seek to impugn his evidence nor was she able to identify any other evidence pointing in a different direction.

(c) Neither the country guidance case of AA nor the current Home Office OGN qualifies its identification of those who are at real risk of persecution by reference to whether an element of the risk they face derives from the fact of being a returning from the UK, but if that factor is taken into consideration, it seems to us that Mr Verney is right to consider that it is one which increases to some degree the level of risk for such claimants. It is true that according to Mr Verney the Sudanese authorities operate a highly sophisticated surveillance of Sudanese nationals in the UK so might be expected to know through their intelligence who are those actively associated with the rebel movement and those who are not. However, there is insufficient evidence to show that the actions and decisions taken by the authorities in Khartoum in Sudan, either at the airport or thereafter, are based on such intelligence.

14. Mr Sills accepts the test for departing from a country guidance case is that recognised by the Judge. It is submitted however that that test was not applied by the Judge as the Judge failed to consider whether the changes in Sudan were both established and durable.

15. Mr Sills submits the document relied upon by the Judge shows a mixed picture and that it is no more than the respondent’s policy and submissions regarding country guidance, in relation to which the Judge needed to exercise caution. It was submitted in the respondent’s document a number of issues arise. Specific reference is made by Mr Sills to the following paragraphs:

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 (see Khartoum, Treatment of non-Arab Darfuris).

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).

- 2.3.15 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.
- 5.2.5 The submission of stakeholders of March 2016 as part of the UPR of Sudan stated, without specifying whether the observations applied to Sudan generally or Khartoum in particular, that: 'JS647 noted that over the past four years the [National Intelligence and Security Service] NISS has used its powers of arrest without charge to arbitrarily detain scores of perceived opponents and other people with real or perceived links to the rebel movements often targeted because of their ethnic origin. The NISS routinely holds detainees incommunicado and without charge for prolonged periods. The NISS used different tactics to frighten political opponents and activists.'
- 5.2.8 In an article dated 26 June 2015, African Centre for Justice and Peace Studies (ACJPS) reported that 'Members of ethnic minority groups, including Darfuris and people hailing from Sudan's Blue Nile and South Kordofan states, are particularly vulnerable to torture and ill-treatment. ACJPS has documented threats of sexual violence against male and female detainees, as well as cases of rape against female detainees in state custody. Detainees have also reported the use of racist verbal abuse.'
- 5.2.9 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. '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.'
- 5.2.12 The UK-DIS FFM report, based on a range of sources, also noted: 'Several sources referred to the NISS conducting surveillance of persons in Khartoum and having a network of informants, including within the Darfuri and Two Area communities, for example DBA (Khartoum) noted that the NISS had informants in the Darfuri student population who had informed the NISS about who was active in demonstrations. One source referred to the NISS' use of electronic surveillance, for example tapping phone calls or monitoring online social media. 'A majority of sources observed that those from Darfur or the Two Areas who were critical of the government and/or had a political profile may be monitored and targeted by the NISS in Khartoum. This could include many different forms of activism. Several sources identified student activists from Darfur and the Two Areas as being at risk of being targeted 'Several sources noted that security operations, including arrest

and detention, by the government, including the NISS was not constant, but changed over time. Freedom House noted, for example, that the intensity of security operations could be seen to reflect the wider political climate with periods when the government would act in a fairly repressive way but during other times persons were able to express their views without serious reaction. 'Referring more generally to the issue of discrimination and restriction of political freedoms, Crisis Group noted that the discriminatory practices suffered by Darfuris and persons from the Two Areas, were systematic, but not constant, and that there may be periods where discriminatory practices were more intensely pursued and conversely times when discrimination was less pronounced... The SDFG [Sudan Democracy First Group] advised that it was difficult to say what was happening in Khartoum today or the extent to which persons from Darfur or the Two Areas were targeted by the NISS now. According to the source, it was predominantly politically active persons who were targeted by the NISS.'

- 5.2.13 The UK-DIS FFM report, citing several sources, stated: 'Four sources observed that all communities from Darfur or the Two Areas in Khartoum could be at risk of mistreatment by the NISS or indicated that persons from these communities may be targeted by the authorities due to their ethnicity alone. However, none of the sources provided specific information indicating that persons from Darfur or the Two Areas were being subjected to mistreatment by the authorities exclusively due to their ethnic background. 'Faisal Elbagir (JHR [Journalists for Human Rights]) noted that whilst there was no official report on ordinary civilians (that is persons who were not involved in political activities) from Darfur or the Two Areas being targeted by the authorities merely due to their ethnic affiliation, such cases could be found on social media. However, the source could not give examples of such cases which had been verified. Elbagir also remarked that due to media restrictions in Sudan, it was often difficult to obtain accurate news reports about cases of detention. 'Khartoum based journalist (1) noted that it was the type and level of political activity rather than one's ethnic background which was the determining factor behind who was monitored and targeted by the NISS. ACPJS [African Centre for Justice and Peace Studies] explained that ethnicity was complicated and that ethnic disputes were often exploited by the government to pursue political goals. ACPJS highlighted that in general anyone who was suspected of political opposition against the government could be targeted, including persons from Arab tribes. 'Some sources advised with regard to the arrest of Darfuris in Khartoum that there had been no large scale arbitrary arrest of Darfuris in Khartoum in recent years compared to that of 2008, following the JEM assault on Omdurman. Sources noted that at that time widespread security operations in Khartoum took place, which were often based on the skin colour and ethnicity of a person. 'A number of sources, however, noted that those from Darfur and the Two Areas, and in particular those of African ethnicity, were more likely to be viewed with greater suspicion and treated worse in detention than other tribes from Darfur and the Two Areas if they did come to the attention of the NISS due to their political activity. Some sources also mentioned Ingessana from the Two Areas among the tribes being suspected by the authorities for political activity. Several sources noted that the Darfuri and the Two Area communities were perceived by the NISS to be 'rebel sympathisers' and consequently these communities would be more closely monitored by the NISS, for example through the use of informants. Khartoum based journalist (3) held the view that it was only those communities arriving in Khartoum post 2003 who would be monitored. 'DBA [Darfur Bar Association] (Kampala) and ACPJS observed that those from other Darfuri tribes (i.e. not the Fur, Masalit and Zaghawa), would not generally be perceived as opposed to the regime or commonly associated with rebel groups and hence not being monitored by the NISS. However DBA (Khartoum) noted, in the context of how persons from Darfur and the Two Areas were treated on arrest, that other African Darfuri tribes,

including the Tunjur, Meidob, Tama, Mima, Gimir and Dago tribes, were treated more harshly than Arab-origin tribes because the authorities assumed that these groups supported armed rebel groups. DBA (Kampala) also observed that activists of Arab origin may experience harsh treatment for advocating in favour of the rights of non-Arab tribes. 'EHAHRDP [East and Horn of Africa Human Rights Defenders Project] commented that it was difficult to be prescriptive about which tribes would be at greater risk, although considered those from Arab Baggara tribes as less likely to experience mistreatment because these tribes were commonly associated with the pro-government Janjaweed militia. 'UNHCR noted, however, that it was difficult in practice to treat persons differently on the basis of their tribal affiliation. The source explained that it was difficult to say which group would be targeted and which would not due to the sheer number of different tribes in Darfur (over 400), and the fact that mixed parentage occurred.'

- 7.1.3 The report also referred to an interview with 2 other Darfuri men returned from Israel. A 36-year-old Sudanese man from Darfur who returned to Khartoum from Israel in August 2013 described how National Security officials interrogated and tortured him when he returned to Khartoum. The man was questioned about why he had gone to Israel and his activities there, including names of persons belonging to the Sudan Liberation Army. A 32 year-old man from Darfur who returned to Khartoum from Israel in February 2014 described his eight-week-long detention and interrogation on returning to Khartoum: 'After almost six years in Israel, I decided to leave in February [2014] after the government said they would detain any Sudanese person in Israel who had been there for more than three years. I knew that they would detain me for an unlimited amount of time and that is a form of mental and physical imprisonment. 'When I arrived in Khartoum, security officials held 125 of us coming from Israel on the same flight and then handed us over to National Security who took us to their building in Khartoum's Sahafa District. There they interrogated me about my political history in Darfur and my support for one of the groups opposing the government there. They knew I had participated in public protests in Israel and asked me about that. The next day they took me to another National Security office near Khartoum's Shandi bus station, which the officers there called "the hotel." There they threatened to beat me if I didn't tell the truth. 'On the third day, they took me to Kober prison in Khartoum and put me in a cell with 28 other people who had also come back from Israel. They held me there for eight weeks including about 20 days in solitary confinement. National Security interrogated me many times in the building they called "the hotel." It was always the same questions about my political views on the conflict in Darfur, which groups I supported there and why I had gone to Israel. At the end of the eight weeks they took me to the prosecutor who charged me with treason for going to Israel. He then released me on bail after my family sold all their land and paid (US)\$40,000. They confiscated my passport and banned me from travelling for five years.'
- 7.1.4 The USSD human rights report for 2015, released April 2016, observed that: 'There were at least two reports of Sudanese citizens residing abroad being deported from their country of residence at the request of the Sudanese government. In December [2015] the Jordanian government forcibly deported 800 Sudanese asylum seekers to Khartoum. The majority of deportees were from Darfur. By year's end there had been no reports of torture or further violence against deportees.'
- 7.1.6 The UK-DIS FFM report, based on a range of sources, noted: 'A number of sources stated that they had no information to indicate that failed asylum seekers / returnees from Darfur or the Two Areas would generally experience difficulties on return to Khartoum International Airport (KIA), or they did not consider that claiming asylum overseas would put such a person at risk per se. Western Embassy (C) noted that they had monitored the forced return of two persons from

Europe in 2015 and had no reason to believe that they experienced any difficulties or mistreatment, although the source acknowledged that they were not present throughout the arrival procedure. The diplomatic source mentioned that they had experience of a very few rejected asylum seekers being deported from Switzerland and Norway. According to the source it was unclear whether these returnees could get support upon return to Sudan. However the source added that those sent back from Norway had not faced any problems upon return 'Some sources noted: a lack of coordination in the return operations from departing countries to inform those concerned when precisely returnees would arrive at [Khartoum International Airport] KIA a general absence of independent organisations at KIA, including UNHCR, when forcibly returned persons arrived in Sudan, although IOM was present for voluntary returns a limited number of enforced returns from Europe 'EAC advised that at the security desk, officers asked a range of questions of failed asylum seekers returning to Sudan (for instance about how long they had stayed abroad; why they did not have a passport; or political affiliations and acquaintances abroad). ACPJS remarked that persons returning without travel documents or under escort would be subject to questioning. 'Several sources noted that Israel and Jordan had deported a number of Sudanese nationals, including persons who had claimed asylum. Sources mentioned that the most recent incident was in December 2015 and involved the large-scale deportation of Sudanese nationals from Jordan, with some sources indicating the number of persons deported was over 1,000 persons. 'Some sources noted that deportees from Israel and some of the deportees from Jordan were arrested on arrival and detained, some may have experienced prolonged detention or physical mistreatment and/or were placed on reporting arrangements or travel restrictions. Other sources noted that returnees from Jordan had been processed smoothly. There is however lack of detailed, accurate information regarding these events, including information on whether these deportees have been de facto refugees. 'UNHCR was not able to verify whether any of the returnees had been detained. However, the source stated that if a person had a high political profile, one could not rule out the possibility that he could face difficulties with the authorities. Information from some other sources about the deportation of Sudanese nationals from Jordan and Israel also indicated that those returnees who were held in prolonged detention may have been detained because of their political profile. 'Some sources highlighted that those returning from Israel were more at risk of being subjected to thorough questioning and/or arrested upon return than those returned from other countries.'

- 7.1.7 The same report noted that: 'Several sources noted that those returnees who had a political profile may be thoroughly questioned and/or arrested at KIA. 'Several sources indicated that a person's ethnicity did not generally affect their treatment on arrival at Khartoum International Airport (KIA), or otherwise had no information to the contrary to contradict this assessment. 'Western embassy (C) noted that upon arrival at KIA, Darfuris and persons from the Two Areas may be treated impolitely and probably asked to pay a bribe, but they would not face any difficulties if they already were not 'flagged' by the NISS. NHRMO observed that those from the Two Areas travelling through Khartoum International Airport (KIA) would be subject to more intensive questioning about their background and political involvement, with ethnic Nuba most likely to experience harassment. 'EAC pointed out that there were officers from Darfur and the Two Areas working at the airport, for example Lieutenant General Awad El Dahiya, Head of Passports and Civil Registrations at the Ministry of Interior was from Southern Kordofan. 'EHAHRDP considered that all asylum seekers from Darfur and the Two Areas would be at risk on return.'
- 7.1.9 At least one of the cases reported was a Darfuri: Mr Abdalmonim Adam Omer, reportedly a Tunjur from Darfur who had been recognised as a refugee by the

UNHCR in Jordan. Mr Omer ‘...on arrival in Sudan following his deportation, he was arrested by the government and detained for 3 days. During these 3 days, he was interrogated and beaten. He was asked why he had left Sudan for Jordan and told he had been presenting Sudan “in a bad way”. He was also interrogated about some people he had been associated with in Jordan and some that he had been to church with, as the Sudanese government were looking for them. He was also asked about his tribal affiliation.’

16. The above sections of the report were clearly selected to establish the point made by Mr Sills that minority groups may be vulnerable to ill-treatment, that there was a moderate risk in Khartoum, that the durability point is not made out as the government is unreliable, there is a lack of information relating to the situation in Sudan, the risk to those returning from Israel, reports of torture and lack of knowledge of what happened to those mentioned, the fact there are no reports of problems does not mean that no problems would occur, risk to someone return who is from Darfur, and that non-Arab Darfuri will be at risk on return as a result of their ethnicity alone. It was argued a number of weaknesses had been identified in the report relied upon by the Judge which did not provide a sufficient basis to depart from the country guidance decision.
17. In relation to Judge Moxon’s decision, it was submitted the findings from [48] mentioned section 2 of the report but make no reference to section 7 and it is submitted the Judge failed to properly engage with all the evidence. It is submitted the decision to depart from the country guidance case at [73 – 74] is not based upon proper reading of all the evidence. Mr Sills submitted the fact the appellant is from Khartoum is not relevant as the risk is based upon his ethnicity, not where he was born, and that *MM* is still good law.
18. Mrs Petterson submitted that any risk to an individual on return depends upon the background hence the need to make findings on what a person’s background actually is. It is submitted this is precisely what the Judge did.
19. It was submitted the appellant’s assertion that internal relocation is unreasonable is not an applicable point as the issue of internal relocation does not arise on the facts of this case. The appellant was born and lived in Khartoum to where he shall be returned which the Judge finds he can safely.
20. It was submitted the Judge sets out in detail the Home Office position between [38 – 64] and that the Judge was not required to refer to all aspects of the report and was entitled to mention some paragraph specifically. It is clear the Judge did look at the report.
21. The Judge accepts that if the appellant has an adverse profile, as he claimed, he will be at risk, but the appellant was not found to have such profile and the adverse credibility findings in relation to the same cannot be challenged in this appeal.
22. It is submitted that on different facts it may be that a person from Darfur cannot internally relocate but it was argued that is not the same as this case. The Judge was aware and records that the appellant had not experienced any difficulties in Sudan and gives reasons for carefully considering the appellant’s position. The Judge was fully aware of the Country Guidance case and does not find durable change for all, but just looks at the risk to this appellant on the facts.

23. It was argued the Judge may have departed from the country guidance case in relation to this appellant but that he was entitled to do so and that no error arises.
24. In relation to the appellant's criticism of the Danish Immigration Service report set out in the grounds, Mrs Pettersen submitted that whilst that organisation may have been criticised in another case that did not mean the Judge could not rely upon it in relation to this case, even though there may be reference to unidentified sources.
25. In response Mr Sills accepted the internal relocation point was not the main issue as the two key paragraphs of the Judges decision are [64] and [74] where he gives the reasons for departing from the country guidance case. Mr Sills submitted the Judge, at [64] does not include any discussion of the country evidence and there is no engagement regarding who or what the evidence relates to. It is not clear whether at [64] the Judge was referring to the general claimants or specifically the applicant. It was submitted the findings at [74] may reflect the point in the report but the finding is that an ethnic non-Arab Darfuri was not found to be at risk for that reason alone. The Judge did not explain why there was no risk on the basis of the evidence.
26. Mr Sills also stated the fact the Judge relied upon birth in Khartoum does not mean other relevant evidence as to risk in the future should be ignored.
27. Mr Sills submitted the Judge should have acknowledged that the evidence goes both ways which is why the evidence falls in the appellant's favour. It was argued the respondents Note goes both ways and is nuanced and it was argued the Judge failed to mention the report regarding what would happen on return and that returnees could be at risk of detention. Mr Sills argued the Judge needed to deal with the overlapping evidence, that the conclusion was not safe, and that the matter should be set aside due to conflicting evidence and inadequate reasons being given to warrant departure from the country guidance case.

Error of law

28. There are a number of relevant cases to be considered in relation to the issues in this appeal, including *TM, KM and LZ (Zimbabwe) [2010] EWCA Civ 916* in which the Court of Appeal said that the Tribunal "must treat as binding any country guidance authority relevant to the issues in dispute unless there is good reason for not doing so, such as fresh evidence which casts doubt upon its conclusions, and a failure to follow the country guidance without good reason is likely to involve an error of law. This is made plain by" paragraphs 12.2 and 12.4 "of the Practice Direction: Immigration and Asylum Chambers of the First-tier and Upper Tribunal 2010.
29. In relation to country conditions; in *IM and AI (Risks - membership of Beja Tribe, Beja Congress and JEM) Sudan CG [2016] UKUT 00188 (IAC)* it was held that (i) 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. The task of the decision maker is to identify such a person and this requires as comprehensive an assessment as possible about the individual concerned; (ii) 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; (iii) Distinctions must be drawn with those whose political activity is not particularly great or who do not have great influence. Whilst it does not take much for the NISS to open a file, the very fact that so many are identified as potential targets inevitably requires NISS to distinguish between those whom they view as a real threat and those whom they do not (iv) It will not be enough to make out a risk that the authorities' interest will be limited to the extremely common phenomenon of arrest and detention which though intimidating (and designed to be intimidating) does not cross the threshold into persecution; (v) The purpose of the targeting is likely to be obtaining information about the claimant's own activities or the activities of his friends and associates; (vi) The evidence establishes the targeting is not random but the result of suspicion based upon information in the authorities' possession, although it may be limited; (vii) Caution should be exercised when the claim is based on a single incident. Statistically, a single incident must reduce the likelihood of the Sudanese authorities becoming aware of it or treating the claimant as of significant interest; (viii) Where the claim is based on events in Sudan in which the claimant has come to the attention of the authorities, the nature of the claimant's involvement, the likelihood of this being perceived as in opposition to the government, his treatment in detention, the length of detention and any relevant surrounding circumstances and the likelihood of the event or the detention being made the subject of a record are all likely to be material factors; (ix) Where the claim is based on events outside Sudan, the evidence of the claimant having come to the attention of Sudanese intelligence is bound to be more difficult to establish. However, it is clear that the Sudanese authorities place reliance upon information-gathering about the activities of members of the diaspora which includes covert surveillance. The nature and extent of the claimant's activities, when and where, will inform the decision maker when he comes to decide whether it is likely those activities will attract the attention of the authorities, bearing in mind the likelihood that the authorities will have to distinguish amongst a potentially large group of individuals between those who merit being targeted and those that do not; (x) The decision maker must seek to build up as comprehensive a picture as possible of the claimant taking into account all relevant material including that which may not have been

established even to the lower standard of proof; (xi) Once a composite assessment of the evidence has been made, it will be for the decision maker to determine whether there is a real risk that the claimant will come to the attention of the authorities on return in such a way as amounts to more than the routine commonplace detention but meets the threshold of a real risk of serious harm; (xii) Where a claimant has not been believed in all or part of his evidence, the decision maker will have to assess how this impacts on the requirement to establish that a Convention claim has been made out. He will not have the comprehensive, composite picture he would otherwise have had. There are likely to be shortfalls in the evidence that the decision maker is unable to speculate upon. The final analysis will remain the same: has the claimant established there is a real risk that he, the claimant, will come to the attention of the authorities on return in such a way as amounts to more than the routine commonplace detention and release but meets the threshold of serious harm.

30. In *AI v Switzerland (application no 23378/15) and NA v Switzerland (application no 50364/15)* the ECHR considered the position of two Sudanese nationals whose asylum applications had been rejected in Switzerland and claimed they would be at risk on return because of their links with JEM. The ECHR said that it understood that the surveillance by the authorities of political opponents abroad could not be said to be systematic. The court would therefore take into account previous interest in and persecution from the authorities, participation in an opposition group and the nature of this group both in Sudan and abroad, nature and level of participation, political engagement abroad and participation in public events and online activities, personal and family connections with eminent members of the opposition. AI was found to be at risk of treatment breaching Articles 2 and 3 due to the intensification of his activities with JEM in Switzerland, past persecution in Sudan and relation with prominent members of JEM. Return would not breach NA's Article 2/3 rights as his participation in activities was limited, he did not occupy a position of public exposure, he was not active online nor was his name cited in the organisation's activities.
31. In *HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062* the Tribunal said at head note 7 that "There will... be limited categories of Darfuri returnees who will be at real risk on return to Khartoum. The Tribunal then went on to say "the Tribunal considers that the following can be said to constitute particular risk categories". The Tribunal then stated that persons in this category may include some (but certainly not all) students, merchants/traders, lawyers, journalists, trade unionists, teachers and intellectuals. Such conduct may take the form of being a political opponent of the government or of speaking out against the government. It may also take the form of being a member of a student organisation that is allied to an opposition party or that is opposed to the government's policies (paragraphs 271-283).
32. In *AA (Non-Arab Darfuris- relocation) Sudan CG [2009] UKAIT 00056* the Tribunal said that head note 7 should no longer be followed because all non-Arab Dafuri returnees would effectively be at risk. However, head note 7 of HGMO could presumably still have some application, if only by way of background guidance when considering other oppositionist or anti-government activists.

33. In *MM (Darfuris) Sudan CG [2015] UKUT 10 (IAC)* it was held that in the country guidance case of *AA (Non-Arab Darfuris-relocation) Sudan CG [2009] UKAIT 00056*, where it is stated that if a claimant from Sudan is a non-Arab Darfuri he must succeed in an international protection claim, “Darfuri” is to be understood as an ethnic term relating to origins, not as a geographical term. Accordingly, it covers even Darfuris who were not born in Darfur.
34. In relation to the evidential value of Operational Guidance Notes/Country reports/CPIN, in *MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC)* the Tribunal said that operational Guidance Notes should not be regarded as country information. They are not produced by the Country of Information Service. They are, in essence, policy statements and as such fall into a different category.
35. In *MSM (journalists; political opinion; risk) Somalia [2015] UKUT 413 (IAC)* it was held that documents such as Home Office Country Information Guidance and Country of Information publications and kindred reports should not be forensically construed by the kind of exercise more appropriate to a contract, deed or other legal instrument. Reports of this kind are written by laymen, in laymen’s language, to be read and understood by laymen. Thus, courts and tribunals should beware an overly formal or legalistic approach in construing them. Furthermore, reports of this type should be evaluated and construed in their full context.
36. In *UB (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 85*, a Sri Lankan national’s appeal against the refusal of his asylum claim based on his membership of proscribed groups and participation in political demonstrations was allowed. The First-Tier Tribunal and Upper Tribunal had not been referred to the 2014 Home Office policy guidance entitled “Tamil Separatism” which was material to the decision and might realistically have affected the outcome. The Home Office had an obligation to serve relevant policy and guidance which was material to the issues in hand and ensure it was before the Tribunal. The cases of *AA (Afghanistan) [2007] EWCA Civ 12* and *Mandalia [2015] UKSC 59* were referred to.
37. The Judge relied upon the more recent document the Home Office now produce, CPIN – country policy and information notes, which combine policy with country information. The Independent Chief Inspector of Borders and Immigration has been highly critical of this development, considering it wrong in principle, recommending that the Home Office should adhere to the EASO methodology for country information (or explain clearly where they are deviating and why) and should immediately stop using “policy” in country of information products- the page linking to his report and the government response can be found here <https://www.gov.uk/government/news/the-chief-inspectors-report-on-country-of-origin-information-has-been-published>.
38. The Home Office response to the Chief Inspector Report; Response to Recommendations, is as follows:
- Recommendation 1.1
- 1 1. The Home Office should distinguish more clearly between what is country information and what is policy in the ‘Guidance’ section of its Country Policy and Information Notes

(CPINs). In particular, the 'Policy Summary' should not make selective use of country information to validate a policy position on the likely strength of asylum or humanitarian claims.

1.1 Accept.

1.2 We believe we already comply with this recommendation, though we reject the assertion that we make selective use of country information to validate a policy position. The policy conclusions are based on the evidence (i.e. the country information); not the other way round. This is formed only after evaluating the evidence in its entirety.

1.3 The example cited, on Albania, suggests that we 'effectively dismiss' homophobic attitudes and risks from non-state groups' in the policy summary. This is not the case. Rather we conclude that, in general, they do not meet the high threshold required to constitute persecution. The same conclusion has been reached by the Upper Tribunal in previous country guidance cases in relation to Albania.

Recommendation 2.2

2.2 The Home Office should clarify the 'legal test' it uses to assess the availability of state protection for particular individuals and groups, and specify how 'intent and actions in practice of protection' will be tested and assessed as sufficient to support a policy of removal and, where relevant, internal relocation.

2.1 Accept.

2.2 We believe we already comply with this recommendation. The 'legal test' is set out in the asylum instruction on 'Assessing Credibility and Refugee Status', which is available on the Gov.Uk website. We link to this instruction in each of the Country Policy and Information Notes we produce and apply the principles set out in it when assessing the position in a particular country.

2.3 The Country Policy and Information Notes are not meant to replace or replicate other guidance (e.g. asylum instructions) but to provide pointers to that material and set it in a country-and topic-specific context. In addition, their purpose of is to assist decision makers in considering whether a person qualifies for protection, not whether they should ultimately be removed from the UK in the event that they do not qualify.

39. It is not made out the Judge was not entitled to place weight upon the CPIN.

40. In relation to the appellants criticism of the use of anonymous sources in reports referred to in the CPIN, in *MD (Ivory Coast) v Secretary of State for the Home Department [2011] EWCA Civ 989* the Upper Tribunal heard evidence on whether the Claimant, as a lone woman, would face a real risk of sexual violence at roadblocks in Abidjan. The panel considered a report from a political officer at the Foreign and Commonwealth Office (the "FCO") which opined that roadblocks no longer posed a serious safety problem despite there still being instances of petty police corruption. The appeal grounds criticised the Tribunal for accepting anonymous evidence of diplomats about country conditions. The Court of Appeal found that this kind of evidence had been considered extensively by the European Court of Human Rights in *NA v the United Kingdom [2008] ECHR 616* and it had nothing to add. Such evidence should not be accepted or rejected because it comes from diplomatic sources but it should be considered with and related to the evidence as a whole. The weight and value to be attached to a political officer's letter had to be assessed in accordance with the guidance contained in *NA v The United Kingdom [2008] ECHR 616* and *TK (Tamils - LP updated) Sri Lanka CG [2009] UKAIT 0049*. Although the Tribunal in the present case had not referred to *NA*, it adopted the approach

described in that case. It treated the political officer's letter not as expert evidence but as akin to other kinds of country information. It considered whether it should attach weight to the fact that the British Embassy had vouchsafed that one of its staff had furnished the evidence in good faith and concluded that it should. The panel also considered the provenance of the information and, most importantly, concluded that the weight to be attached to that evidence was a matter for the Tribunal to determine. Therein lay its expertise (paras 35 – 48).

41. In *CM(Zimbabwe) v SSHD [2013] EWCA Civ 1303* it was held that the Upper Tribunal was entitled to rely on anonymous evidence in the report of a fact-finding commission on Zimbabwe notwithstanding *Sufi and Elmi v UK 2011 ECtHR 83187/07*. The latter case had simply drawn attention to the obvious truth that anonymity of information was likely to inhibit the forensic possibility of challenging it. Whilst it was open to a judge to give no weight to unsupported anonymous evidence because no realistic assessment could be made of its reliability, there was no general rule that uncorroborated material could never be relied on in a country guidance case. Whether it was relied on would depend on the circumstances. Generally, the effect of anonymity would go to the weight to be attached to the material in question.
42. In *Julia Mary Rogers & anr v Scott Hoyle [2014] EWCA Civ 257* the Court of Appeal upheld a High Court decision that "findings of fact" in an independent third-party report from the Air Accident Investigation Branch (the AAIB) of the Department for Transport were admissible as expert evidence. As well as factual evidence, the Report contained the opinions of experts on technical matters. In some parts the experts were identified (though not by name) and in others they were not. It was argued that the Report's authors had not been shown to have the necessary credentials to give expert evidence or, at least, that it was not possible to discern whether they did, as none of them were named. Clarke LJ disagreed. The bar to be surmounted in order to count as an expert was not particularly high, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility. Clarke LJ also confirmed that expressions of opinion based on the facts as the expert understood them, and conclusions informed by his expertise, were admissible.
43. Included in the CPIN, is information from the British Embassy in Khartoum who observed in September 2016: 'As reported in our letter of February 2015 [see Annex B of country policy and information note on Rejected asylum seekers] it remains the case that neither we nor our international partners are aware of substantiated cases of returnees, including failed asylum seekers, being mistreated on return to Sudan.'

Discussion

44. The Judge clearly considered the evidence with the required degree of anxious scrutiny and I do not find it made out that just because the Judge does not set out every paragraph of the document relied upon that he did not give proper consideration to the same.

45. The Judge was clearly aware of the country guidance case law relating to Sudan and make specific reference to it at [7 - 8] of the decision under challenge. I am also satisfied the Judge was aware of the binding nature of the country guidance case which must be treated as the same unless there is good reason for not doing so as there is a specific quote to this effect from *TM (Zimbabwe)* at [9] of the decision under challenge.
46. A reading of the decision shows the Judge was not concentrating his effort or his analysis on those originating from the state of Darfur or living in that part of Sudan prior to their coming to the United Kingdom per se. It is also clear that the Judge was not finding that the country guidance referring to the specific groups that the case law identifies above should be set aside on the basis all those identified at risk will no longer face any risk on return, as it was not the purpose of the hearing before the Judge to consider such wider issues or produce a country guidance decision.
47. The finding of the Judge, on the evidence within the CPIN, that a failed asylum seeker would not face a risk of persecution on return to Sudan, per se, is a finding that has not been shown to be irrational or contrary to the evidence before the Judge. Similarly, the fact the Judge accepts that there is a real if that person has or is perceived to have an adverse political or other profile is not irrational and has been shown to be a finding not in accordance with the country information, including country guidance case law.
48. The reference in *AA (non-Arab Darfuri - relocation)* is based upon a 2009 Operational Guidance Note (OGN) in which the respondent's representative advised the Upper Tribunal that as they were unable to obtain sufficiently reliable information to be able to accurately assess the position case owners could not argue that non-Arab Darfuri can relocate internally within Sudan at that time. When *MM (Darfuri)* was heard in 2015 it was found at that time no new cogent evidence indicating non-Arab Darfuri were not at risk of persecution in Sudan had been provided. The report relied on by the Judge reflects the human rights situation in 2016 and 2017 which, whilst recording discrimination of such persons, does not indicate there is a widespread, systematic targeting of such groups in Khartoum on grounds of ethnicity alone.
49. The Judge had available to him more evidence than that available in the earlier decisions and evidence specifically relating to risk on return.
50. Mr Sill's submission that the CPIN considered by the Judge contained no more than the respondent's policy has no arguable merit as shown above. That comment may have been correct in relation to the original OGN's but the current form which combines both policy and country information is a far more robust document upon which the Judge was entitled to place due weight. It is also clear looking at the 'Content' section that the policy guidance is only to be found from pages 4 to 9 of 40 with country information from pages 10-38 of 40, a letter from the British Embassy in Khartoum at page 39, and administrative information at page 40. The majority of the document therefore does not contain policy guidance.
51. The assertion by Mr Sill's that the CPIN is contradictory and that the finding should therefore have been in the appellant's favour needs to be looked at very

carefully. It is accepted that the report speaks of both those with an ability to return without ill-treatment or acts of persecution and those who face a real risk on return. It is a nuanced report as submitted by Mrs Pettersen, but it is clear that those who face a real risk are those perceived by the authorities in Sudan to be a threat to the stability of the government or country, those associated with rebel groups, or for the other reasons identified in the documents. It is therefore a matter that depends upon an individual's profile.

52. This is not a case of an individual born and brought up in Darfur but a person who has lived all his life in Khartoum. The finding by the Judge is that the appellant has no adverse political profile in Sudan and that he did not therefore accept he would face any adverse attention from the authorities on return, despite his ethnicity and the fact he would return to Sudan as a failed asylum seeker. This has not been shown to be a finding not within the range of those reasonably available to the Judge on the evidence.
53. Mr Sills criticises [73 - 74] of the decision. From [72] the Judge makes the following findings:
72. I have then gone on to consider whether he would face a real risk of persecution or harm due to his ethnicity.
 73. In relation to tribal membership I note the country guidance cases and that I am bound to follow the conclusions of the Upper Tribunal unless there is good reason not to do so.
 74. 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. Whilst there is some merit in Ms Patel's submission that evidence from the Danish Fact-Finding Mission should be treated with caution, it is clear from several sources relied upon that people from non-Arab Darfuri tribes in Khartoum are liable to face discrimination but not persecution, unless there are perceived to be politically active against the regime. This is exemplified by the statement of non-Arab Darfuris in the city and their position in the security services, with the media, government and academia. This is also exemplified by the Appellant himself who was not asserted any difficulties throughout his life on account of his ethnicity save for reduced finances and problems faced by his family in joining the police force. He has clearly been able to access education and employment and has given no account of suffering threats or actual harm safer the purported period of detention which I have rejected.
 75. Preferring the evidence within the Home Office Note I take into account that the case of MM was heard in October 2014, which is over three years ago and therefore there has been sufficient time for change to be identified. I also note that was significant objective evidence has been relied upon within the Appellants bundle it does not detail any harm or persecution of non-Arab Darfuris in Khartoum absent any political activities since the promulgation of MM. I accept the situation in other areas, such as Darfur itself, remains as outlined in AA and MM.
 76. I remind myself that the Appellant originates from Khartoum and has family who remain could no doubt support him. The Appellant has some education and experience of retail and I and so I am satisfied that he would be able to obtain work. Whilst he asserts ongoing physical problems arising from a broken hand he is not argued that this prevents him from work, nor do I have any medical evidence to that effect.
 77. I do not accept that there is a reasonable degree of likelihood that returning the Appellant to Sudan would expose him to a real risk of an act of persecution for reasons set out in Regulation 6 of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006.

78. I am not satisfied that there are substantial grounds for believing that the Appellant would face a real risk of serious harm as defined by paragraph 339C of the Immigration Rules or face a real risk of a breach of his protected human rights.
79. I am not satisfied that there are substantial grounds for believing that he will be exposed to a real risk of torture, or inhuman or degrading treatment or punishment (contrary to Article 3) or death (contrary to Article 2).
54. The rejection of the claimed risk faced by the appellant within Khartoum is amply supported by the evidence and properly reasoned by the Judge; based upon lack of evidence of an adverse profile or consequences arising. The finding of lack of risk on return as a non-Arab Darfuri, in light of the profile of this appellant as found by the Judge, has not been shown to be a finding outside the range of reasonable conclusions open to the Judge on the evidence considered the date of the hearing.
55. The Judge is very careful to ensure that the decision relates solely to the findings applicable to this appellant and does not seek to suggest that the country guidance case with regard to those of Darfuri ethnicity returning to Darfur or non-Arab Darfuri with an adverse profile should not be followed.
56. I do not find it made out the Judge erred in law in a manner material to the decision to dismiss the appeal on the basis of the evidence considered by the Judge and findings made. I find the Judge was entitled in light of the findings to view the appellant as a person with no entitlement to international protection and who therefore falls outside the category of those identified as being at risk in the country guidance cases.

Decision

57. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

58. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 25 July 2018