Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03535/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 April 2022	**On 11 May 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

AG (SUDAN)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Bayoumi, Counsel, instructed by Ferial Solicitors
For the Respondent: Mr T Melvin, Senior Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant without his express consent. Failure to comply with this order could amount to contempt of court.

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of Judge of the First-tier Tribunal Forster ('the Judge') sent to the parties on 9 May 2021 dismissing his appeal on international protection grounds.

Hybrid Hearing

2. The hearing before me was a hybrid hearing. I was present in the hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. Mr Melvin was present in the hearing room. Ms Bayoumi attended via remote link. I was addressed by both representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

3. The Judge issued an anonymity order. No application was made by the parties for the order to be set aside. I confirm the order above. I do so as it is presently in the interests of justice that the appellant is not publicly recognised as someone seeking international protection: *Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private.*

Background

4. The appellant is a national of Sudan and an ethnic Arab. He served in the Sudanese Armed Forces for several years, reaching the rank of Major. He left Sudan in 2009 and lived in Norway for several years where he was issued with yearly residence. Eventually, he travelled to the United Kingdom and claimed asylum on 8 November 2017. He asserts that he has a well-founded fear of persecution consequent to his having deserted the Sudanese Armed Forces.

5. The appeal was heard in Newcastle on 26 April 2021. The Judge found in favour of the appellant on certain issues, including in respect to confusion that had arisen in his interview as to his rank before leaving Sudan in 2009. The Judge accepted that the appellant had left the army holding the rank of Major. However, the Judge did not accept certain assertions made by the appellant, particularly that he was unaware that a military coup had taken place in 1989 and that he considered the army to have not involved itself in internal conflicts occurring in Sudan. In addition, the Judge concluded that he could not consider the appellant's witness, AFM, to be reliable.

6. As to the appellant's personal history, the Judge found, at [28] to [29]:

> '28. The Appellant claims to have begun speaking out about the government after the coup in 1989 (AIR 77- 78). However, he also claims to have only spoken out in private with friends (AIR 80-

81). He further claims that after the coup, it became clear the people involved were from an Islamist background (AIR 79- 80). The Respondent notes that objective sources confirm Islamists performed a role in the 1989 coup. Given that this occurred in 1989 and he claims to have begun speaking out about the government at this time, I do not find it credible that the Appellant continued in the Army, rising through the ranks for the next twenty years.

29. The Appellant claims that he was transferred to Darfur to keep him quiet and to 'get rid' of him (AIR 88). He further states that he discovered he was being transferred from a letter posted in the headquarters (AIR 90 - 91). I do not consider it credible, given the Appellant's claim that the authorities were aware of him speaking out against the government, that they would then arrange for him to be sent to Darfur to get rid of him, yet only notify him by posting a letter on a wall. It is not considered credible that if the government wished to keep the Appellant quiet or get rid of him, they would go to the length of transferring him to Darfur, rather than arresting and detaining him whilst in Khartoum when they had the opportunity to do so. This is inconsistent with the external information about the Sudanese government and how it operated.'

7. In respect of the appellant's assertion that he is a deserter from the Sudanese Army, the Judge concluded at [31]:

'31. I assess the Appellant's claim to the lower standard which means that I need to be satisfied that the events which he describes were reasonably likely to have happened. To that standard, based on my findings of fact, I conclude that the Appellant was an officer in the Sudanese Army. His account of joining the Army in the late 1980s or early 1990's, going through military college, basic training and then being posted to the administration unit in Khartoum is credible. However, I reject his claim to have spoken out against the government since the coup in 1989. It is not credible that if this had been known, as he says it was, that he would have remained in place for twenty years and risen through the ranks to Major. I find it is credible that after serving behind a desk for 20 years, the Appellant did not want to be transferred to active service in Darfur and that was the reason why he left his post. I find that the Appellant is a deserter from the Sudanese Army.'

8. The Judge found that though the appellant deserted the military he had not been involved in political activities before he left Sudan in 2009, nor would his desertion be considered a political act in its own right:

'34. I am referred to the CPIN, Sudan return of unsuccessful asylum seekers, version 4.0, July 2018, at paragraphs 2.4.1 to 2.4.5. In HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 the Tribunal found that neither involuntary returnees nor failed asylum seekers nor persons of military age, including draft evaders and deserters, are as such at real risk on return to Khartoum. However, since the promulgation of IM and IA in 2015

and 2016 there have been allegations that claiming asylum amounts to a political act and that rejected asylum seekers from Europe who have returned are ill-treated. Ms Cleghorn, on behalf of the Appellant, submitted that deserting the Army is a political act. The commentary at paragraph 2.4.2 states that no conclusive evidence has been found of ill-treatment of returnees simply because of the act of return or because of their status as failed asylum seekers.

35. It is stated at paragraph 2.4.4 that the authorities are likely to question individuals on arrival, as part of the immigration and security control process, and they may take a particular interest in those who have been removed forcibly and/or travelling on an emergency travel document. However, there is not clear and cogent evidence that this interest persists beyond arrival or that persons are subject to treatment during questioning amounting to serious harm.

36. Any risk to the Appellant on return to Sudan stems from him deserting the Army in 2009. He will be one of many soldiers who deserted because they did not want to go to Darfur. In BA (military service – no risk) Sudan CG [2006] UKAIT 00006 the Tribunal held that on the available evidence Sudanese draft evaders and draft deserters do not face a real risk of imprisonment as a punishment. Instead, they are forced to perform military service under close supervision. It was held that in view of the ending in January 2005 of the north-south civil war, there is no longer a real risk of conscripts or draft evaders or draft deserters being required to fight in the south. The conflict in Darfur was still ongoing in 2006, however, on the available evidence, it was found that it was not reasonably likely that conscripts or draft evaders or draft deserters were being required to fight in Darfur. Accordingly, it was held that Sudanese who face conscription, or who are draft evaders and draft deserters did not face a real risk on return of persecution or treatment contrary to Article 3.

37. Based on my findings of fact, I conclude that the Appellant fails to establish a Convention ground for his asylum claim. I also find, based on my assessment of the Appellant's status as a deserter, he fails to show that there are substantial grounds for believing that he would face a real risk of serious harm on return to Sudan.'

Grounds of Appeal

9. The appellant's grounds of appeal were drafted by Counsel who represented him before the First-tier Tribunal. I observe that Counsel was not Ms Bayoumi. Four grounds of appeal are identified:

   i) The First-tier Tribunal failed to consider the conclusions of an expert relied upon by the appellant.

   ii) The First-tier Tribunal failed to adequately consider the change in political landscape since the promulgation of relevant country guidance: *HGMO (Relocation to Khartoum) CG* [2006] UKAIT 00062.

iii) The Tribunal failed to apply relevant country guidance: *IM and AI (Risks – membership of Beja Tribe, Beja Congress and JEM) CG* [2016] UKUT 00188 (IAC).

iv) Unsafe credibility findings.

10. The first two grounds are said to arise from the appellant's submission before the Judge that relevant country guidance should not be followed.

11. The fourth ground of challenge can properly be subdivided into three grounds:

(a) The First-tier Tribunal erred in its finding that the appellant was aware as to the 1989 coup.

(b) The First-tier Tribunal was erroneous as to its finding that the appellant had diminished the role of the army in internal conflict.

(c) The First-tier Tribunal was erroneous as to its rejection of the appellant's account as to the arrangements made to send him to Darfur.

12. In granting permission to appeal Judge of the First-tier Tribunal Saffer simply observed that the grounds were arguable. No further reasons were given.

Relevant Country Guidance

13. The Upper Tribunal confirmed in *HGMO* that neither involuntary returnees nor failed asylum seekers nor persons of military age (including draft evaders and deserters) are as such at real risk on return to Khartoum.

14. In *IM and AI* the Upper Tribunal confirmed, *inter alia*, that 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.

Decision on Error of Law

15. I am very grateful to Ms Bayoumi who sought with skill to try to advance a case for the appellant in this matter in circumstances where she was hamstrung by the grounds of appeal.

16. Grounds 1 and 2 place reliance upon the age of relevant country guidance decisions, detailing that there has been a change of landscape in Sudan over recent years. Ground 1 relies upon an expert report which references the creation of the Rapid Support Services in 2013 and identifies remnants of the former Bashir regime as being able to harm the appellant. Ground 2

acknowledges that though 'there is limited reference to deserters and draft evaders' in the documentary evidence relied upon, there is an 'increased tolerance of dissent and opposition' which places the appellant at risk.

17. An earlier hearing of this appeal in March 2022 was adjourned to permit the appellant the opportunity to secure Counsel's note of the hearing before the Judge. Ms. Bayoumi appropriately accepted before me that the notes of both Counsel and the Home Office Presenting Officer attending before the First-tier Tribunal did not identify with the required clarity that an argument was made on the appellant's behalf that relevant country guidance should not be followed. The Judge makes no reference in his decision to such submissions being advanced.

18. Ms. Bayoumi further accepted, and was correct to do so, that the failure to clearly identify such argument being run before the First-tier Tribunal, significantly and adversely impacted upon her ability to advance grounds 1 and 2 before this Tribunal. She drew my attention to the country guidance decision in *Roba (OLF – MB confirmed) Ethiopia CG* [2022] UKUT 00001 (IAC) and its headnote which confirms at 1(6) that where a party fails to address extant country guidance before the First-tier Tribunal or has failed to demonstrate proper grounds for departure from it, it will be unlikely that the party will have a good ground of appeal against a decision founded on the guidance. I observe [23] and [24] of the decision in *Roba*:

> '23. Individual cases will turn on an assessment of their facts and appellants are not to be pigeonholed in some pre-determined classification system. Country guidance must be applied with some degree of subtlety. It cannot, and does not purport to, cover definitively every permutation of fact or circumstance which emerges. Rather, it is, by law, the starting point. It will carry considerable weight even in a case where departure from the guidance is justified, or where the question to be answered is somewhat different from that answered by the country guidance decision: SB (Sri Lanka) v. Secretary of State for the Home Department [2019] EWCA Civ 160, at [70], [75].
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> 24. The treatment of country guidance as a presumption of fact means that it will be for the parties seeking to persuade the Tribunal to depart from it to adduce the evidence justifying that departure …'

19. In this matter there is insufficient evidence presented to this Tribunal establishing that the appellant submitted before the First-tier Tribunal that relevant country guidance decisions should not properly be followed. The height of the case as now understood is that one paragraph of a report prepared by an expert, Peter Verney, dated 18 March 2021, was sufficient for the Judge not to apply relevant country guidance. The relevant paragraph of the report is [158] which reads as follows:

> "158. There is still a significant likelihood of dangerous encounters with elements or remnants of the former Bashir regime who are

> still in positions of authority and able to harm him or charge him with desertion".

20. Ms Bayoumi properly conceded that it is not sufficient in this matter to simply look at one strand of evidence on its own, for example the opinion of an expert. Rather consideration is to be given to identifying the present position existing in Sudan through an assessment of all relevant objective material. What is clear, as accepted in the grounds of appeal, is that insufficient objective evidence was presented to the Judge in respect of risks flowing from desertion. Rather, general evidence as to changes in the political situation were relied upon, but there is no clear evidence that an argument was advanced at the hearing that such general evidence was by itself capable of establishing that material circumstances had changed in Sudan in respect of deserters and that such changes were well established evidentially and durable.

21. It is not sufficient, as asserted in the grounds of appeal, simply to rely upon relevant country guidance being of some age. As the Tribunal recently observed in *Roba* the law, and the principle of country guidance, are not affected by the age of a decision. It may be that as time goes on, evidence will become available that makes it more likely that departure from the decision will be justified. However, the process remains the same, and unless in the individual case the departure is shown to be justified, the guidance contained in a country guidance decision must, as a matter of law, be adopted.

22. In the circumstances whilst Ms Bayoumi properly did not withdraw reliance upon grounds 1 and 2 because she had no instructions to do so, she did not pursue these grounds with vigour and was correct to adopt such course. There are no merits in these grounds.

23. Ground 3 is drafted as (1) a challenge to a purported failure to apply the guidance provided in *IM and AI*, or alternatively (2) a challenge to the Judge applying the guidance in *IM and AI* too rigidly. The inherent tension within the ground is clear. In so far as the ground asserts that the country guidance decision should not be followed because of its age, this complaint is rejected for the reasons detailed above. The remaining element of the ground is that the Judge failed to adequately consider that the appellant had spent a prolonged period of time in the United Kingdom, and this may attract the adverse attention of the Sudanese authorities upon return, particularly in light of his personal history. I am satisfied that the remaining element of the ground is no more than a disagreement with the findings of the Judge at [35] that persons stopped on return are not subject to ill-treatment during questioning and interest in them does not persist beyond arrival. The Judge further concluded at [36] that the appellant was not at risk on return because of his status as a deserter, and at [34] no risk flowed to him as a failed asylum seeker. There is no merit in this ground and Ms. Bayoumi was correct not to pursue it with vigour.

24. Ms. Bayoumi primarily relied upon ground 4. She observed that if she had drafted the grounds, she would have woven Mr Verney's expert opinion through the challenge to credibility. She tentatively suggested that a *Robinson* obvious error had occurred in the Judge's consideration of Mr Verney's report in respect of credibility. However, following discussion, she accepted that it was difficult for her to establish that such a clear error of law existed as for it to be obvious. She was correct to adopt this approach. Whilst, a Judge may have considered the appellant's credibility sympathetically in light of Mr Verney's report, it cannot properly be said that no Judge could properly find the appellant incredible on certain aspects of his evidence upon reading the report.

25. The difficulty for the appellant is that the three challenges identified by means of ground 4 are, at their heart, rationality challenges which require me to conclude that no reasonable Judge considering the evidence placed before the First-tier Tribunal could have made such adverse findings of fact. The appellant is simply incapable of establishing that the Judge's approach to credibility was irrational. In terms of whether or not he had been aware that a coup had taken place in Khartoum in 1989 or as to the actions of the Sudanese Army elsewhere in Sudan, particularly Darfur, the Judge was faced with inconsistent evidence and gave reasons as to why he did not accept the explanation provided by the appellant. I observe that elsewhere in the decision the Judge gave cogent reasons for finding in favour of the appellant on certain issues and so it is clear he weighed each individual inconsistency and considered the explanation provided on a fact-by-fact basis. The Judge cannot be criticised for adopting such approach. As to the Judge having found it incredible that the authorities would arrange to send the appellant to serve in Darfur so as to get rid of him yet notify him of such decision when posting a letter on a wall the ground advanced is, ultimately, merely a complaint as to the eventual decision reached, and no more. It is quite clear that the judge gave adequate reasons for his findings on this and other issues, and the appellant's challenge is solely a dispute as to the findings of fact made. Whilst it would be open for another judge to find in favour of the appellant, it cannot properly be said that no judge, properly directing themselves, could make adverse credibility findings on the facts presented.

26. In the circumstances the appellant's appeal must properly be dismissed.

Notice of Decision

27. The making of the decision of the First-tier Tribunal promulgated on 9 May 2021 did not involve the making of a material error of law.

28. Appeal dismissed.

Signed*: D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 28 April 2022

TO THE RESPONDENT
FEE AWARD

No fee was paid, and the appeal has been dismissed. No fee award is made.

Signed *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 28 April 2022