



IAC-AH-LEM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11051/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 12th January 2016**

**Decision & Reasons Promulgated
On 21st January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**ABDELBASIST HAG MOHAMED HAG
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sinker of Counsel instructed by AJO Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against the decision of Judge M Davies of the First-tier Tribunal (the FTT) promulgated on 4th February 2015.
2. The Appellant is a male Sudanese citizen born 1st January 1963 who arrived in the United Kingdom on 30th April 2014, having been granted a visa enabling him to accompany his employer from Saudi Arabia to the United Kingdom. The visa was valid between 10th November 2013 and 10th May 2014. The Appellant travelled from Saudi Arabia to the United

Kingdom, using his own Sudanese passport which he subsequently disposed of shortly after arrival.

3. The Appellant claimed asylum on 2nd July 2014. His claim was based upon his ethnicity, as he claimed to be a non-Arab Darfuri, being a member of the Tunjur tribe, and his political opinion, being an opponent of the Sudanese government.
4. In summary the Appellant's claim was that he was born in Khandak in north Sudan. The Appellant had never lived in Darfur, but stated that his tribe originated from Darfur and he was therefore a non-Arab Darfuri.
5. The Appellant farmed land which was confiscated by the Sudanese authorities in November 1989.
6. The Appellant moved to live in Saudi Arabia in June 1990. While in Saudi Arabia he spoke out against the Sudanese government at social gatherings.
7. The Appellant lived in Saudi Arabia, and worked there, between June 1990, and 30th April 2014 when he left to travel to the United Kingdom. He made five visits back to Sudan, in 1998 for six months, 2003 for four months, 2007 for two months, 2012 for three months, and 2013 for four months.
8. The Appellant married in Sudan on 24th April 1998. When the Appellant returned to Saudi Arabia, his wife would stay in Sudan which was the reason that he returned to visit. The Appellant and his wife have three children, born in 1999, 2008, and 2010.
9. The Appellant contended that in May 1998 two men came to his house in Sudan, took him to a police station and questioned him and accused him of supporting anti-government activity. He signed a piece of paper confirming that he would not carry out any further opposition activity, and he was then taken to an area of desert and beaten up before being allowed to return home. He was told that when he was in Sudan he had to report every Monday to Algolid police station.
10. The Appellant did not encounter any further difficulties after that incident in May of 1998, until 2014 when he was due to leave Sudan and return to Saudi Arabia. He was told that his exit visa was with the Security Department and he was to collect it from there. He feared that he would be arrested so he fled to Khartoum.
11. The Appellant bribed a general who obtained his passport for him, and ensured that he was able to leave the airport on 18th April 2014 and return to Saudi Arabia. The Appellant then travelled from Saudi Arabia to the United Kingdom on 30th April 2014, using the visa that he had been granted on 10th November 2013, which was due to expire on 10th May 2014.

12. The Respondent refused the Appellant's claim that he was entitled to asylum, and did not accept that he would be at risk if returned to Sudan, and therefore also rejected his claim that to return him would breach his human rights. The reasons for refusal are set out in a letter dated 27th November 2014. In brief summary, the Respondent accepted the Appellant's identity and nationality.
13. It was not accepted that he was a member of Tunjur tribe, the Respondent noting that he had displayed some knowledge of the tribe, but having considered the Appellant's credibility in the round, the Respondent did not accept that he had discharged the burden of proving membership of that tribe.
14. The Respondent did not accept that the Appellant had given a credible account, and it was not accepted that his land was confiscated due to his ethnicity nor that he had spoken out against the Sudanese government, nor that the Sudanese government had any adverse interest in him. It was not accepted that the Appellant had been beaten up as a result of his opposition to the government or as a result of his ethnicity, nor was it accepted that he had to report to a police station every Monday when he was in Sudan.
15. It was not accepted that the Appellant had left Sudan in April 2014 by bribing a general and it was noted that the Appellant had returned to Sudan on five separate occasions since 1990, in order to see his family and it was not accepted that he had encountered any difficulty. It was noted that the Appellant was issued with a Sudanese passport, and issued with exit visas enabling him to leave Sudan.
16. The Respondent noted that the Appellant, on his own admission, had disposed of his passport after arriving in the United Kingdom and it was contended that section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 applied.
17. It was not accepted that the Appellant was a non-Arab Darfuri.
18. The Appellant's appeal was heard by the FTT on 27th January 2015. The FTT found that the Appellant was not credible and dismissed his appeal on all grounds. The FTT found that the Appellant had fabricated his claim.
19. The Appellant applied for permission to appeal to the Upper Tribunal. There was no challenge to the adverse credibility findings made by the FTT as to the Appellant's claimed activities in Sudan, but it was contended that the FTT had erred by failing to allow the appeal on the basis that the Appellant is a non-Arab Darfuri, and had failed to follow country guidance case law, which indicated that if that was the case, the Appellant would be at risk. It was contended that the FTT had erred by treating credibility as the primary issue, whereas country guidance case law indicated that consideration of ethnicity, and whether or not the Appellant was a non-Arab Darfuri should have been the first issue to be considered. It was

contended that the Appellant had been born in Khandak, which is in north Darfur.

20. Permission to appeal was granted by Upper Tribunal Judge Coker in the following terms;
- “1 The First-tier Tribunal determination sets out at great length reasons why the judge did not accept the Appellant’s evidence as to his activities in Sudan. He finds the account not credible.
 - 2 The judge also finds that the Appellant is not a non-Arab from Darfur. He comes to this finding taking into account the Appellant’s witness’ evidence and the Appellant’s evidence – [70] and [75]. The grounds seeking permission to appeal submit that the Respondent accepts that the Appellant was born in Darfur and had some knowledge of the Tonjour tribe.
 - 3 Although the Appellant’s credibility of his asylum claim in so far as his activities in Sudan is disbelieved and permission to appeal those findings is not sought, it is arguable that the First-tier Tribunal erred in law in firstly finding that the Appellant had not lived in Darfur when Khandak is in Darfur and secondly on that basis failed to properly or adequately reason his conclusion that the Appellant was not of the Tonjour tribe.”

Error of Law

21. On 2nd November 2015 I heard submissions from both parties in relation to error of law. It was accepted on behalf of the Respondent that the Appellant was born in Khandak, and that Khandak was in Darfur.
22. I found that the FTT had erred in law and set aside the decision of the FTT. My reasons for so doing are set out in my error of law decision and directions which was promulgated on 13th November 2015. In summary the decision of the FTT was set aside for the following reasons.
23. There was no finding as to whether or not the Appellant was born in Darfur. Country guidance case law indicates that if an Appellant is a non-Arab Darfuri, he must succeed in an international protection claim, and “Darfuri” is to be understood as an ethnic term relating to origins, not as a geographical term. Accordingly it covers even Darfuris who are not born in Darfur.
24. The Respondent had accepted in the reasons for refusal letter that the Appellant had displayed some knowledge of the Tunjur tribe, although this did not prove conclusively that he was a member of that tribe. This evidence was not adequately analysed by the FTT. The FTT did not give adequate reasons for rejecting the Appellant’s claim to be a member of the Tunjur tribe.
25. Although the primary finding of the FTT was that the Appellant was not a member of the Tunjur tribe, it found in the alternative that if he was a member of that tribe, his case could be distinguished from the country

guidance cases, AA (Sudan) CG [2009] UKAIT 00056 and MM (Sudan) CG [2015] UKUT 00010 (IAC). The FTT did not give sufficient or adequate reasons for departing from the principle that if an individual is a non-Arab Darfuri, he must succeed in an international protection claim.

26. Although the decision of the FTT was set aside, because there had been no challenge to the findings made by the FTT in relation to disbelieving the Appellant's account of his activities in Sudan, those findings were preserved.
27. The hearing was adjourned for further evidence to be given, and the issue to be decided was whether the Appellant had proved that he is a non-Arab Darfuri. If that was decided in the affirmative, the next issue to be decided was whether the Appellant would be at risk if returned to Sudan, and whether there are any reasons to depart from the principles in the country guidance decisions AA (Sudan) and MM (Sudan).

Re-making the Decision

The Law

28. The Appellant is entitled to asylum if he is outside his country of nationality and he is recognised as a refugee, as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 as a person who falls within Article 1A of the 1951 Geneva Convention. The onus is on him to prove that he has a well-founded fear of persecution for a Convention reason (race, religion, nationality, membership of a particular social group or political opinion), and is unable or, owing to such fear, unwilling to avail himself of the protection of the country of his nationality.
29. The Appellant is eligible for humanitarian protection under paragraph 339C of the Immigration Rules if he does not qualify as a refugee, but establishes substantial grounds for believing that if he was removed from the United Kingdom, he would face a real risk of suffering serious harm, and is unable or, owing to such risk unwilling to avail himself of the protection of the country of return.
30. In relation to Articles 2 and 3 of the 1950 European Convention on Human Rights (the ECHR) it is for the Appellant to establish that if removed from the United Kingdom there is a real risk of him being killed, or subjected to torture or inhuman or degrading treatment or punishment.
31. In relation to Article 8 of the ECHR the Appellant must satisfy the Immigration Rules in relation to family life under Appendix FM, or private life with reference to paragraph 276ADE(1). If the Appellant cannot succeed under the Rules, the Appellant must show a good reason why Article 8 should be considered outside the Rules.
32. The burden of proof is on the Appellant and can be described as a reasonable degree of likelihood, which is a lower standard than the normal

civil standard of a balance of probabilities. The Tribunal must consider the circumstances as at the date of hearing.

Preliminary Issues

33. At the resumed hearing the Appellant attended and I established that there was no difficulty in communication between the Appellant and the interpreter, and the language used was Arabic.
34. I ascertained that the Tribunal had been provided with all documentation upon which the parties intended to rely, and each party had served the other with any documentation upon which reliance was to be placed. The documentation consisted of the Respondent's bundle with Annexes A-G, and the Appellant's bundle comprising 78 pages.
35. Both representatives indicated that they were ready to proceed and there was no application for an adjournment.

Evidence

36. The Appellant gave oral evidence and firstly answered questions put by Mr Sinker. He stated that he had been born in Khandak, which is in the north of Sudan. When asked whether that is in Darfur, he said that it is not, and Khandak is in the north of Sudan, and Darfur is in the west. The Appellant confirmed that he had never lived in Darfur although his grandfather had.
37. The Appellant confirmed that he belonged to the Tunjur tribe and that his great-grandfather was from that tribe. His father and his uncles were also from the tribe although his mother was not.
38. The Appellant confirmed that he had lived in Khandak, and had undertaken farming until his land was confiscated in 1989. The Appellant confirmed that older members of the Tunjur tribe had distinctive markings, but younger members of the tribe did not.
39. The Appellant was cross-examined. He confirmed that his parents are now deceased. He stated that his children live in Sudan and that he had no other family members there except maternal cousins who lived in Khartoum and Khandak. He said that he had no paternal cousins in Sudan, and when he was referred to his reply to question 11 of his interview in which he stated he had three paternal cousins in Sudan, he said that this was incorrect.
40. The Appellant accepted that he used to have a Sudanese passport and that he had returned to Sudan on five separate occasions after leaving in 1990 and he encountered no difficulties in entering Sudan. His case was that he only encountered difficulty in leaving Sudan in April 2014 which was when he had to bribe a general.

The Respondent's Submissions

41. Mr McVeety submitted the first issue to be considered was whether the Appellant had proved that he is a member of the Tunjur tribe. If he had proved he is a member of that tribe, it was accepted that he would be at risk according to the country guidance case law. Mr McVeety pointed out that the Appellant's explanation that Khandak is not in Darfur, and therefore he had not been born in Darfur, conflicted with the claim made on his behalf by his solicitors when applying for permission to appeal to the Upper Tribunal.
42. I was asked to find that the Appellant had not discharged the burden of proof. I was reminded of the credibility findings preserved by the FTT. It was not accepted that the Appellant had ever been arrested or encountered any difficulties from the authorities in Sudan. The Appellant had travelled from Saudi Arabia to Sudan on five separate occasions without difficulty. He had remained in Sudan for periods of up to six months without experiencing difficulties. The Appellant had been issued with a passport in Sudan, and Mr McVeety submitted that this indicated that he was not a non-Arab Darfuri, and the fact that the Appellant had travelled in and out of Sudan without difficulty also indicated that he was not a non-Arab Darfuri.
43. I was asked to note that the Appellant had changed his account when giving oral evidence, in that he now denied having any paternal cousins in Sudan, whereas when interviewed he had specifically stated that he had three paternal cousins living there. I was asked to dismiss the appeal.

The Appellant's Submissions

44. Mr Sinker submitted that the case law is clear, in that if the Appellant proves he is from the Tunjur tribe he would be at risk and therefore entitled to asylum. I was asked to find that the Appellant had been consistent in relation to his claim to be a member of that tribe. The Appellant had been honest in giving evidence, in confirming that he had not been born in Darfur.
45. The Appellant had displayed some knowledge of the Tunjur tribe which had been accepted by the Respondent. He had explained that tribal markings are no longer a tradition which is why he did not have any such markings.
46. Mr McVeety had observed that no expert report in relation to the Appellant's ethnicity had been submitted, and Mr Sinker responded that such evidence was not necessary. It was accepted that the Appellant had changed his account in relation to paternal cousins in Sudan, but Mr Sinker submitted that that did not undermine his case such that his ethnicity should be disbelieved. I was asked to conclude that the Appellant had proved that he is a non-Arab Darfuri, and therefore according to country guidance case law, he was entitled to a grant of asylum.
47. At the conclusion of oral submissions I reserved my decision.

Preserved Findings

48. I set out below the findings made by the FTT which were not challenged and are therefore preserved those being at paragraphs 67, 68, 69, 71, 72, 73, and 74;

- “67 It is clear that the Appellant is a well-educated man but he has given no detailed or credible evidence as to the nature of the comments made either in Sudan or Saudi Arabia which were considered to be adverse to the interests of the Sudanese government.
- 68 It is simply not credible if the Sudanese authorities had a long-standing adverse interest in the Appellant dating from 1989 that the Appellant would have been able to return to Sudan on five separate occasions and in the main have no difficulties whilst there. It is not credible if the Sudanese authorities had such an interest in the Appellant that they would take him from his home and interrogate and torture him in 1998, that he would be allowed to leave the country subsequently and return to Saudi Arabia. Subsequent to the incident in 1998 the Appellant has had no further difficulties with the Sudanese authorities which amounted to persecution. I do not believe that he was ever required to report to the police station weekly after he had visited Sudan from Saudi Arabia. Even if that was the case such treatment did not amount to persecution. If he had reported to the police station on such a regular basis during his visits to Sudan the Sudanese authorities would have had plenty of opportunity to persecute him but there is no evidence whatsoever to suggest that they did so. If the Sudanese authorities had such an interest in the Appellant that he now fears persecution it is wholly unbelievable that they allowed him to enter and exit Sudan on so many different occasions.
- 69 The Appellant has given no specific evidence as to the nature of the comments he made about the Sudanese government either in Sudan or in Saudi Arabia and I believe his claim to fear persecution on the basis of his political opinion to be a fabrication.
- 71 The Appellant’s credibility is further damaged by his failure to claim asylum on arrival in the United Kingdom. He is a seasoned traveller and educated person. I do not find it credible that he would not be aware of the opportunity to claim asylum on entering the United Kingdom. The fact that he did not damages his credibility. The Appellant’s credibility is also further damaged by his decision to destroy his passport. The Appellant, taking into account his travel experiences over a long period of time would have been well aware of the importance of his passport. Taking into account his lack of credibility, the only reason he would have destroyed his passport was to prevent his removal from the United Kingdom and obstruct the United Kingdom immigration authorities effecting a subsequent removal.
- 72 Specific elements of the Appellant’s testimony contained in his witness statement also persuade me that the Sudanese authorities have no interest in him. It is entirely incredible as the Appellant claims at paragraph 22 of his witness statement that he was forced to hide in Khartoum for two months when he has spent many months living at his

home address in Sudan during his previous visits to Sudan and his final visit.

- 73 In his witness statement the Appellant claims that he was under police surveillance for all the period of time he was in Sudan whilst visiting. If that was the case his claim that he was at risk of being killed by the Sudanese authorities from 1998 was entirely fanciful.
- 74 The Appellant's claim at paragraph 19 of his witness statement that the Sudanese authorities gave him trouble every time he returned to Sudan is not supported by any evidence given by the Appellant. He has not stated what that trouble was."

My Conclusions and Reasons

49. In re-making the decision I have taken into account the documentary evidence, and I have also taken into account the Appellant's oral evidence and the submissions made by both representatives.
50. I find as a fact that the Appellant was not born in Darfur. There was a misunderstanding when permission to appeal was granted, and at the error of law hearing, caused by the Appellant's representatives contending that Khandak is in Darfur. The Appellant has confirmed that is not the case, and it is clear from the Appellant's own evidence that he was not born in Darfur, and he has never lived in Darfur. This does not mean that his claim cannot succeed. I have followed the guidance and principles in AA (Sudan) CG and set out below the head note;
- "All non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan. HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 is no longer to be followed, save in respect of the guidance summarised at (2) and (6) of the head note to that case."
51. I have also followed the guidance and principles set out in the more recent decision of MM (Sudan) CG, the head note of which is set out below;
- "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."
52. The issue to be decided is whether the Appellant is a member of the Tunjur tribe, as if he is, he is a non-Arab Darfuri, and would be at risk if returned to Sudan.
53. The burden of proof is on the Appellant, and the standard is a reasonable degree of likelihood. It is accepted by the Respondent that the Tunjur tribe are non-Arab Darfuris and there is reference to that tribe in the Respondent's Sudan OGM updated in August 2012 at 3.10.3.

54. I do not find that the Appellant has discharged the burden of proof, and therefore I do not accept that he has proved that he is a member of the Tunjur tribe. I accept that the Appellant answered some questions about the tribe correctly and I note that he was questioned about the Tunjur at questions 39-50 of his substantive asylum interview. The Respondent does not contend that the Appellant answered questions incorrectly stating at paragraph 27 of the reasons for refusal letter that some of the information given by the Appellant was consistent with background information, whilst other information was not verifiable. The Respondent's view was that having some knowledge of the Tunjur tribe did not prove that the Appellant was a member of that tribe, and that is also my view. It is possible for an individual to learn some facts about a tribe or a group, without actually being a member of that tribe or group. Therefore, I do not find that answering some questions about the tribe discharges the burden of proof. I have considered the evidence in the round. I note the absence of any expert report in relation to the Appellant's ethnicity. There is no requirement of corroboration, but the Appellant and his representatives were on notice as long ago as November 2014, when the reasons for refusal letter was published, that the Respondent did not accept that the Appellant was a member of the Tunjur tribe. There has been no independent expert evidence submitted to prove the Appellant's ethnicity.
55. Having considered the evidence in the round, I take into account that according to the country guidance case law, non-Arab Darfuris are at risk of persecution in Darfur, and do not have a reasonable option of internal relocation. In other words, they would also be at risk in other parts of Sudan.
56. It is therefore relevant to consider the Appellant's account of having left Sudan in 1990, he chose to return on five separate occasions. These were not fleeting visits, and he stayed for up to six months at a time when he stayed with his family. He was not in hiding. The Appellant's own account is that he did not encounter any difficulties when entering Sudan. He did so legally, with a passport issued by the Sudanese authorities. His account is that only on one occasion did he encounter any difficulties in leaving, and he was always granted the appropriate exit visas.
57. Taking into account the credibility findings of the FTT, I find that the Appellant did not in fact encounter any difficulties in leaving Sudan on any occasion.
58. The Appellant's own account is that he was not questioned about his ethnicity or ill-treated when he entered Sudan or left Sudan. I do not find that he would have been able to enter and leave Sudan without any difficulty, if he was a non-Arab Darfuri. I do not believe that he would have been able to apply for and be granted a Sudanese passport, without any difficulties, if he was a non-Arab Darfuri.
59. I have to balance the Appellant's assertion that he is a member of the Tunjur tribe, although he accepts that he has never lived in Darfur,

together with his ability to correctly answer some questions about the Tunjur tribe, against the fact that there is no expert evidence to prove his ethnicity, no independent evidence to prove his ethnicity, and the fact that he was granted a Sudanese passport without difficulty. Also he has travelled in and out of Sudan on five separate occasions without difficulty, and he has remained in Sudan for substantial periods of time without attracting the adverse attention of the authorities.

60. I conclude that the Appellant has not discharged the low standard of proof, and he has not proved that he is a member of the Tunjur tribe, and not proved that he is a non-Arab Darfuri.
61. The Appellant therefore is not at risk as a non-Arab Darfuri, if returned to Sudan.
62. I conclude that the Appellant, because he is not at risk, is not entitled to a grant of asylum or humanitarian protection, and there would be no breach of Articles 2 and 3 of the ECHR.
63. In relation to Article 8, the Appellant has no family members in the UK, he is not in a relationship in this country, and he has no children here. His wife and children are in Sudan. The Appellant therefore cannot satisfy the requirements of Appendix FM in relation to family life.
64. In relation to his private life, the Appellant has only been in the United Kingdom since 30th April 2014. He cannot satisfy any of the requirements of paragraph 276ADE(1). With reference to 276ADE(1)(vi), the Appellant has not proved that there would be very significant obstacles to his integration into Sudan. This is because the credibility of his account has not been accepted, I do not find that he is a non-Arab Darfuri, he would not be at risk if returned to Sudan, and he could rejoin his wife and three young children who are living in Sudan without any apparent difficulties.
65. With reference to Article 8 outside the Immigration Rules, I have taken into account the guidance in SS (Congo) [2015] EWCA Civ 387, and I do not find there are any compelling circumstances which have been identified in this case, to support a claim for a grant of leave to remain outside the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows;

I dismiss the Appellant's appeal on asylum grounds.

The Appellant is not entitled to humanitarian protection.

I dismiss the Appellant's appeal under the Immigration Rules.

I dismiss the Appellant's appeal on human rights grounds.

Anonymity

The First-tier Tribunal did not make an anonymity direction. There has been no request for anonymity to the Upper Tribunal, and I see no need to make an anonymity direction.

Signed

Date 14th January 2016

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

It appears that no fee has been paid or is payable. The appeal is dismissed. There is no fee award.

Signed

Date 14th January 2016

Deputy Upper Tribunal Judge M A Hall