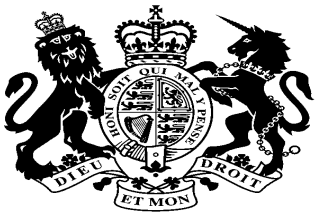

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11572/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 July 2018	**On 12 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BI
(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS

For the Appellant: Mr S Kandola (Home Office Senior Presenting Officer)
For the Respondent: Ms F Shaw (counsel for Fisher Jones Greenwood)

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal of 8 January 2018 allowing the appeal of Bahar Idriss, a citizen of Sudan born 18 June 2000, itself brought against the refusal of 1 November 2017 of his asylum claim.

2. The Respondent's asylum application was based on being a non-Arab Darfuri of the Bargo Silihab tribe. He was born in Tawila, Darfur, on 18 June 2000. He had one younger brother. He did not attend school and was illiterate. His father had a farm and BI helped him to look after the livestock. In 2004 Tawila was razed by the Janjaweed, and many people were killed, including BI's mother.

3. When he was aged 13, the Janjaweed came to the family farm and accused him of working with the rebel Justice and Equality Movement (JEM). He was kidnapped and held for ten days. He was blindfolded and taken to an isolated forest, beaten and interrogated. He possessed scars from being cut with a knife over this period. He was released but told he had to provide information about the JEM. He promised to do so to secure his freedom. He walked back to his family home and told his father what had happened. He was taken to his maternal aunt's house in Kanjara. The Janjaweed continued to visit his family home to look for him. He remained at his aunt's house for some seven months until arrangements were in place for his departure.

4. The last time he saw his father and brother was in January 2015, in Darfur.

5. His asylum claim was refused by the Home Office because whilst his nationality, ethnicity and identity were accepted as established, his account of kidnapping by the Janjaweed was considered to be inconsistent, implausible and unsubstantiated.

6. The First-tier Tribunal heard oral evidence and directed itself to the relevance of the Presidential Guidance note on Vulnerable Witnesses. The Judge found that it was not credible that the Appellant would have encountered the Janjaweed on only a single occasion, nor that he would have been able to successfully navigate back home from an unknown location to where he had been taken blindfolded, nor that he would have been released only to be pursued by them almost immediately, nor that he would have been able to live safely at his aunt's home for an extended period if it was only three kilometres from the family home, given the close interest the Janjaweed ostensibly showed in him over this period.

7. The Judge noted the expert's opinion which suggested that the use of child soldiers by the security forces continued to blight Sudan, and thus inferred that another reason for disbelieving the Appellant's claim was that the Janjaweed would have sought to recruit the Appellant had they found him alone in the forest rather than merely accusing him of working for JEM. However, the same thinking did not apply to the possibility of forced recruitment by JEM themselves, as the country evidence supplied by the Secretary of State indicated that JEM no longer used child soldiers.

8. Nevertheless, notwithstanding the rejection of these aspects of his account, the Appellant had established his ethnicity and so his appeal fell to be determined by reference to his racial origin. In *MM (Darfuris) Sudan* (CG) [2015] UKUT 10 (IAC) (5 January 2015) the Upper Tribunal had relied on the UKBA Operational Guidance Note (OGN) on Sudan of 2 November 2009 at 3.8.19 stating that:

> "**Conclusion**. All non-Arab Darfuris, regardless of their political or other 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 Darfuris and who do not fall within the exclusion clauses will therefore qualify for asylum."

9. In *MM Sudan* the evidence of Peter Verney was summarised to this effect, and accepted:

> "(i) The Sudanese authorities would treat the appellant as a non-Arab Darfuri. What would matter to them was that he was a member of a non-Arab tribe who originate from Darfur. It would make no difference to them that his father had moved away from Darfur and that he himself had neither been born nor ever lived in Darfur.
> (ii) Since the Tribunal case of *AA* there had been no improvement in the attitude of the Sudanese authorities to non-Arab Darfuris and indeed for members of the Berti tribe things were now worse, as a significant number of members of that tribe were educated and educated Darfuris were now being increasingly targeted by the security forces on suspicion that they were assisting the rebel forces.
> (iii) (This like (iv) below) were matters which arose from his oral evidence). Even though there was evidence that a significant number of educated Berti lived in Khartoum and were able to go about their business without significant problems, they were increasingly at risk of becoming a target for adverse treatment.
> (iv) On return the authorities would view the appellant not just as a non-Arab Darfuri/Berti, but as someone who had lived in the UK and had claimed asylum there. They would know from his passport that his exit visa had expired. This would add to the risk he would face on return."

10. Having regard to that evidence, in *MM Sudan* the UT decided that the conclusion of the Tribunal in *AA Sudan* CG [2009] UKAIT 00056 still held good: thus "All non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan." Applying these Country Guidelines, the First-tier Tribunal allowed BI's appeal: he was a non-Arab Darfuri and thus could not reasonably be expected to relocate. The Judge considered that the Secretary of State had been wrong to argue that a country report from the Danish Immigration Service could outweigh a Country Guidelines decision.

11. The Secretary of State appealed on the basis that his view as to risks in Sudan had been reviewed in the latest CPIN and it was no longer accepted that the situation for non-Arab Darfuris placed them at general risk of persecution: the First-tier Tribunal had failed to give adequate reasons for his conclusions, and misdirected himself in the consideration of the background evidence. The country evidence now showed that Khartoum's population included around a million Darfuris many of whom have positions in government and academia.

12. The First-tier Tribunal refused permission to appeal on 30 January 2018; however Judge Kekic granted permission to appeal on 2 May 2018 on the basis that there

was an arguable error in the treatment of the Secretary of State's case as to improvements in Khartoum. It was also arguable that the Judge had failed to properly consider the fabrication of aspects of his claim when assessing credibility.

13. Before me Ms Shaw explained that the Presenting Officer below had not raised any challenge to the Country Guidelines in *MM Sudan*. Mr Kandola acknowledged this and to his credit recognised that inappropriate assertions had been made in the grounds of appeal. Whilst the *Joint report of the Danish Immigration Service and UK Home Office fact finding missions to Khartoum, Kampala and Nairobi* (conducted February – March 2016) had been before the First-tier Tribunal, no formal challenge had been made to the prevailing Country Guidelines decision.

Findings and reasons

14. Given the appropriately pragmatic stance adopted by Mr Kandola, I can deal with the appeal shortly.

15. Stanley Burnton LJ in *SG (Iraq)* [2012] EWCA Civ 940 §47 stated that "decision makers and tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so." So any representative seeking departure from a relevant Country Guidelines decision must identify cogent evidence that establishes very strong grounds justifying a change of stance.

16. The Secretary of State's *Country Policy and Information Note - Sudan: Non Arab Darfuris* (August 2017) cited in the grounds of appeal states:

> "**3.1.2** Existing caselaw has found that non-Arab Darfuris as an ethnic group are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan, including to Khartoum.
> **3.1.3** The Home Office view is, however, that there is cogent evidence indicating that non-Arab Darfuris are not generally at risk of persecution or serious harm solely on the grounds of their ethnicity in Khartoum. This evidence provides strong grounds to depart from the existing caselaw of AA and MM.
> **3.1.4** Rather, a person's non-Arab Darfuri ethnicity is likely to be a factor which may bring them to the attention of the state and, depending on other aspects of their profile and activities, may lead to a risk of serious harm or persecution in Khartoum.
> **3.1.5** Darfuris in Khartoum face discrimination in accessing public services, ducation and employment, experience forced eviction, societal harassment from other Sudanese, and do not have access to humanitarian assistance. However in general such treatment is not so severe that it is likely to amount to persecution but each case will need to be considered on its individual facts."

17. It is clear that there was no submission put to the Judge below that this material constituted cogent reasons for departing from the governing Country Guidelines. Furthermore, the CPIN that was relied on as the theoretical basis for any such submission was not even placed before the Judge below. Thus the threshold for departing from established Country Guidelines was not reached.

18. As an aside, I note that given that BI was a minor at the date of the hearing below, one might well imagine that he would have been able to demonstrate that an internal relocation alternative that would require him to face discrimination, eviction and harassment might well have been unduly harsh in any event. However it is unnecessary to consider that possibility, given that the Secretary of State's grounds of appeal against the decision allowing his appeal based on bare *MM (Sudan)* considerations are without foundation.

19. Grounds of appeal which suggest that an approach was taken by an advocate below without checking that this was truly the case are to be deprecated. Here the Upper Tribunal was effectively misled into granting permission to appeal when the argument contended for had not in truth been advanced below.

20. There was no material error of law in the decision of the First-tier Tribunal.

Decision:

The appeal to the Upper Tribunal is dismissed.

Signed: Date: 13 August 2018

Deputy Upper Tribunal Judge Symes