



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005636
First-tier Tribunal No: HU/516645/2022
IA/02547/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 October 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DHABAIA ADAM MOHAMMED ADAM
(NO ANONYMITY ORDER MADE)

Appellant

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms S Khan instructed by All Nations Legal Services.
For the Respondent: Ms Arif, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 19 October 2023

DECISION AND REASONS

1. In a determination promulgated on 5 September 2023 the Upper Tribunal found an error of law material to the decision of the First-tier Tribunal which allowed the above appellant's appeal.
2. The Upper Tribunal discussed at length points relating to the public interest arising from the refusal pursuant to Part 9 of the Immigration Rules.
3. There have, however, been two developments in the interim, the first being that the appellant has become a mother and her Sponsor a father of a son born in Khartoum, Sudan, on 12 March 2023. The second is the deterioration in country conditions in Sudan to which I shall refer further below.
4. For the purposes of the hearing Ms Khan filed a skeleton argument. At [5] Ms Khan writes:
 5. The Appellant would point out that the 10 year entry ban that has been applied to the Appellant's case under Part 9 does not apply in the cases of Spouses under Appendix FM. Para. 9.8.1 does not apply to applications under Appendix FM (see para. 9.1.1(a)). The application of part 9 to Spouses under Appendix FM is discretionary and not mandatory. The Appellant would submit that there is good reason why that is the case because proportionality assessments where article 8 family life is concerned, there had to be an individual assessment of

the applicant's circumstances. Where that is not the case, the weight given to the public interest is diminished. The Appellant relies on the ZAT and Others v SSHD (Article 8 ECHR - Dublin Regulation - Interface - Proportionality) IJR [2016] UKUT 61 (IAC), at para. 57:

" Lesser weight is to be accorded to the Secretary of State's assessment to the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the [rule in question] embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case by case basis."

6. There is no rational reason why the Spouse of a refugee would be treated less favourably than the Spouse under Appendix FM. On the contrary, generally Spouses of refugees are given preferential status in that they are not required to meet basic requirements that Spouses under Appendix FM have to meet. This is in recognition of the principles of family reunion under the Refugee Convention.
5. It is important to note that whilst Appendix FM makes consideration Part 9 of the Rules in the case of an application by spouse not relevant, the relevance of this provision to an application by an applicant for family reunion with a person who has made a protection claim is specifically provided for in Appendix Family Reunion (Protection). FRP.2.2 states *"The applicant must not fall for refusal under Part 9: grounds for refusal"*. The inclusion of this element in relation to a family reunion applicant, as opposed to a spousal applicant, is in accordance with the will of Parliament. It cannot be read down that provisions relating to one class of individual should apply to another class where specific provisions say otherwise.
6. The 10 year ban on entry applicable to a person whose application is refused as a result of deception in an application, as per appellant in this appeal, is not an absolute ban as it is recognised in the published guidance relating to Part 9 that any decision taken in relation to the same must be compliant with the U.K.'s obligations under both the Refugee Convention and European Convention on Human Rights.
7. A person who would otherwise be excluded for a period of 10 years will be able to succeed with an application within the 10 year period if it can be demonstrated that maintaining the same will breach a Convention right/provision or is disproportionate.
8. Also in her skeleton argument Ms Khan wrote:
 8. The Appellant would further submit that the situation in Sudan has changed. This is relevant when considering if the Appellant can repeatedly travel outside Sudan to meet the Appellant. The Appellant lives in Khartoum. The Appellant relies on the Country Policy and Information Note, Sudan: Security Situation dated June 2023¹ that confirms on the 15 April 2023 fighting broke out in Sudan between the Sudan Armed Forces and the Rapid Support Forces. The executive summary expressly states:

"On 15 April 2023, following weeks of tensions, fighting broke out between the Sudan Armed Forces (SAF), led by Abdelfattah al-Burhan, and the Rapid Support Forces (RSF), a paramilitary force led by Mohamed 'Hemedti' Hamdan Dagalo, in multiple cities across the country. Significant clashes occurred in Khartoum, Al Fasher in North Darfur, El Obeid in North Kordofan, Nyala in South Darfur, Kassala in Kassala and Port Sudan in Red Sea. Fighting was reported in 13 out of Sudan's 18 States.

Since then, clashes between the SAF and RSF, and insecurity as a result of inter-communal conflict, has been concentrated in and around Khartoum, the Darfur states, and North Kordofan. Khartoum has seen the heaviest fighting and large areas of the city remain contested and it is unclear which armed party controls key infrastructure and installations. Despite attempts by international actors to broker ceasefires, the fighting continues.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1162778/SDN_CPIN_Security_situation.pdf

Hundreds of civilians have been killed and thousands more injured have been reported, although the actual number is likely to be higher. The insecurity has led to internal displacement of over 1.2 million people with a further 400,000 choosing to leave the country.

The fighting has also damaged homes, shops, schools, water and electricity installations, mosques, hospitals, and other health facilities resulting in shortages of food, water, medicine, fuel and electricity.

The conflict has restricted travel both by air and road. Sudan airspace remains closed to civilian flights and fighting continues around Khartoum International Airport. Major battles have also centred in urban areas along major roadways. Nonetheless, hundreds of thousands of people have managed to escape in search of safety in other parts of Sudan and neighbouring countries.

In general:

• the level of indiscriminate violence in Khartoum and its hinterlands, Darfur and North Kordofan is such a high level to mean that, within the meaning of paragraphs 339C and 339CA(iv) of the Immigration Rules, there are substantial grounds for believing there is a real risk of serious harm to a civilian's life or person solely by being present in these areas."

9. There is now internal armed conflict in the Appellant's home area. Khartoum Airport is now closed according to the CIPN (para. 3.1.10). The Appellant relies on the FCO² advice that was still current on the 18 October 2023 that confirms the airport is closed. British nationals are told:

"Travel within or out of Sudan is at your own risk. The FCDO cannot offer advice on the safety of travelling to any departure point within Sudan".

"The FCDO currently advises against all travel to Sudan. All parts of the country should be considered potentially unsafe. Significant disturbance and conflict may occur at any time".

10. The whole of Sudan is affected. The Appellant cannot easily travel out of Sudan. Her ability to travel is even more hindered by the fact she has a very young child. The Appellant would submit that by any definition and even giving the maximum weight to the public interest for the Appellant's deception, the decision to refuse entry clearance in this case is disproportionate.

9. It was not disputed before me that family life exists between the appellant and the Sponsor and their son. The issue has always been the proportionality of the refusal decision.
10. Ms Arif was asked to state her case in relation to persuading me that the decision is proportionate bearing in mind continued refusal, even taking into account the act of deception, will leave the appellant and the child in an area where it is recognised there is an internal armed conflict and where there are substantial grounds for believing there is a real risk of serious harm to their life or person solely as a result of being present in the home area.
11. I find having assessed all the available material in the round that it cannot be proportionate for the appellant and the child not to be admitted to the UK and for them to have to remain in Khartoum, contrary to the positive obligation on the Secretary of State, notwithstanding the act of deception, as a result of the real risk identified in the Secretary of State's own publication.
12. Had the material change in country circumstances not occurred, it may be the result would have been different. There is, for the reasons identified in the error of law hearing, a strong public interest in deterring people from believing they can circumvent the Rules by using deception in applications. As there is more in this appeal sufficient to tip the balancing exercise in the appellants favour I allow the appeal on the basis of Secretary of State has not established that continued refusal is proportionate.

² <https://www.gov.uk/foreign-travel-advice/sudan#:~:text=Security%20situation%20in%20Sudan&text=Khartoum%20International%20Airport%20is%20currently,the%20situation%20is%20changing%20fast>.

Notice of Decision

13. Appeal allowed.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2023