IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001816

First-tier Tribunal No: PA/08177/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 30 July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

TP (SUDAN)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G. Lee, Counsel, instructed by Fadiga & Co Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 3 July 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant, her husband and children are 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, her husband or children. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Appellant is a national of Sudan who claims to be at risk on return there on account of her actual or perceived political views and as the mother of daughters at risk of female genital mutilation ("FGM").

2. The First-tier Tribunal ("FTT") made an anonymity order in respect of the Appellant's identity. It is not clear to me why, but in this Tribunal that Order has not been continued as is its normal administrative practice where anonymisation has been ordered below. This meant that the Appellant's full name was included on the Tribunal's list, both at Field House and on-line. That is to be regretted, as it is clear that an association by the Sudanese authorities of the Appellant with the claimed facts of her claim could, in principle, lead to a risk to her on return. In those circumstances, and in the absence of any evidence that there is no longer any point in making an anonymity order, it is plainly appropriate to further anonymise the Appellant in these proceedings, notwithstanding the importance of open justice. The cypher I have given in the heading to this decision does not comprise Appellant's initials. I have also sought to omit from this decision any features of the case which might identify the Appellant or her family members.

3. It is also a matter of significant regret that the Appellant's as yet unresolved protection claim has now been pending for over six years. That is obviously not in the Appellant's interest, but for a protection claim to take so long to be resolved is also – particularly where there are, as set out below significant unexplained delays – contrary to the public interest, declared by Parliament in s.117B of the Nationality, Immigration and Asylum Act 2002 ("the 2022 Act"), in maintaining effective immigration controls.

4. The procedural chronology to the Appellant's asylum claim is as follows:

   a. The Appellant initially claimed asylum on 5 December 2017. This was on the grounds of her and her husband's political views.
   b. The Respondent refused that claim by decision dated 13 August 2019, some 20 months later.
   c. The Appellant appealed this to the FTT. In the FTT, the Appellant raised the risk of FGM to her daughters as a ground on which she claimed to be entitled to asylum. The Respondent consented to the Tribunal considering that 'new matter'. By a decision dated 30 December 2019, the FTT dismissed her appeal.
   d. However, on 16 March 2020, the Upper Tribunal allowed the Appellant's appeal from the 30 December 2019 FTT decision and remitted it to the FTT to be determined *de novo*.
   e. Before that remitted appeal was heard, the Respondent invited the Appellant to a further asylum interview, which took place on 12 May 2021, and, on 28 June 2021, made a Supplementary Decision. That Supplementary Decision considered, but refused, the FGM claim (as well as the original political asylum claim). However, by that decision, the Appellant was granted 30 months leave to remain. The Appellant has assumed that this grant of leave was on the basis of her medical condition, lupus, and the lack of availability in Sudan of appropriate treatment, as this was a further basis on which the Appellant sought to remain in the UK and the Respondent did

not reject it in the Supplementary Decision. Although the Respondent has not disclosed the minute of the decision and Ms Nolan was not in a position to confirm or refute the Appellant's assumption, this appears to be the obvious reason why the Appellant was granted leave in the circumstances and I accordingly proceed on the same assumption.

f. The effect of the grant of leave is that the Appellant's appeal to the FTT was, subject to her serving notice under s.104(4B) of the 2002 Act, deemed withdrawn. On 12 July 2021, the Appellant served a s.104(4B) notice confirming that she wished to proceed with her appeal on asylum and/or humanitarian protection grounds.

g. The remitted appeal came before FTT Judge Cas O'Garro ("the Judge") on 24 August 2021. By decision dated 13 September 2021 ("the FTT Decision") the Judge dismissed the Appellant's protection appeal. However he allowed the Appellant's appeal on the basis of Article 8, finding that there would be very significant obstacles to her reintegration in Sudan given the difficulties in accessing medication.

h. Both parties sought to appeal to this Tribunal against the FTT Decision. On 18 November 2021 permission to appeal was granted by the FTT in respect of the Appellant's application, but refused in respect of the Respondent's. The Respondent did not renew his application to the Upper Tribunal.

i. The hearing of this appeal was originally listed to take place on 6 September 2022. Notice of that hearing was sent to the parties on 16 August 2022. On 18 August 2022, the Appellant's solicitor wrote to the Tribunal stating that Ms Capel, who had previously represented the Appellant in both the FTT and UT, was "not available in the morning of 6th September 2022." This was responded to by the Tribunal on 2 September 2022 (10.37), suggesting that it might be possible for the appeal to be heard later in the day. At 11.06, the Tribunal confirmed that the Judge had confirmed the hearing could be put back to 2pm. The Appellant's solicitors replied informing the Tribunal for the first time that the Appellant's counsel was not available at any time on 6th September as she had a 5-day hearing that week. It was therefore decided to adjourn the hearing. The Tribunal notified the parties that a new hearing date would be sent out in due course. However, nothing was then done by the Tribunal (nor, it is fair to note, by the parties) to bring the appeal on until 30 May 2024, over 20 months later, when it was listed to be heard on 3 July 2024, when it came before me.

5. While the procedural background to this appeal is not wholly straightforward, there have been two periods of 20 months – together making up over half of the 6 years and 7 months since the Appellant made her asylum claim – in which first the Respondent and then the Upper Tribunal have done little to progress matters. In those circumstances, I have sought to write this decision and have it promulgated as expeditiously as possible. Beyond that, I can but apologise on the Tribunal's behalf for the delay which appears to be its responsibility.

The FTT Decision

6. After having set out the background, documentary evidence, what took place at the hearing, the submissions and relevant law, the Judge began his "Considerations and Findings" section at para.32. The Judge considered the Appellant's claim on the basis of her and her husband's political beliefs at paras. 39-53 and considered the claim in relation to the risk of FGM at paras. 54-57. The

Judge then considered the risk on the Appellant's return as a result of being a failed asylum seeker and a member of the Nuba tribe. It is not entirely clear to me why he did so, as this was not a basis on which the Appellant sought asylum.

7. At para. 39-42, the Judge set out the basis of the Appellant claim to asylum on the basis of her and her husband's political belief. In summary, the Appellant claimed that her husband, became a member of the SPLM-N in 2011 but kept his involvement with them a secret as he was at the same time working for the Sudanese Government. In October 2017, the Appelalnt received a phone call from her husband's cousin, who told her that her husband had been arrested and had disappeared.

8. At para.43, the Judge stated that "*In considering the appellant's credibility I have paid regard to the background evidence and noted it states that under the Bashir regime there was general monitoring of all Sudanese by the government, therefore I find that it is not credible that the appellant's husband could have been working for the SPLM-N and the Government since 2011 without being discovered.*"

9. At para.44, the Judge noted that "*if the appellant's husband had been detained for his involvement with the SPLM, according to the objective evidence, the authorities would detain people associated with him and even his relatives.*" He then cited from the relevant CPIN. I note that this gives a single example of a family member of a Darfuri militia leader and former Janjaweed leader having been detained and does not suggest any sort of invariable, or indeed any, practice of detaining family members. The Judge then noted that the person who told the Appellant about her husband's arrest was said to be related to him. At para. 46, the Judge found that "*because of their close association, if the appellant's husband had been arrested and detained because of his link to the SPLM-N party, [the cousin] would have been arrested too. I also find that the authorities would have arrested other family members including the appellant whom I noted had remain [sic] living at her parent's home until 11 November 2017 when she even visited her family home and encountered no problem. The appellant has provided no evidence that any of her family members or her husband's family members have been arrested and detained.*" The Judge therefore considered that the Appellant's claim was inconsistent with the objective evidence and he therefore rejected the appellant's claim that her husband was working for the SPLM-N party and that this led to his arrest and detention.

10. At para.48, the Judge stated that "*As I do not find the appellant credible in her claim that her husband was detained, I will give no weight to the statements made by [other witnesses] relying on guidance given in Tanveer Ahmed [2002] UKIAT 00439.*"

11. At para.49, the Judge considered that, even if there were truth to the Appellant's claim that her husband was detained, the CPIN noted that a 2020 report from the USSD observed "*There were no reports of political prisoners or detainees*" and at para.50, the Judge found that this evidence implied that the Appellant's husband "*must now be a free man*".

12. At para.51, the Judge noted that the expert report of Prof Lightstone stated that "*I understand [the Appellant's] husband has not been allowed to join her so she*

lives on her own." The Judge considered this reinforced his finding that the Appellant's husband was not in detention and remains in Sudan as a free man.

13. At paras. 52-53, the Judge found that in light of the new Government in Sudan that was working with the SPLM-N party, the Appellant would not be harmed by the authorities if returned to Sudan.

14. As to the FGM issue, the Judge noted the expert report of Mr Verney and stated that he had read all the objective evidence. The Judge accepted that FGM is prevalent in Sudan and in the Nuba tribe (of which it was accepted by the Respondent the Appellant, her husband and daughters are part). At para. 56, the Judge considered that the fact that the Appellant and her husband are against the practice of FGM was "*a good starting point because this means if the appellant… were to return…she and her husband will vigorously resist any attempt by anyone to force FGM on their daughters as they have done in the past according to her evidence.*" The Judge then noted that the Appellant's eldest daughter was aged 4 when the family first came to the UK, and had not been subjected to FGM even though the family was said to be forcing them to force their daughter to do so.

15. At para.57, the Judge noted that in July 2020 laws were passed in Sudan to ban FGM. In light of this, the Judge found that "*the appellant and her husband whom I have found is free and resident in Sudan, can turn to the police and civil society organisations for advice and support if anyone tries to force them to undergo FGM on their daughters. I find the appellant [sic] fear has no substance but in any event, I am aware that Sudan has a legal and judicial system to which the appellant can turn to [sic] on return if her fear is genuine.*"

16. At paras. 58-60, the Judge considered that the Appellant was not at risk either as a failed asylum seeker or because of their Nuba ethnicity.

17. Accordingly the Judge dismissed the appeal on asylum and humanitarian protection grounds.

18. At para.62, the Judge considered there was no point in considering whether the Appellant would suffer any "*Article 3 harm"* on account of her health given the grant of leave by the Respondent. At para.63, the Judge then went on to consider whether the Appellant's removal would breach Article 8. He concluded that it would, because the Appellant's and her daughter's health conditions (epilepsy in the daughter's case) and the lack of access to medication in Sudan would constitute very significant obstacles to their reintegration. I would pause to observe that it is wholly unclear to me why the Judge considered Article 8 and considered whether to consider Article 3.

    a. By virtue of s.104(4A)-(4B) of the 2002 Act, the Tribunal had no jurisdiction to determine any human rights claim. Where leave has been granted while an appeal is pending, a notice can be given to prevent it being treated as abandoned "in so far as it is brought on a ground specified in section 84(1)(a) or (b) or 84(3)". These grounds relate only to where removal of an appellant would breach the Refugee Convention on the UK's obligations in relation to persons eligible for a grant of humanitarian protection. Breaches of s.6 of the Human Rights Act 1998 are appealable under s.84(1)(c), which is not included in the scope of s.104(4B). This is no

doubt why, in her notice of 12 July 2021, the Appellant did not seek to proceed with her appeal on human rights grounds.

b. Second, there was no jurisdiction to determine whether the daughter's removal would breach her Article 8 rights. There has, so far as I am aware, been no human rights claim made to the Respondent by the Appellant's daughters, there has therefore been no refusal of a human rights claim, which is a necessary prerequisite to an appeal to the FTT under s.82 of the 2002 Act.

c. Third, even if there were jurisdiction to consider the Appellant's or her daughter's human rights appeal, on the Judge's own logic, there was, it seems to me, no more "*point*" in considering Article 8, than there was Article 3.

The Appeal to the Upper Tribunal

19. In her notice of appeal, the Appellant relied on the following grounds of appeal:

a. Ground 1: The Judge has reached irrational conclusions concerning the plausibility of the Appellant's account from a mis-reading of the background evidence;

b. Ground 2: The Judge committed a *Mibanga* error in para.48 in relation to the evidence of the other witnesses;

c. Ground 3: The Judge failed properly to apply the relevant Country Guidance;

d. Ground 4: The Judge failed to have regard to material evidence in relation to the steps being taken by the Appellant's family for her daughters to undergo FGM;

e. Ground 5: The Judge imposed too low a threshold in determining whether there was sufficiency of protection in relation to the risk of FGM.

20. As already noted, permission to appeal was granted on 18 November 2021. FTT Judge Dixon considered that there appeared to be arguable merit in Ground 2. At first blush, he thought the other grounds appeared to be less strong, but were nonetheless also arguable.

21. The Respondent did not file a response to the appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Analysis

Material error of law

22. I consider that **Ground 1** is made out. As set out above, the Judge determined that the Appellant's account was not credible on the basis of what he considered to be inconsistencies between her account and the background evidence.

23. In particular, the Judge considered that the background evidence demonstrated that "*there was general monitoring of all Sudanese*" by the government. However, as the grounds submit, while the evidence demonstrated a high level of surveillance, it did not suggest that the government was able to successfully monitor the whole population. It does not therefore logically follow, as the Judge considered it did, from the fact that there was monitoring that the Appellant's husband could not (to the lower standard of proof) both be working for the Government and a supporter of the SPLM-N.

24. Likewise, the fact that the USSD Report relied on by the Judge states that there were "*no reports of political prisoners or detainees*" does not itself mean that all political prisoners under the al-Bashir regime had been released and that therefore the Appellant's husband was living freely in Sudan, or that a sufficient number had so that there was no reasonable degree of likelihood that the Appellant's husband remained in detention. Such conclusions are not rationally borne out by this evidence.

25. While a comparison between an appellant's account and background evidence can be a proper way to test the credibility of that account, it is necessary for the two to be genuinely inconsistent before it can damage credibility: see, by way of illustration, the analysis of Elisabeth Laing LJ in *ASO (Iraq) v SSHD* [2023] EWCA Civ 1282 at [49]-[52]. Given the lower standard of proof applicable to protection claims, none of the evidence as set out in the preceding two paragraphs on which the Judge relied was, in my judgment, sufficient to lead him to draw the conclusions he reached as to whether the Appellant's husband (a) was involved in SPLM-N or, in the alternative, (b) had been released from detention.

26. Ms Nolan argued that, if I found ground 1 to be well founded, that it was inevitable that the Judge would necessarily have come to the same conclusion (a) as to the appellant's credibility, (b) as to the ultimate conclusion on the political asylum claim even if the Appellant's account were considered credible, and (c) in relation to the FGM issue in any event. I am unable to accept those submissions. Addressing them in turn:

    a. I am not satisfied that it is inevitable that the Judge would have found the Appellant's account not to be incredible had he not made the errors identified above. There were other aspects of the Appellant's account that troubled the Judge, but in my judgment it is not possible to say that they were so obviously damaging to her credibility that the same conclusion on credibility would necessarily follow.
    b. Ms Nolan's submission that, even if the Appellant's account were considered credible, it follows that the political asylum claim would have fallen to be rejected essentially rests on the correctness of the Judge's treatment of the Country Guidance, which the Appellant challenges under Ground 3. It is therefore convenient to address that here. The Grounds accept that *KAM (Nuba – return) Sudan CG* [2020] UKUT 269 (IAC) to which the Judge referred finds that there is no general risk to those of Nuba ethnicity, but note, correctly, that it also held (at [182]) that the question remains whether the individual's circumstances as known to (or suspected by) the Sudanese authorities create a perception that the individual is a sufficiently serious threat to the Sudanese government to warrant targeting and ill-treatment, in respect of which a fact-sensitive assessment is required by the Tribunal taking into account all the circumstances. Had the Judge accepted the Appellant's account, he would have needed, the Appellant submits, to have considered the following: (i) the Appellant's husband was arrested for being a SPLM-N member in 2017 and has still not been released, despite recent political developments; (ii) she (and her husband) is from the Nuba ethnic group; (iii) she (and her husband) are from South Kordofan; (iv) she is an asylum-seeker who has spent a significant period of time in the UK as the dependent of her husband who was working as military attaché to the Sudanese Embassy. While the assessment of those (and any other relevant) factors would be a matter for the Judge, I agree that the Judge did not

undertake the fact-sensitive assessment required by the Country Guidance, instead relying on the general position in relation to those of Nuba ethnicity, and that this constituted an error of law. Moreover, I do not accept Ms Nolan's submission that in applying the Country Guidance the result would inevitably have been the rejection of the Appellant's asylum claim. On the application of *KAM*, the claim may not, perhaps, be the strongest, but it is not so weak that I can be satisfied that the result would have been inevitable failure by the Appellant.

c. As to materiality in relation to the FGM claims, a significant part of the Judge's reasoning is predicated on the Appellant *and her husband* being able to provide protection for their daughters and on the Appellant *and her husband* being able to seek assistance from the authorities. Given that the error under ground 1 goes to the finding that the husband is free and living in Sudan, that undermines the premise of the Judge's analysis of the availability of protection of the Appellant's daughters. It may be that the Judge would have considered that the Appellant's ability alone (with any necessary support from the authorities) was sufficient, but I am not satisfied that on this issue the high bar of inevitability is reached, so that I can be satisfied that the error is immaterial to this issue.

27. It follows from the above that the FTT Decision must be set aside, at least so far as it relates to the Appellant's protection claims. As Grounds 2, 4 and 5 do not add anything to this conclusion, it is unnecessary to consider them and desirable, in the interests of making this decision as expeditiously as possible, for the reasons set out above, not to do so.

Relief

28. There are two questions relevant to relief: first, whether to set aside the decision in full, or only in so far as it relates to the protection claims, and second, whether the appeal should be remade in the Upper Tribunal or remitted for redetermination by the FTT.

29. As to the first of those questions, by virtue of s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, once the Upper Tribunal finds that the decision of the FTT involved the making of an error on a point of law, the Tribunal has a discretion to set aside the decision. There is nothing on the face of that statutory power that limits that discretion to matters affected by errors of law found, but it has been held in numerous authorities, summarised in *AB (preserved FtT findings;* Wisniewski *principles) Iraq* [2020] UKUT 00268 (IAC), that this encompasses a power to set it aside only to the extent that any findings are "infected" by the error found (to use Kitchen LJ's term in *TA (Sri Lanka) v SSHD* [2018] EWCA Civ 260 at [7]). None of those cases however involved not only findings, but a decision on an appeal that the FTT had no jurisdiction to decide. In such circumstances, it seems to me that I would have the power to set aside those aspects of the decision, notwithstanding that they are unaffected by the errors of law found. However, notwithstanding the jurisdictional nature of the issue, given that this is a matter which could have been, but so far as I am aware was not, raised in the Respondent's cross-appeal on which permission to appeal was refused, and given that, in light of the grant of leave to the Appellant, this issue appears to be of no great moment, it seems to me preferable to leave the Judge's finding as to very significant obstacles and the decision to allow the human rights appeal to stand. I therefore set aside the decision so far as it relates to the Appellant's protection claim.

30. Second, I have given careful consideration to whether, given the lengthy delays in this case, it would preferable to retain the case for remaking in the Upper Tribunal given that it is usually possible (notwithstanding what the history of this case might suggest) to get cases on more quickly in the Upper Tribunal than the FTT. However, given that the protection appeal is to be set aside in full and will require a full fact-finding exercise, and given that the Appellant has extant leave in the UK, I consider the more appropriate course to be to remit the case back to the FTT.

Post-script

31. Finally, I would note that, although this did not form part of the Grounds, the Judge and the Appellant (and possibly also the Respondent) appear to have approached the Appellant's FGM-related asylum claim as wholly parasitic on the question of whether her daughters are at risk of FGM in Sudan. In case it is of assistance when the appeal comes to be redetermined, I would note that the claim is not however brought by the Appellant's daughters. Rather, the claim, as it seems to me, must be that the Appellant herself is at risk of persecution in Sudan, because she is a member of a Particular Social Group. The Respondent accepted in the Supplementary Decision letter that the parent of children at risk of FGM in Sudan is such a PSG (though it seems to me that the PSG might be more accurately defined as "the parent of children at risk of FGM *who is not supportive of the practice*", as it is difficult to see the risk to the parent who is supportive of FGM). If the Appellant's daughters are not at risk of FGM, then the Appellant's claim on this basis must fail, because she will not form part of the PSG. But if they are at risk, the analysis does not in my view end there, as the Appellant in her skeleton argument before the FTT, and the Judge both appear to have considered that it did. The next question is whether the Appellant's opposition to FGM gives rise to a risk to her, and whether there is insufficient protection for her available in Sudan to ameliorate any such risk. Obviously, if the FTT finds that the daughters cannot return because there is a risk of FGM, it likely follows in practice that the Appellant cannot be removed to Sudan on the basis of her Article 8 right to family life with them. However, the question for this appeal is not whether anyone's human rights would be violated by being removed to Sudan, but whether the Appellant it would be a breach of the UK's obligations under the Refugee Convention or in respect of the Appellant's entitlement to humanitarian protection.

Notice of Decision

1. The Appellant is granted anonymity in these proceedings and shall be known as "TP". Attention is drawn to the anonymity order made on the front page of this decision.
2. The decision of the FTT involves the making of a material error of law and the decision to refuse the appeal on asylum and humanitarian protection grounds and all findings related to that decision are set aside.
3. The appeal is remitted to the FTT for redetermination de novo of the asylum and humanitarian protection appeal.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 July 2024