



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

MM (Darfuris) Sudan CG [2015] UKUT 00010 (IAC)

THE IMMIGRATION ACTS

**Heard at Field House
On 7 October 2014**

**Decision and Reasons
Promulgated on
5 January 2015**

Before

**THE HON. MR JUSTICE KING
UPPER TRIBUNAL JUDGE STOREY**

Between

MM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Jacobs of Counsel instructed by Duncan Lewis & Co
For the Respondent: Ms A Holmes, Home Office Presenting Officer

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.

DECISION AND REASONS

1. The appellant is a national of Sudan born in 1973. On 16 June 2014 the Court of Appeal allowed his appeal against a decision of Upper Tribunal Judge King dated 5 March 2013 which upheld the determination within the Fast-Track procedure of First-tier Tribunal Judge Gordon dated 1 February 2013 dismissing his appeal.
2. Our task is to re-make the decision in respect of the appellant's original appeal against the decision of the respondent dated 13 January 2013 to remove him having refused to grant him asylum. In the Statement of Reasons settled for the Court of Appeal the respondent accepts that the findings of fact made by FtT Judge Gordon were unsafe "insofar as such findings were determined in a vacuum whereby risk of persecution was determined on the country guidance and objective evidence". At the time of the hearing before the FtT judge, the appellant's representatives had sought but not obtained an expert report from Mr Peter Verney.
3. The Statement of Reasons also stipulates that the previous decisions of FtT Judge Gordon and UTJ King should be set aside "save for the finding that the appellant is a member of the Berti tribe and from Sudan".
4. One of the grounds of appeal to the Court of Appeal was that Judges Gordon and King had erred in failing to apply the country guidance case of AA (Non-Arab Darfuris - relocation) Sudan CG [2009] UKAIT 00056 which held at paragraph 5 that if a claimant is a non-Arab Darfuri, he must succeed. In the event, however, they agreed the aforementioned Statement which records that the Secretary of State "accepts that the appellant's situation is not covered by the current country guidance case, AA". Since the appellant was arguing that AA **did** cover his case, "accepts" was probably a drafting error, but it remains that this Statement must be the starting point for our consideration.
5. The appellant's grounds of appeal as presented to us had two main bases: the first, (1), reiterated the argument that the appellant was entitled to succeed on the basis of the guidance in AA, which it was emphasised had endorsed the Home Office Operational Guidance Note. The second basis, (2), was that the appellant was entitled to succeed on the basis of his membership of the Justice and Equality Movement (JEM).
6. We explained to the parties at the outset that we would hear evidence and submissions on (1) and only proceed to consider (2) if we found against the appellant on (1).
7. In considering whether the appellant has a well-founded fear of persecution on the basis of (1), we must now take into account not only the evidence that was before the two previous Tribunals, but that submitted since. The most important additions are the reports prepared by Mr Peter Verney which are dated 26 July 2013, 30 April 2014 and a consolidated report (undated). We also heard evidence from Mr Verney.

In view of what we go on to say, it is unnecessary to summarise his evidence save to note that he stated that:-

- (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.

8. Ms Holmes cross-examined Mr Verney but did not seek to suggest that his expert opinion was based on inadequate sources or flawed methodology. Essentially she asked the Tribunal to attach greater weight to the background evidence.

Our assessment

9. It is common ground between the parties that the Berti are one of Sudan's non-Arab tribes (the others being the Fur, Zaghawa, Masaliet, Dinka, Meidob, Birgid Bidiat, Gola, Kbka, Gimir, Morant, Mima and Falata). It is also common ground that the Berti originate from Darfur.
10. We do not know the reason why the respondent in the Statement of Reasons stated that she did not consider the appellant's case to be covered by the country guidance case of AA. That case based its guidance directly on the respondent's own position, as set out in the UKBA Operational Guidance Note (OGN) on Sudan of 2 November 2009 at 3.8.19 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.”

11. What may explain the respondent’s position in the Statement of Reasons (that AA did not cover the appellant’s case) is that neither AA nor the abovementioned OGN on which the Tribunal relied specified what was the personal scope of the term “Darfuri” and whether it was to be understood as a geographical term or as an ethnic term relating to origins.
12. However, in the light of the further evidence we have received it is plain that the Sudanese authorities classify persons as non-Arab Darfuris on the basis of ethnic origin and not geographical location. We note that Ms Holmes was unable to point to any evidence casting doubt on this point.
13. In such circumstances the appellant is entitled to succeed in his asylum appeal unless it can be shown that since AA there is now cogent new evidence casting a different light on the situation of the Berti and/or non-Arab Darfuris. On the contrary, we find:-
 - (a) that the respondent has maintained word for word the position as set out in her 2009 OGN. In the latest version (V.17.0 updated August 1012), the same wording is now contained at 3.9.12 and at 3.10.1 it is stated that applicants can base their claim on membership of the Mussaleit, Zaghawa, Fur “or the other ethnic groups from the Darfur States”.
 - (b) The expert evidence from Mr Verney considers that the current situation in terms of risk for non-Arab Darfuri (including the Berti) has worsened. As already noted, Ms Holmes did not seek to impugn his evidence nor was she able to identify any other evidence pointing in a different direction.
 - (c) Neither the country guidance case of AA nor the current Home Office OGN qualifies its identification of those who are at real risk of persecution by reference to whether an element of the risk they face derives from the fact of being a returnee from the UK, but if that factor is taken into consideration, it seems to us that Mr Verney is right to consider that it is one which increases to some degree the level of risk for such claimants. It is true that according to Mr Verney the Sudanese authorities operate a highly sophisticated surveillance of Sudanese nationals in the UK and so might be expected to know through their intelligence who are those actively associated with the rebel movement and those who are not. However, there is insufficient evidence to show that the actions and decisions taken by the authorities in Khartoum or elsewhere in Sudan, either at the airport or thereafter, are based on such intelligence.

General conclusion

14. In light of the above, our general conclusion is as follows:

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.

Conclusion on the appellant's case

15. For the above reasons we are satisfied that even though not born in Darfur the appellant has established that he faces a real risk of persecution on return as a non-Arab who will be perceived as a non-Arab Darfuri. It is self-evident that the fear or persecution he faces is on account of the Refugee Convention ground of race.

16. In such circumstances it is unnecessary for us to consider the second limb of the grounds of appeal.

17. For the above reasons:-

The decision of the First-tier Tribunal Judge has been set aside for legal error.

The decision we re-make is to allow the appellant's appeal.

Signed

Date

Upper Tribunal Judge Storey