Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02110/2018

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 1st April 2019	**On 30th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR N M G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Howard (Solicitor)
For the Respondent: Mrs H Aboni (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge L Bristow, promulgated on 26th March 2018, following a hearing at Birmingham on 13th March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Sudan, and was born on 1st January 1974. He is 45 years of age. The Appellant appealed against the decision of the Respondent dated 5th February 2018, refusing his claim for asylum, and for humanitarian protection, pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is in the UK with his son, who was born on 21st June 2006, and is aged 12 years now. Together they had left Sudan in June 2016 and travelled to Libya, remaining there for ten days, following which they travelled through Italy and France. They then arrived in the UK on 13th September 2016. The have claimed asylum. They cannot return. The reason for the claim of asylum is that the Appellant is a member of the Nyimang tribe, he is not a non-Arab Darfuri, but has been linked with the National Movement for the Liberation of Sudan (North). His problems arose when his father in February 2016 was minding the family's herd of cattle, whereupon he fell asleep under a tree, only to wake up and to discover that 71 of his cows were missing, having walked off and arrived at military barracks, where the Appellant eventually discovered them, only to be arrested by the military authorities. Subsequently, the next day, the Appellant's cousin telephoned him to say that the cattle had been taken and that his father had been arrested. A day after that, the Appellant travelled to the barracks. He asked about his father and the cattle. He was beaten up. He was hit with truncheons and the butts of guns. He was then detained at the barracks for one and a half months. He was mistreated. He was beaten daily. After six weeks he fell ill. He was told that if the cattle belonged to him then his captors would take that as a confession that he belonged to an anti-government movement. Hearing this, the Appellant told them that the cattle were not his. He was released on 25th March 2016. The Appellant then spent three days in hospital. He was arrested again by security. He was taken to another detention centre and beaten up again. Eventually he was smuggled out of Sudan with his son, and that is how he came to seek sanctuary eventually in the west.

The Judge's Findings

4. In a well-structured and careful determination, the judge, having set out the facts, concluded (at paragraph 34) that the Appellant's claim was not credible for five specific reasons. These were that, it was not credible that such a large number of cattle would just wander off or be herded away, "without considerable disturbance" being caused, it was not credible that the Appellant had failed to provide any other evidence to substantiate his claim given that he remained in contact with his family in Sudan; it was not credible that he had been beaten up for around six weeks and yet was not able "to produce any evidence of scarring or other injury; it was not credible that if he was at risk, then his family, including his wife and father and cousin and other children, remained in Sudan "without encountering

trouble with the authorities"; and that it was not credible that if he was at risk, he would not have afforded himself of the opportunity of claiming asylum in Italy or in Germany, having travelled through those countries before coming to the UK.

5. The claim was dismissed.

Grounds of Application

6. The grounds of application state that in assessing persecutory risk, the Appellant failed to apply the country guidance cases of **IM and AI (risks – membership of Beja Tribe, Beja Congress and JEM) CG [2016] UKUT 188**. Secondly, the judge failed to make findings as to whether internal flight to Khartoum would be unduly harsh for the Appellant if he were required to return there. Third, the judge had failed to give adequate reasons as to why it was not credible that the Appellant's father could not notice the cattle wandering off. Fourth, the judge failed to take into account the fact that the Appellant's wife had moved address and the authorities had gone to the earlier family home. Finally, the judge failed to take into account the implications of Section 55 of the BCIA [2009] given that the Appellant had arrived here with an 11 year old child.

7. On 19th April 2018, permission to appeal was granted on the basis that, given that it was accepted that the Appellant was a member of the Nyimang clan, the judge had failed at paragraph 34 to explain whether this in itself would have exposed the Appellant to a real risk of persecution.

8. On 26th June 2018 a Rule 24 response was entered to the effect that the judge had set out the adverse credibility findings perfectly well at paragraph 34 of the determination. In particular, the judge had explained that the Appellant's family remained in Sudan without any difficulty, and that this was despite the Appellant being of the Nyimang tribe.

Submissions

9. At the hearing before me on 1st April 2019, Mr Howard, appearing on behalf of the Appellant, relied upon the grounds of application, and in particular on Grounds 1 and 2. He submitted that the core aspect of the application before this Tribunal lay in the recognition of the Appellant's ethnicity, as a member of the Nyimang tribe, because once this was accepted (at paragraph 14B), it was then incumbent upon the judge to deal with this, as an aspect of a possible risk of persecution, specifically. This the judge failed to do at paragraph 24, where he had given five specific reasons for why the claim could not succeed.

10. What this meant was that, whereas the judge may well have been entitled to conclude that the Appellant's claim was not credible, insofar as it related to a large number of cattle simply wandering off, without the Appellant's father becoming aware of this, paragraph 34 was not

comprehensive insofar as it failed to deal with the Appellant's ethnicity, as a basis of persecution. This was important because the Upper Tribunal was presently in the process of considering precisely this issue in a case known as **KM v Secretary of State for the Home Department**.

11. Mr Howard handed up a Amnesty International document, dated 24th May 2018, which makes it clear that it is the considered view of this particular organisation that,

> "As is well-known, long-standing conflicts in both Darfur and South Kordofan, where the Nuba Mountains are located, have led to serious and widespread human rights abuses, pervasive insecurity, humanitarian crisis and much force displacement" (see page 1 of 5).

12. In this regard, submitted Mr Howard, it was relevant to point out that Amnesty International had taken the view that

> "It is in light of this context, including the dire humanitarian situation that our organisation considers that individuals from South Kordofan, including those of Nuba ethnicity, would be at real risk of serious human rights violations if they were to be returned to Sudan and expected to try to re-enter South Kordofan." (See page 4 of 5).

13. Furthermore, whilst Mr Howard would readily accept that the cases of **IM and AI** (referred to in the grounds of application at paragraphs 2.1 and 2.2) are not directly applicable insofar as they do not deal with black African Nubans, on which there is currently no country guidance case, the fact remained that the case of **KM** was slated to be a country guidance case, and it was of presently under consideration before the Upper Tribunal. That meant that I should make a finding of an error of law by the judge, and remit the matter back to the First-tier Tribunal, so that the judge can consider the issue of whether ethnicity in itself, of the Nyimang clan, would be enough to raise a risk of persecution, which the judge had failed to do at paragraph 34 of his determination.

14. I asked Mr Howard, as he came to the end of his submissions, whether the concerns of Amnesty International, in relation to membership of the Nyimang tribe alone, creating a risk of persecution, had actually been put before the judge below. Mr Howard drew my attention to page 140 of the Appellant's bundle, where there was the Amnesty International Report, and this was to the effect that no one should be returned to Khartoum. Mr Howard did not specifically suggest to me that, aside from objections to return to Khartoum, the specific point about the return of Nyimang tribe members to Sudan, had actually been put before the judge below.

15. For her part, Mrs Aboni submitted that, although there was documentation now provided before this Tribunal referring to the case of **KM v Secretary of State for the Home Department**, which it was said was before the Upper Tribunal, these documents were not relevant, to the question of whether the judge below had erred in law. The judge had heard this

appeal on 13th March 2018. The letter from Amnesty International that Mr Howard had referred to was dated more than two months' later on 24th May 2018. Second, that being so, the judge's conclusions at paragraph 34, addressing five specific scenarios, was perfectly in order. The judge had also added that the Appellant's entire family remained in Sudan. Finally, as things stood both presently before this Tribunal, and before Judge Bristow below, there was no country guidance case in relation to the return of members of the Nyimang tribe, and this being so, he could not have fallen into error.

No Error of Law

16. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. I come to this conclusion notwithstanding Mr Howard's measured and well-crafted submissions before me.

17. This is a case where the judge did not make a finding that was contrary to an existing country guidance case. He at the outset set out what the issues were (see paragraph 14) recognising that the Appellant was a member of the Nyimang tribe, and that he was a non-Arab Darfuri. The burden and standard of proof were thereafter correctly set out. The factual issues were described. At the end of that, the conclusion was arrived at on each of the specific questions that were raised.

18. The grounds of application are unfortunate in their terminology. The suggestion that the judge's reasons at paragraph 34 are "woefully scant" (paragraph 3.1) do the drafters of those grounds no credit whatsoever. Equally, it is simply not the case that the judge did not give adequate reason as to why it was not credible that the Appellant's father failed to notice the cattle wandering off. To simply state that "the Appellant's father had fell (sic) asleep at the time" (paragraph 3.2) overlooks the fact that the judge in terms addressed this scenario and stated that "such a large herd would not have moved or been moved without considerable disturbance" (paragraph 34A). The issue was addressed. The reasons were given. The judge was entitled to conclude as he did. In the same way, the judge was entitled to draw attention to the fact that this was an Appellant who "remains in contact with his family in Sudan" and that the family, together with other children "remain in Sudan apparently without encountering trouble with the authorities".

19. That left, of course, the question of the Appellant's ethnicity. Mr Howard, who is an experienced advocate in these Tribunals, did well to focus on this single issue. That is he submitted, however, that the judge ought to have referred to the Appellant's ethnicity, as a basis for possible persecution, at the time of the hearing itself, this specific issue was not put to the judge. It is true that the Appellant's bundle (at page 140) does refer to the Amnesty International Report. What this report states, however, is that no one should be returned to Khartoum. There is no

country guidance case to this effect. There is also, insofar as the Appellant's ethnicity as a member of the Nyimang tribe is concerned, no country guidance case in relation to this question.

20. If there is now an appeal before the Upper Tribunal in the name of **KM v Secretary of State for the Home Department**, that is considering this question, this simply confirms that the usual processes of jurisprudential development are taking place, and that cases are being considered on a fact by fact basis. The letter from Amnesty International is dated 24th May 2018. This letter draws attention to the case of **KM v Secretary of State for the Home Department**. The judge below heard the appeal in March 2018. At the time, the judge had no notion of this being the case. Even if it had been put to the judge below, all it demonstrated was that the Upper Tribunal was as yet to promulgate a case that may become a country guidance case.

21. What the outcome of the hearing in **KM** would be is anyone's guess. It is not a basis upon which it can be said that the judge below erred in law, because he failed to consider whether ethnicity would be an issue.

22. For what it is worth, having looked at the judge's conclusions at paragraph 34, set out in five specific sub-paragraphs, it is entirely deducible from those conclusions that the Appellant would not be at risk on the basis of his ethnicity alone of ill-treatment were he to be returned to Sudan, because a large number of his family members remain there, and he remains in contact with them. The judge was not satisfied that the Appellant had ever been ill-treated (see paragraph 34C). All in all, therefore, the decision reached by the judge was entirely open to him.

Decision

23. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

24. An anonymity direction is made.

25. This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Dated

Deputy Upper Tribunal Judge Juss 25th April 2019