Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13467/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 29 April 2019	**On 20 May 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

HAFEZ AHMED OSMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert, instructed by Wilson Solicitors LLP
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Sudan. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 9 November 2018 making a deportation order in respect of him.

2. The appellant has been in the United Kingdom since October 2000. He made an asylum application on the day he arrived and that was refused in December 2000. An appeal against the respondent's subsequent decision

to make directions for his removal was dismissed by an Immigration Judge in 2001. His appeal was unsuccessful and he was removed from the United Kingdom in November 2002 but claims to have re-entered the United Kingdom in July 2003. He was encountered while working illegally in November 2008 and again claimed asylum and that application was again refused. The refusal took place on 29 October 2010. He did not appeal that decision. He absconded on 8 November 2010. He was arrested on 14 May 2017, and on 6 October 2017 he was convicted of sexual offences and sentenced to 30 months' imprisonment.

3. The judge acceded to a request that the Joint Presidential Guidance on child, vulnerable adult and sensitive appellants be applied in light of conclusions of an educational psychologist Mr Sellwood. The judge made the requested adjustments as much as possible, as set out at paragraph 12 of his decision.

4. In the decision letter it was said that the appellant did not have a right to appeal against the decision to deport him or against the decision to refuse his protection claim but he could appeal the decision to refuse his human rights claim. In the decision letter it was said that consideration had been given to his further submissions on the basis of the Refugee Convention and the ECHR but these did not amount to a fresh claim, because his previous asylum and human rights claims were refused on 4 December 2000 and 29 October 2010 and he did not have an appeal pending. In the decision letter the respondent noted what the appellant had said in his previous claim concerning problems he had had with the Sudanese security forces, which included a period of two months' detention and ill-treatment, and noted what he said in his claim of 4 November 2008 about his arrest, detention and interrogation when he returned to Sudan in 2002. Consideration was also given to what he now said about what he would face on return, noting relevant country guidance authorities and evidence from the British Embassy in Khartoum. It was concluded that his submissions did not meet the requirements of paragraph 353 of the Immigration Rules and did not amount to a fresh claim.

5. The respondent considered separately the appellant's Article 8 claim, noting that he had not provided any evidence in that respect. His Article 8 rights were considered in the context of him being a person who had been convicted of an offence for which he had been sentenced to a period of imprisonment of less than four years but of at least twelve months, and it was concluded that he did not meet the private life exception to deportation and there were not very compelling circumstances precluding his deportation. It was said that he did not have a right to appeal the decision to refuse the protection claim but that he could appeal the decision to refuse the human rights claim.

6. The judge noted these points and as a consequence considered the Article 8 human rights claim only, noting that the appellant was not seeking to rely on Article 3 separately from his protection claim.

7. The judge noted the report of Mr Sellwood, the educational psychologist, and also the report of Dr Oette which was an expert report on country evidence respecting Sudan and also the medical report of Dr Cohen. The judge had noted that no other compelling circumstances beyond those which previously formed the basis of his protection claim which the appellant now relied on as giving rise to very significant obstacles to his integration in Sudan had been identified. The judge noted the findings of the Immigration Judge in 2001. The appellant's account in which he claimed the security forces in Sudan had come to his house and he had broken all the windows on their car but they took no action other than to say they would be back to arrest him later, was found to be implausible. Nor had his claim been accepted that he was detained for two months in an unofficial jail and mistreated, since it was found not to be credible that he would be detained for such a long period simply to persuade him to join the army, but he would simply have been handed over to the army or allowed to be collected by the army. It was accepted that the appellant was not a member of a political party and had no political convictions. His account of his detention, given the significant inconsistencies, unexplained facts and lack of detail of his rough treatment and any injuries was found to be wholly implausible. Likewise his account of hiding after escaping detention and then visiting his mother was found to be inconsistent and implausible and it was found to be implausible that the statements that he said were not made by him but made by the interpreter would have been invented by the interpreter. The account of not having fulfilled his military service was found to be implausible and it was not accepted that he had a well-founded fear of persecution from the security forces or the army.

8. The judge noted that the appellant had corrected various parts of his previous evidence, for example he now denied smashing the wingmirror of the security forces' car with a stick, and said that he had been asked by the security forces who detained him why he did not go and fight like his brother and he said he disagreed with the war in South Sudan, and this was again something that had not been mentioned previously. Nor had he previously said that one of his sisters was married to a member of the security forces and it was his brother-in-law rather than his mother who bribed a guard to get him released from detention. He now claimed to have met a leader of the opposition while hiding after his escape from detention and to have been distributing leaflets.

9. The judge noted that this was in the context of someone who had been identified by Mr Sellwood as having significant difficulties with working memory and that his level was only to be found in the lowest 1% of the population. Mr Sellwood also said that the appellant was highly suggestible. The judge noted that the witness statement might have been prepared over some period but the appellant's representatives had not written to explain any particular problems in preparing it. He had produced a statement in January 2019, some nineteen years after the alleged events, despite Mr Sellwood's conclusions. The judge considered

that given the expert findings regarding the appellant's cognitive ability and memory his witness statement of January 2019 was to be treated with some considerable caution.

10. With regard to the plausibility of the appellant's claim of previous detentions in 1998 and 2002/2003, assessed by Dr Oette, the judge considered that several of her conclusions were set in the context of significant issues with the appellant's evidence. For example she said he was not known to belong to any political opposition or an ethnic group considered hostile and that in the absence of further available documentation and information it might have been somewhat unusual but possible that a person in his situation would be subject to detention by the security forces. She considered it might have been considered to be a greater punishment to send him to fight in the war although she commented that this would have been speculation. She concluded that it was plausible that the appellant was detained and tortured in the manner described by him.

11. The judge considered that the appellant's evidence about his treatment after his return in 2002 continued to raise plausibility issues and inconsistencies. He had maintained that he had evaded military service but he made no reference to that being raised by the authorities when they detained him in 2002, and Dr Oette noted also that his evasion of military service was not a factor in the 2002 detention but made no comment about this other than to note that military service was compulsory between 1998 and 2003 and that a statute of limitations meant that he could not be prosecuted after five years. In 2002 he would have been in the midst of the compulsory period and Dr Oette had not in the judge's view properly addressed that issue in the appellant's claim.

12. The appellant had said in his substantive interview that the family home in Sudan was sold after his mother's death and the money used to pay a bribe for his release at the end of 2002, but in the same interview he said his father did not die until 2004 and the house was not sold when his mother died because she died in 2001 and his father was still alive. He had not explained how the house was then sold in 2002 despite his father still being alive then. He maintained in his 2019 witness statement that the proceeds of sale of the family home were used to pay for his release although he claimed that the home was sold before his return and his family remained there as it had only recently been sold. The judge considered that he had still not addressed the position of his father and the clear inconsistency in his previous evidence.

13. With regards to the expert report from Dr Cohen, this concerns scars, most of which were not attributed to torture by the appellant. The scar which the appellant said was being caused by being hit with a broken glass bottle while in detention was said by Dr Cohen to be highly consistent with the appellant's attribution but it was noted that another possible cause would be an accidental wound from broken glass.

14. The judge considered that the appellant's claim taken at its highest was that he was detained on the first occasion because he reacted badly when the security forces came to his home and told him his brother had died while fighting the war and he did not claim any activity with any political organisation previously despite being legally represented when he had the hearing before Immigration Judge Wood. In the 2019 witness statement he claimed to have been involved in helping an opposition leader and distributing leaflets while in hiding but there was no explanation of his failure to mention such a significant element of his claim previously despite being legally represented in 2001. The judge also considered that Dr Oette had not explained how she concluded that it was reasonable to decide that he had been detained and ill-treated if he had already been a perceived opponent of the regime but had reservations about the bribery of the guard as being rather uncommon. The judge considered that even taken at its highest Dr Oette's conclusion about the 2002 detention was limited by being made on the assumption that the appellant had already been a perceived opponent of the regime and the judge was not satisfied that that was the case.

15. He had failed to claim asylum again when he returned to the United Kingdom and that was considered to be inconsistent with his claim that he came here as the only safe country for him. The judge did not accept he had been detained and ill-treated in 2002 and that the appellant had continued to fabricate problems in Sudan. Dr Oette said that the appellant was probably listed in security records held by security agents though it was difficult to assume this without any degree of certainty considering the date of the claimed detentions and the judge considered that he had found that the detention did not take place and therefore he would not be listed in the security records. Dr Oette relied on the appellant's description of security agents asking his sister in Sudan about his whereabouts to conclude that he was on a wanted list, but she provided no details of what wanted lists were operated by the Sudanese authorities and the judge therefore found this statement to be inadequate to provide evidence of any real weight that the appellant was on a wanted list.

16. As regards the appellant's claimed involvement with the Justice and Equality Movement (JEM) taken at its highest this involved no more than him contacting them by telephone to find out what was happening in Sudan.

17. The judge noted what was said in the country guidance cases and the background evidence concerning risk on return and concluded that the appellant had none of the political features which might give rise to risk on return. The appellant had given little reason why he had been unable to resume contact with his sister in Sudan with whom he had had contact as recently as June 2018, and considered, noting his history of working as a farmer and as a trader and working illegally in the United Kingdom, that he had skills and work experience which he could use to seek employment in

Sudan. As regards Dr Cohen's conclusion that further assessment was needed and that although the appellant did not meet the full diagnostic criteria for specific diagnosis of mental health problems, he had features of post-traumatic stress disorder with probable mild depression, it was noted that mental health treatment was available in Sudan both as an inpatient and as an outpatient.

18. The judge noted also Dr Cohen's conclusion that in her opinion removal to Sudan would significantly exacerbate the appellant's mental health condition since he had described great anxiety about that and had given his description of being detained and tortured a second time in 2002. However the judge, having found that the appellant had not shown he was detained and tortured in 2002, concluded that this undermined Dr Cohen's conclusion. In sum therefore the judge decided that the appellant would not face very significant obstacles to reintegration in Sudan and going on to consider the matter under Article 8 outside the Rules concluded that the respondent's decision was proportionate, bearing in mind the considerations set out at section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 and bearing in mind the appellant's criminal record.

19. In his submissions Mr Gilbert argued that the judge had erred in not considering the protection claim. As a consequence he had erred with regard to the standard of proof employed in relation to the Article 8 claim since the relevant issues, although they had been considered, had been considered in the context of the balance of probabilities as set out at paragraph 27 of the decision, rather than the real risk test appropriate to protection claims. This was an error of clear materiality.

20. As regards how the judge evaluated the evidence subsequently, with regard to the point made about the representatives not explaining problems in preparing the statement, this was procedurally unfair and should have been put to Counsel at the hearing to enable evidence to be produced. The expert had noted difficulties in the production of the witness statement and it was clear from paragraph 12 of the evidence that when speaking to the interpreter the appellant had needed a lot of time to answer the question and it was hard to see why this evidence was not regarded as important. There was no Rule requiring such difficulties to be identified by the representatives and this arguably strayed into speculation.

21. With regard to the judge's findings at paragraph 72, the judge had drawn an adverse interest but the evidence had not been considered and it was addressed at paragraph 21 of the appellant's witness statement that he had been told by the agent to say his father was deceased. It was clear from Dr Sellwood's evidence that the appellant was suggestible. This was clearly material to the assessment of the evidence. Also it was illogical for the judge to say as he did about Dr Cohen not addressing the possibility of the scar having been caused by previous work as a farmer in Sudan given

that it was noted that she had said that another possible cause of the scar would be an accidental wound from broken glass. The judge had failed at paragraphs 75 and 76 to take the appellant's statement at paragraph 21 into account and had failed to take into account the appellant's suggestibility. It had been noted by Dr Sellwood that he would be likely to experience difficulties in giving evidence. His evidence had not been considered through the proper prism.

22. With regard to what the judge said about the expert evidence, Dr Oette had said that the appellant was plausible and not reasonable and that was arguably a lower threshold and the judge had failed to take into account the expert's methodological approach as set out in her report. The judge had failed to reason her objections. With regard to the findings at paragraph 79, the appellant had said that he feared being returned and had no money to appeal and that explanation had not been considered. With regard to the issue at paragraph 84, the Tribunal was referred to paragraph 80 of the expert report which set out detail about the current procedures and that should be taken alongside the appellant's evidence as to his previous treatment. The judge had failed to take important aspects of the evidence into consideration and that these were arguably material.

23. In his submissions Mr Kotas argued that the judge had been right to say that there was only a human rights appeal before him. If the appellant was entitled to run the protection elements as a matter of fact or law that would rob paragraph 353 of its utility. Reference was made to what had been said by the Supreme Court in Robinson [2019] UKSC 11.

24. As regards the substance of the claim, there were section 8 delay points which were not explained by the appellant's vulnerability or suggestibility. He had come to the United Kingdom in 2001 and had an unsuccessful appeal and there was no appeal against the later refusal decision and then a delay until May 2017. It changed the fundamentals of his claim, as noted at paragraph 65 of the judge's decision. There was no implied criticism of the representatives at paragraph 67 and the judge was simply entitled to note the point and identify the fact of memory problems yet he was able to recall so much and this the judge was entitled to find was surprising. The criticisms and reservations about the expert evidence were fair and rationally open to the judge. The claim had been taken at its highest, for example at paragraph 75 it was necessary to be careful about evidence which had not been before the judge in 2001 at a time when the appellant was legally represented. His instructing solicitors would have taken proper steps to ensure he was understood and the medical issues made clear. Embellishment was noted at paragraph 76 and this was evidence not mentioned before. There were ample reasons for rejecting the claim.

25. By way of reply Mr Gilbert argued that Robinson was concerned with a "pending appeal" and that was not so in this case. Paragraph 353 was a bar on the ability to raise human rights issues before the judge where

there were no appeal rights but when appeal rights were available, that had no purchase. There could not be a severance from the appeal or parts of the claim.

26. The judge had noted points which went to risk on return and the appellant's vulnerabilities including the expert evidence and the country evidence and none of that had been before the Secretary of State and in respect of which the Secretary of State had said there was not a fresh claim. There was a duty on the judge to consider whether or not the deportation would be in accordance with the law.

27. The section 8 point was not well-founded as the question of errors of law in the decision, did not involve rearguing the case and it was only relevant with regard to the failure to consider evidence as to why there was delay in making an asylum claim. As regards the point as to whether or not the previous representatives were criticised, that was not what was being argued. The inherent cognitive disability identified subsequently had not been identified at the earlier hearing. That was not a criticism of the judge or the representatives in 2001 but the point was that it had not been considered previously and that was relevant to credibility and the failure to assess that.

28. I reserved my determination.

29. On the jurisdiction point, it is I think sufficiently clear from the decision letter that the respondent did not accept that there was a fresh claim with regard to the protection issues but that there was with regard to the Article 8 issues. The judge proceeded to assess the claim on that basis.

30. No authority has been put before me to show or indicate that it is not open to the Secretary of State to come to a decision which accepts part of a claim as being a fresh claim and another part as not. I can see no sound basis for the Secretary of State being precluded from making such a distinction. Considering the matter purely in the abstract, there might have been no Article 8 claim at all at a time when the previous application was made which may have focused purely on protection issues. Alternatively it may be that though the protection issues are not seen as having changed to any significant degree, entirely fresh matters are raised in an Article 8 claim subsequently, for example the existence of a family which did not exist at the time of the earlier claim. I can see no reason in principle why the Secretary of State as a consequence is prevented from denying that part of the claim is a fresh claim while accepting that another part of it is. The proper challenge to a decision that paragraph 353 applies to preclude the claim or part of the claim being a fresh claim is for there to be a judicial review of that part of the decision. No doubt that is still an avenue that the appellant can pursue, although he would have to overcome the issue of delay. But in my view it was fully open to the judge to conclude that as a consequence of the application of paragraph 353 to the protection claim that all there was before him was the Article 8 claim,

and as a consequence the jurisdictional challenge and the challenge with regard to the standard of proof both, in my judgment, fall away.

31. The remaining issue is that of the judge's evaluation of the claim in light of the evidence before her.

32. She accepted that the Joint Presidential Guidance on child, vulnerable adult and sensitive appellants should be applied, and was clearly aware of that throughout her consideration of the claim. The correct legal tests were applied and the claim was considered in the context of those tests. It was open to the judge to note at paragraph 65 that there were clear differences between the earlier claim and the claim now being made. I agree with Mr Kotas that the remark at paragraph 67 of the judge's decision that the representatives had not written to explain any particular problems in preparing the statement is no more than a comment in passing and has to be seen in the context of noting at paragraph 68 that the January 2019 witness statement is to be treated with some considerable caution.

33. I do not think the judge has been shown to have erred with regard to her assessment of Dr Oette's evidence. It was no doubt a careful and thorough report, but it was open to the judge to contrast what Dr Oette said about the fact that it would be somewhat unusual but possible that a person in the appellant's situation would be subject to detention by the security forces and yet conclude that it was plausible that he was detained and tortured as described by him. Clearly this was a matter that had to be and was assessed by the judge in the context of the proper standard of proof before her.

34. It was open to the judge to express the doubts that are set out at paragraph 71 concerning the military service point, in that there was no addressing of the fact that military service was compulsory at the time of the second claimed arrest and yet that was a time when the appellant was liable to military service. There is however a point with regard to paragraph 72 concerning the explanation he gave of being told by the agent to say his father had died which is not a point that was picked up on by the judge. Also the final sentence of paragraph 73 is redundant in light of the previous sentence where it is clear that Dr Cohen accepted that a possible cause would be an accidental wound from broken glass. There is however the contrast between what the appellant said when the claim was taken at its highest at paragraph 75 and the more recent statement that he was involved in helping an opposition leader. There was no explanation for the failure to mention that earlier, as the judge noted, and that was relevant to the evaluation of the claim in light of the background evidence set out at paragraph 74. It was also open to the judge to have a concern about Dr Oette's evidence about the bribery issue in that she considered that the ability of the family to bribe guards to secure his release could be regarded rather uncommon and yet to say it was reasonable to conclude that he was detained and ill-treated. As the judge noted at paragraph 78,

that conclusion was in any event limited by being made on the assumption that he was already a perceived opponent of the regime and it was open to the judge to find that he was not such a person.

35. Again the point is made on the appellant's behalf that he gave an explanation for the failure to claim asylum when he returned to the United Kingdom which the judge did not specifically address. However the conclusion at paragraph 80 that he had not shown he was detained and ill-treated in 2002 was open to her. She noted at paragraph 82 that he had admitted lying in the original claim including saying his father was dead when he was not and the concerns identified by the judge were properly considered by her as being implausible and/or inconsistent. In light of the finding that the detentions did not take place the issue of whether his name would be on the list as such a person falls away. The claimed involvement with JEM was of such a limited nature that it is of no materiality.

36. The judge went on to note the country guidance and the background evidence and the fact that the appellant did not meet the criteria of people facing risk on return and noted also that he has a sister in Sudan with whom he has had relatively recent contact and he has a history of working both in Sudan and in the United Kingdom, even bearing in mind the cognitive and memory issues identified and the further health problems identified by Dr Cohen in respect of which it appears there is treatment available in Sudan.

37. Bringing these matters together, I consider that taken as a whole the judge was entitled to find as she did that the appellant would not face very significant obstacles to reintegration in Sudan. Also her evaluation of the Article 8 issues outside the Rules is detailed, careful and sound and has not been shown to be wrong. I consider that her decision to dismiss the appeal was properly open to her and no error of law in it has been identified. Her decision is accordingly upheld.

38. No anonymity direction is made.

Signed Date 9 May 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

This is a fee exempt appeal.

Signed Date 9 May 2019

Upper Tribunal Judge Allen