AB (return of Southern Sudanese) Sudan CG [2004] UKIAT 00260

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 10 August 2004

Date Determination notified:

17 September 2004

Before:

Miss K Eshun (Vice President)
Mr P R Lane (Vice President)

Secretary of State for the Home Department

APPELLANT

and

RESPONDENT

Representation:
For the appellant: Mr M. Blundell, Senior Home Office Presenting Officer
For the respondent: Miss E Rutherford, Counsel, instructed by Messrs Blakemores

DETERMINATION AND REASONS

1. The appellant, who is the Secretary of State for the Home Department, appeals with permission against the determination of an Adjudicator, Ms S.B. Kirvan, sitting at Walsall, in which she allowed on human rights grounds the respondent's appeal against the decision of the Secretary of State to give directions for the respondent's removal from the United Kingdom.

2. Unfortunately, when permission to appeal was given, incorrect headings and other information appeared on the document setting out the reasons for decision. It is, however, plain from those reasons that the Vice President who granted permission had before him the determination of Ms Kirvan and the Home Office grounds of appeal in relation to it, and that he accordingly has in practice granted permission in relation to that determination. Miss Rutherford confirmed to the Tribunal that she could not seek to argue otherwise.

3. The case before the Adjudicator was that the respondent had been persecuted in Sudan by reason of his political opinion. His father had been an active member of the Sudan Liberation Movement (SPLM) who had been detained on three occasions and then left to join the military wing of the movement, namely, the SPLA. The appellant and his mother were then arrested and detained by the security services for a month, during which time he was ill-treated and tortured. After this he left Malakal (in the south of Sudan) and studied car mechanics. This appears to have been in Omdurman, Khartoum. His studies lasted a year and a half but he was then called back his mother to Malakal. She said she was under observation from the security services. The appellant accordingly sent his mother to Uganda. When they released she had gone the security forces arrested the appellant himself and again tortured him. He was released after twenty days, having promised to cooperate with the authorities. He returned to Omdurman and worked there for two months before security officers arrested him. Once more, he was tortured but released on the basis that he would cooperate. The appellant thereupon went into hiding and escaped via Port Sudan to the United Kingdom. Following his arrival here, the appellant said that the he had been active supporter of the SPLA in this country. He said he would be at risk of being killed if he were now returned to the Sudan (determination, paragraphs 6-9).

4. At paragraph 23, the Adjudicator stated that she considered the credibility of the appellant to be a 'key issue in this case'.

5. It is manifest from paragraphs 23 to 30 of the determination that the Adjudicator had serious issues with the appellant's credibility. At paragraph 23, she observed significant discrepancies in the various statements made by him, which she did not consider had been satisfactorily explained (paragraph 24). She also noted that the appellant 'said that the organisation he was supporting did not have a specific name'.

6. At paragraph 25, the Adjudicator records that the appellant told her at first that he was in touch with his mother who was 'in the southern area' of Sudan. He then said that 'now she is in Uganda'. He said that he had meant to say 'Uganda'. At paragraph 26, the Adjudicator noted that at this point in the proceedings the appellant was being questioned by his own representative 'and was not under pressure'. The Adjudicator was 'not inclined to think he did not make a mistake, but rather that he was speaking honestly in his answer when he said she was in S.Sudan a month and a half ago'.

7. Before the Adjudicator, a letter was produced in support of the appellant by someone calling himself the chairman of the SPLM, Midlands Chapter. The Adjudicator describes this letter at paragraph 21 of the determination. At paragraph 22 the Adjudicator records that the appellant came to court with a witness, Mr Wai Dut, who was not the writer of the letter but who gave evidence on behalf of the appellant. Mr Dut said that he was 'political affairs secretary of the SPLM/UK and Ireland' and that in June 1993 he had been able to meet the appellant's mother at a refugee camp 'near the Ugandan border'.

8. At paragraph 27, the Adjudicator makes it plain that she was unimpressed by the evidence of Mr Dut who 'did not offer any proof of his role in the SPLM, or of his recent visit to Uganda, except his oral evidence. He produced a SPLM membership card which expired on 4.2.2003. In the circumstances I am not satisfied that I should rely on his evidence and do not.'

9. At paragraph 28 the Adjudicator found that the appellant 'has not been entirely honest in his oral evidence and that this also calls into question part of his account of his claimed persecution in the Sudan'. At paragraph 29, the Adjudicator considered it highly unlikely that the appellant would have been released three times, as he suggests, if he were of any interest to the authorities, when on his own account he had nothing to tell them. 'This, coupled with the discrepancies between the self-completion [sic] and the less than honest account of his mother's recent whereabouts lead me to find that the appellant has not satisfied me even to the lower standard of proof that he was detained as claimed'.

10. As for the respondent's support for the SPLM in the United Kingdom, the Adjudicator found at paragraph 30 of the determination that this must 'be based primarily on his activities in the UK which he says has involved him in attending demonstrations, including outside the Sudanese embassy in London which was filmed by some Embassy employees.' Apparently referring to the SPLM letter and to the evidence of Mr Dut, the Adjudicator went on to find that the SPLM in the United Kingdom 'must have their information about [the respondent] in Sudan primarily from him. The [respondent's] witness clamed that they have their method of checking a person's credentials, and it is not possible for me to rely on this, on trust, unless the evidence has been made available for the hearing.'

11. At paragraph 31, the Adjudicator found that, in any event, the respondent said that he had only helped his father with meetings at home in the Sudan and that these were 'secret meetings and people attending would appear as if guests'. The respondent had 'also helped his father collect and sell cattle to raise funds for the SPLA'. However,

after his father had left their home in Sudan in 1997, the Adjudicator observed that 'it would seem that no political work was done by the [respondent] after that, in Uganda'. At the end of paragraph 31, the Adjudicator accepted the respondent's account of his involvement: 'It seems straightforward and unembellished. I also accept the account given by [the respondent] of his activities with the SPLM in the UK.'

12. At paragraph 32, the Adjudicator noted that paragraphs 5.42 and 5.43 of the CIPU Assessment on Sudan (April 2003) stated that 'Leaders and high ranking members of opposition parties, who are already known to the security forces, may encounter problems with the security forces on return to Sudan'. It also states that there is no law, or similar, in force issued to border guards stating that all returning Sudanese nationals who have been abroad for more than one year should be arrested and detained for questioning.'

13. At paragraph 33, the Adjudicator contrasted that information with what was stated in a letter from the UNHCR of 1 July 2002 to the Refugee Legal Centre where there is 'mention of an *administrative decree* [my italics] of 28.2.1993 issued to border points to authorise the arrest of all returning Sudanese who left after the 1989 coup and have been away for more than one year. Returning asylum seekers are questioned at points of entry by security personnel. UNHCR is aware of some who have been subjected to detention without trial on return'.

14. At paragraph 34, the Adjudicator noted that the same letter referred to 'particular dangers' for 'southern Sudanese from the south' who 'are returned to Khartoum. They may be placed in camps for the internally displaced and will be likely to be compelled to contend with the harsh living conditions and physical insecurity'. The Adjudicator was 'satisfied that the UNHCR letter should be taken into account in my decision-making'.

15. At paragraph 36, the Adjudicator concluded that the respondent had not established that he had suffered persecution by reason of his political opinion, nor had he established that he would be at real risk of further persecution under the Refugee Convention, if returned. The Adjudicator accordingly dismissed the appeal on asylum grounds. No challenge to that decision has been made by the respondent.

16. Notwithstanding her earlier findings, the Adjudicator proceeded at paragraphs 37 to 39 of the determination to allow the appeal by reference to Article 3 of the ECHR. Her reasons are contained in paragraph 38:-

> '38. Article 3 prohibits the use of torture, or inhuman or degrading treatment. In accord with my findings

> on the Asylum claim I am not satisfied that the appellant has established that he is at risk of such treatment should he be returned on the basis of his political activities. However, I also have to consider whether he may be at risk as a returned unsuccessful asylum seeker. In making this assessment I have followed the guidance given in the UNHCR letter of 1.7.02. I find that he is very likely to be subject to investigation by the security services on arrival. The UNHCR are aware that some have been detained without trial, and international agencies do not have access to detainees, including the Red Cross. In addition he would not only be a failed asylum seeker but also one who hailed from the south of Sudan. He may well be prevented from travelling to the south but placed in a camp with harsh living conditions and physical insecurity. I also take into account that the appellant has been active with the SPLM in the UK, and has probably come to the attention of security forces in Sudan. I also accept that the appellant does have a family background of SPLM membership, which again could make him vulnerable on entry.'

17. Given those circumstances, and the 'human rights record of the government' the Adjudicator decided that the appellant would be at real risk of treatment contrary to Article 3 of the ECHR if he were to be returned to Sudan.

18. That finding is challenged by the Secretary of State in the grounds of appeal. In his submissions to the Tribunal in support of those grounds, Mr Blundell argued that the Adjudicator had erred in law in placing weight upon the assertion that there was in force an administrative decree whose effect was that those who had been away from the Sudan for more than a year would be detained and investigated. The Adjudicator was wrong to prefer the evidence (such as it is) of the UNHCR letter of 1 July 2002 to that in the CIPU Assessment of April 2003. The Tribunal has in fact considered the whole question of the so-called administrative decree in detail in ***AA*** **(Kreish ethnicity, Decree 4/B/307) [2004] UKIAT 00167.**

19. The Tribunal finds that the Adjudicator has materially erred in law in placing undue weight upon the supposed administrative decree and that this is one of a number of significant errors in paragraph 38 of her determination which led her at paragraph 39 to the wholly unsustainable

conclusion that (have dismissed the appeal on asylum grounds, in the light of her credibility findings) the appeal nevertheless had to be allowed by reference to Article 3.

20. The Tribunal at paragraph 10 of ***AA* (Sudan)** sets out the English version of the decree:-

> 'It is hereby decided to detain any Sudanese person returning from abroad who has left the Sudan after the Revolution of Salvation – and resided for abroad for a period of one year or more. He is to be transferred to the headquarters of the Public Security Department for investigation and for carrying out the necessary security measures.'

21. At paragraph 11 of its determination, the Tribunal noted that investigations had failed to uncover any sign that such a decree existed and that, even if it had, it would have been superseded by the National Security Act 1999. The Sudanese lawyer who provided this information went on to say that 'There was a general feeling that the government of Sudan was encouraging refugees to come home as this might work as good publicity for them abroad.'

22. In addition, the Netherlands Embassy in Cairo is quoted at paragraph 12 of the Tribunal determination as stating that there is no decree or regulation with a 4/B/307 reference and that 'Sudanese nationals who have been abroad for more than one year do not have to report the Security Service, police or any other investigative agency in Sudan for an interview. On the other hand, those who have been abroad for more than one year do have to report to the tax authorities in Sudan on their return.'

23. At paragraph 13, we find that a Danish Fact Finding Report was informed that 'Sudanese citizens in possession of a valid national passport could enter Sudan without any difficulty. However, if they only had a temporary travel document they would be questioned about their circumstances on arrival in Sudan. This applied only to those returning voluntarily to Sudan. The source had no information about conditions on entry for Sudanese citizens who had been forcibly repatriated to Sudan'. In the same passage it is noted that 'Germany had never had problems with the deportation of rejected asylum applicants to Khartoum, either on entry or following entry'.

24. At paragraph 15 of its determination, the Tribunal found that if the decree 'ever existed it is not in force. If it or its aims were being pursued with any sort of vigour at all, we cannot envisage that the various embassies in Khartoum and Cairo would be holding the views that they do about what is actually happening to returnees in Sudan.'

25. No evidence has been placed before the Tribunal in the present case to call into question the conclusions of the Tribunal in ***AA (Sudan).***

26. Apart from the deficiencies in the UNHCR letter of 1 July 2002 concerning the so-called administrative decree, which misled the Adjudicator, paragraph 38 of her determination reveals that she made various other inferences in respect of that letter which are not borne out by what the letter actually says. In the third paragraph on page 2 of the letter, Mr Mahr states that 'UNHCR is aware of some individuals who have been subjected to detention without trial on their return to Sudan. The length of detention is uncertain and international agencies, including the ICRC, do not have access to detainees'.

27. The Adjudicator refers to this passage in paragraph 38 of her determination. It is, however, plainly incapable of constituting evidence that there is a real risk that anyone in the position of the respondent would find himself in such detention.

28. This is so, notwithstanding that the respondent originated from the south of Sudan and is said to be of Nuba ethnicity.

29. At paragraph 17 of the Tribunal's determination in ***AA (Sudan)*** it is stated that 'We are further not aware of any information that shows that the Sudanese authorities in Khartoum are treating returning southerners in such a way as to put them at real risk of Article 3 harm.' The Adjudicator's finding in the present case runs entirely counter to this. As the Adjudicator had herself observed, a ceasefire between the Sudanese government and the SPLA has been in force since January 2002. Miss Rutherford urged us to find that, on the objective evidence, ceasefire violations are still taking place and that accordingly, as a southerner, the respondent could find himself subjected to more intense scrutiny on return.

30. The most recent information regarding the ceasefire is to be found at paragraph 6.132 to 6.134 of the CIPU Report of April 2004. This notes that the ceasefire was extended once more in January 2004 by agreement between the government and the SPLM/A. Paragraph 6.134 is worth quoting in full:

> '6.134 The IRIA reported that the ceasefire resulted in the establishment of an international presence; a cessation of hostilities and reduction in violence; humanitarian access and aid; a check on the alarming decline of the food security situation in the SPLM/A controlled areas of the region. A

> Deutsch Presse Agenteur article of January 2004 reported that there had been no major infringements of the ceasefire since the agreement was signed in January 2002 and that "Of 54 investigated alleged ceasefire allegations, only 9 cases had been considered real violations".'

31. The UNHCR letter of 1 July 2002 has only this to say by way of specific comment on Southerners:

> 'Further factors to be taken into account are the dangers posed where Southern Sudanese who hail from the south are returned to Khartoum. Such persons may be placed in camps for the internally displaced and would likely be compelled to contend with harsh living conditions and physical insecurity'.

32. The Adjudicator at paragraph 38 paraphrases the last part of this passage, with the additional comment that the respondent 'may well be prevented from travelling to the South'.

33. It is, however, difficult to see how any of this, even taken together with other factors, could lead the Adjudicator to the conclusion that there is a real risk of Article 3 violation in the present case. Even accepting that the respondent originated from a place in the south of Sudan, on his own evidence he has lived, studied and worked for significant periods in Omdurman, outside Khartoum. There is no evidence that he would wish or need to make his way ot the south of Sudan, if returned. There is no evidence to show that he would be at real risk of finding himself in a camp for displaced persons. Even if he did, the UNHCR letter contains no assertion that conditions in a camp for the internally displaced, albeit involving harsh living conditions and physical insecurity, would be such as to cross the high threshold required for Article 3. The respondent is, we note, an apparently able-bodied man of twenty-eight.

34. We accept that the US State Department Report of 2003 contains references to continuing problems of various kinds in the south of Sudan, involving both the Sudanese government and the SPLM. The overall picture, however, is plainly one of improvement. Indeed, at page 7 of the report (second full paragraph) it is stated that in August 2003 President Bashir 'promised to release all political detainees as part of peace talks with the rebel SPLM/A. By November, a number of political prisoners were released, including Hassan Al-Turai, former Speaker of the National Assembly and Head of the PNC. However, security forces detained a number of persons after Turabi's release, including many

from Darfur. An undetermined number of Darfurians remained in detention at year's end'.

35. At the bottom of page 17 of the same report, it is stated that large numbers of southerners, as well as those from Darfur, 'continue to live in squatter slums in the Khartoum area'. Reference is also made to the government's announced plans to upgrade conditions in certain camps for displaced persons. As we have already observed, however, there is no evidence to show that this respondent would need to avail himself of such a camp or live in a squatter slum but, even if he did, Article 3 is not thereby invoked.

36. At page 18 of the US State Department Report, we find that 'improved security in the south due to the ceasefire has increased the risk of return of displaced populations into areas of origin that have been severely affected by the war and lacking basic services. There were reports that a number of refugees and displaced persons voluntarily returned to the country during the year, particularly to the Nuba Mountains region.' Mr Blundell also drew the Tribunal's attention to a passage at page 24 of the report, where, unlike 2002, there were during 2003 no reports that militia raiders supported by forces controlled by the government, systematically raided villages in Bahr El-Ghazal and Upper Nile.

37. The position, then, is that neither the fact that the respondent will be returned as a failed asylum seeker who has been absent from the Sudan for more than a year, nor the fact that he has originated from the south of that country, will be reasonably likely to result in him being subjected to significant investigation (let alone detention) by the immigration authorities at Khartoum Airport.

38. Miss Rutherford sought to counter this conclusion by pointing to the fact that the Adjudicator at paragraph 38 of the determination accepted that the respondent 'does have a family background of SPLM membership, which again could make him vulnerable on entry'. The problem with this submission, however, is that the Adjudicator has made a specific finding that the activities of the respondent's father and the respondent himself in Sudan did not result in the respondent coming to the adverse attention of the Sudanese authorities.

39. Finally, Miss Rutherford relied upon the finding of the Adjudicator at paragraph 38 that the respondent 'had been active with the SPLM in the UK, and this has probably come to the attention of security forces in the Sudan'.

40. In the light of the Adjudicator's findings regarding this issue and, in particular, the evidence of Mr Yai Dut, to which we have already

referred, Mr Blundell was, the Tribunal finds, correct to categorise this purported finding at paragraph 38 as entirely unreasoned. The Adjudicator gives no clue as to why she concluded that the respondent 'has probably come' to the attention of the Sudanese authorities. Miss Rutherford asked us to find that he has been captured on film outside the Sudanese embassy in London. It is, however, extremely difficult to see how a photograph of what would be an unknown face in a crowd could be linked to the respondent, upon his return. As Brooke LJ held in ***Danian*** **[2000] IAR 96**, it should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the claimant's home country, either because they will not come to the attention of the authorities of that country or because of the opportunistic nature of such activities, which will be apparent to all, including those authorities.

41. In the present case, the inexorable logic of the Adjudicator's finding that the respondent had fabricated key parts of his account, including being detained by the Sudanese authorities, means that the respondent's alleged political activities in the United Kingdom must indeed be regarded as opportunistic. In the circumstances, cogent evidence is needed to show that elements of the Sudanese security services in the English Midlands, even supposing they exist, have found out that the respondent had been distributing leaflets on behalf of the SPLM. There is no such evidence.

42. In conclusion, the Tribunal finds that:

    (a) there is no evidence before it to cast doubt upon the Tribunal's findings in ***AA (Sudan);***

    (b) there is no evidence to show that, at the present time, being a person who originates from southern Sudan is such as to put him or her at real risk on return to Khartoum;

    (c) conditions in displaced persons camps and squatter slums in Khartoum, for those originating from southern Sudan, are not a violation of Article 3 of the ECHR, and

    (d) the UNHCR letter of 1 July 2002 is today of little evidential value.

43. For the reasons we have given, the Adjudicator reached legally unsustainable findings in relation to Article 3.

44. This appeal is accordingly allowed.