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Judgment: approved by the Court for handing down | *Delivered:* **20/02/09**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ADAM BALA OMAR

APPLICANT;

AND

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT.

AN APPLICATION FOR LEAVE TO APPEAL AGAINST A DECISION OF THE ASYLUM & IMMIGRATION TRIBUNAL PURSUANT TO SECTION 103B OF THE NATIONALITY, ASYLUM & IMMIGRATION ACT 2002 (AS AMENDED)

Before: Higgins LJ, Girvan LJ & Coghlin LJ

HIGGINS LJ

[1] This is an application under Section 103B of the Nationality, Asylum and Immigration Act 2002 for leave to appeal to the Court of Appeal. At the conclusion of the hearing we refused leave and stated that we would give our reasons later, which we now do.

[2] The applicant is a Sudanese national. On 17 January 2007 the applicant approached the Northern Ireland Council for Ethnic Minorities and a claim for asylum was commenced on his behalf. At a screening interview the applicant alleged that he left Sudan on 20 December 2006 and through an agent obtained passage on a boat leaving Libya on 23 December 2006 bound for Belfast. He said he had been detained in November 2006 in Sudan transporting weapons to members of the Justice and Equality Movement. Members of this movement attacked the prison in which he was held and he escaped. He claimed that if returned to Sudan he risks persecution as a result.

He stated he had never been to the United Kingdom before and never had his fingerprints taken. His claim for asylum was assessed and refused principally on the ground of credibility. He appealed against that decision and his appeal was heard by an Asylum and Immigration Tribunal sitting in Glasgow (Immigration Judge Farrelly). At the hearing the applicant admitted that he had been in the United Kingdom before and that in 2003 he had made a claim for asylum in the false name of Abdelaziz Alladam and that the facts on which he relied in his present claim were false. However he contended that the account he gave in 2003 was correct. He said he had fallen in love with the daughter of an Arab businessman and that his family asked her family for permission for them to marry. While awaiting their decision his home was attacked by men from her family using firearms and his sister was killed. His family left the area. Six months later his girlfriend came to his new home saying that her family had arranged for her to marry an elderly man employed by the government. His girlfriend stayed at his home but the following week he was arrested and accused of opposing the government and detained in prison. His relatives arranged for his release from prison two months later and he went into hiding. Eventually he left Sudan and travelled to Libya from where he went on to Italy where he made a claim for asylum. He then proceeded on to the United Kingdom where he claimed asylum, but his claim was rejected and he was returned to Italy. He returned to the United Kingdom in 2005 and eventually made a claim for asylum in Belfast.

[3] Initially the applicant claimed that he was a member of the Justice and Equality Movement but then admitted that he was not a member, but that all his relatives were members. The credibility of his account was challenged. In a comprehensive judgment, in which he reviewed the salient facts and the relevant authorities, the Immigration Judge found the applicant's account incredible. It had been suggested on behalf of the applicant that he should be given credit for stating that the true account was that given in 2003, when the 2007 account was a stronger case for asylum. The Immigration Judge commented that the applicant had no alternative but to rely on the 2003 account as his 2007 account required him to be in Sudan, but there was clear evidence that he was not present in that country. At paragraph 64 and ff the Immigration Judge set out his conclusions –

> "64. Ultimately, I find the 2003 incident unbelievable. This is reinforced by the circumstance of the making of the claim.
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> 65. If I am wrong and there is an element of truth in the claim I agree with the caseworker that with the passage of time any difficulties should have eased. It is open to the appellant to move to a part of the country where he will not encounter this girl or family. I also do not see any Convention reason

engaged on this set circumstances. The appellant's difficulties on his account appear to be purely domestic.

66. The appellant's representative has suggested a broader risk by reason of his ethnicity and imputed political opinions. This more general claim is based on the premise of him originating in a particular part of the country which is considered a anti government 'hot spot'. Whether he is from such an area would be at issue.

67. The country information does indicate that non-Arabs living in certain parts Darfur would be particularly at risk. If the appellant where from a region were there was regular rebel activity he would be at particular risk. This is related to his ethnicity. Related to his ethnicity is that such person's have imputed to thorn political beliefs namely, an opposition the regime.

68. The appellant has been asked about Darfur and I am prepared to accept that he is from there. I do not recall any objective evidence confirming the area he says he came from is considered a hot bed of rebel activity. I am prepared however to accept, bearing in mind the low standard of proof, that he may have lived in an area which experienced trouble with the authorities and was considered to be an area associated with anti government activity.

69. However, I find it a reasonable option should the appellant be from such a locale to relocate within the country. He is a single man who enjoys good physical health. I do not find the evidence supports any real mental illness. As has been pointed out the medical report is not from a consultant psychiatrist. Furthermore, the report is premised on an untrue factual account. Whilst he claims he is a farmer he has been out of that occupation for a number of years. He also has had the experience of living in an urban environment in Europe. He states he is never been to Khartoum. However, I believe it reasonable to expect him to adapt to life there.

> 70. In summary, I do not believe the appellant's account. If there were an element of truth to it or that he faced a real risk of persecution either by reason of his ethnicity or imputed political beliefs this could be removed by his relocating. This could be done by not living in a 'hotspot'. Furthermore, the risk could be considerably reduced further by his relocation outside of Darfur. For the same reasons I do not see any real risk of breach the appellant's human rights. The same considerations apply with regard to humanitarian protection. The appellant has not made out a case that his Article 8 rights would be breached."

[4] The applicant then applied under Section 103A of the Nationality, Immigration and Asylum Act 2002, as amended, for an order requiring the Asylum and Immigration Tribunal to reconsider its decision on the ground that the Tribunal had made an error of law. This application was on the sole ground –

> "that the Immigration Judge had misdirected himself as to the effect of the relevant country-guidance case in a case where an appellant is of non-Arab Darfuri origin and from an area considered as a rebel 'hotspot'."

[5] The applicant alleged that the Immigration Judge was wrong to suggest that a non-Arab Darfuri person like the applicant, who lived in a 'hotspot', could without risk, relocate to another area in Sudan. He failed to consider that the applicant would be at risk at screening on arrival at Khartoum airport on his return to Sudan. The country-guidance case relied on was HGMO (Relocation to Khartoum) Sudan CG (2006) UKAIT 0062. A Senior Immigration Judge (P A Spencer) reviewed the decision and ordered reconsideration on the ground that it was arguable that the Immigration Judge had failed to consider the test for internal relocation set out in AH (Sudan) & Oths v Secretary of State for the Home Department 2007 EWCA Civ 297 which, it was alleged, required a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the country in which asylum is sought. (This was not a ground relied on by the applicant in his application for reconsideration). The case was then reconsidered by the Asylum and Immigration Tribunal comprising the Deputy President of the Tribunal and a Senior Immigration Judge. At this hearing it was accepted that there had been a misreading of the HGMO case. However the real issue was whether or not the applicant would be at risk of real harm on arrival at Khartoum and if so, he could not be expected to relocate in Sudan. It was submitted that it was necessary to compare the situation of the applicant's habitual residence with the situation he would find himself in Khartoum. It transpired that four matters in the evidence were

relied on to show that the applicant could not relocate to Khartoum. Firstly, that the applicant was a farmer but was now out of work. Secondly there was a medical report indicating some health issues. Thirdly, that in HGMO case there was reference to some incidents in the camps in Khartoum and fourthly that it was a more difficult move for the applicant to leave the urban life he had lived in Europe for some years and to relocate to Khartoum, than it would have been if he was simply moving from life as a subsistence farmer in Darfur to Khartoum. As regards the latter submission it was pointed out that in assessing the reasonableness of relocation a comparison between circumstances in the United Kingdom and those prevailing in the country of origin is not relevant – see AH (Sudan) v Home Secretary (HL)(E) 2007 EWCA Civ 297.

[6] The Tribunal was satisfied that in referring to the urban environment in Europe at paragraph 69 of his decision, the Immigration Judge was saying that life in Khartoum would not be an unreasonable alternative to urban life in the United Kingdom. Furthermore there was nothing in the evidence to suggest that the applicant's alleged illness would be any more of a problem for him in Khartoum. (The Immigration Judge found the medical evidence did not support the contention that the applicant suffered from an illness). Crucially the Tribunal found on the evidence that there was no reason to suppose that the applicant would face a risk of persecution in Khartoum. Finally the Tribunal found that the Immigration Judge made no error of law and that his decision should stand.

[7] The applicant applied to the Asylum and Immigration Tribunal for permission to appeal to the Court of Appeal. The grounds relied on were that the Tribunal (on reconsideration) made the same error as the Immigration Judge and misapplied the HGMO country-guidance case and failed to consider properly whether the applicant would be at risk of persecution or of treatment contrary to the European Convention on Human Rights, on return to Sudan. The applicant submitted that persons from rebel hotspots are at risk on identification at screening at Khartoum airport. In addition it was submitted that the Tribunal (on reconsideration) sought to analyse, wrongly, the facts which ought to have been considered by the Immigration Judge. It was submitted that where the Deputy President considers the treatment of the issue by the Immigration Judge to be deficient, he ought to have ordered a second stage reconsideration hearing at which evidence could be presented and the applicant given the opportunity to present his case.

[8] The application for permission to appeal was not granted. The Deputy President stated that there could be no expectation of further evidence where no error in the assessment of the original evidence was established. He went on to comment –

> "The error of law here lay solely in the application of the law to the facts as found, a matter on which the appellant's representative made submissions at the reconsideration hearing. On those facts the applicant has clearly failed to establish a risk in those areas in which he can reasonable (sic) be expected to live. Nothing else matters.

[9] The applicant renewed his application for permission to appeal to this court under Section 103B(3) of the Nationality, Immigration and Asylum Act 2002, as amended. Under Section 103B(1) where an appeal to a Tribunal has been reconsidered, a party to the appeal may bring a further appeal on a point of law to the appropriate appellate court. An appeal to the Court of Appeal may only be brought with the permission of the Tribunal or where it refuses permission, with the permission of the appropriate appellate court. By virtue of Section 103B(5) the appropriate appellate court in this jurisdiction is the Court of Appeal.

[10] An application for leave to appeal to the Court of Appeal is brought under Order 61 Rule 11 which provides –

> "11. - (1) In this rule and rule 12-
> 'the Act' means the Nationality, Immigration and Asylum Act 2002; and
> 'the Tribunal' means the Tribunal established under section 81 of the Act.
> (2) An application for leave to appeal to the Court of Appeal under sections 103B or 103E of the Act shall be made within 14 days after the appellant is served with written notice of the Tribunal's decision to refuse leave to appeal.
> (3) Such an application shall be made ex parte by lodging the following documents in the Central Office, namely-
> (a) a certified copy of the Tribunal's decision to refuse leave to appeal; and
> (b) a statement of the grounds of the application.
> (4) The proper officer shall notify the parties of the determination of the Court of Appeal.
> (5) Where leave to appeal has been granted, the applicant shall notify the President of the Tribunal."

Order 61 Rule 11 envisages an application for leave to appeal to be dealt with on the papers. However where the court is minded to refuse leave it should notify the appellant that it is minded to refuse leave and offer the opportunity for an oral hearing. If leave is to be granted no oral hearing is necessary.

Order 94 Rule 2(xi) provides that such appeals shall be brought by way of case stated.

[11] The court will only grant permission to appeal if it considers that the appeal has a real prospect of success or there is some other compelling reason for the appeal to be heard. The court has to consider whether there is a realistic as opposed to a fanciful prospect of success. A compelling reason might be an issue of public interest or where there is a need for the law to be clarified.

[12] In the Notice of Application for Permission to Appeal the applicant set out the history of the case and passages from the HGMO decision and in effect repeated the argument addressed to the Tribunal when permission to appeal was refused. The Notice then continued –

> "5. Once we take the above into consideration then it is clear the question of risk upon initial return is different from the question of internal relocation. The issues should not be looked at not as 'one composite question' as the Deputy President has done but as a series of questions relevant in the circumstances of the case.
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> 6. If involuntarily returned the Appellant will be screened and found to be a non-Arab Darfuri from a 'hot spot' and or an area associated with the rebel leadership. (As it is accepted that he is from Darfur then the only place as per HGMO that he can safely relocate within Sudan is at one of the Internally Displaced Persons Camp in and around Khartoum). The IJ and the Deputy President (see paragraph 7 of his reconsideration decision) failed to consider the question of the risk that he would face on arrival if returned and being identified as someone from a rebel hotspot. (compare the 2 stage screening process that takes place in Zimbabwe in respect of involuntary returnees and the risks that are applicable to people subjected to the second stage — see Paragraphs 70-72 AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061.
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> 7. This risk on return is a different question from the internal relocation point in the case and deserves to be considered separately (again by way of comparison to Zimbabwe where the 2 questions are obviously treated separately see paragraphs 48-49 in

SM TM MH (MDC - Internal flight Risk categories) Zimbabwe CG [2005] UKIAT 00100 (11 May 2005).

8. If the appellant is able to get through the first part of his return to Sudan relatively safely then we must consider if the internal relocation of him to the IDP camps is unduly harsh. The applicable case law on internal relocation in Sudan is found in AH (Sudan and Others) v SSHD [2007] EWCA Civ 2 and Januzi and Others {2006] UKHL 5. (NB in any event the assessment of internal relocation by the Deputy President has not considered the risk upon point of return). The question, said Lord Hope at paragraph 29 of AH (Sudan), was whether in the safe haven the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there.

9. In this case given the screening process which will apply to the Appellant upon arrival then when addressing the issue of internal relocation it is submitted that for him to actually reach the 'less hostile part without undue hardship or difficulty' would be unreasonable.

10. Thus in order for the Appellant's case to be subjected to the 'most anxious scrutiny' it should be remitted back by order of the Court of Appeal to the AIT for consideration of evidence about the risk to the appellant on return dealing under s103B(4)(c)."

[13] The application for leave is predicated on the basis that the applicant was found by the Immigration Judge to be a non-Arab Darfuri from a 'hotspot' and/or an area associated with the rebel leadership; that on arrival at Khartoum airport he would be screened and so identified and thereby at risk of persecution. Alternatively the court should consider whether relocation to one of the displacement camps was unduly harsh.

[14] It is clear that the Immigration Judge did not believe the claim for asylum made by the applicant. On the basis of that claim no issues relating to relocation or living in a displacement camp arose. The application failed on the ground of credibility. The only outcome could be a refusal of the asylum application and an order for removal from the United Kingdom. On these

findings no error of law arose and there is no basis on which to grant leave to appeal on any ground which has a realistic prospect of success.

[15] Although it was not necessary to do so, in view of his primary finding, the Immigration Judge went on to consider a hypothetical situation on the basis that there might be an element of truth in the applicant's claim. He was prepared to accept, for this limited purpose, that the applicant came from Darfur, but found there was no evidence to suggest that the area he came from was a hotbed of rebel activity. He accepted (for this limited purpose) that the applicant may have lived in an area which experienced trouble with the authorities and was associated with anti-government activity. On consideration of those factors and his earlier life as a farmer and his later life in urban Europe, the Immigration Judge found it to be a reasonable option for the applicant to relocate to Khartoum.

[16] The decision in HGMO provides guidance in relation to the removal to Khartoum of certain Sudanese nationals. It holds that involuntary returnees of non-Arab Darfuri origin are not at real risk of persecution on return to Sudan either at the airport or subsequently. Furthermore persons of non-Arab Darfuri origin can, in general, be reasonably expected to relocate to Khartoum, even to camps, without real risk of persecution or any of the harm contemplated by Article 3 of the ECHR nor would such a person, if required to relocate to a camp, be exposed to conditions which would be unduly harsh. Whether a returnee would be forced to relocate to a camp is a matter which requires proof by the applicant. In HGMO the Tribunal went on to hold that there may be a limited category of Darfuri returnees who would be at real risk and listed them. These included persons of non-Arab Darfuri origin from one of the villages or areas of Darfur which are 'hotspots' or 'rebel strongholds' from which rebel leaders are known to originate. Such cases should be considered on their own merits taking account of all relevant circumstances. However they require credible and specific evidence about the history of the particular place from which the asylum seeker claims to emanate. If the applicant in this case had been believed, the evidence adduced fell well short of establishing that he was such a person or that he was at any risk of persecution or of treatment contrary to Article 3 of the ECHR. Furthermore it was not established that he would be relocated to a camp or that conditions there would be unduly harsh. On the assumption of the hypothetical findings (and in the absence of a finding that the applicant came within the class of persons identified as at possible risk in HGMO) there was no obligation on the Immigration Judge to consider whether the applicant might be at risk on arrival at screening in Khartoum. He concluded that it was reasonable to expect the applicant to relocate, if there was any element of truth in his claim. That was a conclusion that he was entitled to reach on that evidence, had it been believed. In this regard the Immigration Judge considered correctly the guidance arising from HGMO. Therefore on the hypothetical approach no error of law has been identified and no ground of appeal has been established

on which there is a realistic prospect of success and therefore no basis for leave to appeal to be granted.

[17] For all these reasons the application for leave to appeal was dismissed.