Asylum and Immigration Tribunal

JY (Effect of following *AE) Sudan* [2006] UKAIT 00084

THE IMMIGRATION ACTS

Heard at Field House
On 26 October 2006

Determination Promulgated

29 November 2006

Before

SENIOR IMMIGRATION JUDGE LANE
SENIOR IMMIGRATION JUDGE PERKINS

Between

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Representation:

For the Appellant: Mr A Mahmood, Solicitor of Messrs Aman Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

There is nothing in Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department [2006] UKHL 5 that discloses any error of law in the determination of the Tribunal in AE (Relocation-Darfur-Khartoum an option) Sudan CG [2005] UKAIT 00101. It was not, therefore, an error of law for the Tribunal to regard the country guidance issues in AE as authoritative (so far as indicated in paragraph 18.2(a) and (b) of the Practice Directions), in determining appeals between 18 May 2005 and 3 August 2006, when HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 replaced AE as relevant country guidance.

DETERMINATION AND REASONS

1. The appellant, a citizen of Sudan born on 1 September 1976, entered the United Kingdom concealed in a lorry on 11 January 2005 and claimed asylum on 13 January.

2. On 26 July 2005 the respondent decided that the appellant should be removed from the United Kingdom by way of directions. The appellant appealed against that decision to the Tribunal and his appeal was heard on 10 October 2005 at Taylor House by Immigration Judge Kaler. She dismissed the appellant's appeal on asylum and human rights grounds. On 1 November 2005 a Senior Immigration Judge decided under section 103A of the Nationality, Immigration and Asylum Act 2002 to make no order for reconsideration of the Immigration Judge's determination. The Senior Immigration Judge noted that the grounds accompanying the application for reconsideration "represented a lengthy argument" as to the position adopted by the Tribunal in *AE (Relocation-Darfur-Khartoum an option) Sudan CG [2005] UKAIT 00101.* He considered that "*no doubt such points can be argued elsewhere*". Reconsideration was, however, ordered by Sullivan J on 24 November 2005 for the following reasons:

> *"It is now clear that the legal argument (which is developed at excessive length in the grounds in support of this application) that internal relocation of Darfurians is unreasonable if the State itself is involved in a campaign of persecution in Darfur, because (in summary) that would be to endorse the ethnic cleansing of Darfur, was presented before the Immigration Judge. She applied the Country Guidance cases, but if the Tribunal is not the appropriate forum to consider the point of law raised by the applicant I do not understand how he can argue the points 'elsewhere' as suggested by the Senior Immigration Judge."*

3. The nature of the appellant's claim to be in need of international protection is as follows. He is a member of the Berti tribe from Darfur. Having sold a number of sheep to members of the Sudanese Liberation Army, he was arrested in October 2004 by Government security officers and held for 45 days, during which time he was regularly beaten. Released on the condition that he should report once a week, the appellant decided not to do so and went into hiding. As a result of this, the appellant's village was attacked, one of his brothers killed and the other brother taken into detention. The appellant managed to obtain money which he used to travel to Port Sudan, where he embarked on a ship. After disembarking, the appellant continued his journey to the United Kingdom by lorry.

4. Having heard the appellant give evidence, the Immigration Judge found that there were problems of credibility regarding his claim. His description of the events of 10 October 2004 was not consistent. Nor was his account of how he had come by the money to finance his trip. The Immigration Judge did not accept that the appellant would have a political profile *"on the basis that he sold a few sheep to the SLA"* (paragraph 24 of the determination). Any interest which the authorities might have had in the appellant was, the Immigration Judge considered, no more than a passing one. The rest of his account had, she found, been exaggerated.

5. The appellant was diagnosed as suffering from post-traumatic stress disorder. He was also described in a medical report as having a *"perfectionist bordering on obsessional pre-morbid personality*". This was said to be due to his place as the first child in the family. The Immigration Judge accepted that the PTSD of the appellant could be due in part to his having been driven away from his village by an armed militia, then suffering as he did on the sea journey, before being locked up in a lorry for several days. She noted that the medical report was silent about the effects of the death of the appellant's father and the fact that the appellant had left his wife and

other members of his family behind in Darfur. At paragraph 26 the Immigration Judge found that:-

> "*26. This appellant does suffer from moderate depression and post-traumatic stress. There are facilities in Sudan for treatment to be given. That the treatment he may receive would not be as advanced as he would receive in this country is not grounds for granting refuge in the UK."*

6. At paragraph 27, the Immigration Judge summarised her findings of fact as follows:

> *" – The appellant is a member of the Berti;*
>
> *- he suffered discrimination at the hands of the authorities;*
>
> *- he fled the area after the death of his father and raids on his village;*
>
> *- it may be that he was detained for a brief period for selling sheep to the SLA, but I do not find that he has a political profile for this reason;*
>
> *- he may have been briefly detained, but the authorities have no further interest in him;*
>
> *- he has not been severely beaten, although it is likely that he suffered some form of lesser physical ill-treatment;*
>
> *- he is given to embellishment and exaggeration.*"

7. The Immigration Judge considered the Country Guidance determination in *AE*, as indeed she was bound to do by paragraph 18 of the President's Practice Directions of 4 April 2005. She also said in terms at paragraph 28 of the determination that she had considered the objective evidence to which she had been referred by both parties. At paragraph 29, having noted that the area around Khartoum contains some 1.8 million internally displaced persons, most of whom are from African tribes, the Immigration Judge quoted extensively from paragraph 36 of the determination in *AE* as follows:-

> "*To suggest that this appellant on any return and on relocation to Khartoum faces a real risk of persecution or indeed a real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights is tantamount to accepting that all and every internally displaced person within Khartoum faces such a risk. Had that been the case we are satisfied that UNHCR with long and careful knowledge of the area would have so indicated by now. Internally displaced persons in the Khartoum area clearly face a number of difficulties. It may be that for some there may be a real risk arising out of the fact that the authorities would target them as active sympathisers of armed rebel grounds or as persons connected with opposition political groups. But we cannot accept that there is a real risk there to this individual appellant. We are conscious of having to consider this matter on a 'case by case' basis as urged by UNHCR. There is no evidence to suggest that this appellant would be perceived as involved with armed rebel groups or opposition political groups or that he would inextricably be driven to the worst circumstances for internally displaced persons in Khartoum, wherever they may be.*"

8. At paragraph 30 of her determination, the Immigration Judge found that, as with the appellant in *AE*, the appellant in the present case would not be perceived as a political sympathiser or supporter, nor that there was a record of him which would be available to the authorities in Khartoum. He would not be singled out at the airport and there was no real risk that he would be targeted, arrested, persecuted or ill-treated.

9. Finally, at paragraph 31, the Immigration Judge made reference to the determination in *LM (Relocation – Khartoum – AE reaffirmed)* Sudan [2005] UKAIT 00114. The Immigration Judge found support for her conclusions in the fact that, in *LM*, the Tribunal had concluded that it would not be unduly harsh for a person with a family to relocate to Khartoum. In the light of these conclusions, the Immigration Judge dismissed the appellant's appeal.

10. The appellant's grounds, which accompanied his application for reconsideration of the Immigration Judge's determination, made two basic submissions. First, it was asserted that the concept of an internal protection (or relocation) alternative has no place in cases of State persecution; at least, where the persecution was as gross as that said to be carried out by the Sudanese authorities and their allies in Darfur. Secondly, the grounds submitted that, in determining what might be regarded as reasonable for the purposes of internal relocation, the area of possible relocation must be one where "*basic norms of civil, political and socio-economic human rights*" can be said to exist.

11. The House of Lords in *Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department* [2006] UKHL 5 (hereafter referred to as *Januzi*) has now shown that both of those submissions are wrong in law.

12. In *AE*, the Tribunal, at paragraphs 13 and 14 of its determination, had rejected the suggestion that, where the State is involved in the persecution of a person within a particular part of its territory, that person cannot in law be said to have the option of internal relocation to another part of that territory. The House of Lords' opinions in *Januzi* show that the Tribunal was correct to do so. Indeed, at paragraph 21 of the opinions, Lord Bingham rejected the submission, based on the UNHCR guidelines of July 2003, that there is even a presumption against internal relocation in such circumstances:-

> "*There can, however, be no absolute rule and it is, in my opinion, preferable to avoid the language of presumption. The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. The source of the persecution giving rise the claimant's well-founded fear in his place of ordinary domicile may be agents of the State, authorised or directed by the State to persecute; or they may be agents of the State whose persecution is connived at or tolerated by the State, or not restrained by the State; or the persecution may be by those who are not agents of the State, but whom the State does not or cannot control. These sources of persecution may, of course, overlap and it may on the facts be hard to identify the source of the persecution complained of or feared. There is, as Simon Brown LJ aptly observed in Svazas v Secretary of State for the Home Department [2002] EWCA Civ 74 [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. The more closely the persecution in question is linked to the State, and the greater the control of the State over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the State. The converse may also be true. All must depend on a fair assessment of the relevant facts*".

13. As for the second submission in the appellant's grounds, the House of Lords emphatically rejected it in favour of a much stricter test, which the Tribunal in *HGMO*

(Relocation to Khartoum) Sudan CG [2006] UKAIT 00062 has summarised (at paragraph 150 of its determination) as follows:-

> **"***(T)he issue of reasonableness or whether conditions are unduly harsh is a rigorous one (Lord Carswell, paragraph 67); and it is wrong to decide this, as urged by the Hathaway/New Zealand approach, by reference to whether those conditions meet the requirements of international human rights law in full. The issue is whether 'conditions in that country generally as regards the most basic human rights that are universally recognised – the right to life and the right not to be subjected to cruel or inhuman treatment – are so bad that, it would be unduly harsh to expect a person to seek a place of relocation' (Lord Hope, paragraph 54). At most all that can be expected is that basic human rights standards, in particular non-derigable rights, are not breached.*"

14. The first issue for this Tribunal on the reconsideration of the appellant's appeal is to establish whether the Immigration Judge erred in law in relying upon the determination in *AE* in reaching her decision on the appeal. Such an error would be established if it could be shown that there was anything in the opinions in *Januzi* which showed that the Tribunal had applied an incorrect legal test to the facts found by it or had committed some legal error in establishing those facts.

15. Mr Deller, for the respondent, submitted that the reason why the three Sudanese appellants in *Januzi* had had their appeals remitted to the Tribunal was because there appears to have been a consensus that further evidence had come into being, since *AE*, which required to be considered. The most that the House of Lords might be said to have thought about *AE* was that country conditions might have changed in the interim.

16. The Tribunal considers that, although there is force in Mr Deller's submission, the complete picture is as follows. The Secretary of State in the three Sudanese cases apparently did not demur that the appeals of two of the three Sudanese appellants should be remitted. However, he resisted remittal in the third case; it would appear on the basis of the adjudicator's strong adverse credibility findings. As noted at paragraph 55 of the opinions, the Secretary of State's agreement in the first two appeals was "*on the ground that the Adjudicators' determinations in these cases were inadequately reasoned, even applying the test for internal relocation set out in E and Another v Secretary of State for the Home Department [2004] QB 531*". At paragraph 58, Lord Hope considered that, in the case of the third appellant, "*There are sound reasons for doubting whether the risks to which [appellant M] would be exposed in any event if he were to be expected to return to live in a camp in Khartoum were properly explored and analysed*." The determinations in each of the Sudanese appellants' cases in *Januzi* were those of adjudicators. They all pre-dated the determination in *AE*. Accordingly, the errors identified in those determinations can have had nothing to do with any reliance placed on *AE*. Nevertheless, had their Lordships considered that there was any error of law in *AE*, it is reasonable to assume that they would have said so, given that the determination in that appeal was cited to them.

17. This Tribunal has taken account *de bene esse* of a line of attack upon *AE*, which Mr Mahmood did not put forward but which we are aware has featured in other reconsiderations of appeals of Sudanese nationals. This is that the Tribunal in *AE* wrongly equated the test of internal relocation with that of whether a person of a particular origin would, on relocation, face a generalised real risk of Article 3 ill-

treatment. This assertion relies in particular upon the italicised rubric, which is not part of the determination, but which features at the beginning of the reported CG version, and is as follows:-

> *"Internal relocation in the Khartoum area is an option for those fleeing from Darfur. The available evidence does not show that on any such relocation every Darfurian faces a real risk of persecution or ill-treatment contrary to article 3."*

18. A reading of the determination in ***AE*** reveals that the line of attack just described is misconceived. What plainly emerges from such a reading is that the Tribunal in ***AE*** held (1) that as a matter of law, internal relocation was not ruled out because the Sudanese State may be actively involved in the persecution in question; and (2) that on the evidence available to the Tribunal, the situation faced by Darfurians in general in Khartoum was not such as to violate article 3.

19. It is axiomatic that, if the evidence were to have shown that ethnic Darfurians were as such facing persecution or Article 3 ill-treatment in Khartoum and its environs, then the issue of internal relocation could not even arise. It was a common submission by appellants in Sudanese asylum appeals at the time that the evidence showed precisely such a state of affairs. Having reviewed the evidence before it, the Tribunal in ***AE*** found that matters were in general not so grave as to rule out in every case the possibility of internal relocation being available. ***AE*** did not purport to go any further than this in giving country guidance.

20. The fact that the Tribunal in ***AE*** was not basing the test of unreasonableness or undue harshness expounded in ***R v Secretary of State for the Home Department Ex p Robinson*** [1998] QB 929 on the presence or absence of a generalised risk of Article 3 ill-treatment is clearly shown in paragraph 15 of its determination:-

> "*In general terms if there is a safe haven within his own country for a person who has been persecuted in another part of that country even with the complicity of the Government then the international community can expect a claimant to go there. Many hundreds of thousands of people appear to have been displaced from Darfur as a result of the activities of the militias widely condemned by the international community as ethnic cleansing. If as a matter of fact they are safe elsewhere in Sudan it cannot be the responsibility of the international community to give them refuge merely because of the abhorrent nature of the policy which has driven them from their homes. We speak here of the position generally. Of course, in any individual case there may be specific circumstances which would still cause relocation to be unduly harsh, but none were identified by the Adjudicator in this case*" (Our emphasis).

21. We accordingly find that there is nothing in ***Januzi*** that discloses any error of law in the determination of the Tribunal in ***AE.*** It was not, therefore, an error of law for other divisions of the Tribunal to regard the country guidance issues in that determination as authoritative (so far as indicated in paragraph 18.2(a) and (b) of the Practice Directions), in determining appeals between 18 May 2005, when ***AE*** appeared on the Tribunal's website as a country guidance case, and 3 August 2006, when ***HGMO*** replaced ***AE*** as relevant country guidance. Paragraph 18.2 provides as follows:-

> "*A reported determination of the Tribunal or of the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with*

other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence."

22. Without in any way wishing to qualify the points we have made concerning the distinction between the findings in ***AE*** as to the Article 3 situation *in general* for Darfurians in Khartoum and the test of reasonableness in assessing the availability of internal relocation, it is pertinent to observe that, in practice, following ***Januzi*** there is unlikely to be much scope for a claimant to show that it would be unreasonable or unduly harsh for him to relocate, unless he can show that he would face a real risk of Article 3 ill-treatment in so doing. We have already noted at paragraph 13 above the summary at paragraph 150 of ***HGMO,*** with its references to the findings of Lord Carswell and Lord Hope in ***Januzi.*** Of importance also is paragraph 20 of the opinions, in which Lord Bingham cites with approval paragraph 28 of the UNHCR Guidelines on International Protection of 23 July 2003:-

> *"Where respect for basic human rights standards, including in particular non-derigable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in a protected area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative*."

23. Also significant are the passages in paragraph 29 of the Guidelines, concerning economic survival, which were cited by Lord Bingham, and which refer to "*economic destitution or existence below at least an adequate level of subsistence*." Furthermore, Lord Bingham regarded as helpful the passage in H Storey *The internal flight alternative test: the jurisprudence re-examined ((1998)10* International Journal of Refugee Law, 499)**,** which refers to *"economic annihilation, utter destitution or existence below a bare subsistence level*"; denying "*decent means of subsistence*"; and the absence of *"the real possibility to survive economically, given the particular circumstances of the individual concerned*".

24. The relevance of the individual circumstances of the person concerned, in assessing the reasonableness of internal relocation, brings us to the main submission which Mr Mahmood sought to advance in the present case. This was that the Tribunal in ***AE*** had not, in fact, reached any overall conclusion as to whether it would be unduly harsh for a Darfurian to relocate to Khartoum. Accordingly, it fell to the Immigration Judge to consider the matter by reference to the appellant's individual circumstances. Mr Mahmood submitted that the Immigration Judge had failed to do so.

25. In response, Mr Deller said that the Immigration Judge had, in fact, shown that she had carried out such an exercise. He referred to what the Immigration Judge had said about the appellant's mental health difficulties, and the finding as to the treatment he would be likely to receive on return (paragraph 26). Furthermore, the Immigration Judge had (as this Tribunal has earlier noted) shown herself to be aware of the need to look at the individual circumstances of the appellant, in what she had

had to say about the determination in *LM* (paragraph 31). Further reference to the appellant's individual circumstances was to be found at paragraph 28.

26. The Tribunal considers that the Immigration Judge did not fall into legal error in relation to this issue. On any proper reading of her determination, she used the country guidance findings in *AE*, together with the evidence that was before her, to reach the conclusion that a person from Darfur, such as the appellant, would not as such be at real risk of Article 3 treatment, whether by reason of the active hostility of the Sudanese authorities in Khartoum or by reason of conditions in the kinds of places where it might be reasonably likely that he would have to live. She then went on to consider whether there was anything in the appellant's particular circumstances that might make it unduly harsh or unreasonable for him to be expected to relocate to that city. Mr Mahmood, very fairly, conceded to the Tribunal that there was nothing in the evidence before the Immigration Judge to show that it would be unduly harsh for the appellant to relocate. Therefore, even if, (which we do not accept) the Immigration Judge made an error in this regard, it was plainly not material.

27. On the findings of fact of the Immigration Judge, the appellant does not fall to be treated as a refugee by reference to the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and related Immigration Rules. Nor, on those findings, is he a person who is entitled to a grant of humanitarian protection under those Rules. So far as those Rules are concerned, it is noteworthy that paragraph 339O(ii) specifically provides that, in examining whether a part of a country of origin is a place in which a person will not face a real risk of persecution or serious harm and in which he can reasonably be expected to stay, regard is to be had "*to the general circumstances prevailing in that part of the country and to the personal circumstances of the person"* (our emphasis). The Immigration Judge correctly used *AE* to inform her finding as to the first matter, before considering whether the appellant's personal circumstances rendered it unreasonable to expect him to relocate to Khartoum.

28. The determination does not contain a material error of law and the Tribunal accordingly orders that it shall stand.

Signed Date: 20 November 2006

Senior Immigration Judge Lane