Case Nos: C5/2007/0424, C5/2007/1264,
C5/2007/1734, C5/2007/2097, C5/2006/0541

Neutral Citation Number: [2008] EWCA Civ 887

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Asylum and Immigration Tribunal

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2008

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE LONGMORE
and
LORD JUSTICE MOSES

- -

Between :

KH (Sudan)	**Appellants**
QA (Sudan)	
BK (Sudan)	
AA (Sudan)	
KA (Sudan)	
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Mr B Bedford (instructed by **Sultan Lloyd**) for the **Appellant** in **KH**
Mr C Jacobs (instructed by **Messrs White Ryland**) for the **Appellants** in **QA, BK, AK** and **KA**
Ms L Giovanetti and Mr R Dunlop (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 10th-13th June, 2008

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Judgment

Lord Justice Sedley :

1. We began the hearing of these 16 listed appeals and applications for permission to appeal by hearing counsel (we are grateful to them for having been selective as to how many of them addressed us) on what appeared to us to be the only two points either common to more than one case or, in one instance, capable of affecting all the cases if the point was well taken.

2. In *HGMO (Relocation to Khartoum)* Sudan CG [2006] UKAIT 00062 the AIT handed down a country guidance decision on the highly controversial question whether it was unduly harsh to expect anyone, and if so whom, to relocate from an area of Sudan to which they could not return to the displaced persons' camps around Khartoum where conditions were, on any view, deplorable. The decision was that, with discernible exceptions, it was not unduly harsh.

3. In *AH (Sudan) v Home Secretary* [2007] UKHL 49, Lady Hale at §27 spoke of the need in this context for a "holistic consideration of all the relevant factors, looked at cumulatively". Mr Jacobs submits for the appellants that while the House rejected the two errors of law which had been alleged, this does not exonerate the AIT from its error of making stereotypical assumptions about the impact of poverty and the traumas of war on Darfurians. As this court had recognised in its decision in *AH* (§43), health conditions in the camps were appalling. The decision in *HGMO* flew in the face of expert evidence, including that of Accord and of Dr Walter Kalin.

4. These are all submissions with which this court might, if it were a primary decision-maker, have had considerable sympathy. But they are not grounds of appeal before us, and they did not attract either criticism or dismissal in their Lordships' House. In our judgment the decision of the House in *AH* has neither expressly nor impliedly undermined the country guidance contained in *HGMO*. Baroness Hale's concurring speech in *AH* stresses what is uncontroversial, that no country guidance case is for ever; it is a factual precedent, as Laws LJ has aptly called it, and as such is open to revision in the light of new facts – new either in the sense of being newly ascertained or in the sense that they have arisen only since the decision was promulgated – provided in each case that they are facts of sufficient weight. *HGMO* can be seen to set out without demur evidence from credible sources, some of it instanced by this court in paragraph 43 of its decision in *AH (Sudan) v SSHD* [2007] EWCA Civ 297, which in any one case may legitimately re-enter the fact-finding process if the data warrant it, notwithstanding the summary generic findings arrived at in paragraph 309 of *HGMO*.

5. We have had our attention drawn to the arguably discrepant formulations in paragraph 4 of the headnote and paragraph 309(6) of the text of *HGMO*. It is of course the latter which is part of the actual determination. It is to be read and understood in the light of the findings which precede it and which it seeks to summarise, and in the light also, so far as it was accepted by the AIT, of the evidence on which these findings are based. As the AIT itself said in paragraph 266 of *HGMO:*

> "our firm view is that asylum claims or Article 3 claims submitted by non-Arab Darfuris faced with return to Khartoum should be considered on their individual merits."

6. Nor, in our judgment, is there anything impeachable about defining reasonable internal relocation as including any place which, provided of course it offers sufficient safety from persecution, is not unduly harsh for the individual concerned. We would not be entertaining the question but for the submissions made to us by Mr Bedford, founding himself on Article 8 of the Qualification Directive. This captioned "Internal protection" and in paragraph 1 reads:

> "As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of a country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and that the applicant can reasonably be expected to stay in that part of the country."

7. As is well known, the House of Lords in *Januzi v SSHD* [2006] UKHL 5 interpreted this as requiring it to be unduly harsh to expect the appellant to relocate in a particular safe place if it was to be said to be unreasonable for him or her to do so. There is no logical problem in this extrapolation such as is capable, in our view, of even raising a question for the European Court of Justice. We do not accept Mr Bedford's submissions that we can, much less should, refer to the ECJ the question whether the House of Lords have erred in adopting this meaning. It is not necessary to embark any further upon the constitutional questions involved in an attempt to overset a decision of the House of Lords by going from this court to the European Court of Justice.

8. We propose, accordingly, to approach all the applications and appeals in our present list on the footing that internal relocation to a place of sufficient safety will be reasonable unless it is unduly harsh for the individual concerned, and that immigration judges are expected to follow the country guidance contained in *HGMO* unless acceptable evidence is placed before them by either party which shows it to have been incorrect or to be no longer correct in some significant respects.

9. There follow our decisions in those of the 16 cases which have not in the course of argument been resolved by agreement or otherwise disposed of for reasons given at the time.

Lord Justice Moses :

10. Each of the judgments which follow is a judgment of the court.

KH (SUDAN)

11. The Secretary of State has accepted that this appeal against a determination of Immigration Judge Frankish dated 22 December 2006 should be allowed. This court granted permission to appeal following the refusal of Senior Immigration Judge Allen

on 2 February 2007 and of Toulson LJ on 13 February 2008. The issue for us is to determine whether the appeal should be remitted or whether this court should allow the appellant's claim to refugee status.

12. The appellant, a citizen of Sudan born on 1 August 1974, claimed asylum on 19 June 2004.

13. Following the respondent's refusal to grant him refugee status, his appeal was originally heard by an adjudicator who refused his appeal on asylum and human rights grounds. The adjudicator disbelieved the appellant but, on the respondent's concession, accepted that he was a member of a black African tribe and would, therefore, be at risk in his home area in Darfur. Apart from that acceptance, the adjudicator disbelieved his account of his escape. He concluded that he could safely be relocated to Khartoum.

14. Senior Immigration Judge Parkes ordered reconsideration on 8 April 2005; he identified a legal error by virtue of inadequacy of reasoning in the original determination. Following the order for reconsideration, Immigration Judge Frankish refused the appellant's appeal on asylum grounds, humanitarian protection grounds and human rights grounds. It is that determination which was the subject of the appeal before this court.

15. It was accepted that the appellant was from the Bargo tribe, from Korma village in North Darfur. There he engaged in subsistence farming with his family. The Janjaweed first attacked on 27 May 2003; the family shepherd's hut was set on fire but he managed to escape with burns and consequential scarring to his back.

16. On 3 February 2004, the Janjaweed again attacked the village to which the appellant had returned after recovering the family's livestock. The appellant's house was burned, his livestock taken and his mother shot in the right arm. She, his brother and sister fled to Dawila village where his maternal aunt lived and the appellant and his wife fled to another village, Amara Jadid. A month later he returned to the village, at his paternal uncle's request. Whilst tending livestock they heard explosions as the village was attacked again on 16 March 2004; they were captured by the Janjaweed.

17. By the time of the reconsideration on 22 December 2006, the appeal turned on the question whether the appellant was within a risk category identified in *HGMO (Relocation to Khartoum) Sudan CG* [2006] UK AIT 00062. The particular risk categories identified by the AIT in *HGMO* were introduced in § 7:-

> "There will nevertheless, be limited categories of Darfuri returnees who will be at risk on return to Khartoum. Each case will need to be considered on its own individual merits, taking account of all relevant circumstances, considered individually and cumulatively."

18. The particular risk category on which the appellant relied was that identified in § 309(8)(i):-

> "(i) The fact that a person of non-Arab Darfuri origin is from one of the villages or areas of Darfur which are 'hotspots' or

> ‘rebel strongholds’ or whose village has been raided by the Janjaweed and/or Government forces would not in itself give rise to a risk of persecutory harm, although it would be a significant factor when assessing risk on return, if for example, he was from one of the villages from which the current rebel leaderships come or if he has spent some time recently in Chad.”

19. The paragraph I have cited summarises §§ 267-270 under the rubric “persons from Darfur ‘hotspots’”. In that section the AIT recorded some difficulty with the evidence in relation to hot spots. It noted that the rebel groups operated as mobile guerrilla groups rather than being attached to any fixed place. It recorded the widely held view that the Janjaweed campaign was a terror campaign against the civilian population rather than being confined to a military operation against rebels and concluded:-

> “We consider that the Sudanese authorities can be taken to be aware of the wide geographical sweep of the Janjaweed and governmental operations aimed at non-Arab Darfuris in Darfur. In the Tribunal’s view it is not possible, therefore, to infer that a person whose village was attacked by the Janjaweed would, for that reason alone, be regarded on return to Khartoum as a member or active supporter of a rebel movement.
>
> However, we do think, although not constituting a risk factor in itself, that the finding of a reasonable likelihood that a non-Arab Darfuri originates from a village known to be closely associated with the current rebel leadership is a relevant consideration when examining the individual merits of a claim; there is evidence that the rebel leadership’s origins are known. Hence where an immigration judge is presented with credible and specific evidence regarding the history of the particular place from which a person claims to emanate, this consideration will be relevant.”

20. Reading those paragraphs as a whole, it appears that the AIT was accepting that if a non-Arab Darfuri came from a village known to be closely associated with the current rebel leadership that was relevant to the consideration of whether he would be at risk on return. It is not clear why the Tribunal said that that was not “a risk factor in itself”. The Tribunal must have meant that it was a risk factor but was not dispositive. No doubt, it is partly that confusion which prompts the Secretary of State to accept that the Tribunal ought to consider the question of “hotspots” again.

21. In his determination on reconsideration Immigration Judge Frankish cited the passages to which we have referred and continued:-

> “Clearly the appellant is within a risk category to the extent that he comes from a targeted village, Korma, in Darfur, but a risk factor which does not give rise to a need protection *per se*, rather than whose individual circumstances must be considered. The Tribunal clearly considers that a connection between the targeted village and rebel leadership is significant. *There is no*

> *such connection in this case.* The appellant's evidence is devoid of this in respect of Korma as is the background evidence. Indeed the appellant has not been found credible and the only point in his favour is his Bargo/Korma origin. However, there is no reason that he should be linked with the rebels and, as such, there is no reason that he should be targeted upon being removed to Khartoum."

22. The immigration judge's conclusion appears to be founded on the absence of any connection between Korma and rebel leadership. That view, as appears now to be accepted, cannot be sustained. There was before the judge, exhibited to the appellant's witness statement dated 12 December 2006, a report from Amnesty International "Darfur: Korma: Yet More Attacks on Civilians" dated 31 July 2006.

That report details an attack in which seventy-two people were killed and many more injured between 4-8 July 2006 in the villages around Korma town. It says:-

> "The Korma attacks are also significant because:-
>
> - The attackers were members of the SLA faction led by Minni Minawi, known as SLA (MM) who were reportedly supported by the Sudan Armed Forces and the Janjaweed, travelling in more than twenty armed vehicles. Some of the vehicles were said to come from Al-Fasher, the government-controlled capital of North Darfur state. The SLA (MM) faction is a signatory, with the Sudan government, to the Darfur peace agreement of May 2006. *In recent weeks the SLA (MM) has attacked the bases, such as the Korma area, in North Darfur of other SLA factions (Abdel Wahed and Group of 19) that have refused to sign the agreement…*" (my emphasis)

23. The immigration judge refers to the Amnesty report at § 18 of his determination. He records that the report confirms the attacks on Korma but suggests that it indicates that the purpose was to take land rather than to attack rebels.

24. It is plain that the immigration judge accepted the report because he relies upon it in that passage. But he makes no reference whatever to the second page of the report which sets out the attacks by the SLA (MM) on areas where other factions were believed to have refused to sign the agreement of which the Sudanese Government is a signatory. Accordingly, Mr Bedford, on behalf of the appellant, contends that the question of risk of return should be determined on the basis of the Country Guidance paragraphs to which we have referred, coupled with the undisputed evidence from Amnesty International.

25. The evidence before the immigration judge at the relevant time, he submits, was that the village was associated with those in opposition to the Government and other SLA factions which supported the Government. In those circumstances the immigration judge and this court are bound to conclude, applying the relevant paragraphs of *HGMO,* that the appellant originated from a village which was indeed closely associated with the current rebel leadership. On that basis, there is no alternative but

to conclude that he himself would be associated with the rebel movement and thus be at risk on return. It was nothing to the point to recall that the appellant had been disbelieved. Mere origin from a village with a close association with current rebel leadership would be sufficient to attract the attention of the Sudanese authorities on arrival in Khartoum.

26. We have considerable sympathy with this view. But we reluctantly conclude that we cannot say that the only possible conclusion on the evidence is that the appellant would be at risk on return. However one interprets *HGMO* it is at least tolerably clear that the Tribunal did not regard origin from a village closely associated with current rebel leadership, whatever that means, as determinative of the issue of risk. If this court were to resolve that the only conclusion was that the appellant would be at risk on return it would be regarding that factor as dispositive rather than merely a relevant consideration. In those circumstances it seems to us necessary for a Tribunal to consider again the question whether the appellant's origin from a village, attacked because it is a base of those SLA factions who refuse to sign the "peace" agreement, puts the appellant would be at risk on return to a Khartoum camp.

27. For those reasons, whilst it is plain that the immigration judge erred in failing to recognise the link between rebels and Korma, in our view the appeal should be remitted to another Tribunal who will consider, yet again, the risks arising from the appellant's origins. Reconsideration should be limited to the question of whether the proven link was such as to give rise to a risk on return and thus preclude any reconsideration of the underlying facts of the appellant's origin or its connection with the factions identified in the Amnesty report.

QA (SUDAN)

28. This is an appeal against a decision of the AIT, on reconsideration, of 23 March 2007. This court has given permission to appeal, following refusal of such permission by Senior Immigration Judge Warr.

29. It is not disputed that this appellant was born on 5 December 1987. He is a national of Sudan, of the Masseleit tribe, coming from the village of Sindi in Darfur. At the original hearing of his appeal against the Secretary of State's rejection dated 7 July 2004 the adjudicator, by a determination dated 27 September 2004, believed this appellant. Accordingly, there is no dispute as to the background facts which led to the appellant fleeing Sudan.

30. On March 2003 his village was attacked by Arab militia from a majority tribe and his brother and sister were killed. On 28 January 2004, during the course of a further attack on his village by Arab militia his father and mother were killed. A relative took him to stay in another village.

31. On 8 April 2004, that village was also attacked. During the course of that attack the appellant's relative and his wife were killed. The appellant himself managed to escape to El-Fasher, one of the main cities in Darfur. There he met a friend of his father who took him to Khartoum. In Khartoum he was put into contact with an agent and he left Sudan on 14 April 2004, when he was only 16.

Procedural History

32. The adjudicator found that the appellant could relocate to Khartoum and that it would not be unduly harsh to expect him to move there. The AIT refused permission to appeal against that decision. Following the grant of a statutory review by the High Court a senior immigration judge determined that the original adjudicator had made a material error of law and ordered reconsideration. This appeal is against that reconsideration on 23 March 2007.

33. In their determination the AIT set out § 309(1-8) in *HGMO* and then continued:-

> "13. We do not consider that given this guidance the appellant demonstrates that he would be at risk on return to Khartoum as a failed asylum seeker, as a returning young apparently healthy adult who may or not may not face military service, and whose father was a member of an organisation formally in opposition to the government. Nor is the appellant at risk because of the location of the villages where had suffered in the past – the hotspots argument – for the reasons given in *HGMO* in §§ 267-270; we have not been taken to 'credible and specific evidence' concerning the various locations. Counsel accepted that the appellant had been residing with a friend of his father in Khartoum and so it cannot be assumed that the appellant would necessarily end up in the camps. We bear in mind that the passage of time (*sic)* and that his father's friend may not be where he was. However, even if the appellant did have to resort to the camps or the squatter areas, that would not entitle him to argue that relocation would be unduly harsh, applying the Tribunal's reasoning set out above. We are not satisfied that the appellant could be described as an activist by virtue of the prior involvement of his deceased father in the SFDA – see § 271 of *HGMO.*
>
> 14. Taking all the points advanced on the appellant's behalf in the round as we were enjoined to do, we do not find that for the appellant conditions, though undoubtedly tough and difficult, would be unduly harsh in Khartoum and accordingly we hold that reclocation to Khartoum would be reasonable for him."

The Impact on the Appellant if he returns to Khartoum

34. The AIT was entitled to conclude that the appellant did not fall within any specific risk category identified by the AIT in *HGMO* at § 309(8)(i-v). But that is by no means dispositive of the issue as to whether it would be unduly harsh for him to be returned to Khartoum. The House of Lords in *AH* stressed the importance of focussing the enquiry upon whether it would be unduly harsh in the particular circumstances of the claimant in question to relocate. (See Lord Bingham at § 5 and

the reference by Baroness Hale to the necessity for what she describes as "individualised holistic assessment" (§ 28).)

35. In our view, the Tribunal's conclusion that it would not be unduly harsh for this appellant to relocate to Khartoum must be assessed on the basis that it was likely that he would have to live in a camp or squatter area. The Tribunal said:-

> "It cannot be assumed that the appellant would *necessarily* end up in the camps." (my emphasis)

The Tribunal was required to consider not whether he would be bound to end up in a camp but rather whether it was likely he would do so. Four years have now passed since he last resided with a friend of his father in Khartoum. There is no basis for concluding that it is likely his friend is still in Khartoum let alone that it is possible for this young appellant to find him. Accordingly, the harshness of requiring him to return to Khartoum must be considered in the context of his having to live in a camp or squatter area.

36. The AIT in *HGMO*, as endorsed by the House of Lords, has concluded that conditions in a camp or squatter area are not such as to lead to the conclusion that it would be unduly harsh to expect a young male adult to live there. Such a proposition is general and in each case it is incumbent upon the fact finder to consider the impact of such conditions on the particular appellant who contends it would be unduly harsh to return there in the context of his or her particular circumstances. Those circumstances, in the instant appeal, are stark. The appellant has lost all his living relatives, killed by those responsible for conditions in those camps. Not only has he lost his siblings and his parents but also the one surviving relative who enabled him to escape from his village. Nowhere is there any reference within the determination of the AIT to the impact of those circumstances. On the contrary, they are dismissed in a cursory manner in the reference of the Tribunal to this appellant as being a "young apparently healthy adult". No regard has been had to the vital consideration of the effect on this lone young man, even now only 20, who will, if the Tribunal's decision stands, have to face the prospect of survival in a camp. Conditions in such camps were described by Dr Khalil as being a "desperate situation" within "appalling conditions of extreme poverty" (see § 43 of *AH* in the Court of Appeal). The impact of such conditions will be accompanied by the everyday knowledge that those responsible for such conditions are also responsible for the death of his every living relative.

37. In our judgement the failure to make any reference to the particular circumstances of this appellant was an error of law. Anyone reading of such circumstances might have little difficulty in concluding that it would be unduly harsh to require this appellant to return to a camp. But in *HGMO* the AIT made no reference to the impact on those who had seen their parents and relatives killed by the Janjaweed under the sponsorship of the Government of Sudan. For all we know there may be many others in a similar situation to that of this appellant. For that reason we reluctantly accept that it would not be appropriate for this court to decide that the only conclusion which could be reached was that it would be unduly harsh for this appellant to be returned to Khartoum. Accordingly, we would order that his appeal be allowed and that his appeal be remitted for yet another reconsideration as to whether it would be unduly harsh for him to return to Khartoum. Any such reconsideration must be on the basis

of the facts already found as to the murder of his surviving relatives and on the basis that it is likely he will have to live in a camp or squatter area.

BK (SUDAN)

38. This is an appeal with permission of the AIT against a determination of BK's appeal on reconsideration dated 10 January 2007.

39. Permission was given on the basis that the Court of Appeal had allowed the appeal from the AIT in *HGMO*. That ground is no longer pursued.

40. The appellant is a national of Sudan, born on 1 January 1981. He is a member of the Zaghawa tribe from a village in Darfur. He claimed refugee status five days after his entry into the United Kingdom, on 17 February 2005.

41. The appellant asserted that he was at risk of persecution on return on two distinct bases. Firstly, he contends that his activities as a member of the Sudanese Justice and Equality Movement (JEM) including participation in demonstrations, would have come to the attention of the Sudanese authorities and would place him at risk on return. Secondly, that he suffers from liver disease, diagnosed after his arrival in the United Kingdom, which would not be treated in Sudan. Accordingly, to order his return would be to breach his rights enshrined in Article 3 of the European Convention on Human Rights.

42. The Tribunal accepted that the appellant had supported the JEM before his departure from Sudan. He had joined once the Janjaweed militia had begun to attack neighbouring villages. He had continued his participation in the United Kingdom and had become a member of the executive committee of the Nottingham branch. He helped recruit new members and gave out information. He participated in demonstrations, including one outside the Sudanese Embassy on 10 December 2006, which had been filmed by Sudanese authorities. He was able to produce colour photographs of himself at demonstrations in London including a photograph of himself in the front row of thirty or so waving a banner.

43. The AIT, on reconsideration, endorsed the findings of the Immigration Judge as to the appellant's credibility. His activities for the JEM were verified by photographic and other evidence and the AIT records its belief in the sincerity of his political opinion. However, it purported to apply § 309(8)(iv) of *HGMO*. This sub-paragraph summarised the evidence and findings between §§ 286-304.

44. In those paragraphs *HGMO* considered both the risk that participation in a demonstration would come to the attention of the Sudanese authorities and the reaction of those authorities should a participant be returned. The AIT comments (§ 297) on the frequency with which photographs are produced before immigation judges by appellants seeking to establish their participation in demonstrations. It points out that it is difficult to see how a photograph would lead to the authorities at an airport identifying an appellant as a participant.

45. Moreover, the AIT in *HGMO* concluded that *sur place* activities would not put a Sudanese citizen at risk:-

> "…unless those activities are reasonably likely to be regarded by the Sudanese Government as being significantly harmful to its interests." (299 and 309(8)(iv))

46. Applying those principles the AIT in the instant appeal concluded that the appellant's political activities were only at a low level; he attended about six demonstrations, possibly more, with numerous others and holds a minor position in the Nottingham branch of JEM which the AIT describes as a small organisation with no office in Nottingham. It concluded that it was unlikely that there would be any records concerning the appellant to show that he had been an opponent of the Government despite the existence of a photograph of him amongst many other faces. It concluded that his *sur place* activities would not place him at any real risk on return.

47. The challenge to this conclusion is based on the proposition that the AIT did not apply *HGMO* but erroneously identified too restricted a category of those at risk on return by reason of their *sur place* activities.

48. At § 32 the Tribunal said:-

> "If he were a prominent political figure or even a rising young star then perhaps an effort at identification might be made, but he cannot be regarded as of such significance. There are no prior records concerning him."

49. It is true that the AIT in *HGMO* did not restrict those who might be at risk by reason of their *sur place* activities to prominent political figures or rising young starts. But in its reference to a prominent political figure or a rising young star the Tribunal, in my view, sought to do no more than contrast that description with the level at which they placed the appellant's participation. It was not purporting to substitute for the guidance in *HGMO* its own higher standard of participation.

50. The essence of the determination was to signify the Tribunal's conclusion that the appellant's participation in *sur place* activities was not such as to draw him to the adverse attention of the authorities or to trigger their view that his actions were significantly harmful to their interests. In those circumstances, we would reject his appeal on this ground.

51. The second, distinct ground, related to the Tribunal's views as to the appellant's liver condition. The appellant did not challenge the view that only in extreme circumstances would a denial of medical needs amount to a breach of Article 3 (*N(FC) v SSHD* [2005] 2 AC 296). The difficulty for the appellant lay in demonstrating any error as to the brief summary of his condition contained in § 37. The Tribunal concluded that he suffered from a liver condition which was described by the Tribunal as being "delta hepatitis". Treatment for such a condition was described as unsatisfactory, with a remission rate of only 20-30%. This finding was challenged without the benefit of any clear medical evidence. In particular, the bundle of medical reports to which the AIT referred appears to have been lost and could not be traced in time for the appeal. We have some letters in our bundle which describe a condition known as "auto immune hepatitis". Elsewhere it is described as "pretty serious liver disease".

52. This evidence is wholly inadequate for establishing that it would be a breach of Article 3 to return the appellant to Sudan. The circumstances must be exceptional (see, e.g., § 48 in the speech of Lord Hope and § 69 in the speech of Baroness Hale in *NF*). As Miss Giovanetti accepts, should evidence of so critical a condition emerge, it would then be open for the appellant to make a fresh claim. Absent such evidence, any challenge on the conclusion reached by the Tribunal is, in our view, unfounded.

53. For those reasons, we would dismiss this appeal.

AA (SUDAN)

54. This is an appeal against a decision of Senior Immigration Judge Eshin dated 25 June 2007, on reconsideration from a decision of Immigration Judge Thomas, promulgated on 12 December 2006. Senior Immigration Judge Eshin did not detect any error of law in the determination of Immigration Judge Thomas. This court gave permission to appeal against Senior Immigration Judge Eshin's refusal of permission of 22 August 2007, on 12 June 2008.

55. The appellant is a member of the Massaleite tribe in Darfur. He arrived in the United Kingdom on 1 August 2006 with his wife, an Ethiopian national, as a dependant, and applied for refugee status the following day. Just over one month later, on 9 September 2006, a daughter was born.

56. The sole issue relates to internal relocation. Immigration Judge Thomas accepted that the appellant, as a member of the Massaleite, was not at risk of persecution and should not be returned to his home area of Darfur.

57. The appeal turned on the effect of return on the appellant's young wife and baby daughter in the light of the conclusion that the applicant was liable to military conscription and, if conscripted, would be compelled to leave his young wife and baby daughter without support in a displaced person's camp or squatter area in Khartoum.

58. Immigration Judge Thomas accepted that the appellant was liable to be recruited into the army in Sudan where military service is compulsory, since he was born on 1 January 1980 and was thus 26 at the time of the decision. But he rejected the contention that he would be at risk on return on that ground as a draft evader or deserter. The challenge to that conclusion, which did not form a ground of appeal, was therefore not considered by Senior Immigration Judge Eshin. But it does form a ground of appeal before us. Quite apart from the difficulty the appellant faces, stemming from his failure to challenge that conclusion before Senior Immigration Judge Eshin, that contention is, in our view, without foundation. The decision of the AIT in country guidance case *BA (Military Service – No Risk) Sudan CG* [2006] UK AIT 00006 was that draft evaders and draft deserters do not face a real risk of imprisonment as a punishment; rather they would be forced to perform military service under close supervision. Nor was it reasonably likely that they would be required to fight in Darfur. This conclusion was endorsed in *HGMO* between §§ 192-193.

59. The ground upon which greater reliance was placed was an attack on the failure of Senior Immigration Judge Eshin to identify an error of law in Immigration Judge

Thomas's conclusion that the appellant had failed to prove that there was a reasonable likelihood that he and his family would have to live in an IDP camp or squatter area in Khartoum (see §§ 34 and 35). This conclusion was based upon Judge Thomas's finding that:-

> "The appellant is a resourceful man who worked in Sudan prior to leaving. He was able to save money and to leave some of it in his friend's home in Al Takal. It would appear that 4,000 Sudanese Pounds are still with Musa. There is no evidence before me to suggest that the appellant could not now engage the assistance of his friend Musa upon his arrival in Khartoum. The appellant still has colleagues in Sudan, one of whom he contacted shortly after his arrival in the UK."

60. Musa was a friend in Darfur. The appellant had kept some money with Musa for trade purposes and took 11,000 Sudanese Pounds out of the 15,000 he had left with Musa for the purposes of his escape (see § 7 of Judge Thomas's determination). Reconsideration was ordered on the basis that the immigration judge failed to consider Article 8 of the European Convention on Human Rights. But on reconsideration Senior Immigration Judge Eshin merely endorsed Judge Thomas's finding that even if the family was separated because the appellant was conscripted, that would not lead to grave consequences for his family as the family would not have to live in a camp or squatter area (see § 24).

61. This conclusion is challenged on the basis that the evidence merely disclosed that Musa assisted the appellant in Darfur. There was, accordingly, no evidential basis upon which Judge Thomas could conclude that the appellant's family would find support in Khartoum such as to avoid their being left on their own in either a camp or squatter area in Khartoum.

62. Although the grounds in this appeal refer to Article 8, if the appellant has any prospect of success it lies in the contention that it would be unduly harsh to require the appellant and his family to relocate in Khartoum in the light of the risk of separation due to conscription. This would leave an Ethiopian wife and baby without support or protection in a camp or squatter area. In *HGMO* the AIT accepted that it would be unduly harsh to expect a female head of household to live in a squatter area or camp (see § 309(8)(v)).

63. In our view, the difficulty in identifying any error of law lies in the failure of the appellant to establish that there was a real risk that the appellant's family would be left without support in a camp or squatter area. It is true that the evidence appears to show that Musa had helped the appellant when Musa was in Darfur. But it was for the appellant to show, on such evidence as he was able to produce, that his wife and child were at risk of being returned in circumstances where they may have to live in a squatter area or camp. Judge Thomas did not accept that there was such a risk and he was entitled to reach that conclusion. It was for the appellant to prove that they would have no support were he conscripted, and by reason of the assistance Musa had previously provided with resources stemming from the appellant's own trading efforts, the immigration judge was entitled to conclude that he had failed to prove the risk he asserted. It was not for the Secretary of State to establish to the contrary. In those circumstances we, like Senior Immigration Judge Eshin, can discern no error of

law in the factual conclusions of Immigration Judge Thomas. In those circumstances, we would dismiss this appeal.

KA (SUDAN)

64. The appellant appeals with the permission of this court, as long ago as 18 May 2006, against the determination of the AIT dated 16 November 2005, on reconsideration of his appeal against refusal of refugee status.

65. The appellant was accepted to be a Sudanese national. Apart from that acceptance there was dispute as to every feature of the grounds upon which he claimed asylum on 26 April 2004 as a refugee from Darfur. At the hearing of his appeal on 10 August 2005, the adjudicator rejected his claim that he was from Darfur or that he would be at risk on return.

66. The grounds upon which the adjudicator, Ms Pitt, disbelieved the appellant, are not impugned save in one important respect, namely, the appellant's ethnicity. He claims to be from the Barti tribe. This was rejected and the grounds for the adjudicator's rejection form the basis of this appeal.

67. It is, however, important to record that the adjudicator disbelieved the appellant's account of his father's detention and torture as someone suspected of assisting Darfur rebels, the attack on the village to which he said his family had relocated, and his account of his escape.

68. The essential finding challenged related to the adjudicator's findings as to ethnicity. The adjudicator said:-

> "The appellant maintained at the hearing that he could be identified as from the Barti tribe due to his accent, hair and tribal markings. I had no evidence before to identify whether the appellant spoke a form of Arabic or any other language that would show him to be from Darfur. The appellant has very short dark hair and a moustache. The appellant showed me two very small round marks and one very small linear mark on his right cheek. They were hardly noticeable. I had nothing before me to identify them as tribal markings rather than the result of normal skin pigmentation, acne scars or other causes. I do not accept that the appellant's appearance shows him to be from Darfur. Rather, he is relatively pale-skinned and has markedly Semitic rather than Negroid features." (§ 15)

This finding was challenged on the basis that the appellant's ethnicity was not raised in the Secretary of State's refusal letter, nor at a preliminary case management hearing.

69. At the reconsideration before Senior Immigration Judge Mrs Gleeson and others on 7 November 2005 the AIT noted an error of fact in relation to one of the bases upon which the appellant was disbelieved. He had said that when seeking to escape his

horse had been shot in the head. The adjudicator appears to have understood that the appellant was saying that he himself had been shot in the head. The senior immigration judge found that to be an error of fact but immaterial. She concluded that there was ample basis for reaching an adverse finding as to credibility.

70. For the purposes of this appeal, however, it is important to note that counsel then instructed for the appellant had contended that the finding as to being shot in the head was material but continued:-

> "On the ethnicity point he (counsel for the appellant) had no submissions, particularly in the light of the decision of the Court of Appeal in *Hamid and Others v Secretary of State for the Home Department* [2005] EWCA Civ 1219 which indicated that even if the appellant were a Barti, ethnicity would not prevent an internal relocation option." (§ 3)

71. Since that was the approach of the appellant, it seems to us impossible for the senior immigration judge's decision on reconsideration to be impugned on a point of law when that point was never advanced before her.

72. We would however comment that whilst, as it seems to us, there were ample grounds for the adjudicator to disbelieve the appellant, it was unfortunate that she should express herself in a manner which suggested she was an expert as to ethnicity. The way she expressed herself at § 15 suggests that the appellant's assertion that he was a member of the Barti tribe was dismissed because of the adjudicator's views as to his appearance. In reality, however, we accept that that was not the case. Reading the determination as a whole, it appears to us that what the appellant was doing was trying to support his assertion that he was a member of the Barti tribe by reference to his accent, hair and tribal markings. He relied, without expert evidence, upon his appearance as being support for membership of that tribe. Viewed in that light, it was open to the adjudicator, absent expert evidence, to reject his reliance on his own appearance. That is what she was doing in § 15. Perhaps greater caution would have led the adjudicator to express herself in a way which did not suggest she was herself an expert as to the appearance of those from the Barti tribe.

73. That the adjudicator meant to do no more than to reject the appellant's positive assertions in reliance on his appearance is confirmed by her rejection of all of his account in respects which are now not challenged.

74. Nothing daunted, counsel now acting for this appellant, Mr Jacobs, contends that it was not open to the Secretary of State to challenge the appellant's ethnicity in the light of his letter of refusal dated 24 June 2004. But that letter made no concession as to ethnicity, it merely recorded the appellant's own statement that he was a member of the Barti tribe.

75. Finally, as the senior immigration judge recognised, ethnicity was by no means determinative of the issue of risk on return. As she pointed out, even if he was able to establish that he was a member of the Barti tribe, that would not increase his risk on return or make it unduly harsh should he be relocated to a camp or squatter area.

76. Miss Giovanetti recognises that, were there fresh evidence as to the ethnicity of this appellant, it would be open to him to try to deploy it now. But it is of some note that neither on reconsideration nor before us has the appellant made any attempt to support his assertions that he came from the Barti tribe other than by the initial reliance upon his appearance by the adjudicator. For those reasons, we would dismiss his appeal.