IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/00551/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th August 2015	**On 28th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR KIBROM GIRMAY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Mohamed of Counsel
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant states that he is an Eritrean national born on 15th January 1989. The Respondent does not accept that stating that if the Appellant is not Eritrean he is from Ethiopia. The Appellant's claim for asylum was refused in a decision dated 16th December 2014. The Respondent also decided on the same day to remove the Appellant as an illegal entrant. The Appellant's appeal against these decisions was allowed at first instance by Judge of the First-tier Tribunal Iqbal sitting at Hatton Cross on

28th April 2015. The Respondent appealed that decision and for the reasons which I have set out below at paragraph 18 I have set that decision aside and remade the decision in this case. Although therefore this matter came before me initially as an appeal by the Respondent, for the sake of convenience I have continued to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 17th July 2014 claiming asylum on the same day after handing himself into police officers at South Mimms Services. The Appellant left Sudan in January 2014 travelling to Libya where he resided for six to seven months. From Libya he caught a boat to Italy with the assistance of an agent to whom he paid €1,800. His friend's sister sent him the money from abroad to pay for this. He stayed in Italy for fourteen days before catching a train to France. From France he caught a lorry to the United Kingdom arriving on 17th July 2014.

3. The Appellant claimed asylum on the basis that he was an Eritrean national born in the town of Assab and was a practising Pentecostal Christian a religion he inherited from his parents. When he was 3 the family moved from Assab to Addis Ababa in Ethiopia as his father obtained a better job working there as an accountant. The Appellant lived in Ethiopia from 1992 to 2000. In 2000 his family was deported back to Eritrea following that country's conflict with Ethiopia as his father had supported the Eritrean referendum. He lived back in Assab for a further four years before moving to Sudan in 2004 due to persecution for being a Pentecostal Christian. Whilst in Sudan he worked in a private house alongside his mother who worked as a cook. His mother died in 2007. The Appellant also appears to have worked in a food restaurant and bakery. He left Sudan in January 2014 after nine years as he was being abused by a woman in the house he was working in who threatened to report him as she knew he was there illegally.

The Explanation for Refusal

4. The Respondent refused the Appellant's application because the Appellant had been asked a number of questions to establish his nationality and identity and his responses were either inaccurate or incorrect when compared to the background information about Eritrea. The Appellant conversed in Amharic the recognised language of Ethiopia. His lack of knowledge about Eritrean national service was considered by the Respondent to be inconsistent with someone who was a genuine Eritrean national. He was also unable to provide any details of the town of Assab where he claimed to have resided for seven years. His response was to say that he had hardly ventured out of the house he lived in as he was ill and had not continued his schooling in Eritrea because he had become ill. If the Appellant had been as ill as he claimed it was considered inconsistent that he had not sought medical assistance. The linguistic analysis concluded that the Appellant belonged to an Amharic linguistic community that occurred in Ethiopia.

5. The Appellant was asked to take part in a direct analysis interview on 28th November 2014 at Waterhouse (Leeds) and the conclusion reached was that he was in fact an Ethiopian national from the area of Addis Ababa. The Appellant was able to speak Amharic without any discernable inference from Tigrinya. There were no signs of hesitation or inconsistencies observed in the Appellant's speech. The Respondent also rejected the Appellant's claim to believe in the Pentecostal faith as the Appellant was unable to provide basic information about the key tenets of that religion. The Appellant had not claimed asylum in either France or Italy as conditions for asylum seekers he said were really bad there. That was not considered a valid reason for not claiming.

The Determination at First Instance

6. At paragraph 25 the Judge indicated that she had considered the Upper Tribunal's guidance in **MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190** which had considered some of the issues and changes since the last country guidance case of **MA [2007] UKAIT 00059** was promulgated. The Judge quoted from the headnote of **MO** which stated that whilst the position remained that failed asylum seekers as such were not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons were likely to be perceived as having left illegally and this fact save for very limited exceptions would mean that on return they faced a real risk of persecution or serious harm.

7. At paragraphs 27 and 28 the Judge considered the issue of the Appellant's nationality. The Appellant was brought up in Ethiopia amongst Amharic speaking people which was consistent with the findings of the linguistic analysis that the Appellant spoke a language that belonged to an Amharic linguistic community occurring in Ethiopia. The Appellant only lived in Eritrea for three years as a young child before leaving with his family to live in Ethiopia and then again only four years as a teenager before fleeing to Sudan. That too was consistent with the Appellant having a limited knowledge of Eritrea in particular the Assab area in which he had lived. The Judge placed no weight on the inaccuracies that arose in the interview during the course of questions about Eritrea and the Appellant's lack of knowledge with reference to Eritrea.

8. The Judge then proceeded to deal with what steps the Appellant had taken to see whether he might be eligible for Ethiopian citizenship. The Judge noted the Appellant's evidence that the Appellant had attended the Ethiopian Embassy on 8th April 2015 to address the Respondent's concerns as to his nationality. He had completed a number of forms and was invited for an interview after being asked a number of questions as to where he was born and raised and when he left Ethiopia. The Appellant was unable to provide any supporting documentation and as such the Ethiopian authorities were unable to issue him with a passport or nationality. The embassy did not accept the Appellant's fluency in Amharic as determinative of the Appellant's nationality.

9. The Appellant very shortly before his hearing at first instance was due contacted the Ethiopian Embassy on 8th April 2015 taking with him a letter from his solicitors dated 1st April 2015. At paragraph 28 the Judge wrote the following and for the ease of reference I have amended the paragraph to make clearer what the Judge was saying:

> "At the end of the hearing I further received a letter dated 1st April 2015 [written] on behalf of the Appellant to the Embassy of the Federal Democratic Republic of Ethiopia which confirmed that [the Appellant's solicitors] had requested written confirmation of the same, however nothing was received from [the embassy]. I recalled both parties' representatives to make submissions on the matter. I find that the lack of response from the Embassy further corroborates [the Appellant's] position".

10. The Appellant's claim to fear persecution due to his alleged Pentecostal faith was dismissed at paragraphs 29 to 30 the Judge finding the Appellant was not a practising Pentecostal Christian. However as the Appellant was 14 years old when he left Eritrea and approaching the age of national service he would not have been someone who would have been allowed to leave lawfully and therefore he would be at risk upon return for unlawful exit. The failure to claim asylum in either France or Italy was not determinative of the Appellant's credibility or claim. The Judge allowed the asylum appeal under both the Refugee Convention and Article 3 of the European Convention on Human Rights (prohibition of torture).

The Onward Appeal

11. The Respondent appealed the Judge's decision arguing that she had failed to make findings on matters in dispute. The Judge had not taken into account that the Appellant by his own account had lived over half of his life in Sudan which was not an Amharic linguistic community occurring in Ethiopia. Although not explicitly stated in the grounds I assume the point of that submission was to raise a question mark over whether the Appellant really had lived in Sudan for the length of time he claimed or whether he had in fact lived in Ethiopia speaking Amharic of a type spoken in that country. If that was the intended submission it was in truth no more than a disagreement with the result. More importantly the grounds continued that the Judge's findings at paragraph 28 that the Appellant was an Eritrean national failed to take into account the decisions of **MA** and particularly **ST (Ethnic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 52. ST** gives guidance on how an Appellant is expected to prove their Eritrean nationality when it is in dispute.

12. The grounds cited paragraph 58 of the **MA** that an applicant for asylum must if necessary make an effort to procure additional evidence to assist the decision maker. Before a person could be regarded as stateless they should make an application for citizenship of the country with which they were most closely connected. In the case of **ST Ethiopia** (not referred to by the Judge in her determination) it was said that each claimant must demonstrate that they have done all they could to facilitate return as a national of Ethiopia. A person regarded as ethnic Eritrean and who left

Ethiopia during or in the immediate aftermath of the border war between Ethiopia and Eritrea was likely to face very significant practical difficulties in establishing nationality and the attendant right to return. The First-tier had no evidence from the Ethiopian Embassy rejecting the Appellant's claim to be Ethiopian simply that there had been no response. Such a lack of evidence did not meet the requirements laid out in **MA**. The Appellant had not demonstrated that he had done all he could to indicate his nationality. The First-tier had not explained adequately why the Appellant's claim to have been to the Ethiopian Embassy and cooperated fully was accepted by the Judge when she had made negative credibility findings against the Appellant in relation to his claim to be of the Pentecostal faith.

13. The Judge had misdirected herself on the issue of the Appellant's claimed illegal exit from Eritrea. In the case of **MO** following **MA** the Tribunal had found a distinction for those who had left Eritrea after September 2008. These were the restricted categories which the First-tier Judge had quoted at paragraph 31 of her determination. However as the Appellant had left Eritrea in 2004 the Tribunal was required to consider based on the overwhelmingly negative credibility findings the much less restrictive findings of the Tribunal in **MA**. Failure to apply appropriate country guidance was a clear material error of law.

14. The Respondent's application for permission to appeal came on the papers before First-tier Tribunal Judge Andrew on 23rd June 2015. In granting permission to appeal she wrote

> "It is arguable that the Judge applied the incorrect country guidance case given the date the Appellant left his own country. Further the Judge's findings as to the Appellant's nationality have not taken into account case law to be considered when nationality is in dispute".

There was no response from the Appellant in reply to that grant. On 30 June 2015 the Upper Tribunal sent out directions to parties stating that the parties should prepare for the forthcoming hearing on the basis that it would be confined to whether the determination of the First-tier Tribunal should be set aside for legal error and if so whether the decision in the appeal could be remade without having to hear oral evidence in which eventuality the Tribunal was likely to proceed immediately with a view to remaking the decision.

The Hearing Before Me

15. When the matter came before me it was argued by the Respondent that there was no evidence to indicate that the Ethiopian authorities would not issue a passport to the Appellant. There was nothing from the Ethiopian Embassy to say one way or the other. It was a material error of law for the Judge to conclude that the Appellant had demonstrated enough.

16. In reply Counsel for the Appellant sought to uphold the findings of the First-tier Tribunal. The Appellant could not prove a negative. Nothing

about his claim to Eritrean nationality had been rejected by the Judge. The Appellant had spent three years in Eritrea. Sprakab Reports were not to be seen as conclusive or determinative. The Judge had looked at the issue of nationality very carefully. It was not a correct approach to go from saying that the Appellant spoke Amharic to saying that he was Ethiopian. Every single step was taken by the Appellant to deal with the issue of his nationality. The proof was in the bundles. There was no standard in existence as to what the Appellant was supposed to do to show nationality or what the court expected him to do but he had done everything he possibly could.

17. The Appellant's solicitors had written a letter to the Ethiopian Embassy on 1st April 2015 and hat letter was before the Judge (see paragraph 9 above). The letter had given details of the Appellant's place of birth in Assab Eritrea, details of his father and mother, his father has been born in Asmara Eritrea and that his mother had been born in Assab Eritrea and had passed away in 2007. The letter had said that if the Ethiopian Embassy required further information they respectfully asked the embassy to contact the solicitors. Counsel indicated he did know whether the Appellant had completed a form when applying for Ethiopian nationality as no copy of any form was with the papers. I pause to note here that paragraph 17 of the Appellant's statement had stated that he had been given a form to complete by the Ethiopian Embassy and was told to provide specific documents which had to be accompanied with the form after which he was asked to attend for an interview. Whilst Counsel accepted that the Upper Tribunal decision of **ST** was the law and that it had not been brought to the attention of the Judge at first instance it would not have made any difference.

18. I indicated to the parties that I found that the failure by the Judge to analyse the case in the light of the most recent relevant country guidance authority of **ST** was a material error of law. The facts of the case had been found by the Judge and would be preserved. The case turned on a narrow issue namely whether the Appellant had done enough within the authority of **ST** to try to establish Ethiopian nationality. If he had done enough then his case would succeed but if he had not done enough then I could remake the decision without adjourning it for further evidence pursuant to the directions sent out by the Principal Resident Judge (see paragraph 14 above). I further held that nothing particularly useful or helpful would be achieved by remitting this case back to the First-tier to be decided again as I was in possession of all of the relevant facts in the light of the Judge's findings. What I had to do was (inter alia) to apply the relevant case law to those findings.

19. In conclusion Counsel for the Appellant stated that the Tribunal should ask itself what could be gained from any further interaction by the Appellant with the Ethiopian Embassy. The Tribunal could draw on its own experience of what happened in such cases how the authorities would react to any further applications. The Appellant had done all he could.

Findings

20. In order to be eligible for international protection the Appellant must have been able to discharge the obligation upon him to have made a proper application for citizenship of the country with which he was most closely connected. In effect before the Appellant can say that he is stateless or a citizen of another country altogether he must where circumstances require it have made reasonable endeavours to show whether or not he is a citizen of the country with which he is most closely connected.

21. In this case there was no doubt that the Appellant was closely connected to Ethiopia in the light of the First-tier Tribunal Judge's findings which accepted the results of the Sprakab analysis. The Appellant had lived in Sudan for a number of years but the Sprakab analysis showed that the Amharic the Appellant spoke belonged to a linguistic community occurring in Ethiopia. The Appellant must therefore have lived some time in Ethiopia to acquire this language and that was a sufficiently close connection to trigger the requirement to seek citizenship. Although the Sprakab Report and the Judge's reliance on that Sprakab Report were criticised in submissions to me, there was no cross-appeal against the Judge's findings on that point which I find were open to her on the evidence before her. There was no contrary expert evidence for example. The Appellant had demonstrated in interview that he had next to no knowledge of Eritrea. It was reasonable therefore to expect him to have made some effort with the Ethiopian Embassy.

22. Paragraph (5) of the Headnote to **ST** (reproducing paragraph 105 of that determination) states:

> "(5) Judicial fact-finders will expect a person asserting arbitrary deprivation of Ethiopian nationality to approach the embassy in London with all documentation emanating from Ethiopia that the person may have, relevant to establishing nationality, including ID card, address, place of birth, identity and place of birth of parents, identity and whereabouts of any relatives in Ethiopia and details of the person's schooling in Ethiopia. Failing production of Ethiopian documentation in respect of such matters, the person should put in writing all relevant details, to be handed to the embassy. Whilst persons are not for this purpose entitled to portray themselves to the embassy as Eritrean, there is no need to suppress details which disclose an Eritrean connection".

23. The letter written by the Appellant's solicitors dated 1 April 2015 was an attempt to satisfy the requirements of paragraph 105 of **ST** set out in the headnote. The Respondent states that the Respondent's case is that the mere fact that the Ethiopian Embassy have not answered the letter or given the Appellant a decision in writing means that the Appellant has not done all he can reasonably be expected to have done and that he has in fact no evidence that his claim to Ethiopian nationality has been refused by the Ethiopian Embassy.

24. The Respondent makes a subsidiary point which is that as the Judge did not accept the Appellant's claim to be of the Pentecostal faith, she should

not at the same time have accepted the Appellant's claim that he did in fact attend the Ethiopian Embassy. The two issues however are not necessarily connected and as I have indicated I have preserved the findings of fact of the First-tier Tribunal Judge. I therefore proceed on the assumption that the Appellant did indeed attend the Ethiopian Embassy and did produce the letter to them written by his solicitors on 1st April 2015. The Judge had found that the lack of response from the embassy to the letter of 1st April and the attendance on 8th April confirmed the submission that the Ethiopian Embassy were not prepared to accept the Appellant's application for citizenship. The Respondent's case is that that is not enough following the case of **ST**. The Appellant makes a further point that he cannot be expected to prove a negative. In other words if the Ethiopian Embassy does not respond to his application there is no way that he can force them to a response and **ST** cannot be interpreted as stating that.

25. The letter from his solicitors refers to the Appellant living in Ethiopia between 1992 and 2000 and attending elementary school between 1996 and 2000. That might have been sufficient for the Ethiopian authorities to check whether there was any such record but in any event the Appellant cannot be criticised for failing to give relevant information to the Ethiopian authorities. The letter makes clear that the solicitors wanted a response from the embassy although the letter was only written on 1st April the Appellant took it in on 8th April and the hearing was less than three weeks' later on 28th April. It was not perhaps surprising that there had been no response to that letter by the time the Judge heard the matter on 28th April 2015. What is surprising is that given the solicitors wrote a letter apparently to comply with **ST** that case was not drawn to the attention of the Judge at first instance.

26. Nevertheless the question is whether the Appellant has cooperated with the Ethiopian authorities in the documentation process. He cannot compel the authorities to reply. The Appellant's oral evidence was to the Judge was that he was told by the official at the embassy that because the Appellant could not provide any documentation the embassy was not able to issue him with a passport. The official stated that if the Appellant's solicitors forwarded their letter of 1st April to the official he could reply online to them. It appears however that no reply has ever been received.

27. It is not possible for the Appellant to say that his claim to Ethiopian nationality has been rejected until such time as he has a decision from the Ethiopian Embassy to that effect. It is clear from the Appellant's evidence which was accepted by the Judge that what influenced the Ethiopian Embassy not to issue him with a passport there and then was that he had provided no documentation. The fact that the Appellant could speak Amharic was not of itself sufficient to permit the authorities to issue him with a passport but equally it cannot be said that the embassy have rejected the Appellant's claim to be Ethiopian. The matter has been left in the air. If the Appellant wishes to show that his application for Ethiopian nationality has not been accepted he must be in a position to provide

evidence to that effect. He must be able to produce a refusal from the embassy. It was argued that the Appellant cannot force the embassy to do anything. However until such time as the embassy refused this application, he cannot say that his claim to Ethiopian nationality has been rejected.

28. I do not go behind the findings of fact of the First-tier Judge who accepted that the Appellant had spent some time in Eritrea. However beyond his birth in Eritrea and that his parents were born there the Appellant's links to Eritrea are somewhat tenuous. He does not speak the language Tigrinya he lived there at most for the first three years of his life and thereafter between 2000 and 2004. On the other hand he had lived long enough in Ethiopia to acquire a knowledge of the Ethiopian language Amharic without any discernable influence on his speech from Tigrinya the language of Eritrea.

29. In order to establish his claim to international protection the Appellant must have done all that he could to show that he had applied for Ethiopian citizenship. The Judge accepted that he had made an application and had submitted a letter from his solicitors. The Appellant has never received a formal decision on that application. In those circumstances where the application remains outstanding before the Ethiopian authorities it cannot be said to have been rejected. There may come a time whereby if no reply is received from the Ethiopian authorities it can be reasonably assumed that they will not reply. However as I have indicated the application was only made on 8th April less than three weeks before the hearing some four months ago. There was no evidence that the Appellant has sought to chase the Ethiopian authorities in those four months particularly the Consular official's indication that he could write to the Appellant's solicitors.

30. **ST** does not specifically state that the person who approaches the embassy in London should have received a reply. That must be right since there clearly is a risk that the embassy might never reply to an application. However in this case I do not consider that such a long period of time has elapsed since the application that one can say that the embassy will never reply and will never formally reject the Appellant's claim. The Appellant's evidence to the Judge was not that he had received an outright rejection of his claim whether orally or in writing. Rather what he had received was more in the way of an invitation from the embassy to submit more documentation and that an official could write in due course to the Appellant's solicitors. From the Appellant's description of the interview he had it does not appear that the embassy were hostile or deliberately obstructive, what they wanted was some documentation (and perhaps some time for example to investigate the Appellant's schooling) and they might then be in a position to put something in writing. Were the position to change and the Appellant was able to provide some written evidence of a rejection of his claim by the embassy the Respondent could be invited to look at the matter again but the case at present is far from that.

31. There was no cross-appeal against the Judge's decision to dismiss the Appellant's appeal to claim asylum on religious grounds. I find that the Judge gave cogent reasons for her findings that the Appellant did not fear persecution on the basis of his religious faith. What the Judge did was to say on the basis of her finding that the Appellant could not show he was Ethiopian that the Appellant would be regarded as having left Eritrea illegally. However as I have found that the Appellant has not done enough to demonstrate he is not Ethiopian it is premature to consider whether the Appellant would be returned to Eritrea and thereafter considered as a draft evader or one making an illegal exit. The case does not reach that far.

32. I do not consider that at this stage the Appellant has done enough to demonstrate that he has been arbitrarily deprived of Ethiopian nationality which he is otherwise entitled to. I therefore dismiss the Appellant's appeal against the Respondent's decision to refuse him asylum.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant asylum and to remove the Appellant.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 27th day of August 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As no fee was payable there can be no fee award.

Signed this 27th day of August 2015

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Deputy Upper Tribunal Judge Woodcraft