Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/05402/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 January 2016	**On 19 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between
MR ZERIT (AKA DANIEL DEBASAY) MLASH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert of counsel instructed by Montague Solicitors
For the Respondent: Ms A Everett, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant who appeals against a decision of the First-tier Tribunal dismissing his appeal against a decision taken on 10 March 2015 to refuse his asylum claim.

Background Facts

2. The appellant's Nationality is at the heart of the dispute. The appellant claims that he is a citizen of Eritrea, born on 19 December 1971. The respondent considers that the appellant is a citizen of Ethiopia born on 25 May 1973. The background, as claimed by the appellant, is that he left Eritrea in 1995 and went to Ethiopia. He remained in Ethiopia until 2000 when he left for Sudan. On 13 August 2008 he obtained a visa from the British Embassy in Khartoum Sudan to come to the UK for the purpose of family reunion. On 29 November 2013 the appellant claimed asylum on the basis of a well-founded fear of persecution if he were to be returned to Eritrea because he had deserted from the army. That application was refused because the respondent considered that the appellant was an Ethiopian National. The appellant was granted limited leave to remain in the UK on the basis of his relationship with his children in the UK.

The Appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 25 September 2015, Judge Dean dismissed the appellant's appeal. The First-tier Tribunal found that the appellant had not demonstrated that he was an Eritrean National and therefore that he was not a refugee and also was not entitled to humanitarian protection.

The Appeal to the Upper Tribunal

4. The appellant sought permission to appeal to the Upper Tribunal raising issues of procedural impropriety, that the judge had made a factual error, had ignored parts of the evidence and erred in her assessment of Nationality. On 13 October 2015 First-tier Tribunal Judge Astle granted the appellant permission to appeal indicating that it was arguable that a procedural impropriety may have occurred. Thus, the appeal came before me.

5. The appellant and Mr Suleiman Hussein (the interpreter engaged by the appellant's representative) attended the hearing. Mr Hussein had attended the hearing before the First-tier Tribunal and in support of the grounds of appeal provided a witness statement. At the commencement of the hearing Mr Gilbert invited me to consider firstly the other error of law issues as if I were to find a material error of law the procedural impropriety issue may not need to be considered. Mr Hussein was asked to wait outside the hearing room whilst submissions were made.

Summary of the Submissions

6. The grounds of appeal assert in summary:

- That the conduct of judge gave rise for concern – it is asserted that this was raised in the course of the hearing.

- That the judge did not accept the bona fides of the appellant's interpreter/translator who gave evidence at the hearing about his qualifications.
- That a document (a Sudanese driving licence) had been produced at the hearing confirming the appellant's Eritrean nationality - the judge was not happy with the interpreter's translation. The representative suggested that the court's interpreter could verify the translation but the judge refused. This document was significantly material to the case
- That during the hearing it became apparent that the court interpreter was not correctly translating the appellant's evidence. This was raised with the judge. The judge said that any issues could be dealt with at the end of the hearing but said that the appellant's interpreter could not take a contemporaneous note of the issues with the translation.
- That the judge made a factual error at paragraph 8 of the decision – the appellant did not use an Ethiopian ID card or Ethiopian driver's license to support his application to come to the UK. The appellant used an ID card issued by UNHCR in Sudan which recognised him as a refugee.
- The judge, at paragraph 8, accepts that the respondent applies a higher standard of proof to establish identity. However, the visa application forms were not produced by the respondent despite a formal application at the hearing to have then adduced.
- That the appellant has continued to use a false identity undermines his claim. The First-tier Tribunal was fully apprised of difficulties the appellant has had trying to change his name
- In his substantive interview the appellant answered questions about Eritrea correctly and in detail.

7. In his oral submissions Mr Gilbert submitted that the judge failed to record adequately or at all the evidence of the appellant. The judge failed to consider relevant evidence and failed to make findings with regard to that evidence. On reading the First-tier Tribunal decision he submitted that it is not ascertainable what any of the oral evidence was. He submitted that the judge appears to have taken only the evidence that she considered to be against the appellant but has not referred to anything that is supportive of his account. For example the appellant speaks Tigrinya the national language of Eritrea, he gave very detailed and correct answers to the questions regarding Eritrea and in the reasons for refusal letter at paragraph 10 the Secretary of State accepts evidence given in his interview is correct. The appellant gave a plausible account of his activities in Eritrea and his escape and how he spent the intervening years. The judge has not made any findings or addressed this evidence. He submitted that it is impossible to know whether or not the judge considered those aspects of the evidence. Mr Gilbert relied on

the case of AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230. The judge has not engaged with the evidence. Even if she rejected the evidence in favour of the respondent's evidence she needs to say why she prefers that evidence.

8. Mr Gilbert submitted that the judge erred in not taking into account the reason why the appellant had continued to use his false identity. His children are known under that name and family proceedings were in his false identity.

9. At paragraph 8 of the First-tier Tribunal's decision the judge made 2 errors. The first was in the acceptance of the respondent's position that a visa application is much more detailed when no evidence had been provided by the respondent as to what checks had been undertaken. He submitted that in accepting that there was a higher standard of proof in visa applications the judge imported a higher standard than that required in an asylum claim on the appellant to prove his case. The second error was asserted to be that the judge accepted the respondent's assertion that the appellant used an Ethiopian ID card in support of his visa application. It is clear from the interview (at q75) that the appellant clearly stated that he did not have an Ethiopian ID card and at q75 and 76 the only Ethiopian document he had was an Ethiopian driving licence. The judge failed to resolve this material difference. In answer to a question I asked of him Mr Gilbert confirmed that the document used by the appellant to obtain the visa to come to the UK was the UNHCR ID card. This was set out in the grounds of appeal and in the appellant's witness statement at paragraph 2(i). I referred Mr Gilbert to questions 117 and 121 of the substantive asylum interview where it clearly states that the UNHRC document recorded his nationality as Eritrean and was in his real name i.e. Mlash. Mr Gilbert submitted that the document used to obtain the visa has not been resolved – the respondent cannot say what document was used.

10. Mr Gilbert raised the issue of the appellant's children submitting that the judge failed to consider the impact of his removal on the appellant's children. I confirmed with the Home Office Presenting Officer that the appellant had been granted limited leave to remain. Mr Gilbert was content not to pursue this point in light of that.

11. Ms Everett relied on the Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response which concerned exclusively the procedural impropriety point. She submitted that the best she could do in respect of the First-tier Tribunal decision is to submit that the judge did not err in law. The judge mentions on a couple of occasions that she has considered all the evidence – see paragraph 18. She accepted that on reading the determination one cannot ascertain what the oral evidence was. She submitted that what the judge saw to be the critical issue was the Nationality. Regarding the Entry Clearance Officer applying a higher standard Ms Everett submitted that the standard applied is the civil balance of probabilities which is a higher standard

than reasonable likelihood. The Entry Clearance Officer accepted that the appellant was Ethiopian. It is an Entry Clearance Officer's role to check that an applicant is who they say they are and that they are the nationality that they claim to be. I asked Ms Everett if she had any evidence of what checks were routinely carried or what an Entry Clearance Officer did when checking an application. Ms Everett indicated that she did not know. Ms Everett indicated that a record would not generally be made on the visa form of a positive response to checks on validity it was only generally where there was some doubt that you would see references on the visa forms. In relation to this particular application Ms Everett indicated that as the application was made in 2008 the information as to what documents were submitted and what checks were carried out will not be readily available as this was before forms were recorded electronically. I indicated that the visa application form indicated a passport number and asked Ms Everett if where there was no passport to support a visa application what would be recorded there. Ms Everett did not know whether or not another form of identification reference number would be recorded in that space.

Discussion

12. In considering the ground of appeal that the judge did not engage with the evidence, did not set out findings in sufficient detail and did not resolve differences in the evidence giving reasons for preferring the evidence of the respondent I have taken into account the factors set out in AK (Failure to assess witnesses' evidence) Turkey [2004] UKIAT 00230 at paragraphs 9 and 10:

> "9. … Whilst there is of course no general requirement for an adjudicator to set out at length the oral evidence given before him, and in many cases no useful purpose would be served by doing so, nevertheless he ought as a matter of good practice to summarise at least the material parts of the evidence which he has heard so as to enable an informed reader to ascertain the nature and content of that evidence, and also to enable him to be satisfied that the adjudicator has directed his mind properly to the material aspects of the evidence. In general, it is not sufficient for an adjudicator merely to record that a witness has relied on his or her witness statement, although there may be particular circumstances in which that would suffice, e.g. where the evidence in question relates to facts which are not in dispute between the parties, or which are irrelevant to the issues on which the outcome of the appeal will turn.
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> 10. … Save in those exceptional cases where the material facts are not in issue between the parties, it is an essential part of an adjudicator's responsibility to make clear findings of fact on the material issues, and to give proper, intelligible and adequate reasons for arriving at those findings …"

13. The First-tier Tribunal sets out, at paragraph 7, that the appellant's claim is as set out in the documents mentioned in paragraph 4 of the decision. In paragraph 4 the only documents mentioned are a copy of a guardian newspaper report and a copy of the US Department of State

report of 2013 on Eritrea. There is no mention of the appellant's witness statement or any reference to his oral evidence. The only reference that may be inferred is to the record of proceedings. It is clear that the judge has not only taken the two documents referred to in paragraph 4 as these would not have contained the evidence that the judge summarises in paragraph 7. What is not clear is what evidence the judge has taken into account.

14. It is apparent from the record of proceedings that the appellant gave oral evidence as to why he used a false Ethiopian false identity; namely, that he was afraid and didn't want to be known as Eritrean in Ethiopia. He also gave an account of his time in the Eritrean army and his role as a spy for the Eritrea authorities. There is no record of this evidence and neither is there a record of the appellant's evidence set out in his witness statement. The appellant asserts that he did not obtain an Ethiopian ID card. He obtained a forged Ethiopian driving licence. He also asserts that he answered all the questions in his asylum interview on Eritrea correctly and he speaks Tigrinya.

15. I find that the First-tier Tribunal failed to engage sufficiently with the evidence. The main thrust of the decision and reasons for the findings appears to be the use of the false identity in obtaining a visa to come to the UK. The appellant did not deny that he used a false identity and gave reasons in his oral and written evidence as to why he did that. For example in relation to the use of an false identity, at paragraph 18 of the decision, the First-tier Tribunal judge when considering certain behaviour as damaging the appellant's credibility (as she was required to do) the judge finds:

> "… I find the appellant used documents designed or likely to conceal information and designed or likely to mislead. I therefore find that this goes against the appellant's credibility and undermines the credibility of his claim to be an Eritrean national …"

16. At paragraph 19 the judge considers that the appellant's continued use of the false identity whilst in the UK further undermines his claim. There is no engagement with the reasons asserted by the appellant as to why he continued to use the false identity in the UK or why he had used a false identity during his time in Ethiopia and to obtain his visa.

17. The appellant gave an account of his activities in Eritrea and his escape and how he spent the intervening years. The judge has not made any findings or addressed this evidence at all.

18. At paragraph 14 the judge refers to the name on the Sudanese driving licence as being Zerit Mlash Ghebrat. The judge notes that the appellant has never used the name Ghebrat and that this further undermines his credibility. Whilst the judge is perfectly entitled to take this into account, it is not clear that the appellant was afforded an opportunity to explain this issue.

19. The judge has set out in some detail the documentary evidence that she has considered and has given reasons as to why she has made her findings but she has not set out why she has rejected the appellant's evidence. The judge accepted the respondent's assertion that the appellant used an Ethiopian ID card in support of his visa application (at paragraph 9). It is clear from the interview (at q75) that the appellant clearly stated that he did not have an Ethiopian ID card and at q76 the only Ethiopian document he had was an Ethiopian driving licence. The respondent did not provide any evidence as to what documents were used in support of the visa application and at the hearing before me the respondent's representative could not provide an indication as to what documents were used. In the reasons for refusal letter the respondent asserts that the appellant said that he used an Ethiopian ID card and Ethiopian driving licence to support his visa application referring to q75 and 81 of the substantive interview. The answers to those questions do not support the respondent's position. The judge failed to resolve this material difference in the evidence so it is not clear why she came to the conclusion that she did.

20. The judge, at paragraph 9, accepts the respondent's assertion that a visa application is much more detailed and of a higher standard of proof and takes judicial notice of that as a fact. The judge appears to have discounted the answers given correctly in the appellant's asylum interview on the basis of the higher standard of proof applied by an Entry Clearance Officer as she referred to 'simply answering questions at screening and asylum interviews.' There is no other engagement with the fact that the appellant appears to have answered the vast majority of the questions correctly. No doubt an applicant can learn sufficient information or have the knowledge of a particular country for reasons other than being a National of the country to answer sufficient questions correctly. However, there was no real analysis by the judge of why she considered that the correct answers to the questions, which are designed to test knowledge that will either support or damage a claim to be of a certain Nationality, were to be disregarded particularly where the appellant has never denied entering the UK using an Ethiopian false identity and no specific evidence was produced by the respondent on the issue. The respondent had not provided any specific evidence as to what checks had been undertaken. I accept that the respondent will not and ought not to be required to reveal **methods** used to undertake checks In this case there was no indication in the visa documentation as to what document was used to support the visa application (a passport number was indicated on the form). Whilst it might be the case that the Entry Clearance Officer will apply a rigorous approach to ensuring the validity of documents and this will no doubt be, as Ms Everett submitted, a core component of their role in assessing visa applications, they are not infallible. I accept that due weight should be afforded to the Entry Clearance Officer's expertise. However, given the anxious scrutiny required in asylum cases the approach of the judge is inadequate.

21. Whilst the judge's finding were open to her and the decision is not unreasonable, for the above reasons I find that there was a material error of law in the First-tier Tribunal's decision and I set aside that decision. I communicated my decision orally at the hearing.

22. I canvassed the views of the appellant's representative and the Home Office Presenting Officer with regard to proceeding to re-make the decision or alternatively adjourning the hearing for the matter to be re-heard before the Upper Tribunal. Mr Gilbert invited me to remit the matter to the First-tier Tribunal as there needs to be considerable findings of fact. Ms Everett agreed that this was required. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

23. I remit this matter for a de-novo hearing before a First-tier Tribunal judge other than Judge Dean. I considered whether or not I could preserve any of the findings of fact. Whilst this may have been possible with regard to some of the findings on the documents as the findings were inextricably linked to the appellant's credibility I decided that it would not be possible to do so without hampering the First-tier Tribunal when re-hearing the matter. A new hearing will be fixed at the next available date.

24. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

25. I have not considered the grounds of appeal in relation to the procedural impropriety point having found a material error of law as set out above. Although this does not form part of my decision I indicate that it does appear that the appellant may not have had an opportunity to have a fair hearing. Although the judge was correct to point out that the role of a third party is not to comment on the interpretation being undertaken by an authorised court interpreter, if there may have been some issues with the interpretation then by refusing to permit the appellant's representative's interpreter to take a note of the issues so that they could be put forward in submissions might amount to a risk that the hearing was not fair. The judge has not had an opportunity to comment but a note on the file appears to indicate that the judge indicated that the interpreter should not take notes.

Decision

26. The decision of the First-tier Tribunal involved the making of an error of law. I set aside that decision. The matter is remitted to the First-tier

Tribunal for a de-novo hearing before a First-tier Tribunal judge other than Judge Dean.

27. I have not given any specific directions (other than the matter is to be heard by a judge other than Judge Dean) with regard to the re-hearing leaving those matters for the First-tier Tribunal to decide what is appropriate. I did, however, discuss with Ms Everett the desirability of the respondent producing the evidence with regard to what documents were considered by the Entry Clearance Officer (with copies if available) in respect of the application for entry clearance. Ms Everett indicated that she would endeavour to ascertain whether such evidence could be obtained.

Signed P M Ramshaw Date 16 January 2016

Deputy Upper Tribunal Judge Ramshaw