Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA057472016

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court on 27 June 2017	**Decision and Reasons promulgated on 10 July 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KOI
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Azmi instructed by Coventry Law Centre
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Boylan-Kemp ('the Judge') promulgated on 4 June 2017 in which the Judge dismissed the appellant's appeal on asylum, humanitarian protection, and human rights grounds.

Background

2. The appellant is a national of Eritrea born on [ ] 1998.
3. The appellant claims to have left Eritrea in 2001, aged three, and to have travelled with his family to live in Saudi Arabia. It is said his passport was endorsed with an Umrah visa, although it is noted Umrah refers to the Islamic pilgrimage to Mecca and that an Umrah visa does not give entitlement to reside in or work in Saudi Arabia.
4. The appellant claims to have been deported back to Eritrea with his family in May 2015 but also to have left Eritrea in the same month and travelling to Sudan before making the journey to the United Kingdom via Egypt, Italy and France. The appellant entered the UK on 31 October 2015 and claimed asylum on 26 November 2015 which was refused on 25 May 2016.
5. The Judge noted the basis of the appellants claim at [13] of the decision under challenge in the following terms:

> 13. The appellant claims to be an Eritrean national. He and his family lived in Saudi Arabia between 2001 and 2015 where his father worked as a chauffeur. His father was allegedly active in the opposition of the Eritrea regime; he was a member of the Eritrea Liberation Front (ELF). The family were deported from Saudi Arabia back to Eritrea due to a change in the appellant's father's employment and his inability to secure a new sponsor in the country. Upon arrival to Eritrea the appellant's father was detained by the authorities; the family have not seen him since. The appellant and his remaining family (his mother and his younger siblings) were allowed to leave the airport but were required to report to the authorities at a later point. The appellant did not report as required and was informed by his aunt that the authorities were looking for him and so he remained in hiding until he was able to leave Eritrea and travel to Sudan approximately one month later; he left illegally but took the family passport with him, although this was stolen from him in Sudan. The appellant's position is that therefore he would be at risk upon return due to his illegal exit from Eritrea and due to being of conscription age; this is the basis of his asylum and/or humanitarian protection claim. At the hearing, Mr Vokes, acting for the appellant, confirmed that there was to be no reliance upon the appellant's article 8 rights in the UK.

6. Having considered the background in evidence the Judge sets out the findings of fact from [16] of the decision under challenge which may be summarised in the following terms:

    i. The first issue to determine was that of the appellant's nationality. The Judge noted the appellant's explanation for his lack of knowledge of Eritrea and of his native language was as a result of him spending the majority of his life living in Saudi Arabia where he attended school and spoke Arabic. His evidence was that his parents spoke Tigre to

each other at home but they were also fluent in Arabic and would speak to the children in Arabic [16].

ii. The Judge did not accept it was plausible that the appellant's parents had not taught him or the other children their native language despite not residing in Eritrea. It was found to be expected that the children would have learned more than a few basic abstract words as a result. It was found there was always the possibility of the family having to return to Eritrea where they would need to speak the native language, especially if the children were to be educated there, a fact of which the appellant's parents would have been aware. It was found "I therefore find the appellant's inability to speak all but a few basic words of his alleged native language undermine the credibility of his claimed nationality" [16].

iii. The appellant produced a number of documents and photographs in support of his claim. The appellant stated his mother had sent a copy of his father's ELF card to him which he claimed his mother had sent to him from Sudan which is where his family now were. The Judge finds concerns over the genuineness over the document as it was not found plausible that the appellant's mother would have sent this and only this document to him in error especially when his evidence was that his mother had sent him copies of other documents by instant messenger due to her not being able to afford the cost of postage [17].

iv. The appellant provided translated copies of the documents sent by instant messenger referring to the nationality of the appellant and one of his siblings as Eritrean in relation to which the Judge finds the documents were sent by photograph so there could be no inspection of the originals undertaken [18].

v. The Judge finds the appellant has not satisfied the tribunal as to the genuineness of the documents applying *Tanveer Ahmed* for the reasons set out at [19] resulting in the Judge not accepting the ELF card is a genuine document and that little weight can be placed upon the other documents when assessing the appellant's nationality [19].

vi. The Judge expressed concern over the credibility of the appellants claim that he left Eritrea illegally with his family passport which was subsequently allegedly stolen in Sudan. The appellant is said to have failed to provide any reasonable explanation as to why his mother would have given him the family passport especially when his evidence is that the whole family wished to leave but could not afford to do so at that time and so would have required the passport at a later stage. The Judge finds the fact it was stolen and could not be produced to be "convenient"

considering the basis of the claim which focuses on nationality [20].

vii. The Judge took into account the appellant's lack of knowledge about Eritrea claiming he would expect him to know the name of the village in which he was born. It is also stated the appellant was worried about having to do military service and it was not found credible the appellant would not know the age at which conscription occurs [21].

viii. The Judge noted the account of the appellant's family being returned from Saudi Arabia as they no longer had a sponsor, which was accepted as being in line with the country evidence provided, but then went on to state that there was little evidence except the appellant's own testimony which was not found to be credible to demonstrate the appellant's family were in a position of being forcibly returned to Eritrea as he claimed [22].

ix. The fact the appellant travelled through various countries before arriving in the UK without claiming asylum undermines the credibility of his claim resulting in an adverse inference pursuant to section 8 Asylum Immigration (Treatment of Claimants etc.) Act 2004 [23].

x. At [24] *"overall, I found the appellant to not be a credible witness and due to the issues I have identified with his evidence, such as his lack of knowledge of the language and the country and due to his inability to produce any satisfactory evidence demonstrating his nationality, I find that his account has been undermined to such a degree that I am not satisfied, even to the lower standard, that the append is an Eritrean national as he claims. Therefore, I find that as the appellant has failed to satisfy me that he is an Eritrean national then he has failed to establish that he is outside of his country of nationality owing to a well-founded fear of persecution. Consequently, no Convention reason is engaged, meaning that the appellant cannot claim asylum on this basis".*

xi. The Reason for Refusal letter indicates that even though the appellant's nationality was not accepted by the respondent he was to be removed to Eritrea being his claimed nationality [25]. As the appellant did not satisfy the Judge that he is a national Eritrea it was found he cannot be removed to Eritrea resulting being concluded there was no well-founded risk of persecution or serious harm or breach of ECHR or humanitarian protection on this basis. The Judge was unable to comment upon which country the appellant is a national of as it was stated there had been no positive evidence upon which such a finding could be made, and that the issue therefore remains open and should be returned to the Secretary of State for a decision to be made on this matter [26].

7. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 4 April 2017.
8. The Secretary of State opposed the grant in a Rule 24 letter dated 24 April 2017.

Grounds and submissions

9. The grounds of appeal are detailed raising a number of challenges to the decision of the Judge. In relation to the finding at [16] it was submitted that:

    a. the finding is a Wednesbury unreasonable finding as it was not a rational finding on the lower standard that a second-generation migrant must speak the first language of his parents rather than the language of the country he grew up in as his first or predominant language. It is said the adverse plausibility finding made by the Judge sets the standard of proof too high for a protection claim and was not one reasonably open to the Judge.
    b. The Judge made a finding based on no evidence as there was no evidence before the Judge that Tigre was the appellant's 'native language', that education in Eritrea is conducted in Tigre, or that Tigre is the 'native language' of Eritrea. The only available evidence was that Tigre was the appellant's parent's most fluent language. It is asserted the Judge made a speculative finding based on no evidence which is fundamentally and objectively incorrect. It is noted for the appellant's ethnic group of the Bilen people, Tigre is not necessarily the native language, even though it is widely spoken.
    c. The Judge failed to take into account relevant evidence that the appellant's experiences were those of a child rather than an adult, that the appellant's father held strong political opinion including about the treatment of Muslims in Eritrea and that for him the right to speak Arabic is a complex political issue. The appellant gave evidence regarding his father's political views about language at paragraph 12 of his initial witness statement but the Judge fails to make findings on this aspect of the appellant's case at all, and it does not appear to have been a matter that was considered. Whilst a child at the date the appellant gave a statement and when he claimed asylum, there is no sign when assessing credibility that the Judge has taken the appellant's age into account or factored in that in his oral evidence the appellant was having to recall events that happened when he was a child.

10. It is also pleaded there has been a failure to make material findings regarding the appellant's case as there is no finding about whether it

is accepted the appellant lived and grew up spending the majority of his life in Saudi Arabia, which is said to be a significant fact in the assessment of nationality and the credibility and to the assessment of risk on return.

11. The finding by the Judge that the appellant had not satisfied the genuineness of the school reports provided, because they were not sent by post with his father's identity card and there is no verification of the original or evidence independent checks of nationality were undertaken, is said to be flawed as if a proper finding had been made on whether the appellant had actually attended the named school and lived in Saudi Arabia, including as a dependent on his father's work Visa, that would have been material to the assessment of the documents in the round. It is submitted the lack of a finding regarding the appellant's time in Saudi Arabia has tainted the assessment of the evidence regarding the documentation provided.
12. It is argued that in [19] the Judge has set too high a standard of proof when rejecting the validity of the documents by reference to the terms 'possible' and 'may'. It is argued the obligation on the appellant was to adduce evidence capable of proving there were substantial grounds for believing that, if the measure complained of were to be implemented, he will be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention, and that where such evidence was adduced it was for the government to dispel any doubts about it.
13. It is argued that in [19] there is also a failure to give reasons as no reasons are given for the finding the photographs provided did not assist the Judge in determining the appellant's nationality, given the photograph of the appellant's parent's wedding including a banner written in Tigrinyan, which is said to be strong primer fascia evidence that the appellant's parents were married in Eritrea and are Eritrean.
14. At [20] it is said there is a mistake of fact amounting to an error of law as the appellant's evidence was not that he had been given the family passport but his own passport. The adverse credibility finding made in relation to the belief the appellant had taken the family passport is said to amount to a mistake of fact which has prejudiced findings in respect of credibility to a degree that constitutes an error of law.
15. At [21], in which the Judge finds one would expect the appellant to know the name of the village where he was born, it is asserted the Judge failed to take into account or give reasons for finding against the appellant's evidence that he lived in a city not a village as a child in Eritrea even though he was born in a village, and that he left Eritrea at the age of three and so has no memory of this time. The appellant, at paragraph 6 of his witness statement, noted he is only be able to repeat what he was told about his birthplace. It is argued the Judge fails to make any reference to this or to factor this evidence into the conclusions reached.
16. At [14 and 21] it is argued the Judge made adverse findings on a matter that was not in issue. It is said at [14], when summarising the refusal letter an adverse finding is said to have been made because

the appellant was not aware of the conscription age, which was maintained in the Judges own findings at [21] which are said to be incorrect as this was not a point taken in the reasons for refusal letter and therefore not in issue.

17. It is argued that at [23] the Judge failed to take into account relevant considerations in relation to section 8 as the appellant was a minor in control of an adult agent at the time.

Error of law

18. In his oral submissions, Mr Azmi relied on the pleaded grounds which were opposed by Mrs Aboni who argued the appellant was expected to know some basic knowledge of Tigre which it is stated had been spoken at home. It is also argued the Judge had accepted the appellant lived outside Eritrea for most of his life.
19. In relation to the conscription issue, Mrs Aboni accepted this was not part of the asylum claim and did not know if it had been raised in the hearing and did not know if the family passport was his or was the document found by the Judge to have been given to the appellant. It was argued the findings were open to the Judge and that adequate reasons had been given.
20. The grounds of challenge identify a number of concerns with the decision. It is not argued the Judge would not have been able to make the adverse credibility findings recorded in the decision under challenge per se but it is arguable that such conclusions can only be reached having considered all the available evidence with the required degree of anxious scrutiny and when giving adequate reasons.
21. The starting point in this case was the appellant's claim that from the age of three to 15 he had been brought up in Saudi Arabia. The Judge makes no finding in relation to the appellant's account which I find to be an arguable legal error as the other aspects of the case, taken into account by the Judge, can only be properly considered against this background. Accepting the family lived in Saudi Arabia between 2001 and 2015 is, in isolation, insufficient without more. It is not the fact they lived in Saudi Arabia for this period, if indeed the Judge accepted this fact, but the impact of a person living in Saudi Arabia during their formative years upon the weight to be given to the evidence the Judge was asked to consider.
22. In this respect the language issue was of concern to the Judge and there is merit in the challenge to the decision that the conclusions at [16] are inadequately reasoned and based upon a lack of evidence to support the findings made.
23. In relation to the documentation, especially the school reports, the grounds refer to the relationship between the need for clear findings in relation to the appellant's previous life in Saudi Arabia, which should include a finding as to whether he actually attended the named school and lived in Saudi Arabia or not, which must be a relevant issue when assessing the weight to be given to the documents. The Judge

also gives no reason for why it is not plausible that the appellant's mother sent a document to him in error even if other documents were sent by Instant Messenger and why no weight could be attached to the documentation in light of the shortfalls in the assessment of all relevant aspects of the appeal.

24. It is also noted the Judge applied *Tanveer Ahmed* at [19] leading to a conclusion that little weight was attached to the documents when assessing nationality. It is accepted weight is ordinarily a matter for the Judge, but this can only be the case if the evidence has been considered with the required degree of anxious scrutiny and adequate findings made. In this case, it is not made out that the two criteria have been satisfied. It is also the case that any decision as to the weight to be attached to the documents should form part of the overall assessment of the available evidence, yet the finding in relation to the documents appears quite early on in the Judges assessment of the evidence rather than being arrived at once all relevant aspects have been taken into account. Otherwise an artificial separation of the assessment of the credibility of documents can occur.

25. The issue in relation to the alleged make mistake of fact concerning the family passport is made out. The appellant in his witness statement clearly states that he had his Eritrean passport stolen in Sudan. The Judge fails to give adequate reasons for rejecting this aspect of the claim or indeed for considering the circumstances in which the appellant would been issued with an Eritrea passport, which may be relevant. The mistake of fact led to the adverse credibility finding at [20] which was arguably not open to the Judge on the basis of the available material.

26. A fairness point also arises at [21], as the appellant's knowledge of the conscription age is not a matter that was said to be an issue in the appeal. The Judge may have been entitled to make adverse findings in relation to this aspect but would have been required to put the appellant on notice of this matter and to give the appellant the opportunity to respond.

27. It also appears that Judge failed to consider the evidence adequately when concluding that there was an expectation the appellant would know the name of the village in which he was born, in light of the fact his evidence was that he moved to a city in Eritrea and left that country when he was three years of age.

28. It is accepted this appeal would not have been easy to determine as there are a number of elements that required proper consideration. It is not a "run-of-the-mill" appeal when an individual claiming to be from Eritrea may have a lack of knowledge of aspects of that country, including language, whilst also claiming to have lived there for a number of years. In such cases the lack of knowledge of language and other aspects of life within Eritrea may properly warrant adverse credibility findings being made. The determination is suggestive of an approach being taken that this was such a "run-of-the-mill" appeal when the factual matrix suggested otherwise.

29. I make a finding of fact that the Judge has materially erred in law for the reasons set out in the application for permission to appeal and highlighted in this decision. As the adverse credibility findings reached by the Judge were all based upon an assessment of the evidence set out in the determination and have been shown to be unsafe, there can be no preserved findings.
30. As a comprehensive fact-finding exercise is required in relation to all aspects of this appeal it was accepted the only way to proceed, in accordance with the Presidents practice direction, is for the appeal to be remitted to the First-tier Tribunal at Birmingham to be heard afresh by a judge other than Judge Boylan-Kemp who shall be required to make findings in relation to each and every factual aspect of the case and to set out properly and adequately reasoned conclusions regarding the merits of the appeal.

Decision

31. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the appeal to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Boylan-Kemp.**

Anonymity.

32. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson
Dated the 7 July 2017