Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09699/2016**

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision and Reasons Promulgated**
On 9 February 2018	**On 15 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

WM
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms S Walker, instructed by JD Spicer Zeb Solicitors
For the respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Hudson promulgated 22.6.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 6.9.16, to refuse his protection claim.

2. First-tier Tribunal Judge Macdonald granted permission to appeal on 27.9.17.

3. Thus the matter came before me on 9.2.18 as an appeal in the Upper Tribunal.

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4. In summary, the appellant's case was that he was born in Asmara to Eritrean parents. His father was imprisoned due to his membership of the Derg and in consequence his mother fled to Ethiopia, at which time the appellant was 3 years of age. Five years later, his mother was deported back to Eritrea. The appellant was raised in Ethiopia and later lived in Sudan. At the age of 22 he returned briefly to Asmara before leaving the country illegally. He feared return to Eritrea on grounds of imputed political opinion, arising from his parents' affiliations with the Derg.

5. Judge Hudson found the appellant's account not credible and rejected the claim that he is Eritrean or that his mother was deported as claimed. Neither did the judge accept the claimed political involvement of his parents.

6. The appeal was dismissed all grounds. The appellant sought and was granted permission to appeal to the Upper Tribunal.

Error of Law

7. In granting permission to appeal, Judge Macdonald merely observed that there may be merit in the grounds, but did not specify on what basis he considered these to be arguably material.

8. I have given careful consideration to the somewhat lengthy grounds, as well as the submissions of the two representatives before me. I am not persuaded by all of the grounds of appeal. However, for the reasons summarised below, I found sufficient material error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside and remade in the First-tier Tribunal.

9. I am not persuaded that the First-tier Tribunal Judge applied the wrong burden and standard of proof, as pleaded in the first ground of appeal. This relates to the issue of the appellant's nationality. The RFR considered that it was doubtful that he is Eritrean, on the basis that his nationality claim is doubted but the Secretary of State cannot be satisfied that he is a national of another country. This is to be distinguished from a case of disputed nationality, where the Secretary of State does not accept that the appellant is Eritrean and instead believes that he the national of another country, in this case Ethiopian. In the first case the burden remains on the appellant to the standard of reasonable likelihood, whereas in a case of disputed nationality the burden is on the Secretary of State to demonstrate on the balance of probabilities that he is a national of another country.

10. for the reasons carefully set out in the decision, Judge Hudson rejected the claim that by producing a copy of the Eritrean Nationality Proclamation and asserting that the appellant's parents were not Eritrean, the Secretary of State altered its case from one of doubtful nationality to one of disputed nationality, thereby shifting the burden of proof, so that the judge applied the wrong burden and standard of proof. This argument was raised and fully addressed in the First-tier Tribunal appeal hearing, and decision. She

considered but ultimately rejected the argument and on the evidence was entitled to conclude the burden had not shifted. I am satisfied that the findings of the judge in this regard were fully open to her on the law and facts. In effect, this ground is merely a disagreement with the conclusion reached and an attempt to reargue the point.

11. The second ground is that at [17] the judge made a fundamental error in misdirecting herself as to the contents of Human Rights Watch report. Ms Walker referred me to the statement of the judge within [17] : "*The Human Rights Watch report of January 2003 reports in detail of the interrogation of such people and the opportunity they were given to demonstrate loyalty to the Ethiopian regime and that they were not a risk to security*." The relevant part of the report read, "*During the interrogation, the detainees were not given a meaningful opportunity to refute the allegation that they were Eritrean nationals (or security risks) and were denied access to the courts to challenge the legality of their detention or denationalisation*." The grounds and Ms Walker's submissions are to the effect that the judge had misread or misunderstood the report and missed out the word "not" in relation to opportunity. Ms Walker had some difficulty understanding that it does not necessarily follow that the way in which the judge expressed herself in this sentence was a misreading of the report. In one sense, it is correct that the report dealt with the opportunity to demonstrate loyalty, even if in fact they were not given such opportunity. Put another way, the issue of demonstrating loyalty is addressed by the report, but concludes that they were not given such opportunity. I am not satisfied that the judge was necessarily quoting or misquoting the report.

12. However, what becomes clearer on a reading of the decision as a whole on this issue is that the judge did misunderstand the import of the report. It was the view of the judge that both parents having worked for the Derg whilst in Eritrea, she had demonstrated opposition to Eritrean and loyalty to the Derg, and as such there was no reason for the Ethiopian authorities to remove her back to Eritrea.

13. The report in question explains at p11 that the political parties now in government in Ethiopia and Eritrea share a joint history of armed opposition to the former Ethiopian regime, a brutal military dictatorship known as the Derg. The Ethiopian People's Revolutionary Democratic Front (EPRDF), an alliance of a number of ethnically-based liberation movements, fought the Derg for greater autonomy in their local regions. At the same time, and for decades, the Eritrean People's Liberation Front (EPLF) was in armed opposition to the Ethiopian emperor and later the ruling Derg, in a movement to liberate Eritrea from Ethiopian control. In 1962 the Ethiopian emperor had annexed the territory of Eritrea, making it a province of Ethiopia. This triggered a long war of Eritrean independence, with the EPLF emerging as the dominant liberation front amongst several competing rebel factions. The EPLF and the EPRDF formed an anti-Derg alliance. In 1991 this alliance gained control, with the EPRDF gaining control of Addis Ababa (now Ethiopia) and the EPLF took control of Asmara (now in Eritrea). Following the fall of the Derge, the EPRDF established a

transitional government intended to work towards greater democracy in Ethiopia. Meanwhile, the EPLF established a provisional Eritrean government, which led two years later to independence.

14. It follows that if, as claimed, the appellant's parents had both worked for the Derg, his mother could have had no basis for hoping to demonstrate loyalty to the present Ethiopian government which overthrew the Derg in 1991. In that light, the judge's summary of and addressing the issues arising the expert report at [17] of the decision is entirely misleading. The judge proceeded mistakenly on the basis that the appellant's mother was a loyal Ethiopian, and states that she could not see why the Ethiopian authorities should have regarded the appellant's mother as a risk to the national security of Ethiopia, as she ought to have been able to demonstrate her loyalty.

15. It follows that the judge has seriously misunderstood the country background information and that the basis for rejecting on credibility grounds the appellant's factual claims on this aspect of his protection claim was entirely flawed. The judge has erroneously effectively equated association with the Derg to loyalty to Ethiopia in opposition to Eritrea. Whether or not the claim to have worked for the Derg is credible, the way in which the consequences are dealt with at [17] involves a complete misreading of the history of the two countries.

16. I also find that there are errors of law in the judge's treatment of the appellant's claimed recollection of events from his childhood. At [18] the judge purported to find it "unlikely that he would have retained much of any information provided to him prior to his ninth birthday, because it simply would not have been important to him." Similarly, at [24] the judge doubted that an individual "would recognise a childhood friend some 16 years later having changed from pre-pubescence to adulthood in the meantime."

17. The judge was effectively applying her own subjective opinion on matters of the ability of adults to recall events or cultural details from childhood experiences in order to make adverse credibility findings about the appellant's account and that of his witness. It would have been open to the judge to rely on inconsistencies or discrepancies, or to point out that there was no reference to the witness in the appellant's interview or witness statement, or make findings as to the credibility of assertions for other cogent reasons, but it is not open to the judge to find that the appellant could have no recollection of his mother in Eritrea, or of Eritrean customs or food, etc., simply because he was under the age of nine at the time. Such memories from childhood may generally be less reliable and vaguer, but it cannot be said to be implausible that a person would have clear memories of at least some events or experiences. In the circumstances, these findings disclose unfairness and amount to an error of law.

18. It may be that a different judge would reach the same ultimate conclusion on the evidence, but I cannot say that is necessarily so. For all the reasons

explained above, the decision of the First-tier Tribunal cannot stand and must be set aside. In the circumstances, it is not necessary to address the remaining grounds of appeal.

Remittal

19. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.
20. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

21. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside and remade.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

22. The appeal is remitted to the First-tier Tribunal sitting at Manchester;
23. The ELH is 4 hours;
24. The First-tier Tribunal will decide whether any findings of fact can be preserved;

25. The appellant is to ensure that all evidence to be relied at the remitted appeal on is contained within a revised consolidated single, indexed and paginated, bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I continue the anonymity order.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Breach of this direction may lead to proceedings for contempt of court.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup