



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/12462/2017

THE IMMIGRATION ACTS

Heard at Field House
On 17th July 2018

Decision & Reasons Promulgated
On 14th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Counsel, instructed by Kesar & Co Solicitors

For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties. Failure to comply with this order could lead to contempt of court proceedings.

Appellant and Appeal Proceedings

2. The appellant appeals with permission granted in the Upper Tribunal, a decision of the First-tier Tribunal (Judge Rowlands/FTTJ) promulgated on 01 Feb 2018, in which the FTTJ dismissed the appellant's appeal against the refusal of his claim for international protection, made on the basis he is an Eritrean, finding an insufficient basis upon which to depart from an earlier judicial dismissal of his asylum appeal in 2016 in which there was a finding of fact that appellant is not Eritrean.
3. Judge Henderson in the earlier decision of 2016 took into account the fact that the appellant was an Amharic speaker, Amharic being the language of Ethiopia, with only a little facility in Tygrinya, the main language of Eritrea. The appellant said that was consistent with his background because, although he had Tygrinya speaking Eritrean parents, he had learnt Amharic in the context of time spent with his mother in Ethiopia and subsequently in Sudan. The judge noted when he first made contact with the Italian authorities he said he was Ethiopian, and when cross-examined he chopped and changed, giving inconsistent evidence as to whether he had or had not. He gave inconsistent evidence about whether or not he was in contact with his mother. His account of having a brother doing military service in Eritrea and his contact with him was also inconsistent. The judge rejected his account of being unaware that he had been granted status in Italy, and of having been advised by his uncle in Ethiopia to tell the truth about his Eritrean nationality and to move to the United Kingdom. The judge found his oral evidence lacking in credibility generally and found he had not established he was Eritrean.
4. At the second hearing in 2018 Mr Smyth did not represent the appellant but prepared the skeleton argument the solicitor representative submitted beforehand. I summarise:
 - (a) Firstly, by providing new evidence in the form of two witnesses to attest to his Eritrean nationality it was open to the FTTJ to take a different view from the first judge. I pause to note here that that argument failed, not least because there was no reasonable explanation as to why they did not give their evidence to the first judge, but particularly because their evidence did not withstand scrutiny. Permission was not granted to challenge those findings and the ground fell away.
 - (b) Secondly, the skeleton identified issues based on nationality law which had not been argued before the first judge and which may have led to a different view of the nationality issue:
 - (i) the account the appellant gave of his mother returning from Ethiopian to Eritrea in 2000 was in line with the country information concerning Eritreans being deported from Ethiopia.
 - (ii) the appellant was born to Eritrean parents (as accepted by the first judge) and as a result of the operation of the relevant Eritrean nationality law, the appellant was, as a matter of law and fact, Eritrean.

5. Permission to appeal was granted on the basis that if the FTTJ had appreciated the points made about nationality law, a different view might have been taken of the credibility of his claim to be Eritrean.
6. Mr Smyth asserts the FTTJ misapprehended the appellant's case by failing to appreciate that, because the previous judge found that the history provided by the appellant was credible, including his birth to Eritrean parents as well as the cross-border movements of his Eritrean mother, he had in fact established his claim. In short, Judge Henderson in the first appeal in October 2016 had made a wrong decision on the facts found. Judge Rowlands was bound by those earlier positive findings and so was, for the same reasons, wrong, and that was the error of law. I invited him to take me to the detail of the 2016 decision relied on in the skeleton argument. In the event, Mr Smyth had to accept that Judge Henderson in 2016 had not made any finding accepting the history that the appellant had given in order to explain his ability to speak Amharic, or about the nationality of his parents. Mr Smyth amended his argument to say that, on a fair reading of his decision, Judge Henderson had "implicitly" accepted that history, including most importantly that his parents were Eritrean, when:
 - (a) at [39] he explained why he did not find credible the appellant's evidence that he had left Eritrea illegally and stated:
 - (i) *"I appreciate that as the appellant was a young child (aged 9) when he and his mother left for Sudan he may not have fully understood the circumstances of their departure. I would not expect to produce any documentary or other corroborative evidence of this aspect of his claim (or indeed of other aspects of his claim). However his oral evidence lacked credibility generally",*
 - (b) at [45] he stated:
 - (i) *"the appellant's links with Eritrea are minimal. He has lived there for 6 of his 17 years (2000 – 2006): spending his first three years in Ethiopia (1997 – 2000) and then another 6 years (2006 – 2012) in Sudan and one year (2012 – 13) in Libya. On the basis of his evidence, he has as many links (if not more) with Ethiopia as he has with Eritrea. When he was in Sudan, his family appear to have lived in the largely Ethiopian community. When the appellant left Libya to travel to Italy he was in the care of Ethiopian women."*
7. In short, Mr Smyth asked me to find that the credibility of the appellant's account of his birth to Eritrean parents and changes to his geographical location during his upbringing had been established as credible, and that the only relevant point the judge rejected was the reasoning provided by the appellant as to why he had moved.
8. Mr Tarlow invited me to dismiss the appeal. The FTTJ correctly identified that he should start with the findings of Judge Harrison in 2016. The FTTJ had the evidence of the two witnesses whose credibility was not accepted. At [28] the FTTJ refers to the lack of any additional evidence about his Eritrean nationality in the context of tracing family. Nothing more could be said about his nationality, or that of the parents without more evidence, and the FTTJ found that he had not been provided with any. Mr Smyth is simply re-litigating a matter which was concluded on adverse findings.

Discussion

I find no merit in the points raised by the appellant. I have already explained that the skeleton overstated the first judge's findings. Further, the case Mr Smyth sets out above was not the case argued before Judge Rowlands. The FTTJ decision reveals how the case was argued before him. The representative concentrated on the detail of the appellant's oral and witness evidence as to why he spoke Amharic. In summary, it was said that he had such facility in light of his history of moving with his mother to Ethiopia when he was 3 years old in the context of his mother's owning and running a hotel in Ethiopia, returning to Eritrea with his mother when he was about 6 years old, and then living there until he was about 9 years old before moving again with his mother, who had taken exception to his father's second marriage, to live with her brother in Sudan. His maternal uncle had an Ethiopian wife who forced him to speak Amharic and beat him if she heard him speaking Tygrinya. Further he was living and going to school in an Eritrean/Ethiopian enclave in Sudan. Although that account was broadly the same as had been previously rejected, what was said to be new was the corroboration by two witnesses of his movements.

9. The decision shows that how the appellant and the witnesses knew each other and had re-established contact was fully explored, during the hearing, as was the explanation for the failure to bring the witnesses forward in the first hearing in 2016. In what the FTTJ describes as brief submissions, the appellant's representative did not elaborate on the nationality law point set out in the skeleton. The representative did not argue that a Devaseelan point arose in respect of the parents' nationality which was determinative of the appeal, nor invite the FTTJ to make findings as to the nationality of the appellant's parents as a means of determining the appellant's nationality. Instead, the representative put the force of the appellant's case as his having provided a reasonable explanation as to how he had come to speak Amharic and the reliability of his witnesses. The representative did not submit that the claimed history had any importance beyond being the explanation for the appellant's ability to speak Amharic. The respondent argued that there was nothing which could properly be taken into account as new, and that the claimed new evidence in any event lacked credibility.
10. The FTTJ paid attention to the first judge's decision, taking it as his starting point, and found no reason to depart from its conclusions. To provide a "fair reading" of the first judge's decision as Mr Smyth suggests it must be read in the context of the case as it was put, and in the round. Judge Henderson found the appellant lacked credibility on a number of matters. The appellant's credibility was clearly rejected by Judge Henderson, for numerous and cogent reasons which these grounds and submissions minimise. Assessment of credibility is a holistic exercise and, whilst discrete points can arise, the submission here tries to nuance adverse credibility findings to extract as credible a point which was not made. On the case as it was argued before the first judge the issue of the nationality of the parents was not decided. There is no implicit finding that the appellant was born to Eritrean nationals. There is no factual finding in the context of Devaseelan which would be binding on the next judge. The appellant's credibility was clearly rejected at the second hearing by the FTTJ, and not simply by relying on the earlier adverse credibility findings but based on all of the evidence of the case argued before him, including that from the new witnesses.

11. Mr Smyth, in what became a rolling expansion of the grounds submitted that at the very least the FTTJ has fallen into error by failing to recognise the argument set out in the skeleton argument and adopting a more inquisitorial role so as to identify the need to make findings in respect of the points arising from the appellant's parent's nationality, resulting in insufficient fact finding. I find no merit in that point; the FTTJ dealt with the case on the basis upon which it was argued. Mr Smyth did not suggest that the simple failure to reference the skeleton argument was sufficient to constitute an error.
12. For the reasons that I set out above, the assertive evidence of the skeleton mischaracterises the force of the evidence, so that even should the FTTJ have dealt with the assertions therein they would not have been sufficient to bring the appellant's case home. Whilst Mr Smyth reduced the argument based on Judge Henderson's decision to an implicit factual finding rather than an explicit one and amended his position to argue that the FTTJ needed to make additional explicit factual findings, the representative on the day did not make that argument. The rump of the appellant's case left before me is that the FTTJ should, without the assistance of the representative, have found the argument within the skeleton argument, perfected it to amend it to reduce the reliance on positive findings to implicit findings, and recognised the need to make findings about the parents' nationality. The argument goes too far in the context of the adversarial system and does not establish an error of law. Further, although the standard of proof in international protection claims is low, it remains a burden on the appellant to establish the factual matrix upon which he relies. The claims of the nationality of the parents are absent any other evidence and so are matters which wholly depend on acceptance of the general credibility of the appellant. The FTTJ found neither he nor his witnesses credible [24]-[29]. There is nothing the matter with the credibility findings. In those circumstances, I am satisfied it is self-evident the FTTJ could only have articulated that the appellant had failed to meet even the low standard of proof and so failed to establish his parents' nationality.

Decision

13. The decision of the First-tier Tribunal dismissing the appeal reveals no error of law and stands.
14. Signed: Deputy Upper Tribunal Judge Davidge



Date 25 July 2018