Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01038/2019

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On 28th August 2019	**On 23 September 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

HA
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer, Counsel instructed on behalf of the Appellant
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 in the light of the circumstances surrounding this claim. Unless and until a court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly refer to her or her family members. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The Appellant with permission, appeals against the decision of the First-tier Tribunal Judge Moxon (hereinafter referred to as the "FtTJ") who, in a determination promulgated on the 27 March 2019, dismissed her protection and human rights claim.

3. The background to the Appellant's claim is set out in the determination of the FtTJ which made reference to her earlier claim made in 2009, which had been refused and dismissed by Immigration Judge Mensah and in the decision letter of the Secretary of State issued on the 10th January 2019.

4. The Appellant asserted that she had been denied Ethiopian citizenship and that whilst resident in Ethiopia she had become interested in her Eritrean background from her father and this had led to her actions at school and being accused of being a spy for Eritrea and that she had been arrested, detained for 3 months and subjected to sexual violence before her release. She then travelled to Sudan before arriving in the UK via France on the 10th December 2008. She made a claim for asylum and that claim was refused by the Secretary of State on the 5 February 2009.

5. The appellant lodged grounds of appeal against that decision. The appeal came before IJ Mensah on the 26th March 2009 and in a decision promulgated on the 14th April 2009 her appeal was dismissed. The IJ considered the issue of nationality in accordance with the country materials that were relevant at that date and found that she was an Ethiopian national. The IJ rejected her account of the events that had occurred in Ethiopia and did not accept that she had been arrested in 2008 for the reasons that she had given and that it was not credible that the school would provide students with Eritrean newspapers or that it would be necessary to involve the police when they had intercepted a letter a student had written in response to a page in one of the newspapers provided by the school. Judge also found that it was not credible the police would take any interest in such a letter or that she would be deemed a spy. The judge therefore found that she had no political profile and was not risk on return.

6. Permission to appeal that decision was sought and refused and she became appeal rights exhausted by 28 July 2009. Further submissions were provided which included further evidence which resulted in a fresh decision to refuse her asylum claim but with an in -county right of appeal (see decision of the 10th January 2019).

7. The appeal was heard by the FtTJ on the 5 March 2019 and in his decision promulgated on the 27 March 2019, her appeal was dismissed. The FtTJ began his assessment of the evidence by making reference to the previous claim for asylum that are been refused in 2009. At paragraph 59 he recorded that whilst the previous determination was his starting point (applying the decision in Devaseelan), he accepted that there were "various significant matters" that has arisen since 2009 that could reasonably permit departure from that decision and that he was not bound by the previous determination and conclusions in light of the further evidence which included the promulgation of the country guidance of ST (promulgated since 2009), the further evidence which included the visits to the embassy and the expert

evidence in the medical report. Whilst he found that she had given a broadly consistent account which was prime facie plausible in light of the country evidence which enhanced her credibility, he found that she had not taken reasonable steps to establish her nationality (see paragraphs 61 – 64), that there were material inconsistencies in the appellant's account which he did not accept were as a result of her previous history and her mental health problems and that whilst there was a medicolegal report, the report accepted the appellant's account at face value, had not adequately addressed the inconsistencies and that it was not unlikely that her symptoms were as a result of wishing to stay in the UK, as a result of her earlier experiences in childhood and having been assessed by a doctor (see paragraph 69). Thus, whilst he accepted that she suffered from some mental health difficulties, he was not satisfied that she had lost Ethiopian nationality, or that she was arrested, detained or ill-treated as she claimed (see summary at paragraphs 72 – 73). He therefore dismissed her appeal.

8. Permission to appeal that decision was sought and granted on all grounds by the First-tier Tribunal (Judge Scott-Baker) on the 20th June 2019 for the following reasons:

> "The finding at [72] that the discrepancies in the appellant's evidence are not due to mental health or memory problems but were made to embellish the claim is arguably against the weight of the evidence before the judge and is inadequately reasoned. The judge failed to have regard to all of the evidence before him relating the appellant's mental health and the diagnosis of PTSD. The judge has arguably failed to give due regard to the possible different spellings of the appellant surname and in the context of the interview with the Ethiopian embassy and is arguably failed to consider as to whether the appellant has done all that can be reasonably expected of her. There may be some merit in the assertion that there is an argue error of law for lack of reasoning. Permission is granted."

9. The appeal was therefore listed before the Upper Tribunal. At that hearing the appellant was represented by Mr Greer of Counsel who appeared before the FtTJ, and had drafted the grounds, and Ms Petterson, Senior Presenting Officer, appeared on behalf of the respondent.

10. I was able to hear detailed submission from the advocates and I am grateful to Mr Greer and Ms Petterson for their assistance on the issues that arise in the four grounds advanced on behalf of the appellant. I confirm that I have considered those submissions in accordance with the decision of the FtTJ and the grounds which had been filed before the Upper Tribunal. I further confirm that I have given full consideration to those submissions which I have heard, and I intend to incorporate those submissions into my analysis of the grounds that are relied upon by the appellant.

Decision on the error of law:

11. Having the opportunity to hear those detailed submissions, I am satisfied that the appellant has made out a case that the decision of the FtTJ involved the making of an error of law. I shall set out my reasons for reaching that decision below.

12. Dealing with ground 1, Mr Greer submits that the FtTJ gave undue weight to an immaterial matter (see written grounds). The ground is directed to the appellant's attendance at the embassy on two occasions in order to satisfy the requirements set out in the country guidance decision of *ST (Ethnic Eritrean-nationality-return) Ethiopia CG* [2011] UKUT OO 252 (IAC).

13. He submits that the appellant submitted unchallenged evidence that she had attended the Ethiopian embassy in London on two separate occasions but was denied evidence of her entitlement to Ethiopian citizenship. Whilst he submits that it was refused due to her mixed Eritrean heritage, that was not expressly a reason stated by the embassy, however I accept that it could be an inference drawn from the refusal to provide her with the relevant documentation. His referred the Tribunal to paragraph 62 of the FtTJ's decision where the judge set out his finding on this issue and whether she had taken reasonable steps to establish her nationality but expressly considered that by missing out a letter from her father's name, the appellant had deliberately sought to frustrate the process at the embassy by giving such an incorrect spelling (as set out at paragraph 45 of the decision).

14. Mr Greer therefore makes three submissions; firstly, that the inconsistency identified is so minor "to be trifling", secondly, that it is inherently unlikely that the appellant would seek to conceal her identity by giving her true name but with one letter missing and thirdly, that the name given was a different transliteration of the name.

15. By way of reply Ms Petterson on behalf of the respondent submits that the FtTJ correctly set out at paragraph 62 the evidence by reference to the document submitted and that whilst it might be seen as trivial, it was not the only reason the FtTJ gave, as at paragraph 63 the FtTJ referred to the appellant's failure to trace her family and also her school. Therefore it was understandable why the embassy refused to provide a with documents she had not established who she was.

16. Mr Greer responded by referring to specific paragraphs in the country guidance decision of ST (as cited) that dealt with the availability of documentation in Ethiopian and also the stance taken by the Ethiopian authorities.

17. I have therefore considered those submissions in the context of the decision of the FtTJ. At paragraph 62, the FtTJ properly had regard to paragraph 5 of the headnote of the country guidance decision in ST and by reference to approaching the embassy with documents emanating from Ethiopia. At paragraph 63, the FtTJ took into account that the appellant had difficulty in establishing her identity as she had no documentation with her but went on to find that she had not taken reasonable steps to otherwise establish her identity. The reasons given at paragraph 62 related to the incorrect spelling given by the appellant when attending at the embassy. I cannot accept the submission made that this was the sole basis for the FtTJ discounting her attempt to obtain documentation from the embassy. As Ms Petterson submits, that submission fails to take into account the FtTJ's decision at paragraph 63 where he

gave other reasons by reference to the appellant's failure to seek to contact her mother for supportive documents and at paragraph 64, failure to contact school.

18. The inconsistency identified by the FtTJ in the spelling of her father's name is also properly recorded by the FTT J at paragraph 62. He correctly identified the written evidence set out in the application form exhibited in the papers at B37. It was open to the FtTJ to take into account her oral evidence as to how the mistake occurred and to reach the conclusion that the explanation provided by her was not credible and to reject her account that on two different occasions the appellant and an official would both independently make the same spelling error. The finding made that the appellant on two occasions had given the embassy an incorrect spelling was therefore open to the judge to make. Whilst Mr Greer submits that the spelling was a "mistranslation" in Amharic, there is no evidence to support that submission and it was not suggested by the appellant or supported by any evidence reference to the Amharic language.

19. What is not so clear is whether that difference (either by intentionally doing so or by way of mistake) would have frustrated the process, which is the overarching finding made by the judge. The reason given for the refusal by the embassy is set out at B40 where it is recorded that "the applicant does not attach supportive documents with her application for an Ethiopian passport. Therefore there is no valid reason for the embassy to issue her with an Ethiopian passport." There is no reference made to any other information provided in the application form such as the details given by her relating to her parents, and education. Nor is there any reference to any inconsistency in the spelling of her father's name. Whilst paragraph 105 of the country guidance decision makes reference to an appellant producing documents and in the alternative such a person should put in writing all the relevant details, it cannot be said that the refusal to recognise her nationality was as a result of the misstated spelling. To that extent, the inconsistency relied on by the judge is not by itself sufficient to undermine the appellant's attempt to obtain confirmation of her nationality.

20. Furthermore, I am satisfied that the other reasons given at paragraph 63 – 64 failed to take into account the context of the evidence set out in the country guidance case of ST (as cited). As Mr Greer points out, while the judge criticised the appellant for failing to ask for supporting documents from her mother, this failed to take into account whether such documents in fact existed. At paragraph 106 of the decision in ST, reference is made to documents such as birth certificates noting that most Ethiopians do not have such documentation. At paragraph 107 (D 62), it is stated the birth certificates are not usual for Ethiopians and that 95% of births were not registered. The FTT J did not take into account the evidence that out in the CG decision as to the availability of the documents generally in reaching his decision overall as to the reasonableness of her conduct.

21. At paragraph 107, there is also reference to the expert evidence given before the tribunal in ST which refers to anyone who had been out of Ethiopian for 10 years would not be expected to be taken back. On the factual chronology, this arguably

applied to the appellant but was not taken into account in assessing the reasonableness of the appellant's conduct and the decision reached by the embassy as reflected at B 40. Consequently none of those issues have been factored into the assessment paragraph 62 – 64. Therefore I am satisfied it demonstrates an error of approach sufficient to undermine the finding made by the FtTJ particularly when at paragraph 61 he had found her account to have been plausible and consistent with the country materials.

22. Ground 2 to set out in the written grounds as "giving weight to immaterial matters: delay in disclosing sexual violence." Mr Greer submits that the FtTJ noted the applicability of the guidance relating to vulnerable and sensitive witnesses (the presidential guidance) but failed to apply it or in the alternative paid "lip service" to it by taking against the appellant that she did not mention when first interviewed the full extent of the sexual violence during her claimed detention (see paragraph 66 of the FtTJ's decision). He submits that the judge failed to recognise that women who have suffered sexual violence may be reluctant to disclose their experiences when first interviewed and particularly when interviewed by males and that the judge by attaching weight to that delay as thereby undermining the credibility of her account was giving weight to an immaterial matter (see paragraph 9 of the written grounds).

23. Ms Petterson submits that the FtTJ at paragraph 66 was not complaining about the delay but the point made was that she had been inconsistent as to the timing of the misconduct. The evidence before the judge in 2009 was that the ill-treatment had occurred on the way to being detained rather than as explained in the evidence before the Tribunal in 2019 and it was this that the FtTJ was considering at paragraph 66. Therefore she submits that the FtTJ was not complaining about the delay in the timing of the disclosure, but the issue related to the inconsistent evidence of when the ill-treatment occurred.

24. I do not accept the submission made by Mr Greer that the judge failed to apply the Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant ("the guidance note") and also the Practice Direction, First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses. It is plain that the judge had regard to the medico legal report at paragraph 32 which set out the reference in that report to the appellant's difficulty in giving an account, the use of language was limited and that she was better able to respond when asked direct questions. At paragraph 36, the FtTJ set out the conclusion reached by the expert that the appellant met the diagnostic criteria for depression and for PTSD. Against that background, the judge properly treated the appellant as a vulnerable witness and at paragraph 54 expressly said so and set out the special measures and steps taken to ensure that she was able to give her evidence.

25. The grounds set out in extract from *AZ (trafficked women) Thailand* CG [2010] UKUT 118 which considered the position of women suffering trauma from sexual abuse/violence in the context of trafficking. That said, it seems to me the guidance set out is equally applicable to any setting in which sexual violence has been said to have occurred. I would also agree that it is a well-established principle that those

who have suffered sexual violence may be reluctant to discuss their experiences, particularly before males. This is recognised in other jurisdictions and is expressly recognised in the API guidance to caseworkers. Furthermore, a failure to disclose information should not be held against someone when there may be many reasons, including feeling of guilt and shame.

26. Whilst the grounds refer to paragraph 66, in my judgment this paragraph needs to be read in conjunction with the other paragraphs in the determination. At paragraphs 17 – 18, the FtTJ makes reference to her earlier disclosure of sexual violence in the interview and at paragraph 20 the judge recorded that at the previous hearing there had been no assertion that her account was inaccurate or incomplete. At paragraph 38, the FtTJ sets out the appellant's account to the Dr as to why she had not disclosed the full details and paragraph 42, the judge set out the appellant's account of her inability to explain this by reference to the evidence in a witness statement.

27. It is against that evidential background of the FtTJ makes his findings at paragraph 65 – 67 and not just paragraph 66 as relied upon in the grounds. At paragraph 65, the FtTJ sets out the discrepancies in the evidence overall which included at subparagraph (e) the discrepancy relating to the ill-treatment and paragraph 66 which considered the explanation for that specific discrepancy in light of the evidence earlier recorded at paragraphs 17, 18, 20 and 38 and 42.

28. Whilst Ms Petterson submits that the findings do not relate to the timing of the disclosure and therefore delay in that sense, the FtTJ does attach weight to the delay in giving a full account of the ill-treatment suffered in the context of her ability to discuss the issue in her interview. I consider that whilst it was open to the judge to take into account what had been said in the earlier interview and the context in which it was said, it was also necessary to take into account whether there were any reasons as to why she would have been unable to give full disclosure at time. These are the reasons referred to in the submissions made by Mr Greer. Whilst the FtTJ purported to consider this at paragraph 67 (not paragraph 66) reliance was still placed upon her replies in interview by taking into account that she had given clear and unequivocal answers in her previous asylum interview that if she had been unable to answer questions correctly the judge considered that he would have expected it to be stated what she thinks happened or to state that she could not recall, which she failed to do (see paragraph 67). This does not take into account whether there were any reasons do not provide a fuller account and the finding relies solely upon the evidence at the time of the interview rather than the evidence available there after as out in the medico legal report.

29. This leads to ground 3 which is based on the assessment of that evidence. To that end, in my judgment grounds 2 and 3 run together because if the FtTJ considered that the medical evidence in context there may be no error as asserted in ground 2.

30. Mr Greer submits that the judge's assessment of the medical evidence is unreasonable and fails to take into account all that is set out the report and that there were passages of the report that have been misunderstood. He set out the specific

references in the written grounds which he relied upon in his oral submissions. By way of reply Ms Petterson submits that the FtTJ property considered the medical evidence and that reference in the decision was made to HE (paragraph 17) rather than the medical report. However she did appear to accept that there was a difficulty in the consideration of the issue of scarring.

31. I preface my consideration of the issue by stating that the FtTJ plainly took into account the appellant's vulnerability when considering the evidence overall (see paragraph 72) and that he did give weight to her evidence in certain respects (see paragraphs 59, 61 and 71). However, I am satisfied the ground 3 is made out in respect of the assessment of the evidence of Dr Webster and the issue of scarring which is relevant to her account of events in Ethiopia and circumstances of her detention.

32. Mr Greer submits the judge misunderstood the conclusions of the medical evidence and that there was no concession in the report as detailed by the Dr and as set out at paragraph 68.

33. The issue of scarring is considered in the report at paragraphs 44 – 48. The FtTJ records that the Dr conceded that it was not possible to state the age of the scars (see page 9 of the report). Having read the report, the doctor details the difficulties with dating scars and that once mature, nothing useful in terms of age can be inferred from the physical appearance alone. The doctor also make reference to pigmented lesions. However, whilst the FtTJ recorded what was set out at page 9, this does not take into account that the Dr went on to say that "the appearance of all the lesions in this case is in keeping with timescales related to unless stated otherwise" and therefore was a modification of what had been said at page 9 but had not been taken into account by the FtTJ in reaching his conclusions.

34. Furthermore, I can see no concession made by the doctor as recorded by the FtTJ at paragraph 68 where there were "many possible causes" of the scars documented in the report. I have considered whether this is a reference to the FtTJ's own view but the fact that he had recorded this in inverted commas tends to suggest that the FtTJ was recording something set out in the report. As such, this misunderstands the report and the approach to the medical evidence is therefore on a flawed basis.

35. Furthermore, I accept this submission made by Mr Greer that causation was considered by the Dr including the appellant's childhood and potential for fabrication (see paragraphs 70, 60 and 66).

36. Ms Petterson appeared to accept that there was difficulty with the finding at paragraph 68 where the judge made reference to the lack of reference to scarring in 2009. Mr Greer submits that in essence this was a finding that the scars had been self-inflicted since the last appeal and therefore it is contrary to the approach set out in *KV v SSHD* [2019] UKSC 10. When reading the paragraph, I am unclear as to what the FtTJ intended by his reference to this. Did he, as Mr Greer submits, make the finding that the scars had been self-inflicted since the last appeal or was the FtTJ

stating that the appellant did not make any reference to having scars attributable to ill-treatment. In the absence of any reasoning in this respect I cannot assess which is the more likely. I would add that in general terms it would not be right to attribute weight to the failure to provide medical evidence in 2009 when this was not something that apparently was pursued at the hearing as a point. There may have been a number of explanations as to why this had not occurred and to reach a finding on this would have required more elaboration. I would also agree with the grounds at paragraph 16 – 18 that the doctor did not arguably accept her account at face value when the doctor had highlighted in the report the inconsistencies in the appellant's account.

37. As to ground 4, paragraph 65 records the inconsistencies in the account set out above, they were not only identified by the FtTJ but also by the expert. At paragraph 66 the FtTJ took into account the appellant's explanation of the discrepancies. However, as Mr Greer submits whilst it was open to the judge to consider the generality of that, the appellant did give specific evidence in her witness statement concerning her evidence as to the factual events in Ethiopia which do not have been engaged with when reciting those inconsistencies other than in general terms.

38. In light of the identified errors, I am satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law and that the decision should be set aside. Due to the nature of the errors of law identified, both Mr Greer and Ms Petterson submitted that it will be necessary for a fresh hearing and for findings of fact be made. I agree with that submission. I have therefore determined that the appeal should be reheard by the First-tier Tribunal in accordance with the practice statement. Any necessary measures in light of the guidance should be made plain to the First-tier Tribunal in any written documentation prior to the hearing is that out in the decision of AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123

Notice of Decision

39. The decision of the FtTJ did involve the making of an error on a point of law; the decision is set aside, and the appeal shall be remitted to the First-tier Tribunal for a fresh hearing with no findings of fact being preserved.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 17/9/2019
Upper Tribunal Judge Reeds