Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01129/2019

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 13 September 2019	**On 17 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

F. W.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation;
Appellant: Ms Cleghorn, Counsel, instructed by Fadiga & Co
Respondent: Mr Mills, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, an Eritrean national, entered the UK illegally and then made a protection claim in 2018 which was refused on 23 January 2019. The Appellant's appeal against that decision was heard and dismissed by First-tier Tribunal Judge Hands in a decision promulgated on 19 June 2019.

2. The Appellant's application for permission to appeal was granted by Upper Tribunal Judge Grubb on 9 August 2019. The Respondent has not replied to that

grant with a Rule 24 response. Neither party has applied pursuant to Rule 15(2A) to introduce further evidence. Thus the matter came before me.

The challenge

3. It is common ground before me that the Appellant's Eritrean nationality, and his age and identity were not in dispute before the First-tier Tribunal ["FtT"]. Nor was the Appellant's claim to have left Eritrea for Sudan in 2014, when he would have been aged about 48, in dispute. Those agreed facts begged the following questions, which needed to be considered in the light of the current country guidance of MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 433;

   i) whether the Appellant was formally and legitimately discharged from his military service, or a deserter,

   ii) the implications of the Appellant's possession of a document that he had described as a formal legitimate discharge from military service,

   iii) whether the Appellant had established that despite any formal discharge from military service he was nonetheless still regarded by the Eritrean authorities as a military reservist, and liable to recall to military service,

   iv) whether the Appellant had established that he left Eritrea unlawfully, or, whether the evidence required a finding that he had the connections and documents to have left lawfully having been issued with an exit visa,

   v) whether the Appellant had established that he would upon return be perceived as a deserter and/or one who had left illegally, and thus had established that he faced a risk of detention and/or ill treatment in the event of his return to Eritrea.

4. It may be that neither representative appearing before the FtT had engaged properly with the current country guidance to be found in MST, but it is agreed before me that the Judge's decision makes no reference to the guidance to be found in MST @ [368-70]. Nor is there reference to the guidance to be found in MST @ [297-310]. It is also agreed that the Judge's decision [30] contradicts the guidance to be found in MST without offering any adequate reason for any finding that it was appropriate to reach a conclusion contrary to the country guidance.

5. Even at the date of the hearing the Appellant was below the 55 year old threshold limit for recall to service, and thus below the normal threshold for the acquisition of an exit visa. It was agreed that the evidence might however permit the FtT, having properly directed itself as to the current country guidance, to reach the conclusion either that the Appellant was at real risk of harm upon return, or, that in the light of the inferences that could be drawn from his possession of a discharge certificate, that he was not.

6. In the circumstances both parties were ultimately agreed that the Judge did fall into material error of law, and, that the only practical course open to me was to

set aside the decision and remit the appeal to the First-tier Tribunal for a fresh hearing. I agree that this is the only pragmatic course open to me, because it cannot be said that the Appellant has yet had a fair hearing of his appeal. In circumstances such as this, where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the parties of the opportunity for their case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 13 November 2014. Moreover the extent of the judicial fact finding exercise required is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 13 November 2014.

To that end I remit the appeal to the First-tier Tribunal for a fresh hearing with the following directions;

The appeal is to be heard by a judge other than First-tier Tribunal Judge Hands, at the North Shields Hearing Centre.

A Tigrinyan interpreter is required.

Both parties shall serve and file by 5pm on 27 September 2019 a skeleton argument that sets out clearly, but in brief, the elements of the guidance to be found in MST that they rely upon, adequately cross-referenced to the evidence that has been filed in the appeal.

Notice of decision

The decision did involve the making of an error of law sufficient to require the decision to be set aside on all grounds, and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing, with the directions set out above.

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 him. 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 13 September 2019
Deputy Upper Tribunal Judge J M Holmes