Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01668/2018

THE IMMIGRATION ACTS

Determined Without a Hearing at Field House	**Decision & Reasons Promulgated**
On 23 July 2020	**On 18 August 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

TS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I make this order because the appellant is an asylum seeker and is consequentially entitled to anonymity.

2. The appellant says that she is Eritrean. This is an appeal against a decision of the First-tier Tribunal dismissing her appeal against a decision of the Secretary of State on 19 January 2018 refusing her refugee status and/or leave to remain on human rights ground.

3. The appeal has previously been determined unsatisfactorily.

4. At its core there is a dispute about the appellant's nationality. She says that she is Eritrean but the Secretary of State finds that that has not been established. The First-tier Tribunal took the same view.

5. There are careful and important and detailed grounds challenging the First-tier Tribunal's approach to the expert evidence but it is important to remember that that is not the only point in this appeal.

6. This is a case where an oral hearing was anticipated but, as a consequence of the national lockdown in the light of the well-publicised COVID-19 crisis, on 4 May 2020 the Principal Resident Judge sent out directions and a note suggesting that the appeal might be appropriate for disposal without a hearing.

7. As is well-known but is made entirely clear by Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the overriding objective of the Procedure Rules is to ensure that cases are dealt with fairly and justly and this involves avoiding delay. It also involves having regard to Tribunal users who are not parties to *these* proceedings because the hearing of their cases can be delayed by reason of making room for other cases to be heard and in the present crisis the pressure on Tribunal resources is extremely great. Although, as the appellant properly points out, it is invariably the practice of the Tribunal in happier times to determine such appeals after an oral hearing, there is no entitlement under the Rules for an oral hearing but I am obliged by Rule 34(2) to "have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter". The appellant's position is less than enthusiastic support but she recognises the special difficulties facing the Tribunal caused by the pandemic but does remind me, appropriately, that oral argument is usually the best and preferred way. However, it is precisely because of the kind of concern raised here that the Tribunal notified the parties of the possibility of disposal without a hearing and invited further submissions so they had an opportunity of considering their position carefully and having reflected on these things I am persuaded that the overall interest of justice, which is not the same as the wishes of the appellant, requires a determination without a hearing which is what I now set out to do.

8. As well as full grounds of appeal drawn by Counsel I have the "Appellant's Submissions in Response to the Directions of Form A 2020", a Rule 24 notice, a letter from the Secretary of State dated 21 May 2020, and the "Appellant's Reply to Respondent's Submissions".

9. I am not implying that the appellant's submissions in their entirety are in any way excessive or verbose but there is a lot of material there and although I may not find it necessary to comment on all of it I have read it. The Secretary of State's letter is appropriately shorter but everything has been taken into account.

10. Credibility is key to this case. If the appellant is telling the truth that she is a Pentecostal Christian from Eritrea who has left Eritrea irregularly in

circumstances that could be seen as avoiding the draft. If she is telling the truth she may well have a strong case. The Secretary of State's position is that she is unreliable and justifies that assertion with reference to very different accounts with which the appellant has been associated.

11. It is, I find, undeniable that there are difficulties in believing the appellant's account but that is not the same as saying she cannot be believed. The appellant's representatives are clearly aware of this because they have instructed an expert who has commented on the appellant's case. However, as indicated above, before looking at that there are other possible errors that are important and I must consider them.

12. The first ground of appeal is concerned with the expert report. This is important and I return to it below.

13. Ground 2 complains that the First-tier Tribunal was unfair "to rely on Wikipedia material in closing submissions/failure to have regard to material considerations".

14. This appears to be a reference to the judge's finding in paragraph 27 that the appellant had not registered at a school when, according to the grounds, there had been last minute evidence from Wikipedia about the school age in Eritrea.

15. With respect to the First-tier Tribunal Judge, permitting reference to Wikipedia for the first time at the hearing is not a satisfactory way to conduct a hearing. Evidence has to be disclosed broadly before the hearing. This gives parties an opportunity to consider the reliability of background material and make suitable submissions in response. Wikipedia is a useful resource and I accept that is does try to be right and encourages errors to be identified and corrected. However it should not be regarded as an authoritative source of controversial information because it is not subject to peer review. Relying on it in these circumstances risks corrupting "good" points with unsustainable ones.

16. The appellant complains that the material was allowed in but also points out that the article on its own terms it did not help the respondent as suggested because it tended to suggest that many Eritreans do not go to school and so her not being registered with a school, whether or not it was a legal requirement, may not have mattered very much. The Secretary of State points out that there is nothing to indicate there was any formal objection to the evidence but the appellant says this was implied by the complaint that a link to the web could not be followed. In any event that does not deal with the second limb of the ground, namely that the evidence supports a different conclusion and this was not considered.

17. Ground 3 complains that the judge's credibility finding was not "child sensitive".

18. This is addressed particularly at the judge's evaluation of the appellant's evidence that she had previously made a claim for asylum in Switzerland in which she pretended to be considerably older than has now been accepted. This earlier claim was not mentioned until her fingerprints had been taken and checks became possible.

19. The point is also made that credibility does not establish her nationality.

20. The Secretary of State's reply to ground 3 points out that the judge reminded herself that the appellant was a minor when interviewed but also made clear that the appellant has undeniably used deception by telling in different countries quite different stories about things that happened to her and claiming to be very different ages.

21. In the reply the appellant accepts that deception had been established but returned again to paragraph 31 of the grounds which asserts that the appellant was only a young person when she was (on her account) living in Eritrea and the judge was not seen to assess the appellant's knowledge of the country against the fairly clear evidence that the appellant was remembering things from her childhood. There is some merit in this part of the point although the general suggestion that the judge forgot the appellant's youth is unsustainable.

22. Ground 4 complains that the judge wrongly relied on something recorded in a previous decision. As indicated the appeal has previously been determined unsatisfactorily. In fact, its unsatisfactory disposition led to a reported decision (**TS (interpreters) [2019] UKUT 352**) which was a decision of a panel of the Upper Tribunal chaired by its President, Lane J. That decision was set aside and according to the grounds it should have been ignored. The Secretary of State said that the judge was simply referencing an undisputed fact but the appellant in her reply says that is wrong. The reply reads in its material parts:

> "The issue is that the FtTJ relied upon evidence before the FtTJ in cross-examination, in circumstances where there were errors with interpretation. The FtTJ should not have had regard to the previous set-aside decision. The grant of permission by First-tier Tribunal Judge Chohan supports this".

23. However, when this ground is considered carefully it becomes less persuasive. It is quite clear from simple inspection that, according to the First-tier Tribunal Judge on the last occasion when this was determined unsatisfactorily, the appellant did say in cross-examination that she had used the name Sarrap Gebremedhin. The First-tier Tribunal Judge goes on at paragraph 44:

> "When asked at court, the appellant said that was a typical Tigrinya ethnic name, but that has not been established before me ...".

24. It is not clear to me if that is the judge saying what happened before her or referring to the earlier hearing. I cannot find anything in the earlier hearing that suggests that the appellant said to the judge on the first occasion that her name was typical Tigrinya. It may be that there is no

point at all lurking here because the point was accepted in cross-examination before the First-tier Tribunal Judge. However, the contention is that the judge looked at the decision and it is hard to see why the judge would look at that decision. It was an unsatisfactory decision and reliability of interpreting was very much part of the reasons giving to concern. The judge's only point is that the appellant has not established that she ever told the Swiss authorities that she was Eritrean. However, as it does not seem to be suggested she ever told them anything else this is something of an elaborate explanation for a point that really gets nowhere anyway.

25. Ground 5 claims that the First-tier Tribunal departed from accepted findings about the appellant's age and religious convictions. The appellant claims to have always identified herself as a Pentecostal Christian.

26. At paragraph 60 the First-tier Tribunal Judge indicates that she is bound by the Secretary of State's concession although she does muse that it may not in fact be correct. At paragraph 61 the judge is unequivocal that the appellant has not established that she is a Pentecostal Christian from Eritrea. The judge does not say that she has not established that she is a Pentecostal Christian. These points are obvious but they are also taken by the Secretary of State in the Response to directions.

27. Additionally, the Secretary of State points out that the judge said unequivocally that the appellant's allegiance to Pentecostalism was not in dispute (see paragraph 11). Ground 6 is misconceived. The judge fully accepted the appellant's assumed age and declared religion. It was her national origin that she did not prove.

28. Ground 6 lists five errors based on a misreading of the evidence. They are not enormously consequential. They turn on whether the appellant was 11 or 12 at a particular time. There is also a mistake in reference to the "appellant's uncle's wife" when it should have been the "uncle's wife's sister". I am not persuaded that these are as inconsequential as the Secretary of State implies. It is a puzzling feature of the case that the Swiss authorities do not seem to have noticed that the appellant was very young and that mystery is greater if the appellant was 11 rather than 12 but these do not go to the heart of the matter. There is a concern which I suspect is what is meant by the reference to "anxious scrutiny" that in a case where the possible consequences for the appellant are very severe the judge was careless when that was not acceptable. Notwithstanding mistake, the Decision and Reasons are a whole is not careless. The mistakes do not undermine it to the point that I can have no confidence in it but it would be better if they were not there.

29. Ground 7 criticises the judge for finding something implausible. Essentially the appellant said there was a chance meeting between her and a friend from Eritrea. They met at a church in King's Cross. The judge said at paragraph 52 that she had "concerns about the plausibility" of this part of the claim.

30. It was said that there were seven people at a prayer meeting in Eritrea. They met in secret and by chance met again at a church in London favoured by Christians from Ethiopia. The judge also found it significant that this friendship was not mentioned at an earlier stage as the case unfolded. I have to say I find that a bigger concern. As the appellant's Reply points out, this is not a chance meeting between two people from Eritrea but from two people who claim to be Christians from Eritrea living in London. I do not suggest the odds of a chance meeting are particularly high but it is not as wildly improbable as the Secretary of State implies by looking at the population of Eritrea.

31. The judge also recorded that the appellant was asked what appeared a perfectly straightforward question which was whether the friend "F" was one of the seven people who the appellant claimed to have attended a prayer meeting with herself and her father. The judge found the answer evasive. It is very difficult to see why that question could not have been answered in an entirely straightforward way even if the answer happened to be "I do not know".

32. Ground 8 complains that there was an inadequate assessment of the appellant and her daughter's circumstances. The Secretary of State accepts the theoretical nature of their criticism but points out that the appellant had been completely disbelieved and there was really little to go on to support a proper finding about the difficulties on return to the appellant and her child from the point of view of their rights under Article 8. I do not accept that any error identified at ground 8 material.

33. I now turn to the weightier matter of the criticism of the handling of the expert evidence.

34. However, before engaging with the detail of the criticism I propose to consider carefully exactly what the expert had to say.

35. The expert is Dr Samuel A Bekalo and the report is dated 11 September 2018. The report begins by a summary of his instructions and a recognition that his overriding duty is to provide an impartial and independent expert opinion. He explained that he had read the case bundle provided by the solicitors which included the witness statement and supplementary witness statement and the Home Office reasons for refusal and he had interviewed the appellant although the interview had to be organised by "Skype" which, it is hard to remember now, was a little novel in June 2018.

36. Dr Bekalo has first-hand experience living and working with people from the East or Horn of Africa and he had visited the region over ten times since 2000, most recently in August 2017. He is a Research and Development Education Fellow at Leeds University. He explained that he interviewed the appellant. Skype was the only practical method because of the costs in time and money in travelling to meet each other.

37. He began by making observations on the appellant's appearance. He said that she had the relatively high cheek bone, small to medium build, lighter skin colour and straight hair that was typical of Habesha people that comprised much of the population of Ethiopia and Eritrea. Clearly it would be wrong to put much emphasis on a person's appearance in determining her nationality but he was entitled to say there was nothing about her appearance that spoke against her claim to be from the Habesha people.

38. He then turned his attention to the linguistic proficiency of the appellant. He recognised that it was a matter of considerable concern to the Secretary of State that the appellant spoke little Tigrinya because the Secretary of State would expect a person who was Eritrean to be at least competent in Tigrinya and probably Arabic.

39. Dr Bekalo indicated that he too expected somebody affiliated to Eritrea to understand and speak Tigrinya at least to a basic level and also he expected appellants to speak the language of the country in which they reside or had resided for a significant period which in this case was Arabic [the appellant claims to have lived in Sudan]. He then made the observation that the appellant could not speak much Tigrinya or indeed Arabic. He then put it to her in the following terms:

> "Although you and the Eritrean Community in their support letter stated that you speak Tigrinya, your proficiency of Tigrinya you demonstrated today seems to me very limited. In this regard, one may suppose that the HO's view is right in the sense that you should be able to speak your claimed country national language?"

40. The appellant appeared to understand the point but said she had lived most of her life with Amharic speaking people. She had lived in parts of Eritrea where Amharic was the dominant language and said that she and people like her were described as Amitche which she describes as a local term for Eritreans deported from Eritrea. She said they associated with each other graduated and that was the reason that she did not speak other languages. She said that was why she had not learnt more Arabic when she was in Sudan. Essentially she claimed to have spent her time with Amharic speaking people.

41. Dr Bekalo then said that the appellant appeared to be competent in Amharic which was the language to which she had been exposed and he then said:

> "In the light of this, coupled with the other indicators and issues discussed in the preceding and remaining sections, I would say that the appellant could be one of those young Eritreans who was dispersed and lived in various places outside Eritrea, hence happened to master Amharic instead of the Tigrinya language".

42. He made it plain that he regarded this as probable rather than a matter of certainty. Her accent suggested to him a person who had learned the language in Ethiopia rather than in the diaspora and he made the

comment that in his experience some people struggle to learn a language whereas others can learn a language very quickly.

43. He looked at the appellant's family names. Her name and the name of her father, foster mother and "presumed brother", were typical Tigrinya names and tended to suggest an affiliation with Eritrea. Ethiopian ethnic groups, he said, have their own distinct different names.

44. He then asked her questions about life in Eritrea. He explained that he deliberately asked questions that were not connected with each other as he thought he had made it harder for someone who was repeating things they had "mugged up" for the interview rather than saying things that they knew from experience.

45. She began by saying that she thought that national service lasted for two years. Dr Bekalo put it to her that he thought national military service never ended in Eritrea and she did not respond to that suggestion.

46. He then suggested that she would be exempt from military service because she was a mother of a dependent child and she said "I don't know. I'm not sure about that. I can't trust the government".

47. She described Assab as hot and near the sea. She was unsure about any rivers or mountains but she did know there was a mountain called Emba Soira. She was able to name the neighbourhood where she said she was born which was part of the capital Asmara. She named two other cities but did not use or know a local name for Massawa.

48. He then asked her to explain why her family had returned to Eritrea given that they, according to her, were Pentecostal Christians and the religion is banned in the country. She described that as her father's decision.

49. He then put to her on the two matters that concerned him about her story and the answers were recorded. He found it difficult to comment on the plausibility of individual events including the escape from the prayer meeting and the illegal exit from the country. He said that the appellant "does not have a profound knowledge about the country socio-culture as well as the politics and the situation she found herself in which led her to leave the country" but commented as well that this was perhaps not surprising as she was a child when she left Eritrea.

50. At paragraph 3.2 he said:

> "Nonetheless, the appellant came across to me as one of those young Eritreans who lived in and moved around from place to place with family members outside the country, with little information and exposure to her claimed country socio-politics and geography as she says. I say this because, from time to time, I come across people like the appellant in refugee/IDP (*Internally Displaced People*) camps and towns in the Kenya/Ethiopia/Sudan, who speak little or no Tigrinya and know little about the Eritrea country situation. They speak the respective local community languages they are exposed to (*e.g. Amharic, Arabic, Swahili, English*). As

> such and as pointed out in the language section above, the appellant ended up speaking Amharic, although she is a bit familiar with Tigrinya and her names are typical Tigrinya Christian names".

51. He also commented that although he would "exercise caution" about the reliability of the methods and procedures used by the Eritrean Community in Lambeth he did give some weight to their support. You would not expect that support to be forthcoming if it were not sincere.

52. He found it probable but not certain that the appellant was from Eritrea in the Tigrinya ethnic group and he found no evidence to suppose that she is Ethiopian except being fluent in Amharic.

53. He then made comments generally on the situation in Eritrea which are depressing reading but not I think controversial or particularly relevant in the context of this appeal.

54. I consider now how the First-tier Tribunal Judge analysed the report.

55. Her analysis began at paragraph 31 where the judge expressed "some concerns about the reliability of the conclusions given in that report, and its impartiality". The judge then immediately gave reasons for coming to a different conclusion. She said that the Tribunal determined credibility, not the expert, and a finding based on the appellant being believed did not bind the Tribunal unless it too believed the evidence. She noted that Dr Bekalo had not explained why he claimed expertise in assessing nationality and she was concerned that he only claimed to be able to speak basic Tigrinya and a little Arabic which she thought regrettable given so much depended on an ability to speak those languages. She found the report lacked balance and the report did not show any recognition of the inherent difficulties in assessing nationality or ethnicity. She found the reference to being "affiliated to Eritrea" unclear. It could mean someone who was not Eritrean but had ancestors who were. However, she accepted his evidence that the appellant could not use Tigrinya to communicate to describe colours or close relatives or basic foods or count past eight. The judge also found the expert's use of the phrase "balance of probabilities" surprising as in her judgment the reasons given did not make the conclusion probable. (Paragraph 36).

56. The judge also found Dr Bekalo's conclusion that the appellant had learned to speak Amharic in Ethiopia a little puzzling when it was the appellant's claim that she had never been to Ethiopia. The judge noted Dr Bekalo's comments that there were others like the appellant living in the dispersed communities who do not speak Tigrinya or know much about Eritrea but that does not help when it was the appellant's case that she had lived in Eritrea with her father.

57. The judge was also surprised at Dr Bekalo's readiness to excuse the appellant's ignorance of Arabic given her claimed history.

58. Unlike Dr Bekalo the judge found it significant that the appellant did not know that the military service she by implication at least claimed to fear was lifelong and not limited to two years. The judge also found it revealing that she did not seem to have considered whether she would be exempt by reason of being a mother.

59. The judge found nothing was said in the general knowledge questions that was not readily available by a little research in the public domain and Dr Bekalo did not explain why he said the appellant "comes across" as a displaced Eritrean.

60. The judge was also surprised at the failure of Dr Bekalo to consider the possibility that the reason the appellant could not do better in her geography test and general knowledge test about the country was that she was just not telling the truth. The judge did not understand why Dr Bekalo was apparently so willing to attribute the poor performance to nervousness.

61. The judge explained at paragraph 42 how she found the report lacked the objectivity and balance that she expected to find in an expert report.

62. At paragraph 43 the judge noted how Dr Bekalo had found a problem in the Eritrean Community letter which asserted that the appellant did have an ability to speak Tigrinya that she had not been able to demonstrate to him but he then went on to suggest that the opinion would not have been given lightly.

63. At paragraph 44 the judge noted how a main reason given by Dr Bekalo for believing the appellant at all was that she and close members of her family had Eritrean Christian names. The difficulty with this is the previous judge's decision showed that the appellant had claimed asylum in Switzerland in an entirely different name.

64. The judge noted there was no reference or independent evidence to support the contention that the names which she now relied were indeed Tigrinyan and the judge found the appellant's general credibility to be so low that she was disinclined to give any weight to her claimed names being her given names in any event.

65. At paragraph 45 the judge went on to look at what she described as "at least one false premise" in the report. I set out the judge's comment:

> "On the first page Dr Bekalo says he was asked to comment on the plausibility of the appellant's claim to be Eritrean but Amharic speaking, 'due to the claimed fact that she lost her mother when young and was largely brought up outside the country by an Amharic speaking family friend'. It is not clear to me whether that statement originates from the solicitors' instructions, or is the (sic) Dr Bekalo's own assessment of the history, but it is not what the appellant says (WS 3–4). The appellant says she was only raised by an Amharic speaking friend or family member, until the age of 5, after which she was raised outside the country by her Tigrinya speaking father ...".

66. The judge also felt that it was not within the expert's remit to comment on the plausibility of the escape.

67. There are also comments on the general personality of the appellant which the judge found ought not to have been in the report and devalued it to some extent.

68. The judge then went on to deal with the support from the Eritrean Community and found it unsatisfactory that nobody had attended to support the evidence and the evidence referred to her understanding Tigrinya "very well" which did not seem to be supported by anyone else.

69. The judge then considered other matters.

70. The adverse findings relating to the expert report were substantially challenged in the grounds as indicated above. They point out that there should be no confusion about what was sent to Dr Bekalo. It is clear from the body of the report that he was given the refusal letter and witness statements and other matters. It is not a false premise that the appellant "was largely brought up outside the country by an Amharic speaking family friend", that is what the appellant's solicitors had said but the witness statement made matters clear and the appellant was plainly interviewed by the expert on the basis of her spending time in Assab and Khartoum as she claimed to have done in her statements.

71. The criticisms placed on Dr Bekalo's limited language ability have to be assessed against his being a member and examiner of the Institute of Linguistics and his self-deprecatory comments should be seen against that background. He was clearly competent comment on her linguistic skills and on her claimed nationality. He had given reasons to explain his conclusion. Certain things were clearly right and the report was balanced. Whilst the appellant's personality may be irrelevant it was not a feature of the expert's reasoning and need not have attracted adverse comment by the judge. The grounds then summarised the key findings of the report. The appellant has the features of a Habesha. She could be Eritrean Tigrinya. Her names are Tigrinya and she left Eritrea when she was young.

72. I have read the appellant's submissions in response to directions of 4 May 2020. This makes the point that permission was given on all grounds but that has never been doubted, at least not by me.

73. There is an important development around paragraph 11 where Ms Fitzsimons for the appellant points out that the judge had made an adverse credibility finding based on things the appellant said when she was a child, or rather experienced when she was a child. This should not have been a strong point and she suggested tainted the judge's approach to the expert evidence.

74. Eventually there was a response from the Secretary of State, it is dated 21 May 2020. As is so often the case the person drafting the Rule 24 notice did not have access to the Presenting Officer's Record of Proceedings. They do point out correctly that there is no challenge to the finding that the appellant used different names in Switzerland and that does rather undermine the criticism of looking to the earlier decision. It was open to the judge to disbelieve the claim that there was a chance meeting at a church and that the grounds generally are just disagreement.

75. This attracted a further reply from Ms Fitzsimons. It is very critical of allowing in late expert evidence from an untraceable link on Wikipedia (untraceable in the sense the appellant's representative could not find it) and puts a different emphasis on the inherent likelihood of meeting in a church.

76. I have not summarised everything in both of the further papers.

77. This is a case that is not without difficulty from my point of view. I am grateful, and the appellant should be very grateful, to the work of the appellant's solicitors in doing the best they can for her. Some of the observations made in the submissions are well-founded and I have indicated my views about this. The judge should not have allowed in the late evidence from Wikipedia. As far as an error of law is concerned I find the judge was entitled to disbelieve the chance meeting at a church but that has given me food for thought and if that were the only point in the appeal I might have to think even further. The expert was a qualified expert and his opinion should have been given weight.

78. Nevertheless, certain things are clear. This appellant has produced no strong evidence at any stage that she is Eritrean. At its very highest she has produced reasons why her claim should not be disbelieved. The fundamental problem she has is that she does not speak the language that she would be expected to speak. A supplementary problem is she does not know very much about the country. A further problem is that she has undermined her own credibility by telling lies which she clearly has in other proceedings.

79. I agree with the judge that whatever weight is given to the expertise of Dr Bekalo he does not explain why he has reached the conclusion that the appellant is one of the displaced Eritreans. That is fundamental to his report and although may very well be his honestly held opinion the judge was at the very least entitled to say it was not explained properly. I have read the report too and I can find no explanation.

80. This is a decision to be looked at in the round and I am satisfied as a whole the decision stands up to scrutiny. The mistakes have been properly and professionally exposed by skilled representation and I have given that all the weight that I think due but in my judgment the decision as a whole stands and I dismiss the appeal.

81. Notice of Decision

82. This appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 12 August 2020