Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05722/2019

THE IMMIGRATION ACTS

Determined Under Rule 34	**Decision & Reasons Promulgated**
On 14 December 2020	**On 21 December 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

OA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

This is a paper determination which has not been objected to by the parties. The form of remote hearing was P (paper determination that is not provisional). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper.

The documents that I was referred to are in the bundles of the appellant and respondent from before the First-tier Tribunal, the grounds of appeal, and the respondent's written submissions dated 3 August 2020, the contents of which I have recorded.

The order made is described at the end of these reasons.

1. On 12 October 2020, I promulgated a "tentative" decision, within the framework established by the Senior President of Tribunal's *Pilot Practice*

Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal dated 19 March 2020. The tentative decision may be found in the **Annex** to this decision.

2. The tentative decision set out my provisional views that a decision of First-tier Tribunal Judge Jepson promulgated on 7 February 2020 dismissing an appeal brought by OA against a decision of the respondent dated 24 February 2019 to refuse his fresh claim for asylum involved the making of an error of law, that the decision should be set aside, and that the decision should be remitted to the first-tier Tribunal to be heard by a different judge with no findings of fact preserved.

3. For the reasons set out in my tentative decision, I gave the parties 14 days to make submissions concerning the above proposed course of action.

4. By 14 December 2020, neither party had responded.

5. In considering whether to finalise my provisional view as set out above, I have considered the judgment of Fordham J in Joint Council for the Welfare of Immigrants v President of the Upper Tribunal (Immigration and Asylum Chamber) [2020] EWHC 3103 (Admin). I do not consider any of the findings of the High Court in those proceedings to militate in favour of a different approach. Both parties have had the opportunity to make submissions as to whether remitting the case to the First-tier Tribunal would be inappropriate. Neither has chosen to avail themselves of that opportunity. By resolving these Upper Tribunal proceedings in the manner proposed, the appellant will enjoy a full, substantive re-hearing before the First-tier Tribunal. A hearing in the Upper Tribunal would be unnecessary and inject further delay to the proceedings, which would be inconsistent with the overriding objective.

Discussion

6. For the reasons set out in my tentative decision, I find that that the decision of Judge Jepson involved the making of an error of law and must be set aside with no findings of fact preserved. As extensive findings of fact are required, I remit the matter to the First-tier Tribunal to be reheard by a different judge, with no findings of fact preserved.

Notice of Decision

The decision of Judge Jepson involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to be heard by a different judge, with no findings of fact 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 him or any member of their family. 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 *Stephen H Smith* Date 14 December 2020

Upper Tribunal Judge Stephen Smith

ANNEX – PROVISIONAL DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05722/2019

THE IMMIGRATION ACTS

Provisionally determined under rule 34	**Decision & Reasons Promulgated**
On 5 October 2020	12 October 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

OA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (T)

This is a paper determination which has not been objected to by the parties. The form of paper determination was T (triage provisional decision). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper.

The documents that I was referred to are in the bundles of the appellant and respondent from before the First-tier Tribunal, the grounds of appeal, and the respondent's written submissions dated 3 August 2020, the contents of which I have recorded.

The order made is described at the end of these reasons.

7. The parties in this matter were originally invited to make submissions on whether it would be appropriate to conduct a remote hearing in order to determine whether the decision of the First-tier Tribunal involved the making of an error of law and, if so, whether it should be set aside. In light of what appears to be a concession by the respondent in her submissions made in response to those directions that the decision *did* involve the making of an error of law, and that the matter should so be remitted, I have decided that it would be consistent with the overriding objective to set out my preliminary view as to how this matter should be resolved without the need for a hearing in the Upper Tribunal.

8. The parties will have 14 days upon being sent this decision to object to the appeal being allowed and the matter remitted to the First-tier Tribunal. In the event there are no further submissions, this provisional decision shall stand, with the effect that the decision of the First-tier Tribunal will be set aside with no findings of fact preserved, and the matter shall be remitted to the First-tier Tribunal to be heard afresh.

The decision under appeal

9. In a decision promulgated on 7 February 2020, First-tier Tribunal Judge Jepson dismissed an appeal brought by the appellant, OA, against a decision of the respondent dated 24 May 2019 to refuse his fresh claim for asylum. The Secretary of State's decision was taken in response to further submissions made by the appellant on 3 April 2019 and 8 April 2019, following the dismissal of his appeal against an earlier decision to refuse his asylum claim, by Judge Meyler, in a decision promulgated on 20 March 2017. OA now appeals against the decision of Judge Jepson.

10. OA claims to be a citizen of Eritrea. The respondent does not accept his claimed Eritrean nationality, and his nationality was a central issue in the appeal before Judge Jepson. The further submissions made by the appellant featured a range of materials upon which he invited the Secretary of State to take a fresh decision in his favour. In accepting his appeal to be a fresh claim, the Secretary of State, applying paragraph 353 of the Immigration Rules, must have accepted that the new materials provided by the appellant were "significantly different" from those previously considered by her, such that they could be said to provide a realistic prospect of success before a different judge of the First-tier Tribunal.

11. In dismissing the appeal, Judge Jepson considered the reasons given by Judge Meyler for dismissing the appellant's appeal in 2017. Judge Jepson considered the guidance contained in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702, addressing the extent to which materials and evidence personal to the appellant could and should have been made available to Judge Meyler. He noted the "circumspection" with which judges are to approach evidence concerning facts personal to an appellant that were not brought to the attention of the

previous judge, finding that there were no good reasons for the appellant not to have relied on many of the new materials before Judge Meyler.

12. For example, following the appeal before Judge Meyler, it appears that the appellant managed to make contact with his mother, who is said to be in Eritrea, in order to obtain further details from her concerning his claimed Eritrean nationality. This was in the form of a formal teleconference with her which appears to have been facilitated by the Red Cross, on 12 December 2018. The teleconference revealed to the appellant, for the first time, that he was born in Eritrea; until then, he thought he had been born in Sudan. The judge was concerned that making enquiries, "would have been an obvious evidential route to explore." At [50], the judge noted that an identity card "relating to the mother" was issued in 2014, and would, therefore, have been available for the proceedings before Judge Meyler. A Mr Abdullah, chairperson of the Eritrean Community Centre in Leicester, gave evidence on behalf of the appellant, stating that he considered him to be Eritrean. Judge Jepson was concerned that Mr Abdullah's evidence should have been made available to Judge Meyler at the hearing in 2017, given Mr Abdullah's statement recorded that he and the appellant had met in 2015. Similarly, at [51], an expert report by a Dr Bekalo could and should have been made available at the earlier hearing before the First-tier Tribunal, found the judge.

13. This led the judge to make the following findings, which it is necessary to quote at length:

> "[53] All of this means that the appeal here simply does not get past the first step. I am bound as a matter of law to accept the findings of IJ Meyler as the underlying factual matrix in this case. The learned judge simply did not find the appellant has [sic] established, even to the lower standard, that the appellant is Eritrean.
>
> [54] Given I have found there is nothing here of substance which could not have been put before Judge Meyler, this appeal must necessarily fail.
>
> [55] That means all aspects of the appeal are unsuccessful. Because I have ruled there is nothing here that can properly be considered new evidence via the guidance in Devaseelan, it logically follows [that] both the protection and human rights aspects of the case fail at the very first hurdle.
>
> [56] As a final point, even had I found some (or even all) of that submitted to be new evidence which could be considered, I am firmly of the view that there would be insufficient [evidence] here to establish a successful protection claim. Without rehearsing matters in too much detail, there are simply too many discrepancies. Examples include Mr [E] thinking the appellant was married in 2012 (and then partially recanting in his later statement) and the bizarre situation whereby the mother (who is said to have sent one of the ID cards) does not seem to know the sender (a person described by the appellant as his cousin.) Given the factual background for both the asylum/humanitarian and human rights aspects is the same, this means the latter must also necessarily fail.

> [57] I could go on at length, but the reality is even I had [sic] been persuaded there was new evidence in this case, I simply do not believe that which has [sic] put before me. All that fatally undercuts the objective evidence from Dr Bekalo to the extent that any positive impact it could conceivably have had on the appellant's case is largely washed away.
>
> [58] Due to my overall finding, I have not turned my mind in any great detail to the question of whether the documents produced (such as the identification card) are genuine or not. I will say in passing [that] there seem to be a number of discrepancies when comparing names put forward at various junctures."

14. Permission to appeal was granted by First-tier Tribunal Judge Keane on the basis that it was arguable that, while Judge Jepson was entitled to take Judge Meyler's approach as his starting point, he should have considered the additional evidence, and that his failure to do so was an arguable error of law but for which the outcome of the appeal might have been different.

Form of consideration

15. On 20 July 2020, Upper Tribunal Judge Smith gave directions in this matter stating that it was her provisional view that it would be appropriate to determine whether the decision of Judge Jepson involved the making of an error of law and, if so, whether it should be set aside, by means of a remote hearing. Judge Smith gave directions for an exchange of submissions on those points. At paragraph 6(ii), the parties were encouraged to discuss the case with a view to reaching agreement as to whether the decision of the judge involved the making of an error of law.

16. In the spirit of paragraph 6(ii), on 3 August 2020, a Senior Presenting Officer of the respondent's Specialist Appeals Team made the following observations:

> "In response to the specific grounds of appeal, the respondent submits that it would appear that these have been made out in that the FTT judge did not fully assess the additional evidence included with the further representations and concentrated largely on the timing of its production."
>
> "With regard to disposal [,] the respondent submits that this is a case where credibility findings on the appellant and his witness(es) are required and that it would be a suitable case to be remitted to the First-tier Tribunal for a fresh hearing."

17. The respondent did not object to a remote hearing in any event.

18. On 18 September 2020, those representing the appellant wrote to the tribunal in these terms:

> "We note that the respondent's position, as set out in the correspondence dated 3 August 2020, appears to accept that the first-tier Tribunal decision contains an error of law, and that the case should be remitted for a rehearing to the first-tier Tribunal.

> We are writing to ask whether, in the circumstances, the case will proceed to an [error of law] hearing? And whether you require us to provide a skeleton argument?"

19. It is against that background that the matter was placed before me for consideration of whether a remote hearing would be required, or whether the matter could be determined on the papers.

Discussion

20. What follows is my provisional view in light of the respondent's concession. Given the parties were only invited to make written submissions concerning the appropriateness of conducting a remote hearing, rather than having the matter determined on the papers, I consider that it is necessary specifically to afford the parties to address the Tribunal on this point. Accordingly, as I set out below, this decision will be circulated to the parties for further submissions on my provisional conclusions, within 14 days. In the event that 14 days pass with no submissions to the contrary, the appeal will be allowed, and this tentative decision will stand as the Upper Tribunal's final decision, with a corresponding modification to Judge Smith's directions to the effect that the appellant no longer need provide a skeleton argument.

21. Turning to the decision of the First-tier Tribunal, while the judge did conduct detailed analysis of some of the new materials, he did not consider the entirety of the evidence relied upon by the appellant, in the round. While the judge was right to recognise that Judge Meyler's decision was his starting point, it was not, by definition, capable of amounting to his finishing point. Still less was it appropriate for the judge to decline to engage with the new evidence that had been submitted. It is necessary for judges to analyse the entirety of the evidence in a case, in the round. While it may have followed that the judge was entitled to approach some of the new evidence with "the greatest of circumspection" (to adopt the terminology of the fourth Devaseelan guideline), the fact that some evidence fell into that category did not abrogate the judge from the responsibility of considering the entirety of the evidence in the case. It follows, therefore, that the respondent was correct to concede that the judge failed to engage with the entirety of the new evidence in the case. Although the judge purported to do so at [56] and [57], his conclusions at that stage of his analysis were a makeweight, and expressed in broad brush terms, with insufficient reasons.

22. The observations of Judge Keane when granting permission to appeal accord with my provisional view, namely that the judge irrationally failed to take into account relevant considerations, namely the entirety of the further submissions. While the judge did purport to have considered all evidence in any event, there is no analysis or reasoning concerning the

remainder of the evidence, and the judge accordingly failed to give sufficient reasons for his concluding findings at [57] and [58].

23. The above analysis is consistent with the approach taken by the respondent in her written submissions of 3 August 2020.

24. My provisional view is that the effect of the judge's non-engagement with the entirety of the evidence was to taint his credibility assessment such that the decision must be set aside. Due to the extent of the fact-finding required, it will be appropriate for this matter to be remitted to the First-tier Tribunal for a complete rehearing before a different judge. The parties have 14 days upon being sent this decision to object to this proposed course of action.

25. In order to preserve the *status quo*, I grant the appellant anonymity.

Notice of Decision

My provisional view is that the decision of Judge Jepson involved the making of an error of law, that the decision must be set aside with no findings of fact preserved, and that the matter should be remitted to a different judge of the First-tier Tribunal.

The parties have 14 days from being sent this decision to make submissions concerning the above approach, should they wish to object to it.

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 or any member of their family. 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 *Stephen H Smith* Date 5 October 2020

Upper Tribunal Judge Stephen Smith