Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05994/2019 (P)

THE IMMIGRATION ACTS

Decision under Rule 34	**Decision & Reasons Promulgated**
On 8 June 2020	**On 19 June 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

M.B.
(ANONYMITY DIRECTION NOT MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Decision made under rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008

Introduction

1. The appellant appeals against the decision of Judge of the First-tier Tribunal Moxon ('the Judge'), issued on 19 December 2019, by which his appeal against the decision of the respondent to refuse to grant him international protection was dismissed.

2. The appellant appeals on all grounds with permission of Judge of the First-tier Tribunal Chohan by means of a decision sent to the parties on 20 February 2020.

Rule 34

3. This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').

4. In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), I indicated to the parties by a Note and Directions dated 20 April 2020 my provisional view that it would be appropriate to determine the following questions without a hearing:

   (i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so

   (ii) Whether the decision should be set aside.

5. In reaching my provisional view, I was mindful as to the circumstances when an oral hearing is to be held in order to comply with the common law duty of fairness and also as to when a decision may appropriately be made consequent to a paper consideration: *Osborn v. The Parole Board* [2013] UKSC 61; [2014] AC 1115.

6. The respondent consented to the proposed approach as to the consideration of this hearing.

7. By a letter dated 5 May 2020 the appellant's representative raised no objection to the consideration of the appeal under rule 34 of the 2008 Rules, though requested that if the decision of the First-tier Tribunal were to be set aside an oral hearing should then take place.

8. I am grateful to Fountain Solicitors, on behalf of the appellant and Mr. Tufan, Senior Presenting Officer, on behalf of the respondent, for filing their helpful written submissions, dated 5 May 2020 and 19 May 2020 respectively.

Anonymity

9. An anonymity direction was issued by the Judge and no application was made by either party to set it aside. The direction is confirmed at the conclusion of this decision.

Background

10. The appellant is aged 26 and asserts that he is an Eritean national, having been born in Eritrea to an Eritrean father and an Ethiopian mother. The respondent considers that he is a national of Ethiopia.

11. The appellant states that in 1996 his father, then working in Eritrea, was transferred by his company to work in Addis Ababa and the appellant accompanied him to Ethiopia. In 1999 the family were deported by the Ethiopian authorities back to Eritrea. His father was arrested by the Eritrean authorities after the family's return and his mother died soon after. He resided with his uncle for a period of time and then his uncle arranged for him to cross into Ethiopia where he resided at a refugee camp for 2 years. He was aged around 10 or 11 when he returned to Ethiopia. He decided to leave the refugee camp and slept on the streets in Addis Ababa from 2007 until 2012.

12. The appellant states that he left Ethiopia in 2012 and went to Sudan where he lived until travelling to Libya in 2018. Whilst in Sudan he was in a relationship with an Ethiopian national. The appellant provided inconsistent evidence as to whether he did or did not marry his partner in 2014. After a period of 17 months in Libya, he travelled to Italy and then travelled onto this country, via France. He claimed asylum on 20 October 2017 and the respondent refused to grant him international protection by means of a decision dated 11 June 2019.

The hearing before the First-tier Tribunal

13. The appeal came before the Judge on 28 November 2019. The appellant attended and gave oral evidence. The Judge made a number of adverse credibility findings and determined that the appellant was not an Eritrean national. As to the appellant's personal history the Judge found, *inter alia*, at [21]:

> '21.
>
> ...
>
> e. The Appellant stated that upon entering Ethiopia he told soldiers that he had escaped from Eritrea and they took him to the Hitsats refugee camp. He was unequivocal about this and given that he asserts that he lived and was educated in the camp until the age of 13, I do not accept as credible that he would be mistaken as to which camp he resided. His account of being taken directly to the Hitsats camp is inconsistent with

external evidence relied upon by the Respondent that newly arrived refugees would initially be taken to the Endabaganu screening and refugee camp.

f. The Appellant asserts that he stayed in the Hitsats refugee camp between 2005 and 2007, but this is contradicted by external evidence relied upon by the Respondent that the camp was not constructed until 2013. Whilst he states that he lived in a room with three other young people and that they slept in bunk beds, this is contradicted by external evidence relied upon by the Respondent that young people were accommodated in groups of 5 to 9 and that they would sleep on mats or beds made out of mud.

g. The Appellant stated that he left the camp as he wanted to progress his education, however this account is undermined by the fact that he asserts that he left at grade 4 whereas the camp provided education to grade 5 and is inconsistent with external evidence relied upon by the Respondent that the Provided education to grade 12.

14. I observe at this juncture that the respondent detailed at paragraph 39 of her decision letter that the appellant's evidence was inconsistent with the fact that Hitsats refugee camp was constructed in 2013 and the respondent placed objective documentary evidence from the UNHCR before the First-tier Tribunal confirming that the camp opened in May 2013.

15. As to the appellant's efforts to secure proof of his efforts to acquire Ethiopian nationality from the Ethiopian Embassy in London, the Judge found, at [23]:

> '23. Whilst the Appellant asserts that he visited the Ethiopian Embassy, he had failed to disclose this prior to the hearing and his explanation of failing to tell his solicitors is not credible. I give little weight to the photograph of him stood outside the Embassy as it does not show that he entered the building. Further, I note that he has not sought to return to show them the birth certificate, despite his assertion that they had asked for proof that his mother is Ethiopian. I therefore do not accept that the Appellant has made sufficient effort to obtain confirmation from the Ethiopian Embassy about his entitlement to citizenship.'

16. The Judge concluded, at [24]:

> '24. I have stood back and considered all of the evidence in the round and given as much weight as I feel able to the evidence that is supportive of the Appellant's claim. I have reminded myself of the low standard of proof to be adopted. However, even upon that low standard of proof I am not satisfied that the Appellant has given a truthful narrative account or that he is

> Eritrean. I reject his account of ever living in Eritrea and having ever been deported from Ethiopia. I find is a fact, to an extremely high standard, that he is and is recognised by the appropriate authorities as an Ethiopian national and an Ethiopian citizen and additionally that he is married to an Ethiopian citizen. I reject his accounts of having lived in a camp and being deported from Ethiopia.'

17. As an alternative, the Judge found, at [25]-[26]:

> '25. In any event, even if I was to accept the Appellant's account, which I do not, I nevertheless find that he is eligible for Ethiopian citizenship on account of his mother and wife both being Ethiopian. Whilst Mr. Sills argued that dual nationality is not permitted, it is clear from considering the CPIN that the nationality laws in Ethiopia would permit Ethiopian citizenship in the Appellant's purported circumstances provided that any Eritrean citizenship is relinquished.
>
> 26. I do not accept that there is a reasonable degree of likelihood that returning the Appellant to Ethiopian would expose him to a real risk of an act of persecution ...'

The grounds of appeal

18. The appellant relies upon five grounds of appeal that can be summarised as follows:

    1) The Judge failed to consider whether there would be very significant obstacles to the appellant's integration into Eritrea if he were required to leave the United Kingdom: paragraph 276A(1)(vi) of the Immigration Rules ('the Rules').

    2) The Judge erred in his consideration of the appellant's efforts to acquire Ethiopian nationality.

    3) The Judge erred by making contrary findings of fact.

    4) The Judge erred by failing to make any findings in relation to the appellant qualifying for Eritrea nationality.

    5) The Judge erred by materially misdirecting himself as to the correct standard of proof.

19. In granting permission to appeal Judge Chohan observed, *inter alia:*

> '2. The grounds that have substance in relation to the judge's findings are on the issues of whether the appellant had been deported from Ethiopia and whether the judge applied the incorrect standard of proof.

3. At paragraph 20 of the decision, the judge states that it is plausible that the appellant may have been deported from Ethiopia based on objective evidence. However, at paragraph 24, the judge rejects the appellant's claim that he had ever been deported from Ethiopia. In the same paragraph, the judge refers to the lower standard of proof but then goes on to make a finding 'to an extremely high standard'.

Written submissions

20. The written submissions from both parties succinctly address the grounds relied upon by the appellant and have been considered with care.

Decision on error of law

21. Though permission to appeal was granted on all grounds, I proceed to initially consider grounds 3 and 5 which formed the basis of Judge Chohan's reasoning when granting permission to appeal.

22. Ground 3 details:

> '3.1 At [20] of the FTTD, the IJ made findings that the appellant's account of '*... being deported from Ethiopian is plausible ...*' The IJ, at [24] then makes a contradictory finding and rejects the appellant's account of ever being deported from Ethiopia.
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> 3.2 We submit that this contradictory finding amounts to a material error.'

23. The written submissions filed on behalf of the appellant expands upon this ground:

> '6. In relation to ground 3, it is further contended that the FTT Judge made contrary findings on a material aspect of the appellant's case which go to the core of the account. At [20] of the FTT determination, the FTT Judge found that the Appellant had given a plausible account of having been deported from Ethiopia and stated that this in fact 'enhanced' the appellant's credibility. However, by [24] of the FTT determination, the FTT Judge had rejected the appellant's account of being deported from Ethiopia. These findings are contradictory, particularly given that between [20] and [24] of the FTT determination, the FTT Judge has not made any other findings in relation to the appellant's account of how he left Ethiopia.
>
> 7. This is a fundamental aspect of the appellant's case. The appellant's account is that he is an Eritrean national and is at a persecutory risk

as a consequence. If it is establishing that the appellant was in fact deported from Ethiopia, this is indicative that the appellant is not an Ethiopian national contrary to the FTT Judge's findings at [24].'

24. The Judge's observation as to plausibility is located at [20] of his decision:

> '20. The appellant's account of travelling between Eritrea and Ethiopia and being deported from Ethiopia is plausible when considering objective evidence and so enhances his credibility.

25. This ground of appeal is misconceived. A finding as to plausibility is not a finding as to credibility and so not a finding of fact. Ouseley J, sitting as the President of the Immigration Appeal Tribunal, confirmed in *MM (DRC – plausibility) DRC* [2005] UKIAT 00019; [2005] Imm AR 198, at [15], that while an assessment of credibility may involve an assessment of plausibility of what has been said in the context of objective background information, it is not a separate stage in the assessment of credibility, which requires an assessment of the totality of the evidence, including consistency on essentials or major inconsistencies, omissions and details, improbabilities or reasonableness. In this matter, the Judge observed that the purported history of travel between Eritrea and Ethiopia and being deported from Ethiopia was plausible in light of relevant objective evidence, and proceeded to give positive weight to the plausible history in the overall assessment, but then placed a number of significant, adverse findings of fact into his overall assessment before making his decision as to credibility. Consequently, the Judge did not, as alleged by ground 3, make contradictory findings of facts. Rather, he undertook a lawful assessment of the evidence in the round, giving appropriate weight to the individual evidence presented. There is no merit in this ground of appeal.

26. Turning to ground 5, the appellant asserts:

> '5.1 At [22] and [24] of the FTTD it is submitted that the IJ has applied the incorrect standard of proof. At [22] the IJ stated '*... there are already reasons to doubt the Appellant's credibility ...*' At [24] the IJ stated *'I find is a fact, to an extremely high standard ...*'
>
> 5.2 The IJ has, in at least two paragraphs in relation to the Appellant's core of the claim has (sic) incorrectly applied the correct standard of proof. The application of the incorrect standard of proof is a material error and the decision must be set aside.'

27. By means of his written submissions, the appellant details:

> '9. In relation to ground 5, it is contended that the FTT Judge has materially erred in law by applying the wrong standard of proof to the consideration of the appellant's refugee protection claim. At [22] the FTT Judge states *'.... Given that there are already reasons to*

doubt the appellant's credibility …' At [24] the FTT Judge states '*… I find as a fact to an extremely high standard …*' Again, it is contended that having applied the wrong standard on more than one occasion, that such material errors go to the core of the account.'

28. At [22] of the decision, the Judge was considering the appellant's reliance upon an Eritrean birth certificate:

> '22. The Appellant has adduced a copy of what he purports to be his birth certificate. The weight assigned to that letter is enhanced by the fact that it was printed many years ago and appears to have been sent within an envelope affixed with Eritreans stamps. However, his account of meeting a friend by happenstance only a month after the refusal, and that friend being able to reconnect the Appellant with his uncle who have possession of his birth certificate and with whom he had not spoken to for approximately 14 years, is unpersuasive. The credibility of the account is further undermined by the Appellant's failure to reduce evidence from the friend, not only about how the birth certificate was obtained, but about him knowing the Appellant is from Eritrea. Given that the Appellant and his representatives knew that the central issue in this appeal was nationality, as demonstrated by the disclosure of the purported birth certificate, I do not accept as credible the Appellant's account that he did not believe it would be prudent to obtain supportive witness evidence from the friend. Given that there are already reasons to doubt the Appellant's credibility, as outlined above, the failure without good reason to obtain that evidence which would have been readily available is undermining to the credibility of the appellant. In all the circumstances, I give little weight to the purported birth certificate as I'm not satisfied that it is a reliable document.'

29. Upon reading this paragraph in its entirety, rather than the one sentence referred to within ground 5, it is clear that the Judge was continuing his consideration of the evidence in the round. In undertaking such consideration he adopted an approach akin to using a check list and in doing so identified factors upon which he concluded that he was to give positive weight favourable to the appellant, namely the apparent age of the document and the means by which it was sent to the appellant. He then proceeded to consider factors adverse to the appellant and in doing so he referred to 'doubts' raised by the appellant's evidence as to his personal history addressed at length in [21]. I note that no challenge is made by appellant in this appeal to the reasoning adopted at [21]. The reference to 'doubts' is consistent with no final finding having been made as to the appellant's credibility at this point of the decision. It is consistent with an ongoing assessment of the evidence in the round, with such assessment only being concluded at [24]. The approach adopted by the Judge towards the birth certificate at

[22] as part of his overall assessment of credibility was lawful and this element of ground 5 possesses no merits.

30. As to the Judge's consideration of credibility at [24], the Judge applied the correct standard of proof, namely the lower standard, when assessing the appellant's history as to a fear of the Eritrean authorities, and such approach is not challenged by the appellant. The challenge advanced is to the consideration by the Judge as to the appellant being an Ethiopian national:

> '24. ... I find is a fact, to an extremely high standard, that he is and is recognised by the appropriate authorities as an Ethiopian national and an Ethiopian citizen and additionally that he is married to an Ethiopian citizen. I reject his accounts of having lived in a camp and being deported from Ethiopia.'

31. By means of her decision letter dated 11 June 2019 the respondent confirmed at paragraph 50 that she considered the appellant to be of Ethiopian nationality. As such assertion was made by the respondent, she was required before the First-tier Tribunal to prove it to the civil standard. Whilst the Judge applied an erroneous standard when considering this issue, one akin to the criminal standard of proof, namely beyond reasonable doubt, the appellant cannot benefit from such error as on the application of the civil standard, the balance of probabilities, the same finding as to nationality would have been reached by the Judge. Consequently, there is no merit to ground 5 and it is dismissed.

32. Having found that there are no merits to grounds 3 and 5, the other grounds are so significantly undermined as to also possess no merits. As to ground 1 there was no requirement for the Judge to consider under paragraph 276ADE(1)(vi) of the Rules as whether there would be very significant obstacles to the appellant's integration into Eritrea as he found that the appellant is an Ethiopian national and not Eritrean and so will be returned to Ethiopia. There was no material misdirection in law.

33. As to ground 2, the Judge held that the appellant is an Ethiopian national and so despite the contention advanced within this ground there was no requirement for him to consider whether the appellant could 'acquire' Ethiopian nationality. In any event, the Judge gave lawful reasons at [23] for not accepting that the appellant had undertaken sufficient steps to provide the Ethiopian Embassy in London as to evidence of his true nationality.

34. Ground 4 is misconceived. The Judge did not find the appellant to be credible as to his personal history. He did not accept the appellant's evidence that his father is an Eritrean national. In such circumstances there is no merit in the submission that the Judge was required to

consider as to whether the appellant qualified for Eritrean nationality through his father. This ground enjoys no merit.

Notice of Decision

35. The decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

36. The decision of the First-tier Tribunal, dated 19 December 2019, is upheld and the appeal is dismissed.

37. An anonymity order is confirmed.

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

38. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 8 June 2020

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed, and no fee award is payable.

Signed: D. O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 8 June 2020