Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **PA/07703/2019**

THE IMMIGRATION ACTS

Determined under rule 34	**Decision & Reasons Promulgated**
On 29 September 2020	**On 07 October 2020**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

EY
(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 by the parties were primarily the report of Dr S. Bekalo dated 11 November 2019, the decision of the First-tier Tribunal, the grounds and grant of permission to appeal, and the written submissions of the appellant and respondent, the contents of which I have recorded.

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

1. This is an appeal against a decision of First-tier Tribunal Judge Nazir promulgated on 10 March 2020 dismissing an appeal by the appellant against a decision of the respondent dated 31 July 2019 to refuse his asylum and humanitarian protection claim.

Factual background

2. The appellant claims to be a citizen of Eritrea. That was disputed by the respondent, and a central issue in his asylum appeal was his true nationality. The appellant relied on a birth certificate and a repatriation card said to have been issued by the Eritrean authorities, but the judge did not find either document to be reliable. The judge noted concerns raised by the respondent in the course of the decision under challenge, some of which concerned the format and presentation of the documents, observing that the appellant had not responded to those concerns: see [38] and [39].

3. In addition to rejecting the reliability of the birth certificate, the judge had a number of other credibility concerns.

4. The appellant was granted permission to appeal by First-tier Tribunal Judge Bird, who considered that it was arguable that the judge had overlooked a report dated 11 November 2019 of a Dr Samuel Bekalo, a regional expert, which opined that the birth certificate "seems to me to be genuine/valid". Dr Bekalo's report stated that the contents and format of the birth certificate were consistent with those issued by the appellant's claimed hometown in Eritrea, Assab. It was also signed by the relevant official, commented Dr Bekalo. The report added that Eritrean birth certificates "in the past" were not routinely issued, and that there was no automatic entitlement to be issued with one, in contrast to the position in many other countries. In relation to the repatriation card, Dr Bekalo concluded, "not with absolute certainty in the strict sense of the word, but on the balance of higher degree of probability… seems to me to be genuine".

Consideration under rule 34

5. Judge Norton-Taylor gave directions stating that it was his provisional view that the questions of whether the decision of the First-tier Tribunal involved the making of an error of law, and, if so, whether the decision should be set aside, could be determined without a hearing. The parties were directed to exchange further submissions on those points.

6. Paragraph 4 of the Senior President of Tribunal's *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* dated 19 March 2020 provides that, "where a chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights in the chamber's procedure rules about notice and consent." Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides, where relevant:

> "(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."

7. The starting point for my consideration as to whether it would be appropriate to determine the issues identified by Judge Norton-Taylor without a hearing is the overriding objective. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the overriding objective of the Upper Tribunal is to "deal with cases fairly and justly". That includes, at (2)(c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings", and, at (d), "using any special expertise of the Upper Tribunal effectively". Also relevant is the need to avoid delay, so far as compatible with proper consideration of the issues: see paragraph (2)(e).

8. In light of the requirements of the overriding objective, and the clarity of the issues which require resolution under rule 34 (particularly in light of the respondent's written submissions dated 13 August 2018, to which I return below), I am satisfied that it is consistent with the overriding objective to determine this matter on the papers. An oral hearing would provide no additional procedural or substantive benefit to either party, and would only introduce delay into the proceedings. Each has contributed to this written procedure in a substantive manner.

Discussion

9. In written submissions dated 13 August 2020, Mr Ian Jarvis on behalf of the Secretary of State accepted that the judge's failure to engage with the contents of the report in his operative analysis of the birth certificate at [38], and in relation to the "repatriation card" relied upon by the appellant, was a material error of law such that the decision should be set aside, if the Upper Tribunal agreed.

10. I agree with the Secretary of State and find that the decision should be set aside. While the judge did refer to the submissions made by each party in reliance upon the report at [14] and [21], the reasoning relied upon by the judge to reject the reliability of the appellant's claimed birth certificate and the repatriation card did not refer to the opinion expressed by the expert at all. I consider the Secretary of State's concession to have been made appropriately. Of course, it may be the judge may have considered the document and had good reasons for ascribing little weight to its conclusions. The difficulty is, however, that the judge did not give any reasons for ascribing little weight to it. The judge either failed to take into account a material consideration or failed to give sufficient reasons for his findings; either way, the decision of the First-tier Tribunal involved the making of an error of law.

11. While, as the Secretary of State's written submissions suggest, a number of observations may properly be made about the weight to be attached to Dr Bekalo's report, such analysis must take place as part of a holistic assessment of the appellant's credibility. Such an assessment cannot be said properly to have taken place. This was an error of law such that the decision must be set aside.

12. In light of this finding, it is not necessary to address the second ground of appeal relied upon by the appellant concerning the judge's application of ST (Ethnic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 00252 (IAC).

13. It follows that the matter must be remitted to the First-tier Tribunal, to be heard by a judge other than Judge Nazir, with no findings of fact preserved.

14. I maintain the order for anonymity made by Judge Nazir.

Notice of Decision

The decision of Judge Nazir is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal, to be heard by a different judge.

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