Upper Tribunal
(Immigration and Asylum Chamber) **A**ppeal Number: PA/08101/2019 (P)

THE IMMIGRATION ACTS

Decided Under Rule 34 without a Hearing	**Decision & Reasons Promulgated**
On 25 June 2020	**On 09 July 2020**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

I B
(ANONYMITY DIRECTION CONFIRMED)

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. This is an appeal against the decision of Judge of the First-tier Tribunal French ('the Judge') sent to the parties on 4 November 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant her international protection was dismissed.

2. By a decision sent to the parties on 6 March 2020 Judge of the First-tier Tribunal Keane granted permission to appeal on all grounds.

‘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 by a Note and Directions sent to the parties on 6 May 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. I detailed at para. 3 of the Note and Directions:

> “I observe the grounds of appeal. They are discursive in nature, but I note the clear distillation of the challenge by JFtT Keane when granting permission to appeal on 3 March 2020. I am therefore satisfied that the issues arising in this matter are clear between the parties. The attention of the parties is drawn to the guidance of the Court of Appeal in *R (SG (Iraq)) v Secretary of State for the Home Department* [2012] EWCA Civ 940; [2013] 1 WLR 41, at [43] to [50] and also *R (on the application of Qader) v Secretary of State for the Home Department* [2011] EWHC 1765 (Admin), at [34] - [35]. As to the approach to be taken to the evidence of an expert, the attention of the parties is drawn to the judgment of Lord Reed and Lord Hodge in *Kennedy v Cordia (Services) Ltd* [2016] UKSC 6; [2016] 1 WLR 597, at [38] - [61].”

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

8. The Tribunal has received no communication from the appellant’s legal representatives, Tann Law Solicitors, as to the appellant’s position. The appellant’s solicitors have not filed written submissions. I observe that the Note and Directions was sent to two email addresses belonging to the appellant’s solicitors held on file, one of which is detailed on the firm’s website. The firm presently confirms by its website that it is monitoring emails during the Covid-19 pandemic. I am therefore satisfied that the Note and Directions were appropriately served upon the appellant’s solicitors.

9. I am grateful to Mr. T Lindsay, Senior Presenting Officer, for his very helpful rule 24 response, dated 29 May 2020. Consequent to the respondent accepting that the Judge materially erred in law I am content

that it is just and appropriate to proceed under rule 34 in the absence of submissions from the appellant.

Anonymity

10. The Judge issued an anonymity direction. No application was made by the representatives to set aside this direction and I confirm that it remains in place.

11. The direction is confirmed at the conclusion of this decision.

Background

12. The appellant is a national of Ethiopia and is presently aged 36. She states that she is of Oromo ethnicity. She is married and has three children, one of whom is now an adult and the youngest is aged 15.

13. She details that she has a family history of involvement with the Oromo Liberation Front ('OLF'), with her parents having been detained as supporters of the movement in the early 1990s. She understands that they were killed in detention. The appellant asserts that she commenced supporting the OLF in 2012, contributing money and being involved in recruitment. She asserts that she was arrested in May 2014 and accused of using her restaurant business as cover for her political activities. She states that she was ill-treated in detention and forced to sign documents in a language that she did not understand before being released. She details that she was arrested on a second occasion in November 2014 when the authorities raided an OLF cell meeting. She was detained for 10 days and ill-treated, resulting in a confession being extracted as to her political activities. She was released following payment of a bribe.

14. The appellant asserts that she left Ethiopia on 15 November 2014 and travelled to the United Kingdom via Sudan, Turkey, Greece, Macedonia, Serbia, Hungary and France. She states that she arrived in this country clandestinely on 4 March 2016 and claimed asylum upon arrival. The respondent refused the application for international protection by a decision dated 9 September 2019.

Hearing Before the FtT

15. The appeal came before the Judge sitting at Birmingham on 29 October 2019. The appellant attended and was represented. The Judge did not find the appellant to be a credible witness.

16. I observe that in undertaking his task, the Judge was not aided in his efforts by the filing of an unwieldy and significantly unhelpful skeleton argument drafted by the appellant's solicitors that ran to 20 pages and covered 76 paragraphs. It appears that the author of the document failed to recall that the purpose of a skeleton argument is to assist the Tribunal by setting out as concisely as practicable the arguments upon which a

party intends to rely. Rather, the document reads as a series of thoughts drafted in a prolix manner, for example at para 29:

> "29. … It is contended that the respondent use of the said phrase was to diminish and downplay the role of the appellant so as to justify her erroneous findings and decision. Her use thereof also clearly illustrates that this respondent has not undertaken the necessary investigations which it is expected a competent authority charged with making decisions in such serious cases is obligated to carry out so as to make sound decisions (pp 21-51; 89-248 of appellant's bundle)."

17. It is unclear how the point addressed in para. 29 was meant to aid a judge in his or her considerations as to whether a well-founded risk of persecution existed at the date of hearing, nor as to which of the 189 pages referred to within the appellant's bundle was relevant to the issue.

Grounds of Appeal

18. The grounds of appeal were drafted by the applicant's solicitors and run to 24 paragraphs over 7 pages. As observed above, the grounds are discursive in nature, but three grounds are identified:

    (i) The FtT erred by failing to consider relevant evidence

    (ii) The FtT erred by failing to 'appropriately' consider country expert evidence

    (iii) The FtT failed to give any adequate reason for departing from binding Country Guidance

19. In granting permission to appeal JFtT Keane was able to succinctly detail the grounds being advanced, and reasoned:

> "The grounds disclosed arguable errors of law but for which the outcome of the appeal might have been different.
>
> First, the judge arguably failed to carry out that global assessment of the issue of credibility which was intrinsic to his task. Although the judge frequently referred to the respondent's bundle he did not refer or did not adequately refer to the many documents comprised within the appellant's bundle of documents and indeed to the further representations which the appellant's representatives caused to be placed before the respondent after [her] asylum interview.
>
> Second, the judge arguably had regard to an irrelevant consideration when suggesting at paragraph 12 of his decision that the expert credentials of Dr Berri were undermined by the fact that Dr Berri had not lived in Ethiopia since 1996. It was arguably more pertinent for the judge to consider whether Dr Berri possessed sufficient knowledge, qualifications or credentials which enabled him to pass expert opinion upon conditions prevailing in Ethiopia.
>
> Third, it was incumbent upon the judge to apply the proposition for which the country guidance decision of the Upper Tribunal in *MB (OLF and MTA – risk) Ethiopia CG* [2007] UKAIT 00030 stood as authority.

> The judge arguably made only passing reference to the decision and did not apply the proposition for which the decision stood as authority.
>
> All the grounds are arguable. The application for permission is granted."

Decision on Error of Law

20. By way of his rule 24 response, Mr. Lindsay succinctly confirmed on behalf of the respondent:

> "2. The respondent accepts that the decision of First-tier Tribunal Judge French promulgated on 4 November 2019 contains material errors of law.
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> 3. In particular it is accepted that the approach to both credibility and country guidance case law is erroneous, amounting to material misdirection.
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> 4. The Secretary of State agrees that the FTT determination should be set aside with no findings preserved."

21. It may have been reasonable for the Judge to conclude on the evidence before him that the appellant was not a credible witness because of inconsistencies or lack of relevant detail. It was also open to him to accept the appellant as a credible witness. However, when undertaking such assessment, he was required to observe that the appellant relied upon an expert report from Dr Berisisa Berri, a business management professional who asserts that he enjoys a long-term involvement with the OLF. Dr Berri detailed his curriculum vitae over 3 pages of his report. His evidence is supportive of the appellant's asserted history of political involvement, and so required careful consideration.

22. It is well-established that the evidence of an expert witness is not to be rejected lightly: *Karanakaran v. Secretary of State for the Home Department* [2000] Imm AR 271. It was incumbent upon the Judge to assess Dr Berri's qualifications and expertise. If not satisfied that he is an expert on the issue before the Tribunal, adequate reasons were required. If the Judge were so satisfied, then he was required to assess the nature and context of the expert evidence presented.

23. The clearest statement of the basis on which a court or tribunal should permit expert testimony in a case is found in the judgment of Chief Justice King in the South Australian case of *R v Bonython* (1984) 38 SASR 45, 46 in which he set out a test with several limbs. The first may be summarised as 'does the court need expert evidence to reach an informed conclusion?' The Judge was therefore required to consider as to whether the issue or issues upon which Dr. Berri was instructed to opine are ones that require expert evidence. The second limb may be summarised as 'is there a reliable body of specialist knowledge?' It is whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the

witness would render his or her opinion of assistance to the court. The third limb can simply be identified as whether the witness is impartial in his or her presentation and assessment of the evidence. This may be relevant in this matter consequent to Mr. Berri's stated long-term involvement with the OLF. The final limb may be summarised as 'is the particular witness an expert in that field?' A judge is to be mindful that an expert is generally expected to be a person with extensive knowledge or ability based on research, experience, or occupation and in a particular area of study.

24. The approach adopted in *Bonython* was approved by the Supreme Court in *Kennedy v Cordia (Services) Ltd* [2016] UKSC 6; [2016] 1 WLR 597, at para. 43, where Lord Reed and Lord Hodge (on behalf of the Court) considered the evidence of skilled witnesses in civil proceedings at paras. 38 to 61. The approach adopted to civil proceedings appears, for the purpose of this appeal, to be consistent with the approach to be adopted in Tribunal proceedings. It was held that there are threshold questions as to the admissibility of expert evidence, para. 39, and at para. 41 it is noted that 'an expert in the social and political conditions in a foreign country who gives evidence to an immigration judge also gives skilled evidence of fact.' The Judge was therefore required to assess as to whether a witness, in this instance Dr. Berri, purporting to be an 'expert' providing skilled evidence of fact, actually possesses the necessary knowledge and experience: para. 44. The possession of such knowledge and experience was addressed by the Supreme Court at para. 50:

> "50. The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence, which is not based exclusively on personal observation or sensation, or opinion evidence. Where the skilled witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise: Myers v. The Queen [2015] 3 WLR 1145, para. 63."

25. A Presidential panel in *MH (review; slip rule; church witnesses) Iran* [2020] UKUT 00125 (IAC) confirmed at paras. 38-39:

> "38. At [43]-[44] of *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6; [2016] 1 WLR 597, the Supreme Court approved a section of the South Australian decision in *R v Bonython* (1984) 38 SASR 45, from which it distilled four key considerations which governed the admissibility of expert evidence (which in Scots law is known as "skilled evidence").
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> (i) whether the proposed skilled evidence will assist the court in its task;
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> (ii) whether the witness has the necessary knowledge and experience;
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> (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."

39. As we have already stated, no question of admissibility arises in the IAC but these criteria are nevertheless relevant in deciding whether evidence is properly described as 'expert evidence'."

26. Unfortunately, the Judge undertook no assessment as to whether Dr Berri was an expert for the purposes of the issue before him. Instead there is a cursory observation as to Dr Berri's personal history and a simple reference to his report, and no more, over 5 lines in para. 4 of the decision. Such approach is inconsistent to that identified by the Supreme Court in *Kennedy v. Cordia (Services) LLP* and the Court of Appeal in *Karanakaran* and establishes a material error of law.

27. I observe at this juncture that Dr Berri does not expressly identify his understanding as to his duties and obligations to the Tribunal as identified by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep. 68. Nor is a copy of his letter of instruction filed within the appellant's bundle. These are matters that another judge may wish to consider, as well as whether he has sufficient expertise to aid the Tribunal.

28. As to ground 3, the Judge did not accept any of the appellant's stated history and so was not required to consider the decision in *MB (OLF and MTA – risk) Ethiopia CG* [2007] UKAIT 00030 as it was not accepted that she was (i) a member of the OLF, (ii) a sympathiser of the OLF, or (iii) perceived by the Ethiopian authorities to be a sympathiser of the OLF. However, at para. 11 the Judge detailed that he would consider the appeal in the alternative, on the basis that the appellant was required to leave Ethiopia in 2014 because of her history of arrest and detention. The Judge was then required to expressly consider the country guidance decision in *MB*, which is favourable to the appellant, and to be mindful that the decision remains authoritative unless and until it is set aside on appeal or replaced by a subsequent country guidance determination: *R (on the application of Qader) v Secretary of State for the Home Department* [2011] EWHC 1765 (Admin), at [34] - [35]. He was therefore required to identify strong grounds, supported by cogent evidence, to justify not doing so: *R (SG (Iraq)) v Secretary of State for the Home Department* [2012] EWCA Civ 940; [2013] 1 WLR 41, at [43] to [50]. Even though the country guidance relates to circumstances arising in Ethiopia well over a decade ago the requirement that the Judge consider whether to follow such guidance was confirmed by the courts in *Qader* and *SG (Iraq)*. The failure to undertake such consideration, or even to expressly consider *MB*, in the alternative assessment was a material error of law.

29. In such circumstances, several material errors of law having been identified, there is no requirement to consider ground 1.

Remaking the Decision

30. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision

31. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 4 November 2019 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

32. This matter is remitted to the First-tier Tribunal for a fresh hearing before any Judge other than the Judge of the First-tier Tribunal French.

33. No findings of fact are preserved.

Directions

34. It is expected that the First-tier Tribunal will issue appropriate directions. However, to aid the Judge who is to hear this appeal, this Tribunal makes the following direction:

    1. No later than 14 days before the listed hearing of this appeal the appellant is to file and serve a skeleton argument running to no more than 5 pages, clearly identifying the issues relied upon and identifying relevant individual pages within the appellant's bundle concerned with such issues.

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

35. 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

Dated: 25 June 2020