IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005497
First-tier Tribunal No:
PA/50540/2022
IA/01578/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 April 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

E.A.Z
(**ANONYMITY ORDER MADE)** Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Miss A Jones, Counsel instructed by Shawstone Associates
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 24 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (and/or any member of his family). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction / Background

1. This is an appeal brought by the appellant against the decision of First-tier Tribunal Judge Thapar, promulgated on 1 August 2022, in which she dismissed his appeal against a decision of the respondent refusing his asylum and human rights claim.

2. The appellant is a national of Ethiopia, of Amhara ethnicity, born on 22 September 1994. He entered the UK clandestinely by lorry on 2 September 2020 and claimed asylum on 5 September 2020.

3. The appellant claimed asylum on the basis of his political activities in Ethiopia and his sur place activities in the UK. He claims that he was arrested by the Ethiopian authorities and accused of being a member of the Tigray People's Liberation Front ("TPLF"), the National Movement Amhara ("NAMA") and the Raya Amharic Restoring Committee ("RAYA"). He claims that he fled Ethiopia after an arrest warrant was issued following his escape from detention. His claim was supported by documentary evidence including a copy of an arrest warrant. He claims to have continued his political activities following his arrival, as a member of the Amhara Community in United Kingdom ("ACUK"), and participated in political demonstrations against the Ethiopian government.

4. The respondent gave detailed consideration to the appellant's claim in her refusal letter ("RFRL"). Of significance in this appeal is her acceptance the appellant was politically involved with and is a member of NAMA (at [28] & [61]). That concession was made following consideration of the appellant's evidence and the documentary evidence of membership fee payment receipts to NAMA, a NAMA ID card and a NAMA yellow book. Whilst the respondent identified anomalies and contradictions in the documentary evidence and reasoned that this diminished the weight attributable thereto, the concession was made nevertheless on the basis of the appellant's "externally consistent", "reasonable answers" and the "credible information" he provided at interview (RFRL at [58]-[60]).

5. Notwithstanding, the respondent did not accept the appellant was politically involved with RAYA; that he was detained in consequence of any political involvement in Ethiopia; that his political involvement with NAMA was known to the Ethiopian authorities or that he was politically active in the UK. The respondent identified various inconsistences in the evidence that undermined the veracity of the account and accordingly refused the claim.

6. The appellant's appeal against that decision was heard by First-tier Tribunal Judge Thapar on 28 July 2022. The parties were represented; the appellant gave oral evidence and both representatives made submissions (at [6]). At [13], Judge Thapar recorded the respondent's concession made in the RFRL. At [14]-[34] Judge Thapar then considered the appellant's claim including his written and oral testimony, two expert reports, and the documentary evidence and set out her reasons for rejecting the evidence. Judge Thapar rejected the appellant's evidence and the experts' view that the arrest warrant was genuine and identified various infelicities in the evidence. In consequence she rejected the appellant's claim that he was detained in Ethiopia or that his father had been arrested (at [17]). Judge Thapar then turned to consider the appellant's evidence as to the provenance of the NAMA membership card and the membership fee payment receipts. She considered that the appellant had not given a consistent and credible account of how the membership card was created and did not accept the cash receipts were genuine for reasons set out at [18]-[20] respectively.

7. In respect of this evidence Judge Thapar concluded as follows:

> "21. Mr Sansom submitted although the Respondent accepted the Appellant was involved with NAMA in Ethiopia this had to be reconsidered in light of the Appellant's oral evidence. I would agree and

> considering my findings above I find the Appellant has sought to rely upon documents that are not genuine. This I find significantly undermines the Appellant's credibility and the veracity of his claim. I find the Appellant has not established to the lower standard that he was a member of NAMA or that he came to the adverse attention of the authorities in Ethiopia."

8. Judge Thapar then turned to consider other facets of the appellant's claim, namely his claimed membership of RAYA, and the ACUK and his political activities in the UK. She considered that the appellant's evidence and the documentary evidence supportive of it was not credible. She noted various inconsistencies and omissions in the evidence and concluded the appellant had no political profile; was not of interest to the authorities in Ethiopia; that his political activities in the UK were not borne out of a genuine political belief, and that his recent membership of the ACUK was an attempt to bolster his claim. Judge Thapar found that the appellant could safely return to his family in Ethiopia without fear of persecution and that his enforced removal would not breach his human rights. She accordingly dismissed the appeal.

The Appeal to the Upper Tribunal

9. The grounds of appeal upon which permission to appeal was granted are three-fold: (i) that the judge erred by failing to apply binding authority in permitting the Respondent, during the course of submissions, to go behind the concession made in the RFRL that the appellant was a member of NAMA; (ii) that she failed to take account of material matters and give adequate reasons and, (iii) proceeded under a mistake of fact.

10. Permission to appeal was initially refused by the First-tier Tribunal but granted on renewed application by Upper Tribunal Judge Grubb on 28 November 2022.

11. On 20 December 2022 the respondent filed a rule 24 response opposing the appeal.

12. The matter comes before us to determine whether the decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties as above. Both representatives made submissions and our conclusions below reflect those arguments and submissions where necessary. We had before us a court bundle containing *inter alia* the core documents in the appeal, including the appellant's bundle before the First-tier Tribunal and the respondent's bundle.

Discussion

13. In view of the pragmatic position adopted by Miss Jones at the hearing, we begin with Ground (iii). It is asserted that the judge was mistaken in her observations appertaining to certain features she identified on the face of the appellant's NAMA membership card. Whilst permission to appeal was granted in respect of this ground, Upper Tribunal Judge Grubb observed in his grant of permission that, "it may be less meritorious". Before us, Miss Jones took the view that this ground was not "strong enough" and she did not rely on it. We are satisfied that she was right not to do so in view of the cogent reasons given by the judge at [18], which were entirely based on the evidence and were conclusions that were properly open to her. We find that there is no merit in Ground (iii) and we need say no more about it.

14. We turn to consider Grounds (i) and (ii), which primarily seek to impugn the judge's decision permitting the respondent to withdraw the concession in the RFRL, that the appellant was involved with NAMA in Ethiopia and contends that, in so doing, the judge failed to adopt the correct approach and failed to give adequate reasons for permitting the withdrawal. We agree with Miss Jones that Grounds (i) and (ii) stand or fall together and we have thus considered them compositely.

15. It is asserted on behalf of the appellant that the judge erred in permitting the respondent to withdraw the concession without putting the appellant on notice of her intention to do so. It is submitted that the appellant first became aware of the withdrawal upon receipt of the judge's decision and that this went against binding authority which required the respondent to make a formal application to withdraw the concession, and the judge to adjudicate upon it before the conclusion of the hearing, taking into account factors such as the timing of the withdrawal, any prejudice to the opposing party and give reasons for doing so. The grounds of appeal refer to the judgements in Mark Lewis Law Ltd & Anor v Taylor Hampton Solicitors Ltd & Anor [2017] EWHC 2359, and AM (Iran) v Secretary of State for the Home Department [2018] EWCA Civ 2706.

16. Miss Jones in amplification of the grounds submitted that the withdrawal of the concession during submissions placed the appellant in the difficult position of not being put on notice of the case he had to meet. She submitted that he was therefore deprived of the opportunity to provide a riposte to the points taken against him. This it was argued was prejudicial to the appellant giving rise to unfairness.

17. We first begin with the approach to withdrawal of a concession made by the respondent. Whilst not cited to us, the case law is helpfully summarised in the Court of Appeal's decision in AK (Sierra Leone) v SSHD [2016] EWCA Civ 999 (Jackson and Black LJJ) at [31]–[38] as follows:

> "31. … I shall begin by reviewing the law concerning the making and withdrawal of concessions.
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> 32.Carcabuk, appeal number 00/TH/01426 dated 18 July 2000 was a decision of the Immigration Appeal Tribunal comprising Collins J and Mr Ockelton dealing with two cases where issues arose concerning concessions made by the Secretary of State. The concessions concerned the credibility of the Claimants in two cases at hearings before the adjudicator. In paragraph 11 of his judgment, Collins J, delivering the judgment of the Immigration Appeal Tribunal, held that concessions of fact made by a Home Office Presenting Officer may be queried by a adjudicator, but if the Home Office Presenting Officer maintained the concessions, they bound the adjudicator. Nevertheless, the Secretary of State may be able to withdraw the concessions on appeal.
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> 33.In Opacic, appeal number 01/TH/00850 dated 15 May 2001, the Immigration Appeal Tribunal reviewed the application of the principles stated in Carcabuk to different circumstances. The Immigration Appeal Tribunal noted that in Carcabuk the concessions under consideration related to credibility, whereas in the matters before the Immigration Appeal Tribunal, the concessions were in a different context. At paragraph 22, the tribunal said:

> "Where an appeal has been conceded in its entirety, as in these cases, we do not consider that such a concession can be withdrawn and we see nothing in Carcabuk and Bla that leads us to any contrary view."

34. In Secretary of State for the Home Department v Davoodipanah [2004] EWCA Civ 106 an issue arose about a concession made by the Secretary of State. Kennedy LJ, with whom Clarke LJ and Jacob LJ agreed, said that the Immigration Appeal Tribunal had power to allow withdrawal of a concession. The tribunal would exercise that power in order to do justice in the circumstances of the case.

35. In NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856 the Home Office Presenting Officer made two different concessions at separate hearings. The first concession was that if the appellant was a lesbian, she would be at real risk on return. The second concession made at a separate hearing was that the appellant was indeed a lesbian and in a relationship with a woman called Ms S in 2006 and 2007. The Asylum and Immigration Tribunal allowed the Secretary of State to withdraw both the concessions. The Court of Appeal upheld that decision. Goldring LJ, with whom Lloyd LJ and Mummery LJ agreed, stated at paragraph 12:

> "As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted..."

36. The Court of Appeal applied those principles in CD (Jamaica) v Secretary of State for the Home Department [2010] EWCA Civ 768, but that judgment does not call for any further discussion.

37. Similar issues arose in a case in this court last week, namely Koori v Secretary of State for the Home Department [2016] EWCA Civ 552. The appellants in that case contended that they could benefit from rule 276ADE(iv) of the Immigration Rules. That rule provided that the requirements to be met by an applicant for leave to remain on the grounds of private life in the UK were that the applicant was under the age of 18 years and had lived continuously in the UK for at least seven years, discounting any period of imprisonment, and that it would not be reasonable to expect the applicant to leave the UK.

38. Mr Malik on behalf of the appellants contended that the Secretary of State had conceded that the seven year rule was satisfied. Mr Malik failed in that submission on the facts. In relation to the issue of principle, however, Elias LJ, with whom Underhill LJ and Peter Jackson J agreed, said this at paragraph 31:

> "I would accept that if there had been a considered and lawful decision to deem the seven year rule to be satisfied, the Secretary of State should not be allowed to resile from that decision. An administrative body cannot keep revisiting decisions which affect

> individual rights: there must be finality, at least unless there is a powerful public interest to the contrary."

18. We would make two points. First, the case law recognises that a concession may be withdrawn if it is in the interests of justice to do so, having regard to all the circumstances including any prejudice to the parties and the nature of the concession whether it is to fact or law. Secondly, however, as can be seen from the summary of the case law, the concessions that were being considered were ones *either* made in the First-tier Tribunal and sought to be withdrawn in the Upper Tribunal (or its equivalent at the time) *or* were made in the Upper Tribunal (or its equivalent at the time) and were sought to be withdrawn in the Court of Appeal. An example of the latter, in which the Court of Appeal declined to allow a concession to be withdrawn that had been made in the Upper Tribunal before it, is AM (Iran) v SSHD [2018] EWCA Civ 2706. Mr Wain referred us to paragraph [44], where Simon LJ said this:

> "In my view the Secretary of State's application to withdraw the concession made before the UT cannot easily rely on principles of justice and fairness, particularly when it is sought to do so in a belated and informal way. One would expect those who seek to withdraw a concession to explain both promptly and frankly why the concession was made, why it was mistaken and why it is now just and fair that they be allowed to withdraw it. It is striking that when the application for permission to appeal to the UT from the UT decision was made, the Secretary of State's newly instructed and experienced counsel (who was not the counsel instructed before this court) did not seek assert that there was a mistake or seek leave to withdraw the concession."

19. Consequently, none of the concessions being considered in the cases were ones made solely in the decision letter. They had been made during the judicial process and it was sought to resile from them on appeal. We agree with Mr Wain therefore that AM (Iran) is distinguishable from the position in this case where the concession was made in the RFRL. The distinction is important as there may be a greater reluctance to permit withdrawal in the interests of justice at a later stage of the judicial process which has previously proceeded on the basis of a concession. It is also important to remember that a discretion to permit a withdrawal is wide and is exercised bearing in mind the particular circumstances of the individual case.

20. Mr Wain properly accepts the respondent did not make a formal application to withdraw the concession, but we agree that it is implicit at [21] that that is what the Presenting Officer was seeking to do and gave reasons for doing so. It was an application made during submissions as a consequence of the unsatisfactory nature of the appellant's oral evidence and could not therefore have been made earlier in the proceedings. The timing of the withdrawal is important because it is argued on behalf of the appellant that he had been effectively ambushed and was not on notice of the case he had to meet. We do not agree.

21. The appellant was on notice of the respondent's concerns relating to the documentary evidence as she identified various inconsistencies and anomalies raised by the content of that evidence in the RFRL. The judge's decision indicates that the appellant was questioned about the provenance of the documentary evidence at the hearing. The appellant was represented at the hearing and no objection to that line of questioning is recorded by the judge in the decision. At [16] the judge records the appellant's inability to explain the spelling errors apparent on the face of the arrest warrant; at [18] she found the

appellant's evidence relating to the creation of the NAMA membership card was inconsistent and, at [20], considered the appellant's oral evidence relating to the fee payment receipts and found that they had been produced to bolster the claim. We are in no doubt that during the course of the hearing therefore, it must have been appreciably clear to the appellant's representative that the Presenting Officer was taking issue with the reliability of the documentary evidence, which included the documentation relating to the appellant's membership of NAMA.

22. If the appellant's representative considered that the proceedings were thereby unfairly compromised it would have been open to him either to make responding submissions or to apply for an adjournment, if he so wished, in order to deal with the additional points taken against the appellant and present the best possible case in terms of the evidence. However, there was no application for an adjournment of the hearing after the submission had been made by the respondent's representative. This is the context in which we must consider the appellant's grounds and in doing so we detect no procedural unfairness. The appellant was not disadvantaged in the way he presented his case and indeed no further evidence has been filed since the hearing. It is plain that the judge took a very poor view of the appellant's general credibility. She was plainly aware of the respondent's concession (at [13]) and gave detailed reasons why she agreed with the Presenting Officer's submission that the concession should be reconsidered in view of the appellant's oral evidence. The judge's reasons at [17]-[21] are entirely based on the evidence and the appellant can be left in no doubt why she agreed with the Presenting Officer's submission. For these reasons, we are not persuaded that the judge erred in her approach.

23. We have considered, if we are wrong about the error, whether it would have made a material difference to the outcome. Judge Thapar's task was to arrive at a contemporary assessment of the appellant's case, taking proper account of all the evidence and the competing arguments of the parties, and perform an evaluative assessment of risk. Judge Thapar embarked upon a thorough assessment of the evidence and gave equal consideration to the opinions of two country experts. She gave detailed and cogent reasons for rejecting the appellant's evidence at [14]-[34]. These findings are not challenged by the appellant and consist of adverse findings dispositive of the protection claim namely that the appellant was not detained in Ethiopia on account of his political affiliation; that he had no political profile known to the Ethiopian authorities, and that his father had not since been arrested. We do not see in view of these unchallenged findings, even if the concession stood, how this would have made a material difference to the outcome.

24. Accordingly, for all of these reasons we find no merit in the grounds of appeal. The judge gave full consideration to the claim and gave a plethora of reasons for rejecting the appellant's evidence. There was nothing unlawful about her approach to the evidence and it was entirely open to her to dismiss the appeal on the basis that she did.

Notice of Decision

The decision of the First-tier Tribunal does not involve the making of an error on a point of law. We do not set aside the decision. The decision of the First-tier Tribunal shall stand.

R.Bagral

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
Date: 30 March 2023