IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005138
First-tier Tribunal No:
PA/52610/2021
IA/13562/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
25 April 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

D B
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jagadesham, Counsel instructed on behalf of the appellant.
For the Respondent : Mr McVeety, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 3 April 2023

Order Regarding Anonymity

Anonymity is granted because the facts of the appeal involve a protection claim. 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed the appellant's protection and human rights appeal in a decision promulgated on the 29 April 2022 (uploaded on 16 May 2022).

2. Permission to appeal that decision was sought and on 14 October 2022 permission was refused but on renewal was granted by UTJ Owens on 28 November 2022.

3. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundles provided. The appellant claims to be a citizen of Eritrea and that she would be at risk on return as a result of her religion as a Pentecostal Christian. The factual basis of her claim is that she was born in 1985 in Eritrea and when she was approximately 3 years of age the family left Eritrea and moved to Ethiopia. In Ethiopia she lived in an area which was described as "mixed "but she spent time at school with children speaking Amharic which was her first language. There was an election in which her father had voted, and it was stated that the police had come to the family telling them that they had to leave Ethiopia. The family were taken to Eritrea and then to a camp. This occurred when she was 14 to 15 years of age. It is said that her uncle then took the family to Aseb.

4. The appellant's father and mother were Pentecostal Christians and in or about 2001 her father was arrested on account of his religion and later beaten by the police. The appellant stated that her mother was also later arrested but had never returned home. The appellant's uncle arranged for her to leave Eritrea and she went to a camp in Sudan. She later married whilst there having lived there for a substantial period of time. The appellant travelled to the UK via Turkey and Greece and arrived on 28 November 2017. She made a claim for asylum based on her nationality and her religion.

5. The appellant's claim was refused in a decision taken on 23 May 2018 and her appeal before the FtTJ was dismissed on 25 March 2019. The FtTJ found that she had not demonstrated that she was a national of Eritrea although it was accepted that she was a Pentecostal Christian.

6. The appellant lodged further submissions on 18 December 2020 and whilst it was accepted as a fresh claim with a right of appeal, it was refused in a decision letter dated 14 May 2021. The FtTJ summarised the respondent 's case at paragraph 9 of his decision.

7. The appeal came before the FtTJ on 19 April 2022. In a decision promulgated on 29 April 2022 the FtTJ dismissed the appeal on asylum grounds and on human rights grounds. Applying the decision of Devaseelan the FtTJ took as a starting point the previous decision reached in 2019 where the appellant's lack of knowledge of Tigrinya formed part of the basis of the negative credibility findings. In this respect the FtTJ noted that it had not been clear what background material had been available previously to show that Assab was not a region in Eritrea where Amharic was spoken but that in the present appeal there was an expert report available. The FtTJ departed from the earlier finding and concluded that the lack of language was not definitive of her nationality. The judge found that the appellant knew very little of her claimed culture having not seen her father since she was 14; a further explanation for her lack of knowledge was that her mother is Amharic. However the FtTJ considered that this was of "neutral effect in support of her claim." When considering the inconsistencies that had been previously found, the FtTJ concluded that the expert report was "neutral" and that the appellant had failed to demonstrate her claim nationality. He therefore dismissed the appeal.

8. The appellant sought permission to appeal which was granted by UIJ Owens on 28 November 2022._The grounds of challenge submitted that the FtTJ had erred in consideration of the appeal; that the that the reasoning was inadequate and/or confused and it was unclear why the FtTJ had determined that the appellant had failed to establish that she was Eritrean and that there was a mistake of fact made in relation to the appellant's mother and that the judge failed to take into account or address the expert evidence.

9. At the hearing before the Upper Tribunal, Mr Jagadesham of Counsel appeared on behalf of the appellant and Mr McVeety, Senior Presenting Officer appeared on behalf of the respondent. It was explained by the advocates that it was agreed between them that the decision of the FtTJ involved the making of an error on a point of law for the reasons set out in the original grounds provided and as summarised in the renewed grounds. Mr McVeety outlined the position on behalf of the respondent stating that he accepted that the FtTJ erred in law in a material respect by reference to the assessment of the expert evidence and reference made to it as "neutral"(at paragraph 48 of the decision). He explained that the expert report provided an opinion on the matters relevant to nationality, but the FtTJ had not made a decision on that opinion insofar as it addressed the previous issues from the earlier hearing. He submitted that this was a central issue to the appeal and as a result the decision could not stand and should return to the First-tier Tribunal for an assessment of the evidence.

10. It is therefore accepted by the respondent that the errors were material to the outcome for the reasons set out in the appellant's renewed grounds._Thus it was conceded that the decision should be set aside in its entirety. It was further submitted by both advocates that the appeal should be remitted to the FtT.

11. Given that the parties are in agreement that the decision of the FtTJ erred in law for the reasons set out in the original and the grounds, it is not necessary to set out in any detail why that concession was properly made. The first part of the grounds challenge the reasoning between paragraphs 41 – 43. At paragraph 36 the FtTJ had set out the previous findings made and in that decision the central reason for dismissing the appeal related to the issue of language and also inconsistencies in the appellant's account. At [37] the judge stated that it was not clear what background evidence the previous judge had available to him but properly noted that in the fresh claim appeal an expert report had been provided which was then referred to between paragraphs 38 – 40. Whilst the FtTJ identified evidence not previously available and thus could depart from the previous findings which related to Assab, and the language spoken by her at [41] is not possible to follow the later reasoning. Mr McVeety on behalf of the respondent accepted there was no reason finding made at [41] and that it was not made clear what was meant by the phrase the population of Assab "being predominantly Ethiopian" and that the appellant had stated that "her father was proud to Ethiopian as he lived in Ethiopia.." Furthermore, whilst the FtTJ did note that the appellant confirmed he was Eritrean, it did not appear that the FtTJ rejected the appellant's explanation in this regard and paragraph [42] it is unclear whether the judge accepted the appellant's father was Eritrean or if he did not find so, no explanation was provided.

12. The advocates agree that the FtTJ did not address the evidence in the expert report at [41] and whilst reference had been made by the FtTJ to Assab being "predominantly Ethiopian", the expert evidence indicated that a significant number of ethnic Eritreans had relocated to Assab. The advocates also agree that

the FtTJ erred at paragraph [48] in his decision when assessing the expert evidence. Mr McVeety on behalf of the respondent accepted that the grounds were made out and that the finding that the report was "neutral" did not address the points made in the expert report in relation to the previous decision. In this regard, it is clear that the concerns of the previous judge was that the appellant only spoke Amharic. As Mr Jagadesham pointed out, the present FtTJ did not find that that this necessarily meant she was not of the nationality claimed, however whilst the FtTJ set out parts of the expert evidence referable to the issue of the assessment of inconsistency in the evidence, at [48] the judge considered that the reasoning was "neutral". Both advocates agreed that it was not clear how that finding was reached. The inference from the use of the word "neutral" was that the report did not assist either way. In the alternative, if the FtTJ meant to say that the reasoning in the report applied to both Eritrea and Ethiopia, then the contents of the expert evidence that related to the sociocultural context of the inconsistencies identified in the appellant's evidence required assessment and engagement. That is because the inconsistencies had been used as a basis for the previous negative credibility findings.

13. For those reasons it is accepted on behalf of the respondent that the grounds are made out. As the errors are material to the outcome reached as a consequence the decision should be set aside. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision 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.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) 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, it is appropriate to remit the case to the First-tier Tribunal."

14. Both advocates submitted that in light of the agreed errors of law that had been outlined above, the appeals should be heard by way of an oral hearing and both advocates agreed that the venue for hearing the appeal should be the FtT.

15. I have carefully considered the submissions of the advocates and have done so in the light of the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512. As to the issue of remaking the appeal, I am satisfied that the appeal falls within paragraphs 7.2 (b) of the practice statement. It is agreed between the parties that the decision of the FTT involved the making of an error of law and that as a consequence the appeal will require a rehearing with factual assessment made in accordance with the evidence including the oral evidence of the appellant. In those circumstances the appeal falls within paragraph 7.2 (b) and the best course and consistent with the overriding objective is for it to be remitted to the FTT for a hearing. It will be for the First-tier tribunal to undertake a fresh assessment of the evidence provided.

16. For those reasons, the decision of the FtTJ involved the making of an error on a point of law and the decision is set aside. It is remitted to the First-tier Tribunal for a fresh hearing.

17. Whilst the Upper Tribunal has made an anonymity direction, this is a matter that can be the subject of further argument before the First-tier Tribunal as to whether the order should continue or be discharged.

Notice of Decision

18. The decision of the FtTJ involved the making of a material error of law; it is set aside with the decision to be remitted to the First-tier Tribunal.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

4 April 2023