Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11188/2014

THE IMMIGRATION ACTS

Heard at Phoenix House	**Decision and Reasons Promulgated**
On 12 May 2015	**On 12 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GEBERASELASIE MEBHRAHTOM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the appellant: Miss C Warren of Counsel
For the respondent: Mr M Diwnycz, Senior Presenting Officer

DETERMINATION AND REASONS

1. The appellant is the Secretary of State and the respondent claims to be a citizen of Eritrea born on 10 May 1989. However, for convenience, I refer below to Mr Mebhrahtom as the appellant and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal.

2. The Secretary of State appeals with permission to the Upper Tribunal against the determination of First-tier Tribunal Judge NP Dickson

promulgated on 19 February 2015, allowing the appellant's appeal against the decision of the Secretary of State made on 5 December 2014, in which the Secretary of State refused the appellant's claim for asylum and humanitarian protection in the United Kingdom.

The appellant's case

3. The appellant's case is as follows. The appellant was born in Assab, Eritrea. His family consisted of his mother, his father is two brothers and two sisters. The appellant was about one-year-old when he and his family left Eritrea and went to live in Ethiopia. The appellant and the family remained in Ethiopia until 2000 after which they were deported to Eritrea. The family lived temporarily in a hotel before moving to a refugee camp in Assab in Eritrea where they stayed for two years as they had no means to support themselves. The appellant and his father returned to Ethiopia illegally in 2002. The appellant's father went to find work and the appellant who was 13 years old at the time did not want to be subjected to military service in Eritrea.

4. The appellant returned to Eritrea to marry a woman from his local tribe and ethnic group. He went by car to the border of Eritrea and Ethiopia and then went across the border on foot throughout the night. His uncle came to the border and took him into Eritrea. He was only there for five days during which he married. He heard rumours that the neighbours and other people have found out that he has returned. The appellant was concerned he would be reported to the authorities and taken for military service. He left Eritrea with his wife because if he had left his wife in Eritrea, he believes that her life would have been at risk if she faced questions from the authorities about his whereabouts.

5. After he re-entered if you appear the appellant and his wife were taken to a nearby refugee camp by military officials. He resided in the camp for a short period before he travelled to Sudan. His wife remained in the camp. The appellant's intention was to obtain legal status in another country and then his wife could join him. The appellant cannot return to Eritrea as he left the country illegally and he has yet to carry out military service. The appellant claims that he is a national of Eritrea and not a national of Ethiopia.

The respondent's reasons for refusal

6. The respondent in her Reasons for Refusal letter dated 5 December 2014 stated in summary the following. It is not accept that the appellant and his family were deported to Eritrea in 2000 due to the border conflict with if you appear. The country information confirms that during the border conflict between 1998 and 2000 many Eritreans were deported from Ethiopia during this time. It was not accepted that the appellant's family was deported because his father voted for independence in the referendum in 1993, which is some seven years later. It is not accepted therefore that the deportation had taken place.

7. In the alternative, the appellant has been able to live and work in Ethiopia since 2002 and has had the opportunity to regularise his status. He could have obtained Ethiopian citizenship under the 2004 Directive issued by the Ethiopian immigration Department to regularise the status of Eritreans remaining in Ethiopia. It was therefore reasonable to assume that the appellant was in fact an Ethiopian national.

8. The appellant has not been credible in his evidence. The appellant claims that in 2000 into the appellant's family left Eritrea and returned to Ethiopia as he felt uncomfortable joining the Eritreans military. However at that time the appellant was only 13 years old so this reason lacks credibility. The appellant claims that in 2014 he went to Eritrea to marry his wife which is inconsistent with this claim that he fled Eritrea to evade military service and his fear of being recruited on return. At his asylum interview at question 6 the appellant claimed that he has never returned to Eritrea after 2002 and at question 16, he denied that he had said this. These matters go to the appellant's credibility.

9. The appellant has also given inconsistent accounts of when he first left Eritrea after his wedding travelling to Sudan and then saying that he left Eritrea and traveled to Ethiopia before leaving to Sudan. The respondent also relied on section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 because the appellant travelled to Italy and France before entering the United Kingdom which are considered safe countries in which the appellant did not claim asylum.

10. The respondent believes that the appellant is an Ethiopian national. He has failed to demonstrate any problems in Ethiopia and accordingly he could return to Ethiopia and join other members of his family apart from one brother who is in Djibouti and his mother who is in Eritrea.

The First-tier Tribunal Judge's findings

11. First-tier Tribunal Judge NP Dickson gave the following reasons for allowing the appellant's appeal.

    i. Paragraph 29 "the reasoning of the Home Office in the refusal letter had failed to take into account country guidance determination of the upper Tribunal in ST Ethiopia. This determination held that although the question of whether a person is a national of a particular state is a matter of law for that state, the question whether a national of a particular state has been lawfully or unlawfully deprived of the nationality of that state is a legitimate issue for the court or Tribunal to determine. It was held that an unknown but a considerable number of dual nationals were expelled from Ethiopia to Eritrea without having been subject to due process and not too much should be read into the finding of the Ethiopia-Eritreans Claims Commission.

    ii. Paragraph 30 "in ST the Tribunal referred to the arbitrary behaviour of the Ethiopian authorities and various other matters with disclose the general and pragmatic approach to the rule of law in Ethiopia. The

evidence of the experts regarding the 2004 Directive was referred to in the determination. The 2004 Directive provided a way for Eritreans in Ethiopia to obtain registered foreign status in Ethiopia and in some cases a route to the re-acquisition of Ethiopian citizenship. However this applied only to those who are resident in Ethiopia when Eritrea became independent and who had continued to reside in Ethiopia until the date of the Directive. The Tribunal accepted the expert evidence to the effect that the opportunities in Ethiopia making use of the 2004 Directive was extremely limited, with registration being possible only between March and June 2004. The evidence in another case had suggested that by 2007 the Ethiopian authorities would not take back anyone who was not regarded by them as a national".

iii. Paragraph 31 "the Tribunal also considered the situation of persons perceived as Eritreans in Ethiopia in 2011. It was stated that such persons would lack even the limited security registration under the 2004 Directive. Tensions between Ethiopia and Eritrea remain high and there are unresolved issues regarding the border. It was stated that Eritrea has a repressive regime, haemorrhaging population, particularly young people seeking to avoid its draconian form of military service. All these matters were highly likely to aggravate the feeling of insecurity of someone in Ethiopia in this situation and in particular when the relationship between the countries is deteriorating".

iv. Paragraph 32 "the appellant has given an explanation for the inconsistencies in his travel dates…I have taken into account the low standard of proof in asylum cases and have found him to be a credible witness. The appellant's evidence that Eritreans nationals would not be able to obtain Ethiopian nationality following their return to Ethiopia in 2002 is supported by the findings in ST. I accept that for many years the appellant and certain members of his family lived illegally in Ethiopia and were not granted any status. It follows that the appellant cannot now approach the Ethiopian authorities and seek to regularise his status in that country.

v. Paragraph 33 "I therefore find the appellant is a citizen of Eritrea. Following his wedding he left Eritrea illegally. In accordance with MA Eritrea the appellant will be perceived of a person of draft age who has left Eritrea illegally and would suffer persecution from the authorities as he has not carried out any military service. It follows that he will face a real risk of persecution or serious harm on his return. The appellant has established a well-founded fear of persecution and in reaching my conclusion I take into account not only the history of the matter and the situation at the date of the decision but also the question of persecution if the appellant were now to be returned to Eritrea."

The respondent's grounds of appeal

12. The respondent's grounds of appeal states the following. The Judge erred in his approach to the appellant's nationality by misunderstanding the Home Office's stance in the refusal letter. At paragraph 14 of the refusal letter, the appellant's claim to be Eritrean was rejected. The Immigration Judge's analysis of nationality starts with the assumption that the appellant is an Eritrean and that might be legible for Ethiopian citizenship and has made findings in the appellant's favour in this regard. The Judge has approached this assessment from the wrong starting point which is evident in his analysis from paragraph 26 to 33 in the determination. The Judge has based his finding on a misunderstanding of the respondent's argument as to the appellant's nationality.

13. At the hearing we heard submissions from both parties as to whether there is an error of law in the determination.

Findings as to whether there is an error of law

14. The Judge fell into material error as he failed to determine the question of the appellant's nationality taking into account the respondent's view that the appellant was of Ethiopian nationality and not an Eritrean. The Judge did not consider the two opposing points of view but accepted that the appellant is an Eritrean national without giving adequate reasons for his finding that the appellant was an Eritrean. The Judge simply assumed that the appellant was an Eritrean national and his discussion was about the appellant's inability to acquire Ethiopia citizenship by reference to the background evidence. This was a material error of law.

15. Nationality like any other fact in an appeal has to be proved on a balance of probabilities. If the appellant alleges that he is an Eritrean national, he must prove that on a balance of probability.

16. The Judge found the appellant to be a credible witness but failed to take into account the various discrepancies in the appellant's evidence. The appellant's evidence was that his father worked for the Ethiopian army and was viewed as an Ethiopian by the Ethiopian government. There is nothing in the determination where the Judge analysed this evidence and questioned why the appellant's father would be accepted into the Ethiopian army if he was not Ethiopian.

17. The appellant claims that his father was deported from Ethiopia to Eritrea in 2000. Asked why his father would be deported when he was viewed as having Ethiopian nationality, having belonged to the Ethiopia army, the appellant stated that after Eritrean independence his father was viewed as having changed allegiances. That might have been so but that would still not have made his father an Eritrean national. The Judge's failure to question this evidence brought him into material error.

18. The explanation given by the appellant for why his father was deported to Eritrea was that his father "was deemed to be bad for the public good as he had voted in the referendum for Eritrean independence in 1993". The

Judge did not question why the appellant's father would be deported seven years after voting in the referendum in 1993. He also did not address or question how the Ethiopian authorities would have found out that the appellant's father had voted for Eritrean independence in the referendum. The respondent in her reasons for refusal letter made the point that it is not credible in the least that the appellant's father would be deported seven years after the referendum. There is nothing in the challenged determination to indicate that the Judge considered the implication of this evidence.

19. There is also nothing in the challenged determination to indicate that the Judge considered Section 8 of the 2004 Act when assessing the appellant's credibility. He did not take into account that the appellant did not claim asylum while in a safe country as he was in Italy and France before he came to the United Kingdom.

20. I am ultimately satisfied that there is a material error in the determination of First-tier Tribunal Judge, in that he did not give adequate reasons for finding the appellant's account to be credible and consistent, and there is nothing in the determination to show that he gave sufficient consideration to points adverse to the appellant's credibility that were set out in the reasons for refusal decision.

21. Consequential to my finding that there is a material error of law, I set aside the determination of the Judge.

22. Both parties agreed that the appeal ought to be sent back to the First tier-Tribunal so that findings of fact can be made. I agreed that this was the proper course of action to take in this appeal in accordance with section 7. 2 (b) (i) the Senior President's Practice Statement of 25 September 2012 as we were of the view that the appeal requires judicial fact-finding and should to be considered by the First-tier Tribunal.

23. The re-making of the decision on appeal will be undertaken by a First-tier Judge in the First-tier Tribunal other than by First-tier Judge NP Dickson Tribunal on a date to be notified

Decision

24. The determination of First-tier Tribunal Judge NP Dickson is set aside, and the appeal is sent back to the First-tier Tribunal for re-determination.

Signed by

Date 5th day of June 2015

A Deputy Judge of the Upper Tribunal Judge
Mrs S Chana