Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00351/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 September 2015	**On 9 October 2015**

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department — Appellant

And

KH — Respondent

(ANONYMITY ORDER MADE)

Representation:
For the Appellant: Mr T Wilding, Senior Presenting Officer.
For the Respondent: Mr G Thomas, of Counsel, instructed by Irving & Co Solicitors.

Anonymity
The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.
I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the claimant (as defined in para 1 below) by initials only.

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal to the Upper Tribunal against a decision of Judge of the First-tier Tribunal Hodgkinson who, following a hearing on 17 March 2015, allowed the appeal of KH (hereafter the "claimant"), a national of Eritrea, against a decision of the Secretary of State of 19 February 2014 to refuse to revoke a deportation order made against him on 7 April 2009.

The judge's findings and reasons

2. The judge's findings may be summarised as follows: The judge accepted that the claimant was a practising Pentecostal Christian whose preferred means of worship is by attendance at a Pentecostal church rather than at any other denominational church, that he has chosen to practise his faith in a larger church community, that he was not happy to practise his faith in small groups and that he needed to be with more people ([44] and [45] of his decision). At [49], the judge made a point of reiterating that he had concluded that the claimant wishes to practise his religion in the Pentecostal Church "*for the reasons set out by him in his oral evidence*" and at [50] that he wishes to continue to be an active member of the Pentecostal faith.

3. At [47] and [48] of his decision, the judge quoted from Germany v Y & Z [2012] EUECJ C-71/11 and HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31, to the effect that a person should not be required to modify his or her sexual behaviour– and, the judge considered, by analogy, their practice of their religion – in order to avoid persecution. At [50], he noted that the respondent accepted that the claimant would face persecution in Eritrea on account of a Geneva Convention reason if he were an active Pentecostal Christian.

4. It can be seen that the judge found the claimant's evidence credible. At the very beginning of his assessment of the evidence (at [30)], he summarised the findings of a panel of the First-tier Tribunal (the "panel") in a previous appeal. The panel dismissed the appeal on 12 February 2009. The judge said, at [36]-[37]:

> "36. I reiterate that the *Devaseelan Guidelines* are applicable to the findings of the Panel, whose findings I have set out above, the Panel's determination being my starting point in considering the relevant evidence in the present appeal. It should be noted that the Panel accepted that, in 2006, (the claimant) had come into contact with the Pentecostal church in the United Kingdom and that he became a member of that Church in Sheffield, led by a Pastor Hirpo Kumbi. The Panel also accepted that (the claimant) attended prayer meetings at the home of a Mr Thorn, as referred to above, but concluded that there was no evidence that (the claimant) had latterly been attending a Pentecostal church. For the avoidance of doubt, the Panel did not make any definitive finding that (the claimant) was not a practising member of the Pentecostal church; it simply concluded that there was no documentary evidence supporting his contention that he was and, without more, did not accept that he was.
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> 37. However, and in any event, the Panel proceeded to conclude that it was not essential, to (the claimant's) ability to worship, for him to attend large gatherings, such as in a church, bearing in mind its conclusion that (the claimant) appeared to be content to attend relatively small prayer groups in a Mr Thorn's house. However, interestingly, and of relevance to the appeal before me, as part of (the claimant's) evidence before the Panel, in paragraph 26 of the Panel's determination, (the claimant's) evidence is recorded, to the effect that he

> considered it desirable, albeit not essential, to worship in a large group, it also being recorded that (the claimant) indicated that he would prefer to worship in a large group. The Panel concluded, relying upon the findings of the Tribunal in its Country Guidance decision in **YT**, that (the claimant) was "*therefore clearly capable of limiting his involvement to meetings of less than five people and would not be at risk of persecution on his return to Eritrea*" as a result. Of course, the Panel did not have available to it the subsequent Supreme Court judgment in **HJ (Iran)** upon which, *inter alia*, (the claimant) also now relies."

5. The judge then summarised the claimant's oral evidence and the evidence of his wife at [39] before turning (at [41]) to a letter dated 30 November 2010 from the Chaplain of HMP Birmingham confirming that the claimant was a practising Christian with a Pentecostal background, a letter from Pastor Hailemariam of "Holiness unto the Lord International Church" ("HUTLIC") dated 25 July 2014 which confirmed that the claimant was a full member of his church. The judge said that "*there was no challenge to the indication that HUTLIC (was) a Pentecostal church*". At [42], the judge referred to a letter from a Michael Haile, a "leader" of HUTLIC in which he indicated that the claimant was a genuine and enthusiastic believer. At [43], he referred to a letter from the claimant's GP which said, inter alia, that "*the [claimant] was well supported by the church community and in particular by his pastor*".

6. The judge then referred to the matters adverse to the claimant, at [44], stating:

> "44. I confirm that, in assessing (the claimant's) credibility, I have borne in mind, and have taken into account, his willingness to claim asylum under a false name in 2008, and his subsequent willingness to use a false identity, in 2010, in order to obtain employment, but I have also taken into account (the claimant's) circumstances and explanation in relation to those two offences. I have also borne in mind Judge Forster's adverse credibility findings in relation to (the claimant's) 2005 asylum claim. The respondent has not raised any issues with reference to Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and I am not aware of any behaviour which engages that Section."

7. The judge then made his findings which I have summarised at [2] above.

The grounds:

8. The original grounds stated that the judge had materially erred in law in placing weight on HUTLIC being a Pentecostal church because a print-out from the church's website does not suggest that it is Pentecostal church. Reliance was placed on an extract from the website of HUTLIC which said:

> *"We are a non denominational and charismatic church based in West London one of the most cosmopolitan cities in the world. Holiness unto the Lord International Church was set up with one goal in mind: to share the uncompromising Word of God with signs and wonders following. We welcome all who are seeking God and want to know him.*
>
> *(Source: http://www.hutlic.org/index.html)"*

9. It was contended that this shows that HUTLIC is "*a non-denominational space for Eritreans/Ethiopians"* which, it was contended, undermined the claimant's claim that

he attends a Pentecostal church and that he only wishes to attend such a place of worship.

10. The renewal grounds contended:

(i) The judge erred when he said at [36] that the panel had not made a positive finding against the claimant's claim to be a practising Pentecostal Christian. It is contended that this was a distinction without a difference as the burden of proof was on the claimant and the clear finding of the panel was that he was not a practising Pentecostal Christian.

(ii) The renewal grounds refer to the fact that, in the period follow the determination of the panel, the claimant had been convicted of another offence of dishonesty.

(iii) The judge's assessment of these adverse credibility issues at para 44 was an inadequate assessment of the truthfulness of the claimant's assertion that he will avoid genuinely desired religious practice on return because of fear. The renewal grounds contended that, given the claimant's history of deceit, more analysis was required.

(iv) In view of the claimant's past conduct, the conclusion at [45] and [50] was simply irrational.

Assessment

11. Mr Thomas submitted a letter from HUTLIC dated 11 August 2015 in which Mr Michael Haile who signed himself as "*Trustee, Chair*" stated that: *"…we would like to unequivocally confirm that we are indeed a Pentecostal church*", that "*HUTLIC is a Pentecostal church*" and that "*(the claimant) is a Pentecostal member of HUTLIC*".

12. I heard briefly from Mr Wilding following which I informed Mr Thomas that I did not need to hear from him. I announce my decision that I could not see any material error of law. I will now give my reasons for reaching that conclusion.

13. Dealing first with the original grounds, it is clear that there was no concession on behalf of the respondent that HUTLIC was a Pentecostal church. Nevertheless, the fact is that the respondent did not challenge the evidence given at the hearing that it was a Pentecostal church. The Secretary of State's evidence from the website of HUTLIC (at [8] above) should have been submitted to the judge. It was not submitted to the judge. It can only be admitted under the principles in Ladd v Marshall [1954] 1 WLR 1489 (Denning LJ, at p1489) and E and R v Home Secretary [2004] EWCA Civ 49 if it can be shown, inter alia, that the evidence shows that the judge was mistaken as to an incontrovertible existing fact. This simply cannot be said, given the letter from HUTLIC dated 11 August 2015 which was submitted at the hearing before me. Accordingly, the evidence from the website is not admissible.

14. My conclusion on this ground is that the Secretary of State was attempting, belatedly, to present a case or rely upon evidence that should have been presented or submitted to the judge. I can see that, if this evidence had been submitted to the judge, it might have made a material difference. It might have persuaded the judge to take an entirely different view of the credibility of the remainder of the evidence, both

written and oral. However, the Secretary of State's representative did not rely upon this evidence at the hearing before the judge. This notwithstanding the fact that the hearing before the judge was a second hearing of this appeal because the appeal that was heard before the judge had been remitted to the First-tier Tribunal by the Upper Tribunal. The jurisprudence concerning the admissibility of evidence that was not relied upon before a judge at first instance is clear. Such evidence cannot be relied upon to demonstrate an error of law except in limited circumstances. One of those is that the judge made an error as to an existing fact which is incontrovertible. I have already explained why this cannot be said to apply. No other arguments as to admissibility were advanced before me.

15. There is quite simply no substance in the renewal grounds, which I will deal with in turn.

16. In relation to the first argument (at [10(i)] above), the judge was entitled to note that the panel had not made a definitive finding that the claimant was not a practising member of the Pentecostal church and that it had concluded that there was no documentary evidence to support his contention that he was and that, without more, it did not accept that he was. It was the judge's duty to understand the scope of the panel's findings, so that he could start his assessment from the correct footing, given that the panel's findings were a starting point under the guidance in Secretary of State for the Home Department v. D (Tamil) [2002] UKIAT 00702* (also known as Devaseelan) which the judge applied.

17. The next argument is essentially that the judge overlooked considering the fact that, since the previous determination by the panel, the claimant had been convicted of another offence of dishonesty. There is nothing at all in this argument. As the author of the grounds himself said, the judge referred to this further offence of dishonesty at [5] of his decision and at [44] he specifically referred to the offence in 2008 and the offence in 2010.

18. The third argument is likewise bereft of substance. There are two points made in this regard. First, that the judge only considered the adverse matters after he had already made a positive assessment of credibility. However, this argument simply ignores the fact that a judge has to start his assessment somewhere. The mere fact that he has started with the positive aspects does not mean that he left the negative aspects out of account. In this particular case, the judge specifically said that, at [44], that: "*I confirm that, in assessing the [claimant's] credibility, I have borne in mind, and have taken into account …"* It is plain, in my judgment, that he had taken the negative aspects into account in reaching his conclusion on credibility. It is not the case that he made his positive assessment before turning to those factors which impacted negatively on credibility.

19. The second point in the third argument is that the judge gave inadequate reasons for his positive assessment. However, the renewed grounds identify nothing that has been left out of account, other than the matters I have dealt with in the preceding paragraph. Accordingly, there is nothing in this point.

20. Mr Wilding could not explain what argument was being advanced in relation to [10(iv)] above if it was intended to advance an argument that was different from the remainder of the renewal grounds.

21. For these reasons, the Secretary of State's grounds do not establish that the judge erred in law.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed Date: 4 October 2015
Upper Tribunal Judge Gill