Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04871/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 26 November 2015	**On 29 March 2016**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YA
(Anonymity order made)

Respondent

Representation:

For the Appellant: Mrs M O'Brien, Home Office Presenting Officer
For the Respondent: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors

DECISION AND REASONS

1) This is an appeal by the Secretary of State against a decision by Judge of the First-tier Tribunal Kempton allowing an appeal by YA (hereinafter referred to as "the claimant") on asylum and human rights grounds.

2) The claimant was born in 1989. His nationality is disputed. He claims to be from Eritrea but the Secretary of State considers that he is Ethiopian. It is not disputed that he is a Pentecostal Christian and that were he to be removed to Eritrea as an Eritrean he would face a real risk of persecution in that country by reason of religion.

3) The evidence before the First-tier Tribunal was that the claimant was born in Eritrea. He went with his parents to Ethiopia but the family was subsequently returned to Eritrea. On return to Eritrea they lived in Campo Sudan. His difficulties in Eritrea began when he and his friends were praying for his sick mother and were overheard by the authorities. The claimant was arrested but was released after his uncle paid a bribe. He then fled Eritrea and, according to his account, lived in Sudan for 8 years before travelling to the UK as he feared being sent back to Eritrea by the Sudanese authorities.

4) The Judge of the First-tier Tribunal appears to have accepted that the claimant had lived both in Eritrea and in Ethiopia. There was no dispute that the claimant could not be returned to Eritrea. However, according to the judge, there was no indication that the Ethiopian authorities would accept him there. The claimant had not been to the Ethiopian Embassy to make inquiries into this matter.

5) The judge observed that when the claimant was interviewed on behalf of the Secretary of State he was not questioned appropriately as to his nationality. In particular, he was not asked if there was any reason why he could not be returned to Ethiopia. Nevertheless, Ethiopia was the country to which the Secretary of State proposed to remove the claimant. The judge seems to have concluded that if the claimant were to be removed to Ethiopia it would be unlikely that the Ethiopians would accept him. There was a real risk that the Ethiopians would remove the claimant to Eritrea, which the claimant had left illegally and where he could not practise his religion without persecution. On this basis the judge allowed the appeal.

6) The Secretary of State sought permission to appeal on the basis that the judge had failed to make a finding on the claimant's nationality and the risk on return to Ethiopia. The Secretary of State's reasons for refusal letter gave reasons for not accepting that the claimant was a national of Eritrea and the judge had identified inconsistencies in the claimant's account and had said that certain evidence he gave did not make sense.

7) According to the Secretary of State's grounds the judge accepted that the claimant had not been to the Ethiopian Embassy. In relation to this the judge did not follow the precedent of MA (Ethiopia) [2009] EWCA Civ 289. In this case it was said there was no reason why the appellant in question should not have visited the Embassy of Ethiopia to seek to obtain requisite documents to enable her to return there. It was stated that before an applicant for asylum can claim the protection of a surrogate state, he or she must first take all steps to secure protection from the home state. It was incumbent upon the asylum seeker to take all reasonable steps to obtain authorisation to return.

8) Permission to appeal was granted on the basis that the judge had failed to make finding on the claimant's nationality and had failed to have regard to MA (Ethiopia).

Submissions

9) In her submission on behalf of the Secretary of State, Mrs O'Brien referred to the lack of a finding on nationality. The judge accepted that the claimant had not been to the Ethiopian Embassy. The judge failed to engage not only with MA (Ethiopia) but also with the Upper Tribunal decision in ST (Ethnic Eritrean - nationality – return) Ethiopia CG [2011] UKUT 00252, notwithstanding that this decision was before her. According to this case the judge must consider whether someone does not qualify for refugee status by reason of being able to go to another safe country. If the judge had followed this decision there was a real possibility of a different outcome to the appeal. The claimant had made no application to the Ethiopian authorities. The claimant had failed to discharge the burden of proof. There was no positive credibility finding in favour of the claimant. The judge should have found against the claimant.

10) For the claimant, Mr Winter raised two questions. The first was whether the findings made by the judge were sufficient to show that the claimant was accepted as an Eritrean. The second was whether any error made by the judge was material.

11) Mr Winter referred to the judge's finding that the claimant had not been asked appropriate questions at interview about the risk of return to Ethiopia. In 2000 the claimant had been removed from Ethiopia to Eritrea. This showed that the claimant was not accepted as Ethiopian. There was evidence about the claimant's nationality in the form of his mother's identity document and the claimant's own birth certificate. The judge, however, had not made a finding in relation to these.

12) Mr Winter further submitted that any omission by the claimant in not approaching the Ethiopian Embassy was not raised in the Secretary of State's refusal letter and was not relied upon as a factor in the refusal of the asylum claim. Mr Winter referred to the case of ST Ethiopia, at paragraph 108 onwards, as showing that Ethiopian nationality could not be reacquired from abroad without a period of residence in the country. The claimant could not obtain Ethiopian nationality from abroad and would not be admitted to Ethiopia, a country from which he had already been deported. It appeared to have been accepted by the judge that the claimant had been deported in 2000. The position of the claimant was such that the Ethiopian authorities would refuse to recognise him as a citizen. Because of this, even if the judge had made an error, on the basis of ST Ethiopia it would not be material.

13) In response Mrs O'Brien reiterated that the judge should have made a finding on nationality. Such a finding was required before the appeal could be allowed. There was no reference to the claimant's mother's identity document and the claimant's birth certificate in the decision of the First-tier Tribunal.

14) In relation to this matter Mr Winter submitted that where the judge failed to take account of evidence it could be inferred that the evidence was not material, in terms of MA (Somalia) [2011] Imm AR 292, which was the decision of the Supreme Court.

15) Mrs O'Brien continued that the entire challenge by the Secretary of State was based on a failure to make clear findings. The issue of nationality was central to the appeal.

Discussion

16) I agree with the submission by Mrs O'Brien as to the lack of clear findings by the Judge of the First-tier Tribunal. Although the judge put in her decision a heading "Credibility findings and reasons" it is difficult to identify any credibility findings under this heading. The judge summarises the claimant's evidence; points out that the Secretary of State accepted that the claimant was a Pentecostal Christian; records that the claimant has not been to Ethiopian Embassy to make inquiries about whether he would be accepted as a national; and then finds there is a real risk of the claimant being sent from Ethiopia to Eritrea were he removed to Ethiopia. I am not satisfied that the judge made adequate findings to support this final and supposedly conclusive finding.

17) For example, the judge raised certain questions arising from the claimant's evidence about the time he allegedly spent in Sudan but did not make any finding as to whether this part of the claimant's account was accepted. The judge raised questions about the supposed move of the family to Ethiopia and then their return to Eritrea but again made no findings in relation to the credibility of this part of the account. The judge even commented, at paragraph 26, that the claimant's account of not being able to contact his mother while he was in Sudan "does not make sense …" but no credibility finding was made in relation to this, either negative or positive.

18) It is accepted by the parties that there were documents before the judge relating to nationality, in the form of the claimant's mother's identity document and the claimant's birth certificate. No findings were, however, made by the judge in respect of these documents and indeed there is no reference to them in the decision. Mr Winter asked me to find that by implication if the judge did not refer to these documents they were not material. There may be occasions when it is possible to draw such an inference. This would be on the basis that the judge had made a thorough assessment of all the evidence considered to be material and had made clear findings. This is not the position with this decision. In effect Mr Winter is asking me to second guess the findings that the judge might have made had she taken account of these documents. That does not seem appropriate in the circumstances of this appeal and goes beyond the proper scope of a hearing before the Upper Tribunal.

19) Mrs O'Brien referred also to the apparent failure by the judge to have regard to MA (Ethiopia) and the country guideline case of ST Ethiopia. The

main issue in the Secretary of State's application for permission to appeal was a failure to have regard to MA (Ethiopia).

20) Mr Winter submitted that this omission was not material. He submitted that on the basis of ST the claimant would not qualify for Ethiopian nationality. The basis on which Mr Winter was able to make this argument was the assumption that everything the claimant had said about his family background and his family's removal from Ethiopia to Eritrea was credible. There are, however, no clear credibility findings in the judge's decision.

21) Furthermore, as the judge herself pointed out, there had been no approach made by the claimant to the Ethiopian Embassy, as required by MA (Ethiopia). The judge indicated that in her view the issue of nationality was not properly addressed at the asylum interview. Be that as it may, this does not preclude an obligation on the claimant to make an application for a travel document at the Ethiopian Embassy.

22) Mr Winter submitted that the point about making an application to the Ethiopian Embassy was not raised in the reasons for refusal letter. On my reading the thrust of the reasons for refusal letter appears to be that the claimant's assertion that he was of Eritrean nationality was not credible. Once this decision had been made, it was then incumbent upon the claimant to approach the Ethiopian Embassy if he wished to pursue his contention that he was Eritrean. The claimant was represented and those who represented him should have been aware of the relevant authorities in terms of MA (Ethiopia) and ST.

23) It is fundamental to making a determination of refugee status to ascertain the nationality of the person claiming to be a refugee. This is because a person qualifies as a refugee only where he or she has a well founded fear of persecution either in his or her country of nationality or, if he or she has no nationality, in his or her country of formal habitual residence. As was pointed out in MA (Ethiopia), a person is entitled to the protection of a surrogate state only after he or she has taken all steps to secure protection from their home state. Thus the question of nationality was material and was crucial to the question of whether or not the appeal should have been allowed on asylum grounds.

24) As I indicated to the parties at the hearing, if I found in favour of the Secretary of State the appropriate course would be to remit the appeal to the First-tier Tribunal for hearing before a judge other than Judge Kempton. This is because the judge made no clear findings on credibility and on the extent to which the claimant's account was accepted or rejected.

Conclusions

25) The making of a decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

26) The appeal is remitted to the First-tier Tribunal for hearing before a different judge. No findings are preserved except where those have been the basis of a concession between the parties.

Anonymity

27) The First-tier Tribunal did not make an order for anonymity. Given that the appeal proceedings are continuing, however, I consider that such an order should be made at least for the duration of the proceedings. Accordingly, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity order. Unless the Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original claimant. This order applies to amongst others all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Signed Date
Upper Tribunal Judge Deans