Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07682/2016

THE IMMIGRATION ACTS

Head at Newport	**Decision & Reasons Promulgated**
On 5 September 2017	**On 31 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between
KH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: S Caseley, Counsel instructed by Migrant Legal Project
For the Respondent: Mr S Kotas, Senior Home Presenting Officer

DECISION AND REASONS

Introduction

1. **Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

2. The Respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family.

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This direction applies both to the Respondent and to the Appellant. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

3. The appellant appeals with permission the decision of the First-Tier Tribunal, Judge Fowell, promulgated 10th of February 2017, in which he dismissed the appellant's appeal on international protection grounds finding that she was not Eritrean as claimed, but Ethiopian. The judge concluded there was no evidence that the appellant would be at risk on grounds of her Pentecostal Christianity on return to Ethiopia. Judge Fowell then went on to allow the appeal on Article 8 ECHR grounds, finding that in the context of the appellant's vulnerability, and against the background of historical abuse, and the length of time that she had been out of Ethiopia, the poor position of women in Ethiopian and the week state protection, lacking any education and without accommodation or resources there would be very significant obstacles to the appellant reintegrating there. He thought her circumstances would be close although not reaching the article 3 threshold. He found it compelling that her mental vulnerability arose at least in part from the treatment experienced in the United Kingdom. In those circumstances, the judge found that the interference with the appellant's private life unnecessary on public policy grounds.

4. The appellant sought to appeal the decision on the grounds that the judge had placed undue weight on the appellant's inability to speak Tigrynian "fluently" given that nationality is not defined by language, and failed to give adequate weight to the positive matters that the judge had found in the appellant's favour.

5. So far as the approach to the embassy was concerned the grounds point out that the letter had been written by the appellant solicitors not by her and asserted that it was wrong for the judge not to give weight to the appellant's confidence and desire to assist in establishing her nationality by instructing her solicitors to approach the embassy.

6. Judge Fowell should have given greater weight to the positive answers given about the country because in the light of the appellant's post-traumatic stress disorder her ability to "learn" such information was impaired.

7. Permission was granted in the Upper Tribunal on the basis that whilst the written grounds did not clearly establish argueability the challenge to the judge's conclusion on nationality required full exploration in the context of an oral hearing.

The hearing at the Upper Tribunal

8. There was no application to adduce further evidence.

9. Ms Caseley made a written application to amend the grounds to assert that the judge should have taken into account the country guidance case

of ST square brackets 2011] UKUT 00252 (IAC) which concluded that those who were deported during the (border war) would face a number of difficulties and either obtaining or re-acquiring Ethiopian nationality.

10. Mr Kotas objected to that amendment on the basis that it was late and represented an entirely new argument which was not before the First-tier Tribunal.

11. I took the view that as it was a country guidance case going to disputed Eritrean nationality I would hear the argument. Ms Paisley took me to paragraph 69. In summary, her argument was that the difficulties in obtaining documentation from the Ethiopian government meant that no adverse conclusion should follow from the appellant's inability to do so. The appellant had no Ethiopian documents. She left Ethiopia when she was 7.

12. Ms Caseley argue that it was irrational of judge Fowell to place reliance on the question of language, it was not unrealistic that she would not speak Tigrinya given that she left when she was very young, she had none Amharic speaking made, and her parents were working. The judge's consideration that by the age of 5 she could be expected to have learnt any significant amount of Tigrinya was speculative, only open to him on the basis of expert evidence. He should have taken into account that as a result of her life history, and traumatic events, she might have lost her language ability. The judge has failed to accord the appellant the benefit of the doubt and did not take into account the medical report when considering whether or not the appellant would have been in the position to learn information about Eritrea the purposes of the claim.

13. Mr Kotas addressed me. He relied on the rule 24 response. The judge had dealt with the case fairly and reached conclusions open on the evidence and the submissions were but a disagreement.

Discussion

14. The judge begins by correct self direction as to the standard of proof and the position of the appellant as a vulnerable witness based on age and the diagnosis of post-traumatic stress disorder. He records that he limited questions to the matters pertinent to the nationality dispute.

15. The judge considered a medical report from Dr Battersby in some detail. The report identified that the appellant is diagnosed with moderate complex PTSD, unrelated to any persecution from which she is seeking protection. The judge noted that it was accepted that she had experienced domestic slavery in the United Kingdom, the judge found the appellant's account of her mother dying at the age of 9, and the very difficult experiences she had endured since, as set out in the medical report, explained her disjointed account. The judge concluded to the lower standard that the appellant found herself as an orphan in Sudan at a very young age.

16. The judge took a holistic view of the evidence. He accepted the appellant's explanation in respect of some of the disputed matters, such as the claim that she had told the arresting officers that she was Ethiopian, gave a false name and date of birth, contradictions in the names of her parents, a reference to "Combi Sudan", and the provision of inconsistent dates of 2002 with 2012 in respect of her father's death. of recording error, including mixing up her claim with another asylum seeker, finding a recording error, allowing that her claim may have been mixed up with another asylum seeker's. The judge saw no reason to reject the appellant's claimed age, and rejected the "Merton compliant" report relied upon by the respondent, finding her to be born in 1997, as she claimed, rather than in 1995 as she had been assessed.

17. The judge noted that the appellant had given a false name in Hungary, where she had claimed asylum, and that she had travelled through a number of safe countries before arriving in the United Kingdom, however he noted that if her account were true she was not fleeing from immediate persecution so that it would be understandable that she would not necessarily stop in the 1st safe country that she came to.

18. The appellant had demonstrated some knowledge of Eritrea and in particular of Assab. The respondent argued that given that she had had 9 months prior to her interview she had the opportunity of learning the information which she had provided, none of which was exceptional. The judge noted that this was the high point of the evidence of her being Eritrean, but found the inability to speak Tigrinya and the absence of any proper effort to obtain confirmation of her lack of citizenship qualification from the Ethiopian Embassy, more significant.

19. In respect of language the judge noted the appellant did not speak Tigrinya, but spoke Amharic. The judge noted that, contrary to the interviews, the appellant was now saying that she could understand Tigrinya, just not speak it. The judge noted that there had been no such claim in her earlier interviews, and it had not been tested and no language evidence presented. The judge concluded that it could reasonably be expected that she would have acquired the language of her parents, both Tigrinya speakers. The judge did not accept her explanation she did not use Tigrinya because her mother worked as a chef and employed a maid, and so had little interaction with her. The judge found the explanation undermined by the fact that the appellant was an only child. The judge also found her account of living for 3 or 4 years in Eritrea, where Tigrinya is widely spoken, undermining of the inability to speak Tigrinya. The judge rejected the appellant's explanation that she did not use Tigrinya on deportation to Ethiopia because she had lived in Assab along with many other deportees who continued to use Amharic. The judge found that it was plausible enough that in the circumstances she described would speak Amharic but not that she would not have acquired a command of Tigrinya.

20. The judge considered the evidence of the appellant's efforts to act in good faith and take all reasonable practical steps to acquire documentation to enable her to return to Ethiopia, in line with the expectations set out in the case of MA (Ethiopia) v SSHD (2009) EWCA civ 289. He found that the appellant, who had not approached the embassy in person but whose solicitors had written about 2 weeks before the hearing, had not made a proper effort, through the appropriate authority, to get to the bottom of her nationality.

21. The judge reminded himself of the correct answers the appellant had given in her asylum interview about Eritrea before concluding that the appellant had failed to establish that there was any real likelihood of her being from Eritrea, recording that he had borne in mind the lower standard, and that he had put to one side many of the criticisms made of her account.

22. I deal briefly with the ST point. Paragraph 69 to which I was taken is under the heading: "The approach to refugee claims based on deprivation of nationality". The case concerned an allegation that the Ethiopian authorities deprived Ethiopian nationals who they perceived as being ethnic Eritreans and who remained in Ethiopia during the war, of their nationality. I find it adds nothing to the appellant's case because although concerning the treatment of the Ethiopian government of ethnic Eritreans, the factual matrix is not similar to the position here. Nor does the case give succour to an argument that the Ethiopian authorities did not respond to the solicitor's letter because of a history of persecution. The point, as identified by reading the decision of Judge Fowell, is that her efforts were too scant to constitute a proper attempt. The letter only sent 2 weeks before the hearing, or the instructions to send the letter, was the entirety of the evidence of the appellant's efforts. In those circumstances, the response of the Ethiopian government is not the issue.

23. Ms Caseley was also critical of Judge Fowell on the basis that the respondent's point that the appellant could have learnt information about Eritrea was perverse because the medical evidence showed that she would not be able to learn in that way.

24. The judge deals with the medical evidence in detail between [22]–[27], and notes medical advice that the appellant suffers post-traumatic stress disorder and that her evidence might be affected by: "Avoidance, patchy memory and impaired concentration may lead to apparent inconsistencies, omissions or lack of detail." In the event from the details consideration of her evidence set out in the judge's decision, and the submissions recorded, it does not appear that such difficulties obtained.

25. The medical evidence does not address the point about learning country information. The argument put forward now was available on the day but it was not made. It exceeds the medical evidence. Dr Battersby had the refusal letter in which the point that the appellant could have learnt such information was made. If the point was so obviously clear, as Ms Caseley

submits, that it was perverse for anyone to contemplate, one could have expected it to have been covered. The submission also overlooks that the judge plainly recognised the positive implications of the appellant giving correct answers. He identifies it as expressly positive evidence in the credibility assessment because he describes it as such at [71].

26. I find no merit in Ms Caseley's submission that the judge failed to give adequate positive weight to the other matters that he had concluded in her favour. Given the detail of his decision in respect of all matters it cannot be said that he did not hold the entirety in his mind before making his final assessments. As I have set out above he reminds himself of that before he reaches the overall adverse conclusion. The reality is that it was open to him find other evidence outweighed the positive.

27. Turning to the ground that too much reliance is placed on the question of language, I also find no merit here. There is nothing perverse in the judge placing reliance on the question of language in an Eritrean case. He has not strayed into the area of expert evidence, or of speculation. Contrary to the grounds, the judge does not require "fluency". The grounds fail to read the decision as a whole. The judge found, as he was entitled to conclude that living with 2 parents, both native Tigrinya speakers, until the age of 5, and thereafter with one until the age of 9, and having spent 3 or 4 years in Eritrea subsequently, a facility in the language would have developed. AS per the country information, it is not the appellant's ability to speak Amharic which undermines her claim but rather, the judge finds, the inability to speak Tigrinya, in the context of the background claimed.

28. The judge has provided a very carefully considered and written determination. He plainly had the medical evidence uppermost in his mind. In respect of each dispute he carefully weighed the points for the appellant, identifying evidence which supports her account. This is not a judge who has gone all one way, he has accepted the appellant's explanation on several matters.

29. As the grant of permission notes, this was a judge who was faced with a difficult task in making a finding of fact as to nationality on scant evidence. He was bound to make what he could of that evidence and reach a conclusion. Having had the opportunity of oral elaboration of the grounds I have concluded the judge was entitled to reach his conclusion.

Decision

30. The decision of the First-tier Tribunal dismissing the appeal on international protection grounds, but allowing the appeal on article 8 ECHR grounds, reveals no material error of law and stands.

Signed Date 27 October 2017
Deputy Upper Tribunal Judge Davidge