



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/11598/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Columbus House,
Newport
On 23 October 2017**

**Decision & Reasons
Promulgated
On 21 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

N A N S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Caseley, Counsel

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Eritrea whose protection claim was refused by the Secretary of State on 7 October 2016 and his appeal against this decision was dismissed by First-tier Tribunal Whitcombe in a decision promulgated on 14 February 2017 on asylum, humanitarian protection and human rights grounds. Permission to appeal to the Upper Tribunal against that decision was granted by First-tier Tribunal Judge Gillespie in a decision dated 1 September 2017.
2. The Appellant relies on two grounds of appeal. Firstly, it is argued that the First-tier Tribunal erred in refusing the Appellant's adjournment application and secondly in failing to follow the Country Guidance case of **ST (Ethnic-Eritrean-nationality-return) Ethiopia CG [2011] UKUT 00252**.

3. Permission was granted on the grounds that it was fairly arguable that the First-tier Tribunal Judge erred in law, through procedural unfairness, in failing to grant the adjournment prayed. Having refused to permit the adjournment of the purposes of obtaining an expert's report as to the law of Ethiopia the Judge made findings as to the effect and practical application of that law, through his own interpretation of the foreign law, and without the benefit of expert evidence as to its content, the very evidence which it had been the purpose of the adjournment request to obtain.
4. At the hearing Ms Caseley said that she was only really relying on ground 1. An oral application was made at the hearing for the purpose of obtaining an expert's report and the expert had been instructed but had not produced the report by the agreed date. Legal aid funding had been in place and there was no fault on the part of the Appellant's representatives for the delay. The Judge had failed to making a finding on whether the hearing would be fair in the absence of the expert report requested contrary to **Nwaigwe (adjournment: fairness)** [2014] UKUT 0418. The report was material to the issue of de jure and de facto nationality. It was an issue that the Judge interpreted Ethiopian law.
5. Mr Diwnycz conceded that there was an error of law due to the failure to consider fairness as the criteria and the fact that this led the Judge then to interpret Ethiopian law which was the remit of an expert.

Discussion

6. The First-tier Tribunal found that the Appellant would have a well-founded fear of persecution in Eritrea. He found at paragraph 59 that the Appellant was entitled in law to Ethiopian citizenship and had not made reasonable efforts to acquire that citizenship. He found that he could acquire Ethiopian citizenship and return there. It was the Appellant's case that he could not acquire Ethiopian nationality from outside Ethiopia and that up to date evidence in the form of an expert's report from Mr Schroeder would have been capable of establishing that he would not be able to acquire Ethiopian citizenship without complying with the requirements of Article 5 of the Proclamation on Ethiopian nationality which required him to live for 4 years in Ethiopia before applying for citizenship.
7. The Appellant applied for an adjournment at the beginning of the hearing. The Judge set out the reasons given for the application at paragraph 17 and concluded at paragraph 17 (ix):

"While the priority is always to ensure that the appeal is determined fairly, that does not amount to an unfettered right to an adjournment or postponement wherever it can be shown to be necessary in order to obtain potentially relevant evidence. Other countervailing considerations are the cost, disruption and delay caused by the postponement (including cost and delay caused to other appellants in the tribunal's lists), whether in all the circumstances the party applying for the postponement has enjoyed a reasonable opportunity to obtain the evidence in

question, and whether the application for a postponement was made as soon as reasonably practicable.”

8. He concluded that the Appellant had had ample time to obtain expert evidence and the application for an adjournment should have been made earlier. In the circumstances he found that the interest of justice weighed against the postponement of the hearing.
9. It cannot be said that the Judge failed to apply a test of fairness, because he specifically refers to it as a consideration. Nor can it be said that the factors that he took into account were not relevant ones because they were enshrined in the overriding objective in rule 2 of the Tribunal Procedure Rules 2014. However, the proposed expert, Mr Schroeder was the country expert in the relevant country guidance case of **ST** in which the practices and procedures of the Ethiopian Embassy’s grant of citizenship was analysed and his evidence was given significant weight by the Tribunal. In **MA (Disputed Nationality) Ethiopia** [2008] UKAIT 00032 it was held that expert evidence could legitimately form part of the assessment of whether a person fulfilled the nationality requirements. At paragraph 51 of the decision, the Judge acknowledged that the case of **ST** was 5-6 years old and there was no up to date evidence of the requirements of Article 5 of the Proclamation on Ethiopian Nationality which provided that 4 years domicile in Ethiopia was required before an application for citizenship could be made. The Judge at paragraphs 49 to 52 made his own interpretation of how Ethiopian nationality law would be applied.
10. I find that Mr Diwnycz was correct to concede that the Judge proceeded in a procedurally unfair manner in failing to grant an adjournment for the purposes of obtaining expert evidence for which funding was already in place and had through no fault of the solicitors not been delivered by the hearing date in circumstances where that evidence was key to the core issue of nationality in the appeal. This was clearly an issue on which expert evidence could have been material to the outcome of the appeal because, as acknowledged by the Judge, there was no up to date evidence leading the Judge to stray into the territory of an expert in interpreting foreign nationality law.
11. The parties agreed that the findings in relation to the risk to the Appellant on return to Eritrea at paragraph 43 of the decision should be reserved. I remit the case to the First-tier Tribunal as the effect of the error has been to deprive the Appellant of a fair hearing (Part 7.2 (a) Senior President’s Practice Statements).

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remit the matter to the First-tier Tribunal for re-hearing.

Anonymity

The First-tier Tribunal made an order and I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008). Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

A handwritten signature in black ink, appearing to be 'L J Murray', enclosed in a rectangular box. The signature is cursive and somewhat stylized.

Deputy Upper Tribunal Judge L J Murray