Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00221/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 August 2020	**On 2 September 2020**

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

FS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity Direction

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. Liberty to apply.

Representation:
For the Appellant: Mr A Jafar, instructed by UK Lawyers and Advocates
For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS
(Decision given orally on 7 August 2020)

Introduction

The appellant is a citizen of Eritrea, born in 1959. She appealed to the First-tier Tribunal against a decision of the Secretary of State for the Home Department

dated 24 December 2018, refusing her protection and human rights claims made on 27 June 2018.

To put this case in its proper historical context I will set out again what is said at paragraphs 3 to 6 of the First-tier Tribunal's decision. The appellant has visited the UK several times with properly issued family visit visas. She was granted a multi-entry visit visa on 25 April 2018 having applied in Jeddah, Saudi Arabia, using an Eritrean passport. The appellant left Saudi Arabia in May 2017, 10 days after the cancellation of her Saudi Arabian residency permit (on the appellant's case) and arrived at Heathrow on 6 May 2017.

The core of the appellant's claim for protection is founded on the following factual assertions. She was born in Eritrea and lived there until she was 15 years old. Her family left the country illegally at the outbreak of the civil war in 1975. She has lived in Saudi Arabia since 1975 and married a Yemeni national residing in Saudi Arabia. The appellant believes that her husband is still in Saudi Arabia but as of the date of the hearing before the First-tier Tribunal she had not had contact with him for three months. The appellant states that she returned to Eritrea in 2000 and stayed for one week. Whilst there, she received a visit from the Eritrean authorities asking her to report to their offices the following day, but she failed to do so and subsequently left the country illegally. Her claim is that her family were involved in the political opposition party, the ELF; indeed, it is said that her father was one of the founding members of that organisation. She claims to have been involved in the ELF since an early age and a more significantly since 2001. She has six adult children, all of whom are Yemeni nationals born and raised in Saudi Arabia. Two of the children are now British citizens and two have humanitarian protection in the United Kingdom. The other two children are not in the United Kingdom.

Appeal History

The First-tier Tribunal dismissed the appellant's appeal in a decision of 28 November 2019.

Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Keith, in a decision dated 2 March 2020. In paragraphs 2 and 3 of that decision Judge Keith says as follows:

> "2. The grounds assert that the FtT erred in (1) indicating to the parties that she was minded to allow the appeal, saying 'you will have to wait until [you] receive confirmed view. Although, having said yes, I cannot say no in a determination.' The FtT then went on to dismiss the appeal based on the same evidence and the appellant argues that this demonstrates arguable inconsistency and irrationality. (2) The appellant argues that the FtT had erred in assuming that the appellant could not have obtained her passport from outside Eritrea (at [28(a)] of the decision); (3) The FtT erred in drawing adverse inferences from the failure to adduce previous passports; and grounds (4) and (5) assert that the FtT was mistaken as to the evidence presented to her.

3. Whilst ground (2) has no merit, as [28(a)] of the FtT's decision does not assert that that the appellant could not obtain a passport from outside Eritrea (nor could it reasonably be read as making that finding); and while grounds (3) to (5) appear to be weaker, ground (1) gives rise to an arguable error of law on procedural grounds, on the assumption that the appellant's assertions as to what was said by the FtT were correct. Permission to appeal is granted on grounds (1) and (3) to (5)."

I make the observation at this point that at the time Upper Tribunal Judge Keith granted permission he had not had sight of the First-tier Tribunal's Record of Proceedings, a document which came into the Tribunal's file subsequently, upon request.

Procedural matters before the Upper Tribunal

As can be seen from the passages above, Judge Keith granted permission to appeal on four grounds.

At the hearing before the Upper Tribunal, both in his initial submissions and then in his reply, Mr Jafar applied to admit three further grounds. The first of these additional grounds relates to the number of trips that the appellant made to Eritrea, and the mechanics by which the First-tier Tribunal eventually concluded that she had made more than one trip there. The second and third additional grounds relate to asserted inconsistencies as between the First-tier Tribunal's reasoning process and extant country guidance authority.

Having heard lengthy submissions from Mr Jafar I refused permission to allow the grounds of challenge to be amended. During the course of the hearing I invited Mr Jafar to provide explanation for the lateness of the application to amend. In response Mr Jafar indicated that he is being instructed on a private basis, that the determination is thick and dense in its reasoning and that cost limitations permitted him only to make the points he did in the formal grounds of challenge. There was insufficient time and funds to allow him to engage in the sort of forensic exercise that he has now been engaged in, for the purposes of the preparation for today's hearing.

I observe (i) that this explanation was not supported by a witness statement, as it ought to have been, (ii) that the Home Office were not put on notice that such an application was to be made and (iii) the application has not been reduced to writing at any point.

Whilst I have no reason to doubt anything Mr Jafar says, and in particular his assertion that the additional grounds which he now seeks to raise came into his thoughts only today once the full preparation for the hearing had been undertaken and, indeed, in one respect only once Mr Whitwell's submissions had been made, they plainly are all grounds of challenge which ought to have been properly pleaded. There have been two clear opportunities to plead these grounds, because the initial application for permission to appeal was refused. The explanation for failure to plead the grounds in a timely fashion is in my view unsatisfactory, particularly given the additional period of time that has expired since the grant of permission - during which time the appellant, the

appellant's legal representatives and Mr Jafar would have known that a hearing was on the horizon.

Looking at all the circumstances of the case, including the fact this is a protection claim, the length of the delay, the explanation provided for the delay and indeed the merits of the grounds being pursued in the context of the other grounds, I refuse permission to amend the grounds and I now move on and deal with the grounds as pleaded.

Error of Law – Decision and Reasons

The first ground asserts, broadly, that the First-tier Tribunal erred in dismissing the appeal on the Article 8 ground in its written determination because it had already stated in open court that the appeal would be allowed on that ground.

This evidential foundation for this challenge is found in an extract taken from what is stated to be Mr Jafar's contemporaneous record of the proceedings before the First-tier Tribunal. In this note the following is ascribed to the First-tier Tribunal judge.

> "I am minded to allow under Article 8
>
> You have to wait until receive confirmed view
>
> Although having said yes I cannot say no in a determination
>
> Even if allow under family and private life Home Office can still appeal me – keep in touch with lawyers, after fourteen days you can breathe relief
>
> If get asylum wrong can also be appealed, need time".

Case law from the Upper Tribunal clearly identify the evidential expectations on a party making the sort of assertions that have been made in this case - see BW (witness statements by advocates) Afghanistan [2014] UKUT 00568. A witness statement ought to have been prepared by author of the contemporaneous note, if such a note is to be relied upon. In this case, of course, the note is authored by Mr Jafar. BW also identifies that the author of such a statement should not appear as the advocate before the Upper Tribunal, for obvious reasons.

In the instant case Mr Jafar has chosen not to provide a statement, a situation which also prevailed in Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 - in which the Tribunal concluded that the version of events put forward by the representative was not to be accepted because it was not supported by any witness evidence.

Moving on, in response to this ground of challenge the Secretary of State contacted Counsel who appeared on her behalf at the hearing before the First-tier Tribunal. Counsel drew attention to the terms of a minute of the hearing he had produced and sent to the SSHD, which made no mention of the judge having given an indication that the appeal would be allowed on the Article 8 ground – the minute materially stating that the *"FTTJ reserved her*

determination". Counsel had no further recollection of events of the hearing. I observe that the SSHD has failed to provide a witness statement in support of the contents of the minute, as she ought to have done.

The Upper Tribunal has made its own enquiries of the judge in this case. The judge responded to these enquiries by way of a written note which ought to have been, but was not, sent to the parties in advance of the hearing. Nevertheless, I read the material terms of the note to the parties at the hearing and neither party sought an adjournment to take stock of what was said. In summary, the judge indicated that she had no recollection of making the comments ascribed to her but, due to passage of time, she was unable to confirm that she had not made such comments. The judge further identified that her usual practice, when indicating at a hearing that an appeal is to be allowed, is to write this outcome at the top of the written Record of Proceedings, in red. I observe that there is no such note made at the top of, or indeed anywhere on, the judge's Record of Proceedings in the instant case.

As it turns out, I need make no finding on Mr Jafar's assertion that the judge stated at the hearing that she intended to allow the appeal on the Article 8 ground. This is so because this challenge must be rejected for the following reasons. On words said to be ascribed to the judge by Mr Jafar (see paragraph 13 above) it is plain that any indication given by the judge in the terms alleged did not amount to an oral decision, and Mr Jafar did not assert to the contrary. In such circumstances, the judge's decision did not become final until it was promulgated in its written form.

Furthermore, in my conclusion, there was no procedural unfairness caused to the appellant by the judge changing her mind on the merits of the Article 8 claim (if insofar as that is what she did) because, despite what is said in the grounds of challenge, the indication is now said by Mr Jafar to have been given after the close of the evidence and after closing submissions.

I now turn to grounds 3, 4 and 5 which, for the reasons which follow, I conclude are each made out.

Ground 3 focusses on the reasoning set out in paragraph 28(d) of the First-tier Tribunal's decision:

> "An incomplete copy of the appellant's Eritrean passport… issued 6 February 2014 and date of expiry of 5 February 2019. It is a concern that a complete passport was not provided by the appellant which would have shown the exit and entry details of her various trips to Eritrea. During oral evidence the appellant claims to have left her previous passport back at home and did not bring it either to the UK or the hearing which is a further concern considering she was legally represented throughout her proceedings;"

In my conclusion, the First-tier Tribunal was wrong to treat that the appellant's failure to produce a complete copy of her current passport as a matter weighing adversely on the appellant's credibility. This was not a point taken by

the SSHD at the hearing, and neither was this issue clearly put to the appellant so as to provide her with an opportunity to explain.

It is asserted by Mr Jafar that the passport is held by the SSHD and, consequently, that the appellant could not have produced a copy of full document. Although there is no witness evidence to support this assertion, I observe that Mr Whitwell did not seek to assert to the contrary during the course of his submissions.

I further find that the rationale deployed by the First-tier Tribunal for treating the appellant's failure to produce her 'previous passport' is unsustainable. The appellant claimed to have left her previous passport in Saudi Arabia. She also asserts that she has no contact with her husband, or indeed anyone else in that country. Whilst the appellant was legally represented throughout the proceedings it is not explained by the Tribunal why this inexorably leads to an adverse inference being drawn against the appellant. I accept, as Mr Jafar asserted, that it must also be of some significance that the appellant was not legally represented at the point in time when she left Saudi Arabia i.e. at the point in time when the decision was made to leave the 'previous' passport in that country.

Moving on to ground 4, which relates to the following passage in paragraph 28(i) of the First-tier Tribunal's decision:

> "The appellant after claiming that three Eritrean officials attended her home, during oral evidence, then claimed initially this was four officials and then that it was twenty officials. … After claiming she was smuggled out of the country by car by a people smuggler, the appellant then claimed that she left Eritrea by plane and she was not stopped and there were not problems leaving Eritrea."

This challenge can be broken down into two limbs. First, it is said that the appellant did not change her evidence *"from three officials coming to the house, then four officials coming to the house and to then twenty officials coming to the house"* and that, consequently, the Tribunal took account of an immaterial matter when assessing the credibility of the appellant. This ground, once again, should have been supported by witness evidence appending Counsel's contemporaneous note of the proceedings. It was not. However, that does not mean that it should be rejected.

An analysis of the Tribunal's typed Record of Proceedings supports Mr Jafar's contention. The passage relating to *"twenty officials"* is identified in the Record of Proceedings as being part of an exchange between the appellant's representative and the judge (marked "Rep" and "K" respectively), and not part of the evidence of the appellant.

The second limb of the challenge follows a similar pattern, in that it is asserted that the appellant did not give evidence to the effect that she had left Eritrea by plane. Having analysed the Record of Proceedings, which have clearly been drawn with some care, there is no record therein of the appellant stating that she left Eritrea by air. The only record of evidence relevant to this issue reads:

"He try smuggle you out as he knows people at the airport, he said to me this was too difficult to get out so he smuggled you by car. overland outside the country". Once again, therefore, I concur with Mr Jafar and conclude that First-tier Tribunal erred in relying on an immaterial matter when assessing the credibility of the appellant.

The final ground, ground 5, takes aim at the reasoning in paragraph 28(l) of the First-tier Tribunal's decision, which reads:

> "Asked who the known political activists of the appellant's family are considering this is well-known to the Eritrean authorities, whereas the appellant could only name her father and one uncle, Mr Faid [who also gave evidence on behalf of the appellant] despite his generic assertions in his letter and witness statement was only able to name two persons and was unaware that both were dead. … Asked the relationship of these well-known political ELF activities Mr Faid then claimed both were brothers of the appellant whereas she claimed one was an uncle and one was her own father and he was of the view one brother was dead whereas she claimed both her father and uncle were dead. … Then during re-examination he claimed that the father of the appellant was the founder of ELF, a fact I find surprising he had forgotten when he claimed that only her two brothers were political activists, and is a claim not made by the appellant whatsoever, and clearly not know as not referred to by any of her adult children in their witness statements."

The Tribunal's Record of Proceedings sets out a sequence of exchanges between the appellant and her Counsel (in examination in chief) and the Secretary of State's Counsel and the appellant (in cross examination) on the issue of which of the appellant's relatives had involvement with the ELF. Contrary to the findings made in paragraph 28(l) of the First-tier Tribunal's decision, the record of such exchanges identifies that the appellant not only referred to her uncle and her father as being involved in the ELF but she clearly identified that her two brothers were involved as well. The appellant named these four relatives during the course of her evidence. In addition, the evidence given by Mr Faid, as recorded, is entirely consistent with that given by the appellant.

Whilst it is correct that it was only in re-examination that Mr Faid mentioned that the appellant's father was an ELF activist, I note that this was in direct response to a specific question asked by Mr Jafar. No questions were asked in relation to the father either in examination-in-chief or in cross-examination of Mr Faid.

Consequently, looking at the Record of Proceedings as a whole, I conclude that the First-tier Tribunal erred in the manner claimed in ground 5 of the grounds of challenge.

Setting aside the First-tier Tribunal's Decision

The issue then turns to one of materiality of the aforementioned errors. In this regard, Mr Whitwell refers to what can fairly be stated as the vast swathe of adverse findings made by the First-tier Tribunal, which have not been the

subject of challenge. He submits that the errors identified above have a very narrow focus and that it is possible to say that the First-tier Tribunal would have come to the same conclusion had those errors not been made.

In response, Mr Jafar in large part relied upon the application to amend his grounds to include what are said to be further errors in the determination. I have already refused permission to rely upon such challenges.

I have not found this to be an easy task. Mr Whitwell is absolutely correct to say that there are a vast swathe of findings relating to both plausibility and inconsistency of the evidence before the First-tier Tribunal which are untroubled by the errors identified above. Mr Whitwell also correctly reminds the Tribunal that it must look at the decision as a whole.

Whilst it is perfectly possible that the First-tier Tribunal would have come to the same conclusion had the above identified errors not been made, in my view it cannot be said that it inevitably would have done so. I draw some assistance in this regard from what is said in paragraph 31 of the First-tier Tribunal's decision where, in summarising the reasons for rejecting the appellant's claim, the Tribunal states:

> "Due to the adverse finding regarding her credibility and the contradictory claims of the appellant and Mr Faid regarding her political background and family links to ELF I do not accept that her name or her family background is as claimed."

To my mind, the Tribunal is therein identifying the particular importance it gave the findings identified in paragraph 28(l) of the decision, which I have found to be in error.

In all the circumstances, therefore, I have concluded that the appropriate course is to set the First-tier Tribunal's decision aside. I further conclude, given the assessment of the appellant's credibility is going to have to be undertaken afresh, that it is appropriate in this case for the appeal to be remitted to the First-tier Tribunal to be so determined.

Notice of Decision

The decision for the First-tier Tribunal contains an error of law. I set that decision aside and remit the matter to the First-tier Tribunal to be determined afresh by a judge other than Judge K James.

Signed

M O'Connor
Upper Tribunal Judge O'Connor
Date 01 September 2020