Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000420
(PA/52702/2021); IA/07417/2021

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 20th October 2022

Decision & Reasons Promulgated
On 26th March 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

TB
(Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Howard, Fountain Solicitors
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

An anonymity direction was made by the First-tier Tribunal ("FtT"). As this a protection claim, it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, TB is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

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Introduction

1. The appellant claims to be a national of Eritrea. She arrived in the United Kingdom on 14 February 2020 and claimed asylum. She claimed that she was born in Assab, Eritrea in January 1996 and lived in Eritrea with her parents until they were arrested for practicing their Pentecostal faith. In a screening interview the appellant claimed that she left Eritrea when she was three years old and went to live in Ethiopia until she was 20 in 2016. She subsequently claimed in a statement dated 17 March 2020 that she left Eritrea when she was six years and three months old.

2. The appellant's claim for international protection was refused by the respondent for reasons set out in a decision dated 27 May 2021. The respondent rejected the appellant's claim that she is a national of Eritrea and in light of that conclusion, rejected her claim that she would be made to perform national service in Eritrea. The respondent however did accept that the appellant follows the Pentecostal faith and that she had been raped in the past in Ethiopia as she claims.

3. The appellant's appeal was dismissed by First-tier Tribunal Judge French for reasons set out in a decision dated 25th November 2021. The appellant claims the decision of Judge French is vitiated by material errors of law. The appellant advances six grounds of appeal. First the judge failed to apply the correct standard of proof. Second, the judge failed to give any adequate reasons for finding on the balance of probabilities, the appellant is a national of Ethiopia. Third, the judge erroneously held against the appellant, her evidence that she had largely forgotten her birth language of Tigrinya in circumstances where the respondent had accepted the appellant was able to establish that she can speak Amharic and Tigrinya. Fourth, the judge failed to give adequate reasons for rejecting the appellant's account and finding that the appellant has made no attempt to trace her family. Fifth, the judge failed to make any findings as to whether there would be significant obstacles to the appellant's return. Finally, the judge failed to give

anxious scrutiny to the claim. The appellant refers to the reference on the face of the decision to the respondent being the “Entry Clearance Officer” rather than the Secretary of State for the Home Department and reference to the appellant’s advocate relying upon “her” grounds of appeal when the appellant’s representative is a male.

4. Permission to appeal was granted by Upper Tribunal Judge Rintoul on 19 April 2022. He said:

> “It is arguable that, as is averred in ground 3, the judge misdirected herself as to whether the appellant spoke Tigrinya or not; the references to Kunama confuse the issue, and it is unclear whether the appellant had ever said she learned it as a mother tongue. It will, however, be for the appellant to show that the error was material.
>
> Permission is granted also on grounds 1,2, 4 and 5 although there is significantly less merit in those.”

5. At the outset of the hearing before me, Mr Howard confirmed that the focus of his submissions would be upon the second and third grounds of appeal that relate to the finding that the appellant is a national of Ethiopia, which appears to be based upon the concerns expressed by the Judge regarding the language spoken by the appellant.

Error of Law

6. It is appropriate to deal with the second and third grounds of appeal together and address those first because they were the focus of the submissions before me. In Jamila Omar Hamza v Secretary of State for the Home Department [2002] UKIAT 05185, Mr Justice Collins highlighted that if a judge is going to make a positive finding against the appellant regarding the issue of nationality, then the judge must do so not on the asylum standard, but on a higher standard which would be the balance of probabilities. Mr Howard submits there is no indication in the decision of Judge French that the judge adopted the higher standard that is applicable to that issue.

7. The burden of proof was on the appellant to prove that she is a national of Eritrea as she claims. I accept, as does Mr Williams, that

Judge French does not make any reference to the decision of Mr Justice Collins in Jamila Omar Hamza v SSHD and does not expressly refer to the standard of proof applied when he found that the appellant is not Eritrean, but is a national of Ethiopia. The appellant is entitled to know, either expressly stated or inferentially, what it is to which the First-tier Tribunal was addressing its mind. In some cases the burden of proof applied will be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not.

8. Judge French refers to the evidence of the appellant at paragraphs [5] and [6] of his decision. Mr Howard accepts Judge French was correct to say at paragraph [9] that the key issue in the appeal is the appellant's credibility. He submits Judge French erroneously found that it is unlikely that the appellant could have forgotten her first language as a factor weighing against the appellant in the assessment of her credibility and her nationality. Mr Howard submits the judge had correctly noted, at [5], that Tigrinya is the language spoken in Eritrea and Amharic is an Ethiopian language. The language(s) spoken by the appellant was a key factor relevant to any conclusion regarding the appellant's nationality. Mr Howard submits the Judge started upon the flawed premise that the appellant had forgotten her first language, and that impacts upon all of the subsequent consideration by the judge of the appellant's account of events.

9. I accept, as Mr Howard submits, that the standard of proof applied by Judge French is difficult to discern from the decision. Accepting for the purposes of this appeal that Judge French erred in failing apply the higher standard (i.e. the balance of probabilities) when he made a positive finding that the appellant is an Ethiopian national, I have considered whether that error is material to the outcome of the appeal.

10. I reject the claim that Judge French fails to give reasons for finding the appellant is a national of Ethiopia. Judge French set out the relevant immigration history at paragraph [2] of his decision. The appellant had

requested a Tigrinya interpreter to assist her during the hearing before the First-tier Tribunal. Mr Howard accepts Judge French correctly noted at paragraph [5] of his decision that the appellant had stated she would prefer to speak in Amharic. He explained the issue arose because the appellant switched between speaking Tigrinya and Amharic and the appellant was asked to confirm which language she would prefer to speak in, to avoid any confusion. The appellant said she would prefer to speak in an Amharic and so the appellant continued to give her evidence in Amharic throughout.

11. In paragraph [9] of his decision, Judge French analysed the appellant's account of events. He found there were numerous instances of inconsistency, contradiction and implausibility in the appellant's evidence. He said "*.. Firstly there was the fact the appellant told the Tribunal that she had largely forgotten her birth language of Tigrinya because she had lived away from Eritrea since she was six..".* That was undoubtedly an accurate record of the appellant's evidence and how the hearing unfolded. Judge French went on to note the appellant had been living with her aunt and step-uncle until she was 16 and that their main language was Tigrinya. He went on to say that "*It seemed unlikely to the Tribunal that she could have forgotten her first language..".* Judge French went on to refer to a number of other internal inconsistencies in the appellant's account of events. The appellant does not challenge the other adverse findings made by Judge French in paragraph [9] of the decision. Judge French concluded:

> "9. … I conclude from all the above that the appellant is not a credible witness. As far as the arguments put forward by the appellant's advocate are concerned, I would first of all say that I do not accept that the appellant is Eritrean but rather is Ethiopian. Accordingly she would be returned to Ethiopia, rather than Eritrea. She would not therefore be at risk of being required to engage in national service… Equally there was no prohibition on her practising her religion in Ethiopia…"

12. Mr Williams accepts that in her decision the respondent confirmed the appellant was able to establish that she can speak Amharic and Tigrinya. He referred me to the record of the screening interview which

confirms the appellant was interviewed with the assistance of an Amharic interpreter. He also referred to the record of the interview conducted on 8th March 2021. That too confirms the appellant was interviewed with the assistance of an Amharic interpreter. During that interview, the appellant was asked in Tigrinya (Q.95 to 99), some very basic questions *(what day it is, how she was feeling, what day it is tomorrow and a little about herself)*. Mr Williams submits the appellant was able to provide the most basic information but nothing that is sufficient to assist appellant to establish that she is Eritrean.

13. It was in my judgement open to Judge French to have regard to the appellant's evidence that she had largely forgotten her birth language of Tigrinya because she had lived away from Eritrea, in reaching his decision. In any event, in the end, the language spoken by the appellant was only one factor that Judge French had regard to when considering the appellant's account of events and reaching a decision as to the appellant's nationality. In reaching his decision, Judge French had regard to the various ingredients of her account of events, and the story as a whole, by reference to the evidence available to the Tribunal. It is clear the appellant had failed to discharge the burden upon her to prove that she is a national of Eritrea as she claims and if Judge French had simply said that he did not accept the appellant is Eritrean, the appellant would have no cause for complaint. I accept the submission made by Mr Williams that having made adverse findings relating to the claims made by the appellant, the only proper conclusion Judge French could have reached is that it is more likely than not that the appellant is Ethiopian.

14. The remaining grounds of appeal amount to mere disagreements with the reasoning of Judge French. It is unsurprising that Judge French did not make any findings as to whether there would be very significant obstacles to the appellant's return to Ethiopia. The appellant did not advance a claim that there were any obstacles to her return to Ethiopia. In reaching his decision, Judge French had clearly had regard to the

evidence that for reasons that remained unexplained, the appellant had left her husband and child behind in Ethiopia. The obligation on a Judge in a specialist jurisdiction is to set out the reasons that have led to the decision. Such reasons need not be elaborate, and do not need to address every argument or every factor which weighed in the decision. It is sufficient that the critical reasons to the decision, are recorded. I am satisfied Judge French considered the evidence before the Tribunal in the round, and reached conclusions that were open to the Judge. Nothing in the appeal turns upon the reference on the face of the decision to the respondent being the "Entry Clearance Officer" rather than the Secretary of State for the Home Department and the reference to the appellant's advocate relying upon "her" grounds of appeal when the appellant's representative is a male.

15. Although the decision could have been better expressed, an appellate court should resist the temptation to subvert the principle that they should not substitute their own analysis of the evidence for that of the Judge by a narrow textual analysis which enables it to claim that the Judge below misdirected themselves. It is not a counsel of perfection. An appeal to the Upper Tribunal is not an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits.

16. I am satisfied Judge French carried out a fact-sensitive analysis of the risk upon return. In my judgement, the findings made by Judge French were findings that were properly open to him on the evidence before the Tribunal and it was open to him to conclude that the appellant is not a credible witness for the reasons he gave.

17. It follows that I dismiss the appeal.

NOTICE OF DECISION

18. The appeal is dismissed and the decision of First-tier Tribunal Judge French stands.

Signed **V. Mandalia** Date; 1st March 2023

Upper Tribunal Judge Mandalia