Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03962/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 11 April 2022	**On the 19 April 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

DH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Burrett, Counsel, instructed by JD Spicer Zeb
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge V. A. Cox ("the judge") promulgated on 5 May 2021, dismissing an appeal by the appellant, a claimed citizen of Eritrea, against a decision of the respondent dated 1 June 2020 to refuse his asylum and humanitarian protection claim.

2. It was common ground at the hearing that the judge had erred by failing to address the evidence of KA. I allowed the appeal at the hearing. This decision records my reasons for doing so.

Factual background

3. The appellant was born in 1993. He arrived in the UK clandestinely in July 2019 and claimed asylum the next day. The basis of his asylum claim was that he was a citizen of Eritrea, and would be at risk of being persecuted on account of his Christian faith. While the respondent accepted the appellant's claim to be a Pentecostal Christian, she rejected his claim to be Eritrean and rejected his

account of illegal exit from Eritrea, concluding that he was Ethiopian. The Secretary of State also rejected an additional feature in the appellant's narrative, namely that he had been persecuted by the authorities in Sudan, where he claimed to have lived for 16 years from 2003.

4. The judge outlined the evidence and submissions at the hearing in some depth. This included the appellant's cross-examination, and, significantly for present purposes, the evidence of KA. KA has been accepted by the respondent to be a citizen of Eritrea, and has been granted refugee status on that basis. KA's evidence was that he had known the appellant in Eritrea, having met him there in 2000 when they were children. Their parents were friends. At [34] to [37], the judge outlined KA's evidence.

5. The judge's operative reasoning commenced at [44]. The judge set out a number of credibility concerns arising from the appellant's claim and his evidence before the tribunal. The judge did not accept the appellant's claimed account of his unlawful exit from Eritrea, nor the reason that he did not speak Tigrinya, and could only speak Amharic. The judge also had concerns that the appellant's inability to speak Arabic, and lack of knowledge concerning Sudan, harmed the credibility of his claim to have lived in Sudan. At [57] the judge made findings that the appellant's inability to speak Amharic weighed against him and said, "I find it is, again to the relevant low standard, likely… that he is Ethiopian."

6. The judge did not make any findings in relation to KA's evidence.

7. The judge accepted the appellant's claim to be a Christian: see [59]. The Secretary of State had accepted that part of the asylum claim in the refusal letter in any event: see [48] of the decision.

Grounds of appeal

8. The sole ground of appeal was that the judge failed to make any findings concerning the evidence of KA. Permission to appeal was granted by First-tier Tribunal Judge Easterman on that basis.

9. There was no rule 24 response.

Submissions

10. Mr Burrett focussed his submissions on the judge's failure to make findings concerning the evidence of KA which, he submitted, was potentially highly probative of the appellant's nationality, and the core basis of his claim. Ms Everett said that she did not seek to defend the decision and conceded that the judge erred on account of the failure expressly to consider that evidence.

Discussion

11. In light of Ms Everett's concession, my analysis can be brief.

12. It is important to recall that the jurisdiction of the Upper Tribunal is in relation to errors of law, not disagreements of fact. Certain findings of fact may amount to errors of law, on bases that are now well established. A failure to consider relevant evidence may be an error of law, but there is no obligation on a judge to rehearse all the evidence, or discuss all relevant points. For a recent summary of the relevant principles see *Volpi and Delta Limited v Volpi* [2022] EWCA Civ 464

at [2] and [3]. See also *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9], in which Brooke LJ summarised the frequently encountered bases upon which findings of fact may amount to an error of law in this field. Such an error of law may entail:

> "ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters…"

13. In the present matter, the judge's operative analysis omitted any reference to the evidence of KA. The judge was clearly aware of KA's evidence, having summarised it in relatively extensive terms. It cannot be said that the judge had overlooked it in its entirety. However, the omission of any reference to it in the judge's operative analysis raises two significant concerns.

14. First, it is not clear whether KA's evidence featured at all in the judge's operative reasoning. While it is not necessary for a judge to address each and every facet of the evidence, it is necessary to resolve key conflicts of fact or opinion on material matters. KA's evidence was potentially dispositive of the appellant's case, as it placed the appellant in Eritrea as a young boy, with Eritrean parents, known to an accepted Eritrean, KA, as being a fellow Eritrean citizen. KA's evidence was of such potential significance that it merited express consideration.

15. Secondly, by not addressing KA's evidence, the reader is left wondering why the appeal was dismissed. That is not to say the judge was bound to accept the evidence of KA. It simply means that, if the judge was not persuaded by KA's evidence (for whatever reason), it was necessary to say so, and to give reasons. Such reasons could be brief: but there need to be reasons. By not doing so, the judge failed to give adequate reasons for dismissing the appeal.

16. The appeal is allowed on the basis that the judge failed to give sufficient reasons for dismissing the appellant's appeal.

17. At the hearing, Mr Burrett (who had been instructed at a late stage) sought to advance additional criticisms of the judge's decision, going beyond the grounds of appeal. For example, he submitted that the judge erred at [57] by finding, to the lower standard, that the appellant was Ethiopian. Nationality findings should be made to the balance of probabilities standard, he submitted. There is considerable force to that submission. Had the appeal not succeeded at the hearing on the basis set out above, I would have heard argument on whether the appellant should be permitted to rely on additional grounds of appeal. However, it was not necessary to do so, as in my judgment the judge's failure to engage with the evidence of KA when conducting the overall credibility analysis contaminated the overall credibility analysis such that the entirety of the decision must be set aside, with no findings of fact preserved. It is therefore not necessary for me to engage with this submission further.

18. I set aside the decision of Judge Cox. In light of the scope of findings of fact required upon the decision being remade, it will be appropriate to remit the matter to the First-tier Tribunal to be heard by a different judge.

19. While the judge's findings at [59] that the appellant is a "practising Christian" are favourable to the appellant, it is not necessary to preserve those findings. The Secretary of State's decision accepted the appellant's claim to be a Pentecostal Christian, and so the question of whether he is a Christian should not be in issue at the remitted hearing before the First-tier Tribunal.

Anonymity

20. It is appropriate to maintain the anonymity order that is already in force, in light of the nature of the appellant's claim, which is yet to be resolved on appeal.

Notice of Decision

The appeal is allowed.

The decision of Judge Cox involved the making of an error of law. The decision is set aside with no findings of fact preserved.

The appeal is remitted to the First-tier Tribunal to be heard by a judge other than Judge Cox.

Direction Regarding Anonymity – 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 their 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 Stephen H Smith Date 13 April 2022

Upper Tribunal Judge Stephen Smith