Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08913/2013

THE IMMIGRATION ACTS

Heard at Field House
On 13th February 2014

Determination Sent:

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Before

UPPER TRIBUNAL JUDGE REEDS

Between

Y H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bandegani, Counsel instructed on behalf of Kesar & Co Solicitors
For the Respondent: Mr Nigel Bramble, Senior Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Reference to the claimant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to

comply with this direction may lead to a contempt of Court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it.

2. The Appellant is a female unaccompanied asylum seeking child with an accepted date of birth as 19th February 1996. She appeals with permission against the decision of the First-tier Tribunal (Judge Taylor) who in a determination promulgated on 22nd October 2013 dismissed her claim on asylum and human rights grounds.

1. The central issue in the appeal before the First-tier Tribunal related to the Appellant's claimed nationality in which she stated she was a citizen of Eritrea. The history given by her was that her parents were both Eritrean and that whilst pregnant, the Appellant's mother fled Eritrea with her sister to Ethiopia where the Appellant was born. Her mother died during childbirth and thus the Appellant was cared for by her aunt. At the age of approximately 3 or 4 it was said that her aunt was deported by the Ethiopian authorities to Eritrea, at a time during the Eritrea/Ethiopian war. The Appellant was left behind with an Ethiopian woman whom the Appellant referred to as her "godmother", who cared for her. In Ethiopia she was brought up as a Pentecostal Christian, attended church and also attended school from the age of 7. At the age of 12 her godmother became ill and she left Ethiopia by way of Sudan by the use of an agent to live with her aunt who by that time had relocated from Eritrea to Khartoum in Sudan. She remained in Khartoum for three years with her aunt till she left on 4th July 2012, whereby the agent took her to an airport where she took a flight to France and was taken to a lorry park. She was hidden the back of a lorry and taken to the United Kingdom and was one of eight people arrested by the police in the back of a lorry at Whitfield, Kent on 7th July 2012.

2. In view of her age she was referred to Kent Social Services as an unaccompanied minor and thereafter attended the Asylum Screening Unit in July 2012 and her claim was registered on 2nd November 2012. Subsequently her asylum application was refused on 7th December 2012 but she was granted discretionary leave to remain until 19th August 2013. On 15th August 2013 she applied for further leave to remain in the United Kingdom.

3. The Respondent in a detailed reasons for refusal letter dealt with a number of issues but principally with the issue of nationality on the basis that the Respondent believed her to be a citizen of Ethiopia rather than Eritrea which was her claimed nationality. For the reasons set in the refusal letter, and by reference to the objective material, her application for asylum was refused.

4. The Appellant appealed that decision and it came before the First-tier Tribunal (Judge Taylor) on 22nd October 2013. In a determination promulgated thereafter, the judge reached the conclusion that the Appellant was not a citizen of Eritrea but had citizenship of Ethiopia and rejected her evidence as not being credible as to the issue of her nationality. The judge therefore considered risk on return to Ethiopia finding

that there was no basis to conclude that she would be subject to any harsh treatment if returned there. Thus her appeal was dismissed.

5. The Appellant sought permission to appeal that decision and on 10th December 2013 Judge Cruthers granted permission. It is plain from the grant of permission that Judge Cruthers granted the application primarily because as he stated "It seems to me arguable as per paragraph 9 of the grounds the judge did not make an assessment of the Appellant's best interests before concluding that her removal will be proportionate in Article 8 terms (his paragraph 22)." It is right to record that following the grant of permission and the Rule 24 response on behalf of the Secretary of State, a letter was sent by those instructed on behalf of the Appellant seeking to demonstrate that the grant of permission did not restrict the grounds and that in the light of the decision of the **Secretary of State for the Home Department v Rodriguez [2014] EWCA Civ 2**, that the grant of permission was an unrestricted one whereby all grounds should be arguable.

6. Before the Upper Tribunal Mr Bandegani, Counsel on behalf of the Appellant developed the grounds for permission and did so helpfully in a skeleton argument that he had produced for the hearing. Dealing with Ground 3 at the outset of his submissions, he directed the Tribunal to the decision of Blake J in **ST (Child asylum seekers) Sri Lanka [2003] UKUT 292** and in particular paragraphs 16 and 21 – 24 of that decision. He submitted that the Tribunal had not directed itself properly or at all either to Section 55 of the 2009 Act specifically or the best interests principle generally. He submitted that the decision of **ST** was of relevance because firstly the Appellant was accepted to be a child, secondly this was a Section 82 appeal against the removal decision and an assessment of whether she would face harm was required. He further submitted that because of the potential consequences of removal, an assessment was required of risk, which could only be undertaken with regard to the fact that the Appellant was a child at all times prior to her claim for protection. Thus he submitted that the First-tier Tribunal had failed to do that and had also failed in its approach to the evidence by taking into account child relevant considerations. He built upon those grounds in his oral submissions. At the outset of the hearing Mr Bramble conceded that there was an error of law disclosed in the determination of the First-tier Tribunal by reference to the decision of **ST** (as cited). Mr Bramble had been the Presenting Officer in the appeal of **ST**. He agreed with and endorsed the submissions made by Mr Bandegani that the First-tier Tribunal had failed to apply the principles in that decision and in particular, failed to take into account the statutory duty under Section 55 and take into account the best interests of the Appellant, who was a minor at the time of the hearing. He further submitted that the judge had failed to deal with the impact upon return to Ethiopia, in terms of family network (if any relative was available) or as a minor or young female being returned to Ethiopia. None of that had been assessed.

7. As to the other ground raised by Mr Bandegani and developed in his oral argument, Mr Bramble also conceded that that disclosed an error of law also he conceded that the findings at paragraph 14 onwards, when making an assessment of credibility, at no point did the judge take into account or consider the age of the Appellant who at

the time he had given the information originally upon arrival was a minor and indeed was a minor at the date of the hearing and thus the findings of credibility are affected by that approach also.

8. In the light of the concession made on behalf of the Secretary of State, there is no basis on which I could possible do otherwise and accept that concession and find that the judge made an error of law as set out in the proceeding paragraphs. It is therefore only necessary to state in brief terms why the Tribunal finds that to be the case. In arriving at its determination, as Mr Bandegani submits, the First-tier Tribunal did not give any consideration to the statutory obligation on the Secretary of State and the Section 55 of the 2009 Act to ensure her functions in relation to the Appellant's asylum application were discharged "having regard to the need to safeguard and promote the welfare" of a Appellant whilst in the UK. It was conceded on behalf of the Secretary of State in **ZH (Tanzania)** that the Section 55 duty extended to the consideration of an asylum application by a child such as the Appellant (as per Lady Hale at paragraph 24 of **ZH (Tanzania)**). That would require any consideration in the terms as set out in decision of **ST** (as cited) and would require the assessment by way of the country materials as to the situation upon a return. The second issue relates to the credibility findings that were made generally and the lack of self direction as to how those matters were affected by the age of the Appellant. As noted by both representatives, at paragraph 15 of the decision, the Appellant's claim has always been that her grandmother was dead. The judge found that she had "submitted no evidence of the medical condition of her godmother", further that there were no documents from her aunt or any photographs (paragraph 16). and thirdly the judge referred to the Appellant being unable to explain why her aunt was deported but that she was allowed to stay. When the decision maker is faced with the unsupported testimony of a child, particular regard should be given to the country information. Article 4(3) c) of the QD provides that an assessment of an application for international protection is to be carried out on an individual basis and includes taking into account the individual position and circumstances of the applicant, including factors such as background, gender, age. The country materials that were before the judge at page 24 give support for the Appellant's factual claim that the Ethiopian police exercised "complete random discretion" as to decide which family member stayed and which family members were deported. There is no reference in the determination to any of the country material.

9. Having accepted the concession made on behalf of the Respondent that the determination discloses an error of law the decision should therefore be set aside. As to the remaking of the decision both advocates have invited the Tribunal to determine the appeal with a fresh oral hearing by way of remittal to the First-tier Tribunal. Both parties before the Tribunal indicated that in their view, by reason of the nature of the error, none of the findings could be preserved and that a fresh oral hearing would be required.

10. I am satisfied that the appropriate course to follow is the one that both parties invited the court to adopt, namely to remit the appeal to the First-tier Tribunal. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there

are reasons why in this case such a course should be adopted, having given particular regard to the overriding objective of the efficient disposal of appeals and also that there are issue of facts that require determination which will be required to be assessed.

11. Therefore the decision of the First-tier Tribunal is set aside, none of the findings shall stand and the case is to be remitted to the First-tier Tribunal at Taylor House for a hearing on a date to be fixed in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

Signed Date: 14/2/2014

Upper Tribunal Judge Reeds