



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/08363/2015

THE IMMIGRATION ACTS

Heard at Field House

On 29 January 2016

**Decision &
Promulgated
On 09 March 2016**

Reasons

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

**MR YAG
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Hulse, Counsel instructed by Supreme Solicitors
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Maka dated 3 November 2015 in which the judge dismissed the Appellant's appeal against the Respondent's decision of 20 May 2015 to refuse his claim for asylum. The Appellant's nationality is disputed by the Respondent. The Appellant's claim is that he was born in Eritrea; that he and his parents left

there for Ethiopia when he was three; that he was deported from Ethiopia to Eritrea in 1999; that he was conscripted into the Eritrean army; that he deserted and made his way to Sudan where he then lived for 12 years; then spending further time in south Sudan, before making his way to Europe and ultimately to the UK. He claimed to fear serious harm from the Eritrean authorities as a result of his desertion and illegal exit from Eritrea.

2. The Respondent rejected the credibility of that claim for reasons set out in her letter of 20 May 2015, and held that the Appellant was an Ethiopian national with no fear of harm in that country. In the alternative, the Respondent asserted that changes in country conditions since the last Country Guidance case of MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190 resulted in there being no real risk of harm to the Appellant if returned to Eritrea in any event. The Respondent relied in particular on the Home Office CIG of March 2015, which relied significantly on a Danish Immigration Service Fact Finding Mission Report of 2014 ('the Danish FFM Report').
3. The Appellant appealed against that decision in a notice of appeal which was received by the Tribunal. The present appeal before the Upper Tribunal relates to the sequence of events which then transpired, as the Appellant did not attend the hearing of his appeal on 27 October 2015 at the Harmondsworth hearing centre. In short it is the Appellant's case that neither he nor his representatives received notice of a hearing on that date and it is for that reason that it is necessary to go into some detail as to what correspondence was or was not issued by the Tribunal in relation to the giving of notice of the hearing.
4. I will first describe how this matter was dealt with by the judge who dismissed the appeal in the absence of the Appellant. At paragraph 5 the judge provides as follows:
 - "5. The appeal came before me for hearing on 27 October 2015. There was no-one in attendance for the Appellant and the Appellant himself did not attend. Mr Sartorius, Home Office Presenting Officer, represented the Respondent.
 6. I considered whether or not I should determine the appeal in the Appellant's absence. I noted the file history. On 29 May 2015, notification was sent to the Appellant and his representatives that the hearing was listed for 25 November 2015 with a pre-hearing review on 11 November 2015. The Appellant returned his pre-hearing review form on 5 June 2015. On 26 August 2015 a notice of hearing was sent out to the Appellant and his representatives that the pre-hearing review would now be on 13 October 2015 and the full hearing on 27 October 2015 at Harmondsworth. There is a handwritten note on file that although the file copy of the notice of hearing is addressed to

another Appellant the notice was 'sent out to the correct Appellant on 26 August 2015'.

7. A pre-hearing review of the case was done by Judge Nightingale on 14 October 2015. [*It is to be noted that this was a paper CMR*]. In her directions it was stated 'the parties are reminded that the substantive hearing is listed on 27 October 2015 at Harmondsworth hearing centre.' Again, the notice accompanying the directions, which had the new hearing date of 27 October 2015 was sent out to the Appellant and his representatives, Supreme Solicitors, on 14 October 2015.
 8. I asked my clerk to make an enquiry with the Appellant's representatives why no-one was in attendance before me. His initial call at 10.55am was responded to with a message that the solicitor dealing with the case was not in and would call back later on. At 12.00pm I received a message via my clerk the solicitor had called and had stated neither he nor his client had not received [sic] notice of hearing for today. I then received a fax at 12.44pm asking for the case to be adjourned as this was an administrative error by the Tribunal.
 9. I considered all the evidence including the Procedure Rules as well as my own discretion. I am satisfied a correct notice of hearing was served on 26 August 2015 as noted on file by my clerk and a further notice was sent on 14 October 2015 following Judge Nightingale's directions. I did not accept the explanation given to me that neither the Appellant nor his solicitors had received no less than four separate notices, which had informed them of today's hearing.
 10. I had noted the Appellant in his reply form in June 2015 said he was intending to send a medical report. It was now 27 October 2015 and there was still no medical report before me.
 11. I considered all the evidence as well as Rule 28 and Rule 2 of the Procedure Rules. I am satisfied the Appellant and his solicitors have had sufficient notice of the hearing before me. I find the Appellant has chosen not to attend. I do not accept the explanation given that there had been an error on the part of the Tribunal. This was without any merit. I determined that reasonable steps had been taken to notify the Appellant and his representatives of the hearing and it was in the interests of justice for me to proceed."
5. I have seen on the Tribunal file the fax referred to by the judge at [8], sent to the First tier Tribunal on the day of hearing. Although not set out in full in the judge's decision, I find it of assistance to do so. It provides:

"We write further to our telephone conversation with the court clerk today. The court clerk informed us today that the hearing of the above Appellant's asylum appeal was listed to be heard today, Tuesday 27 October 2015. However, we have not been notified of the change of the hearing date and the venue of the hearing centre. Our client has also confirmed to us that he was not aware of the change of the hearing date and the venue of the hearing centre. In a notice dated 29 May 2015 the CMR hearing was listed for Wednesday, 11 November 2015 and the full hearing was listed to be heard on Wednesday, 25 November 2015 at IAC Hatton Cross. This is an administrative error on the part of the Tribunal Service and we request the Tribunal to list the case as previously listed in a notice dated 29 May 2015."

6. The judge proceeded to consider the Appellant's appeal. As part of his decision to proceed in the Appellant's absence, the Judge also observed at [13] as follows:

"Weighing all of this, I determined there was very little that could have been said to me even if the Appellant was present and if I were wrong on proceeding in his absence, which would have cast doubt on what was a document of record (asylum interview) anyway and on the outcome."

The Judge held that the Appellant's account was not reliable, that he was a dual Ethiopian and Eritrean national, and that he would not face a real risk of serious harm in either country, and dismissed the appeal.

7. The Appellant applied for permission to appeal against that decision, asserting, in summary, that:
 - (i) neither the Appellant nor the solicitor had had notice of the amended date and venue of the hearing; the decision to proceed was procedurally unfair, and failed to take into account, as per *Karagoz v Immigration Appeal Tribunal* [2003] EWHC 1228 (Admin) (19 May 2003) at para 21, that the Appellant's past compliance with the Respondent's procedures and the Tribunal's directions and time limits should be, but were not, taken into account by the Judge when deciding to proceed in his absence; further, inadequate reasons had been given by the Judge for failing to accept the assertion by the Appellant's solicitor, given on the day of hearing, that neither had received the amended notice; see *Karagoz* para 30:

"But it is a strong step, particularly in the light of its consequences, not to accept the assertion of any professional person that a Notice sent by post, but otherwise than by Recorded Delivery, has not been received. And if the Notice posted to the solicitors was not received, that may

fortify an assertion by the appellant that a Notice apparently posted to himself in the same batch was also not received.”

- (ii) the judge erred in law in purporting to find that the Appellant’s attendance was immaterial to the outcome of the appeal; credibility was disputed, and evidence accompanying the grounds of appeal sought to establish that the Appellant had, prior to the hearing, been in the process of making enquiries with the Ethiopian authorities as to his alleged entitlement to Ethiopian nationality, and that he was in the process of obtaining medical evidence regarding scarring he had sustained during military service;
 - (iii) the judge erred in law in purporting to disapply MO Eritrea CG [2011] UKUT 190, and the Appellant made reference to country information which disputed the reliability of assertions made in the Danish FFM report; such evidence would have been provided to him if the Appellant had had notice of the appeal.
8. Permission to appeal was granted on those grounds by First-tier Tribunal Judge Foudy on 2 December 2015. A Rule 24 response from the Respondent dated 18 December 2015 provides that “the Respondent opposes the Appellant’s appeal. In summary the Respondent will submit inter alia that the Judge of the First-tier directed himself appropriately.” However, the reply provides at paragraph 3 that “the ground raised is a procedural [one] between the A and the IAC – the SSHD offers no comment either way”.
 9. In preparation for this hearing today I have considered the documentation attached to the correspondence pin in the Tribunal file. I have copied the various notices of hearing for the benefit of both parties today and have heard submissions from both parties. The following becomes apparent.
 10. There was indeed a notice of hearing dated 29 May 2015 on form IA28 sent to the Appellant at his home address of 82 Compton House, and to Supreme Solicitors, giving notice of the original hearing dates of 11 November for the CMR and 25 November for the full hearing. There was a blank reply notice on form IA29 which the Appellant was invited to complete and return to the Tribunal. In the file there is then a copy of the completed reply notice in which the Appellant provided the relevant information for the Tribunal to case-manage the appeal. That reply notice was directed to be provided to the Tribunal by 9 November 2015. In fact it was completed on 3 June 2015 and received by the Tribunal as early as 5 June. This is promptness in the extreme in my view.
 11. There are then a series of documents all dated 26 August 2015, which are addressed to a completely different Appellant, Ms M N C, and to a different set of solicitors (not the solicitors for the present appellant). These are:

- (i) a form IA28 giving notice of hearing dates; CMR on 13 October 2015 (to be conducted on the papers) and a full hearing on 27 October 2015 at Harmondsworth;
- (ii) a form IA31 giving directions that the appeal was to be listed on the date shown on the accompanying notice of hearing;
- (iii) a form IA41 giving notice of adjourned hearing which notes “the hearing of this appeal previously fixed for 11 November 2015 has been adjourned”, and a separate IA41 giving notice that “the hearing of this appeal previously fixed for 25 November 2015 has been adjourned”; both said that a new notice of hearing would follow in due course;
- (iv) a form IA32 giving standard directions as to the provision of witness statements and bundles.

All of those documents are addressed to Ms M N C and to her solicitors and show a different appeal reference number to that of the present Appellant.

12. On the face of the IA32 addressed to Ms M N C there is a handwritten amendment which says “Notice sent out to correct Appellant on 26 August 2015”. Significantly, there is no copy in the Tribunal file of any such amended notice of hearing or any amended notice of directions, addressed to *the present Appellant* dated 26 August 2015.
13. With respect to the judge, I do not understand how in the face of such documentation he can have been so satisfied to have confidently held at paragraph 9 that the Appellant had received an amended notice of hearing issued to him on 26 August 2015. With respect, I find these notices in a different appellant’s name with a handwritten amendment in the form that I have recorded above to be unsatisfactory evidence to demonstrate that the present Appellant was given notice on 26 August 2015 of the amended hearing date.
14. The judge noted that there was a CMR or pre-hearing review which took place on the papers on 14 October 2015 by Judge Nightingale. There are a series of documents which relate to that event. There are three notices, each on form IA55, dated 14 October 2015, all of which state merely: “Notice. Please see attached directions”. One is marked as a file copy. It bears the addresses of the Appellant, his Solicitors, and the Respondent. The address of the Appellant is crossed out and ‘On file’ is written by hand next to it. The address of the Respondent is crossed out and ‘Email’ is written by hand next to it. Another IA55 is addressed to the Appellant alone, and a third is addressed to the Appellant, his solicitor, and the Respondent, this time with no crossings out.
15. There are two further documents bearing the date 14 October 2015. One is a document entitled “Directions” with the Appellant’s name and appeal reference number on it. I assume that these were the directions referred to in the IA55 notices. The directions document does not bear the address of the Appellant or Respondent. It is a two page document in standard

form giving standard directions to both the Appellant and Respondent, to be complied with no later than 5 working days prior to the substantive hearing of the appeal. There is no date specified on that document as to the date of any hearing, or making reference to any amendment to the date of hearing.

16. There is then a separate single sheet entitled "Asylum Pre-hearing Review Form" which refers to the Appellant by name and appeal reference number. It does not bear the address of the Appellant or Respondent. It seems to me to have the appearance of an internal Tribunal document. The proforma questions on it ask whether the Appellant has any dependants; if so, how many; whether the notice of decision was on file; whether the notice of appeal was on file; whether the issue of timeliness was dealt with; whether the reply notice has been received; whether an oral hearing was required; how many witnesses were to be called; whether further documentary evidence was to be filed; whether medical or expert evidence was to be called; whether an interpreter was needed and in what dialect; the points allocated to the case and whether it was suitable for the float list. There is then a separate text box asking whether an adjournment request was made and if so whether the adjournment was granted and the reasons and the code for such adjournment, and a note as to whether the case should be kept anonymous.
17. Although, as I note above, the appearance of this document is that it seems intended for internal Tribunal use, it is to be noted that at the bottom of the document, the following is written:

"Parties are reminded that the substantive hearing is listed on 27th October 2015.

There are then three Tribunal addresses given, the address of the Harmondsworth hearing centre is selected. The very bottom of the gives the name of First tier Tribunal Judge Nightingale and the date of 14 October 21014.

18. This then appears to be the only document dated 14 October 2015 in which the details of the amended date and venue of the hearing are set out. I note that it is not on a form IA28 giving notice of a date of hearing.
19. It is to be recalled that the Appellant avers that neither he nor his Solicitors received any notice giving notice of changed date or venue of hearing. However, it is appropriate for me to acknowledge that today, Ms Isherwood for the Respondent discovers on her file a copy of the "Asylum Pre-hearing Review Form" document that I have described above. It appears therefore that the Tribunal had served a copy of that document, at least on the Respondent, on which the details of the date of hearing are given.

20. I then consider the likelihood of whether the “Asylum Pre-hearing Review Form” document had additionally been sent to the Appellant and/or his representative.
 - (i) I note that the Tribunal’s ‘file copy’ of the IA55 dated 14 October 2014 has the home address of the Appellant crossed out and the words ‘on file’ written next to them. This gives rise to a reasonable suspicion that no copy of any of the documents dated 14 October 2014 were sent to the Appellant personally.
 - (ii) Further, there also seems to be evidence that the manner of service of the 14 October 2015 documentation was different in respect to the Appellant’s solicitors, and the Respondent – being stated to be by email for the latter, but not the former.
 - (iii) I also note that the IA55 document makes reference to directions being attached, but that the 2 pages directions document itself makes no reference to any change of hearing date or venue.
 - (iv) I also take into account that the “Asylum Pre-hearing Review Form” has the appearance of an internal document and it is not obvious to me that it is a form of document that would generally be intended to be served on the parties to an appeal.
21. I form the view that there is very poor evidence of an amended notice of hearing having been sent to the Appellant and his solicitors on 26 August 2015, and there is additionally a lack of clarity regarding the documentation of 14 October 2015 as to what was sent out, and how, and to whom. Ultimately, I form the view that there is considerable doubt that the Appellant and his solicitor had in fact received the four separate notices that the Judge assumed at [9] had been sent to them.
22. I therefore turn to the actions of the Judge, and whether his decision to proceed involved any procedural unfairness amounting to error of law.
23. I find that had the Judge considered the documentation of 26 August and 14 October 2015 properly, this ought to have given rise to a suspicion that the Appellant had not been given notice of amended hearing. Consequently, I find that there was no adequate reason given by the Judge for failing to take the assertions of the Appellant’s representatives in their letter of 27 October 2015 (that they had not had amended notice of the hearing), at face value. Such assertions were being given by professional persons, and there was no adequate reason given by the Judge for taking the ‘strong step’ (Karagoz) to disbelieve such assertions.
24. Further, the Judge failed to take into account the Appellant’s earlier swift compliance with directions. Further, when making his observation at [10] that the Appellant had failed to provide a medical report, he failed to take into account that such failure could itself be explained by the Appellant

not having received the amended notice of hearing; such evidence would still have been filed in compliance with the original directions given to the Appellant if filed and served 5 working days before the original hearing date of 25 November.

25. As to whether, as suggested by the Judge at [13], the Appellant's attendance at the hearing would have been immaterial; I find that this is not a finding which can be sustained. There were a number of credibility issues in the appeal, determination of which would have been assisted by the Appellant's oral evidence; including why he appeared to say certain things in his screening and SEF interviews. Further, the Appellant would have sought to rely on medical evidence and evidence of his communications with the Ethiopian embassy in the United Kingdom, relevant to the assessment of the Appellant's nationality. Further, the Appellant would have referred to other country information calling into question the reliability of the Danish FFM report.
26. Further, although not the subject of submissions before me, I would opine that it would take something more, by way of reference to Ethiopian nationality law, to support the Judge's apparent finding at [56] that as the Appellant spoke Amharic, and was married to an Ethiopian, he was 'therefore' entitled to Ethiopian nationality. By way of analogy, speaking English and being married to a British citizen says nothing, without more, as to a person's entitlement to British nationality.
27. I find that the Appellant is entitled for his present appeal to the Upper Tribunal to be allowed on the basis that the proceedings before the First tier were vitiated by procedural unfairness, by having proceeding in the absence of the Appellant.
28. Ms Hulse for the Appellant today asks the Appellant's appeal be remitted to the First-tier. I agree. I find in accordance with paragraph 7.2(a) of the Practice Statement of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal that the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal.

Notice of Decision

29. I find that the making of the First tier decision involved the making of a material error of law.

I set aside the First tier decision.

I remit the appeal to the First tier Tribunal for a hearing before a Judge other than Judge Maka.

Direction

30. I direct that the appeal not be listed before two weeks after the date of this error of law decision being served upon the Appellant. I am not asked to make any other directions.

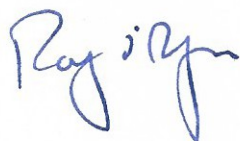
Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 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.

The reason for this order is that the Appellant is advancing a protection claim, and the merits of that claim are to be decided fresh by the First tier. The attitudes of the Ethiopian and/or Eritrean authorities towards the Appellant are therefore still to be determined. The publishing of the present decision of the Upper Tribunal may prejudice the Appellant.

Signed

Date: 3.3.16

A handwritten signature in blue ink, appearing to read 'Rag O'Ryan', is written over the printed name.

Deputy Upper Tribunal Judge O'Ryan