



**Upper Tribunal
(Immigration and Asylum Chamber
PA/09090/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 30 August 2018**

**Decision and Reasons
Promulgated
On 1 November 2018**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RH

(ANONYMITY DIRECTION MADE)

Respondent

**This decision is amended as indicated under Rule 42 of the
Tribunal (Upper Tribunal) Rules 2008**

Representation:

For the Appellant: Mr K Smyth, instructed by Kesar & Co
Solicitors.

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal that is Mr H as the appellant and the Secretary of State as the respondent.
2. The respondent was granted permission to appeal a determination of First-tier Tribunal Judge Sethi, which allowed

the appellant's appeal, on human rights grounds, against a decision of the Secretary of State dated 9th August 2016. That decision refused his protection and human rights claim pursuant to a Deportation Order made under Section 32(5) of the UK Borders Act 2007 signed on 8th August 2016.

3. The appellant arrived in the UK in 2001 aged 13 years accompanied by his 2 older brothers (also minors). The appellant, together with his brothers, was refused asylum on 19 February 2001 but on 22 August 2001 he was granted exceptional leave to remain valid until 8 September 2005. On 3 May 2007 the appellant was granted indefinite leave to remain.
4. The Metropolitan police cautioned the appellant in January 2006 for the possession of cannabis a class C controlled drug and on 22 November 2016 he was convicted at Stratford Magistrates Court of possessing cannabis and a non-recordable non-motoring offence for which he was fined on each count. On 2 March 2012 he was convicted at the Central Criminal Court for "conspiracy to steal" for an offence committed on 19 September 2011 and for which he was sentenced on 1 June 2012 to two years imprisonment. He was served with a liability for deportation letter in 2012 and he made representations outlining his asylum and human rights claim. A further liability to deportation letter was issued on 8 July 2013 which included details of section 72 of the Nationality, Immigration and Asylum Act 2002.
5. The respondent noted the appellant's protection claim that he had a fear of persecution should he return to Ethiopia. It was noted he had been consistent in his claim to be an Ethiopian national and it was noted he was able to speak the languages of both Ethiopia and Eritrea, but the respondent rejected the appellant's claim his parents had been taken by government officials and killed. It was asserted that the account he had given contained discrepancies and the account was not credible even though he may not have had much recollection of certain details given his relatively young age and leaving Ethiopia.
6. The respondent placed a reliance on the country guidance given in **ST (ethnic Eritreans - nationality - return) Ethiopian** CG [2011] UKUT 00252. It was noted that he had initially claimed that he and his parents had been born in Ethiopia and were Ethiopian nationals albeit his grandparents were of Eritreans origin. It was not accepted that he was Eritrean as there was no evidence to suggest he had been deprived Ethiopian nationality or was denied the right to return to Ethiopia. There was no evidence to suggest he had approached the Ethiopian authorities in London.

7. In relation to a human rights claim noted he had two brothers in the United Kingdom, but his deportation was conducive to the public good and in the public interest because he had been sentenced to a period of imprisonment of at least 12 months but less than four years. Under paragraphs 398 and 399A of the immigration rules he did not have a family life with a partner or child and it was not accepted that he was socially and culturally integrated into the United Kingdom. He had not provided evidence of any positive contribution to the society of the United Kingdom. It was not accepted that there would be a very significant obstacles to his return to Ethiopia to where it was proposed he would be deported. It was acknowledged that he spoke Amharic as well as English and Tigrinian. It was possible that he had family remaining in Ethiopia. These conclusions were based, inter-alia, on a screening interview dated 30 October 2013 and an asylum interview record dated 15 October 2014. Nor were there any very compelling circumstances.
8. A supplementary reasons letter was provided whereupon the photographs and the passport of his claimed Eritrean grandmother, MBW, was considered. It was not accepted that he was of Eritrean heritage. Specifically, it was noted at no point had he previously claimed to be Eritrean.
9. The appellant's claim was that he was forced to flee Ethiopia during the war between Ethiopia and Eritrea when his parents were taken and although he was born in Ethiopian he was of Eritrean ethnicity. He had now lived the majority of his life in the UK and he was fully socially and culturally integrated within British society. Since his release he had completely disassociated himself from his old contacts and was intent on leading a law-abiding life and was not a danger to the public; he had been in prison and learned his lesson. He had undergone numerous courses whilst in prison to build a better life on release. He was now the father of a two-month-old daughter and he maintained a relationship with the mother and daughter although they were not living together.
10. The judge made the following findings
 - (i) it was clear from the length of sentence that the appellant was deemed to have committed a particularly serious crime but before the appellant could be excluded from the protection of the Geneva Convention he must be shown to be a "danger to the community" and that the presumption that he was such, was rebuttable. The judge noted that the OASys risk assessment report completed on 12 November 2013, which assessed the appellant to be a low risk of reoffending with no presentation of likelihood of serious harm to others. The report noted he had at all times complied with the requirements of contact and with

his licence/order, and did not identify any triggers to offending behaviour that required attention.

The judge considered the oral evidence of his family and that he had continued to lead a law-abiding life. There was no suggestion that the appellant had reoffended since the offence committed in September 2011 and that he had disassociated himself from his previous contacts. The judge noted the respondent relied on no further evidence to support the certification under section 72. The judge considered the whole of the appellant's offending history and concluded that the appellant no longer posed a risk of serious harm to others and a low risk of reoffending and that he did not present the person who was a danger to the community.

(ii) the judge found the appellant had given a credible and reliable account as to his ethnicity. At its time of arrival, he was a minor age 13 years. The evidence advanced in relation to the initial asylum claim was that provided to his solicitors by his elder brother also a minor, not the appellant himself.

(iii) the judge took into account the background information on Ethiopian and Eritrea and, noted that at the time when the appellant was born in 1988, was the time when Eritrea was still part of Ethiopian and not a separate country and it became so following the referendum on Eritrea independence in May 1993.

(iv) the judge took into account from the time of his arrival in the UK the appellant's claim was advanced on the basis that although born in Ethiopian he was a person of Eritrean heritage. The judge referred to RB A 14 which showed that when questioned about his ethnicity it was recorded that the appellant stated he was 'Ethiopian but of Eritrean descent'. The judge recorded

*'in the respondent's first decision dated 19 February 2001 [RBB 1] it was noted at paragraph 6 that the appellant had not submitted any evidence in support of his application, nor "any proof that your parents were arrested **solely in connection with their ethnicity** other than that your father was called a "traitor" which could be attributed to a number of reasons...". The same decision at paragraph 8 with reference to the referendum on Eritrea independence proceeds to conclude that it was not accepted that he "would be denied entry to that country because of your parents' inability to take part in the voting". There is nothing within that decision to indicate that the respondent had rejected the appellant's claimed ethnicity advanced at the time of his arrival in the UK*

now some 17 years ago. I find that I have no reason to believe that as a child aged 12 that the appellant would have had any reason to advance a dishonest account as to his ethnicity'. [50]

I also take into account that at the time of his arrival in the UK the appellant spoke both Amharic and to Tigrynian, which I find to be consistent with his claim to have been born in Ethiopian to parents of Eritreans ethnicity... The appellant was placed in the foster care of Mrs E, a person Eritreans origin who in her oral evidence, stated that at the time of his placement she had been informed by social services that he was on Eritrea child from Ethiopia' [51].

(v) the judge was satisfied the appellant had been consistent from a young age as to his ethnicity. She considered his replies at his asylum interview of 15 October 2014 specifically at AIR question 8, question 13 and question 22 and that his evidence supported by that of his brother and foster mother. She was satisfied the appellant was person of Eritreans ethnicity born in Ethiopia.

(vi) his account, provided on entry to the United Kingdom, of his parents being taken by the Ethiopian authorities owing to their ethnicity was "entirely plausible and consistent with the background country information as to the treatment of Ethiopians of Eritreans origin. The judge cited 2.2.1 - 2.2.3 of the Country Information Country Guidance Ethiopia: people of mixed Eritrea and Ethiopian nationality, which identified that during the border conflict 1998-2000 the government expelled approximately 70,000 Ethiopians of Eritreans origin. Further Ethiopians were subject to arrest harassment and discrimination. The appellant's account in 2001 was that at that time his parents were taken by the authorities his family home was searched and that although his parents' house was ransacked, and his parents arrested he and his brothers were left behind. The report concluded a number of Ethiopians of Eritrean origin was stripped of their Ethiopian nationality and expelled. [54] Further in the CIG report at 6.1.4 "there are even some cases of children being expelled alone' and "*numerous reports of children being left behind in Ethiopia in many cases without any relative to look after them when a parent was expelled*" [my italics].

The judge found that at all times the core of the appellant's account as to his ethnicity was consistent, the fact of his parents' arrests and his claim that he has not seen or heard of them since the events of May 2000 had at all times been consistent, and, plausible in the light of the

background country information. There was no inconsistency in the account that he believed his parents to be killed. The judge applied **AM (Afghanistan)** [2017] CWC 1122.

(vii) the judge was assisted by the evidence of the appellant's older brother who was able to provide a fuller and coherent account as to the reasons and circumstances in which he and his siblings were forced to leave Ethiopian and that his account was consistent with the account provided in 2001. He had not been asked about whether he had family in Eritrea. The parents may have been born in Eritrea but there was only one country and that was Ethiopian when they were born. His father had been born in Asmara and he and his brothers had been born in Addis Ababa. The judge accepted there was a mistake in the screening interview record in 2001 and the explanation of the appellant that he had not noticed this error in 2001, in the context of the minority of the appellant. [57]

(viii) the judge applied paragraphs 74 and 76 and 129 of **ST**. This confirmed that the credibility of the appellant was likely to have a bearing on the assessment of how one views the present attitude of the Ethiopian authorities and that

'a person who is regarded by the Ethiopian authorities as an ethnic Eritreans and he left Ethiopian during or in the immediate aftermath of the border war between Ethiopia and Eritrea is likely to face very significant practical difficulties in establishing nationality and the attendant right to return stemming from the reluctance of the Ethiopian authorities to countenance the return of someone at guards as a foreigner'. [129 (4)].

'A person who left Ethiopian as described in (4) above is unlikely to be able to reacquire Ethiopian nationality as a matter of right by means of the 2003 nationality proclamation and would be likely first to have to live in Ethiopian for a significant period of time (probably four years)'.

(ix) the judge found that the account of events provided by the appellant at the time of his arrival when considered against the background country information and **ST** caused her to be satisfied that there was a "real likelihood that as persons of Eritreans origin living in Ethiopian his parents, when arrested in 2000, at their personal identity documents confiscated consistent with that described in **ST** 'such as to make it very likely that this was done with a view to impeding his ability to establish Ethiopian nationality in the future'".

(x) as the appellant was a minor at the time he was unlikely to have had possession of any personal identity document and he and his brothers arrived in the United Kingdom without personal documentation. Although the appellant had not approached the Ethiopian Embassy she was satisfied having regard to his age at the time of his arrival and because *“as an ethnic Eritrean and who left Ethiopian during or in the immediate aftermath of the border war between Ethiopia and Eritrea”* that he is the person *“is likely to face very significant practical difficulties in establishing nationality and the attendant right to return”*.

(xi) As such the judge specifically found that there would be no utility in the appellant approaching the Ethiopian embassy on the factual matrix arising in his case

(xii) the judge found that the appellant had established his claim protection grounds and went on to find that in the alternative that is claim fell to succeed under paragraph 399A because he was socially and culturally integrated and there would be very significant obstacles to his integration into the country to which it was proposed he would be deported. The appellant had undertaken all of his mandatory secondary school education in the British school system, had been employed in the UK, had grown up in British society, had two older siblings in the UK and a foster family and now had a British child albeit only two months old. The judge accepted the term of imprisonment served by the appellant did weaken the level of integration, but this was a custody of 14 months as against 17 years of lawful residents. In addition, there would be significant obstacles to his integration in the country to which to be returned. He had little knowledge of life there but had demonstrated that the requirements of paragraph **399 A** were met. The judge specifically addressed the question of the public interest in section 117C. The judge specifically noted they the deportation of foreign criminals was in the public interest and the more serious the offence committed by the criminal the greater the public interest in his deportation, but she was satisfied paragraph **399A** was mirrored in section 117C (4).

The appeal was allowed on all grounds.

Application for Permission to Appeal

11. The application for permission contended

(i) the judge had failed to give clear reasons why the appellant should not approach the Ethiopian embassy in line with **ST**. The onus was on the appellant proves that he would not be accepted for return and this had not been

addressed in the determination. The appellant and his siblings registered as Ethiopian national is confirmed by the CID records and at no time prior to the current proceedings has this issue been raised

(ii) the judge had failed to deal with the major credibility issue in the supplementary letter regarding the claimed photograph from Eritrea conflicted with the written evidence the appellant had never been to Eritrea

(iii) the judge failed to give clear reasons of 57 as to how a qualified interpreter could mix up Addis Ababa and Asmara when taken with the other issues.

The application for permission to appeal was initially refused by first-tier Tribunal Judge Saffer who determined that the application was nothing more than a disagreement with the findings of judge was entitled to make.

Those grounds were renewed to the upper tribunal and it was additionally submitted that the appellant's claim under 399 A that if the appellant was found to be an Ethiopian national there would be the no very significant obstacles to integration in Ethiopia and his integration in the UK should be based on more than merely the length of residence. The judge had not given clear reasons why the appellant's circumstances outweighed the public interest.

Permission to appeal was granted by UTJ Kebede who found there was arguable merit in the assertion that the judge erred in accepting that the appellant without relevant supporting evidence would be unable to return to Ethiopian or would be subjected to ill-treatment on return.

The Hearing

12. At the hearing, Miss Isherwood submitted that the appellant had always stated that he was an Ethiopian national. The judge had not followed **ST**.
13. The appellant's legal representative stated that the account had been accepted overall and it was the mistake of the representative who had referred to the photograph as being taken in Eritrea rather than Ethiopia. That did not however undermine the overall findings in the decision.

Conclusions

14. The judge set out in full the objections the Secretary of State made to the claim of the appellant. She also set out in full the documentation considered the appellant's and his witnesses' oral evidence. The judge applied the relevant country background material and the relevant country guidance. I am

not persuaded that she failed to direct herself appropriately or give proper and adequate reasoning. The question of the photograph does not appear to have been put to the appellant and Mr Smith submitted that it was apparently a mistake by the representatives. Overall and in the context of the judge's findings I am not persuaded that this undermines the First-tier Tribunal's decision.

15. It was clearly **not** the case, as submitted in the hearing before me and in the grounds for permission that the first time the appellant had raised the issue of being of Eritrean nationality was in his appeal. The judge, as can be seen from the findings above, carefully assessed the evidence and noted the interview given by the appellant when he was 13, his brothers' evidence and his foster mother's evidence. They all referred to the Eritrean heritage. In the original asylum refusal letter dated 2001, and which was not previously subjected to judicial scrutiny, the Secretary of State accepted that the appellant spoke Amharic and Tigrynian, and that social services placed him as an Eritrean child. That was significant in the assessment of the ethnicity of the appellant. Further as the judge legitimately found, she did not accept *'that as a child aged 12 that the appellant would have had any reason to advance a dishonest account as to his ethnicity'*.
16. The judge also identified the observations with regard to the parents made in the reasons for refusal letter of 2001 and which I have cited more fully above. That letter did not appear to discount that the appellants' parents were Eritrean.
17. The judge mapped the account of the appellant, which she found to be consistent, against the country background material. She was obliged to consider the evidence in the round which she did. She was also obliged to apply **AM (Afghanistan)** to the evidence of the appellant and his brothers bearing in mind that they all entered the UK when they were only minors. The standard of proof in protection claims is to the lower standard of proof and this applies to the assessment of key facts in relation to an appellant's claim.
18. When assessing the credibility of the asylum claim the judge also rightly assessed the evidence in the round. Some of the key documentation was that dating from when the appellant entered the UK in 2001 when he was a minor of 13 years old. For cogent reasons she accepted the account. The judge addressed the issue of the inconsistency of the error of the place of the parents' birth and it was open to her to accept that a minor may not have identified this error. His brothers it should be remembered were also minors at that time and having been granted leave have had no need to revisit this point for many years until now. Interpreters can make mistakes

but the length of time since the interview makes revisiting this point largely redundant.

19. The judge carefully set out **ST**, against the background as set out, and it is not the case that she merely accepted that the appellant was without supporting evidence. It is correct to state that the judge did not receive evidence from the Ethiopian Embassy that the appellant had applied but she was entitled, as she put it, on this factual matrix, to find that the appellant was likely to experience persecution and very significant difficulties in establishing his claim to be Ethiopian. As stated in the judgment whether deprivation of citizenship amounted to persecution is a question of fact. The judge cited paragraph 76 of **ST** onwards. The findings in relation to the facts prior to departure from Ethiopia were relevant and the appellant's account found to be credible. What is expected is that each claimant must demonstrate that he or she has done 'all that could be reasonably expected'. In this instance the judge found that what had been undertaken was in the circumstances reasonable, against the practices of the Ethiopian Embassy in London. As the judge stated, a person who is regarded by the Ethiopian authorities as an ethnic Eritrean, which the judge found this appellant would be, and who left Ethiopia in the aftermath of the border war was likely to face very significant practical difficulties in establishing nationality.
20. I appreciate headnote (5) of **ST** which states in terms that judicial fact finders will expect a person asserting arbitrary deprivation to approach the embassy with documentation, or write a letter with all relevant details, but the judge found the appellant and his brothers had no documentation emanating from Ethiopia and further, the judge also stated, despite head note (5), that a person who left Ethiopia, as in (4) would be unlikely to re-acquire Ethiopian nationality as a matter of right.
21. In the circumstances of this case, and I note that **ST** emphasised that tensions between Ethiopia and Eritrea 'remain high', it was open to the judge to make the findings she did. A critical feature was that the appellant had always claimed Eritrean ethnicity and left as a minor with no documentation.
22. The judge did not merely give the appellant's length of residence as the overwhelming factor when finding in the appellant's favour. She noted at paragraph 70 that the appellant had a lengthy residence but also that he had no ties remaining in Ethiopia. The judge made a broad evaluation of his circumstances in the United Kingdom and the difficulties on return. She found he was still culturally integrated and because of his age would have little knowledge of any society other than the UK where his immediate family reside including his British citizen child (although very young at 2 months). He was

granted settlement in 2007 prior to which he was an unaccompanied minor. The judge did remind herself of the public interest and identified that the deportation of foreign criminals was in the interests of society. She weighed the public interest into the balance. Nonetheless the judge found that the appellant had fulfilled one of the exceptions to the general rule and, on the evidence, it was open to her to allow the appeal.

23. I find no material error of law in the decision of the First-tier Tribunal and it will stand. Mr RH's appeal stands allowed.

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.

Signed Helen Rimington

Date

25th October 2018

Upper Tribunal Judge Rimington