



Upper Tribunal

(Immigration and Asylum Chamber)

**Appeal Number: UI-2021-001729
(PA/50640/2021); IA/01405/2021**

THE IMMIGRATION ACTS

**Heard at George House,
Edinburgh
On the 12 October 2022**

**Decision & Reasons Promulgated
On the 14 November 2022**

Before

**UT JUDGE MACLEMAN
& DEPUTY UT JUDGE FARRELLY**

Between

SEBLE TAYE BERHANU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Cowx dismissed the appellant's appeal by a decision dated 10 November 2021.
2. The appellant sought permission to appeal to the UT on grounds, in summary, as follows:

Ground 1 - *sur place* activity

Error ... at 8.2 ...

(i) by using credibility findings adverse to the appellant as an *a priori* reason to find she is not a genuine oppositionist and to undermine the letter from the AWFA Group which indicates that she was a genuine member ...;

(ii) if the FtT is correct ... that the appellant is in bad faith ... inadequate reasons why she is nevertheless not at real risk ... where the expert report states at [118] that there are paid informants and that attending protests is most likely to result in identities being known to the authorities ... see [120] ... even if the appellant was wearing a mask that does not undermine the use of informants disclosing her identity ...;

(iii) error in the assumption that the authorities operate a rational decision-making process ... to distinguish between a genuine political opponent and a hanger-on ... the evidence is of a repressive, arbitrary regime. A presumption of rational assessment is counter-intuitive

Ground 2 - wrong standard of proof

... applying balance of probability at 7.2 ... in particular, “*If they were looking for incriminating documents, it is more likely than not ...*” and “*I find it more likely than not that they would have clearly articulated their purpose ...*” ... this is compounded by the view of the FtT at [7.6, 7.7 and 7.10] that the evidence is “*unconvincing*” ...

3. On 11 January 2022 FtT Judge Chowdhury granted permission: ...

(2) The grounds argue that the Judge used previous adverse credibility findings to find the appellant was not a genuine oppositionist to reject the supportive letter from an Ethiopian opposition group. Those findings it is said are used as an *a priori* reason to undermine and reject the document and there is a risk that supportive evidence is being wrongly excluded from the overall assessment. This ignores the Judge’s additional reasons for finding the appellant opportunistic i.e. her interest and participation only began 2 years after arrival in the UK and after [her] previous appeal failed - see [8.2].

(3) Notwithstanding any bad faith, the grounds submit at [1.ii] the Judge failed to engage with the expert’s report that those attending protests are likely to attract adverse attention from the Ethiopian authorities. According to paragraphs 118 and 120 of the expert’s report (at pages 97 and 99 of the electronic bundle) the government monitors diaspora activities by embedding spies and informants in political gatherings. This arguably may be a material omission by the Judge.

(4) It is arguable that the Judge employed the wrong standard of proof by finding at [7.2] ... that he found it more likely than not the Ethiopian authorities would have articulated their purpose with the appellant. Permission is granted on all grounds.

4. That decision reads as if permission was not to be granted on [1 i], but representatives agreed that, read as a whole, permission has been granted on all grounds.

5. On ground [1 i], we agree with the observations of Judge Chowdhury. This ground, on its own, does not disclose an error by which the decision, if otherwise sound, might not stand.

6. Grounds [1 ii and iii] overlap. As Mr Winter put it, [iii] builds upon [ii].

7. The only reason given by the Judge for not accepting that the appellant might be of interest for taking part in demonstrations is that she wore a face mask. That is sensible, as far as it goes, but Mr Mullen had to accept that he could not show that the Judge dealt anywhere with alleged risk through use of informants, or with the allegation that there might be a risk even to a hanger-on acting in bad faith.
8. We find that those were points which might not have decided the case in the appellant's favour, but which did need an explicit resolution.
9. On ground 2, Mr Winter accepted that the correct standard of proof was expressed in self-directions at 5.3 of the decision, and again in the overall conclusion at 9.1; but he said there was a failure to apply it in the passages cited in the grounds, where the lower standard might have led to another conclusion, and elsewhere, expressing conclusions point by point, as at 7.3, "not true"; 7.6, of the evidence of the witness KT, "not truthful ... a fabrication" and 7.11, "untrue".
10. Mr Mullen acknowledged that in certain passages the Judge had not chosen his words as carefully as he might have done, but he argued that the decision should stand, because:
 - (i) although cases have ultimately to be decided on the whole of the evidence, it is necessary also to deal with matters point by point and in some order;
 - (ii) the decision overall was clearly and logically reasoned;
 - (iii) the decision had to be read in context of the starting point that the appellant failed to establish her case in earlier proceedings; and
 - (iv) it was "difficult to see that any error might be material."
11. Representatives agreed that if we were to uphold only ground 1 the case should be retained in the UT, but that if we were to set aside on ground 2, it should be remitted.
12. On ground 2, Judges are well acquainted with the lower standard of proof which is perhaps the best-known feature of this jurisdiction. They are not to be taken to lapse in its application only for infelicities of expression, particularly where the standard is correctly stated at the outset and in the ultimate conclusion.
13. Invariably, aspects of evidence are probative to different standards, from practically beyond doubt to carrying very little weight. It matters not that they are so expressed, provided that the correct standard is applied to the claim as a whole.
14. There is an often-visited borderland between imperfect expression and substantial error. We note in this case (i) use of terms of the balance of probability rather than reasonable likelihood; (ii) several unclear and undesirable statements of not being "convinced"; and (iii) categorical findings of untruth at discrete stages, prior to the ultimate decision. Although there was some merit in the resistance offered by Mr Mullen, we

are unable to read into this decision that the same overall conclusion must have been reached, but for those errors along the way.

15. Under section 12 of the 2007 Act, and under Practice Statement 7.2, the decision of the FtT is set aside. It stands only as a record of what was said. The case is remitted to the FtT for a fresh hearing, not before Judge Cowx.
16. No anonymity direction has been requested or made.

H Macleman

18 October 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.