



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-005064

First-tier Tribunal No: PA/54256/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

18th January 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

FM
(Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Platt, of VictoriMax Solicitors

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2024

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his asylum and human rights claims.
2. The appellant claims to be a national of Eritrea born on 21 October 1995, but the respondent believes him to be an Ethiopian national. He claims to have arrived in the UK on 17 March 2017, having left Ethiopia on 27 March 2015 and resided in Sudan for three months, Libya for a year and four months, Italy for a month, and France for three months and to have then travelled from France to the UK by lorry.
3. The appellant claimed asylum on 17 March 2017. His claim was made on the grounds that he would face mistreatment if he returned to Eritrea due to his imputed

political opinion as a result of having left the country illegally and avoiding military service, as well as due to him practising a banned faith, namely Pentecostal Christianity. He also claimed to have been involved in opposition political activity and to have been arrested and detained by the authorities in Ethiopia. He claimed to have been born in Assab, Eritrea and to be of Tigrinya ethnicity. He claimed that his parents passed away in 1997 and that his brother was put in prison after his parents passed away following which he was cared for by a friend of his mother's, H. He claimed that when his brother was released from prison they both moved to Addis Ababa, Ethiopia, in 2000, exiting Eritrea illegally, and that they lived in Ethiopia with a friend of H who was a teacher, Z, who arranged for him to attend school in Ethiopia illegally. He claimed to have lived in Ethiopia for 14 years, attending school and then obtaining work as an illegal resident. The appellant claimed further that he started supporting the Ethiopian Democratic Party (EDP) in 2014 and attended public demonstrations with a friend but was arrested at a demonstration and detained for three days and beaten. The authorities discovered that he was Eritrean and threatened to deport him and he believed that he was being watched by the authorities when he was released. He was arrested again at the end of January 2015 and was told to pay money to the authorities or he would be deported. He was held for a day and released and he then left Ethiopia on 27 March 2015.

4. The appellant's claim was refused on 15 September 2017. The respondent disputed his claimed Eritrean nationality as a result of inaccurate or incorrect responses when he was interviewed about his nationality and identity. It was noted that he could not speak Tigrinya and claimed to speak only Amharic, despite claiming to be of Tigrinya ethnicity and despite claiming that his parents both spoke Tigrinya and that his brother and H spoke Tigrinya and Amharic. The respondent considered that to be inconsistent with the country background information. The respondent considered the appellant's account of a teacher enabling him to attend school illegally in Ethiopia and enabling him to avoid being deported to Eritrea in 2000 when the Ethiopian authorities were deporting Eritrean nationals to Eritrea, to be lacking in credibility. The respondent considered the appellant's account of having no right to reside in Ethiopia to be inconsistent with the fact that he was able to live in Ethiopia from the age of five for 14 years, access education, attend regular Church meetings, be baptised by the Church and get married in the Church. The respondent noted that the appellant was able to provide a moderate amount of detail when answering questions about Eritrea but observed that the information was available in the public domain. The respondent also rejected the appellant's claim to be Pentecostal Christian and his claim to have been involved in opposition political activities in Ethiopia and did not accept that he had exited Eritrea illegally or that he was a national service evader from Eritrea. The respondent considered that the appellant would be at no risk on return to Ethiopia and that he would be returned to Ethiopia, as an Ethiopian national.

5. The appellant appealed against the respondent's decision. His appeal came before First-tier Tribunal Judge Myers on 12 March 2018. Judge Myers heard from the appellant and two witnesses. She accepted as possible that the appellant's limited knowledge of Tigrinya was consistent with his background of being brought up in an Amharic speaking household and only spending a short period of his life in Eritrea. She gave no weight to the appellant's ability to answer questions about Eritrea. However she said that she had difficulty with the fact that the appellant claimed to have attended school and church in Ethiopia for many years as there was no evidence to support that. She noted the appellant's claim to have had no contact with Z since 2015 and to have been unable to trace him but considered that it should not have been difficult for him to get in touch with Z to obtain information about his attendance at school and church, his brother's death and his claimed involvement with the

Eritrean Community Association in Addis Ababa and found the absence of such evidence to undermine his claim to have been living in Ethiopia illegally. The judge also found that the appellant had failed to do all that he could to establish that he did not have Ethiopian nationality, in accordance with the guidance in ST (Ethnic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 00252. The judge had before her a letter from the Eritrean Community in Lambeth confirming the appellant’s Eritrean nationality, but she accorded it no weight. The judge rejected the appellant’s account of his involvement with the Ethiopian Democratic Party and found, in addition, that the appellant had not provided a credible explanation as to why the Ethiopian authorities had not deported him to Eritrea once they learned of his nationality. The judge accordingly rejected the appellant’s claim to be Eritrean. Although she accepted the appellant’s account of being Pentecostal Christian, she did not consider him to be at risk on return to Ethiopia on that basis. She found that the appellant’s removal from the UK would not be in breach of his human rights and she dismissed the appeal.

6. The appellant sought, but was refused, permission to appeal to the Upper Tribunal and became appeal rights exhausted on 14 September 2018.

7. On 8 December 2020 the appellant lodged further submissions, maintaining his claim to be an Eritrean national and producing further documentary evidence. That evidence included a copy of his Eritrean birth certificate, his father’s Eritrean identity card, a letter from H, a letter from Z, his EDP membership card, his school leaving certificate and student report, a letter from the Ethiopian Full Gospel Believers Church, a letter from Bole Sub City Wrefda Admin Office, supporting testimony from neighbours, DHL envelopes as proof of postage from both Ethiopia and Eritrea, an authenticity report from Teshale Aberra dated 23 February 2022, a letter to the Ethiopian Embassy and photographs of his visit, as well as background country information.

8. The respondent, in a letter dated 27 September 2022, agreed to treat the appellant’s submissions as a fresh claim but refused the claim. The respondent relied on the findings of Judge Myers in the appellant’s previous appeal and considered that the new evidence provided was not sufficient to depart from her findings. The respondent noted that Judge Myers had accepted that the appellant was a Pentecostal Christian and accepted that he would be at risk in Eritrea as such, but found that he was not an Eritrean national and would be returned to Ethiopia where he was not at risk. The respondent accepted that the appellant would be at risk in Eritrea if he was an Eritrean national who had exited the country illegally and had evaded national service, but did not accept that he was Eritrean. The respondent did not accept that there was sufficient evidence to depart from Judge Myers’ rejection of the appellant’s claim to have been involved with the EDP/ EDEPA in Ethiopia and considered that he was not at risk on return to Ethiopia.

9. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Codd on 16 October 2023. The appellant produced an appeal bundle for the appeal including the documents accompanying his submissions and in addition a further statement from the appellant, a country expert report from Dr Bekalo and evidence about his partner and child in the UK. His partner did not attend the hearing. It was said that that was due to childcare responsibilities. When questioned about how he had obtained the new documents, the appellant’s evidence was that they were in his house in Eritrea and H had gone to the property and obtained them and then provided them to Z, who had forwarded them to him in the UK.

10. Judge Codd considered that there was nothing within the new evidence which permitted him to re-evaluate the findings made by Judge Myers in relation to risk on return to Ethiopia. He remained of the same view as Judge Myers that the appellant could have taken further steps to demonstrate that he did not have Ethiopian nationality and he did not find his account of attending the Embassy to be credible. The judge did not consider that the documents relating to the appellant's school in Ethiopia took his case any further forward. He found, with regard to Mr Aberra's report, that his expertise in Eritrean documents was not clear and that in any event his report was of limited assistance, and he attached little weight to it. The judge found that the appellant had not provided a credible narrative about how contact was resumed with H and Z and how the documents were located by H and Z and he accorded little weight to the documents. As for the report from Dr Bekalo, the judge found that the purpose of his report was misguided and that it provided only limited assistance. The judge concluded that he was unable to depart from the findings of Judge Myers and that the finding that the appellant was Ethiopian remained. As for the appellant's Article 8 claim, the judge found that, on the limited evidence before him, the appellant had failed to show that he had a genuine and subsisting relationship with his daughter and claimed partner. He dismissed the appeal on all grounds.

11. The appellant sought permission to appeal to the Upper Tribunal against that decision on five grounds. Firstly, that the judge had misunderstood parts of the evidence and had misunderstood the role of the expert Dr Bekalo. Secondly, that the judge had failed to consider and engage with the new evidence in the appellant's bundle and had misunderstood the appellant's evidence about the steps taken to establish his nationality. Thirdly, that the judge had failed properly to consider the country and authentication experts' reports. Fourthly, that the judge had failed appropriately to consider the appellant's Article 8 claim and erred in his assessment of the appellant's relationship with his partner and child. Fifthly, that the judge had failed to give adequate reasons for departing from binding country guidance and had failed properly to engage with the guidance in ST (Eritrea).

12. Permission was granted in the First-tier Tribunal on 20 November 2023. The matter then came before us and we heard submissions from both parties.

13. In making his submissions, Mr Clarke emphasised the principles in Devaseelan, particularly the requirement set out at [42] for there to be *some very good reason* why the appellant's failure to adduce relevant evidence before the previous Tribunal should not be held against him. He submitted that that was something that Judge Codd had properly grappled with when considering the appellant's explanation for being able to produce documents when he had previously been unable to do so. In that respect, we agree with Mr Clarke that the judge was entitled to have some concerns about the appellant's evidence of resumption of contact with H and Z, with whom he had claimed before the previous Tribunal to have lost contact, and with the production of documents which he could perhaps have been reasonably expected to obtain for his appeal before Judge Myers.

14. However we do otherwise agree with Judge Dainty who, in granting permission, considered that the judge had arguably adopted an incorrect approach to Devaseelan. It is relevant to note that the basis of Judge Myers' adverse decision was largely an absence of supporting evidence from the appellant at that time. Indeed, it seems from her findings at [25] that she found against the appellant owing to a failure to produce evidence of his attendance at school and church in Ethiopia which, as Judge Codd properly found at [34] when such evidence was produced by the appellant, was not really relevant to the issue of his nationality in any event. Judge Codd also followed

Judge Myers' approach with regard to ST and the inadequacy of the appellant's attempts to establish that he did not have Ethiopian nationality. However we find merit in the assertion in the grounds that the principles in ST were, in fact, misapplied, since that case involved deprivation or denial of Ethiopian nationality to a person of Eritrean ethnicity whereas the appellant was not claiming ever to have held Ethiopian nationality or to have had lawful residence in Ethiopia.

15. We agree with Judge Dainty that, in adopting such a restrictive approach to Judge Myers' decision, Judge Codd failed properly to engage with some of the new evidence, in particular the evidence of Dr Bekalo. Indeed we indicated to Mr Clarke at the commencement of the hearing that we considered the strength of the appellant's grounds to lie in the challenge to the judge's consideration of Dr Bekalo's report. It was Mr Clarke's submission that Dr Bekalo's report did not take matters any further for the appellant as it simply concluded, as the judge pointed out at [46], that the appellant's claim to be Eritrean was plausible, which was essentially no different from the respondent's own position. However it seems to us that that is an over-simplification of the report which in addition to finding the appellant's account of his circumstances to be plausible, also included various specific observations, such as that the appellant's facial/physical features/complexion had a typical look of Eritrean, that the appellant's full name as well as that of his partner and daughter in the UK sounded like typical Eritrean Tigrinya Christian names and that the appellant came across as more likely an Eritrean than Ethiopian during the interview. Whilst it was, of course, open to the judge to draw his own conclusions from those observations and whilst the weight to be accorded to Dr Bekalo's report was a matter for the judge when considered together with the evidence as a whole, our concern is that he simply did not engage with the observations and conclusions in the report but rejected it largely because of Judge Myers' adverse findings and thus adopted the wrong approach to the evidence.

16. In the circumstances we conclude that there was a failure by Judge Codd properly to apply the principles in Devaseeelan and to undertake a full and rounded assessment of all the evidence. Although the outcome may ultimately be the same, we cannot discount the possibility that another judge, adopting the correct approach to the evidence, would reach a different decision. As such Judge Codd's decision in regard to the appellant's nationality cannot stand and we set it aside.

17. Although we find little merit in the grounds challenging the judge's decision on Article 8, we note that the judge's adverse conclusion was largely based upon a lack of evidence at the time and, given that Article 8 is to be assessed at the date of the hearing, it seems appropriate that the entire case is re-heard and that that be undertaken by way of a remittal to the First-tier Tribunal for a *de novo* hearing.

Notice of Decision

18. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Codd.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 January
2024