Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01147/2014

THE IMMIGRATION ACTS

Heard at : Nottingham Magistrates Court
On : 13 May 2015

Determination Promulgated
On 20 May 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

EUAELE WONDEMU GEBRESELASIE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik, instructed by Wilson Solicitors LLP
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Ethiopia whose date of birth has been recorded as 1 January 1982. He has been given permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision that section 32(5) of the UK Borders Act 2007 applied.

2. The appellant was encountered in the United Kingdom when he was arrested on 31 March 2009 on suspicion of illegal entry, having previously made an unsuccessful application for settlement to join his mother in 2001 and a further unsuccessful visa application in Ethiopia using false documentation in June 2004, and was served with form IS151A as an illegal entrant. He claimed asylum the same day. His asylum application was

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refused in September 2009 and his appeal against the decision was dismissed in February 2010. He left the United Kingdom in June 2010. According to the appellant he went to Ireland but was sent back to the United Kingdom by the Irish authorities, returning here on 30 September 2010. He claimed asylum again. His claim was refused in November 2010 and his appeal against that decision was dismissed in February 2011.

3. On 22 December 2012 the appellant was convicted of theft and sentenced to 16 weeks' imprisonment. On 7 August 2013 he was convicted of attempted robbery and sentenced to 1 year and 6 months' imprisonment. In light of the conviction he was notified, on 3 September 2013, of his liability to automatic deportation. He completed a questionnaire on 3 September 2013, stating that his deportation would be in breach of the ECHR and the Refugee Convention. A deportation order was made against him on 29 May 2014 and a decision was made on 11 June 2014 that section 32(5) of the UK Borders Act 2007 applied.

4. The appellant claims to fall within the exceptions to automatic deportation. He claims to be at risk on return to Ethiopia as a result of his activities for the OLF (Oromo Liberation Front) and, more recently, as a result of his sexuality.

5. In his first claim, after initially claiming to be an Eritrean national unable to practice his religion in Eritrea, he claimed to be Ethiopian and Oromo and to have been involved in distributing information about the Oromo cause for the OLF. He claimed to have been caught on one occasion when distributing leaflets and to have been arrested and beaten up and taken to prison, where he was tortured. He claimed that his uncle was also arrested and ill-treated and was accused of financially supporting the Oromo movement and died after his release from injuries received in prison. He came to the United Kingdom on the advice of his uncle who arranged for an agent to bring him here, also in the hope of finding his mother and being re-united with her, having last seen her when she left Ethiopia when he was seven or eight years of age and having last had contact with her in 2003. He claimed that his father was in South Africa, having fled Ethiopia because of problems arising from his support for the Oromo cause.

6. The respondent, in refusing the appellant's claim in October 2009, did not accept that he was Oromo, that he was a supporter of the OLF or that he had been arrested as claimed and considered that he would be at no risk on return to Ethiopia. In dismissing the appellant's appeal in February 2010, the Immigration Judge found him to be lacking in credibility and considered that he had fabricated his account and was not Oromo.

7. In his second asylum claim the appellant claimed again to have been involved with the OLF, although on that occasion he claimed to have been arrested and detained three times as a result of his involvement with the movement. In refusing that claim, the respondent again rejected his claim to be Oromo and considered that he would be at no risk on return to Ethiopia. In dismissing the appellant's appeal in February 2011, the Immigration Judge again found him to be lacking in credibility and considered that he had fabricated his account and was not Oromo, noting further inconsistencies arising out of his second claim in addition to those previously noted. On that occasion, however, there was no appearance by or on behalf of the appellant and therefore no oral evidence.

8. In the deportation decision of 11 June 2014 the respondent referred to the appellant's previous unsuccessful asylum claims and appeals and maintained that he would be at no risk on return to Ethiopia. With regard to Article 8 of the ECHR, it was considered that he could not meet the requirements in paragraph 399(a) and (b) or paragraph 399A of the immigration rules and that there were no exceptional circumstances outweighing the public interest in his deportation for the purposes of paragraph 398. The exceptions to automatic deportation did not, therefore, apply to him.

9. The appellant appealed that decision and his appeal was heard on 13 January 2015 by First-tier Tribunal Judge Hollingworth.

Appeal before the First-tier Tribunal

10. Judge Hollingworth heard from the appellant and had before him a witness statement in which he repeated his claim as regards his involvement with the OLF but also claimed to be gay. The judge also had before him a medico-legal report from Dr Tania Longman, photographs of scars on the appellant's body and a Rule 35 report compiled by a doctor in the healthcare centre where he was detained. He placed little weight upon Dr Longman's report and found that it did not detract from the adverse findings made by the judges in the appellant's previous appeals, which he took as his starting point. He rejected the appellant's account of his involvement with the OLF, as well as his account of his sexuality and found that he would be at no risk on return to Ethiopia on either basis. He also found that the appellant's deportation would not be in breach of Article 8 and he dismissed the appeal on all grounds.

11. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant, and granted, on the grounds that the judge's approach to the question of scarring and the deliberate infliction of the scars was arguably flawed.

12. The appeal came before me on 13 May 2015.

Consideration and Findings

13. Having heard submissions from both parties it seems to me that there are fatal flaws in Judge Hollingworth's decision such that it cannot stand.

14. At paragraph 36 of his decision, the judge placed significant weight upon the fact that the appellant had not raised the question of scarring previously. However it is clear that reference had been made to scarring and torture in both his interviews, at questions 35 and 41 of the first interview and at questions 18 and 35 of the second interview. Further, the Rule 35 report from April 2014 contained details about torture and scarring. Mr Mills submitted that the judge's comments at paragraph 36 should be read as meaning that scarring had not formed an important part of the appellant's case before, since it was clear from paragraph 27 that he was aware that there had been previous references to scarring. Whilst that may be the case, it is certainly not clear from paragraph 36 that that was so, and given the adverse weight attached by the judge to the matter it seems to me that more detailed and explicit findings ought reasonably to have been made at that point. Indeed no findings were made on the Rule 35 report at all.

15. Further, whilst the judge considered that the reliability of the medico-legal report was undermined by the expert's failure to give proper consideration, with respect to the scarring, to the question of self-infliction and self-infliction by proxy, it seems to me that he in turn failed to address the findings that the expert did make in that regard, in particular at paragraphs 6.2.5, 6.2.11, 6.2.13, 6.2.15, 6.2.22 and 6.2.23. Neither was the appellant given an opportunity to respond to a suggestion of self-infliction by proxy, which Mr Mills agreed would have been appropriate in line with the guidance in RR (Challenging evidence) Sri Lanka [2010] UKUT 274.

16. Mr Mills accepted that there were problems with the judge's decision and that errors had been made by the judge, but it was his submission that those errors were not material. However I do not agree. The appellant's scarring and the conclusions reached by the medical expert were fundamental to the assessment of credibility, particularly in light of the substantially adverse findings already made against the appellant and the acknowledged discrepancies in his evidence. As such, it seems to me that any errors made in the consideration of the evidence of scarring and the assessment of the medical evidence simply had to be material. Accordingly I consider that the judge's decision cannot stand and has to be re-made.

17. Both parties agreed that, if a material error were to be found in the assessment of the medical evidence, that would go to the heart of the credibility findings and, as such, would have infected all parts of the judge's decision and would necessitate a complete rehearing of the appeal. It was therefore agreed, in such circumstances, that the appropriate course would be for the case to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

18. The appeal is allowed.

19. 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, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be dealt with afresh, before any judge aside from Judge Hollingworth.

Signed
Upper Tribunal Judge Kebede