Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08804/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2017	**On 13 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETRY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R A K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr D O'Callaghan of Counsel, instructed by Duncan Lewis & Co Solicitors (Harrow Office)

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Griffith promulgated on 20 May 2017 allowing the RAK's appeal against a decision of the Respondent's dated 4 August 2016 refusing a protection claim.

2. Although before me the Secretary of State for the Home Department is the appellant and RAK is the Respondent, for the sake of consistency with the

proceedings before the First-tier Tribunal I shall hereafter refer to the Secretary of State as the Respondent and RAK as the Appellant.

3. The Appellant's nationality has been the subject of dispute. Indeed, her exact position on her nationality may well have recently shifted: see further below. In her application and hitherto in the appeal, the Appellant has claimed to be a national of Eritrea, whilst the Respondent has taken the view that she is a national of Ethiopia and returnable thereto.

4. The Appellant claims to have been born in Assab in 1978 - a territory which is now within the borders of the country of Eritrea. It is said that she relocated in 1983 to Addis Ababa with her parents and brother. The Appellant would have been 5 years old at this point. It is said that in March 2000 she was expelled with her mother and brother to Eritrea, her father having recently been also expelled.

5. The Appellant, on her account, shortly thereafter relocated to Sudan with an uncle; she then worked as a housekeeper in Khartoum for approximately seven years. During this time she became involved in the Pentecostal Church. There came a time where her employer was minded to relocate, and it is said that in the circumstances the Appellant's uncle, concerned that the Appellant might not be able to continue living in Sudan without the effective protection of an employer, made arrangements for her to come to the United Kingdom. She arrived in the United Kingdom in November 2007 and made an application for asylum. The application was refused on 14 July 2010, and a subsequent appeal dismissed on 14 September 2010 by decision of Immigration Judge Archer (reference AA/10692/2010).

6. The Appellant then seems to have made a number of sets of further submissions to the Respondent. Representations made in September 2014 eventually culminated in the decision of 4 August 2016 to refuse the Appellant asylum again, with a right of appeal.

7. The Appellant lodged an appeal in the IAC. The appeal was allowed for reasons set out in the Decision of Judge Griffith.

8. The Respondent sought permission to appeal, which was granted by First-tier Tribunal Judge Robertson on 15 August 2017.

9. The focus in the appeal before the First-tier Tribunal - and in due course in the Respondent's challenge to the decision of the First-tier Tribunal - was

on the Appellant's claimed nationality. Judge Robertson concluded that the Respondent had raised arguable grounds in respect of Judge Griffith's approach to the Appellant's linguistic skills, Judge Griffith having come to a different conclusion in this regard from that reached by Judge Archer in the Appellant's previous appeal. Judge Robertson expressed the arguable case in these terms:

> *"The question is whether the Judge was entitled to take a different view from the previous Judge (who assessed the Appellant's credibility in the context of all the credibility findings) on the basis simply of what he thought may or may not be unusual, and this point is reasonably arguable."*

In granting permission to appeal on this point Judge Robertson commented that the materiality of this point to the outcome in the appeal was not clear in light of the Appellant's attempts to obtain documentation from the Embassy for Ethiopia in the UK.

10. During the course of argument I invited the observations of the representatives, and in particular Mr O'Callaghan, as to the relevance or otherwise of the decisions in **ST (Ethnic Eritrean - nationality - return) Ethiopia CG [2011] UKUT** and **MA (Ethiopia) [2009] EWCA Civ 289**, both of which had been cited in the Decision of Judge Griffith. Both those cases involved claims based on an allegation of arbitrary deprivation of citizenship amounting to persecution giving rise to entitlement to international surrogate protection. This was not, seemingly, the way in which the Appellant had put her case to the Respondent and to the First-tier Tribunal. It appeared that the Appellant had not put her case on the basis that she was Ethiopian and had been deprived access to her citizenship rights by reason of the refusal to issue travel documentation, but rather had consistently put her case on the basis that she was Eritrean and faced a risk of persecution in Eritrea such that she was entitled to protection.

11. I pause to note that the Respondent acknowledged that the Appellant would be at risk in Eritrea, but did not propose to return her there. It was the Secretary of State's case that as the Appellant was Ethiopian - notwithstanding the Appellant's denial - she could be safely returned to Ethiopia. The exploration of the Appellant's ability to obtain travel documentation from the authorities of Ethiopia therefore appears to have been relevant to the question of nationality and returnability rather than the risk of persecution *per se*.

12. Be that as it may, having invited observations on the applicability or otherwise of **ST** and **MA**, following a lunchtime adjournment Mr O'Callaghan drew certain matters to my attention in consequence of which

it is now essentially common ground that this appeal needs to be remitted to the First-tier Tribunal for a decision to be remade in the appeal with all issues at large.

13. In essence Mr O'Callaghan acknowledged that it would now appear that both before Judge Archer and before Judge Griffith nobody had really fully and properly understood the nature of the Appellant's case. Indeed, after some exploration it is not entirely clear to me whether the Appellant's representatives fully understood the Appellant's case at the time that they were making their further submissions in September 2014. Mr O'Callaghan now says that this is indeed a case which should be articulated on the basis of the Appellant being an Ethiopian national who has been arbitrarily deprived of her citizenship and it should no longer be articulated, as it seems to have been hitherto, on the basis of her claiming to be an Eritrean national at risk in Eritrea: cf. the representations of 4 September 2014 which continued to describe the Appellant in the heading as Eritrean. (Whilst I note that some passages in that letter refer to the arbitrary deprivation of Ethiopian nationality, such passages are not readily reconcilable with the description of the Appellant's claimed nationality in the heading, or the passages that strongly argue that she was not Ethiopian. It seems to me likely that the references to arbitrary deprivation appear only by reason of careless use of standardised paragraphs from a template, and not because this was the conscious intention of the author. The seeming continuing absence of any clear articulation of the case up until the afternoon of the hearing reinforces this notion.)

14. Mr O'Callaghan now draws the following matters to my attention. The Appellant was born in 1978, in territory which whilst now being part of the territory of Eritrea was at the time the within territory of Ethiopia - Eritrea not then existing as a country. When the Appellant moved from Assab to Addis Ababa in 1983, as she claims, it was a move within the territory of the nation state of Ethiopia. It was not until 1991 that there was a universal declaration of independence on the part of Eritrea; it was not until 1993 that Eritrea became a *de jure* state - at which time in the Appellant's claimed chronology she was outside the territory of Eritrea and within the territory of Ethiopia. Mr O'Callaghan submits that consequently the Appellant would have been at birth a citizen of Ethiopia, and there is nothing to indicate that at any point thereafter she would have acquired citizenship of Eritrea. (This is of course all premised upon an acceptance of the Appellant's claimed narrative chronology: as Mr O'Callaghan points out, it is not readily apparent that clear findings have been made in this regard.)

15. Pursuant to the above, Mr O'Callaghan now indicates that the Appellant's case is seemingly really one of being a national of Ethiopia who has been

arbitrarily deprived of citizenship, and not one, as hitherto, of being a national of Eritrea who fears persecution in her country of nationality. I emphasise in this regard that the Appellant continues to express a fear of going to the territory of Eritrea but it is not this that Mr O'Callaghan says forms the claim for international surrogate protection.

16. I entirely understand the way in which Mr O'Callaghan now seeks to put the case, having been prompted into it by the invitation to consider the applicability or otherwise of **ST** and **MA** to the First-tier Tribunal's decision. However, the question for me is slightly more difficult: what, if any, error of law the First-tier Tribunal Judge made in circumstances where it does not seem overt that the Appellant put her case on the basis that it is now articulated. Mr O'Callaghan suggested that in circumstances where the Judge failed to appreciate the true nature of the case it might be considered that the error of law was a lack of appropriate or 'anxious' scrutiny.

17. I hesitate to determine the case on that basis. I understand Mr O'Callaghan's resistance to the notion that the case should be determined on the basis of the challenge of the Secretary of State, but it seems to me that there is substance to that challenge. (I should record that Mr Tarlow did not resist the suggestion in any event that this case should be remitted to the First-tier Tribunal, and indeed observed that there might then be an opportunity for the Respondent to consider how best to respond to the new articulation of the Appellant's claim.)

18. I am satisfied that there was an error of law in the approach of the First-tier Tribunal. Given the common ground adopted by the representatives as to the way forward, inherent in which is an absence of meaningful resistance by the Appellant to the Respondent's challenge to the decision of Judge Griffith on the basis that it is now acknowledged that the Judge did not determine the true basis of the Appellant's case, I do not propose to go into too much detail. Suffice to say, I am satisfied that the point identified as arguable by Judge Robertson in the grant of permission to appeal, is indeed made out. Whilst First-tier Tribunal Judge Griffith reached conclusions in respect of the Appellant's use of language in the home at paragraph 43, he did so without any reference to, or attempt to explain, why such matters should be revisited after the findings of Judge Archer in light of the new evidence which in essence only amounted to the attempts to obtain documentation from the Ethiopian Embassy. Judge Archer gave a number of reasons by reference to the submissions before him as to why he did not find the Appellant credible, and necessarily his evaluation of her claim to have changed the use of language at home involved a consideration of those reasons. There was nothing in Judge Griffith's decision that explored any of those matters and to that extent I am satisfied that the Judge fell into error in failing adequately to reason or

explain why the different approach indicated at paragraph 43 was appropriate. (It does not follow that Judge Griffith inevitably reached the wrong conclusion in this regard; it does mean, however, that the conclusion he reached was not supported by any sustainable reasons and was thereby unsafe - and may require to be revisited in due course.)

19. Moreover, insofar as the Judge may have placed reliance in his analysis of the Appellant's case on the case law of **ST** and **MA** it seems to me that in the context of the way in which the case had been articulated before the First-tier Tribunal the reliance on that line of authority was inappropriate. It is clear from those cases that the Ethiopian authorities are inclined to refuse to issue travel documents in some cases to its own nationals if there is something to suggest that they may be Eritrean by way of background or ethnicity. It follows that the value of a refusal to issue a national document is limited as an indicator of nationality and so did not really go very far towards demonstrating that the Appellant was Eritrean as the Judge concluded - and, as Mr O'Callaghan now indicates, the Appellant now wishes to deny in any event!. Whilst it may well be that Judge Archer made some observations in his decision as to the potential value of obtaining evidence as to any attempts to obtain Ethiopian documentation, it seems to me that no expectation could be said to have arisen from those observations one way or the other as to the impact that that might have upon re-evaluation of the entire case.

20. Accordingly I am satisfied that the First-tier Tribunal Judge fell into error of law. The consequence is that the decision in the appeal is to be set aside, and the decision in the appeal therefore requires to be remade. Given that the Appellant now essentially wishes to rearticulate her case, remaking the decision in the appeal will involve renewed fact-finding; accordingly the appropriate forum is the First-tier Tribunal before any Judge other than Judge Griffith or Judge Archer.

21. Because the Appellant seeks to put her case on a different basis I directed at the conclusion of the hearing that the Appellant is to file and serve within 21 days her restated case, and that the matter should be set down on the first available date after six weeks from 26 September 2017 for a Case Management Review hearing before the First-tier Tribunal - by which point the Respondent will, it is hoped, be in a position to indicate whether or not this appeal is ready to be set down for a substantive hearing or whether the Respondent wishes more time to consider the re-articulation of the Appellant's case.

Notice of Decision

22. The Decision of the First-tier Tribunal contained material errors of law and is set aside.

23. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Archer or First-tier Tribunal Judge Griffith with all issues at large.

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 her or any member of her 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: Date: **9 November 2017**

Deputy Upper Tribunal Judge I A Lewis