**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/00921/2017

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Decision & Reasons Promulgated** |
|---|---|
| **On 23rd February 2018** | **On 8th March 2018** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ASTER WULUTAW**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Mr J Ficklin of Counsel

**DECISION AND REASONS**

## Introduction and Background

1. The Secretary of State appeals against a decision of Judge G R J Robson (the judge) of the First-tier Tribunal (the FtT) promulgated on 13th June 2017.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to her as the claimant. She claims to be an Eritrean citizen born 5th April 1986.

3. The claimant arrived in the UK in January 2009 and claimed asylum. Her claim was refused and her subsequent appeal dismissed by Judge Khawar following a hearing on 29th July 2009. Judge Khawar did not accept that the claimant was an Eritrean citizen.

4. The claimant remained in the UK and subsequently submitted an application for leave to remain as a stateless person, pursuant to paragraph 403 of the Immigration Rules. This application was refused on 14th November 2016, the Secretary of State recording in the refusal, that the Appellant was not stateless, but is an Eritrean national.

5. This appears to have prompted the claimant, on 21st December 2016, to make further submissions claiming refugee status. These submissions were refused on 12th January 2017. The submissions included a claim that the claimant would be at risk as a Pentecostal Christian. The Secretary of State accepted the further submissions as a fresh claim, but did not accept that the claimant was entitled to asylum. It was not accepted that she had provided sufficient evidence to prove that she can be considered to be an Eritrean citizen (notwithstanding apparent acceptance of Eritrean nationality in the refusal dated 14th November 2016). It was not accepted that the claimant would be at risk if removed from the UK. It was not accepted that the claimant's removal from the UK would breach Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

6. The claimant appealed and the judge allowed the appeal on asylum and Article 8 grounds. The judge found at paragraph 68;

> "I find that I can move away from the original determination and I find that, to the lower standard, in the light of the totality of her evidence, the Appellant is of Eritrean nationality."

7. The judge found that because the claimant is Eritrean, and she would be eligible to be drafted on return, she was entitled to asylum. The judge rejected her claim that she would be at risk as a Pentecostal Christian.

8. The judge also allowed the appeal with reference to Article 8, finding that the claimant has family life with her partner who has refugee status, and the couple have a child, and it would be in the best interests of the child to remain with both parents. The judge found it would be disproportionate for the claimant to be removed from the UK.

9. The Secretary of State applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.

10. Firstly it was contended that the judge had erred in law by failing to follow the guidance in Devaseelan Sri Lanka [2002] UKIAT 00702. It was submitted that the judge had not used the previous Tribunal decision as a starting point, but had sought to discredit findings made by the first Tribunal, in relation to the nationality and credibility of the claimant. It was further contended that the judge had failed to consider that some of

the additional evidence before him could have been before the initial Tribunal in 2009, and no reasonable explanation had been given as to why it was not. Therefore that evidence should have been treated with "the greatest circumspection" instead of being accepted at face value by the judge. It was contended that inadequate reasoning had been provided for departing from the previous finding that the claimant was not Eritrean. It was contended that the previous Tribunal had used the correct burden and standard of proof, in finding that the claimant had not proved that she is Eritrean.

11. The second ground of appeal is that the judge erred in law in considering Article 8. The judge had allowed the appeal with reference to Article 8 outside the Immigration Rules, but had not explained why it was an exceptional case. The Secretary of State relied upon Agyarko [2017] UKSC 11. It was contended that the judge had given greater weight to the claimant's family life than should have been given and had failed to carry out an adequate balancing exercise in respect of proportionality, and had failed to consider the public interest considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

12. Permission to appeal was granted by Designated Judge Manuell in the following terms;

> "1. First-tier Tribunal Judge G R J Robson allowed the Appellant's appeal against the refusal in a decision and reasons promulgated on 13th June 2017. The Appellant claimed to be Eritrean but her previous appeal was dismissed in 2009.
>
> 2. The Respondent's onward grounds dated 22nd June 2017 were in time. In summary the grounds contend that the judge erred in his approach to Devaseelan [2002] UKIAT 00702 and to Article 8 ECHR proportionality.
>
> 3. The grounds are arguable. The judge was mistaken to find that too high a standard of proof had been applied by the experienced judge who for secure reasons had found against the Appellant on all issues, including her claimed nationality, in 2009. Similarly, the Article 8 ECHR proportionality assessment appears to have been driven by sympathy rather than statute."

13. Following the grant of permission to appeal the claimant lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the judge had not materially erred in law. It was contended that Judge Khawar was wrong in law in stating at paragraph 40 of his decision in 2009;

> "The burden of proof of establishing the issue of nationality is upon the Appellant. The standard of proof is that of a balance of probabilities. The evidence presented in this case, is not adequate to establish to the required standard of proof that the Appellant is of Eritrean nationality."

14. It was submitted the guidance issued by the Secretary of State confirmed that in doubtful nationality cases the burden of proof is on the Appellant to show that he or she qualifies for protection under the Refugee Convention which includes evidencing his nationality. The standard of proof is a reasonable degree of likelihood. In disputed nationality cases the Secretary of State's guidance is that the burden of proof rests with the Secretary of State to prove the assertion according to the balance of probabilities.

15. It was therefore contended that the judge was entitled to consider again the issue of nationality. The Secretary of State had in the grounds seeking permission relied upon MA (Ethiopia) [2009] EWCA Civ 289, and on behalf of the claimant it was argued that this was not on point, and that MA (Ethiopia) was not authority to confirm the standard of proof in disputed or doubtful nationality cases. The nationality of MA was neither in doubt nor in dispute, the issue was whether she was entitled to obtain an Ethiopian passport or not. It was submitted that Devaseelan cannot be read as authority that a later judge must adopt the clear error of a previous judge.

16. With reference to Article 8 it was contended that there was clear evidence before the FtT that if the claimant was removed from the UK, there were exceptional circumstances preventing the continuation of family life between the claimant, her partner and their son.

17. Directions were issued that there should be a hearing before the Upper Tribunal to ascertain whether the judge had erred in law such that the decision should be set aside.

**Submission**

18. Mrs Pettersen relied upon the grounds contained within the application for permission to appeal. I was asked to note that the earlier decision of Judge Khawar had not been successfully challenged. I asked for, and received from Mrs Pettersen a copy of a refusal of reconsideration in relation to that decision, dated 19th August 2009, prepared by Senior Immigration Judge McGeachy. Mr Ficklin was also provided with a copy. There is no reference in Judge McGeachy's decision to the burden of proof.

19. In making oral submissions Mr Ficklin relied upon the rule 24 response. It was conceded that the judge could have dealt with Article 8 more fully but I was asked to note that it was accepted that there was genuine family life between the claimant, her partner who is an Eritrean with refugee status, and their son and therefore the judge was entitled to find that it would be disproportionate for the claimant to be removed from the UK.

20. With reference to Devaseelan, Mr Ficklin argued that the judge had not misapplied the guidance, and was fully entitled to look again at the issue of Eritrean nationality, and one of the main reasons for that, was the finding by Judge Khawar, that in relation to nationality it was for the claimant to prove this on a balance of probabilities. I was asked to find

that the decision did not contain material errors of law, and therefore the appeal of the Secretary of State should be dismissed.

21. At the conclusion of oral submissions I reserved my decision.

## My Conclusions and Reasons

22. It is common ground that the judge was aware that there had been a previous appeal and that he was aware that the relevant guidance is contained in Devaseelan, as he confirms this in paragraph 51 of his decision, in which he takes as his starting point, the decision of Judge Khawar. The issue that I must decide, is whether the Devaseelan guidelines were correctly applied.

23. In my view the judge did not err in law on this issue. At paragraph 37 of Devaseelan guidance is given that the decision of the first judge stands as an assessment of the claim the claimant was then making at the time of that decision. It is not binding on the second judge, but the second judge is not hearing an appeal against it. As an assessment of the matters that were before the first judge, it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second judge may be quite different from what might have been expected from a reading of the first decision only. But it is not the second judge's role to consider arguments intended to undermine the first judge's decision.

24. At paragraph 38 guidance is given that the second judge must be careful to recognise that the issue before him is not the issue that was before the first judge, in particular, time has passed, and the situation at the time of the second judge's decision may be shown to be different from that which obtained previously. The claimant's skeleton argument that was before the judge addressed the Devaseelan point at length. The judge was specifically referred to the burden of proof, and I find that he was entitled to consider this. My view is that the claimant's argument is correct that when deciding nationality, where there is a doubtful or unknown nationality, the burden of proof rests with the claimant to show that they qualify for protection under the Refugee Convention and the 1950 Convention, and this includes evidencing their nationality. The standard of proof that the claimant needs to meet is the lower standard which is a reasonable degree of likelihood, not a balance of probability. In my view the judge was entitled to consider this point.

25. In addition there were issues that were not before Judge Khawar. The judge was referred to background evidence on language and refers to this at paragraph 65. This article was produced in 2015 and therefore could not have been before Judge Khawar. In the previous appeal Judge Khawar had found at paragraph 48 that "in the fullness of time the British Embassy will or will be able to make some better progress in obtaining a response from the Eritrean Embassy. It may be that the Appellant will be able to establish her claimed citizenship, that of an Eritrean." Judge

Khawar went on to find at paragraph 40 that the fact that the claimant spoke Amharic tends to support the conclusion that she is Ethiopian, although only limited weight could be attached to this.

26. The judge in referring to the report at paragraph 65 places weight upon the report by Asfaha Yonas Mesfun who described a period when the Ethiopian language was imposed on the Eritrean people. In addition the judge noted that the Appellant's partner, who had been granted refugee status as an Eritrean, also spoke Amharic and "a little Tigrinyan".

27. The evidence of the partner, to the effect that he spoke the same language as the Appellant, and he had been accepted as Eritrean, could not have been before Judge Khawar in 2009.

28. I therefore conclude there were issues, some of which, such as the report, and the evidence of the Appellant's partner, could not have been before Judge Khawar, which meant that the judge was entitled to consider those issues, and in my view he was entitled to consider the burden of proof issue, and he did not misapply the guidance in Devaseelan.

29. I do not find a material error of law in the conclusion by the judge, that the Appellant is Eritrean, and would be at risk if returned as a draft evader, but not as a Pentecostal Christian.

30. In considering Article 8, I agree with Mr Ficklin's observation that the judge could have dealt with this more fully. There is no evidence that the judge had regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002 and that is an error of law. There is inadequate consideration of the public interest.

31. However, as the judge concluded that the Appellant would be at risk if returned to Eritrea, and therefore was entitled to asylum, it is my view that the errors in relation to Article 8 are not material and would not have altered the outcome of the hearing.

32. The judge further erred in having allowed the appeal on asylum grounds, and purporting to also allow it on humanitarian protection grounds. An individual cannot be granted humanitarian protection if they are a refugee. However that error is not material, and would not have altered the outcome of the hearing.

## Notice of Decision

The decision of the FtT does not involve the making of a material error of law such that it must be set aside. I do not set aside the decision. The appeal of the Secretary of State is dismissed.

## Anonymity

The FtT made no anonymity direction. Mr Ficklin confirmed that no anonymity direction was requested by the claimant. I see no need to make an anonymity direction.

Signed Date 3rd March 2018

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT**
**FEE AWARD**

As the decision of the FtT stands so does the decision not to make a fee award.

Signed Date 3rd March 2018

Deputy Upper Tribunal Judge M A Hall