Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01427/2019

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On: 10th December 2019	**On 16 January 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

And

JMA
(anonymity direction made)

Respondent

For the Appellant: **Mr Diwnycz, Senior Home Office Presenting Officer**
For the Respondent: **Ms Khan, Legal Justice Solicitors**

DETERMINATION AND REASONS

1. JMA says that he is Eritrean. The Secretary of State does not accept that he is. This appeal is concerned with that dispute.

Background and Decision of the First-tier Tribunal

2. JMA claimed asylum on the 15th November 2016. He told officers that he was an Eritrean national and that he feared serious ill-treatment if returned there – he

had left illegally and this would be punished severely, with adverse political opinion being imputed to his behaviour.

3. Protection was refused on the 31st January 2019. For the purpose of this appeal the material part of the Secretary of State's reasoning was as follows [at §19]:

> "You were interviewed on 23 January 2019 and during your substantive interview you were asked a number of questions so that I could establish your nationality and identity. However, your responses were either inaccurate or incorrect when compared to the background information about Eritrea, therefore your claim to be a national of Eritrea is considered unknown for the reasons given below.."

4. The letter then lists the information provided by JMA which the Secretary of State believed to be inaccurate, and this conclusion reached [at §28]:

> "Your asylum and/or human rights claim is based upon an alleged fear in Eritrea. For the reasons given above it is not accepted that you are a national of Eritrea nor that you have established a real risk of persecution or a breach of the ECHR in Eritrea. You will be removed to Ethiopia as this is the country which you have lived in for the majority of your life, were educated in, worked in and speak the official language of".

5. It will be observed that the Secretary of State nowhere asserts that JMA is Ethiopian. She simply notes that on his own account he spent much of his childhood there, and so she believes that he can be removed to that country.

6. In its written decision of the 14th August 2019 the First-tier Tribunal (Judges Saffer and O'Hanlon) recorded the opening statements of the respective representatives as follows [at §20]:

> "Both representatives accepted that the key issue for determination for the Tribunal was the issue of the Appellant's nationality. The Presenting Officer confirmed that if the Tribunal found that the Appellant was from Eritrea, he would not be returned there".

7. This latter submission appears to have been interpreted by the First-tier Tribunal as a concession that if JMA is Eritrean, then he will have made out his claim to be a refugee. Before me Mr Diwnycz was able to confirm that this interpretation was correct. Although it is not articulated the factual basis of this concession is that a man of JMA's age is very likely to have left Eritrea illegally and having done so would be perceived as a politically-motivated draft dodger: MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 443 (IAC).

8. At paragraph 14 of its decision the First-tier Tribunal directed itself that the standard of proof applicable in asylum appeals is one of 'real risk'. At paragraphs 26-37 the Tribunal weighs up the competing evidence and [at §38] it concludes:

> "Having considered all of the evidence before us in the round and notwithstanding the inconsistencies previously referred to in the Appellant's account, we are satisfied to the requisite standard of proof that the Appellant is from Eritrea. In reaching our conclusion we have placed particular reliance upon the fact that the Appellant was able to answer many of the questions put to him in his asylum interview about Eritrea, and the fact that he has throughout his various accounts maintained the core of his claim, namely that he was taken by his parents from Eritrea to Ethiopia at the age of 2 years and the fact that the Appellant is able to speak Tigrinya, the language of Eritrea, to a sufficient standard to be able to give a detailed medical history with the assistance of a Tigrinya interpreter in the preparation of the medical report dated 29th March 2019. We therefore find to the requisite standard of proof that the Appellant has demonstrated that he is from Eritrea and that he has a well-founded fear of persecution on return to Eritrea and we therefore find that the Appellant has established that he is a refugee."

The appeal was thereby allowed.

The Secretary of State's Appeal

9. The Secretary of State's primary contention is that the decision of the First-tier Tribunal is "wholly unlawful" for an application of the incorrect standard of proof. It is submitted that the standard was not 'real risk' but the balance of probabilities. The Secretary of State relies, in support for this proposition, on the decision in MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289.

10. It is further submitted that the Tribunal erred in treating JMA's ability to speak Tigrinya as "virtually determinative" of the question of his nationality.

11. Permission to appeal was refused by First-tier Tribunal Lever on the 18th September 2019 but granted, upon renewed application, by Upper Tribunal Judge Grubb on the 2nd October 2019.

Discussion and Findings

12. The passages in MA (Ethiopia) cited in the grounds of appeal are as follows:

> "49. However, this is a highly unusual case in which it became apparent during the hearing before the AIT that the outcome depended upon whether the Ethiopian authorities would allow the appellant to return to Ethiopia. I do not accept the appellant's submission that the AIT simply had to determine this question to the usual standard of proof. It is a question which can, at least in this case, be put to the test. There is no reason why the appellant should not herself make a formal application to the embassy to seek to obtain the relevant documents. If she were refused,

> or she came up against a brick wall and there was a failure to respond to the request within a reasonable period such that a refusal could properly be inferred, the issue would arise why she had been refused. Again, reasons might be given for the refusal. Speculation by the AIT about the embassy's likely response, and reliance on expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary.
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> 50. In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean."

13. The Secretary of State relied upon these passages to submit first, that the applicable standard of proof was the 'balance of probabilities' and second, that JMA had failed to demonstrate that he had made a *bona fide* attempt to obtain nationality documents from the Ethiopian embassy (he had gone there but claimed that consular staff had refused to issue him with any paperwork).

14. In response to this challenge Ms Khan submitted that the author of the grounds had fundamentally misunderstood the effect of the decision in MA on protection appeals such as this. The question in this appeal was not, as Elias LJ had framed it [at his §50] in MA, "whether someone will or will not be returned", it was whether or not JMA had a well-founded fear of persecution in Eritrea. The standard applicable to *that* question was indisputably the lower test of 'real risk' or 'reasonable likelihood', and it manifestly did not require the putative refugee to visit any embassies.

15. That this is so is apparent from the context in MA as well as the judgment itself. MA was an Ethiopian of Eritrean origin. By the time that her appeal had its third outing in the Upper Tribunal the issue in her case had narrowed: the Tribunal were concerned with whether a refusal by the Ethiopians to recognise MA as a national would amount to persecution. Whether such a refusal could amount to 'serious harm' was a question of refugee law; the matter of whether they would in fact admit her was not. The Court described MA's case as "highly unusual", and so it was, since the question of nationality was treated as a precedent fact which in turn was wholly determinative of the asylum claim. As Ms Khan submits, this case is quite different. JMA has tangible fears unrelated to technical issues of return: he fears imprisonment, ill-treatment and disproportionate punishment for his act of leaving Eritrea without permission, and by extension his failure to report for military service. The question of his

nationality is simply a composite part of the test set out at Article 1A(2) of the Refugee Convention, to which, globally, the lower standard applies:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, **is outside the country of his nationality** and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"

16. The distinction is well expressed in the Secretary of State's own guidance: *Nationality: disputed, unknown and other cases* (Version 6.0 – 2 October 2017). Under the heading 'Burden of Proof' this reads:

> *'Unknown nationality cases (previously described as 'doubtful nationality')*
>
> In unknown nationality cases, the Home Office is not asserting that the claimant holds a particular nationality. The burden of proof rests with the claimant to show that they qualify for protection under the Refugee Convention and the European Convention on Human Rights, including evidencing their nationality. The standard of proof that the claimant needs to meet is the lower standard, they just need to show a reasonable degree of likelihood (or real risk) that they will face persecution.'

17. The Court of Appeal has itself underlined the fact-specific nature of the guidance in MA (Ethiopia). In RM (Sierra Leone) [2015] EWCA Civ 541 Lord Justice Underhill stresses that MA was a case concerned with 'returnability'. He cites Stanley Burnton LJ [at §78 MA]:

> "There was debate before us as to the standard of proof to be applied in a case in which a person contends that he is unable to obtain in this country the passport or emergency travel document that is her right as a national of her country of origin. In my judgment, it is not the 'real risk' test. The 'real risk' test applies to the question whether the fear is well-founded: it is well-founded if there is a real risk of persecution. Thus a person who is unwilling to return owing to a fear that is so justified is entitled to refugee status. Inability to return is not qualified in the Convention by the words 'owing to such fear', and ... I see good reason why it is not. Inability to return can and should be proved in the ordinary way, on the balance of probabilities."

18. So too in Abdullah v Secretary of State for the Home Department [2013] EWCA Civ 42 where the Court drew a distinction between the question of whether Mr Abdullah would face persecution in Saudi Arabia - a matter to be determined on the lower standard of proof - and the question of whether, as a Palestinian, they would let him in at all: that being a factual question unrelated to the asylum enquiry, the ordinary civil standard applied.

19. Having reviewed MA (Ethiopia) and Abdullah the Court of Appeal in RM (Sierra Leone) concludes as follows:

> "What emerges from those cases – and would in truth be clear enough even in the absence of authority – is that what standard of proof applies to the question of an applicant's nationality depends on the legal issue to which it is relevant. If it is relevant to whether he will suffer persecution (whether by reference to the Refugee Convention or article 3), the lesser standard will apply. But if it is relevant to some other issue – such as whether it is in fact possible in practice for him to be returned, and any rights that may accrue if it is not – the standard is the balance of probabilities."

20. For those reasons I am satisfied that there was no error in the First-tier Tribunal applying the lower standard of proof to an issue that here was simply a composite part of the test in Article 1A(2).

21. The Secretary of State's second ground of appeal reads as follows:

> "Additionally, the Fft have seemingly treated the A's alleged use of a Tigrinyan interpreter as virtually determinative of nationality. This was also a material error".

22. I, and indeed Mr Diwnycz, struggled to identify the error of law here alleged. The evidence before the Tribunal indicated that a JMA had used a Tigrinya interpreter not only for the preparation of a particular medical report, but consistently in GP consultations since 2017. That evidence came from the GP notes and the medical report itself: it is difficult to discern what point the author of the grounds seeks to make by introducing the word "alleged". Presumably it is not being suggested that the doctors were involved in fabricating evidence. The Tribunal was in my view perfectly entitled to place weight on that evidence; weight is classically a matter for the Tribunal and Mr Diwnycz did not seek to persuade me that the Tribunal had acted irrationally in so doing. As to the submission that the Tribunal treated the matter of language as "virtually determinative" I would add that it is apparent from the passage I have cited at my §8 above that it did not: the fact that JMA could speak Tigrinyan was only one of the reasons that the Tribunal gave for finding JMA to be Eritrean.

Decisions

23. I find no error of law and the decision of the First-tier Tribunal is upheld.

24. This appeal concerns a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

"Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Upper Tribunal Judge Bruce
14th January 2020