IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003088
(PA/02710/20)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 October 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

DY (Eritrea)
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mrs C. Johnrose, Counsel instructed by Broudie Jackson and Canter Solicitors
For the Respondent: Mr C. Bates, Senior Home Office Presenting Officer

Heard in Manchester Civil Justice Centre on the 9th September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify him or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant asserts that he is a national of Eritrea born in 1990. He appeals with permission against the decision of the First-tier Tribunal (Judge Hillis) to dismiss his appeal on protection and human rights grounds.

2. It was the Appellant's case that he is an Eritrean national who had lived for some of his life in Ethiopia. He is of Tigrinya ethnicity, but is primarily an Amharic speaker. He fears being returned to Eritrea because he will face punishment for draft evasion and having left the country illegally, such treatment amounting to persecution for reasons of his imputed political opinion. The Respondent refused to grant leave on the basis that she could not be satisfied that the Appellant was in fact Eritrean. The Appellant appealed to the First-tier Tribunal.

3. Judge Hillis dismissed the appeal on the 3rd June 2023. He found that although the Appellant may believe himself to be an Eritrean national, he has not been able to prove this matter to the requisite standard. On his own evidence he left that country when he was three years old, so can say little about it beyond what one might glean from the internet. He has no documents which could prove it. In respect of Ethiopia, the Tribunal says this: "I conclude that the Appellant has failed to show that he was ill-treated in Ethiopia on the basis that he was an Eritrean National and that it was more likely to be due to him being undocumented" [FTT §26]. The decision goes on to find that the Appellant cannot safely be returned to Eritrea, *inter alia* because of his own genuine belief that he is an Eritrean national:

> "He cannot be required to lie to the Eritrean authorities on removal to Eritrea and if he states, as he apparently genuinely believes, that he is an Eritrean National he will be required to undertake National Service for an indefinite period.
>
> His medical conditions and, in particular, his PTSD combined with his complete lack of knowledge of the country, its culture and social mores are very significant obstacles preventing him from successfully obtaining employment to accommodate and maintain himself in Eritrea. In reaching this conclusion I have taken into account that a major cause of his PTSD is likely to be the ill-treatment he was subjected to in Sudan and Libya in addition to the detention and ill-treatment he claims to have received in Ethiopia".

4. As to the consequences of its findings on the facts, the Tribunal said this:

> "I conclude that the statement in the Refusal Letter at paragraph 29 that he will be removed to Eritrea as this is the country of which he claims to be a National is not accurate and is for administrative purposes only….
>
> In the absence of the Respondent establishing, on the balance of probabilities, the Appellant's true nationality it is not possible for me to ascertain whether the country to which he would be returned would have adequate provision for the Appellant's medical care which he can afford and access".

The appeal was thereby dismissed.

5. Permission to appeal to this Tribunal was granted by Upper Tribunal Perkins on the 29th May 2024 in the following terms:

> "Arguably something is adrift here. The Respondent intends to remove the Appellant to Eritrea. The Judge has found that the Appellant cannot be removed to Eritrea without exposing him to a risk of harm but the Judge has dismissed the appeal, apparently because the Respondent will not remove the Appellant to Eritrea notwithstanding that is what the Respondent says that he intends to do".

6. This conundrum, pithily encapsulated by Judge Perkins, is at the centre of this appeal.

Discussion and Findings

7. As Judge Perkins notes, the Respondent had identified Eritrea as the proposed country of return. The Tribunal, in clear and unchallenged findings, concludes that if the Appellant were to be returned to Eritrea, he would face a real risk of persecution. Yet it dismissed the appeal. Ground (i) is that this was an 'ultra vires' act, because the Tribunal was obliged to apply its own findings about risk in its conclusion.

8. Had this been an appeal against removal directions under what was once s84(1)(g) Nationality Immigration and Asylum Act 2002, or an appeal on the grounds that the decision was 'not in accordance with the law' under the old s84(1)(e), I would agree that something had indeed gone adrift. The difficulty for the Appellant is that this is an appeal brought under the current version of s84(1)(a), on the ground that "the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention". A refugee is:

> "a person who owing to a 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".

9. It is common ground that the burden of proof, in respect of each limb of this definition, lies with the Appellant. This includes whether he "is outside the country of his nationality". It is also common ground that the standard of proof applicable to the question of his nationality in this context is one of 'reasonable likelihood': see RM (Sierra Leone) [2015] EWCA Civ 541 [at 35]. The only way that a Tribunal can allow an appeal on the grounds that the claimant is a refugee is if all elements of that definition are met. What the refusal letter has to say about the proposed country of destination is neither here nor there. Judge Hillis was right to say that it is simply an administrative matter.

10. That is not however to say that the decision is free from error. The Tribunal found that burden of proof in respect of nationality could not be discharged on the evidence before it. The question raised, albeit implicitly, in the grounds, is whether this was a conclusion rationally open to the Tribunal, given its own findings.

11. The First-tier Tribunal accepts, or at least does not reject, the evidence that the Appellant was born in Eritrea and lived there until he was three years old. It accepts that he speaks some Tigrinya, which he learnt from family members. It is accepted that he has some knowledge of the country, albeit very limited. It is accepted that the Appellant genuinely believes himself to be Eritrean. Importantly it appears to be accepted that he suffered ill-treatment in Ethiopia because he was "undocumented" ie did not have the documents which would enable him to live legally in that country. The grounds contend that this latter finding is "irreconcilable" with the finding that the Appellant has not shown himself to be Eritrean. Mrs Johnrose asks rhetorically: 'if he is not Ethiopian, what is he?'. That is a good question. The Respondent has elected in this case to stay silent on the matter of alternative nationality, but this does not mean that the Tribunal must make its assessment in a vacuum, focusing only on the possibility of Eritrean citizenship. If the Tribunal was satisfied that he was not Ethiopian, this was a finding that then had to be considered in the mix, in the context of the country background material. That country background material, and twenty years of Tribunal jurisprudence, would tend to indicate that a Tigrinya man who speaks Amharic and Tigrinya is either going to be Ethiopian or Eritrean. That will not always be the case, but it is a fact of general application which provided important context for the Tribunal's assessment. Had the Tribunal asked itself Mrs Johnrose's rhetorical question, I am satisfied that it can only have concluded, on the lower standard of proof, and having regard to its own findings, that the Appellant must be Eritrean. I would allow the appeal on that basis.

12. I should add for the sake of completeness that in discussion at the hearing the spectre of what is sometimes called 'proving the negative' was raised. In MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289 the question was whether the Ethiopian authorities would admit the claimant to their territory, it being MA's case that in an act of persecution they had denied her citizenship. Stanley Burnton LJ held that in such circumstances it was incumbent upon the claimant to prove that the Ethiopians would not recognise her – ie that the claimed persecution had taken place - by making a *bona fide* attempt to get documentation from the Ethiopian embassy in the UK. As is clear from the judgment, this does not place a universally applicable burden on applicants to make applications at embassies in the UK. Judgment must be exercised about whether it would be reasonable, or safe, to expect the individual to do so:

> 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. This case is not on all fours with MA. MA claimed that Ethiopia would refuse to admit her. The Appellant's fear is the very opposite. He fears that the Eritreans will willingly admit him, and as the First-tier Tribunal sets out, immediately enlist him for military service or alternatively punish him for its evasion. I do not think, in those circumstances, that it would be in any way reasonable or safe to expect the Appellant to approach the Eritrean embassy in London.

Decisions

14. The decision of the First-tier Tribunal is set aside.

15. The decision in the appeal is remade as follows: the appeal is allowed on protection grounds.

16. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
25th September 2024