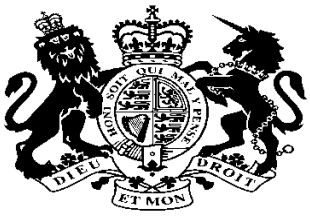

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12190/2016**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reason Promulgated**
On 28 September 2017	**On 17 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz Senior Home Office Presenting Officer
For the Respondent: Ms L Brakaj of Iris Law Firm

DECISION AND REASONS

1. To preserve the anonymity order which the First-tier thought appropriate, I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Spencer, promulgated on 7 March 2017, which allowed the Appellant's appeal on asylum and ECHR grounds.

Background

3. The Appellant was born on 01/01/1990 and is a national of Eritrea. On 21/10/2016 the respondent refused the appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Spencer ("the Judge") allowed the appeal against the Respondent's decision on asylum and ECHR grounds.

5. Grounds of appeal were lodged and on 20 June 2017 Judge Pedro gave permission to appeal stating inter alia

> 3. The grounds assert that the Judge materially misdirected himself regarding issues of the appellant's entitlement or otherwise to alternative nationality, including misapplying relevant caselaw and making inconsistent findings.
>
> 4. The grounds disclose arguable errors of law capable of affecting the outcome.

The Hearing

6. Mr Diwnycz, for the respondent, moved the grounds of appeal. He told me that he had now considered the appellant's rule 24 response, and considers that the Judge has engaged with all of the evidence. Having reviewed the file, Mr M Diwnycz told me that there was evidence before the First-tier which showed that the appellant had gone to the Ethiopian embassy (there are photographs showing the appellant within the Ethiopian embassy; there are travel tickets vouching his journey to London). Mr Diwnycz told me that it was apparent that that evidence was before the Judge, and it was that evidence that the Judge took account of when reaching his conclusions. He told me that it was a question of what the appellant could reasonably be expected to do. He did not argue the grounds of appeal any further.

7. For the appellant, Ms Brakaj adopted the terms of the rule 24 response for the appellant. She told me that the Judge's decision does not contain errors of law, material or otherwise. She told me that the Judge considered the relevant caselaw. She relied on UKVI guidance, which says that in cases of disputed nationality the burden of proof rests with the Home Office. She told me that the Judge carefully considers whether the appellant is entitled to Ethiopian or Sudanese nationality, and decided that the appellant cannot meet the criteria for naturalisation. She told me that the appellant was rebuffed when he approached the Ethiopian embassy. She told me that the Judge's decision is carefully reasoned and is informed by country guidance and the respondent's policy. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. Between [1] and [8] the Judge sets out the background to this appeal and draws a clear focus on the issues to be determined. At [8] the Judge records that there is agreement that if the appellant is only entitled to Eritrean nationality his appeal succeeds. If the appellant is entitled to either Ethiopian or Sudanese nationality his appeal will be dismissed.

9. Between [9] and [16] the Judge sets out the appellant's claim. At [15] the Judge records that it is the appellant's position that on 27 November 2016 the appellant attended both the Ethiopian Sudanese Embassies both of whom were

> …. less than helpful and told him that they could not help him.

10. Between [17] and [21] the Judge reminds himself of the law and the burden and standard of proof. The Judge correctly refers himself to the relevant country guidance cases.

11. The Judge's findings of fact are between [29] and [41] of the decision. At [36] the Judge finds that the appellant unsuccessfully approached the Ethiopian embassy. Between [36] and [38] the Judge considers whether the appellant can obtain Ethiopian nationality and at [39] concludes that the appellant cannot. He concludes [39] by finding that the respondent has not substantiated that the appellant is entitled to Ethiopian nationality by naturalisation.

12. At [40] and [41] the Judge considers whether the appellant could be a Sudanese citizen and finds that he cannot be, because the respondent has not substantiated her position that the appellant is Sudanese.

13. Those findings draw the Judge to the conclusion that the appellant is Eritrean. The Judge's finding that the appellant is Eritrean is sufficient for the appellant to succeed on asylum and article 2, 3 and 4 ECHR grounds.

14. In ST (Ethnic Eritrean- nationality- return) Ethiopia CG [2011]UKUT 00252 (IAC) the Tribunal held that pursuant to MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032, each claimant must demonstrate that he or she has done all that could be reasonably expected to facilitate return as a national of Ethiopia, the present procedures and practices of the Ethiopian Embassy in London will provide the backdrop against which judicial fact-finders will decide whether an appellant has complied with this requirement. A person who is regarded by the Ethiopian authorities as an ethnic Eritrean and who left Ethiopia during or in the immediate aftermath of the border war between Ethiopia and Eritrea, is likely to face very significant practical difficulties in establishing nationality and the attendant right to return, stemming from the reluctance of the Ethiopian authorities to countenance the return of someone it regards as a "foreigner", whether or not in international law the person concerned holds the nationality of another country.

15. In MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) it was held that (i) Although reconfirming parts of the country guidance

given in MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059 and MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190 (IAC**),** this case replaces that with the following: (ii) The Eritrean system of military/national service remains indefinite and since 2012 has expanded to include a people's militia programme, which although not part of national service, constitutes military service; (iii) The age limits for national service are likely to remain the same as stated in MO, namely 54 for men and 47 for women except that for childre a 48 n the limit is now likely to be 5 save for adolescents in the context of family reunification. For peoples' militia the age limits are likely to be 60 for women and 70 for men; (iv) The categories of lawful exit have not significantly changed since MO and are likely to be as follows: (a) Men aged over 54; (b) Women aged over 47 (c) Children aged under five (with some scope for adolescents in family reunification cases; (d) people exempt from national service on medical grounds; (e) People travelling abroad for medical treatment; (f) People travelling abroad for studies or for a conference; (g) Business and sportsmen; (h) Former freedom fighters (Tegadelti) and their family members; (i) Authority representatives in leading positions and their family members; (v) It continues to be the case (as in MO) that most Eritreans who have left Eritrea since 1991 have done so illegally. However, since there are viable, albeit still limited, categories of lawful exit especially for those of draft age for national service, the position remains as it was in MO, namely that a person whose asylum claim has not been found credible cannot be assumed to have left illegally. The position also remains nonetheless (as in MO) that if such a person is found to have left Eritrea on or after August/September 2008, it may be that inferences can be drawn from their health history or level of education or their skills profile as to whether legal exit on their part was feasible, provided that such inferences can be drawn in the light of adverse credibility findings. For these purposes a lengthy period performing national service is likely to enhance a person's skill profile; (vi) It remains the case (as in MO) that failed asylum seekers as such are not at risk of persecution or serious harm on return; (vii) Notwithstanding that the round-ups (giffas) of suspected evaders/deserters, the "shoot to kill" policy and the targeting of relatives of evaders and deserters are now significantly less likely occurrences, it remains the case, subject to three limited exceptions set out in (vii) (c) below, that if a person of or approaching draft age will be perceived on return as a draft evader or deserter, he or she will face a real risk of persecution, serious harm or ill-treatment contrary to Article 3 or 4 of the ECHR. (vii) (a) A person who is likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and/have signed (or are willing to sign) the letter of regret; (vii) (b) Even if such a person may avoid punishment in the form of detention and ill-treatment it is likely that he or she will be assigned to perform (further) national service, which, is likely to amount to treatment contrary to Articles 3 and 4 of the ECHR unless he or she falls within one or more of the three limited exceptions set out immediately below in (vii)(c); (vii)(c)) It remains the case (as in MO) that there are persons likely not to face a real risk of persecution or serious harm notwithstanding that they will be perceived on return as draft evaders and deserters, namely: (1) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (2) persons who are trusted family members of, or are themselves part of,

the regime's military or political leadership. A further possible exception, requiring a more case specific analysis is (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the War of Independence; (vii) Notwithstanding that many Eritreans are effectively reservists having been discharged/released from national service and unlikely to face recall, it remains unlikely that they will have received or be able to receive official confirmation of completion of national service. Thus it remains the case, as in MO that "(iv) The general position adopted in MA, that a person of or approaching draft and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, is reconfirmed, subject to limited exceptions…" (ix) A person liable to perform service in the people's militia and who is assessed to have left Eritrea illegally, is not likely on return to face a real risk of persecution or serious harm. (x) Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (a) that he or she left illegally, and (b) that he or she is of or approaching draft age, is likely to be perceived on return as a draft evader or deserter from national service and as a result face a real risk of persecution or serious harm; (xi) While likely to be a rare case, it is possible that a person who has exited lawfully may on forcible return face having to resume or commence national service. In such a case there is a real risk of persecution or serious harm by virtue of such service constituting forced labour contrary to Article 4(2) and Article 3 of the ECHR; (xii) Where it is specified above that there is a real risk of persecution in the context of performance of military/national service, it is highly likely that it will be persecution for a Convention reason based on imputed political opinion.

16. Despite what is said in the grounds of appeal, there is no inconsistency in the Judge's findings of fact. Despite what is said that the grounds of appeal, the Judge does not reverse the burden of proof. The Judge manifestly takes guidance from caselaw before considering each aspect of the appellant's case. The Judge correctly assigns the burden of proof, reminding himself at [21] that it is for the appellant to show substantial grounds for believing that there is a real risk that his rights will be breached, and that it is for the appellant to show that protection from persecution is not provided within his country of origin. At [17] the Judge reminds himself that the burden of proof rests on the appellant to show that he is a refugee.

17. It is the Judge's comments between [36] and [41] which leads the respondent to suggest that the burden of proof has been reversed. It is there that the Judge analyses the evidence and makes findings of fact. Is there the Judge explains why he can find no substance in the respondent's position that the appellant is either Ethiopian or Sudanese. That is not a reversal of the burden of proof.

18. Mr Diwyncz correctly focused on the ratio in ST. The test is whether the appellant has done what he can reasonably be expected of him to facilitate return to a country of alternative nationality. It is common ground that there was evidence before the First-tier that the appellant had approached the Ethiopian & Sudanese embassies to ask for travel documents to facilitate return to those countries, and that his approaches were rejected. The Judge clearly relied on that evidence and made his findings of fact that neither the Ethiopian nor the Sudanese authorities will entertain

the appellant. Those findings of fact form the foundation for finding that the appellant is an Eritrean national. The Judge's findings from [36] to [41] build on that foundation and explain why the appellant cannot be either Ethiopian or Sudanese.

19. The fact that the Judge finds of the appellant is not a credible or reliable witness when discussing the core aspects of his claim does not lead to inconsistent findings of fact. The Judge correctly identifies that the determinative issue is the appellant's nationality. It is with that determinative issue that the Judge grapples. The Judge identifies that nationality is the central issue at [8] of the decision.

20. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her.

21. In this case, there is no misdirection in law & the fact-finding exercise is beyond criticism. The decision is not tainted by a material error of law. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed.

CONCLUSION

22. No errors of law have been established. The Judge's decision stands.

DECISION

23. The appeal is dismissed. The decision of the First-tier Tribunal promulgated on 7 March 2017 stands.

Signed

Paul Doyle Date 30 September 2017

Deputy Upper Tribunal Judge Doyle