Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01096/2017**

THE IMMIGRATION ACTS

Heard at Liverpool Employment Tribunals	**Decision & Reasons Promulgated**
On 7th February 2018	**On 5th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR T M O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik (Counsel)
For the Respondent: Mr C Harrison (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge T Thorne, promulgated on 4th April 2017, following a hearing at Manchester on 3rd March 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Eritrea, and was born on 1st January 1990. He appealed against the decision of the Respondent Secretary of

State refusing his claim for asylum and for humanitarian protection under paragraph 339C of HC 395 by a decision dated 19th January 2017.

The Appellant's Claim

3. The Appellant's claim is that he was born in Barentu in Eritrea. The authorities visited his family home twice to try and call him up for military service. On both occasions he was not at home. After their last failed attempt he exited the country illegally in October 2010. He travelled to Sudan where he lived for five years. In about 2015 he travelled from Sudan to Libya. He stayed one month. From there he travelled by boat to Italy. He stayed for ten days. He then travelled to France. He was there for five days. From France he came to the UK hidden in a lorry. He arrived in the UK on 8th October 2015 and claimed asylum upon arrival. He now fears that if returned to Eritrea he will face ill-treatment and persecution by the state authorities.

The Judge's Findings

4. The judge had regard to the basis for refusal by the Secretary of State. This largely rested upon the answers that the Appellant had given during his asylum interview. For example, he was unable to answer questions about military service in Eritrea. He wrongly stated that Zoba Anseba River runs through Barentu. He said that the closest villages to Barentu were Dassie, which was in fact an island 400 kilometres away. He said Gogne and Barentu were 22 kilometres away but did not know in which direction. He gave inconsistent evidence about what he did in Eritrea. He said he looked after cattle. However, he also said that "all he did was plough" (see paragraph 9 of the determination). He wrongly stated that the rainy season was in June and July. He did not know what the Eritrean festival of Expo was. He thought that the Buna ceremony was conducted in Eritrea when in fact it was conducted in Ethiopia. He did not know the nearest airport in Barentu. Finally, and in addition, he repeatedly refused to undertake a language analysis test to support his claim that he was from Eritrea.

5. At the hearing before Judge Thorne, the Appellant's Counsel produced a letter from his solicitors dated 16th February 2017 (which repeated what the Appellant had said at paragraph 12 of his witness statement) that he was not averse to taking a language analysis test, having just been advised by his solicitors to do so (paragraph 27).

6. The judge did not accept that the Appellant was an Eritrean national from Eritrea. Full account was taken by the judge of his lack of education and the explanations he gave. However, he had (a) wrongly described Asmara and Sawa as port towns; (b) wrongly stated that Sawa was in the Anseba Region; and (c) was unable to answer questions about military service in Eritrea. (See paragraph 53 of the determination). It was also observed by the judge that he had considered the Appellant's explanations "that at various stages he did in fact answer the questions correctly but they were misrecorded and/or that the interpreter failed to interpret properly"

(paragraph 54), but the judge was unpersuaded. The judge held that the Appellant had stayed for five years in Sudan but was unable to answer questions in relation to the river that ran through Kassala and the nearby towns of Kassala (paragraph 55). Moreover, the Appellant had repeatedly refused to undertake a language analysis test to support his claim that he was from Eritrea (paragraph 56). The appeal was dismissed.

Grounds of Application

7. The grounds of application rely upon the case of **JA (Afghanistan) [2014] EWCA Civ 450** and assert that the judge failed to apply "anxious scrutiny" to his assessment of the risk to the Appellant. He also failed to assess the potential scope for misunderstandings that arose in the Appellant's account. In particular, the judge failed to adhere to the guidance provided in **JA (Afghanistan)**. He also unfairly held against the Appellant's purported refusal to undergo a language analysis.

8. On 10th October 2017, permission to appeal was granted by the Upper Tribunal for two reasons. First, that the judge failed to attach sufficient importance to the Appellant's solicitor's letter of 16th February 2017 which stated that, upon the Appellant taking advice from his solicitors, he was now willing and able to undergo a language analysis. Second, that the explanations provided in the Appellant's witness statement, with respect to the alleged discrepancies, had been overlooked.

9. On 31st October 2017, a Rule 24 response was entered by the Respondent Secretary of State to the effect that there was no merit in the grounds of application which amounted merely to a disagreement with the adverse outcome of the Appellant's appeal.

The Hearing

10. At the hearing before me on 7th February 2018 the Appellant was represented by Mr M Karnik, of Counsel, and the Respondent was represented by Mr C Harrison, a Senior Home Office Presenting Officer.

11. In his submissions before me, Mr Karnik stated that the judge had failed to apply the guidance in **JA (Afghanistan)** insofar as that case emphasised the distinction between oral evidence and written evidence, the latter stating the position in black and white, and much more cogently, than oral evidence might do.

12. Second, in short paragraphs, the judge had dismissed the Appellant's claim, on the basis of adverse credibility findings against him, but these findings were essentially little more than what the refusal letter had already stated, but with respect to which the Appellant had offered credible explanations, which the determination failed to take into account properly. Thus, at paragraph 53, it was stated that the Appellant had a lack of knowledge of Eritrea which led the judge to believe that he was not from Eritrea, but which grew essentially from matters that the Secretary of State had already identified in the refusal letter. At paragraph 54, the judge stated that having considered the explanations provided by the

Appellant, as emphasised by Mr Karnik of Counsel before him, he would still "reject his explanations". Thereafter, at paragraph 56, the judge decides that because the Appellant had refused to undertake a language analysis test he could not be Eritrean. However, there was confusion as to whether the Appellant did actually refuse. But in any event, by the time that he had taken advice from his solicitors, it had been made entirely clear that he was more than willing to take the test. Mr Karnik submitted that if one was coming from a country where one had a distrust of authority, one was not likely to accede to requests made by the authority for fear that these may amount to a trap, which had to be avoided at all costs. The Appellant's solicitors had for that reason written on 16th February 2017 to say that the Appellant was happy with the language analysis test.

13. For his part, Mr Harrison relied upon the Rule 24 response. He submitted that the conclusions arrived at by the judge were open to him. The judge gave adequate reasons for his findings. The adverse credibility findings were set out at paragraphs 53 to 54, but the judge had then gone on from paragraphs 56 to 61 to give additional reasons of his own, which are not based upon the adverse credibility findings reached by the Secretary of State in the refusal letter. Therefore, the judge had consistently explained throughout the determination why the Appellant was lacking in credibility.

14. In reply, Mr Karnik submitted that the judge had erred in failing to accept the letter from the Appellant's Eritrean community (at page 17 of the bundle) confirming that he was Eritrean. If they thought he was Ethiopian they would never have supported him in the way that they purported to do in this letter. In the same way, the letter from the Appellant's solicitor of 16th February 2017, which confirms what the Appellant had himself stated in his witness statement from paragraph 12 onwards, had been overlooked. Insofar as the judge had gone on to give further reasons from paragraphs 56 to 61 of the determination, having earlier concluded that the Appellant was lacking in credibility, at paragraphs 53 to 54, this could not suggest that his decision to adopt the conclusions of the refusal letter, had not infected the way in which he had approached the matter from paragraphs 56 to 61.

Error of Law

15. I am satisfied that the making of the decision by the judge involved the making of an error of law such that I should set aside the decision and re-make the decision. My reasons are as follows.

16. First, the judge did have his attention drawn to the solicitor's letter of 16th February 2017, but states that "it made no reference to A and there was no clue as to which asylum claim it related to. Unsurprisingly it was not on the Home Office file" (paragraph 27). It goes on to say that "it contained a series of disagreements" (paragraph 27). The letter of 16th February 2017, however, is from Broudie Jackson Canter (solicitors). It states that, "but it was the first opportunity our client has had to have had the contents of his asylum interview transcript read back to him via an interpreter". It ends

with the statement that they would wish to "highlight that the Appellant is willing to undertake a language analysis test should the Respondent want to still take this approach. We reiterate that the delay in bringing these matters to your attention were through no fault of the Appellant". It is trite that the Appellant is entitled to legal representation in a case which involves the exercise of "anxious scrutiny" and raises serious human rights concerns and those of protection under the Refugee Convention.

17. In the light of this letter of 16th February 2017, the judge erred in the conclusion that, "the credibility of his claim to be a genuine citizen of Eritrea is undermined by the fact that in his A1 he repeatedly refused to undertake a language analysis test to support his claim that he was from Eritrea" (paragraph 56). In cross-examination, the judge records the Appellant's answer which was that, "my memory is that I was asked whether I wanted the interview recorded not for a language test" (paragraph 56).

18. Whatever the position, the fact remains that the Appellant, having taken legal advice from specialist solicitors, was now more than willing to have a language analysis undertaken. Had the Appellant's proficiency in the Tigrinya language then been assessed, with respect to his claim that he was from Eritrea, this could have made a material difference to his claim that he was from Eritrea.

19. Second, the explanations given by the Appellant with respect to the answers that arose in the interview are arguably not simple disagreements. The letter of 16th February sets these out. I have also looked at the Appellant's witness statement (at pages 1 to 9) dated 1st March 2017. In this the Appellant (at pages 3 to 5) refers to the questions read back to him. For example, at question 38, the Appellant explains that he said "Bun" and not "Buna". He also said that "Suwa" is drunk too. At question 63, he explains that the festival is celebrated in Asmara, although he had never been to Asmara. He did not say that he had no knowledge of it. At question 64, with respect to the Eritrean ID card, he had described the colour of the card, the contents he had said were written in Tigrinya and Arabic, but he did not go into any further detail regarding what is contained in the ID. Otherwise, he explains he would have said that it contains the full name, date of birth, place of birth, date of issue, occupation, and a photo of the ID holder. At question 19, he had explained that he did not have documents such as an Eritrean ID, but he did have a birth certificate. At question 29, he had said that Sawa is found in Gash-Barka Region, and not Anseba Region. At question 31 he had said that there are no rivers that run through Barentu, but the nearest river is Gash River.

20. Where he was not clear about the question being asked, such as at question 33, he had told the interpreter that he did not understand it. At question 35 he had said that Fenkel is celebrated on 10th February, and it marks the freedom of Massawa, and this was a major fight for independence. Insofar as there was confusion about the Appellant being unable to name the nearest airport, he explains at question 36 that the

interpreter never used the word "port" and he instead asked the Appellant about the nearest "airport", and that is why his answers referred to airports. In relation to his marriage, the Appellant had at question 44 stated that his marriage was not registered with the local administration, but it was a family arranged marriage, and they had a cultural ceremony.

21. He was asked about directions of a town, and he explained at question 88, that he was not educated and was not good at directions. He did not say he did not know. One rather significant issue is that of the Appellant's work in Eritrea. The judge states that, "at one point, he said that he looked after cattle but he also said that *all* he did was plough" (paragraph 9). The interview notes, however, do not suggest that this is the case.

22. When he was asked at question 80, how he is aware of the animals that they had on the farm, he explains, "normally I help my father and we plough land during winter" (paragraph 80). He did not say that all that he did was plough the land. It is also not the case that he did not know the dialling codes. When he is asked at question 70 what the dialling code for Sudan is, he explains it is "249" at question 70. When he is asked what the dialling code for Barentu is, he explains that it is "291" (at question 71). When he is asked about what work experience he has, he answers "farming" (at question 12).

23. To conclude, it does seem that, given that "anxious scrutiny" has to be applied here, the combination of the Tribunal failing to take into account a clear offer on the part of the Appellant to undertake a language test in the letter of 16th February 2017 from his solicitors, which was the first opportunity that they had to go through his asylum interview transcript with the aid of an interpreter, with him; and secondly, the construction put on the answers that he gave during the interview answers in themselves (which one assumes must have been the reason which led the solicitors acting for him to immediately on 16th February 2017 suggest that the proper course of action for him was to offer himself forward for a language analysis test) means that there has been an error of law here. Both sides agreed that in this event, because the effect of the error had been to deprive a party before the First-tier Tribunal of a fair hearing or of an opportunity for the party's case to be put and considered by the Tribunal, that I should remit the matter back to the First-tier Tribunal under Practice Statement 7.2(a).

Re-making the Decision

24. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be heard by a judge other than Judge T Thorne, under Practice Statement 7.2(a).

25. An anonymity direction is made.

26. This appeal is allowed.

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 him or any member of his 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

Deputy Upper Tribunal Judge Juss 26th February 2018