



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04352/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 4th April 2019**

**Decision & Reasons Promulgated
On 18th June 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**EBT
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ross of Counsel, instructed by chambers of Iain Ross Solicitors

For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the Appellant's appeal against the Respondent's refusal of his protection and human rights claim dated 19 March 2018, following the finding on 18 February 2019 of an error of law in the decision of First-tier Tribunal Judge Hosie promulgated on 6 July 2018. The error of law decision is set out the annex to this decision, which sets out the background and procedural history, which will not be repeated herein unless necessary.

2. The Appellant claims to be a national of Eritrea who would be at risk on return there both as a Pentecostal Christian and also because he had exited the country illegally. The Respondent refused the application on the basis that it was not accepted that the Appellant was from Eritrea, but from Ethiopia; nor was it accepted that he was a draft evader nor a Pentecostal Christian. The Respondent did accept that Pentecostal Christians would be at risk in Eritrea but given that the Appellant was Ethiopian, he would not be returned to Eritrea or at risk there.
3. As set out in paragraph 18 of the error of law decision, it was found by the First-tier Tribunal that the Appellant had established that he was a Pentecostal Christian, that finding was not challenged by the Respondent and is preserved for the purposes of the appeal. The only outstanding issue remaining to be determined in the appeal is as to the Appellant's nationality. If the Appellant is found to be Eritrean, then the Respondent accepts that he would be at risk on return to Eritrea as a Pentecostal Christian. If on the other hand the Appellant is an Ethiopian national, it is accepted that he could safely be returned to Ethiopia.
4. In summary, in relation to nationality, the Appellant claims that he was born in Asseb (or Assab - the spelling differs between the evidence, witnesses and probably interpreters, but it is the same place and the difference in spelling is material, the version is used interchangeably in this decision depending on the source), an Amharic speaking area near the border in Eritrea in 1987, to Eritrean parents and as such is a national of Eritrea. He says that he moved to Ethiopia with his parents at the age of two and was deported back to Eritrea at the age of 11 in 1988, which was at the time of the border wars between Eritrea and Ethiopia. The Appellant claims that he is not an Ethiopian national, nor has he ever had any entitlement to recognition as such.

The hearing

5. The oral hearing before me proceeded by way of submissions only on behalf of both parties, there being no further evidence submitted by either party for the remaking of the decision. The evidence is therefore the same as that which was before the First-tier Tribunal, as recorded in paragraphs 14 to 16 of the decision of the First-tier Tribunal promulgated on 6 July 2018, as well as the oral evidence of the Appellant, Pastor [PM], Mr [AD], Mr [SF] and Mr [MT] recorded in paragraphs 18 to 42 of that decision. I set out further below the relevant parts of the evidence to the issue of nationality.

Documentary evidence

6. A letter dated 26 September 2016 from the Eritrean Community in Lambeth, signed by a Community Adviser confirms that the Appellant is an Eritrean national who has attended community meetings, health seminars, social gatherings and has used the services of the group. Assessment was made of the Appellant using elders with potential relevant knowledge of

Eritrea to discover family roots and the Appellant was questioned about his family history and those domiciled in Eritrea. The elders confirmed in this case that the Appellant's family came from Asmara and thus they authenticated the Appellant's Eritrean nationality. The Appellant was born in Assab, in which the Amharic language was widely spoken.

7. The bundle includes a Certificate of Birth showing registration of the Appellant, born in Assab, Eritrea and registered on 16 November 1999. The document bears official stamps, includes the Appellant's mother's name, date of birth, sex, birth time (albeit recorded by zeros) and the address. The Public Registration Office is of the Southern Red Sea Asseb and the document is also stamped from the Ministry of Foreign Affairs Consular & Community Dep.
8. There is a copy of proof of delivery from DHL dated 27 September 2016, showing a package to the Appellant from Asefa Tesfamichael in Asmara, Eritrea.
9. At the hearing before the First-tier Tribunal, the Home Office Presenting Officer handed up a document dated 21-24 October 2002, "Demographic Profile and Birth Registration Status of Eritrea"; authored by individuals from the Ministry of Justice, the National Statistics and Evaluation Office and UNICEF. On its face it is stated to be for the Kampala Workshop on Birth Registration. The document states that there is a transitional code of birth registration in selected urban areas only, which includes Assab, but in which birth registration is optional and not obligatory. It states that there is no mechanism more nor established institution that backs the birth registration system and its practice throughout the country. There is a draft civil code dealing with birth registration which indicates that a Birth Registration Certificate includes the name of the child: sex: date of birth: place of birth: parents' names, birth places, addresses and citizenship. The status or application of the draft civil code is not included in the paper but a recommendation made at the end that the establishment of a birth registration system is essential.

The Appellant's evidence

10. In his written statement finding dated 27 April 2018, the Appellant confirmed that he spoke both Amharic and Tigrinya, but was more comfortable with the former being the main language he grew up with and which was commonly spoken both in Assab and Addis Ababa.
11. So far as relevant to the remaining issue, the Appellant's oral evidence in cross examination and re-examination before the First-tier Tribunal was recorded in the decision of Judge Hosie as follows:

"19. In relation to the Eritrean birth certificate provided by the Appellant he was asked who registered his birth in 1999 and he stated that his father did. He stated that at that time they were living in Assab and that the reason the birth certificate was obtained at that time was that his father had a plan to go to

Sudan and that he needed a birth certificate in order to do this. He stated that the document was issued by the Assab registrar. He was asked if he knew which documents his father had to show in order to obtain this document and he stated that he did not know because he was young at the time. The Appellant was asked why he had not produced a birth certificate at his previous asylum appeal and he stated that it was because he could not get hold of his uncle. He stated that his uncle sent him this document via DHL at the end of 2015 and that his uncle is now in Asmara. The Appellant was asked how his uncle came to be in possession of his birth certificate and he stated that in 1999 he and his father stayed with his uncle until they went to Sudan.

20. The Appellant confirmed his parents were both born in Eritrea and that they lived in Eritrea until they moved to Ethiopia. He confirmed that his grandparents were also born in Eritrea though he never knew them as they died before he was born. He stated that he has other relatives in Eritrea including his uncle and his children and his aunt and her children.

21. The Appellant was asked if he had approached the Eritrean embassy in the UK to confirm that he was born in Eritrea. He stated that he did not because he was afraid for his safety. In relation to his visit to the Ethiopian embassy the Appellant was asked if he had an appointment. He stated that he did not and that he went there because the Home Office told him to go there. He stated that he spoke to a man who was the manager. He stated that he was given his business card with phone number and address and that he gave his business card to the Home Office.

...

25. The Appellant was asked when he and his father came back from Sudan and he stated that it was in 2010 and they went to live in Assab in their own house. He was asked if his uncle explained where he got the Appellant's birth certificate which he then sent to the Appellant. The Appellant stated that his uncle said he found it in his own house and that his uncle's house was about 30 minutes or so from his house."

Evidence of Mr [AD]

12. There are a number of letters available from Mr [D], who has been accommodating the Appellant since March 2016, including assisting him with making further representations to the Respondent. In the letter dated 26 June 2016 he states that he attended the Ethiopian embassy with the Appellant to at which the Appellant was told he could not apply for Ethiopian nationality without a birth certificate showing he was born in Ethiopia for the same evidence for his parents.

13. In a written statement signed and dated 27 April 2018, Mr [D] sets out the support and assistance is given to the Appellant since March 2016 and his experience of him having Eritrean friends, sharing stories of life at home in Eritrea and about the food and culture of Eritrea.
14. Mr [D] attended the hearing before the First-tier Tribunal and gave oral evidence in relation to the Appellant's attendance at the Ethiopian embassy, which was recorded as follows in the decision of the First-tier Tribunal:

"35. Mr [D] identified himself and his address and confirmed that his witness statement contained in the supplementary bundle was true and accurate. He asked that it be adopted as his evidence. Mr [D] confirmed that he is a solicitor by profession. He was asked what happened at the Ethiopian embassy. He stated that he travelled to the embassy with the Appellant who was living with him at the time and that they met [SF] from the night shelter. He stated that they took photographs as evidence of attendance as the Appellant had previously attended on his own. He stated that they went down to the basement and spoke to someone regarding how to apply for Ethiopian nationality. He stated that they were told to wait for an appointment and that they went into a room after a short wait. He stated that the Appellant was asked why he had come and he was asked if he had documentary evidence to show that he was Ethiopian. He stated that he did not and the person they spoke to stated that he did not know what the appellant thought they could do for him. The Appellant stated that he was born in Assab and the man I spoke to at the embassy told him there was nothing they could do for him without evidence that he is Ethiopian. The man at the Embassy gave them his business card. Mr [D] stated that the meeting lasted 20 to 30 minutes.

36. Mr [D] was asked why the appointment had been made prior to attending the Ethiopian embassy. He stated that there were told they would be able to attend and ask appointment on the day. He stated that they waited for half an hour for an appointment. He was asked if the Appellant had received anything in writing to state that he was not eligible for Ethiopian nationality and he stated that he did not as far as he was aware. Mr [D] was asked if the Appellant had approached the Eritrea embassy for confirmation of the nationality and he stated that he was not aware. He was asked how many times the Appellant had been to the Ethiopian Embassy and he stated that he did not know though the Appellant had been with him at once."

Evidence of Mr [SF]

15. Mr [F] is a project worker at the C4WS Homeless Project who has worked with the Appellant and who also attended the Ethiopian embassy with him and Mr [D]. In a letter dated 24 June 2016, he states that the Ethiopian

embassy had told the Appellant that there was no process for him to apply for Ethiopian nationality. Further confirmation of the same and of Mr [F]'s attendance at the Ethiopian embassy with the Appellant is given in a further letter dated 23 April 2018.

16. Mr [F] attended the oral hearing before the First-tier Tribunal and gave oral evidence, recorded in the decision of the First-tier Tribunal as follows:

"37. Mr [F] identified himself and his address and confirmed that his witness statement contained in the supplementary bundle was true and accurate. He asked that it be adopted as his evidence. In relation to the DHL envelope he referred to he was asked if he knew what had happened to it and he stated that he did not. He confirmed that he attended the Ethiopian embassy with the Appellant and Mr [D] where they were granted a meeting and were told that the Appellant would need a birth certificate or parents to confirm Ethiopian nationality. He stated that the Appellant said that he was born in Assab and as a result Ethiopian nationality could not be established at the embassy.

38. Mr [F] was asked why the Appellant was enquiring about Ethiopian nationality if he was Eritrean. He stated that this was what he was told to do by the Home Office and he was told to do take witnesses and that was why he himself attended. He stated that he supposed that the Appellant had to show that he was not Ethiopian. He was asked if the Appellant had an appointment and he stated that he could not remember. He stated that they went and asked if they could see someone and that the time was arranged. Mr [F] was asked if he knew if the Appellant had approached the Eritrea embassy to see if he could obtain Eritrean nationality and he stated that he did not know. He was asked if the Appellant had received anything in writing from the Ethiopian Embassy to confirm that he was not Ethiopian. He stated that he did not receive anything whilst he was there."

Evidence of Mr [MT]

17. In a letter dated 30 September 2016, Mr [T] states that he was born on 14 October 1967 in Asseb which is now part of Eritrea. He states that he knew the Appellant's family well when he lived in Asseb where they were neighbours and he went to celebrations for the Appellant's first birthday. He confirms the Appellant's birth in Asseb and the name of his parents.
18. In a written statement signed and dated 21 April 2018, Mr [T] confirmed that he is a Norwegian citizen who knew the Appellant, being a close friend of his parents and neighbour in Assab and he describes the property. Mr [T] was present at the Appellant's first birthday.
19. Mr [T] had contact with his mother in Assab at the end of 2013, when he heard that the Appellant's father had passed away and the Appellant was in prison. Mr [T] was able to get in touch with the Appellant in the United

Kingdom in the middle of 2016 through a pastor who he knew from Eritrea who had met the Appellant at a worship conference in London.

20. Mr [T] attended the oral hearing before the First-tier Tribunal and gave oral evidence in Amharic with the assistance of a court appointed interpreter. He is a Norwegian citizen, originating from Eritrea which he left for political and religious reasons. His evidence as recorded by the decision of the First-tier Tribunal was that his mother and sister are still living Eritrea and that he himself was born in Assab and lived there until 1989. His main language is Amharic but he did understand some Tigrinya. Mr [T]'s passport showed that his place of birth was in Ethiopia, but this was because at the time, Assab was part of Ethiopia and Eritrea only gained independence from Ethiopia in 1991.

Submissions

21. On behalf of the Appellant, Counsel relied on the skeleton argument prepared on 23 October 2018, which dealt with the issue of nationality in paragraphs 8 to 21.
22. In relation to the birth certificate, it was submitted that this was one piece of the jigsaw which together with the other to evidence taken in the round supports the Appellant's claim to be Eritrean. The address given on the birth certificate is consistent with the Appellant's birth in Assab and the wider evidence. The details even on the certificate comply with most of what the Respondent says are the relevant requirements, although it could not be explained as to why only the Appellant's mother's details had been included when on the Appellant's claim, she had died prior to the date of registration and there was no evidence as to who registered the birth in 1999. In addition, the Appellant has given detailed evidence, supported by other witnesses who have been found to be credible, of the circumstances of receipt of the birth certificate. There is no obvious reason why the Appellant would forge a birth certificate at this point.
23. In any event, there is evidence from Mr [T] that he knew the Appellant as a baby in Eritrea and supported by the evidence of Mr [D] as to the effect on the Appellant when he was first reunited with Mr [T]. In addition, there was written evidence from the Appellant's cousin, a recognised refugee from Eritrea, who identified the family connection and the slight difference of spelling of the name is immaterial as to credibility.
24. The Appellant was found to be credible in relation to his claim to be a Pentecostal Christian, is supported by other witnesses who have been found to be credible by the First-tier Tribunal and taking everything in the round, it was submitted that the Appellant has established to the lower standard of proof applicable in asylum claims that he is an Eritrean national and therefore at risk on return.
25. On behalf of the Respondent, Ms Isherwood took issue with the authenticity of the birth certificate relied on further relied on the reasons

given in the refusal letter. It was noted that the Appellant had not given any evidence on how his birth was registered, and if this was by his father, why his details were not included on the certificate. In the reasons for refusal letter, the Respondent stated that there had been a delay in the Appellant producing his birth certificate, no explanation as to why it had not been relied upon earlier and in any event there is nothing to show that this is a birth certificate which meets standard requirements in Eritrea. The document was printed on plain A4 commercially available paper and did not contain any security features or watermarks with no objective supporting evidence to show its genuineness. Overall it was not accepted as a genuine document.

26. In relation to the letter from the Eritrean Community in Lambeth, it was submitted that the letter contained a lack of explanation and detail as to how it was assessed that the appellant was from Eritrea and confusion within the letter as to whether his family was from Asmara or Assab. Although there are a number of people supporting the Appellant, their evidence is largely based upon information that he himself has given them and their credibility can only be as to the belief of the Appellant. It was further noted that the Appellant's cousin did not attend the oral hearing to give evidence.
27. Overall it was submitted on behalf of the Respondent that the Appellant's claim to be Eritrean was not established to the lower standard of proof in his appeal should therefore be dismissed as he would not be at risk on return to Ethiopia as an Ethiopian national.

Findings and reasons

28. The only remaining issue in this appeal is as to the Appellant's nationality, whether he is an Eritrean national (who would thus be accepted as at risk on return to Eritrea as a Pentecostal Christian) or whether he is an Ethiopian national and therefore not at risk on return to Ethiopia (it being accepted that Pentecostal Christians are not at risk in Ethiopia).
29. Although issue can and has legitimately been taken against some of the evidence relied upon by the Appellant, in particular the birth certificate relied upon, taking all of the evidence in the round, I find that the Appellant has established to the lower burden of proof applicable in asylum claims that he is an Eritrean national for the following reasons.
30. First, there is written and oral evidence from Mr [T] who gave a consistent account of knowing the Appellant at the time of his birth in Assab and of knowing the Appellant's parents, being one of their neighbours. Aside from a query about a reference to him being born in Ethiopian, which has been fully explained by the history of the independence of Eritrea, there is no substantive challenge to the credibility of Mr [T] or his evidence. Mr [T] is now a Norwegian citizen,

having been granted asylum in Norway. I find his evidence to be credible and supportive of the Appellant's claim.

31. Secondly, there is written evidence from the Appellant's cousin who also attests to the Appellant's nationality and their family connection. He is also a refugee from Eritrea, having been accepted as such by the Respondent. There is no substantive challenge to the credibility of this evidence, although I do note that the Appellant's cousin did not attend to give oral evidence before the First-tier Tribunal, nor before me, such that his evidence could not be tested in cross-examination and therefore carries less weight
32. Thirdly, the Appellant has made a consistent claim, both in relation to nationality and his religion, with no significant inconsistencies nor issues of plausibility raised as to his claim. He has been found to be credible in relation to being a Pentecostal Christian by the First-tier Tribunal, a preserved finding within the appeal.
33. Fourthly, the Appellant speaks Amharic and there is supporting background evidence that this is common in Asseb, near the border between Eritrea and Ethiopia. There is nothing about the Appellant's primary language to undermine his claim.
34. Fifthly, in relation to the birth certificate, there was a lack of background evidence from either party as to the system of registration of births (if any) at the time of the Appellant's birth and its registration and nothing to suggest the draft civil code from the document produced for a workshop in 2002 was in force at either date. There is limited evidence available supporting the issue of birth certificates in English and although it lacks any clear security features and details about, for example, who registered the birth or father's details which would be common in other jurisdictions, there is nothing to suggest that these were common or required features within Eritrea at the relevant time. There is limited background evidence from the Respondent showing that even in 2002 there was no compulsory system of registration of births, with no clear mechanisms or system in place for registration. In these circumstances, whilst concerns can legitimately be raised about the genuineness of the birth certificate, there is little objective basis to substantiate those concerns. In these circumstances, I attach some weight to the birth certificate in the Appellant's favour that he was born in Asseb in Eritrea.
35. Sixthly, although I attach little weight to the letter from the Eritrean Community in Lambeth given the lack of detail as to who assessed the Appellant as Eritrean and how they did so, it does lend limited support to the Appellant's claim.
36. Finally, the other witnesses who gave supporting evidence before the First-tier Tribunal were all found to be credible by Judge Hosie and their evidence, albeit in part limited to what the Appellant has told them, is entirely consistent with his claim and supportive of it.

37. For all of these reasons and to the lower standard of proof applicable in asylum claims, I find that the Appellant is an Eritrean national and on the accepted basis that he would be at risk on return to Eritrea as a Pentecostal Christian, his appeal must be allowed on asylum grounds.
38. For completeness, although there were significant discussion before the First-tier Tribunal and at error of law stage before the Upper Tribunal as to the applicability or otherwise of the country guidance in MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289 and ST (Ethnic Eritrean - nationality - return) Ethiopia CG [2011] UKUT 00252 (IAC), neither party relied upon either case in the latest oral hearing. I do not find that either case is in fact relevant to the Appellant's claim or its determination, both of which deal, in different ways, with the situation of a person who had or could acquire Ethiopian nationality based on their residence in Ethiopia before and after Eritrea's independence, continuing through the border wars and up to the 2004 directive.
39. There has been no substantive challenge to the chronology set out by the Appellant as to the dates on which he resided in Ethiopia and Eritrea, nor that he was deported from Ethiopia to Eritrea around the time of the border wars. There is also no suggestion that the Appellant is a person who has been denied Ethiopian nationality because of events around that time, it is only his case that he is not and has never been an Ethiopian national nor entitled to Ethiopian nationality. Given the findings above which support the Appellant's credibility, there is no reason to find that either of the country guidance decisions are applicable in his case and in any event, at its highest, the decision in ST is in his favour.

Notice of Decision

For the reasons set out in the error of law decision contained in the annex, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The decision on appeal is remade as follows:

The appeal is allowed on asylum grounds.

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 their 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.

A handwritten signature in black ink, appearing to read 'E. Jackson', with a long horizontal flourish extending to the right.

Signed

Date 13th June 2019

Upper Tribunal Judge Jackson

ANNEX



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04352/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20th December 2018**

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**EBT
(ANONYMITY DIRECTION MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ross of Counsel, instructed by Iain Ross Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission the decision of First-tier Tribunal Judge Hosie promulgated on 6 July 2018, who dismissed his appeal against the Respondent's refusal of his protection and human rights claim dated 19 March 2018.
2. The Appellant claimed that he was at risk on return to Eritrea as a Pentecostal Christian and also because he had exited from the country illegally. The Respondent refused the application the basis that it was not

accepted that the Appellant was from Eritrea, nor was he a draft evader, nor a Pentecostal Christian and therefore would not be at risk on return to Eritrea or Ethiopia. It was however accepted by the Respondent that Pentecostal Christians would be at risk in Eritrea, just that on the facts, it was not accepted that the Appellant was from Eritrea.

3. Judge Hosie dismissed the appeal in a decision promulgated on 6 July 2018 on all grounds. In summary, the First-tier Tribunal did not accept that the Appellant was an Eritrean national and although the evidence relating to his religion was considered to be more persuasive, a Pentecostal Christian would not be at risk as such in Ethiopia.

The appeal

4. The Appellant appeals on five grounds as follows. First, that the First-tier Tribunal misdirected itself in law as to the relevance of the decision in MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289 and should have instead applied the country guidance case of ST (Ethnic Eritrean - nationality - return) Ethiopia CG [2011] UKUT 00252 (IAC). Secondly, that the First-tier Tribunal misdirected itself as to whether in law, the Appellant was obliged to have approached the Eritrea embassy for confirmation of his nationality. Thirdly, the First-tier Tribunal failed to make clear findings on the core issues in the case, including as to the reliability of the Appellant's birth certificate, as to the Appellant's religion and the assessment of the evidence from the Church. Fourthly, that there was procedural unfairness in findings being reached on matters which were not put to the Appellant and other witnesses at the appeal hearing. Finally, the First-tier Tribunal erred in its findings in relation to the birth certificate which were made without evidence as to the nature of such documents in 1999.
5. At the oral hearing, Counsel for the Appellant relied on his skeleton argument and made oral submissions in accordance with that and the original grounds of appeal. On the nationality issue, it was submitted on behalf of the Appellant that the First-tier Tribunal wrongly applied the case of MA (Ethiopia) which was not applicable to his circumstances, as appears to have been recognised by the First-tier Tribunal itself in paragraph 66 of the decision. The Appellant claims to have been born in Asseb, an Amharic speaking area near the border in Eritrea in 1987 to Eritrean parents and has never made a claim to Ethiopian nationality. He moved to Ethiopia with his parents at the age of two and was deported to Eritrea at the age of 11, in 1998, at the time of the border wars and after the independence of Eritrea. This is not a case such as in MA (Ethiopia) where a person has claimed to be an Ethiopian national but has been deprived of Ethiopian citizenship, to which evidence of them attempting to establish the same with the Ethiopian authorities would be highly relevant. Instead, the First-tier Tribunal should have applied the country guidance case of ST which more directly considered the situation of a person who had been deported from Ethiopia after the border wars and which found that that such a person would have significant difficulties establishing Ethiopian

nationality. Counsel for the Appellant could not confirm whether that case had specifically been relied upon at the First-tier Tribunal hearing, but in any event submitted that as a country guidance case it should have been applied.

6. A further ground of challenge is against the findings made by the First-tier Tribunal that the Appellant had in essence not done everything he reasonably could to support his claimed nationality and in addition, the First-tier Tribunal fell into error in criticising the Appellant for not approaching the Eritrean embassy for confirmation of his Eritrean nationality. In circumstances where the Appellant claims a fear of persecution from the Eritrean authorities, this is unreasonable.
7. In relation to the evidence before the First-tier Tribunal as to the Appellant's nationality, the Appellant relied on a range of evidence as to his nationality, including a birth certificate, with no background evidence to suggest that there were any security features missing from the same and in circumstances where supporting witness evidence of it being sent to the United Kingdom was considered to be credible. The First-tier Tribunal took a number of points against some of the witness evidence which were not raised at the oral hearing and no opportunity to was given to respond to these points. These included, for example, how one of the witnesses knew that the Appellant cooked Eritrean food, details about the Appellant's wife and further details such as photographs or addresses from one of the witnesses as to the situation in Eritrea in the late 1980s and as to why the Appellant had not obtained his Eritrean ID card from his uncle.
8. On behalf of the Respondent, it was submitted that the onus was on the Appellant to prove his nationality to the lower standard and in this case the First-tier Tribunal properly considered all of the evidence and found that that burden had not been met. The starting point of the previous First-tier Tribunal decision in 2015 was emphasised, as well as the Appellant's linguistic background and obvious concerns as to the genuineness of the birth certificate were relied upon. It was further submitted that the case of ST was of no assistance to the Appellant as it concerned Eritreans who had been deported from Ethiopia which the Appellant had not claimed.
9. As to whether the Appellant should have approached the Eritrean authorities, it was submitted on behalf of the Respondent that on the present facts it was not necessarily a question of risk for the Appellant going to the Eritrean embassy, but a practical step of availing himself of asking authorities to confirm the facts he relies upon. In conclusion it was submitted that the First-tier Tribunal had reached a lawful conclusion on the evidence before it that the Appellant was not an Eritrean national and as such, he would not be at risk on return to Ethiopia.

Findings and reasons

10. As to the grounds of appeal in relation to the Appellant's religion, there was no dispute between the parties that the First-tier Tribunal had made positive findings that the Appellant was a Pentecostal Christian even if there was no express finding to this effect in conclusion. In particular, the evidence given by the Pastor on behalf of the Appellant was found to be credible, the First-tier Tribunal accepted that there had been an error in the earlier First-tier Tribunal decision in 2015 about the type of church that the Appellant had previously attended and in paragraphs 84 and 89 of the decision, the Appellant's evidence as to his religion appears to have been found credible as well. When reading the decision as a whole, it is clear that the First-tier Tribunal did find that the Appellant is a Pentecostal Christian and although it would of course have been better for this conclusion to have been more expressly stated, there is no material error of law for failure to make a finding on this key issue. The key issue in this appeal remains as to the assessment of the Appellant's nationality.
11. The remaining grounds of appeal in relation to nationality are to some extent intertwined and overlapping and which together challenge the approach of the First-tier Tribunal to the evidence and what can reasonably be expected of the Appellant in circumstances such as the present case.
12. The First-tier Tribunal's decision refers to the starting point being the previous decision wherein it was found that the Appellant was not an Eritrean national. The Appellant's evidence, supported by two witnesses, as to his approach to the Ethiopian Embassy is set out in paragraph 66 of the decision, including a recognition that the Appellant's claim is that he is not Ethiopian and neither were his parents. The Judge then states, *"notwithstanding that I note he could still have applied for Ethiopian nationality if he had been resident in Ethiopia at the time of Eritrea receiving at independence. The Appellant's account is however that he and his father left Ethiopia prior to that. If he was not born in Ethiopia then MA (Ethiopia) may not assist him. However, I note that there is no evidence that he showed his Eritrean birth certificate to the official at the Ethiopian embassy nor that there was any detailed discussion of dates when the Appellant lived in Ethiopia or in relation to Eritrean independence. The evidence presented in relation to this visit is therefore of limited weight to the Appellant's claim to be Eritrean."*
13. Although the First-tier Tribunal needed to assess all of the evidence as to nationality in the round, the passage in paragraph 66 set out above makes no clear findings as to the Appellant's claim as to where he was born or when he left Eritrea before applying for specific country guidance. In this paragraph it is only noted what the Appellant's account was and that on that basis MA (Ethiopia) may not assist him. Such findings are however required to determine whether MA (Ethiopia) is relevant at all to this Appellant, or in the alternative whether the country guidance case of ST, whether or not expressly relied upon before the First-tier Tribunal, was applicable. There is a fundamental, and in the context of the facts in this case very important, distinction between the issues which arose in MA

(Ethiopia) which broadly dealt with cases of disputed nationality but more specifically, once a person was accepted as a *de jure* national of the state, a second stage of analysis is engaged as a factual question as to whether it would be reasonably likely that the authorities of the state concerned would accept the person if returned as one of its own nationals. In that context, the Court of Appeal in paragraph 50 set out that where the central issue before the Tribunal was whether someone will or will not be returned, an applicant is required to act *bona fide* and take reasonably practicable steps to seek to obtain the requisite documents to enable them to return and in that case whether the authorities will permit a person to return, i.e. whether they will issue the required documents to enable this.

14. In contrast, in the case of ST, much wider issues about the practices of the authorities in Ethiopia as to nationality and the availability of Ethiopian nationality to those of Eritrean descent were considered and country guidance given. In particular, the country guidance included that “*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.*”. Further guidance is given on the circumstances in which a person may be able to reacquire Ethiopian nationality.
15. In the findings made against the Appellant which follow paragraph 66, albeit without express reference to MA (Ethiopia), it is apparent that it has been applied, together with paragraph 339L of the Immigration Rules, and held against the Appellant that he has not done more to establish his claim to Eritrean nationality (see paragraph 89 in particular) and should have presented more detail to the Ethiopian embassy, as well as approach the Eritrean embassy directly. This is a material error of law which infects the factual findings about the Appellant’s nationality. It is necessary for the First-tier Tribunal first to make appropriate findings of fact and apply the relevant country guidance to those facts as part of the overall assessment of the evidence as to the Appellant’s nationality. In the present case the First-tier Tribunal simply failed to do so. This was not clearly a case which fell into the ambit of MA (Ethiopia) without clear findings that the Appellant was a *de jure* national of Ethiopia and instead the First-tier Tribunal applies the reasoning in MA (Ethiopia) in a somewhat circular fashion to support findings as to nationality. This amounts to an error of law and as such it is necessary to set aside the decision of the First-tier Tribunal. It is clear that the error could have a material impact on the outcome of the appeal.
16. As I have found an error of law in relation to the applicable country guidance to this case which requires the decision of the First-tier Tribunal to be set aside, it is not necessary to consider in as much detail the remaining grounds of appeal as to the First-tier Tribunal’s approach to the

evidence on nationality, as the issue will need to be considered de novo in the remaking of this appeal. However, I do find a further error of law in the decision of the First-tier Tribunal in relation to the consideration of the birth certificate produced by the Appellant, on which no clear findings made as to its genuineness and the concerns raised about it are without evidential foundation. Although it is for the Appellant to prove his case to the appropriate standard, the First-tier Tribunal has in paragraphs 71 and 72 considered that the Appellant could have derived assistance in relation to his birth certificate or ID documents from family members or the wider Eritrean community, without these matters being put to the Appellant.

17. In relation to the birth certificate itself, in paragraph 73, the Respondent's concerns as to the lack of security features in the birth certificate are noted, without any background evidence as to what would be expected of such a document and simply with a conclusion that the Appellant had been unable to counter the Respondent's concerns. These concerns were not however raised in the reasons for refusal letter and it is not clear that the Appellant has had any proper opportunity to respond to them.
18. For the reasons already set out, the First-tier Tribunal's decision contains errors of law in relation to the assessment of the Appellant's nationality such that it is necessary to set aside the decision. The findings in relation to the Appellant's religion that he has established that he is a Pentecostal Christian (although as above, not made as expressly as would be preferable) are not challenged by the Respondent and are preserved.
19. At the oral hearing, Counsel for the Appellant submitted that if an error of law is found and the decision to be remade on nationality only, it was not expected that any new evidence would be relied upon and a preference was expressed that the appeal is retained within the Upper Tribunal to remake the decision under appeal. I agree that that is appropriate in accordance with the relevant Practice Statement and reserve the appeal to be relisted on the first available date before UTJ Jackson.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

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 their 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.

Directions

The appeal is adjourned to be relisted in the Upper Tribunal before UTJ Jackson on the first available date with a time estimate of 1.5 hours.

Signed
Upper Tribunal Judge Jackson



Date 11th February 2019