Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Dawit Mehari

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Perkins

Application for judicial review: substantive decision
AMENDED PERSUANT TO RULE 42 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008.

Having considered all documents lodged and having heard the parties' respective representatives, Ms G Ward of Counsel, instructed by Joint Council for the Welfare of Immigrants on behalf of the Applicant and Mr M Aslam of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 16 September 2019.

Decision: the application for judicial review is granted

(1) For the reason given in the extempore judgement appended hereto I find that the respondent should not have decided on 6 February 2019 that the applicant's further submissions are not a fresh claim.

Order

(2) I therefore make an Order quashing the Respondent's decision dated 6 February 2019.

Costs

(3) The Secretary of State shall pay the applicant's costs of this application subject to assessment and Civil Legal Aid Regulations of 2013.

Signed: **Upper Tribunal Judge Perkins**

Dated: **30 March 2020**
Re Dated: **4 May 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3.

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/2438/2019

Field House,
Breams Buildings
London
EC4A 1WR

16 September 2019

THE QUEEN
(ON THE APPLICATION OF)
DAWIT MEHARI

Applicant

and

THE SECRETARY OF STATE FOR HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PERKINS

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Ms G Ward, instructed by Joint Council for the Welfare of Immigrants appeared on behalf of the applicant.

Mr M Aslam, instructed by the Government Legal Department appeared on behalf of the respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE PERKINS:

1. This is a challenge to a decision of the Secretary of State on 6 February 2019 that the applicant's further submissions are not a fresh claim. The applicant has on an earlier occasion sought asylum in the United Kingdom. It was the basis of his claim that he was an Eritrean who would be persecuted in the event of return to Eritrea. It is also right that he was disbelieved in very emphatic terms when he appealed the decision of the Secretary of State refusing his application.

2. The further submissions leading to the decision presently complained of were based on different facts. They were based on his alleged attempt to assert Ethiopian nationality being frustrated by the Ethiopian Embassy refusing to entertain his application for a passport.

3. I have been reminded, and I remind myself because it is important, that my function here is to determine the rationality of the decision of the Secretary of State on the material that was before her when the decision was made. The important matter in this case, the area of dispute, is whether the Secretary of State was entitled to conclude that the applicant had raised a hopeless case, and that is that no independent decision-maker might have reached a different conclusion on the same facts. I do not think it is asserted that the decision in all respects is inherently irrational in the sense that it was not open to the Secretary of State to make it. The dispute is whether it was right to say that it could not be a fresh claim.

4. The important part of the decision letter is set out on page 171 in the bundle. It refers to the case of **ST (Ethic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 00252 (IAC)** and then continues:-

> "It is not accepted that you have demonstrated that you have taken all reasonable steps to re-document yourself. You state that you attended the Embassy, which you have included as part of your submissions, but you have provided no response or proof that it was ever considered by the embassy. Within Miss Tanin's statement she states that you both attended the embassy but she was told there was no person available to deal with your application and that you should come back the next day. You have provided no evidence that you returned to the embassy. Therefore, it is not accepted from the information you have provided demonstrates that you have made all reasonable attempts to be re-documented by the Ethiopian embassy. You have not provided any letters from the embassy stating that your claim has been rejected or that they see you as a 'foreigner'. Any official applications will have a paper trail and you have not submitted this, so it cannot be seen you have done all you can to re-document yourself at the Ethiopian Embassy."

There are really two points there. The second is there is

no documentary trail confirming any attempt to re-assert nationality. Ms Ward dealt with this in appropriately withering terms. The whole essence of the complaint is that the Ethiopian Embassy would not engage with the application. That contention by the Secretary of State really is profoundly unhelpful.

5. I am more taxed by the first point which is that, in the opinion of the Secretary of State, the applicant has not done all that he could have done to establish his nationality. The test that there must be all reasonable steps taken is, in my judgement, an entirely appropriate summary of the law. The interesting question is whether what has happened here can be described as "all reasonable attempts" or not.

6. The way it is put in the paragraph that I have just set out makes the position clear. It is that there is more that could be done. The applicant could have gone back the next day as he was instructed to do. The applicant said today that he did not have the resources to go back the next day but that was never put to the Secretary of State and Ms Ward was reduced to suggesting that it should have been obvious to the Secretary of State because of the funding commitments. I do not accept that there is merit in that.

7. What I am not happy about is whether the summary given in that letter is in fact a fair summary of what happened. I make it plain that when I first read the papers I was attracted to that argument. Looking at it again it seems rather different. The applicant has the difficulty of being profoundly disbelieved and it is therefore entirely appropriate that he based his case not on what he set out to the embassy but on what is said by somebody who could be trusted and certainly a caseworker with the Joint Council for the Welfare of Immigrants is somebody who I would trust completely. She says there were some difficulty getting into the embassy and she had to vouch for the identity of the applicant before they were allowed into the embassy. I do not think very much follows from this but this is a record of what happened on that occasion and it certainly does not follow from that that the presence of a particular representative from the Joint Council for the Welfare of Immigrants is a necessary prerequisite to entering the embassy. The fact is they both got into the embassy.

8. She then introduced herself as a person who appeared to be the appropriate employee and then there was a conversation. The first thing, according to paragraph 10, is that she was told that the manager was not there to deal with the application and that they should return the next day. However matters do not stop there. According to Ms Tanin's statement she, as would be expected, reminded or drew to the attention of the person dealing with her that they had made previous enquiries and were told that no appointment was necessary and that they should just turn up, which is

precisely what they had done.

9. That was an invitation for further explanation from the embassy. The embassy could have said, for example, “well that is normally right but the appropriate person just isn’t here today. You are unlucky, come back”, or some explanation of that kind. But that is not what is recorded. What is recorded is a change of tack by the embassy. The embassy official then said not “come back tomorrow” but “we can’t deal with this” and there is a further reference to “he has to go to immigration”. I do not know what that means. It was said in a speculative submission that it might be a suggestion that it was thought that there was some return scheme that had to be engaged but that does not get anybody anywhere. The fact is we do not know.

10. But what is clear on Ms Tanin’s evidence is that she was told “we can’t deal with this” and then was told to leave the embassy. It is regrettable with the benefit of hindsight, which is always a great counsellor, that Ms Tanin did not press further and asked if there any point in coming back tomorrow. The answer to that could have been determinative of this application but the question was never asked.

11. I am not satisfied from reading this that the only possible construction of these events is that the applicant did not do all that could have been done. I am satisfied from reading this that it is possible that a properly directed judge would take the view that this was somebody not being invited to return on a third occasion but fobbed off by the embassy, and in that event it seems to me possible for a judge to decide rationally that the person has tried to assert his Ethiopian nationality unsuccessfully. It follows therefore that I grant judicial review in this case.

Order

12. I therefore make an order quashing the respondent’s decision dated 6 February 2019.

Costs

13. The Secretary of State to pay the applicant’s costs of this application subject to assessment and Civil Legal Aid Regulations of 2013. ~~~~*0*~~~~