



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

Appeal Number: PA/11055/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 19 March 2019**

**Decision & Reasons Promulgated
On 22 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**NNY
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Barnfield, instructed by Halliday Reeves

For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born in 1997 and is a male citizen of Ethiopia. In June 2012, the appellant came to London to carry the Olympic torch on behalf of Ethiopia. It was intended that he would return to Ethiopia the following day. He did not do so but instead absconded and claimed asylum. His application was refused by the Secretary of State by a decision dated 31 October 2013 and a subsequent appeal before Judge Garratt was dismissed. The appellant made further submissions supported, in particular, by an expert report prepared by Mr David Seddon. The Secretary of State refused this fresh claim for asylum by decision dated 9 October 2017. The appellant appealed to the First-tier Tribunal (Judge

O'Hagan) which, in a decision promulgated on 1 December 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appeal turns on the judge's treatment of the expert report. In a thorough and lucid analysis, the judge concluded [23] that the expert's analysis and conclusions were:

"... so fundamentally flawed that no reliance can be placed upon them. It is not open to me to disregard those experts of his report which specifically canvass the possibility that Judge Garratt might be wrong last relying on the remainder it is clear that the belief that this might be so infests the report as a whole, permeates it to such a degree that it cannot be relied upon. In short, he has failed in his duty as an expert to respect judicial findings."

That conclusion of the judge lies at the very heart of the issue between the parties before the Upper Tribunal.

3. What most concerned the judge regarding the expert's report, as mentioned in the passage quoted above, was the willingness of the expert to disagree with and to disregard the findings of a judicial decision-maker. It is not in dispute that the expert did, as Mr Barnfield, who appeared for the appellant, accepted 'overstep the mark' in his report at 7.6 and 7.8. The expert posits the suggestion that the 'asylum determination' and Home Office refusal letter might be wrong, that the appellant was not, as the judge found, an economic migrant but 'someone who genuinely and with good reason feared that he would be at risk because of his imputed political beliefs and his association with his father's political activities' thereby directly contradicting findings by the Tribunal (which had not been successfully challenged on appeal), namely that the appellant had fabricated his claim regarding his father's political opinions and that the appellant himself would have no opposition political opinions imputed to him.
4. I agree with many of the judge's criticisms of the expert for the reasons that he has given. I agree that the expert has, quite wrongly, treated the views of the Secretary of State expressed in the refusal letter and the judicial findings of the First-tier Tribunal as if they carry the same weight. The question is whether the flaws in the expert's report entitled the judge to reject everything which the expert said. In other words, were the various observations and conclusions of the expert severable and discrete or did the flaws in the report inevitably corrupt the reliability of the entire report.
5. In my opinion, expert evidence can be distinguished from evidence of fact in this regard. A witness of fact who is found to have given untruthful or inaccurate evidence may well find the judge cannot rely in consequence upon anything which he or she may say. The same is not necessarily true of an expert witness who is giving opinion evidence. I acknowledge that sometimes an expert report may be so partisan as to forfeit any claim to

objectivity. However, it does not necessarily follow that, simply because a judge rejects an expert's opinion on one matter, an entire report is rendered unreliable. In part, this is because of differing motivation; an expert witness is unlikely to have any reason to tell deliberate lies whilst a witness of fact may seek to gain by doing so. In part, it is because of the different natures of factual and opinion evidence. For example, an expert may offer an opinion on the matter outside the limits of his or her expertise. By doing so, it does not follow that matters within an expert's expertise should also be rejected. A good example of that principle occurs in Dr Seddon's report at 7.11 and 7.12:

"7.11 From this we see that it is not only political leaders and high profile opposition activists but also supporters of opposition parties that are arrested, detained and allegedly ill-treated; we also see the family members and friends of those suspected of being involved in political opposition activities at home and abroad are kept under surveillance and the 'government also regularly monitors and records telephone calls, particularly international calls, among family members and friends.' N has kept in contact with his parents in Ethiopian by telephone and it is entirely plausible that these conversations have been monitored, given his defection (about which the Determination seemed convinced the Ethiopian authorities would have been aware) and his father's alleged political activities.

7.12 It seems to be highly likely that N will be questioned on his return by the Ethiopian authorities as to the reasons for his having left the country, claimed asylum abroad and having been sent back as this is known to be routine practice. It is entirely plausible (given that he would presumably be travelling on his own passport issued in 2012 with the assistance of UNICEF) that he will be identified -either before he arrives on his return-as the high-profile young man sent in 2012 to represent Ethiopia is a torchbearer in the pre-Olympic games relay, who defected the day after he ran."

6. At 7.11, the expert repeats his disagreement with Judge Garratt as to the genuineness of the appellant's claim that his father was involved in opposition politics in Ethiopia. In consequence, it is not 'entirely plausible' that conversations between the appellant and his family would have been monitored. Here, the expert's opinion is indeed tainted and rendered unreliable by his unwillingness to accept the facts as found by Judge Garratt. At 7.12, however, the expert offers an opinion which is not only untainted but is consistent with the findings made by the Judge O'Hagan. It is helpful, for example, for the expert to be able to use his knowledge of Ethiopia to indicate that questioning of returnees is a routine practice. In my view, Judge O'Hagan went too far at [23] in finding that the entire report of the expert was so flawed that no reliance could be placed upon it.
7. The question which remains is whether the judge's conclusions at [29-30] survive his error in rejecting the entirety of the expert report. In summary, the judge considered that it was 'realistic to suppose that the appellant's activities would be known to the Ethiopian authorities.' He acknowledges that the Olympic Games were a high-profile event that the appellant's personal role and his disappearance also attracted publicity. Further, the

judge found that ‘the appellant would have to return to Ethiopia using the passport that he used to enter the United Kingdom. He would have to pass through border control. His name might be on a stop list or might be remembered by border officials. There must, at the least, be a real possibility that he would be stopped and questioned.’ The judge goes on to find that the appellant would be likely to lie and dissemble ‘as freely with the authorities in Ethiopian as he has with the authorities in this country.’ Given that the appellant’s claimed political views of fabricated, he could be expected to be ‘less than frank’ with the Ethiopian authorities, to use the expression used in *TM (Zimbabwe)* [2010] EWCA Civ 916, an authority upon which the judge relies. The judge went on to find that the opportunistic nature of the appellant’s conduct in the United Kingdom would be apparent to the Ethiopian authorities. The appellant’s defection was, the judge found, ‘a high-profile act, but not a political one.’ The judge found that, ‘the evidence, including the country guidance, does not support a finding that the government would view [his defection] as a political act as opposed to one undertaken for economic reasons.’

8. In my view, the judge’s conclusions can be reconciled with those opinions of the expert which are severable from his disagreements with the previous Tribunal decision. Whilst the expert found that the Ethiopian authorities would regard the appellant’s conduct as a slight to Ethiopia, the judge concludes that, whilst those same authorities would be well aware what the appellant had done, they would be equally aware that his actions were not political but opportunistic and most likely economically motivated. When one removes from the expert’s conclusions his incorrect view that the appellant (and his father) have political profiles in Ethiopia, then his conclusions at 7.12 can be reconciled with the judge’s assessment of risk on return. In so far as the views of the judge and the expert differ, I find that it was open, on all the evidence and by reference to the findings of the previous Tribunal, for the judge to reach the conclusion that the appellant would not be at real risk on return. Consequently, I find that any legal error into which the judge has fallen by rejecting the entirety of the expert report is not material to the outcome of the appeal.

Notice of Decision

9. This appeal is dismissed.

Signed

Date 20 March 2019

Upper Tribunal Judge Lane

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.