Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11217/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 5 August 2019	**On 15 August 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MISS Z S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr W Khan, Counsel, instructed by Fountain Solicitors (Walsall)
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who claims to be a national of Eritrea, has permission to challenge the decision of Judge Fowell of the First-tier Tribunal sent on 6 December 2018 dismissing her appeal against the decision made by the respondent on 14 August 2018 refusing her protection claim. The respondent noted in the refusal decision that "... it is accepted that you come from Egypt" (paragraph 25) and took the basis of the appellant's

claim to be that on return to Egypt she would not have anywhere else to stay and would not be able to afford her medication.

2. The respondent noted that the appellant stated that whilst in Egypt she had accepted a job from a princess to work for her as a servant and had been granted entry clearance to accompany the princess to the UK. The respondent noted further that the appellant claimed that once in the UK she had been forced to work against her will. The respondent observed that the National Referral Mechanism (NRM) had decided on 6 July 2018 that she was not a victim of trafficking or slavery, servitude or forced/compulsory labour. The respondent concluded that "[d]ue to your responses in your asylum interview and the inconsistencies in your account, it has been rejected that you were forced to work against your will" (paragraph 32).

3. In her grounds of appeal the appellant stated inter alia that "I have been the victim of trafficking" and that "I am an Eritrean national. I would be seen as evading military service". The judge considered that "[t]he essential question here is simply her nationality ..." (paragraph 8). At paragraphs 22-32 the judge addressed the appellant's representatives' submissions that the appellant was a national of Eritrea, not Egypt. At paragraph 32 the judge concluded:

> "32. Given these failures and discrepancies I cannot accept that Ms Saleh's account is credible or that she is from Eritrea. As a result her claims for asylum and humanitarian protection must be dismissed".

4. The appellant's grounds are stated as being four in number but essentially articulate two grounds, the first alleging that the judge failed to make findings on the appellant's asylum claim which centred on her being a victim of trafficking and been forced to work against her will as a domestic servant; the second contending that the judge's reasoning for concluding the appellant was a national of Egypt were erroneous.

The Trafficking/Forced labour issue

5. It is demonstrably clear, and Mr Mills did not dispute the matter, that the judge did not address the appellant's claim to have been the victim of trafficking and servitude. Since the appellant had raised this claim in her asylum interview and the respondent had addressed it in the refusal decision under the sub-head "Forced to work by the princess in Egypt and the UK", it was a matter that required to be addressed and a decision made upon it. It was not addressed.

6. However, I agree with Mr Mills that this error was not a material one insofar as the appellant's asylum claim was concerned. I so conclude for two reasons. First, the only fear regarding return to Egypt identified by or

relied upon by the appellant was her medical condition and the fact that prior to obtaining work with the princess in Egypt she could not afford to pay for the medication necessary to control her epilepsy. Even taking the appellant's claim at its highest she could only succeed on the basis of this claim if able to show that the likely problems she would face as regards medication amounted to an act of persecution within the meaning of Article 9(1) of the Qualification Directive. That would require establishing that such problems amounted to a violation of her non-derogable right not to be ill-treated or some violation of a fundamental human right (or rights) equivalent in severity. Yet the judge made a clear finding on the issue of Article 3 ill-treatment, concluding at paragraph 36:

> "36. Finally, little was made of her medical condition. It appears that this was under control in Egypt and that the medication she requires could be obtained there, even if a charge is made, so there is no basis to succeed under Article 3, that she would be returning to inhuman or degrading treatment".

That finding was not challenged in the grounds of appeal nor did the appellant's representatives in submissions take issue with it. Given the nature of the appellant's medical condition (epilepsy) and the uncontroversial fact that it is controlled by medication, the appellant could only have been able to succeed if able to show that on return she would not be able to obtain that medication or access medical facilities able to provide it to her. This she had wholly failed to do. This point links to my second reason.

7. My second reason for concluding that the judge did not materially err in law by failing to address the appellant's claim to face risk on return to Egypt is that it was predicated on the appellant being a national of Egypt. She could only face a real risk in Egypt on the basis that she was a national of that country. If she was, then that would mean she had the rights and benefits that attach to persons of that nationality. This is important because, prior to the princess's agents helping her obtain an Egypt passport, she was a person registered with UNHCR as an asylum seeker and at that time on her own account (taking it at its highest) she and her family were undocumented and in hiding. By virtue of being a national of Egypt who had been granted a passport, the appellant would not face the previous types of difficulties arising from her non-national status.

The appellant's nationality

8. If the appellant's grounds are to succeed, therefore, it must be on the basis of the judge's treatment of the issue of the appellant's nationality. The first point raised in the appellant's second ground is unpromising. It complains that the judge "failed to take into account the fact that the appellant's mother and sister were accepted by UNHCR as refugees in

Egypt on the basis that they were Eritrean citizens by descent". Clearly, however, the judge took this fact into account: see paragraph 24.

9. The second point contends that "[t]here was no evidential basis for the judge to find differently that the appellant was not Eritrean". That ignores the fact that the judge's finding was that the appellant was a national of Egypt and it is unarguable that in reaching that conclusion the judge had evidence of this: in the form of the copy of her Egyptian passport submitted with her application for entry clearance. That was quite a different factual scenario than that disclosed by the documentation relating to the mother and sister. I would accept that the judge does not specifically state anywhere that he considered the appellant a national of Egypt, but read as a whole, the judge's decision is clearly premised on that fact, as was the respondent's clear refusal decision: see paragraphs 2, 5, 7, 19 and 29 of the judge's decision.

10. The appellant's third point takes issue with the judge's statement at paragraph 27 that:

> "27. Each country has different rules about nationality. Some are based on place of birth, some on descent or on a combination of the two. I have no evidence before me about the basis of Eritrean nationality, but even if it is the case Mrs Adams is entitled to claim Eritrean nationality, and by extension her daughter too, it is surprising that Egypt does not allow any naturalisation of those who are born there and have lived there all of their lives".

I would agree that it was mere speculation on the part of the judge to opine that "it is surprising that Egypt does not allow any naturalisation of those who are born there and have lived there all their lives", but this shortcoming cannot establish an error of law since, as explained earlier, the judge's entirely reasonable premise was that the appellant held an Egyptian passport anyway.

11. The fourth prong of the appellant's second ground assails what was said by the judge at paragraph 24:

> "24. On its face it provides support to the appellant's case, and there is further support in the fact that her mother and sister were admitted to the UK on a similar basis. The fact that they were accepted as refugees indicates that it must have been accepted that they too were Eritrean. But they have not been able to explain to me why that was the case".

I would accept that the first sentence is problematic. Given that the mother and sister had produced their documentation showing that they were accepted by UNHCR as Eritrean and that their other evidence made clear that their family origins were in the territory of what became Eritrea, there was nothing else for them to explain: these facts spoke for themselves. I would also agree that there is a further related error in paragraph 26 where the judge said:

> "26. That claim is therefore based on descent from her father, who would also have been Ethiopian before independence. Since she cannot have acquired Eritrean nationality before she was 32, and was not living there, she must have applied for it, based on her father's origins. But she made no mention of any such application or the evidence needed to support it".

If the mother and daughter had Eritrean nationality by descent, then on the basis of the known facts about Eritrean nationality law (set out in **MA (Ethiopia)** [2009] EWCA Civ 289), they possessed that nationality *ex lege*. Their possession of it was not dependent on making an application.

12. At the same time, I fail to see that either error was material for the same reason given earlier. Even if the judge was wrong to reject the evidence pointing to the appellant being Eritrean, the appellant could only succeed in establishing that this was a material error if able to show that the judge erred in finding that she was a national of Egypt. By virtue of the second paragraph of Article 1A(2) of the 1951 Refugee Convention, if a person has dual nationality they can only establish they fall within the scope of the first paragraph if able to show they face a well-founded fear in both countries (there was no issue in the appellant's case that Egypt would refuse to admit her or refoule her to Eritrea).

13. The critical issue, therefore, is whether the judge erred in finding that the appellant was a national of Egypt. It seems to me that here the crux of the judge's decision is paragraphs 28 and 29:

> "28. Even it all that is true, the position could still have been investigated and resolved, as required in cases involving disputed Ethiopian/Eritrean nationality. In **MA (Ethiopia) v Secretary of State for the Home Department** (2009) EWCA Civ 289 the Court of Appeal held that the Tribunal should require the claimant to act in good faith and take all reasonably practical steps to seek to obtain the requisite documents to enable her to return. The evidence in that case indicated that the appellant, of dual Ethiopian/Eritrean nationality had gone to the Ethiopian Embassy and asked for a passport but told the staff that she was Eritrean. That did not constitute an attempt in good faith to obtain an Ethiopian passport and so her appeal was dismissed.
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> 29. In this case Ms Saleh says that she could not go to the Egyptian Embassy as she did not hold the original passport. But it ought still to have been possible to send a copy and ask whether that passport number was valid and in her name. If this was met with a demand for the original, an approach to the Home Office could have been made and if that was refused the position would have been different – she would have done all that she could to substantiate her claim".

Essentially what the judge relied on was the failure of the appellant to show that she was not a national of Egypt, notwithstanding her possession of an Egyptian passport. The appellant's case both before the judge and before me was that the appellant's Egyptian passport had been obtained

(without the appellant's full involvement or consent) by agents of the princess and thus could not, in the usual way, be taken as prima facie evidence of the appellant's nationality as Egyptian. Mr Khan submitted before me that since the appellant did not have a copy of her passport (her princess employer having held on to it), it was not possible or realistic to expect that enquiries of the Egyptian Embassy on her behalf to seek confirmation of whether or not they accepted her as a national of Egypt would yield results. It was the respondent's case, by contrast, that the appellant's passport had been checked by the British Embassy when the application had been made for entry clearance. Mr Mills pointed out that the photocopy of the biodata page of the appellant's Egyptian passport (at A2) contained all the information needed in order for a specific request to be made to the Egyptian Embassy to confirm or disconfirm that the appellant was an Egyptian national. I agree with Mr Mills. The burden of proof to establish nationality rests on the appellant. Given that there was prima facie evidence that she was a national of Egypt (in the form of the photocopy of the biodata page of her passport), it was for the appellant to establish that this evidence was not to be relied on. There was a simple, realistic way in which the appellant might have been able to substantiate her claim that she was not a national of Egypt, namely contacting the Egyptian Embassy. Her failure to take such steps constituted a failure to establish that she was not a national of Egypt: see also **AS (Guinea)** [2018] EWCA Civ 2234**.**

14. The appellant's second ground includes the contention that "[t]he judge has failed to appreciate that enquiries to the Egyptian Embassy would not have been relevant as to whether the appellant is an Eritrean national". Of course, such enquiries could not have established anything about whether the appellant was an Eritrean national. But the judge did not rely on them for that purpose: the plain – and entirely proper - purpose of such enquiries was considered at paragraphs 28–29 to be established of Egyptian nationality.

15. The appellant's second ground also challenges the judge's reliance when assessing nationality on doubts about whether the appellant had told the truth about her age and the circumstances under which she managed to contact her mother in the UK, and the judge's reliance at paragraph 32 on such "failures and discrepancies". This ground lacks force and substance. In assessing the issue of nationality the judge was obliged to take into account all relevant factors, including the appellant's general credibility. The judge's specific reference in paragraph 3 to Article 4 of the Qualification Directive makes clear that he was applying the requisite holistic approach.

16. This appeal therefor fails. However, it may be this is not completely the end of the matter. Given the unusual circumstances of this case, and the fact that if one left entirely to one side the evidence of Egyptian nationality, the appellant would have realistic prospects of establishing she was Eritrean, I would merely observe that:

(i) if she is able to make diligent enquiries without delay of the Egyptian Embassy; and

(ii) the result of those enquiries was that they considered her not to be a national of Egypt,

then she would likely have a strong basis for making a fresh claim under paragraph 353.

17. To conclude:

The decision of the judge, being free of material legal error is upheld.

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.

Signed Date

Dr H H Storey
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed:

H H Storey

Date: 14 August 2019

Dr H H Storey
Judge of the Upper Tribunal