Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00485/2013

THE IMMIGRATION ACTS

Heard at : Royal Courts of Justice	**Determination Promulgated**
On : 4 November 2013	**On : 11 November 2013**
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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

A H
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, instructed by Blavo & Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following a grant of permission to appeal on 23 September 2013.

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2. The appellant is a citizen of Eritrea, born on 24 May 1991. He claims to have arrived in the United Kingdom on 7 June 2007. He applied for asylum on 13 June 2007. His claim was refused on 11 October 2007 but he was granted discretionary leave until 24 November 2008 as a minor. On 27 November 2008 he applied for further leave to remain which was refused on 16 September 2011. He lodged an out of time appeal on 13 January 2012 which was not accepted by the Tribunal.

3. On 21 February 2012 the appellant was convicted at South East London Magistrates Court of assault occasioning actual bodily harm and was sentenced to six months imprisonment. On 25 June 2012 he was convicted at South East London Magistrates Court of common assault and was sentenced to four months imprisonment. On 14 September 2012 he was convicted at Bromley Magistrates Court of offences against the person (assault) and sentenced to three months imprisonment. His total sentence was 13 months imprisonment.

4. On 12 October 2012 the appellant was served with a notice of liability to deportation and on 26 October 2012 the respondent made a decision to make a deportation order by virtue of section 3(5)(a) of the Immigration Act 1971. The appellant appealed against that decision, on asylum and human rights grounds.

Appellant's Asylum Claim

5. The appellant's asylum claim was put on the basis of his religion and his illegal exit from Eritrea. He claimed that, as Pentecostal Christians, his family had experienced problems in Eritrea, that they had had to practice their faith in secret and that his father was arrested in May 2005 because of his faith and had not been in contact since that time. His mother was also arrested, but released after three days. Due to his fear of being arrested himself, he left his home in August 2006 and went to Sudan, where he remained for one month, and then went on to Libya where he was arrested and detained for five months before being forcibly returned to Eritrea. On return to Eritrea he was imprisoned for about a month and forced to perform manual hard labour, but he managed to escape and in May 2007 fled to Sudan, from where he took a flight to an unknown country and then travelled by lorry to the United Kingdom.

6. The respondent, in refusing the claim on 11 October 2007, noted significant discrepancies in the appellant's account of events and did not accept that he was a Pentecostal Christian or that he was imprisoned in Eritrea. It was considered that he would be at no risk on return. In the refusal of his subsequent application for leave to remain, on 16 September 2011, following his failure to attend an interview on 25 August 2011, the respondent maintained the same reasons for refusal. The respondent also considered the country guidance in MA (Draft evaders; illegal departures; risk) Eritrea CG [2007] UKAIT 00059 and concluded that the appellant would not be perceived as a draft evader or deserter by the Eritrean authorities and would not face any risk on return on the basis of illegal exit. His removal was not considered to be in breach of his human rights.

7. Subsequent representations were made on behalf of the appellant requesting re-service of the decision in order to enable the appellant to attend an interview or make an in-time appeal, on the grounds that his disappearance from the immigration system had been as a result of him suffering from mental health problems and being hospitalised and having been found living on the streets. However, that was not granted and in a decision made on 17 January 2012 the First-tier Tribunal refused to extend time for appealing.

Deportation Proceedings

8. Following the appellant's conviction on various counts of assault and his sentence to a total of 13 months imprisonment, a decision was made to deport him. The reasons given by the respondent for that decision, as set out in their letter of 26 April 2013, were that he had demonstrated a propensity for violence and that his removal was necessary for the prevention of disorder and crime. It was not considered that the presumption in favour of deportation was outweighed by any other factors. The respondent, in concluding that the appellant's deportation would not breach the UK's obligations under the ECHR, considered the immigration rules relating to family and private life but found that the appellant did not meet the requirements of those rules. Consideration was given to a letter from a mental health practitioner at HMP High Down confirming that the appellant was known to the mental health services, that he had been diagnosed with schizophrenia and was on medication to stabilise his mental state and risks, that he presented psychotic symptoms, and that on release it was important for him to be linked up with the community mental health services. The respondent concluded, however, that there was adequate mental health care available in Eritrea and that the appellant's deportation would not breach his human rights.

9. The appellant's appeal was heard before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Walters and Mr M E Olszewski JP. The panel heard from the appellant and had regard to a psychiatric report from Dr David Ho, a Specialist Registrar in Forensic Psychiatry in relation to his mental health problems. They were informed that there had been no material change in his claim for asylum since it was first made in June 2007. They recorded the appellant's evidence that he had two sisters and two brothers who lived with their mother in Senafe, Eritrea, and with whom he last had contact, through the Red Cross, in October 2011. They also noted the appellant's claim to have been hearing voices since he was nine years of age and to have received medical treatment for his medical condition in Eritrea and been hospitalised in Senafe for about two months in 2005 before being released and provided with medication for one month.

10. The panel found the appellant's account of his religion to be inconsistent and rejected as lacking in credibility his claim to be a Pentecostal Christian. They did not accept his account of his father's imprisonment and neither did they accept his account of his departure from Eritrea in August 2006, of being returned to Eritrea and of being imprisoned on return. They considered the question of risk on the grounds of illegal exit, with reference to the country guidance in MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 190 and MA but found that he would not have been considered medically fit for military or any other service in Eritrea and that it therefore could not be inferred that

he would have had to exit the country illegally. They found that he would be at no risk of persecution on return to Eritrea and accordingly dismissed his appeal on asylum and humanitarian protection grounds. With regard to the appellant's ill-health, the panel did not find that his removal would breach Articles 3 and 8 of the ECHR. They considered further that he did not meet the requirements of the immigration rules relevant to family and private life and they dismissed the appeal on human rights grounds.

11. Permission to appeal to the Upper Tribunal was sought on the following grounds: that the Tribunal had made errors of law in its findings that the appellant did not leave Eritrea illegally; that the Tribunal had failed to determine risk on return to the appellant as a person of draft age; that the Tribunal had failed to make a holistic assessment of the appellant's individual circumstances in Eritrea when determining whether his removal in light of his mental health exposed him to a real risk of treatment prohibited by Articles 3 and 8 of the ECHR; and that the Tribunal had made errors of law in determining the appellant's Article 8 claim.

12. Permission to appeal was granted on 23 September 2013 on all grounds.

Appeal hearing

13. The appeal came before me on 4 November 2013. The appellant was present but was not required to give oral evidence. I heard submissions from the parties in regard to the error of law.

14. Mr Slatter expanded upon the grounds of appeal. He submitted that the Tribunal, when finding that the appellant would have been able to secure exemption from military service, failed to give proper consideration to the evidence of the expert Professor Kibreab in MO as to the steps that would have had to be taken in order for him to do so, including having to obtain medical certificates. The Tribunal failed to show how it got to the conclusion that the appellant would have obtained exemption on medical grounds. In any event, according to Article 13 of the Eritrean National Service Proclamation 1995, as quoted at paragraph 280 of MA, and in accordance with the findings at paragraph 334 to 336, he would still have had to undertake 18 months of national service and could be required to re-register. The fact that he was required to undergo hard manual labour on return to Eritrea raised an issue as to whether he had been declared unfit. The Tribunal failed to deal with the question of whether the second exit was illegal. With regard to Article 3 and health grounds, Mr Slatter submitted that the Tribunal had failed to make a holistic assessment of the appellant's circumstances, as required in GS and EO (Article 3 - health cases) India [2012] UKUT 397 and had failed to give full consideration, in terms of assessing the exceptional cases referred to in GS and EO at paragraph 85(5), to the manner in which he would be treated in Eritrea as a person with mental health problems. The Tribunal had also failed to consider Article 8 as a discrete issue, in terms of physical and moral integrity, including his inability to access the equivalent health care and community support in Eritrea; it had failed to give proper consideration to the appellant's lack of ties to Eritrea under paragraph 399A; it had failed to consider his exceptional circumstances

within the rules in paragraph 398; and it had failed to consider the two-stage process in relation to Article 8 outside the rules.

15. Mr Tufan submitted that the Tribunal had given detailed consideration to the guidance in MA and MO and was entitled to conclude that the appellant was not telling the truth about having left Eritrea illegally. The Tribunal was entitled to accept the appellant's account of having had two months of medical treatment in Eritrea for his mental health problems and to have concluded that he would have been exempt from military service. There was no evidence before the Tribunal to show that the appellant was able to meet the high threshold for establishing an Article 3 claim with respect to his mental health and his condition was very different from that of the appellants in GS and EO. There was evidence before the Tribunal of medical treatment available in Eritrea, albeit not of the same standard as in the United Kingdom. The Tribunal was entitled to conclude that the appellant had links to Eritrea and that he could not meet the requirements of paragraph 399A and paragraph 398, and to treat the immigration rules as a complete code with respect to human rights.

16. In response, Mr Slatter questioned the Tribunal's entitlement to believe and rely on only one part of the appellant's claim, namely to have had medical treatment in Eritrea in 2009, whilst rejecting the rest of his claim. He also referred to the background evidence produced by Mr Tufan in regard to the availability of medical treatment in Eritrea. He reiterated his submission as to the inadequacies of the Tribunal's findings with respect to Articles 3 and 8.

Consideration and findings.

17. In my view the Tribunal did not make any errors of law such that its decision needs to be set aside.

18. The grounds do not challenge the Tribunal's adverse credibility findings. Mr Slatter submitted that that was not the same as an acceptance that the appellant's claim was a lie. However it is clear from the respondent's detailed refusal reasons and the Tribunal's findings that there were significant inconsistencies in the appellant's account, in particular with respect to his religion, his father's detention and his reasons for leaving the country, and as such the Tribunal was entitled to take the view that he had given a completely untruthful account of his experiences in Eritrea.

19. The Tribunal was, nevertheless, careful to remind itself, as it did at paragraph 70, that that was not alone a sufficient basis for concluding that the appellant had lied about having left Eritrea illegally and that it was the manner of his exit from Eritrea that was crucial to the question of risk on return. That reflected the findings at paragraph 449 of MA, to which the Tribunal plainly had full regard. Nevertheless, the Tribunal was entitled to take the appellant's lack of credibility in other matters into account and was in particular entitled to place weight upon the fact that he had presented an untruthful account of having previously experienced ill-treatment by the Eritrean authorities as a result of illegal exit. The Tribunal also gave careful consideration to the country guidance

in MO and was aware of the distinction made in that case in circumstances of exit from Eritrea prior to August/ September 2008, when it became more difficult for Eritreans to obtain lawful exit from Eritrea, and the relevance of that to the appellant's own situation.

20. It was the finding of the Tribunal that the appellant would have been considered medically unfit for military or other service in Eritrea as a result of his mental health problems. The grounds challenge that finding as perverse, although in so doing they erroneously rely on the fact that the appellant's previous stay in hospital in Eritrea was some six to seven years prior to his departure from the country, as opposed to the previous year. In any event, the threshold in demonstrating perversity is high and the challenge simply fails to meet that threshold. Mr Slatter submitted that the Tribunal was not entitled to reject all of the appellant's claim but to choose to accept his account of having experienced mental health problems since the age of nine years. However I do not agree. It was open to the Tribunal to accept part of the appellant's claim whilst rejecting others, provided it gave good reasons for so doing, which I find that it did. There were, as already stated, significant inconsistencies and discrepancies in the appellant's evidence relating to his experiences in Eritrea upon which the Tribunal was fully entitled to rely. However his account of having had mental health problems since the age of nine and of being hospitalised in Eritrea for two months in 2005 was entirely consistent with other evidence before the Tribunal. The Tribunal had before it a psychiatric report from Dr Ho confirming a diagnosis of paranoid schizophrenia, together with various other reports detailing the appellant's medical treatment and access to care in the United Kingdom dating back to 2009. Dr Ho's report included the appellant's own account of having experienced problems such as hearing voices since the age of nine years, as well as accounts given by third parties to whom he had reported such experiences. As such, the Tribunal was entitled to accept that part of the account and to conclude that he would have been and would be, viewed by the Eritrean authorities as medically unfit.

21. Mr Slatter submitted that that was not in itself sufficient to show that the appellant would have been able to exit Eritrea legally, given that he may well still have been required to undertake national service in Eritrea, in accordance with Article 13 of the Eritrean National Service Proclamation, and that that was a matter to which the Tribunal had failed to have regard. However it seems to me that that point is adequately dealt with by the evidence the Tribunal had before it at paragraph 9.48 of the UKBA Country of Origin Information Report of 17 August 2012, in regard to the varying levels of exemption, and is reflected in their finding at paragraph 71, that the appellant would have been considered medically unfit for military *or any other service* in Eritrea, a finding that was open to the Tribunal to make and that was entirely consistent with the guidance in MO.

22. Accordingly, I find that the Tribunal was entitled to conclude, on the basis of the evidence before it, including the background information, the medical evidence and the appellant's own oral evidence, and in accordance with the guidance in MA and MO, that he had failed to demonstrate to the lower standard of proof that he had exited Eritrea illegally and that he would be viewed as a draft evader or deserter.

23. With regard to the grounds and to Mr Slatter's submissions on Articles 3 and 8, with respect to the appellant's medical condition, I find that those matters were more than adequately dealt with by the Tribunal at paragraphs 88 to 102. Those findings took full account of the relevant case law, the background information and the documentary evidence relating both to the appellant's own circumstances in the United Kingdom and to the circumstances to which he would be returned in Eritrea. Although the Tribunal did not cite the case of GS and EO, there was nothing in their findings that was inconsistent with that decision. Mr Slatter submitted that the Tribunal failed to consider Article 8 as a discrete matter, on the basis of the appellant's physical and moral integrity. However it is clear from paragraphs 93 to 97 and paragraph 103, as well as paragraphs 116 to 118, that the Tribunal gave separate consideration to Article 8, taking account of his circumstances in the United Kingdom and in Eritrea and taking account of his medical condition and the care facilities available to him in the United Kingdom and in Eritrea. The Tribunal gave full and comprehensive reasons for concluding that the appellant's deportation would not breach his human rights on the basis of his medical condition or otherwise and was entitled to conclude as it did. Mr Slatter's submissions, albeit lengthy, amounted to no more than a re-arguing of the case.

24. As regards the Tribunal's findings with respect to family and private life in general, full and proper reasons were given for concluding that the appellant's case did not fall within the rules. With regard to paragraph 399A, the Tribunal was entitled to conclude that the appellant retained ties to Eritrea, on the basis of his evidence as to his family members remaining there. There was no requirement on the Tribunal to accept his claim to have lost contact with his family, particularly in the light of his overall lack of credibility. In any event, in view of the fact that he had not spent at least half of his life in the United Kingdom, the appellant could not meet the requirements of paragraph 399A, irrespective of his ties to Eritrea. Having found that to be the case, the Tribunal properly proceeded to consider whether there were any exceptional circumstances outweighing the public interest in deportation, as required by paragraph 398 of the rules. Contrary to the assertion made by Mr Slatter it is plain from the findings made at paragraphs 115 to 188 that the Tribunal gave adequate consideration to the appellant's circumstances in that respect. The Tribunal was fully aware of the appellant's medical history and the medical treatment he received and the services to which he had access in the United Kingdom and, whilst no specific reference was made to those factors in those paragraphs, such consideration was given previously within paragraphs 88 and 102 and it is plain that they formed part of the Tribunal's overall consideration in concluding that no exceptional circumstances existed.

25. With regard to the last ground of appeal, challenging the Tribunal's failure to follow the two-stage approach to Article 8, it seems to me that the Tribunal's approach as set out at paragraphs 120 to 122 was a proper one and one that is in any event entirely consistent with the recent judgement of the Court of Appeal in MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192.

26. Taken as a whole, the determination contains a thorough and detailed consideration of all the evidence before the Tribunal, including the evidence specific to the appellant as

well as the background information, and a careful assessment of that evidence in line with the principles and guidance in the relevant cases of MA and MO and the case law relating to health. The Tribunal was entitled to make the findings that it did on the basis of that evidence and the grounds of appeal do not disclose any errors of law in its decision.

DECISION

27. The making of the decision of the First-tier Tribunal did not involve an error on a point of law, such that the decision has to be set aside. I do not set aside the decision. The decision to dismiss the appellant's deportation appeal therefore stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I have decided to continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Upper Tribunal Judge Kebede