Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02022/2013

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 17 December 2014	**On : 19 December 2014**

Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE KEBEDE

Between

MZ
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Palmer, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Eritrea, born in September 1988. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to revoke a deportation order previously made against him, it was found at an error of law hearing on 30 June 2014 that the Tribunal had made errors of law in its decision. Directions were made for the decision be set aside and

re-made by the Upper Tribunal with respect to the question of risk on return under Article 3 of the ECHR.

2. The appellant was encountered by police on 21 October 2004 and claimed to have entered the United Kingdom clandestinely the previous day. He was issued with illegal entry papers and detained. He then claimed asylum as an unaccompanied child, aged 16 years, and was released the same day with reporting restrictions but failed to report and was listed as an absconder. He failed to complete a Statement of Evidence Form and to comply with the asylum process and his asylum application was accordingly refused on non-compliance grounds on 25 August 2005.

3. On 13 September 2006 the appellant was convicted of possession of a false, improperly obtained identity document and was sentenced to four months at a Young Offenders Institution. On 21 February 2008 he was convicted at Maidstone Crown Court of two counts of sexual activity with a female child under 16 and was sentenced on 8 May 2008 to four years' detention in a young offender's institution, registered on the sex offenders register indefinitely, disqualified from working with children and put on a sexual offenders prevention order. As part of his sentence he was recommended for deportation.

4. On 11 August 2008 the appellant made a fresh claim for asylum. On 29 October 2009 a deportation order was made against him under the provisions of the UK Borders Act 2007 and a decision was made the same day that section 32(5) of the 2007 Act applied and refusing his asylum claim. His appeal against that decision was heard in the First-tier Tribunal on 11 February 2010 and was dismissed. Permission to appeal to the Upper Tribunal was refused.

5. On 1 March 2013 the appellant submitted a fresh asylum claim which was treated as an application to revoke the deportation order and was refused on 23 September 2013, following an interview on 30 July 2013.

The Appellant's Claim

6. The appellant claimed to be at risk on return to Eritrea for various reasons, including his religion, his illegal exit from the country, being a failed asylum-seeker, his lack of loyalty to the regime and because he would be conscripted into the Eritrean army. He claimed to have converted from Catholicism to Pentecostal Christianity together with his family, in 2000, and to have attended church in Eritrea and experienced problems as a result, including the arrest of his parents and sister in 2002 and his own arrest together with his mother in May 2004. He tried to leave Eritrea at that time but was stopped at a checkpoint and sent back to his home village when he produced his student identity card. In August 2004 the police came to his house looking for him and threatened his family. He left Eritrea in September 2004, travelling on foot to Kesala, Sudan. He then travelled to Khartoum before flying to France on 19 October 2004 and from France he travelled by lorry to the United Kingdom.

7. In dismissing the appellant's appeal against the decision to deport him the First-tier Tribunal, in its decision of 16 February 2010, found his account to be lacking in credibility and concluded that he had fabricated his claim after arriving in the United Kingdom. The Tribunal did not find that he had given a credible account of his journey to the United Kingdom and rejected his claim as regards his membership of the Pentecostal church. The Tribunal did not consider that the appellant would be regarded as a deserter from military service, did not accept his claim as regards his father's past allegiance to the ELF, did not accept that he would be at risk as having left Eritrea illegally, did not accept that he would be at risk by reason of being forced to undertake military service and concluded that his deportation would not put the United Kingdom in breach of its obligations under the Refugee Convention or the ECHR. The appeal was dismissed on all grounds.

8. The appellant's fresh claim, made on 1 March 2013, was based on developments recognised in the more recent country guidance in MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 190. It was submitted on behalf of the appellant that he was at risk of forcible conscription and persecution on return to Eritrea and that, regardless of the fact that he had been found not to be a credible witness and to have left Eritrea legally, he was still at risk as a failed asylum seeker. Those submissions were expanded upon in further representations made on behalf of the appellant on 12 September 2013, in which it was submitted that there was no evidence to show that he fell within the two narrow exception categories referred to in MO for people eligible for exit visas and, as such, it had to be concluded that he had left Eritrea illegally.

9. The respondent considered the representations as a request to revoke the deportation order previously made against the appellant and refused the claim in her letter of 23 September 2013, concluding that section 72 of the Nationality, Immigration and Asylum Act 2002 was applicable to the appellant and that in accordance with Article 33(2), the Refugee Convention did not prevent his removal from the United Kingdom. The respondent did not accept that the appellant left Eritrea illegally and considered that he would be at no risk on return. It was not considered that his removal would breach his human rights and the exceptions to deportation accordingly did not apply to him.

10. The appellant's appeal against that decision was heard in the First-tier Tribunal on 13 January 2014. The appeal was essentially pursued on Article 3 grounds as the s72 certification was not challenged. The Tribunal did not find the appellant to be a truthful witness and did not accept that he was a member of the Pentecostal Christian church and that he would be at risk on such a basis. It was not accepted that he would be treated, upon return to Eritrea, as someone who had evaded army conscription and it was considered that there was a real possibility that he had left Eritrea legally. The Tribunal considered there to be no reason why the Eritrean authorities would be aware that the appellant was a failed asylum seeker and considered that he would not be at any risk on return and accordingly dismissed the appeal.

11. Permission to appeal was sought on various grounds and was initially refused. However permission was subsequently granted, upon a renewed application, on 29 April 2014, on the limited ground that it was arguable that the Tribunal had failed properly to

apply MO and had failed to make a clear finding on whether or not the appellant left Eritrea illegally.

12. At an error of law hearing on 30 June 2014 the First-tier Tribunal's determination was found to be materially flawed, for the following reasons:

> "12. As was made clear in the previous country guidance in MA (Draft evaders; illegal departures; risk) Eritrea CG [2007] UKAIT 00059 and continued to be the case in the more recent guidance in MO, illegal exit is a key factor in assessing risk on return to Eritrea. That being so, it was incumbent upon the Tribunal to make clear findings on the circumstances and nature of the appellant's exit from Eritrea and to support such findings with full and proper reasons. As the Upper Tribunal found in MO at paragraph 116, those reasons have to go beyond assumptions arising from generalised adverse credibility findings, particularly in the case of an appellant of draft age.
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> 13. In the appellant's case, the Tribunal rejected his claim to have left Eritrea illegally, finding at paragraph 18 that there was a real possibility that he had left Eritrea legally. However there is a clear lack of reasoning accompanying that finding and a failure to engage with and address the guidance in MO. Of particular concern is the Tribunal's failure to make any reference to, or findings on the documentary evidence at pages 65 and 66 of the appellant's bundle, despite that evidence being specifically referred to in the skeleton argument before the panel (paragraph 35). The reliability or otherwise of that evidence was clearly relevant to the question of illegal exit and the failure by the Tribunal to make any findings on it, when taken together with the absence of full and proper reasoning to support its conclusions, leads me to conclude that the decision simply cannot stand and must be set aside.
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> 14. Accordingly I find that the Tribunal made material errors of law such that its decision has to be set aside and re-made, with respect to the question of legal/ illegal exit and the issue of risk on return to Eritrea.
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> 15. At the hearing I indicated to the parties that, in the event that the Tribunal's decision was set aside and was to be re-made there appeared to be no need for further oral evidence, given the limited basis upon which permission was granted. However, upon reflection, and having further considered the documentary evidence at pages 65 and 66, it seems to me that there is a need for the appellant to provide further details about that letter including its provenance and his ability to obtain such evidence from Eritrea. The findings otherwise made in regard to credibility are preserved. "

13. The following directions were made for the resumed hearing:

> **"Directions**
>
> (a) No later than ten days before the date of the next hearing, any additional documentary evidence relied upon by either party is to be filed with this Tribunal and served on the opposing party, to include a statement from the appellant addressing the provenance of the letter at pages 65 and 66 of his bundle of evidence.
> (b) Both parties are to file with the Tribunal and serve upon the other party a skeleton argument setting out all lines of argument to be pursued at the hearing and in particular applying the guidance in MO to the appellant's circumstances."

Appeal hearing and submissions

14. The appeal then came before us for a resumed hearing on 17 December 2014.

15. The appellant gave oral evidence before us, through the court interpreter in the Bilin language. He adopted his more recently made statement which, in compliance with the Tribunal's directions, provided some explanation as to the provenance of the document at page 65 of the appeal bundle, namely a letter from the Eritrean authorities demanding from his father the payment of a penalty for his illegal exit from the country. When presented by Mr Walker with the results of a Eurodac search indicating that he had been apprehended and fingerprinted in Italy, he admitted that he was indeed in Italy in September 2004. He said that he had not told the Home Office this when interviewed because he feared being sent back to Italy. He confirmed his route to the United Kingdom, stating that he left Eritrea in August 2004, crossed the border illegally into Sudan with the assistance of an agent paid for by his uncle, travelled through the Sahara desert by car to Libya, took a boat from Libya to Italy, left Italy after being denied accommodation there and took a train to France from where he then travelled clandestinely in a lorry to the United Kingdom. He confirmed that he had never taken part in any events or demonstrations in favour of the Eritrean government in the United Kingdom and had never paid any money to the Eritrean Embassy.

16. When cross-examined, the appellant said that he had last had contact with his parents in January 2014 and had lost contact with his brothers in Sudan a year ago. With regard to the document at page 65 of the appeal bundle, the government had withdrawn the demand for payment of the outstanding fine. He obtained the letter produced as evidence from his paternal uncle, at page 6 of the supplementary bundle, through his cousin who had been living in Germany for ten years. He had only recently got in touch with her when a friend who had visited Germany met with her. She had left Eritrea legally with a marriage visa.

17. In response to our further questions, the appellant said that the Eritrean government had found out through their informants that he had left the country illegally and a police officer had delivered by hand the letter about the penalty fee to his father in October 2006, following which his father had been summonsed to the government offices to pay the fine but had paid only a part of it. His father had been released from prison some time in 2006 and he found out about that in mid-2011.

18. In his submissions, Mr Walker relied on paragraph 132 of MO and asked us to find that in light of the appellant's age and the date when he left Eritrea, at a time when the regime took a less restrictive approach to issuing exit visas, and given the adverse credibility findings made against him, it ought not to be accepted that he left the country illegally. He was not evading the draft at the time he left and he would be at no risk on return.

19. Mr Palmer submitted that even if it was not proven that the appellant left Eritrea illegally he would still be at risk as a failed asylum-seeker and as someone who would be

conscripted. He relied upon a Home Office Operational Guidance Note (OGN) of February 2014 in submitting that the appellant qualified for protection on the basis of being forced into indefinite military service as well as on the basis of his inability to show pro-government activity and payment of tax for the Eritrean government during his stay in the United Kingdom.

Consideration and findings

20. We accept that if the appellant had left Eritrea illegally, as he claims, he would very likely encounter hostility from the Eritrean authorities. We note in that respect paragraph 133(iv) of the Upper Tribunal's decision in MO:

> "(iv) The general position adopted in MA, that a person of or approaching draft age (i.e. aged 8 or over and still not above the upper age limits for military service, being under 54 for men and under 47 for women) and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, is reconfirmed…."

21. It was on that basis that the Tribunal in MA considered that a finding as to whether an Eritrean appellant had shown that it was reasonably likely that he or she had left the country illegally was likely to be crucial in deciding risk on return to that country.

22. In MO the Upper Tribunal made it clear at paragraph 133(iii) of its determination that a finding that an appellant lacked credibility was not in itself a sufficient basis upon which to conclude that their claim to have left Eritrea illegally was not to be believed:

> "the general position concerning illegal exit remains as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible."

23. However, MO focussed in particular on the change in circumstances since the decision in MA and the fact that the Eritrean regime had, since 2006, and particularly since August/ September 2008, taken a much more restrictive approach to issuing exit visas, noting that since that time there were a number of indications that it had become more difficult for Eritreans to obtain lawful exit from Eritrea. With regard to those people found to have left Eritrea prior to August/ September 2008, the Tribunal at paragraph 132 in MO said the following:

> "That brings us back to the significance of determining, if at all possible, whether a person left Eritrea before or after August/September 2008. If they left before, it seems to us that the guidance given in MA remains broadly applicable and that, even if of or approaching draft age, if they have been found wholly incredible, they are likely to be found not to have established a real risk of persecution or serious harm on return."

24. That in turn reflects the findings of the Tribunal in MA at paragraph 449:

> "A finding as to whether an Eritrean appellant has shown that it is reasonably likely he or she left the country illegally, is therefore likely to remain crucial in deciding risk on return to

> that country (see paragraph 234 above). In making such a finding, judicial fact-finders will need to be aware of evidence that tends to show the numbers of those exiting Eritrea illegally appear to be substantially higher than those who do so legally and that distaste for what is effectively open-ended service at the behest of the state lies behind a good deal of the current emigration from Eritrea. Nevertheless, where a person has come to this country and given what the fact-finder concludes (according to the requisite standard of proof) to be an incredible account of his or her experiences, that person may well fail to show that he or she exited illegally."

25. Accordingly, on the basis that the appellant's evidence is that he left Eritrea in 2004, credibility is a significant issue in determining whether or not he exited Eritrea illegally, albeit having regard to the above comments as to the statistics showing substantially higher numbers of illegal, rather than legal, exits.

26. We note that the Asylum and Immigration Tribunal (as it then was), in its determination of 16 February 2010, found the appellant to be wholly lacking in credibility, rejecting his claim as regards his religion, his father's past allegiance to the ELF and his account of his journey to the United Kingdom and concluding that he had fabricated his entire asylum claim. Further, Vice President of the Upper Tribunal Ockelton, in refusing permission to appeal to the Upper Tribunal on 15 April 2010, found that there was no basis in credible evidence for assuming that the appellant left Eritrea illegally. We note also that the First-tier Tribunal, in its decision of 20 February 2014, found the appellant's claim to lack credibility and rejected his account in its entirety (and other than its conclusion on illegal exit, those adverse findings have been preserved).

27. With regard to the appellant's evidence before us, we also make adverse findings. The appellant relies, as evidence of his illegal exit from Eritrea, upon a document at page 65 of his main appeal bundle and translated at page 66, a letter purporting to emanate from the Administrative Office of Keren advising his father about finalising payment of a penalty fee, which he claims was delivered by hand to his father. It is his case, as expressed in his initial statement of 8 January 2014 and his supplementary statement of 9 October 2014, that his father had been fined by the Eritrean government because he (the appellant) had left Eritrea illegally and that his father had paid part of the fine and had since had the rest of the debt wiped off. However the existence of that document, dated 10 October 2006, and the explanation as to how it came to be with his father, was plainly contradicted by previous evidence given by the appellant in his interviews and at his appeal hearing in February 2010, as to a complete lack of contact with his father since his arrest and detention in 2002.

28. As can be seen from paragraph 9 of the determination of the AIT in the appellant's appeal in February 2010, discrepancies had already been noted by the Tribunal in the appellant's account of when he last saw his father, which he blamed on interpretation problems, but he maintained at that time that he had last seen his father (and his sister) in 2002 when they were arrested, so suggesting that they remained in detention at the time of the appeal hearing (in February 2010). His explanation for the existence of the document of 10 October 2006 is to be found in his statement of 8 January 2014 where he claimed to have only discovered, after recently resuming contact with his family, that his father had

actually been released from prison in 2006. In his later statement of 9 October 2014 and at the hearing before us his evidence was modified once again to suggest that he had had contact with his father at an earlier stage, in mid-2011, and had found out at that time that he had been released some time in 2006. However that entire explanation was contradicted by the grounds of appeal before the First-tier Tribunal, dated 4 October 2013, which stated at paragraph 5 that his father was released from prison around November 2011 and also by a letter of 23 December 2010 from the UKBA at page 69 of the main appeal bundle confirming the appellant's claim that all his family members including his father, were living at that time in their village in Eritrea. It is also relevant to note the GCID case record sheet at page 80 of the appeal bundle, where the case notes record information provided by the appellant at an interview in late 2011/early 2012 stating that his parents still lived in Eritrea and that he was in contact with them and that he had provided the same information previously.

29. Clearly the appellant was unable to give a consistent account of his father's whereabouts and his earlier indication that his father still remained in prison after his arrest in 2002 stood in direct conflict with the claim that his father had been served with a fine for his (the appellant's) illegal exit in 2006. We note that the letter at page 65 is not on properly headed paper as would reasonably be expected of an official document and, contrary to the appellant's claim, has not been accompanied by a receipt for payment of part of the fine. We also note that the appellant was unable to provide us with a coherent chronology of events involving the demand for payment of the fine. In all of those circumstances, and considering also the appellant's previous reliance upon false documentation, we do not consider the document at page 65 to be a reliable piece of evidence and we reject the appellant's account of the government fining his father for his illegal exit from Eritrea. We place no weight upon the document at page 6 of the supplementary bundle, a letter from his uncle claiming that the appellant was smuggled out of Eritrea, and do not consider it to be reliable and independent evidence. We note that the letter claims that he left Eritrea because the government wanted him to join the army, which is inconsistent with the reason he gave himself for fleeing the country and is unsupported by any evidence or suggestion that he was due to be conscripted at the time he left. We consider such attempts by the appellant to support his claim of illegal exit by producing such unreliable evidence serve only to undermine the claim further.

30. The appellant has lied about his journey to the United Kingdom, choosing previously not to mention his stay and encounter with the authorities in Italy, he has fabricated an asylum claim based on religion and perceived political activities and has lied about his family circumstances. It became apparent from his evidence before us that he has family living in Germany – a cousin who was able to obtain an exit visa from Eritrea around the same time as the appellant himself left the country. It seems also that he has family or other close links in Sudan as his evidence was that his family attended a wedding there in 2011 and his parents were able to travel freely. It is relevant to note that there is a paucity of evidence of difficulties faced by those seeking exit visas from Eritrea in 2004. As we stated earlier, MO focussed on the situation subsequent to 2006 and Mr Palmer did not point to evidence relating to the period of time relevant to the appellant's departure. In all of these circumstances we reject his claim to have exited Eritrea in the manner stated and

we conclude that he was able to exit lawfully, most likely through the sponsorship of family living outside the country, on the basis of seeking to visit or join such family members or on another basis, and that he did so at a time and age sufficiently in advance of the age of conscription so as to avoid any problems from the authorities on the grounds that he was seeking to avoid being drafted. We conclude that his claim to have exited Eritrea illegally was a fabrication intended to frustrate his deportation from the United Kingdom and that he would in fact be at no risk on return to Eritrea on any such basis.

31. We do not consider that the appellant would be considered as a draft evader or would be at risk on the basis of having failed to undertake his military service, considering in particular the young age at which he left the country and the absence of any suggestion that his family have since received conscription papers for him. We take note of the Tribunal's findings in MA at paragraph 448:

> "A person of or approaching draft age who fails to show that he or she left Eritrea illegally is not reasonably likely to be regarded with serious hostility on return, even if the authorities are or would be reasonably likely to be aware that that person had made an unsuccessful asylum claim abroad."

32. That particular issue was also considered by the AIT in the appellant's appeal, in February 2010 and its findings, that the appellant would not be at risk on such a basis was upheld by the Upper Tribunal in refusing to grant permission to appeal in the decision of 15 April 2010. The decision in MO has not undermined such findings.

33. Mr Palmer relied upon the Home Office Operational Guidance Note of February 2014 in submitting that there remained a risk to the appellant as a result of being conscripted on return to Eritrea. However we do not consider such a submission to be supported by any background information. Paragraph 3.12.19 of the OGN, as quoted at paragraph 2.5 of Mr Palmer's skeleton argument, is related specifically to those who exited Eritrea illegally, which we have found not to be the case with the appellant. Paragraph 3.12.20 refers to applicants of draft age who did not leave Eritrea illegally but face being drafted on return, but goes no further than stating that there may be situations where such applicants may qualify for protection "*on the particular circumstances of their case*". We have been provided with no evidence to suggest that the appellant's particular circumstances would be such that he would face a real likelihood of Article 3 risk on such a basis.

34. Mr Palmer also submitted that the appellant would be at risk as a failed asylum seeker who had not shown support for the Eritrean government in the United Kingdom and who had not paid taxes to the Eritrean Embassy. However such arguments were considered in full in MO and comprehensively rejected. Consideration was given in particular in that case, at paragraph 130, to situations such as those of the appellant whose evidence was found to be wholly incredible. We consider for the same reasons that there is no basis upon which to conclude that the appellant would be perceived as having committed an act of disloyalty by virtue of having claimed asylum or otherwise. Mr Palmer submitted that the OGN goes further than the findings in MO in that respect and refers to paragraph 6 of the OGN. However we find nothing in that paragraph to suggest that the appellant would be perceived, by having claimed asylum abroad (if, indeed, it

was even known that he had done so), to have acted disloyally to the Eritrean government. In view of his overall lack of credibility there is no reason to accept his claim to have paid no taxes to the Eritrean government, but in any event we uphold the findings of the First-tier Tribunal that he could not be expected to have paid a proportion of his income when he has not been working and earning an income in the first place.

35. We find, accordingly, that the appellant has failed to show that he would be at any risk on return to Eritrea. He has failed to show that his deportation would breach the United Kingdom's obligations under the ECHR and has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007. Accordingly his appeal is dismissed on all grounds.

DECISION

36. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Anonymity

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

Signed Date **19 December 2014**
Upper Tribunal Judge Kebede