



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/08138/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 5th March 2015

Determination Promulgated
On: 19th May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Mohammad Hamid Yassin Ali
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Madubuike, AJO Solicitors

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

DETERMINATION AND REASONS

1. The Appellant claims to be a national of Eritrea date of birth 1st January 1973. He appeals with permission¹ the decision of the First-tier Tribunal (Judge Davies)² to dismiss his appeal against a decision to remove him from the United Kingdom

¹ Permission was granted on the 13th February 2015 by First-tier Tribunal Judge VA Osbourne

² Determination promulgated on the 21st November 2014

pursuant to s10 of the Immigration and Asylum Act 1999. That decision followed from the rejection of the Appellant's claim to international protection.

2. The Appellant's case before the First-tier Tribunal was that he faced a well-founded fear of persecution in Eritrea for reasons of his imputed political opinion. He does not wish to perform military service in Eritrea and having left the country illegally he fears that he will face serious harm if returned. He claimed that he had returned to Eritrea in 2005 after attending university in Sudan and that soon after his arrival he was served with call-up papers. He avoided the draft by going to live in a village with his cousin, as a result of which his father was detained and his brother drafted. He claims to have left Eritrea illegally.
3. The Respondent had rejected the entire account, including the claimed nationality, for want of credibility. The Respondent believed the Appellant to be Sudanese.
4. The First-tier Tribunal accepted that the Appellant is Eritrean. By the time of the hearing before the First-tier Tribunal he had produced an Eritrean identity card, had given details at interview about Eritrea and had been interviewed in Belin, a language only spoken there. The First-tier Tribunal was not however satisfied that the Appellant was at any risk in that country. It was found to be "reasonably likely" that given the time he had already spent in Eritrea he had in fact completed his military service; the Appellant had also spent a long time in Sudan, a country where on his own evidence the Eritrean authorities frequently kidnap draft avoiders and bring them back to Eritrea. He had encountered no problems when living there and had even approached the Eritrean embassy to have his ID card renewed in November 2003. The Tribunal did not accept that the Appellant would be able to live with his cousin in the village for six years with no problems. It is found that the Appellant has not demonstrated that he left Eritrea illegally.

Error of Law

5. The ground of appeal are, in essence, that the Tribunal failed to have regard to the extant country guidance MO (illegal exit-risk on return) Eritrea CG [2011] UKUT (IAC) and the Respondent's Operational Guidance Note of February 2014 in respect of military service and which categories of Eritreans are allowed to leave the country lawfully. In short, even if the Appellant had completed his initial call up (as the Tribunal appears to find) at his age of 43 he is still subject to re-call: the objective material shows the age of military service liability to stretch to 54³. He would not in those circumstances be permitted to leave the country lawfully. It is submitted that the determination fails to give sustainable reasons for its finding to the contrary. At paragraph 45 the Tribunal notes that the Appellant's credibility is damaged by the fact that he used a false passport to travel from Sudan to France; there is no evidential basis for the finding that he did not leave Eritrea illegally.

³ See paragraph 95 MO where the findings in MA (Draft Evaders - Illegal Departures - Risk) Eritrea v. Secretary of State for the Home Department, CG [2007] UKAIT 00059 are upheld. See also paragraph 3.16.8 of the OGN v14.

6. For the Respondent Mr McVeety agreed that the Tribunal had not specifically had regard to the country guidance or background material in assessing whether it was reasonably likely that at 43 the Appellant would be allowed to leave Eritrea legally. Although he correctly submitted that the negative credibility findings made were relevant to the determination of that question⁴, he conceded that the failure to have regard to MO and the OGN meant that the assessment was incomplete.
7. That must be so. Whilst Mr Madubuike was overstating his case in claiming MO to contain a *presumption* that any Eritrean under the age of 54 must succeed, the findings in that case do illuminate two matters that the First-tier Tribunal did not have regard to. First is that as a 43 year old the Appellant remains liable to military call up for the next 11 years (absent any special dispensation); second, that this may have had some bearing on whether he would have managed to leave the country lawfully. If he remains liable to call up, and left Eritrea without permission, the country guidance indicates that he has a currently well-founded fear of persecution.
8. For those reasons the decision contains an error of law and must be set aside.

The Re-Made Decision

9. The headnote of MO reads as follows:
 - (i) The figures relating to UK entry clearance applications since 2006 – particularly since September 2008 – show a very significant change from those considered by the Tribunal in MA (Draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and are among a number of indications that it has become more difficult for Eritreans to obtain lawful exit from Eritrea.
 - (ii) The Eritrean authorities continue to envisage lawful exit as being possible for those who are above national service age or children of 7 or younger. Otherwise, however, the potential categories of lawful exit are limited to two narrowly drawn medical categories and those who are either highly trusted government officials or their families or who are members of ministerial staff recommended by the department to attend studies abroad.
 - (iii) 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. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be, that inferences can be drawn from their health history or level of education or their skills profile as to whether legal exit on their part was feasible, provided that such inferences can be drawn in the light of the adverse credibility findings.
 - (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, subject to limited exceptions in respect of (1) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (2) persons who are trusted family

⁴ See paragraph 109 MO; 444-448 of MA

members of, or are themselves part of, the regime's military or political leadership. A further possible exception, requiring a more case-specific analysis, is (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the war of independence.

(v) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons are likely to be perceived as having left illegally and this fact, save for very limited exceptions, will mean that on return they face a real risk of persecution or serious harm.

10. Paragraph (ii) of the headnote is a summary of the conclusions set out at paragraphs 106-108 of the decision itself:

106. It seems to us that in deciding on the continuing scope for lawful exit from Eritrea, the most significant piece of evidence remains Professor Kibreab's latest evidence on what he considers to be the remaining categories of lawful exit, together with his opinion on their likely ambit. We remind ourselves that according to his revised formulation the remaining categories are:

- (i) a male of 54 years or over;
- (ii) a female of 47 years or over
- (iii) children of 7 or younger;
- (iv) a person declared by an official committee to be unfit on medical grounds to perform any military or national service;
- (v) a person certificated by an official committee to be unable to receive appropriate medical treatment in Eritrea;
- (vi) highly trusted government officials and their families;
- (vii) members of ministerial staff recommended by the department to attend studies abroad.

107. His current reformulated list can be seen to delete one category from his MA list (see above para 27) entirely (ex-Ministers), and view others as more narrowly applied.

108. Three initial observations are in order about this list even as now slimmed down. The first is that it demonstrates to our satisfaction that the Eritrean authorities continue to envisage lawful exit as being possible for those who are 7 or under and those who are over national service age. Putting matters in this way also serves as a useful way of clarifying the purport of the reference in MA to persons being "of or approaching draft age". Odd as it may seem at first sight, that must now be understood to mean (and it seems to us to have been implicit in MA already) persons being seven or over and still of draft age. This clarification must be borne in mind when applying this part of the MA guidance presently. The second observation, which is partly related, is that in terms of gauging whether an Eritrean asylum claimant might have had a basis for lawful exit, the categories are relatively straightforward except for the last two. In respect of the first three categories, being based on sex and/or age, it should be readily ascertainable whether a person has a qualifying basis for obtaining exit legally or not. In respect of the fourth and fifth categories (on the basis that medical evidence from medical experts in the UK should in principle be obtainable to corroborate them), it should likewise be relatively

straightforward to establish whether legal exit was possible. The last two categories raise greater problems since, applying GM principles, the evidence still does not appear to show conclusively that appellants cannot fall within them (but see para 115 below). Furthermore, it may be, in relation to category (vii), that the regime's interest in maintaining close ties with its few international friends (the Human Rights Watch report specifies Qatar, China, Iran and Libya) means it is more confident that those students granted exit visas to study in those countries will not defect. [We are aware, of course, that recent events in Libya might require some reconsideration of whether it remains a friend of Eritrea]. In other words it may be that Professor Kibreab's evidence focuses too much on persons who wish to exit to study in Western countries. A final initial observation is that it is implicit in Professor Kibreab's description and analysis of category (vi) that it must include those who are themselves members of the military or political leadership.

11. It is accepted that the Appellant is not over 54 and that he is male. He is not a child of seven or under. There is no medical evidence to suggest that he would be likely declared unfit to perform military service. His only declared medical problem is constipation, which presumably can be treated in Eritrea as effectively as it can here; in the absence of any evidence to the contrary I accept it unlikely that this Appellant has been given dispensation to travel abroad for medical treatment. That leaves the final two categories identified by Professor Kibreab as persons who might possibly be permitted to exit Eritrea lawfully. As the Tribunal note in MO, whether or not an individual falls into one of these groups is a matter to be considered in the round, drawing inferences where appropriate from their personal background. For instance a person from an uneducated rural background is unlikely to be ministerial staff; conversely it might be argued that a person with a university education, such as this Appellant, might be more likely to hold such a position.
12. On final part of the guidance in MO is relevant to this assessment. The Tribunal heard and accepted evidence that in August / September 2008 the government of Eritrea, angered by the number of nationals who had been granted exit permits who did not come back, clamped down and further restricted the ability of people to leave the country. This leads to the following conclusion:
 116. The general position concerning illegal exit remains, therefore, 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. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be that inferences can be drawn from uncontentious personal data recorded on an appellant as to their level of education or their skills profile as to whether legal exit was feasible.
13. Having had regard to that guidance I remind myself that the appropriate standard of proof is a relatively low one. Is it reasonably likely that the Appellant left Eritrea unlawfully? In considering that matter I have had regard to the following factors:
 - Although his evidence was rejected by the Respondent a substantial part of his evidence, namely that relating to his nationality, has been accepted

by the First-tier Tribunal as credible. It cannot be said that he is a “wholly incredible” witness;

- Material parts of his account, such as his personal history of avoiding the draft, were nevertheless rejected. It cannot therefore be said that he is a wholly credible witness;
- He arrived in the UK in 2014, claiming to have started his journey by walking out of Eritrea into Sudan in August 2012. On all of the evidence before me I see no reason to reject his claimed date of departure from Eritrea;
- The Appellant states that he is educated to degree level, completing his degree in Science and Technology in Sudan in 2005. He states that this was paid for by UNHCR. I see no reason to reject that evidence.
- The Appellant claims to have only ever worked as a “tea boy” in a restaurant and herding goats.
- He has spent considerable periods of time as a refugee in Sudan, having completed his education and married there.
- He was discovered by UKBA staff hiding in a lorry at Dover.

14. Having considered all of these factors in the round I find it to be very unlikely that the Appellant is a highly trusted government official, a member of such an official’s family or a member of ministerial staff. I say that because it seems unlikely that such a person would have spent long periods as a refugee in Sudan. It is further unlikely that the travel arrangements of such a person would include being concealed in a lorry. The Appellant does have an education, and has been found to have lied about certain elements of his claim, but having regard to the country guidance I am satisfied that it is reasonably likely that he left Eritrea unlawfully in the manner he describes, i.e. walking into Sudan. He does not fall within any of the categories of person entitled to lawful exit and I bear in mind that since September 2008 it has become even more difficult to leave Eritrea with permission.

15. On the lower standard I am satisfied that the Appellant has left Eritrea unlawfully. He remains liable for the draft and for those reasons his appeal must be allowed.

Decisions

16. The determination of the First-tier Tribunal contains an error of law and it is set aside.

17. The decision in the appeal is remade as follows:

“The appeal is allowed on asylum grounds.

The Appellant is not entitled to humanitarian protection because he is a refugee.

The appeal is allowed on human rights grounds”.

18. I make no direction for anonymity. There was no application for such an order and on the facts I see no reason to make one.

Deputy Upper Tribunal Judge Bruce
9th May 2015