Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01079/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 August 2017	**On 13 September 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THOMAS GIRMAY

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Hooper of counsel, instructed by Kesar & Co Solicitors

For the Respondent: Mr. S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant was born in Saudi Arabia on 19 August 1984. He arrived in the United Kingdom in 1990 with his mother and three siblings. His mother applied for asylum but her application was refused on 30 September 1990. She was granted exceptional leave to remain until 30 September 1993 and the Appellant and his siblings were also granted exceptional leave to remain for the same period of time. The Appellant and his family members were subsequently granted further leave to remain until 30 September 1996 and then indefinite leave to remain.

2. Between September 1997 and September 1999, the Applicant was convicted on seven occasions and received a series of fines and supervision orders. On 28 September 1999 he was sentenced to 42 months' imprisonment for robbery, attempted robbery and the supply of crack cocaine.

3. As a consequence, his application to naturalise as a British citizen was refused on 4 December 2002.

4. On 13 July 2004, the Applicant was sentenced to eleven years in prison for robbery and causing grievous bodily harm with intent.

5. A deportation order was signed on 28 September 2009 and the Appellant did not lodge an appeal. But on 25 March 2013 his current legal representatives applied for his deportation order to be revoked on the basis that his removal to Eritrea would breach the Refugee Convention and Article 3 of the ECHR.

6. On 3 February 2014, the Appellant was granted immigration bail and on 29 May 2014 the Respondent refused his application for a revocation of his deportation order. He appealed on 12 June 2014 and his appeal was heard by First-tier Tribunal Judge Goodrich, who dismissed his appeal in a decision promulgated on 20 January 2017. First-tier Tribunal Judge Chohan refused him permission to appeal against this decision. But on 11 May 2017 Upper Tribunal Judge Smith did grant him permission to appeal and on 27 June 2017 I found that First-tier Tribunal Judge Goodrich did make errors of law in her decision and set it aside, whilst retaining some of her findings in relation to Article 3 of the ECHR.

THE HEARING

7. Counsel for the Appellant handed up a further skeleton argument and also a supplementary witness statement by the Appellant's solicitor. I also heard brief oral evidence from the Appellant and his solicitor, Rahath Abdar. Counsel also accepted that the Appellant was potentially entitled to Eritrean citizenship. The Home Office Presenting Officer provided me with further case law and informed me that the Respondent had not been able to locate the Appellant's mother's asylum file.

8. Both counsel for the Appellant and the Home Office Presenting Officer made detailed oral submissions and I have referred to the content of these submissions, where relevant, in my decision. Counsel for the Appellant handed up a further skeleton argument and also a supplementary witness statement by the Appellant's solicitor.

DECISION

EXCLUSION FROM ENTITLEMENT TO REFUGEE STATUS

9. Article 33 of the Refugee Convention states that:

> "1. No contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

10. This Article has been incorporated into national law through section 72(2) of the Nationality, Immigration and Asylum Act 2002, which states that:

> "A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is-

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years".

11. Sub-section 72(6) also states that:

"A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person".

12. In paragraph 45 of *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630 Stanley Burnton LJ found that "the words "particularly serious crime" are clear, and themselves restrict drastically the offences to which the article applies". However, the sentencing remarks made by His Honour Judge Roberts QC on 5 July 2006 indicate that the Appellant had been party to the targeting of a vulnerable woman and to subjecting her to a gang attack in her own flat. It is also noteworthy that, even taking into account the mitigating factors which arose from the fact that the Appellant was only 19 at the time of the offence and had been under the influence an older and violent gang leader, he was still sentenced to eleven years' imprisonment. In the light of this evidence, counsel for the Appellant accepted that he had committed a particularly serious crime.

13. However, counsel also submitted that the evidence relied upon by the Appellant rebutted the presumption that he constituted a danger to the community of the United Kingdom.

14. I accept that in paragraph 43 of *EN (Serbia)* Lord Justice Stanley Burnton found that "to construe "danger" [for the purposes of Article 33.2 of the Refugee Convention] as restricted to "very serious danger" is to add words that the Member States did not include".

15. The Home Office Presenting Officer submitted as long as there was evidence of some danger to the community, the presumption would not have been rebutted. However, the test formulation in *EN (Serbia)* by Lord Justice Burnton was more nuanced. He found in paragraph 45 that "so far as "danger to the community" is concerned, that danger must be real, but if a person is convicted of a particularly serious crime, and there is a real risk of its repetition, he is likely to constitute a danger to the community". I accept that in paragraph 46, he rejected the submission that the danger to the community must be causally connected to the particularly serious crime of which the person had been convicted. But he went on to find

"that normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence or of the recurrence of a similar offence". He also accepted that "the wording of Article 33(2) reflects this expectation".

16. In addition, in paragraph 66 he found that "once the State has established that a person has been convicted of what is on the fact of it a particularly serious crime, it will be for him to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of it repetition he does not constitute a danger to the community". Therefore, in the circumstances of this appeal, the question of whether the Appellant would re-offend by committed another particularly serious crime was of central importance.

17. The Home Office Presenting Officer submitted that it was not necessary to consider whether the danger was a present one. However, in paragraph *EN (Serbia)* Lord Justice Burnton also found in paragraph 112 that "on reconsideration, it will be open to KC to dispute both the seriousness of his crime and that at the date his case falls to be considered by the Tribunal he is a danger to the community". Therefore, I have to consider whether he poses a danger, as defined above, at the date of this hearing.

18. The factual background to this assessment was accepted by both parties. The Appellant had committed a particularly serious crime when he was nineteen years of age and he is now thirty three years old. This was also his last conviction and occurred on 13 July 2004. For the purposes of assessing the danger he poses, it is also relevant that he was released on immigration bail on February 2014 and there is no suggestion that he had committed any further offences of any sort or failed to meet the conditions of his bail. There is also no evidence to indicate that he still has any contact with members of any gang or anyone involved in criminal behaviour.

19. No OAYS report has been provided but the Appellant relies on an independent psychological report by Lisa Davies, a chartered and registered forensic psychologist, dated 5 September 2016. She has been a consultant forensic psychologist since 2011 and has practiced as a psychologist since 1996. I also note that much of her past experiences has involved the treatment of serious offenders. Therefore, I find that she has the necessary qualifications and experience to provide such an expert report. I also note that she had been provided with all

relevant evidence before completing her report and referred to this evidence, where appropriate, in her report. She also referred to a number of academic articles and reports, which constituted relevant background evidence.

20. Much of her report addressed the key issue of whether the Appellant did now constitute a danger to the community in the United Kingdom.

21. Her report, explained in detailed how she had assessed what, if any danger, he posed to the community using the Level of Service Case Management Inventory, the Historical Clinical Risk Management tool and SAPROF Assessment of Protective Factors. In paragraph 10.3.3. of her report, Lisa Davies explained that the nature of his past offences alone was sufficient to put the Appellant in the category of moderate risk and that this was a static factor which could not be changed. However, it was her opinion that it was the other factors which were more indicative of any current risk.

15. At paragraph 4.4.7. she noted that his score on the dynamic need index, a measure of treatment and management needs, placed him in the low range with a t-score of 39 and percentile score of 17. She also explained that higher scores on this index (percentiles of 75 and above) reflected higher levels of treatment and management need and higher levels of recidivism.

16. In addition, she found in paragraph 4.4.9. that his score on the Protective Strength Index fell at the 77th percentile. She explained that this scale is a measure of the presence of protective influences and strengths. She noted that he fell in the high range with respect to his cognitive and behavioural regulation skills and in the average range with respect to anger regulation abilities. She acknowledged that he fell in the low range in respect to education and training but concluded that the scores taken together suggested that the presence of protective factors was high with respect to his ability to regulate his emotions although gaining employment and improving his employability would be beneficial in further reducing his risk and increasing the level of protection although risk overall is noted to fall in the average range. This conclusion served to meet the concerns raised by the Home Office Presenting Officer that he had no history of employment.

17. In paragraph 4.4.10. she concluded that his profile of scores indicated that his static risk was mitigated by the presence of a range of protective strengths and low treatment needs.

18. As a consequence, she concluded in paragraph 5.0.10 of her report that it was only likely that the Appellant had the potential to cause serious harm (through the commission of further offences) if there was a significant change in his current circumstances for example, a return to consistent gang associations, a return to consistent use of drugs and a perceived need for financial gain.

19. Furthermore, in paragraph 10.3.2 of her report, she concluded that the Appellant had begun the process of desistance from gang membership and there is no current evidence to indicate the presence of violent or offence supportive attitudes or beliefs or beliefs supportive of the use of weapons or gangs. He currently expresses pro-social orientation and is hopeful of being given the opportunity to live an offence free lifestyle for himself in the UK. I am confident that he will continue to desist from engagement in criminal activity and has been successfully rehabilitated".

20. The Appellant had been on bail since 29 May 2014 and, therefore, it was possible to assess his behaviour since that date and when he was living in the community. It was not disputed that he was living with his parents and was devoting his time to charity work, going to the gym and playing other sports. It was also not disputed that he had not re-offended and had broken all ties with his previous associates. He had also developed a business plan and was very keen to obtain employment when his immigration status permitted him to do so. Therefore, applying a balance of probabilities I find that the Appellant has rebutted the presumption that he constitutes a danger to the community.

21. As a consequence, I find that the Appellant is not excluded from a grant of asylum.

RETURN TO ETHIOPIA

22. The Appellant accepts that he is entitled to Eritrean citizenship but it is his case that he would suffer persecution there. It is the Respondent's case that this fear of persecution is irrelevant as the Appellant is also entitled to Ethiopian citizenship and he has not expressed a fear of

persecution there. In particular, the Respondent submitted that the Appellant is entitled to Ethiopian citizenship as his mother used an Ethiopian passport to enter the United Kingdom.

23. This is not denied by the Appellant but it is his case that he has no access to that passport and, therefore, cannot not provide it to the Ethiopian Embassy in connection with any application for Ethiopian citizenship. He is supported in this assertion by his mother. In her own witness statement she explained that, when she came to the United Kingdom in 1990, she had to travel on an Ethiopian passport as Eritrea was not yet an independent state. She added that it was when Eritrea became independent in 1993 that she applied for an Eritrean identity card. (I note that this timing is historically accurate.) She added that once she received her Eritrean identity card, she sent her Ethiopian passport to the Home Office.

24. I have also taken into account the fact that in the note and directions, promulgated by Designated First-tier Tribunal Judge Peart on 28 September 2015, it is recorded that the Respondent, through her Home Office Presenting Officer, accepted that both of the Appellant's parents had been born in Asmara, which is now in Eritrea and that the Appellant had been born in Saudi Arabia and had never lived in Ethiopia.

25. Designated First-Tribunal Judge Peart had also directed the Respondent do use her best endeavours to forthwith locate and produce copies of the Appellant's mother's Ethiopian passport to the Appellant on the basis that he understood that it was lodged with the Respondent in 1993 of thereabouts. (At the start of the current hearing, the Home Office Presenting Officer, informed the Tribunal that the Respondent had been able to comply with this direction or to locate the Appellant's mother's file.)

26. This is relevant as it is the Respondent's case that it is the Appellant who has not taken all reasonable steps to establish that he is entitled to Ethiopian citizenship. She relies on *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289 in which Elias LJ held at paragraph 50 that:

"In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put

the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean".

27. In the current case, it is accepted that the Appellant was not born in Ethiopia and, therefore, cannot provide a birth certificate from that state. It is also accepted that he was not born in Eritrea when it was still part of Ethiopia. Therefore, at best he will be able to establish that he is entitled to Ethiopian citizenship by descent.

28. It is also the case that the Appellant has not tried to disguise his origins from the Ethiopian Embassy as was the case in *MA (Ethiopia).* He has also visited the Embassy to try to apply for Ethiopian citizenship. At the hearing the Appellant and his solicitor gave oral evidence about the time they visited the Ethiopian Embassy in London together. Their oral evidence was consistent and it appeared that the Appellant, assisted by his solicitor, tried to both obtain information about his entitlement to citizenship and to pursue an application for citizenship. They managed to pursue a member of the staff at the Embassy to speak to them in a private room but that they were told that the Appellant did not have the necessary documents to even make an application.

29. The Appellant's Bundle also contained a copy of an Application form for an Ethiopian origin Identification Card. There was provision for a foreign national of Ethiopian origin to apply for an Identification Card. However, the form and the accompanying notes stated that he would have to provide two copies of a supporting document that showed that he was of Ethiopian origin. As stated above, it was accepted that the Appellant had been born in Saudi Arabia and, therefore, there was no question of him being able to provide a copy of his birth certificate as authenticated through the Ethiopian Ministry of Foreign Affairs. In addition, the Respondent did not submit that the Appellant would be able to obtain a court document authenticated by the Ministry of Foreign Affairs which confirmed that he was of Ethiopian origin or that his parents or grandparents were Ethiopian or that he was the legal inheritor of biological parents who are or were Ethiopian citizens.

30. The Respondent merely relied on the failure by the Appellant to submit a copy of the Ethiopian passport held by his mother when she first entered the United Kingdom in 1990.

However, the notes provided by the Embassy do not suggest that a copy of his mother's old passport of itself would meet the requirements of the Embassy. He would also have to obtain a court document attesting to her citizenship which had been authenticated by the Ethiopian Ministry of Foreign Affairs. However, Ethiopian Nationality Law 2003 states at 12.1 that any Ethiopian who voluntarily acquires another nationality shall be deemed to have voluntarily renounced his Ethiopian nationality.

31. The Application Form also required the Appellant to provide the name and address of a parent or close relative with an address in Ethiopia and it was accepted that the Appellant's parents did not live there and there had been no suggestion that he had any close relatives living there. At best, if the Appellant had been able to provide a copy of his mother's passport, it would have shown that she had been born in what was now Eritrea.

32. The Home Office asked why the Appellant's solicitor had not followed up his visit by letters and telephone calls. However, the solicitor had explained that an application could only be make at the Embassy as it was necessary for an applicant to be fingerprinted at the same time as making the application.

33. I have also taken into account the fact that in his expert report, dated 21 September 2016, Gunter Schroder noted that section 3.1 of the Ethiopian Nationality Law 2003 states that any person shall be an Ethiopian national by descent where both or either of his parents is Ethiopian. However, at paragraph 17 of his report, he concludes that the Appellant's mother undoubtedly lost her Ethiopian nationality when she applied for and was issued an Eritrean National ID-Card in 1993 and, at paragraph 20, he added that it was also his view that the Appellant would have lost his Ethiopian citizenship in 1993 through the verification of the Eritrean nationality of his mother. I have also reminded myself that, in paragraph 16 of *CS & Others (Proof of Foreign Law) India* [2017] UKUT 00199, it was confirmed that "foreign law is capable of being proved by the evidence of a person possessing demonstrated expert credentials".

34. The Home Office Presenting Officer relied on the passage in paragraph 49 of *MA (Ethiopia)* where the Court of Appeal noted that "speculation by the AIT about the embassy's likely response, and reliance on expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary". However, the Appellant had

visited the Embassy twice and on the first occasion he had been accompanied by his solicitor, who had provided both a written witness statement and oral evidence about his visit. The Appellant had also obtained an application form and accompanying notes which indicated that he was not in possession of the necessary supporting documents.

35. The Home Office Presenting Office submitted that the expert in the current appeal had speculated in paragraph 20 of his report when he said that that there was no reason whatsoever to assume that the Appellant's mother had informed the Ethiopian authorities that she wanted the Appellant to retain his Ethiopian citizenship. In my view, this was a statement of fact and not a speculation about the law. It was also entirely proper for the expert to give his opinion in relation to the practices adopted by the Ethiopian Embassy based on his own knowledge and experience in paragraph 19 of his report.

36. The Home Office Presenting Officer submitted that the expert did not have the requisite expertise in relation to Ethiopian nationality law. However, his report displayed a detailed understanding of the issues involved and he referred to relevant legislation and practice. There was also no doubt that he was an expert in relation to the situation in Eritrea.

37. I have taken into account the fact that in paragraph 74 of *ST (Ethnic Eritrean – nationality – return) Ethiopia CG* [2011] UKUT 00252 (IAC) the Upper Tribunal held that:

"Although the question of whether a person is a national of any particular state is a matter of law for that state (KK and Others (Nationality: North Korea) [2011] UKUT 92 (IAC), the question whether a national of a particular state has been lawfully or unlawfully deprived of the nationality of that state is a legitimate issue for a court or tribunal in another state to determine, in the course of deciding a person's entitlement to international protection. This is evident from the judgments in EB (Ethiopia) and MA (Ethiopia)".

38. I have also noted that in paragraph 94 of *ST* the Upper Tribunal also found that:

"On this basis, it is important to make plain the ambit of any country guidance to be given by the Upper Tribunal on this issue. The general attitude and practices of the Ethiopian Government, operating through its London Embassy, as disclosed by the evidence in the present case, are no more than the backdrop against which each individual claimant in an Ethiopian asylum case of the present

kind must take all reasonably practicable steps on a bona fide basis to secure Ethiopian acknowledgement of his or her Ethiopian nationality. That attitude and practice will also, of course, inform judicial fact-finders in deciding whether an individual has, in fact, taken all such steps".

39. I have also noted that in paragraph 97 of *ST,* the Upper Tribunal accepted evidence from a witness, which indicated that an ID/birth certificate would be expected by the embassy, in connection with an application for return as a citizen, failing which the situation "becomes much more difficult", in that the relevant *kebele* would need to make enquiries about family in Ethiopia, failing which information as to the applicant's last permanent address would be needed, so that that could be verified. The efficiency of *kebele* record keeping, as regards house numbers and who live in those houses, has been attested by the expert witnesses".

40. Therefore, taking this and the totality of the evidence into account I find on a balance of probabilities that the Appellant had taken all reasonable steps to obtain an Ethiopian Identity card to show that he is entitled to Ethiopian citizenship and that, as a consequence, I find on a balance of probabilities that he is not entitled to Ethiopian citizenship.

RETURN TO ERITREA

41. The Appellant accepts that he is entitled to Eritrean citizenship but it is his case that he will be subjected to persecution if removed there because he would have to undertake military service. When I made by error of law decision, I retained the findings made by First-tier Tribunal Judge Goodrich in paragraphs 80 to 89 of his decision. He found in paragraph 88 of the decision the First-tier Tribunal Judge concluded that if the Appellant were to be removed to Eritrea he would be at real risk of being required to perform national Service. He also found that a real risk on return of having to perform military national Service duties (including civilian national service but not with the people's militia) was likely to constitute a flagrant or a mere breach of Article 4(3) as well as a breach of Article 3 of the ECHR". When reaching this decision, he also relied on country guidance provided in *MST and Others (national service – risk categories) CG* [2016] UKUT 00443, where the Upper Tribunal found that:

"2. The Eritrean system of military/national service remains indefinite and since 2012 has expanded to include a people's militia programme, which although not part of national service, constitutes military service.

3. The age limits for national service are likely to remain the same as stated in MO, namely 54 for men and 47 for women except that for children the limit is now likely to be 5 save for adolescents in the context of family reunification. For peoples' militia the age limits are likely to be 60 for women and 70 for men.

11. While likely to be a rare case, it is possible that a person who has exited lawfully may on forcible return face having to resume or commence national service. In such a case there is a real risk of persecution or serious harm by virtue of such service constituting forced labour contrary to Article 4(2) and Article 3 of the ECHR.

12. Where it is specified above that there is a real risk of persecution in the context of performance of military/national service, it is highly likely that it will be persecution for a Convention reason based on imputed political opinion".

42. The Appellant is thirty years old and does not fall into any category of person who may be exempt from military service. Therefore, applying the requisite lower standard of proof I find that his liability for service amounts to a breach of Article 3 of the European Convention on Human Rights and the Refugee Convention.

43. Therefore, the Appellant falls within the exceptions contained in section 33(2) of the UK Borders Act 2007 and the Respondent has the power to revoke the Appellant's deportation order under section 32 of the Act.

DECISION

(1) The Appellant's appeal is allowed.

Nadine Finch

Signed Date 11 September 2017

Upper Tribunal Judge Finch