



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/12537/2016**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 5 September 2017**

**Decision & Reasons  
Promulgated  
On 18 September 2017**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCCARTHY**

**Between**

**SENAY AFEWORKI  
(NO ANONYMITY ORDER)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms B Smith, instructed by Lambeth Law Centre  
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision and reasons statement of FtT Judge Mathews that was promulgated on 16 January 2017. Judge Mathews decided the appellant was not a refugee from Eritrea or otherwise in need of international protection. Judge Mathews also decided the appellant did not benefit from article 8 ECHR on family life grounds even though he is the father of a British citizen child.
2. At the outset of the hearing, Mr Mills advised Ms Smith and myself that, in light of the Upper Tribunal's decision in SF and others (Guidance, post-2014 Act) [2017] UKUT 120, he accepted that Judge Mathews erred when dismissing the original appeal under article 8 ECHR. Mr Mills conceded

that because the appellant had a genuine parental relationship with a British citizen child, his appeal on that ground must succeed. In response, I indicated that I would find that the decision and reasons statement contains legal error on this issue, that I would set aside the decision and remake it to allow the appeal on article 8 grounds.

3. Although Ms Smith thanked Mr Mills for this concession, she was in a little difficulty because she was not able to concede the issue relating to whether the appellant is a refugee because she did not have instructions. I decided for the sake of clarity, I should hear argument on those issues to decide whether Judge Mathews had erred on those grounds.
4. Ms Smith confirmed there was no challenge to Judge Mathew's adverse credibility findings. The issue was whether he erred by not considering the current country guideline case, MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 443 when assessing the risks the appellant might face on return as a draft evader.
5. Although the original grounds of application argued that Judge Mathews should have re-examined the earlier judicial finding of Judge Saffer that the appellant had not left Eritrea illegally in light of the additional evidence considered by the Upper Tribunal, Ms Smith realised that was a difficult argument to pursue because it was necessary to consider the situation in Eritrea when he left and not now. Her argument moved, therefore, to focus on paragraph 11 of the head note to MST and others, which identifies that:

*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.*

6. At [21], Judge Mathews finds no cogent reason to depart from the findings made by Judge Saffer in relating to an earlier appeal that was dismissed on 15 December 2008. The key findings in relation to the issues I must consider appear at paragraph 45 and 46 of Judge Saffer's determination.

*45. In summary, therefore I accept that the appellant is from Eritrea and did military service from 2000, this ended sometime prior to 2007, he had no problems while in active service, he subsequently worked as a farmer, he remains on reserve duty, and his continued contact with his family and lack of provision for their safety indicates they were at no risk as a result of his actions. I do not therefore accept it is reasonably likely his father had the problems claimed.*

*46. The question I must ask myself is what is reasonably likely to happen to him on his return to Eritrea. I accept he is still subject to reserve duty. The only evidence he left illegally is his word. Regrettably his credibility is so poor for the reasons I have given that I am unable to accept his word on this issue. Exit permits are required (COIR 34.03). he has failed to establish it is reasonably likely he did not have an exit permit and accordingly that he left illegally.*

7. Ms Smith submitted that the fact the appellant remains on reserve duties can only mean that he has a well-founded fear on return of having to resume national service.
8. Mr Mills submitted that this was a major change in the grounds of appeal and permission for the amendment had not been sought or granted. Even if the new ground were entertained, there was a question whether the available evidence, including that considered by the Upper Tribunal in MST and others identified a real risk to a person such as the appellant or a mere possibility that needed investigating. Mr Mills argued that the lack of evidence before Judge Mathews means the appellant could not discharge even the lower standard of proof in his case.
9. Mr Mills also argued that the original grounds of appeal could not be made out because the question of lawful exit had to be examined as the situation was in 2008 and not as it is now. Judge Saffer's findings were not in doubt because they are part of the credibility findings of Judge Mathews, which are unchallenged.
10. I have considered the arguments and make the following findings.
11. Ms Smith's primary submissions seek to persuade me that because the appellant's evidence shows he does not fall within one of the categories of persons able to leave Eritrea lawfully Judge Mathews must regard him as a person who left unlawfully.
12. This argument is defeated by the fact both Judge Saffer and Judge Mathews found the appellant had not given a credible account of his circumstances in Eritrea before he left. For this reason, both judges concluded they could not find that it was reasonably likely the appellant left Eritrea unlawfully. I recognise that the judges did not make a finding as to whether the appellant left lawfully, but there was no requirement for them to make such a finding. The situation is unchanged because Ms Smith concedes there is no challenge to the credibility assessment. It follows that it is impossible to decide whether the appellant left unlawfully or not because his accounts of his circumstances in Eritrea are not believed.
13. This conclusion means I find there is no legal error in the conclusion reached by Judge Mathews regarding whether the appellant left unlawfully.
14. The secondary submissions are that the appellant would be at risk as a reservist aged 37 because he would be of interest to the authorities if forcibly returned. This argument depends on whether the appellant would be able to prove that he left lawfully; if he can, then it can be inferred he would not face a real risk for the reasons given in MST and others. As this argument developed during the hearing, I was effectively asked to consider whether the Eritrean authorities would have adequate records to show that the appellant had left lawfully on the assumption that if they did not then the appellant would face a real risk of being recalled to national service.
15. I have examined the approach taken to this issued by the Upper Tribunal in MST and others. From paragraph 300, the Upper Tribunal considered the conflicting evidence and identified that there was a possibility that a

person of military service age who was forced to return to Eritrea and who could not demonstrate completion or exemption from military service might be recalled to service. But the Upper Tribunal only identified this as a possibility. The evidence was equivocal and there was no clear overall picture.

16. Ms Smith had no evidence to develop the findings of the Upper Tribunal and recognised that the finding that the appellant was not credible weakened her argument. I am satisfied that although there is a possibility the appellant could be recalled, the risk is below the real risk threshold because the evidence is not adequate. Because Judge Mathews found the appellant's claim not to be credible, there was no need for him to consider this possibility, which in any event was not argued below. Mr Mills categorised the possibility as speculative and I agree.
17. It follows that I reject the secondary ground.
18. However, the finding that the protection grounds are not made out does not undermine my decision that the decision and reasons statement is infected with legal error in relation to the assessment of the appellant's private and family life.

## **Decision**

The appeal to the Upper Tribunal is allowed because FtT Judge Mathews erred in law.

I remake the decision to allow the original appeal to the extent indicated above in terms of article 8 ECHR.

Signed

Date

15 September 2017

Judge McCarthy  
Deputy Judge of the Upper Tribunal