



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/11026/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 November 2018

Decision & Reasons Promulgated
On 7 December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

MEDHANIE [T]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Dakora (for Barnes Harrild Dyer Solicitors)

For the Respondent: Ms K Everett (Specialist Appeals Unit)

DECISION AND REASONS

1. The Appellant is a citizen of Eritrea born [~] 1984, who appeals against the decision of the First-tier tribunal of 5 March 2018 to dismiss his appeal, itself brought against the decision to refuse him asylum of 24 September 2016.
2. The Appellant's asylum claim can be summarised thus. He was born in Adisagdo. He attended school until grade 5. When he left school he went into hiding to avoid military service, sometimes in Asmara at his grandfather's home, and at other

times with other paternal relations. In 2006 his mother died. His brother had previously been called up and wounded in battle, around 2007.

3. The Appellant was arrested at his place of abode and taken for military service in the Third Brigade. He absconded whilst on training and travelled, with a friend, to Sudan, in 2007, where he stayed for around four months. In December 2007 he left Sudan and travelled to Libya, and onwards to Italy (where he lived rough for some five months over a period when his asylum application was apparently not being processed) and France (where he was poorly treated), where he spent several months before finally arriving in the UK.
4. He claimed asylum on 29 June 2009. His asylum claim was treated as withdrawn when he was recorded as an absconder, on 8 July 2011. Over this period he had been supported by the Eritrean community and a female friend with mobility problems who helped with household chores. He subsequently applied for a residence card as the family member of an EEA national, though that application was refused on 6 September 2011. Further submissions were made in June 2014 relating to his asylum claim and these were refused, though acknowledged as raising a fresh claim meriting the right of appeal. His appeal was originally heard and dismissed on 16 January 2017, though that decision was found legally flawed and the matter was remitted by the Upper Tribunal on 4 August 2017 for re-hearing, the resulting dismissal of the appeal giving rise to the instant appeal before the Upper Tribunal.
5. The First-tier tribunal noted the Appellant had a poor immigration history, having travelled through many safe countries, before absconding having submitted an asylum claim in the UK and pursued an apparently unmeritorious EEA claim; “a genuine refugee would have claimed asylum at the first opportunity when he arrived in a safe country.” His journey across Europe indicated that he was forum-shopping and his having absconded in the UK also counted against his credibility having regard to the considerations in section 8 of the 2004 Act.
6. The First-tier Tribunal found the core events underlying his asylum claim to lack credibility because several aspects of that account were considered implausible: namely the possibility that he would have returned to his family home having previously lived in hiding had he truly feared conscription, his claim to have escaped from “under the noses” of armed soldiers guarding the Sawa military camp in Eritrea, and the ability of himself and his friend to enter Sudan and then be released by the Sudanese authorities, notwithstanding their lack of immigration status.
7. Given those credibility findings, the Judge found that he would not be subject to repressive treatment on a return to Eritrea. At worst he would have to pay the diaspora tax which represented a means by which asylum seekers might return and avoid persecution. There was some disquiet over its administration but generally returnees who had left the country illegally appeared to have gone unpunished.

8. The First-tier Tribunal noted the effect of the CG decisions, which it summarised as holding that lawful exit from Eritrea was difficult, and that those above draft age and below retirement age, and some government officials and their families, were allowed to leave the country; otherwise individuals who departed, particularly after August/September 2008, might well face hostility on return.
9. Overall his account wholly lacked credibility and thus the Appellant did not fall within the class of person at risk. He was not to be presumed to have left Eritrea illegally, given that only after his departure, in 2008, was there a turning point when exit visa facilities were suspended. In conclusion, the negative credibility to which the Judge came were, in his own estimation, sufficient to remove any real chance that the Appellant had departed the country unlawfully.
10. Grounds of appeal argued that
 - (a) There was no express reference to the correct standard of proof or to the *Adimi* principle regarding choice of forum to claim asylum;
 - (b) There was no express evidence justifying a finding that the Appellant had left Eritrea lawfully, and the findings on plausibility were not a sufficiently compelling basis for such an inference - *MST* warned such findings should not be lightly made, and in *GM* the Tribunal had found that the rejection of the individual account of illegal exit did not necessarily justify a finding of unlawful departure more generally where the individual was of an age for military service, had been called up, and did not obviously fall within the very limited risk categories who did not require exit permission - *MST* had not accepted that paying the diaspora tax counteracted the dangers otherwise present;
 - (c) Material evidence was overlooked that might have arguably established that the abuse that took place in the military service regime could itself be persecution;
 - (d) A material conclusion of the Tribunal in *MST* had been overlooked, namely its finding that a person who had exited Eritrea lawfully might nevertheless have to re-commence military service on a return, which whilst likely to be a rare scenario, would where it arose lead to persecution for reasons of imputed political opinion.
11. Although the First-tier tribunal refused permission to appeal on 28 March 2018, the Upper Tribunal granted permission on 8 October 2018. The Judge granting permission considered that the findings based on not claiming asylum in a safe third country failed to take account of the well-documented difficulties faced by asylum seekers in some European countries, and both those conclusions, and the express reasons for disbelieving the Appellant, all amounted to *plausibility* factors, which might not suffice to counteract the likelihood of illegal exit; furthermore the risk categories in *MST* appeared to have not been adequately assessed.

12. Mr Dakora submitted that the findings did not justify the inference that the Appellant had left Eritrea illegally. Ms Everett accepted that the findings were not sufficiently clear cut to dispose of the Appellant's fear of persecution. Whilst there were negative findings, she acknowledged that it was difficult to see how it was that they could justify a finding of lawful rather than illegal departure.

Findings and reasons – Error of law hearing

13. The Tribunal gave Country Guidelines in *MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 190 (IAC)* on 27 May 2011, though in so far as those findings remain relevant they are in fact summarised in the subsequent Country Guidelines case, *MST Eritrea CG [2016] UKUT 443 (IAC)*, the headnote of which it is necessary to cite at some length:

“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.

4. The categories of lawful exit have not significantly changed since *MO* and are likely to be as follows:

- (i) Men aged over 54
- (ii) Women aged over 47
- (iii) Children aged under five (with some scope for adolescents in family reunification cases)
- (iv) People exempt from national service on medical grounds
- (v) People travelling abroad for medical treatment
- (vi) People travelling abroad for studies or for a conference
- (vii) Business and sportsmen
- (viii) Former freedom fighters (Tegadelti) and their family members
- (ix) Authority representatives in leading positions and their family members

5. It continues to be the case (as in *MO*) that most Eritreans who have left Eritrea since 1991 have done so illegally. However, since there are viable, albeit still limited, categories of lawful exit especially for those of draft age for national service, the position remains as it was in *MO*, namely that a person whose asylum claim has not been found credible cannot be assumed to have left illegally. The position also remains nonetheless (as in *MO*) that 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 adverse credibility

findings. For these purposes a lengthy period performing national service is likely to enhance a person's skill profile.

6. It remains the case (as in *MO*) that failed asylum seekers as such are not at risk of persecution or serious harm on return.

7. Notwithstanding that the round-ups (*giffas*) of suspected evaders/deserters, the "shoot to kill" policy and the targeting of relatives of evaders and deserters are now significantly less likely occurrences, it remains the case, subject to three limited exceptions set out in (iii) below, that if a person of or approaching draft age will be perceived on return as a draft evader or deserter, he or she will face a real risk of persecution, serious harm or ill-treatment contrary to Article 3 or 4 of the ECHR.

(i) A person who is likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and/have signed (or are willing to sign) the letter of regret.

(ii) Even if such a person may avoid punishment in the form of detention and ill-treatment it is likely that he or she will be assigned to perform (further) national service, which, is likely to amount to treatment contrary to Articles 3 and 4 of the ECHR unless he or she falls within one or more of the three limited exceptions set out immediately below in (iii).

(iii) It remains the case (as in *MO*) that there are persons likely not to face a real risk of persecution or serious harm notwithstanding that they will be perceived on return as draft evaders and deserters, namely: (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 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.

8. Notwithstanding that many Eritreans are effectively reservists having been discharged/released from national service and unlikely to face recall, it remains unlikely that they will have received or be able to receive official confirmation of completion of national service. Thus it remains the case, as in *MO* that "(iv) The general position adopted in *MA*, that a person of or approaching draft 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..."

9. A person liable to perform service in the people's militia and who is assessed to have left Eritrea illegally, is not likely on return to face a real risk of persecution or serious harm.

10. Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (i) that he or she left illegally, and (ii) that he or she is of or approaching draft age, is likely to be perceived on return as a draft evader or deserter from national service and as a result face a real risk of persecution or serious harm.

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."

14. There are certain features of the Appellant's profile that cannot be gainsaid. He is clearly of draft age and there is no evidence of any unfitness for military duties. The Tribunal appeared to accept that he had been conscripted (anything else would be surprising given the universality of the draft). It is very difficult to see any basis, from the reasoning of the First-tier Tribunal, from which the Eritrean security forces could reasonably be predicted to infer that he is a person who had travelled abroad for medical treatment, for studies, business or sporting purposes, or as a former freedom fighter; there is no overt evidence that he is from a prominent family.
15. In these circumstances, only the very clearest and unanswerable adverse credibility findings could prevent the inference that he had left Eritrea illegally. I do not think that the findings here fell into that category. Findings on the plausibility of aspects of an asylum claim must always be made with some care, and findings made by reference to the statutory criteria relevant to credibility via section 8 of the 2004 Act must take account of all relevant circumstances. The correlation between a person's failure to claim asylum in Italy or France and an inference that they left Eritrea unlawfully is a rather distant one.
16. Furthermore, the Tribunal below appeared to misunderstand critical aspects of the Country Guidelines.
 - (a) Given the prevalence of enforced military service, its own finding that the Appellant had not absconded from military service would seem to imply that he had not so far performed any such service notwithstanding that he was plainly of an age liable for it. The only reason for him so avoiding service would appear to have been a need to live in hiding in order to avoid it, unless he had been permitted to undergo some other form of national service. However no consideration was given to this issue below.
 - (b) Payment of the diaspora tax is not in fact seen by *MST Eritrea* as removing all risk of serious harm on return (headnote 7(i)).
 - (c) As shown for example by *MO* §104, "since 2006 - particularly since August/September 2008 - it has become *gradually more difficult* for Eritreans to obtain lawful exit from Eritrea" (emphasis added). So it cannot simply be said that August/September 2018 represented a watershed moment.

17. In the light of the various considerations identified above, this is a case where it is appropriate to endorse Ms Everett's realistic concession that the adverse findings were not sufficiently sweeping to remove a real possibility of unlawful departure.
18. In those circumstances, the appeal must be re-determined. It is unfortunate that it requires a third hearing on its merits. However, the assessment of the Appellant's claim overall must be conducted fairly and lawfully in order for the appropriate platform of facts to be found from which inferences as to unlawful departure can be drawn.
19. The appeal is accordingly remitted for re-hearing afresh, with no findings preserved.

Decision:

The decision of the First-tier Tribunal contained a material error of law and is set aside.

The appeal is remitted for hearing afresh.

Signed:

Date: 29 November 2018

A handwritten signature in black ink, appearing to read 'M.A.S. Symes', with a long, sweeping underline that extends to the left and then curves back under the signature.

Deputy Upper Tribunal Judge Symes