



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07634/2019

THE IMMIGRATION ACTS

**Heard at Bradford
On 11 March 2020**

**Decision & Reasons Promulgated
On 24 March 2020**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MT

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer

For the Respondent: Mr Davsion, Ison Harrison, solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1976 and is a male citizen of Eritrea. By a decision dated 30 July 2019, the Secretary of State granted restricted leave for six months to the appellant but refused his application for asylum under the provisions of Article 1(F) of the Refugee Convention. The appellant appealed against that decision to the First-tier Tribunal which, in a decision promulgated on 28 October 2019, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The respondent had accepted that the appellant is a citizen Eritrea and the the factual basis of the appellant's claim, namely that he had deserted from National Service and departed from Eritrea illegally. The respondent also accepted that the appellant had been detained in Eritrea, first on the charge of organising an unregistered religious gathering and, secondly, as a suspected Pentecostal Christian. The appellant had trained with the Eritrean police force (EPF). In the employment, the Secretary of State considered that the appellant had participated in human rights abuses perpetrated by the EPF. As a consequence, the appellant should be excluded from protection as a refugee under Article (1) (f) (b) of the Convention.
3. The judge found that the appellant had stated in interview that 'beating people who had not admitted the crime was not a problem' [59]. He found that the appellant was present during interrogations as a trainee. The judge concluded [63] that 'respondent did not satisfy me that the appellant's presence during an investigation facilitated or contributed to the crimes against humanity. In my view, the abuses would have taken place regardless of the appellant's presence and I do not consider that he aided or abetted acts against humanity.' The judge was satisfied that the appellant's involvement was involuntary [65] and found the appellant had not made a substantial contribution to the abuse [64].
4. There are three grounds of appeal. First, respondent submits that the judge found that the appellant was an investigator for 14 months and had variously stated that he had been a trainee for three and six months respectively. The judge failed to make any clear finding as to why the period of six months as a trainee was accepted as accurate. At [44], the judge had found that 'the appellant's failure to give a consistent account suggest that he is not being wholly truthful and is trying to minimise his involvement with the EPF.' Notwithstanding that observation, it was not clear why the judge accepted that the appellant had been a trainee for six months. The inconsistency was significant given the judge's finding at [61], which appears to have weighed in favour of allowing the appeal, that the appellant had been 'present during interrogations as a trainee and was there as part of his national service.'
5. If being a 'trainee' was relevant to the degree of involvement or culpability of the appellant in the abuse, then it was unclear why the judge accepted the appellant's evidence as to his period working as a trainee, especially given the judge's misgivings regarding the reliability of the appellant's evidence. I find that that ground of appeal has merit. It is clear from reading of the decision that the judge did consider it significant that the appellant was 'involved' in the abuse concerned but as a trainee. The Tribunal's failure to provide reasons why the appellant's evidence on this element of his account was accepted amounts, in my opinion, to an error of law given the significance of the capacity in which the appellant was 'involved' in abuse.

6. The second ground of appeal concerns the judge's alleged inadequate reasoning of the appellant's 'involvement' in human rights abuses. Against a background of the judge's concerns with the failure of the appellant give a consistent account past events [44], the judge has provided no proper analysis of the apparent distinction made by the appellant in his asylum interview between 'beating' and 'torture'. For example, at Q40, the appellant had been asked whether he had ever been involved in torturing anyone. He replied, 'I cannot say I was *torturing* them but they were prisoners who *are beaten up* some when beaten up though (*sic*)' [my emphasis].
7. I agree with the Secretary of State that the appellant appears to make a distinction between 'beating' and 'torture' (both arguably forms of abuse) with which the judge has not properly engaged. I also agree that the appellant appears unequivocally in interview to accept that he had been involved in 'beatings during investigation'. At [53], the judge wrote: 'as to whether the appellant actually beat a detainee, I found this difficult to determine. The appellant stated that the first interview that he had been 'involved' in beating a detainee. However, 'involved' can include at one end of the spectrum personally beating a detainee, to the other end, mere presence. In many cases, the distinction does not matter is the person's presence would be contributing to the acts against humanity. Especially if you knew that these things happen.' I agree with the Secretary of State that the appellant's answer at interview to Q43 'it was not a problem' to the question 'so when *you beat people* you would not admit crime, *you didn't see anything wrong with this?*' [my emphasis] has been overlooked by the judge. I find that the judge's discussion of 'involvement' in abuse at [53] fails to engage with the relatively clear evidence provided by the appellant at interview. On my reading, the appellant has not denied that he beat people and that he did not consider such beating 'a problem.' The failure of the judge to engage properly with this evidence and to make unequivocal findings constitutes, in my opinion, legal error.
8. Finally, the Secretary of State complains that the judge, having recorded at [57] that the appellant relied upon the defence of duress, has failed to engage with that defence by reference to the appropriate legal test. That test appears in the Rome Statute at Article 31(1) (d) and has three elements. First, the person relying upon the defence must show that he/she was subject to a threat of imminent death or continuing or imminent serious bodily harm; that he/she acted necessarily and reasonably to avoid this threat; that he/she did not intend to cause a greater harm than the one sought to be avoided. I agree with the Secretary of State that, having recorded that the appellant relied upon duress, there has been no discussion that defence. Consequently, the judge's analysis is incomplete. I agree also with the Secretary of State that the judge's reliance upon his finding that the appellant was a trainee fails to engage with Article 33.
9. For the reasons which I have set out above, I find that the judge erred in law and that the decision of the Tribunal should be set aside. I set aside all

the findings of fact. There will need to be a new fact-finding exercise, which is better conducted in the First-tier Tribunal. The appeal is returned to that Tribunal for it to remake the decision following a hearing *de novo*.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The appeal is returned to the First-tier Tribunal for that Tribunal to remake the decision following a hearing *de novo*.

Signed
2020
Upper Tribunal Judge Lane

Date 18 March

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.