



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001192
(PA/51149/2021); IA/04612/2021

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2022

Decision & Reasons Promulgated
On 27 September 2022

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

Z H
(ANONYMITY ORDER MADE)

Respondent

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent who is also referred to below as the claimant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the claimant and to the Secretary of State and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

I make this order because this is a protection claim.

The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the Appellant: Mr Melvin, Senior Home Office Presenting Officer.

For the Respondent: Mr T Hodson of Elder Rahimi Solicitors.

DECISION AND REASONS

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Hanley (hereafter the “judge”) who, in a decision promulgated on 4 February 2022, allowed the appeal of Mr Z H (hereafter the “claimant”) on asylum and human rights grounds (Article 3) against a decision of the Secretary of State dated 9 March 2021 which refused his further submissions dated 25 September 2018 on protection and human rights grounds.
2. The claimant is a national of Eritrea, born on 5 April 1967. He was 54 years old as at the date of the hearing before the judge.
3. The issue in the appeal before me is whether the judge materially erred in law in reaching his finding that the claimant would be at real risk of persecution on return to Eritrea because he was a deserter.
4. The claimant first claimed asylum in the United Kingdom on 30 September 2003. On that occasion, he falsely claimed to have entered the United Kingdom illegally and without a passport. On 22 January 2002, he was issued with a passport by the Eritrean authorities. Prior to his arrival in the United Kingdom, he had applied for entry clearance in order to study in the United Kingdom. Entry clearance was granted and endorsed on his passport on 26 September 2022. The entry clearance was valid until 30 September 2003. On 3 September 2003, he arrived in the United Kingdom with his Eritrean passport. An immigration officer’s leave to enter stamp appears in the passport (paras 2-4 of the judge’s decision).
5. The appeal before the judge was the fourth time that the claimant had exercised a right of appeal on protection grounds. The previous appeals are described at para 11 below. As will be seen, there was a determination by Adjudicator Trotter promulgated on 7 June 2004 (the “first determination”); a determination by Immigration Judge Hemingway sitting in a panel (the “2008 panel”) promulgated on 11 November 2008 (the “second determination”); and a determination by Judge of the First-tier Tribunal Miles sitting in a panel (the “2013 panel”) promulgated on 19 February 2013 (the “third determination”).
6. It was not until the appeal before the judge that a copy of the claimant’s passport was produced and submitted in evidence. There was no exit visa in the passport. According to a note from the Home Office file dated 7 October 2005, which is mentioned in a letter dated 12 August 2019 from the claimant’s current solicitors to the Home Office, the passport was found by Teesside police hidden in the briefcase of another person who was trying to depart Newcastle airport using a full UK passport (para 32 of the judge’s decision). According to para 33 of the judge’s decision, there was no suggestion that the claimant was himself at Newcastle airport.
7. The claimant has always claimed that he left Eritrea illegally, that he did not have an exit visa and that he was, or would be perceived on return, as a deserter. Adjudicator Trotter, the 2008 panel and the 2013 panel did not find his evidence as to these matters credible. The 2008 panel did not find credible other aspects of the claimant’s evidence credible. For example, the 2008 panel did not accept the claimant’s evidence that he was detained in Eritrea in December 2001 and/or in 2002 or that his mother had been imprisoned or that he had escaped from prison or from a military hospital in Eritrea or that he was a genuine member of the Eritrean Democratic Party in the United Kingdom (para 12 of the judge’s decision). The findings of the 2008 panel are set out at para 12 of the judge’s decision.

8. It is unnecessary for me to go into any further detail concerning the findings made on appeal in the claimant's previous appeals, although I stress that, in view of the fact that heavy reliance is placed on the Secretary of State's behalf on the adverse credibility assessments in the three previous appeals, I have carefully considered and taken into account all the previous findings in reaching my decision in this appeal.
9. On 29 March 2016, i.e. subsequent to the first, second and third determinations, the claimant's previous solicitors, Rotherham and Co Ltd, made a fresh protection claim. It is this firm of solicitors that obtained at some point a copy of the claimant's passport from the Home Office. The protection claim of 29 March 2016 was supported by a copy of the claimant's expired Eritrean passport upon which he had arrived in the September 2003. It was argued on his behalf that the absence of a stamp establishes that he left Eritrea illegally. The fresh claim was refused in a decision dated 8 December 2016, para 37 of is quoted at para 27 of the judge's decision and which reads:

"It is considered that the submissions raised regarding your client's fear of return to Eritrea have previously been extensively considered by the SSHD. It is noted your client has lodged three previous asylum claims which have been considered and refused, all three claims were challenged and upheld at appeal by adjudicator Trotter and immigration judges Hemingway, Miles and (UTJ) Craig. Your client's submissions and supporting evidence are **not materially different to the previously considered material** and would therefore not warrant a reconsideration of his claim or cause us to alter from the findings of the Tribunal. In accordance with our Asylum Policy it is considered that your client's rights under the convention would not be breached on his return to Eritrea".

[emphasis added by the judge]

10. In commenting on the decision letter dated 8 December 2016 at para 28 of his decision, the judge said:

"28. It is striking that the [Secretary of State] gives no weight at all in this decision to the emergence of the [claimant's] passport. The copy was plainly provided in support of the fresh claim [R78]. It is clearly highly material and new evidence."

The judge's decision

11. The judge described in some detail the relevant background and how the three previous appeals came about. In summary:

(i) The first appeal, which was dismissed by Adjudicator Trotter, was against a decision dated 17 November 2003 which refused the claimant's original asylum claim made on 30 September 2003.

(ii) The second appeal, which was dismissed by the 2008 panel, was against a decision dated 12 June 2008 which refused his protection claims of 27 August 2004 and 31 August 2005. On 12 June 2008, the respondent also served a notice of a decision to deport on conducive grounds under the Immigration Act 1971.

The decision to deport was made following the claimant's conviction at Sheffield Crown Court of an offence of obtaining a pecuniary advantage by deception and an offence of using a false instrument with intent that it be accepted as genuine.

He was sentenced on 9 January 2008 to 12 months' imprisonment on each count, the sentences to be served concurrently.

(iii) The third appeal, which was dismissed by the 2013 panel, was an appeal against a decision dated 6 November 2012 which treated the claimant's further submissions of 13 August 2010 and a subsequent separate claim on asylum and human rights grounds as an application to revoke the deportation order.

12. As I have mentioned above, the judge set out in detail (at para 12 of his decision) the findings of the 2008 panel at para 135 of the second determination. At para 17 of his decision, he noted that the third determination set out the factual findings from the second determination and treated them as the starting point. At para 18 of his decision, he set out the conclusion of the 2013 panel at para 28 of the third determination which reads:

"28. Having considered all this evidence, ..., We have concluded that the [claimant] has failed to show to the standard of reasonable likelihood that he left Eritrea without an exit visa. In our judgement that finding, which necessarily rejects his evidence on that matter, also **leads us to conclude** that he has also failed to establish to that standard that when he left Eritrea he was still subject to military service. On our own separate assessment of him, we agree with the previous panel that this [claimant] is not a credible witness and therefore his assertion to that effect is of no weight. Furthermore Dr Kibreab's report fails to consider whether or not the [claimant] may have qualified for demobilisation as a male former combatant, given his evidence that "ageing women and male former combatants" were the group of 5000 immobilised (sic) in July 2002."

[emphasis added by the judge]

13. The judge noted (at para 19 of his decision) that permission to appeal to the Upper Tribunal was granted on 16 May 2013 but the substantive appeal was dismissed by the Upper Tribunal Judge Craig in a determination promulgated on 5 November 2013. At para 20 of his decision, the judge quoted paras 67-68 of Judge Craig's decision which read:

"67. I have set out the arguments advanced before me in some detail, and I am entirely satisfied that this panel considered the [claimant's] arguments with care and reached findings which were open to it on the evidence.

68. I deal first with the [claimant's] claim, which has always been rejected, that he left Eritrea illegally. If he had left without an exit visa, **production of his passport**, which contained a student visa for this country, would have shown that he had not also obtained an exit visa, which would have been supportive of his case. In light of his admission that he told lies at an earlier hearing, and the previous findings that his evidence was not credible, I do not accept his explanation that he lost his passport in Middlesbrough in 2004. **In my judgement, the obvious inference from his failure to produce his passport is that if he had, it would have undermined his case"**

(Emphasis added by the judge).

14. The judge summarised the decision letter dated 9 March 2021 which was the subject of the appeal before him, at paras 36-51 of his decision. Paras 37-41 of the judge's decision read:

"37. At paragraph 14 -16 [R 153] the Secretary of State states:

"14. It is accepted that your Eritrean passport, which was retained by parts of the Home Office in 2005, does not demonstrate that you left Eritrea legally. It is further accepted that the absence of an exit visa in your

passport effectively rebuts the previous findings of the IAC on the issue of your illegal exit from Eritrea.

15. It is therefore accepted that you left Eritrea illegally.

16. We apologise for not disclosing that your passport was held by the Home Office previously. We further apologise for not arranging for an examination of your passport earlier. This was an oversight on our part.

However, we do not accept that this omission has materially disadvantaged your case as we do not accept that the absence of an exit visa is determinative in and of itself in light of the previous appeal findings in your case and current country guidance caselaw.”

38. The Secretary of State quotes from previous determinations, pointing to the Secretary of State's previous acceptance that the [claimant] performed military service between 1983 and 1988 and that thereafter he continued to perform national service limited to administrative duties until 1991. The Secretary of State also accepted that between 1991 and 1997 the [claimant] was engaged in “civil service” and that he obtained his university degree. “Thereafter the Secretary of State accepts that the [claimant] returned to military service in an administrative capacity in 1998.” [See second determination paragraph 30 at [R 17]. This acceptance is maintained at paragraph 21 of the refusal letter [R 154].

39. The Secretary of State also relies on findings of the third determination (at paragraph 28 at R 57) that the [claimant] had failed to show that “when he left Eritrea he was still subject to military service”. That finding had been upheld in the Upper Tribunal [see paragraphs 76 -77 at R 75 & 155].

40. The Secretary of State argues that because the [claimant] on his own admission has completed military national and civil service in Eritrea that:

“23. ... it is considered that you are not identified, or viewed, by the Eritrean authorities as having avoided your military or national service by fleeing the country and will therefore not be considered a draft evader/deserter on your return.” [R 155].

41. The Secretary of State does not accept that the [claimant] will be at risk as a person still within the draft age. At the date of the decision the [claimant] was 53 years old and will be 54 in April 2021. The Secretary of State therefore did not accept that the [claimant] would be recalled for further national service because he would reach the upper limit of 54 “in a matter of weeks” [R 156]. The country evidence demonstrated that the [claimant] would not be called up for service beyond his 54th birthday (on 5 April 2021).”

15. The judge reminded himself of the guidance in Devaseelan v Secretary of State for the Home Department * [2002] UKIAT 702 (para 52) and listed the documents that were before him (paras 54 and 56). At para 64, he set out the key issues that required resolution in the appeal before him as follows:

“64. The key issues requiring resolution are as follows:

- a) Was the [claimant] performing military service when he fled Eritrea in July 2003?
- b) Is the [claimant] at real risk of being treated as a deserter?
- c) Is the [claimant] at real risk of being subject to military service and return to Eritrea?
- d) Do the sur place activities create a real risk?
- e) Is the [claimant] a refugee?
- f) Is the [claimant] at real risk of treatment contrary to article 3?”

16. The judge heard oral evidence from the claimant and another witness, Mr T Medin. He summarised the claimant's oral evidence at paras 67-77. He set out a summary of Mr Medin's witness statement at paras 78-85 and his oral evidence at paras 86-91.

17. The submissions advanced before him were summarised by the judge at paras 92-96. It is relevant to note that it was submitted on the Secretary of State's behalf (para 92 of the judge's decision):

“... [The Secretary of State's representative] confirmed that the Secretary of State accepted that the [claimant] illegally exited from Eritrea, but it was not accepted that he was still doing his military service when he left. An illegal exit is not enough to place the [claimant] at risk. It was not accepted that the [claimant] would be perceived as a deserter. There was a factual finding by I J Hemingway that the [claimant] had fought in the War of Liberation [R26]. There was no explanation as to why the [claimant] had lied about his participation in the War of Liberation. There was a lack of explanation as to why the [claimant] had been recalled to serve in an administrative capacity. She submitted that the [claimant] would not be regarded as a draft evader, because he had already exceeded 18 months military service. She submitted that the failure to get an exit visa was not, in itself, evidence that the [claimant] was a deserter. She referred to CPIN at 2.4.19(iii). It is possible that the [claimant] had completed his military service and was just not able to get the letter to confirm his release. Maybe he could not get the paperwork. (See 13.1.2). The [claimant] did not have any fear in applying for a passport or applying for the exit visa. She relied on Devaseelan. She said that it is only the [claimant's] mere assertion that he remained in the military up until illegally leaving Eritrea. The [claimant] was not credible. He had given 2 completely different accounts of his escape from Eritrea....”

18. The judge directed himself on the relevant law at paras 97-100 and set out in detail the country guidance in MST and others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC). He noted (at paras 103 and 104 respectively) that the country guidance cases that were in place as at the date of the second determination and the third determination were, respectively, MA (Draft evaders – illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190 (IAC).

19. Having directed himself on the applicable burden and standard of proof, the judge began his assessment of the evidence at para 107 and stated his finding on the question whether the claimant was at risk of persecution as a deserter at para 131. I shall now quote paras 107-131 in full (the text underlined is my emphasis):

“Findings and Reasons

107. In reaching my decision I have weighed and considered all the evidence before me both documentary and oral, the arguments set out in detail in the refusal letter and the background country material to which I had my attention drawn to.

108. In considering and weighing the evidence I have followed the approach set out in particular by the Court of Appeal in Karanakaran v Secretary of State for the Home Department [2000] Imm AR 271.

109. This is the [claimant]'s fourth appeal against adverse decisions on his protection claims stretching back to 2003.

110. My starting point are the factual findings in the three previous determinations of either the AIT or the FTT (IAC) and the decision of the Upper Tribunal, which I have set out and referred to above. In assessing the evidence before me I apply the principles established in Devaseelan in my approach to resolving the appeal before me. The first, second and third determinations at the first-tier and the determination in the Upper Tribunal are to be treated as the authoritative

assessment of the [claimant]'s case at the respective points in time that they were made.

111. Several significant elements of the [claimant]'s protection claim have previously been found to be lacking in credibility. The [claimant] accepts that he has previously lied in several highly significant elements of his claim. For example the [claimant] now confirms that he has never been detained during the course of his military service, he has not been hospitalised as a result of that detention and he has not escaped from detention nor escaped from hospital. The [claimant] accepts that the whole account of detention (s) were fabricated. The [claimant] also confirms that his elderly mother has not been detained in Eritrea.
112. However there is one aspect of the [claimant's] disputed history in which it has now been established that he has been telling the truth. The [claimant] presented a misleading account of his entry to the UK when he applied for asylum in 2003 because he said that he had entered illegally and without a passport. He subsequently maintained that he was unable to produce the passport because he had lost it, having mislaid it at temporary accommodation in about 2005. He only revealed the existence of the passport and its loss after the first determination of adjudicator Trotter [A10]. The second and third judges did not believe the subsequent account of the lost passport. However that passport came into the possession of the Home Office in 2005 and a copy of the passport was disclosed to the [claimant] at the time of a fresh claim that was put forward in 2016. In refusing that fresh claim the Home Office make no reference to the passport, despite being provided with a copy, and despite the Secretary of State continuing to hold the original. The 2016 solicitors appear to have obtained a copy by way of subject access disclosure.
113. Having completely ignored the relevance of the passport in 2016 the Secretary of State now concedes that the passport does not have an Eritrean exit stamp and accepts that the [claimant] left Eritrea illegally.
114. The [claimant] only has himself to blame for failing to disclose his passport and depriving himself of the best possible evidence of his illegal exit. He recognises that he made a number of poor decisions in connection with his asylum claim [A 9]. He attributes his decision-making to bad advice from members of the Eritrean community. The [claimant] has given only a very vague account of bad advice and a limited explanation of his state of mind and beliefs at the time of his application for asylum. He was 36 years old when he applied for asylum and completed university level education in Eritrea. He has been untruthful in many aspects of his asylum claim over the years. I give little weight to his assertion that he received bad advice and in my judgement that assertion is more likely to be an attempt to distance himself from his failure to disclose his passport. In my judgement the [claimant's] decision to conceal his passport was clearly in breach of his obligations under the immigration rules are set out in paragraph 339 I. It was also behaviour which damages his credibility (Section 8).
115. The passport has been in the possession of the Home Office since 2005 as verified by the entry on the Secretary of State's computer system. That passport should have been produced to the second and subsequent judges. The Secretary of State should plainly have had regard to the passport (see UNHCR Handbook paragraph 196). The Secretary of State's own policy API "Assessing credibility and refugee status version 9.0 at 4.2 "Evidence to be considered" identifies passports as evidence, (Passports: where available, checked for entry/exit stamps, visas, to confirm the [claimant's] immigration status and history). The Secretary of State has apologised in the refusal letter. There is a lack of any real explanation as to why the passport was not produced. The Secretary of State states that the passport was held by another part of the Home Office. The Secretary of State is under a duty in a refugee claim to assist the asylum seeker. The passport is an important and highly relevant document because it makes

good an important part of the [claimant's] protection claim, namely his illegal exit from Eritrea.

116. I do not accept the Secretary of State's argument that the absence of the passport did not "materially disadvantage" the [claimant]. In my judgement the previous judges drew a strong adverse inference from the absence of the passport, which impacted on the assessment that the [claimant] was a draft evader or deserter. I have set out above relevant extracts of previous judgements with emphasis added.

Is there a real risk that the [claimant] is a deserter?

117. In approaching this issue I take into account the previous adverse credibility findings. The [claimant] himself confirms that he has advanced an untruthful and misleading account in significant material aspects. He concealed his passport. There was a delay in claiming asylum. He has a conviction in the UK. During the course of the appeal before me he denied having fought in the war of liberation, contrary to his initial claim and contrary to factual findings of the previous judges. He did not give any explanation for his change of story. He limited his response to repeated apologies for having previously, according to him, untruthfully claimed to have served in the war of liberation. He was not questioned about the injury to his hand and foot which had formed part of his account and which he attributed to his service in the war of liberation. Ms Swindells argued that this was an attempt to misleadingly bolster the account that he was doing his military service after 1998 because if he had fought in the war of liberation he may have been exempt.

118. I do not find the [claimant's] claim not to have served in the war of liberation to be credible, because it was made for the first time in response to cross examination and the [claimant] failed to set the record straight in his witness statement dated 30 July 2021 [A6], merely referring to the war of liberation, but not correcting his previous account of involvement. The absence of any explanation in connection with the injury to the hand and foot previously attributed to service in the war of liberation tends to undermine the credibility of the new claim not to have fought in that war. The previous judges have made factual findings that the [claimant] fought in the war of liberation (factual finding (b)) and I am not persuaded solely on the [claimant's] assertion that I should depart from that finding.

119. The [claimant] has been found to put forward false claims in his asylum claim designed to mislead [sic] and embellish. He admits as much. But that does not necessarily mean that the [claimant] is untruthful in connection with the core basis of his claim. The core of the claim is that following his graduation and following a year of work with an NGO in July 1998 he was conscripted for military training with the 29th division and he remained in the 29th division until he fled from Eritrea in 2003. He provides details of his postings at [A7]. He had a human resources role in the army. He was stationed at remote locations close to the frontline.

120. The factors which tend to undermine the credibility of the military service claim in the period from July 1998 until his claimed desertion in 2003, are the [claimant's] overall poor credibility, his previous service in the war of liberation (which ended in 1991 when the [claimant] would have been about 24 years old), his ability to get a passport which was issued on 22 January 2002, and the decision to apply for entry clearance to study in the UK.

121. There is some evidence referred to by Ms Swindells [see 13.1.2 of CPIN dated September 2021] that there is significant delay in the authorities issuing necessary "release letters" to confirm discharge from national service.

122. The factors which tend to support the [claimant's] account of military service from July 1998 until his claimed desertion in 2003 are as follows.

123. The country background evidence establishes that there was mobilisation during the period of the border war with Ethiopia between 1998 -2000. It is therefore consistent with the country situation at the time that the [claimant] was called up.
124. The [claimant's] passport establishes that he was not able to obtain an exit visa from the Eritrean authorities. Continued military service could explain the inability to obtain an exit visa. There are other possible explanations, such as bureaucratic delays but overall the absence of an exit visa merits weight in the [claimant's] favour. The absence of an exit visa is not determinative, but it is a factor which taken in the round tends to support the [claimant's] account.
125. I make a positive credibility finding in respect of the witness Mr Medin. I take into account the friendship that this witness has with the [claimant]. The written evidence in his statement dated 5 February 2018 [R131 – 133], which I have summarised above, is detailed. He describes his involvement in the application for a student visa. Mr Medin's knowledge of the [claimant's] military unit and place of service is given with care and appears credible. In my judgement Mr Medin responded with clear detailed answers to the questions that were put him in cross examination and I have summarised that evidence above. Mr Medin struck me as an honest and truthful witness and no discrepancies emerged in respect of his detailed written statement which was nearly 4 years old at the date of the hearing of the appeal. I got the distinct impression that he was giving evidence from his personal knowledge stretching back to 1992 when he first met the [claimant]. When he was asked about a matter that he had no knowledge (such as the details of the crossing to Sudan) he made clear that he was unable to help. Unlike the [claimant], Mr Medin was entirely straightforward. I give weight to Mr Medin's evidence. The [claimant's] military service in the period 1998 up to his desertion was central to that evidence.
126. The account of the steps taken to obtain a student visa to come to the UK [A7 8] and the support from his friend and witness Mr Medin appear plausible. The student visa was issued on 26 September 2002. That is the date that appears in the [claimant's] passport and that date is not disputed by the Secretary of State. The visa was valid until 30 October 2003. I accept as plausible and reasonable the [claimant's] claim that he wanted to travel on that visa as soon as possible and commence the master's program of studies at Manchester University at the beginning of the academic year in October 2002. The absence of an exit visa tends to suggest that the [claimant] is telling the truth about his journey across the border to Sudan [A8]. The background evidence is that an illegal land crossing of the border is fraught with danger. The account of a failed attempt to cross the border illegally in May 2003 [A8] appears plausible. The [claimant] needed to travel on the UK student visa before its expiry on 30 October 2003. After nearly a year of failing to obtain an exit visa account of the eventual illegal crossing into Sudan on 22 July 2003 appears plausible. The student visa was only a vehicle to enable the [claimant] to find a place of safety and the [claimant] never actually studied the UK.
127. In weighing all the evidence in the round I also take into account the objective country background material which has been provided by the [claimant]. The nature of the Eritrean regime is relevant. In MST the tribunal accepted 9 of the 10 propositions put forward by Ms Dubinsky on behalf of UNHCR who participated as interveners. The 10 propositions were derived from the country background material and established that Eritrea is a one-party state, without an independent media, there is an absence of rule of law, there is both official and unofficial detention sites, detention is often unrecorded, torture remains widespread and there remains an undeclared state of emergency in accordance with the policy of "no war, no peace". [See paragraph 245 of MST for full details]. There is no suggestion that there has been any durable change or amelioration since MST.

128. Reflecting on the evidence in the round and applying the lower standard I make the following factual findings:
- a) The [claimant] fought in the war of liberation and following independence was able to study and work for an NGO in Eritrea.
 - b) The [claimant] was called up again in 1998, and following further military training, was assigned to an administrative task in the 29th division. This was at the time of the border war with Ethiopia between 1998 – 2000. [MST at paragraph 300 whilst noting the liability to be recalled following the completion of national service and considering this not to be a widespread phenomenon at the date of the hearing of the appeal notes that: “.....In relation to national service, for instance, examples are given of people having been recalled when the war with Ethiopia broke out in 1998 and 1999 and remaining in national service.” In my judgement that is material that tends to support the [claimant’s] claim.
 - c) The [claimant] remained with the 29th division until he deserted in July 2003. He was performing military national service as opposed to civilian national service because he was attached to the 29th division and his unit was stationed near the front line. I have accepted Mr Medin’s contemporary knowledge of the [claimant] at that time.
 - d) The [claimant] was unable to obtain an exit visa. Notwithstanding the grant of a UK student visa, whatever contribution he had made in the war of liberation, was insufficient to persuade the authorities to grant him an exit visa. There is some possibility that the inability to get an exit visa was caused not by ongoing military service in the 29th division but administrative delay in securing “a release letter”. In my judgement the Secretary of State’s submission is speculative. When set against the evidence of Mr Medin it is insufficient to persuade me, applying the lower standard, that the [claimant] had already been discharged.
 - e) The [claimant] left Eritrea illegally in July 2003. The Secretary of State now accepts that the [claimant] left Eritrea illegally. The date of his illegal exit is broadly consistent with the date of his eventual entry to the UK.
 - f) The [claimant] is not at risk on the sole basis that he carried out an illegal exit from Eritrea, [MST].
 - g) There is a real risk that the [claimant] is a deserter and will be perceived as such. He would be questioned on arrival in Eritrea following a forced removal from the UK. In addition he has been interviewed by the Eritrean embassy in 2018 in Harmondsworth and questioned in connection with national service [R 99]. His evidence is that he has provided details of his unit to the Eritrean officials and I consider that to be plausible.
 - h) Punishment of a deserter will amount to persecution and treatment contrary to article 3. [See the assessment in MST at paragraphs 280 - 283. In particular there is reference to an EASO Report which concluded that “punishment is harsh being more severe for deserters”].
 - i) The [claimant] is a refugee because it is highly likely that persecution for desertion will be for a Convention reason based on imputed political opinion. [See paragraph 430 in MST for a more detailed analysis].

129. Applying the guidance in MST the [claimant] is at risk on return. He will be perceived as a deserter. He is a person subject to a forced return.

Is there a real risk that the [claimant] will be perceived as a draft evader?

130. I am not persuaded by Mr Hodson that the [claimant], who is 54 years at the date of the hearing of the appeal, is at risk as a draft evader. I find that liability for

conscription expires on a person's 54th birthday. Mr Hodson's argument that the obligation continues for the 12 month period during which a person is 54 years old does not sit with the natural reading of the Eritrean law as set out in MST and the most recent CPIN. In my judgement a man who is "over 54" is a man who has had his 54th birthday.

131. The [claimant] did not evade the draft in 1998. He is at risk because he is a deserter."

The grounds

20. The Secretary of State's grounds contend that the judge erred in law as follows:
- (i) The judge erred by seemingly taking the fact that the Secretary of State had accepted that the claimant did not have an exit visa in his passport as evidence that the claimant left Eritrea illegally and would be considered to be a deserter on return to Eritrea.
 - (ii) At para 124, the judge found that the fact that there was no exit visa in the claimant's passport demonstrated that he had been unable to obtain one. However, there was no evidence that the claimant had sought to obtain an exit visa.
 - (iii) The judge gave inadequate reasons for relying on the claimant's evidence, given that the claimant made misleading statements, claiming that he had arrived in the UK without a passport and gave conflicting accounts as to whether or not he had fought in the War of Independence.
 - (iv) The judge gave inadequate reasons for finding that the claimant would now be perceived as a deserter given the lack of evidence that he sought to obtain an exit visa. There was no evidence that an exit visa was refused "*such as to bring him to the attention of the Eritrean authorities*" or any evidence that he was serving in the military at that time "*such that he should be now be considered to be a deserter; his current age and the passage of time since he left Eritrea*".
21. I pause here to note, in relation to (i) above, that the grounds ignore the fact that the Secretary of State had accepted in the decision letter dated 9 March 2021 that the claimant did leave Eritrea illegally.
22. At para 3 of his decision granting permission, Upper Tribunal Judge Grubb said that it was arguable that the judge failed to give adequate reasons why the absence of an exit visa meant that the claimant had not been able to obtain one rather than, for example, it being the case that he had simply left Eritrea not having one.

Assessment

23. At the hearing, Mr Melvin relied upon the grounds, the grant of permission and his skeleton argument dated 3 August 2022. Mr Hodson relied upon his rule 24 response and his skeleton argument dated 29 September 2021 that was before the judge. I also heard oral submissions from Mr Melvin and Mr Hodson.
24. I have considered with care and in detail all of the submissions and arguments as well as all of the material relied upon by each party, including the findings made by Adjudicator Trotter and the reasoning and findings of the 2008 panel and the 2013 panel. All three roundly rejected the claimant's evidence and made adverse credibility assessments. Their findings were findings that were a starting point, pursuant to the

guidance in Devaseelan. One can therefore understand why the Secretary of State might have found it difficult to accept the finding by the judge that the claimant would be at real risk because he was a deserter.

25. However, at para 52 of his decision, the judge set out the guidance in Devaseelan as follows:

“52. The approach to be taken in second and further appeals is set out in Devaseelan v The Secretary Of State For The Home Department [2003] Imm AR 1 especially at paragraphs 39-42. The guidelines have been approved in numerous cases. In SSHD v BK (Afghanistan) [2019] EWCA Civ 1358 the guidance was summarised as follows [at paragraph 32]:

- (1) The first adjudicator's determination should always be the starting point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
- (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
- (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
- (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
- (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
- (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
- (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
- (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case.”

26. The judge then plainly applied Devaseelan, specifically stating at para 110 that his starting point was the factual findings on the three previous determinations. He had earlier set out, inter alia, a list of the findings of the 2008 panel. At para 111, the judge noted that several significant elements of the claimant's protection claim had previously been found to be lacking in credibility, that the claimant accepted that he had previously lied in several highly significant elements, that the claimant accepted that his whole account of his detentions was fabricated and that his elderly mother had not been detained in Eritrea. At para 112, he noted that the claimant had given a misleading account of his entry to the United Kingdom in his original asylum claim in 2003 when he said that he had entered the United Kingdom illegally and without a

passport. He noted that the claimant only revealed the existence of the passport and said that he had lost it after the determination of Adjudicator Trotter. At para 114, he said that he gave little weight to the claimant's evidence that he had received bad advice and that his decision to conceal his passport was behaviour that damaged his credibility.

27. At para 115, the judge said that the claimant's passport has been in the possession of the Home Office since 2005 and it should have been produced to the 2008 panel and the 2013 panel. It is plain, in my view that, as the claimant's passport was not in his possession at the time of the hearings before the 2008 panel and the 2013 panel, he could not have submitted his passport in support of his evidence before the 2008 panel and the 2013 panel that he did not have an exit visa when he left Eritrea. Thus, para 32(7) of Devaseelan applied in his favour so that para 32(4) of the guidance in Devaseelan did not.
28. The judge said, at para 116, that he did not accept the Secretary of State's argument that the absence of passport did not "*materially disadvantage*" the claimant. He was entirely correct to say (at para 166) that the previous judges had drawn a strong adverse inference from the absence of the passport and that this had impacted on their assessment of whether the claimant was a draft evader or deserter.
29. At paras 117-127, the judge turned to consider whether there was a real risk that the claimant was a deserter. He once again said (at para 117) that he took into account the previous adverse credibility findings and that the claimant had himself confirmed that he had advanced an untruthful and misleading account in significant material aspects. His reasoning at para 117 demonstrates that he took fully on board not only the previous adverse credibility assessments in the claimant's earlier appeals but also his own adverse assessment of various aspects of the claimant's case. At para 118, he rejected the claimant's claim that he had not served in the war of liberation, giving his reasons for his adverse assessment of this aspect of the claimant's evidence. At para 119, he once again reminded himself that the claimant had been found to put forward false claims in his asylum claim designed to mislead and embellish but he reminded himself that it did not necessarily mean that the claimant was untruthful in connection with the core basis of his claim which was that, following his graduation and following a year of work with an NGO in July 1998, he was conscripted for military training with the 29th division and he remained in the 29th division until he fled from Eritrea in 2003.
30. The judge then went on to explain (at para 120) the factors which tended to undermine the credibility of the military service claim in the period from July 1998 until his claimed desertion in 2003 (at paras 120-121), being the claimant's overall poor credibility, his previous service in the war of liberation which ended in 1991, his ability to obtain a passport which was issued on 22 January 2002 and the decision to apply for entry clearance to study in the United Kingdom. He took into account, at para 121, that there was some objective evidence that there was significant delay in the authorities issuing necessary "release letters" to confirm discharge from national service.
31. The judge then set out the factors which tended to support the claimant's account of military service from July 1998 until his claimed desertion in 2003 at paras 123-126. This included his positive assessment of the evidence of Mr Medin. I will return to deal with the judge's assessment of Mr Medin's evidence shortly.

32. At para 127, the judge said that, in weighing all of the evidence in the round, he took into account the objective country background material concerning the nature of the Eritrean regime.
33. The judge then set out his findings at para 128 after “*reflecting on the evidence in the round and applying the lower standard*”.
34. I turn now to deal with the grounds using the numbering at my para 20(i)-(iv) above for convenience.
35. The ground summarised at my para 20(i) above ignores the fact that the Secretary of State accepted not only that the claimant did not have an exit visa in his passport but also that he had left Eritrea illegally – see para 15 of the decision letter dated 9 March 2021. Thus, the judge did not err, as contended, by taking the fact that Secretary of State had accepted that the claimant did not have an exit visa as evidence that he had left Eritrea illegally.
36. Plainly, the fact that the claimant's passport did not contain an exit visa does not, of itself, mean that he had applied for an exit visa and been refused one nor does it, of itself, mean that he was performing military service at the time of his departure from Eritrea and that he was a deserter. However, the fact is that the judge plainly did not infer, from the mere fact that the claimant's passport did not contain an exit visa, that he had applied for one and been refused it and/or that he had deserted from the army. Indeed, at para 124 and para 128 d), of his decision, the judge took into account that there were other possible explanations for the absence of an exit visa in the claimant's passport and he specifically stated at para 124 that the fact that the claimant's passport did not contain an exit visa was not determinative.
37. There is therefore no substance in the grounds as summarised at my paras 20(i)-(ii) above.
38. The grounds do not, in terms, contend that the judge had failed to take into account the adverse credibility assessments in the three earlier appeals. The complaint in the ground summarised at my para 20(iii)-(iv) above is put differently, i.e. that, given that the claimant had made misleading statements previously and the lack of evidence that he had sought to obtain an exit visa, the judge gave inadequate reasons for his findings that the claimant was refused an exit visa and that he was a deserter. However, in case I am wrong about that, it simply cannot be said, in my judgment, that the judge failed to take into account the previous adverse credibility assessments by Adjudicator Trotter, the 2008 panel and the 2013 panel. Not only did he set out the findings of the 2008 panel and explain the decisions of Adjudicator Trotter and the 2013 panel, he repeatedly reminded himself of their adverse credibility assessments and the guidance in Devaseelan.
39. Nor can it be said that the judge gave inadequate reasons for his findings that the claimant had been refused an exit visa and that he was a deserter when he left Eritrea. This ground simply ignores the judge's reasoning at paras 117-127.
40. Insofar as the grounds as summarised at my paras 20(iii)-(iv) above contend that there was no evidence that the claimant had sought to obtain an exit visa, that there was no evidence that the claimant had sought to obtain an exit visa “*such as to bring him to the attention of the Eritrean authorities*” and that there was no evidence that the claimant was serving in the military at the time of his departure “*such that he*

should now be considered to be a deserter", they ignore the claimant's evidence and the evidence of Mr Medin. Given that there was fresh evidence before him that was not before Adjudicator Trotter or the 2008 panel or the 2013 panel in the form of the claimant's passport, the evidence of the claimant and Mr Medin was evidence that the judge was entitled to assess, pursuant to the guidance in Devaseelan, in deciding whether or not he ought to depart from the previous adverse findings provided that he bore in mind the previous adverse credibility assessments, something that he plainly repeatedly did.

41. Turning to the evidence of Mr Medin before the judge, the grounds did not take issue with the judge's assessment of the evidence of Mr Medin. However, at para 11 of his skeleton argument, Mr Melvin submitted that the judge had failed to explain why the evidence of a friend who had never appeared before a Tribunal in any of the previous hearings could without any documentation overturn previously held findings of fact.
42. Mr Hodson submitted that the Secretary of State did not have permission to argue that the judge erred in relying upon the evidence of Mr Medin because no issue was taken in the Secretary of State's grounds concerning the judge's assessment of Mr Medin's evidence. However, given that the grounds contend that the judge had given inadequate reasons for his findings that the claimant was refused an exit visa and that he had deserted from the army, the Secretary of State is entitled, in my judgment, to address the reasons that *were* given by the judge as being inadequate.
43. Mr Hodson drew my attention to the fact that Mr Medin had given evidence before the 2008 panel which was summarised at paras 63-65 of the second determination. He also drew my attention to the assessment by the 2008 panel of Mr Medin's evidence, at para 120 of the second determination where the 2008 panel expressed its reservation about Mr Medin's evidence with regard to the question of the claimant's mother's imprisonment in that:

"it sits unhappily with the [claimant's] own failure to mention this given numerous appropriate opportunities to do so".
44. It is not the case, as Mr Melvin submitted at the hearing, that the 2008 panel had found the evidence of Mr Medin to be without merit. I agree with Mr Hodson that the assessment by the 2008 panel of Mr Medin's evidence did not extend to any evidence that he might have given (if he did) to the 2008 panel to the effect that the claimant had been denied an exit visa decision and that the claimant was in military service at the time of his illegal exit from Eritrea. Thus, the judge's assessment of the evidence of Mr Medin was not in conflict with the guidance in Devaseelan.
45. There is no substance in the remainder of Mr Melvin's skeleton argument.
46. I shall now deal with Mr Melvin's submissions to the extent not already dealt with above and to the extent I consider it necessary to do so.
47. Firstly, Mr Melvin repeatedly relied upon the fact that the claimant was 54 years of age as at date of the hearing before the judge in advancing his submission that the judge erred in reaching his finding that the claimant was a deserter. In my judgment, Mr Melvin was conflating two separate issues; that is, whether there was a reasonable likelihood that the claimant was a deserter or would be perceived as such and whether there was a reasonable likelihood that the claimant would on return to Eritrea be liable to be conscripted. The decision letter correctly acknowledges, in

effect, that the two issues are separate – see the judge's summary of this aspect of the decision letter at paras 38-41 of his decision.

48. The judge dealt with the draft evasion issue at para 130 of his decision. The upper age limit of 54 for conscription concerns the likelihood of an individual being drafted or considered a draft evader, whereas the judge found that the claimant had deserted the Eritrean army at the time that he left Eritrea illegally. Although the claimant was 54 years old and (as found by the judge) no longer liable for conscription on account of his age, this does not undermine his finding that the claimant deserted from the Eritrean army when he left Eritrea illegally.
49. Secondly, Mr Melvin relied upon the fact that the claimant has been absent from Eritrea for 20 years as evidence that, in his submission, reduced the likelihood of the claimant being perceived as a deserter if returned to Eritrea now. Not only is it the case that this issue was not raised in the Secretary of State's grounds and it was not argued before the judge (see paras 92-94 of the judge's decision), Mr Melvin was unable to point me to any country guidance or background material that was before the judge and that showed that lapse of time was a relevant consideration in any consideration of the likelihood of an individual being regarded as a deserter.
50. Thirdly, Mr Melvin repeatedly relied upon the fact that the claimant had already performed 11 years of military service in Eritrea which, in his submission, the judge did not take into account and which undermined the claim that the claimant was serving in the Eritrean army at the time of his departure from Eritrea. However, once again, the fact is that the grounds did not contend that the judge had overlooked this evidence. In any event, the submission is without any substance. The judge was plainly aware of the Secretary of State's case on this issue because he summarised this aspect of the decision letter at paras 38-40 of his decision which, taken together with his summary of the claimant's and Mr Medin's evidence at paras 67-91 and his assessment at paras 107 onwards, plainly demonstrate that he was aware of and took into account the length of the claimant's service in reaching his finding that the claimant was a deserter.
51. Fourthly, Mr Melvin submitted that, in any event, the background material shows that the claimant would have to serve in the people's militia if he is now required to perform any service and therefore that, pursuant to para 9 of the country guidance in MST, he would not face a real risk of persecution. However, again, the Secretary of State's grounds did not challenge the judge's assessment of the future risk of persecution on the basis of the findings he made. Mr Melvin therefore did not have permission to argue the judge's assessment of the future risk on the basis of the findings he made.
52. In granting permission, Judge Grubb said that it was arguable that the judge failed to give any adequate reason why the absence of an exit visa meant that the claimant had not been able to obtain an exit visa rather than, for example, it being the case that he had simply Eritrea not having one. However, as I have said at para 36 above, the judge took into account at para 124 and para 128 d) of his decision that there were other possible explanations for the absence of an exit visa in the claimant's passport and he specifically stated at para 124 that the fact that the claimant's passport did not contain an exit visa was not determinative.
53. For all of the reasons given above, I am satisfied that the judge did not err in law. I am conscious of the fact that a senior colleague granted permission because he

considered the grounds arguable. However, the judge's decision is a lengthy and detailed one. I have had a greater opportunity to consider his determination, the grounds and the earlier determinations. Having carefully considered everything, I am satisfied that there is no substance in the Secretary of State's case as advanced in the grounds, the skeleton argument and oral submissions on her behalf. In effect, the Secretary of State's case amounts to no more than a disagreement with the very detailed and careful reasoning and findings of the judge and an attempt to re-argue the case.

54. The Secretary of State's appeal is therefore dismissed.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside.

Accordingly, the decision of the First-tier Tribunal to allow the claimant's appeal against the Secretary of State's decision on asylum grounds and on human rights grounds (Article 3) stands.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed: Upper Tribunal Judge Gill

Date: 12 August 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email