



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2024-000281

First-tier Tribunal No:  
PA/55323/2023  
LE/01976/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 7 August 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FARRELLY**

**Between**

**N M A H**

(Anonymity order made )

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr G Hussein, Counsel, instructed by the Joint Council for the Welfare of Immigrants.  
For the Respondent: Ms T Rixon, Senior Office Presenting Officer

Heard remotely at Field House on 2<sup>nd</sup> April 2024

**DECISION AND REASONS**

Introduction

1. The appellant is a national of Eritrea. He unsuccessfully claimed protection in 2008 .His appeal, heard on the 15th of July 2010, was dismissed. Thereafter, there were a series of further submissions, all of which were rejected. There was a further appeal on the 29th of August 2017 which also was unsuccessful.
2. There were subsequent unsuccessful submissions ,the last of which resulted in a negative decision dated 12th of August 2022. The appeal was heard before First tier Tribunal Judge Malik at Manchester on the 24th of November 2023. That appeal was also unsuccessful, and he now appeals with permission to the Upper Tribunal.

3. Permission to appeal was granted by First tier Tribunal Judge Rhys-Davies. He found it arguable that the judge erred in evaluating the risk the appellant faced as a male of draft age and the conditions of national service. On these issues he arguably did not applying the country guidance of MST and others (National service risk categories) Eritrea CG [2016] UKUT 00443 .

### Background

4. The appellant claimed to have arrived in the United Kingdom on the 18th of November 2008, claiming protection the same day. Following an age assessment his age was taken as the 3rd of December 1990. He said his family left Eritrea many years earlier and he and his siblings were born in Saudi Arabia and have never visited Eritrea. He said he speaks Arabic rather than Tigrinya.
5. The respondent relied upon the previous appeal decisions of the 15th of July 2010 and the 20th of August 2017. He was not considered credible, and it was not accepted he would have no family support in Eritrea, nor would he become destitute. He said he had a brother in the United Kingdom who has been recognised as a refugee. The respondent did not accept the relationship. He had submitted DNA to demonstrate the relationship, but the respondent did not place reliance upon it, stating there were inconsistencies.
6. In the review the refusal was maintained. Reference was made to the previous appeal findings of two judges, both of whom found the appellant to lack credibility. Neither judge found he left Eritrea illegally nor was he a draft evader. Previously, he had claimed he left illegally and now concedes he did not. Because he did not leave illegally the respondent took a view he would not be perceived as a draft evader on return.
7. Although it was accepted he was an Eritrean national ,First tier Tribunal Judge Malik found there was nothing to suggest he would be perceived as a draft evader. Accepting he was of military age; the evidence did not suggest he would have to commence national service.
8. The respondent had referred to paragraph 9 of MST and others (National service risk categories) Eritrea CG [2016] UKUT 00443 :

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.

9. First tier Tribunal Judge Malik did not find he came into one of those rare cases referred to. The application for permission argued that the appellant would be at risk because he would be returned as a failed asylum seeker and as he was of draft age would be liable to perform national service indefinitely. It was suggested that the country guidance decision found national service constituted forced labour and breached articles 3 and 4 of the European Convention on human rights. MST records:

427. For similar reasons we also consider that to the extent that the Eritrean system of military/national service breaches Article 4(2) it is also likely to give rise to a violation of Article 3.

428. We would emphasise, however, that our findings above concern active national service only. If one is a reservist subject to recall, we do not find that the risk of recall is sufficiently likely to amount to a breach of Article 4 ... above).

429. We conclude that the national service regime in Eritrea does not as a whole constitute enslavement or servitude contrary to Article 4(1) of the ECHR, but that it does constitute forced labour under Article 4(3) which is not of a type permitted under Article 4(3)(a)-(d). A real risk on return of having to perform military national service duties (including civilian national service but not with the people's militia) is likely to constitute a flagrant or a mere breach of Article 4(3) as well as a breach of Article 3 of the ECHR.

430. 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. In so concluding we take into account that the Home Office CIG: Eritrea: National (Inc. Military) Service, Version 3.0, August 2016 at 2.2.6 considers that given the Eritrean regime's economic realpolitik and the widespread emigration "it is unlikely that avoiding national service, by itself, is now perceived to be a political act by the government" ...

10. It was argued that conclusion he was not at risk in the circumstance was flawed as he is of draft age and would be liable to indefinite service.
11. The respondent made a rule 24 response on the 12th of February 2024 opposing the appeal. It said there were no factors that could mean he was one of those rare cases where a person leaving legally is treated as a draft evader.
12. The presenting officer in the First tier Tribunal referred the judge to paragraph 431(7)(iii) (3) of MST to the effect that a child of someone who fled Eritrea during the war of independence would be a possible exception to the general rule that returnees of draft age would be considered draft evaders or deserters. The judge referred to this at paragraph 21 of the determination. It was submitted there were no factors which would make him one of those rare cases whereby the person would be treated as a draft evader for the reasons set out in paragraph 431(9) of MST.

#### The Upper Tribunal hearing.

13. Mr Hussein argued that the judge had misapplied the country guidance. He said an Eritrean national was subject to draft up to the age of 54. He said that the rare cases referred to related to people who had exited illegally. He said that if a material error of law was found then in his view a rehearing with necessary and the most appropriate forum was the First-tier tribunal.
14. Ms Rixon referred me to the CIPIN report at 2.4.22 and submitted that the appellant would not be considered a draft evader. If an error were found

then she submitted the appeal should remain in the Upper Tribunal as the issue was a narrow one.

### Consideration

15. The Country Policy and Information Note on Eritrea in the bundle is dated September 2021. 2.3 .1 refers to the country guidance case of MST where it was held that there was a real risk of persecution based on imputed political opinion in relation to performance of military service. The case gave guidance on those who had left illegally and avoided national service. 2. 4.2 refers to open-ended national service remaining a feature. 2. 4.4 says that national service is compulsory and a 2020 article on the Eritrean Ministry of Information website referred to it as being an intangible cultural asset to be respected by all. It was described as a rite of passage. Evasion or desertion is an offence which is dealt with by military commanders with punishments meted out arbitrarily. Service remains indefinite from the age of 18 to the age of 54 for men. 2. 6.20 refers to those able to obtain an exit visa and leave the country lawfully. It indicates that if they were forcibly returned they may have to resume or commence national service, but this was described as a rare case. Sources varied: some spoke of a clear risk while others simply considered it a risk that could not be ruled out. If a person signed a regret letter and paid they might be allowed to live in peace.
16. MST was promulgated in October 2016 and has not been superseded. It refers to limited scope for leaving the country lawfully, especially for those of draft age. The appellant's position is different in that he was never in the country in the first place and so did not leave illegally. Turning to the conclusions at paragraph 431, it was stated that if a person approaching draft age would be perceived as a draught evader or deserter they would face a real risk of persecution. The appellant is of an age for military service. He does not claim to have deserted, so the only issue is evasion. An individual who left illegally they may not be at risk where they have given service to the regime or those who fled during the war of independence. Paragraph 439 indicates individuals who made an asylum claim which was not found to be credible and who left illegally could be at risk. Reference is made to what was considered likely to be a rare case of a person who has exited lawfully and being forcibly returned facing military service. In the appellant's situation none of these apply as he never was in the country.
17. First Tier Tribunal Judge Malik set out the appellant's immigration history and his initial claims had been untrue .He grew up in Saudi Arabia and agreed he did not exit Eritrea illegally. He could not be a deserter as he never enlisted. The remaining argument was whether on return he would be perceived as a draft evader.
18. The judge correctly applied the Devaseelan principle and the previous appeals which had been damaging to his credibility. The judge at paragraph 15 concluded he would not be at risk for exiting Eritrea illegally. This is based on the simple fact he was never there in the first place. It was common case that he was an Eritrean national. Reference was made to the CPIN and the country guidance of MST. A paragraph 22 the judge said there was nothing to suggest he was or would be perceived as a draft evader, bearing in mind he did not exit Eritrea illegally as he had never been there. The judge referred to the absence of inquiries from his relatives about him,

indicating he was of no interest to the authorities. The judge referred to the appellant being of military age but found the evidence did not suggest he was one of those rare cases where on return there might be a risk of national service.

19. It is my conclusion that First tier tribunal judge Malik had correctly applied the country guidance decision to the facts. The judge made clear findings of fact and assessed the risk in that context. Adequate reasons were given. I find no material error of law established. Consequently, the decision dismissing his appeal shall stand.

### Decision

No material error of law has been established. Consequently, the decision of First tier Tribunal Judge Malik dismissing the appeal shall stand.

Francis J Farrelly  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber.