Upper Tribunal Appeal Number AA.08010.2012
Immigration and Asylum Chamber

THE IMMIGRATION ACTS

Heard at: **North Shields**
On: **Tuesday 20th August 2013**

Before

Judge Aitken
Deputy Chamber President (HESC)

Between

Mr A A

(Anonymity Direction)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr R Solomon
For the Respondent: Mr C Dewison (Home Office Presenting Officer)

Decision

1. This is a resumed hearing remaking the decision of the First Tier Tribunal limited to an assessment of whether the appellant may have left Eritrea illegally and thus be at risk on return. Following a hearing on 16th May 2013 I found as follows:

> "1. This matter appeared before me following the grant of permission to appeal by First Tier Tribunal judge Bird on 2nd November 2012 in the following terms:
>
> *"1. Judge of the First-tier Tribunal Cope dismissed the appeal of the appellant, a citizen of Eritrea against the decision of the respondent asking to remove him from the United Kingdom.*
>
> *2. The appellant seeks permission to appeal against this determination on the grounds that the judge failed to take into account the relevant background*

evidence submitted by the appellant and fell into error by saying that this document had not been placed before him (the Canadian IRB Report dated July 1999). It is alleged that during the oral submissions the appellant's representatives specially addressed this issue and referred the judge to the document attached to the skeleton argument produced at the start of the hearing.

3. The judge considered the question of draft evasion from paragraph 26 onwards. The judge noted that the appellant's account that he had been able to avoid military service could not be accepted because his other siblings had to undertake it when they became 18. The appellant's evidence that he was able to obtain an exemption from military service was not accepted by the judge for the reasons that he gave in paragraphs 24 to 48. It is arguable that the judge failed to take into account of the relevant evidence that was produced. At paragraph 49 he records as follows:

> *"The appellant says that such an exemption was available during the 1990s and relies on a report from the Canadian Immigration and Refugee Board from July 1999. Unfortunately I have not been provided with a copy of this report" (Emphasis mine).*

At paragraph 51 the judge notes as follows:

> *"Mr Solomon suggested in his oral submissions that whilst they may reflect the current position following a clampdown from 2001 onwards, historically it was not true. So this may or may not be the case, it does not explain how the appellant could be regarded as or apparently believed himself as having an exemption on such basis for the next eleven years."*

4. The judge's conclusion on this crucial part of the appellant's evidence failed to take into account the objective evidence that was produced at the hearing and is attached to the skeleton argument. In failing to consider the report from the Immigration Refugee Board of Canada dated 1 July 1999 it is arguable that the judge made an Arguable error of law in the conclusion that he came to.

5. Ground 4 alleges that the judge made an arguable error of law in failing to determine the risk to the appellant as a perceived draft evader/ deserter and made no findings or consideration of the risk to the appellant of being both a perceived draft evader and someone who exited the country illegally.

6. It is arguable that the judge failed to take into account the risk to the appellant for these two factors. An arguable error of law has arisen in this omission (paragraph 66 of the determination). The judge gives no reasons for not accepting that the appellant had evaded or been exempt from military service or that he had left illegally."

2. I am obliged to Mr Martin and Mr Kingham for their concise and helpful submissions. Mr Martin took two points. Firstly that at paragraph 49 of the determination the Tribunal judge recorded this "*Unfortunately I have not been provided with a copy of this report"* Whereas a copy was appended to a skeleton argument which the judge had referred to several times, this was plainly an error which went to the assessment of credibility. Mr Kingham accepted that the report was before the judge but argued that in the context of all of the evidence and findings it was not significant.

3. I too had some difficulty in locating the report, since it covers only around a single page, it is clear that it was in the papers before the judge. It is not however significant and in that sense does not give rise to an error of law which may have influenced or affected the decision because it relates to the position of national service in 1999, and the judge at paragraph 51 makes it plain that even if he accepted the position stated within the report in 1999 it would not affect his decision because a larger problem of credibility for the appellant was the ability to avoid serving for the next 11 years rather than whether some form of exemption for military service in 1999 was possibly available.

4. Mr Martins second point was that the judge had fallen into error in assuming that having rejected the appellant's account as being wholly fabricated the assessment of risk on return was over. Mr Kingham argued that there had been a comprehensive rejection of the appellant's account for good reasons and the appellant had failed to discharge the burden upon him of establishing he was at risk.

5. The judge recorded this at paragraphs 68 to 70:

> "68 *The Asylum and Immigration Tribunal in **MA** (which was largely confirmed by the Immigration and Asylum Chamber of the Upper Tribunal in **MO**) effectively endorsed previous decisions of the Tribunal and the immigration Appeal Tribunal which had decided that absent of specific aggravating features such as illegal exit from Eritrea or acceptance of events or behaviour which could give rise to a specific well-founded fear of persecution under the 1951 Refugee Convention, people returned to Eritrea as failed asylum seekers were not at risk of persecutory ill-treatment from the Eritrean authorities.*
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> *69. In the light of the background evidence adduced before me and of the case law, there is nothing then which leads me to consider that the Appellant would be at risk of adverse attention from the Eritrean authorities. I am not satisfied that he has shown me that it is reasonably likely that he evaded national service or deserted from Sawa military training camp, or that he left Eritrea illegally as he has claimed.*
>
> *70 Consequently then I do not consider that the Appellant would be of any interest to the Eritrean authorities on the basis that he himself has claimed. He may well have a generalised reluctance to return to Eritrea but this is not the same as a subjective fear of persecutory ill-treatment for a 1951 Refugee Convention ground."*

6. In fact at paragraph 116 of ***MO (Illegal exit –risk on return) Eritrea [2011] UKUT 00190 (IAC)*** the Tribunal recorded this:

> "*116. The general position concerning illegal exit remains, therefore, as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However, 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 uncontentious personal data recorded on an appellant as to their level of education or their skills profile as to whether legal exit was feasible."*

7. The Upper Tribunal ha gone further in paragraph 115 to give an example of the way in which material needed to be examined:

> "*115. We appreciate that in the context of a case in which the decision-maker has found a claimant/appellant wholly lacking in credibility (save in relation to sex and perhaps age and/or date of departure from Eritrea and health), it is difficult to see any basis for finding conclusively that they would not fall within one of the above two categories (highly trusted government officials and their families or those who are themselves members of the military or political leadership; members of ministerial staff recommended by the department to attend studies abroad). But at least in a range of cases the evidence may be such as to make it clear that the claimant concerned, albeit wholly or largely lacking in credibility, could not have any links with government officials or the regime's inner circle and could not have an education or skills profile making it likely they have been civil servants or have an educational bent (e.g. if they are found to come from a rural part of Eritrea and have had no secondary schooling). What may be involved here sometimes is clearer recognition by the decision-maker that when finding a claimant wholly incredible they are not in fact meaning that they lack credibility in every conceivable particular, since they may in fact accept, for example, that they are from a rural background and lack education*."

8. It is therefore necessary to further examine the evidence already present, as to age, background and educational attainment and to draw what conclusions are proper from that (if any) in considering risk on return. There is no reason to disturb the general findings but there is an error of law in that the judge did not go on to perform the extra scrutiny required for risk on return.

9. It is not clear what of the appellant's background is accepted by the Secretary of State, who has indicated in the reasons for refusal letter that no part of the account is accepted, but specifically accepts the nationality of the appellant because of his ability to answer questions about Eritrean life in Tigrinyan, and at paragraph 23 notes the appellant's ties to Saudi Arabia and Dubai, indicating that at least some part of his claimed background may be accepted. It seems likely that some evidence will be needed as to the appellant's background before he became 18 and eligible for conscription, and that will be dealt with by way of directions for a hearing in the Upper Tribunal to remake the decision limited to risk on return on the facts as found by judge Cope and any further facts as to background.

10. In those circumstances there is a material error of law which necessitates the decision being remade."

2. On 20th August the hearing resumed before me the appellant represented by Mr R Solomon, the Respondent by Mr C Dewison. The Home Office served no additional material as to the appellant's background, although a photocopy of the appellant's ID card in what I assume to be Tigrinyan was produced without translation, I have taken that document into account with the rest of the evidence, he had previously explained its provenance as being supplied by his uncle from Asmara whilst he was in Sudan.

3. The appellant relied upon his interview and statement of 15th September 2012 in evidence. He claimed to have dropped out of school in grade 8 whilst attending the Cuba High School in Jeddah, following that he returned with his family in 1993 to Eritrea, he worked as a barber and smallholder with his family, in a village named Adi-Woderki near a town called Adi-Quala.

I note here that in his statement he indicated that he gave up his education in Eritrea because of his family responsibilities (at paragraph 5 of his statement), but his clear evidence before me was that he gave up his education "dropped out" before the family left Saudi Arabia in 1993 and before his father's death. The account given about when he stopped his education before me was also the account given in interview. This adversely affects his credibility.

4. The appellant was vague when asked at the hearing about the location of his home where he claimed to have lived between 1993 and 2012, around 9 years. He was unable to give any indication of how far away the capital Asmara was, it is shown as around 50 miles on maps, nor could he give any indication by means of how long it would take to travel there or indeed any indication at all. He explained this as being because he had never travelled to Asmara. In interview he had claimed that he had visited Asmara from his village with his uncle and the journey took about 4 hours, that distance or time is itself plausible, he was asked a number of questions about that visit in interview, that he should now have no memory of that adversely affects his credibility.

5. In interview he was asked what was next to the administration office in Adi Quala, this was a town 4 kilometres away which he said in interview he visited every Friday for prayers, it adversely affects his credibility that he was unable to give such detail. He was able to draw a rough sketch map which corresponded to the area, however when pressed on such details as the names of churches or the name of a stream that ran nearby, he was unable to recall them.

6. Whilst the appellant did answer more questions correctly than he was unable to answer, however knowledge of a village and small town in which one has spent 9 years would in ordinary circumstances lead to very great familiarity with the buildings and features such as streams nearby. One would expect a far greater familiarity than the appellant has shown for someone who has lived in a village as he has described.

7. Considering all of the evidence including of course the finding by First Tier Tribunal judge Cope that the appellant's account was not credible, and considering his evidence before me I too find that the appellant has not established that he left

Eritrea illegally. There appears to be no dispute that he was born in Saudi Arabia when his parents fled fighting in Eritrea, and that he is Eritrean, given all of the circumstances it has not been established that the appellant left Eritrea illegally, since I am unable to find on the evidence that there is a serious risk that the appellant was resident in Eritrea between 1993 and 2012.

8. At paragraph 39 of MO the Tribunal records the evidence of Professor Kibreab

"*Asked what he thought would happen to the children of people who had fled Eritrea during the war of independence if they went back having claimed asylum in the UK, Professor Kibreab said that may not be an issue for them, but they would be required to do military service if within the stipulated age ranges".*

9. In those circumstances the appellant would not be at risk on return to Eritrea.

Decision

The decision is remade by the Upper Tribunal.

The appeal is dismissed on Asylum Grounds, Humanitarian Protections and Human Rights Grounds.

Judge Aitken
Deputy Chamber President (HESC)
Monday, 2 September 2013