Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04078/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 10 October 2014	**On 4 February 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

E M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, instructed by Parker Rhodes Hickmotts, Solicitors
For the Respondent: Mr M Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, E M, was born in 1972 and is a male citizen of Eritrea. The appellant left Eritrea in October 2008 and travelled to the United Kingdom via Sudan, arriving in February 2009. Shortly after arrival, he claimed asylum, his application was

refused, though the appellant was granted two more periods of further leave to remain the last terminating on 29 November 2014. The appellant appeals under Section 83 of the Nationality, Immigration and Asylum Act 2002 against the rejection of his asylum claim. The First-tier Tribunal (Judge Turnock) in a determination dated 1 August 2014 dismissed the appellant's appeal. The appellant now appeals against that decision, with permission, to the Upper Tribunal.

2. The Secretary of State rejected the appellant's asylum claim primarily because she considered that he was excluded under Article 1F because there were "serious reasons to consider the appellant's guilty conduct that amounts to a serious non-political offence". Judge Turnock followed the guidance provided in *AH (Article 1F(b) – "serious" Algeria* [2013] UKUT 00382 (IAC):

In considering exclusion under Article 1F(b), the test is whether there are 'serious reasons to consider that the appellant is guilty of conduct that amounts to a serious non-political offence'. 'Serious' in this context has an autonomous international meaning and is not to be defined purely by national law or the length of the sentence. Guidance on the meaning of 'serious' in relation to Article 1F(c) may be found in the decision of the Supreme Court in Al-Sirri and another v Secretary of State for the Home Department [2012] UKSC 54 at paragraph [75]. Arts 1F(a) and (c) serve to illustrate the level of seriousness required to engage Article 1F(b); the genus of seriousness is at a common level throughout.

2. *A claimant's personal participation in acts leading to exclusion under Article 1F(b) must be established to the ordinary civil standard of proof, that the material facts are more probable than not. The appellant's guilt need not be proved to the criminal standard. Personal participation in a conspiracy to promote terrorist violence can be a 'serious crime' for the purpose of Article 1F(b). Where the personal acts of participation by a claimant take the form of assistance to others who are planning violent crimes, the nature of the acts thereby supported can be taken into account. The relevant crime may be an agreement to commit the criminal acts (in English law a conspiracy), rather than a choate crime.*

3. *In the absence of some strikingly unfair procedural defect, United Kingdom courts and tribunals should accord a significant degree of respect to the decision of senior sister Courts in European Union legal systems; there is a particular degree of mutual confidence and trust between legal systems that form part of the same legal order within the European Union. However, the ultimate question of whether the conduct of which the United Kingdom court or Tribunal is satisfied is sufficiently serious to justify exclusion is a matter for the national court or tribunal.*

4. *The examination of seriousness should be directed at the criminal acts when they were committed, although events in the supervening passage of time may be relevant to whether exclusion is justified: a formal pardon, or subsequent acquittal, or other event illuminating the nature of the activity may be relevant to this assessment. Despite suggestions to the contrary by respected commentators, it does not appear to be the case that service of the sentence, or indeed a final acquittal, brings the application of the exclusion clause to an end.*

3. The grounds of appeal record that Judge Turnock made the following findings of fact: (i) the appellant was conscripted into the Eritrean Army; (ii) the appellant was a platoon leader who had responsibility for prisoners as head guard; (iii) torture is used as a standard form of military punishment against prisoners and National

Service conscripts; (iv) the appellant had "significant autonomy" in his treatment of prisoners under his control. The grounds take issue with this latter finding on the basis that it is not consistent with the judge's finding that the appellant had been conscripted into the Eritrean Army. The position of "platoon leader" had been allocated to him. The appellant had no choice of the role in the army to which he would be allocated. The judge had failed to take into account the fact that the role of "platoon leader" did not have any military rank associated with it. Relying on *MT (Article 1F(a) – aiding and abetting) Zimbabwe* [2012] UKUT 15 (IAC), the appellant asserts that he had no moral choice but to carry out acts of violence against prisoners because he was acting under duress.

4. In her oral submissions, Ms Khan, for the appellant, told me that the evidence showed that "platoon leader" was the lowest rank of authority within the Eritrean Army. Even when the appellant had not been in the presence of a commanding officer, the influence of senior authority in the army and the fear of punishment should he not act in accordance with the wishes of that authority would have led to the appellant committing acts of violence against detainees in circumstances where he had not received direct orders to do so.

5. Ms Khan referred me at length to the appellant's interview record. That record had also been analysed in considerable detail by Judge Turnock at [44] *et seq*. The judge found that, subsequent to the asylum interview, the appellant had arguably sought to play down his authority and role within his platoon. He had, for example, stated in interview [150] that if a prisoner had been "non-compliant" then the appellant would have struck him. Asked [151] whether he had ever hit prisoners without permission of the head of company, the appellant had replied "you're not allowed but there are exceptional circumstances if someone is agitated and becomes violent when the head of company is out of reach you have to beat them". The appellant claims that the interpreter at his asylum interview had failed to translate his answers accurately. The appellant had also described a punishment known as "Otto" in which a prisoner's arms and legs were tied behind his back and he was placed on the floor. In interview, the appellant claimed [146-147] that he had used this technique against prisoners. Before the First-tier Tribunal [50], the appellant said that he was never asked whether he had used this technique.

6. Judge Turnock had [152] found the appellant's explanation (poor/inaccurate interpretation) was not credible. He gave, in my opinion, entirely adequate reasons for rejecting credibility of the appellant's explanation. The appellant had been accompanied at the interview by a solicitor and had been provided with notes of the interview. The appellant accepted that he had not taken issue with the content of the interviews at the time but claimed that he had realised that the record contained mistakes. It was open to the judge to reject that explanation as incredible. Likewise, the appellant's denial that the "Otto" technique had been referred to in the interview was not credible given the frequency with which that technique has been referred to in the interview record. The judge found [53] that the appellant was in a position of authority and significant autonomy. He accepted that the appellant was a conscript as he claimed but that, having been conscripted, he had chosen to assault prisoners

under his control including at times when he had not been in the presence of senior officers or acting under duress. At [57] the judge found:

> I did not accept his evidence that he was not permitted to hit prisoners without the permission of the head of company given the authority, which was vested in him as platoon leader and head guard. Moreover the evidence of the appellant at the hearing was that the company head was not always present at the prison. In those circumstances the appellant would be in a position of significant authority.

The judge went on [58] to find that "the appellant was acting under his own authority when using the "Otto" technique on prisoners, was not acting under duress or in response to superior orders but rather of his own volition".

7. Judge Turnock had the opportunity and advantage of hearing the appellant give oral evidence. I am satisfied that he has considered all the evidence in this appeal very carefully before reaching his conclusion. I find that there is no contradiction (as the grounds assert) between the judge finding that the appellant was a conscript to the Eritrean Army who chose to act violently towards prisoners under his control as a "platoon leader" and that there had been occasions when he had done so when he had not been acting the direct orders of superior officers or whilst under duress. The judge has given clear reasons why he has accepted the appellant's claim to be a conscript to the army whilst, at the same time, rejecting his attempts to resile from the answers he gave at the asylum interview. There is, in any event, no reason to suppose that a conscript to an army cannot behave with unnecessary or gratuitous brutality towards others whilst acting in a role of authority that he or she has not chosen to occupy. The findings which the judge made were open to him on the evidence and I do not find that he has erred in law either for the reasons stated in the grounds of appeal or at all. Accordingly, the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

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

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

Signed Date 10 January 2015

Upper Tribunal Judge Clive Lane