Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06463/2014

THE IMMIGRATION ACTS

Heard at Birmingham City Centre Tower	**Decision & Reasons Promulgated**
On 13th March 2015	**On 24th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR MUSSIE FREZGHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Woodhouse (LR)
For the Respondent: Mr D Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Thomas promulgated on 29th October 2014, following a hearing at Birmingham Sheldon Court on 3rd October 2014. In the determination, the

judge dismissed the appeal of Mussie Frezghi. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Eritrea, who was born in Asmara City, and has been a practising Orthodox Christian. His father was in the military. The Appellant's claim is that his brother is aged 17, but his whereabouts are unknown, and his elder sister lives with his mother. He attended school from the age of 11 to 12. Since birth, however, he has been blind in the right eye. When he was 12, he suffered an injury to his left eye when a stone was thrown at him accidentally. He now has poor sight in that eye however and this caused him to stop his studies. His reason for claiming asylum is that he will be subjected to compulsory military duties through conscription in Eritrea were he to be returned.

The Judge's Findings

3. The judge gave consideration to the relevant legal authorities. These were **MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059** and **MO (illegal exit – risk on return) Eritrea CG**. The judge considered the evidence that, although some children are taken up in round ups, the authorities would not recruit the Appellant for military service whilst he was under 18 years. On the other hand, the Appellant maintained that he was not exempt from military service. He was not completely blind. He had partial sight in his left eye. He would be required to serve. He would be examined by a military doctor in Sawar, who would decide whether he would be exempt or not, and something would be found for him. Moreover, because he left Eritrea illegally he would be severely punished for having done so.

4. The judge also observed that the Appellant left to go to Sudan where he received medical treatment soon after his arrival. The judge concluded that the Appellant left Eritrea of his own free will and did so legally and "had no difficulty with the authorities" so that "this paints a picture of normal life being resumed" (paragraph 27). The judge also concluded that the Appellant was 15 years of age, had lived in Eritrea legally, and had not been called up for military service at that time, and "there is no evidence that he has been called up since he left the country". Moreover the Appellant was partially sighted, and until he has seen a military doctor, it was not known whether he would be exempt from military service or will be given non-military duties (see paragraph 29). Accordingly, the Appellant was unable to prove that he had left Eritrea illegally before he could complete military service and he was not at risk in Eritrea of persecution or serious harm on any other grounds.

The Grounds of Application

5. The grounds of application state that the judge erred in law in that she found there to be inconsistencies in the evidence when in reality there were no inconsistencies. The judge made findings as to how the Eritrean authorities would have behaved in circumstances for which there is no evidential basis. It was not clear why the judge felt that the Appellant's credibility was damaged by going to another country. The judge did not properly consider the country guidance which makes it clear that an exit permit for medical treatment abroad is on the basis of a very narrow category. The Appellant did not fit into this narrow category. The judge did not explain how he did. Normal exit permits are granted to countries "friendly" with Eritrea, such as Qatar, China, or Libya. Many people who leave illegally end up in Sudan, and that there is where the Appellant went, and the judge's conclusions were accordingly wrong.

6. On 19th November 2014, permission to appeal was granted.

7. On 5th December 2014, a Rule 24 response was entered. It was stated that there were a series of credibility findings that could be upheld.

Submissions

8. At the hearing before me on 3rd March 2015, Mr Woodhouse, appearing on behalf of the Appellant submitted that the country guidance case was clear that anyone who is conscripted into the army effectively becomes a slave to the officers there. The Appellant had shown a reasonable degree of likelihood that he would be conscripted. Although the judge had referred to the case of **MO**, the fact was that this had not been properly followed at all. Prior to the hearing, Mr Woodhouse had sent an email to the Eritrean expert who had appeared in both the cited cases to elicit his views. He had replied by email to say that the Appellant would not be exempt from military service even if he was partially sighted. There is no reference to this email by the judge.

9. For his part, Mr Mills submitted that he would have to accept that there was a possibility of a call up for a person even such as the Appellant. However, he would then go, as the judge found, to a military doctor, and there be assessed. If it was found that he could serve he would be given military duties. Otherwise he would be given non-military duties. Second, it is true that the judge did not refer to the email from the country expert, but the email would not have changed the decision made by the judge, because the expert's reference to "partially sighted" would have covered a very wide category, and without the expert examining the Appellant, he would not have known how partially sighted the Appellant was. In the country guidance case of **MA**, it had been made clear that if one was not found to be a credible witness then one could not have been believed about the unlawful means used allegedly in making one's exit. It is true that **MO (Eritrea)** changed this to confirm that, even if one had been found to be lacking in credibility, one could still have left illegally, given how few were the exit permits given by the Eritrean state. Nevertheless, the judge had not found the Appellant to be credible. The judge held that

the Appellant had left legally for medical treatment. Therefore, he is unlikely to be subjected to ill-treatment.

10. In reply, Mr Woodhouse submitted that the case of **MO (illegal exit – risk on return) Eritrea CG** is clear that those who are allowed to leave for medical treatment reasons are a category that is very narrowly drawn. For the judge to have made this assessment, she needed to examine the Appellant's case much more carefully. In any event, the Appellant would not have been given an exit visa to go to Sudan, where many of the illegally arrived Eritreans find their way, and which is not categorised as a friendly country to Eritrea. Reference was made to pages 28, 34 and 108 of the bundle. Mr Woodhouse submitted that no anxious scrutiny had been exercised by the judge. He drew attention to his skeleton argument. The inconsistencies were not sustainable.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the operative country guidance case currently is **MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190**. The judge concluded that, "one of the grounds for securing a permit to travel abroad for medical treatment is if one is unable to receive appropriate medical treatment in Eritrea. This appears to be the case for the Appellant. ..." (paragraph 28). Yet, no analysis is provided as to why this should be the case. This is important because the case of **MO**, makes it clear that the lawful exit categories "are limited to two narrowly drawn medical categories and those who are either highly trusted government officials or their families or who are members of ministerial staff ....". The judge fails to explain how the Appellant satisfied the requirements of the two narrowly drawn medical categories. Given the application of the principle of 'anxious scrutiny' in asylum cases this should have been done as an exercise in fact-finding to be sustainable.

12. Second, the Appellant is a person who left Eritrea after September 2008 (having done so on 30th July 2013) and did so, "by public bus". The judge states that "it is unlikely that he would have risked travelling in this public manner or that he would have been able to do so without being encountered" (paragraph 25). However, the case of **MO** makes it clear that even if the Appellant is not found to be credible, that he has left Eritrea on or after August/September 2008, "if inference can be drawn from their health history or level of education or their skills profile as to whether legal exit on their part was feasible ... " then such an inference should be drawn. The judge fails to apply this jurisprudence to the conclusion arrived at. It has not shown why the Appellant is not credible in what he says about his exit from Eritrea given his level of education. This is a significant omission given that lawful exit visas are highly restricted.

13. There is significant evidence that the majority of exits (given the tight limitation on Exit Visas) of such persons are likely to be perceived as having left illegally. If this is right of the appellant here then it will mean that on return he will face a real risk of persecution or serious harm. It is not possible to say this of this particular Appellant without an proper application of the jurisprudence of **MO** to his case. It is also significant that the Appellant has found his way to Sudan which is a country that is not seen as a "friendly" status country. Indeed, many that have left *illegally* do go to Sudan.

14. For all these reasons, given that the Judge erred in the decision making process in this determination, this determination must be set aside. The appropriate course of action is for the matter to be remitted back to the First-tier Tribunal to be determined by a judge other than Judge Thomas so that appropriate findings can be made on the basis of the application of **MO**.

Notice of Decision

15. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is remitted back to be determined de novo to be determined by a judge other than Judge Thomas under Practice Statement 7.2.

16. No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 23rd March 2015