Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/02217/2013
DA/02218/2013
DA/02219/2013
DA/02220/2013
DA/02221/2013
DA/02222/2013
DA/02223/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 15 January 2015	**On 6 February 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

SKG
TT
RK
LSK
SSK
ESK
JSK
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Howard, Fountain Solicitors
For the Respondents: Mr Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a re-making of the appellants' appeals against deportation on Refugee Convention and Article 3 ECHR grounds.

2. The re-making is limited to the error of law found by me in my decision promulgated on 14 August 2014. That decision is appended and sets out the background to this matter.

3. In short, the appellants are citizens of Eritrea. They are all related, the first and second appellants being the parents of five minor children, the remaining appellants.

4. The parents of the family maintain that they left Eritrea illegally and, as a result of that illegal exit, will face mistreatment on return. That issue is the only one remaining at large after my error of law decision which decided in their favour that the First-tier Tribunal had not dealt adequately with that matter.

5. The limited point before me was to make a finding on whether the two main appellants left Eritrea illegally. It was common ground before me that this finding would be determinative of the appellants making out their protection claim given the real risk of serious harm from the Eritrean authorities to those who return having left the country illegally.

6. I was most grateful to Mr Howard and Mr Mills for their skeleton arguments on this matter and their customary thorough preparation and focussed submissions.

7. The first and second appellants have always maintained that they left Eritrea illegally. They have been consistent on this matter throughout their asylum claims and remain so before me. I must weigh that consistency on this point against the evidence as a whole and taking into account the guidance from case law that was before me.

8. Of some relevance, is that the adult appellants claimed asylum in the UK on 28 July 2005. They clearly left Eritrea prior to that date. In an earlier appeal hearing before Judge Blandy their evidence recorded at paragraph 3.2 was that they left Eritrea for Sudan in early June 2004.

9. It remains the case that the two adult appellants have been found unreliable as regards other aspects of their claims for protection. It was not accepted that they had been mistreated prior to leaving the country, that they had made a genuine conversion to the Pentecostal faith, that their children would face harsh working conditions on return or that the female children faced a real risk of FGM.

10. Nevertheless, the adult appellants argue that their consistency on this point combined with the country evidence on the tight restrictions on lawful exit from Eritrea are sufficient factors to show to the lower standard that they could only but have left illegally.

11. Certainly, the current country guidance case on Eritrea shows that legal exit from Eritrea is very restricted. The head note of the case of MO (illegal exit-risk on return) Eritrea [2011] UKUT 00190 (IAC) states:

> "(i) The figures relating to UK entry clearance applications since 2006 – particularly since September 2008 – show a very significant change from those considered by the Tribunal in MA (Draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and are among a number of indications that it has become more difficult for Eritreans to obtain lawful exit from Eritrea.
>
> (ii) The Eritrean authorities continue to envisage lawful exit as being possible for those who are above national service age or children of 7 or younger. Otherwise, however, the potential categories of lawful exit 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 recommended by the department to attend studies abroad.
>
> (iii) The general position concerning illegal exit remains 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 their health history or level of education or their skills profile as to whether legal exit on their part was feasible, provided that such inferences can be drawn in the light of the adverse credibility findings.
>
> (iv) The general position adopted in MA, that a person of or approaching draft age (i.e. aged 8 or over and still not above the upper age limits for military service, being under 54 for men and under 47 for women) and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, is reconfirmed, subject to limited exceptions in respect of (1) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (2) persons who are trusted family members of, or are themselves part of, the regime's military or political leadership. A further possible exception, requiring a more case-specific analysis, is (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the war of independence.
>
> (v) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons are likely to be perceived as having

left illegally and this fact, save for very limited exceptions, will mean that on return they face a real risk of persecution or serious harm."

21. It should be noted immediately that MO distinguishes the level of difficulty in leaving Eritrea from September 2006 onwards, finding it to be more restrictive after that time than the earlier time at which these adult appellants must have left Eritrea.

22. The case of MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT, referred to at (i) of MO, states in the head note:

> "1. A person who is reasonably likely to have left Eritrea illegally will in general be at real risk on return if he or she is of draft age, even if the evidence shows that he or she has completed Active National Service, (consisting of 6 months in a training centre and 12 months military service). By leaving illegally while still subject to National Service, (which liability in general continues until the person ceases to be of draft age), that person is reasonably likely to be regarded by the authorities of Eritrea as a deserter and subjected to punishment which is persecutory and amounts to serious harm and ill-treatment.
>
> 2. Illegal exit continues to be a key factor in assessing risk on return. A person who fails to show that he or she left Eritrea illegally will not in general be at real risk, even if of draft age and whether or not the authorities are aware that he or she has unsuccessfully claimed asylum in the United Kingdom."

23. In GM (Eritrea) v SSHD [2008] EWCH Civ 833, the Court of Appeal considered how the country evidence and ratio of MA should be approached when assessing illegal exit where there is little or no reliable evidence other than the country evidence as to illegal exit.

24. The Court of Appeal in GM (Eritrea) does not set down that the country evidence on illegal exit should lead a Tribunal to conclude to the lower standard that illegal exit must have occurred. The Court concludes that it may remain difficult for an appellant to show illegal exit if the remainder of their claim is not credible and/or there is no reliable evidence as to how they exited. None of the appellants in that case was found to have exited illegally even where one of them, MY, appeared to be clearly outwith the categories of persons who could have left legally as set out in MA.

25. So, against that case law guidance, I must weight the fact that the adult appellants before me are consistent as to having left Eritrea. The country guidance indicates that it was difficult to leave lawfully even in 2004 or 2005 but not as difficult as it was from September 2006 onwards. Against that the appellants are not, generally, at all credible as witnesses.

26. In addition, there is the issue of the first appellant being found by Judge Blandy to have completed his military service; see 6.2 of that determination.

27. There is the further evidence, noted at [33] and [34] of the respondent's reasons letter dated 14 October 2013, the first appellant also had evidence of a war injury in 1999 and had associated symptoms and conditions. The categories of those who might obtain legal exit even after September 2006, according to the third paragraph of the head note of MA, included those who were medically unfit.

28. My conclusion is that the evidence before me indicates that the adult appellants here have not shown even to the lower standard that they left Eritrea illegally, notwithstanding the county evidence on the difficulty of illegal exit and their consistent evidence on this point. Their general lack of credibility, their having left prior to September 2006 and the first appellant having completed military service and there being evidence of medical unfitness are sufficient to undermine their claim as to illegal exit.

29. Where that is so, they have not shown on any basis that they or their children are in need of international protection. They have not made out their asylum and Article 3 ECHR claims.

Decision

16. The decision of the First-tier Tribunal on the appellants' asylum and Article 3 ECHR claims discloses an error on a point of law to the extent set out above and is set aside accordingly to be re-made.

17. The appeals against deportation are refused.

Signed:  Date: 5 February 2015

Upper Tribunal Judge Pitt

Anonymity

I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants as a result of the content of the protection claim and in the best interests of the minor appellants.

Upper Tribunal
(Immigration and Asylum Chamber)

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DA/02221/2013
DA/02222/2013
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THE IMMIGRATION ACTS

Heard at Birmingham
On 7 July 2014

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE PITT

Between

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(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Howard, Fountain Solicitors
For the Respondents: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

The Appeal

1. This is an appeal against a decision promulgated on 17 April 2014 of First-tier Tribunal Judge Parkes and Dr J O de Barros which refused the appeals on asylum and human rights grounds brought against the respondent's automatic deportation orders dated 25 October 2013.

2. The appellants are citizens of Eritrea. They are all related, the first and second appellants being the parents of five minor children, the remaining appellants.

Background

3. The background to this matter is that the first two appellants claim to have arrived in the UK illegally on 28 July 2005. They claimed asylum. The claim was refused on 9 September 2005. The appeal against refusal was dismissed in a decision of Immigration Judge Blandy promulgated on 14 November 2005. Appeal rights became exhausted on 8 December 2005.

4. On 18 September 2007 the first appellant was convicted of possessing a false identity document and on 25 February 2008 was sentenced to 12 months' imprisonment.

5. On 9 May 2008 the respondent served notices of a decision to deport to the first four appellants. The appeal against deportation was dismissed in a decision of Immigration Judge Osborne and Mr J H Eames promulgated on 2 October 2008. Deportation orders were issued against the first four appellants on 24 December 2008 and served on 29 December 2008.

6. Various further representations to the respondent followed leading to correspondence over a number of years between the appellants and the respondent, those matters continuing until 21 March 2013 when the respondent made a decision refusing to revoke the deportation orders. Appeal proceedings started but on 7 October 2013 the respondent revoked the deportation orders made against the first four appellants.

7. The respondent then made automatic deportation orders against all of the appellants on 25 October 2013, having explained in letters dated 14 October 2013 why, in her view, the family had not shown that they had protection or Article 8 claims of any merit.

Decision of the First-tier Tribunal

8. Before the First-tier Tribunal there was agreement that the appellants could only succeed in their appeal against deportation unless a protection or Article 8 claim was made out.

9. At [21] the First-tier Tribunal adopted the findings of the two previous appeal determinations that no protection claim had been made out in so far as those findings were on similar facts to those currently being put forward.

10. At [22] to [27] the First-tier Tribunal found that the conversion of the family to Pentecostal Christianity, a new head of claim, was not genuine.

11. At [28] to [32] the First-tier Tribunal found that there was not a real risk of the minor female appellants undergoing FGM on return to Eritrea. This was also a claim that had not been made previously.

12. The First-tier Tribunal concluded at [33] that no protection claims had been made out.

13. At [34] to [45], the First-tier Tribunal found that the evidence did not show that the deportation decisions breached Article 8 of the ECHR.

The Grounds of Appeal

14. There were five main grounds of appeal which can be summarised as follows:

    i. The panel did not make a finding on whether the second appellant and the children were genuine converts to Pentecostal Christianity

    ii. The best interests of the children were incorrectly assessed

    iii. The assessment of the risk of female genital mutilation for the female children was in error

    iv. The panel was incorrect in finding the private life of the family not "particularly strong"

    v. The risk on return for those who exit Eritrea illegally was not addressed

Error of Law

15. I did not find any merit in the first four grounds.

16. The First-tier Tribunal set out from [22] to [27] its reasons as to why it concluded that the claimed conversion to Pentecostal Christianity was not genuine. The panel was clearly entitled to place weight at [23] on the timing of the conversion. The positive views of members of the church attended by the family were taken into account in terms at [24]. The appellant's responses in interview to questions about his religion were considered at [25] to [26]. The finding at [25] and [26] that adverse weight could be placed on the appellant's lack of knowledge, in particular his inability to name the five gifts of the Holy Spirit in an interview conducted 4 years after his claimed conversion was correct on the basis of the evidence that was before the First-tier Tribunal. The new material put before me on the question of the five gifts of the Holy Spirit cannot show an error of law in the reasoning of the First-tier Tribunal.

17. The First-tier Tribunal stated in terms at [27] that it did not accept that either the appellant or his wife had undergone a genuine conversion. In that light of that sustainable finding, it did not appear to me that the panel could be said to have erred in not addressing directly whether the minor children had undergone a genuine conversion. If the conversion of the parents is not genuine and they do not face a risk on return as they will not wish to practice the Pentecostal faith, nothing in the evidence indicated that the children had any independent views on these matters such that they might act differently on return.

18. The First-tier Tribunal did not err in its assessment of the best interests of the children. The First-tier Tribunal cannot be said to have failed to weigh the children's best interests a primary factor, setting out the correct approach at [13] and stating in terms at [41] that the position of the children was the strongest part of the Article 8 claim and at [44] that the best interests were weighed as a primary factor. At [35] it considered the evidence of the children's length of residence and education in the UK and accepted at [42] and [43] that return to Eritrea would interfere with the children's lives and education and that the standard of services available in Eritrea would be lower than that in the UK. It was not obliged to find that these matters, even where one child had been in the UK for over 7 years, showed the decision to deport the children with their parents was a disproportionate breach of their private lives.

19. The grounds refer to the country evidence on child labor in Eritrea but there was nothing to indicate that these children would be forced to work when both of their parents are able to do so and nothing suggested that the oldest child still in Eritrea was subject to significantly poor working conditions, if working at all. The panel correctly pointed out at [35] that that much of the children's residence had been during the years when they remained closely involved in the family rather than forming independent social lives. The family speaking Tigrynyan and the oldest child of the family is still being in Eritrea were further factors which allowed the panel to conclude that return of the children to Eritrea with the parents was not disproportionate.

20. The panel's consideration of the risk of FGM to the female children is at [28] to [32] and the reasoning there is entirely sound and in line with the country evidence on the improved situation regarding FGM in Eritrea. No error arises there.

21. As above, at the heart of this Article 8 claim was the situation of the children and the oldest child in particular. Where the First-tier Tribunal's decision on the situation of the children was not in error, as discussed above, and the panel took into account the material facts concerning the parents' private lives no error arises in its assessment of the family's private life.

22. I did find that the final ground of appeal had merit, however. The First-tier Tribunal did not consider whether the appellant and his wife exited Eritrea illegally. The respondent's refusal letter at [33] maintains that previous determinations found that there had been no illegal exit. Neither the determination of Judge Blandy promulgated on 14 November 2005 nor the determination of Immigration Judge Osborne and Mr J H Eames promulgated on 2 October 2008 address the question of illegal exit in terms, however.

23. The current country guidance case of MO (illegal exit-risk on return) Eritrea [2011] UKUT 00190 (IAC) indicates that an individual would face serious mistreatment on the basis of imputed political opinion on return as someone of draft age who had left Eritrea illegally. The fourth paragraph of the head note to MO states:

> "(iv) The general position adopted in MA, that a person of or approaching draft age (i.e. aged 8 or over and still not above the upper age limits for military service, being under 54 for men and under 47 for women) and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, is reconfirmed … ".

24. The fifth paragraph of the head note of MO states, referring to the country guidance case of MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT:

> "(v) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons are likely to be perceived as having left illegally and this fact, save the very limited exceptions, will mean that on return they face a real risk of persecution or serious harm."

25. I concluded that this was a material matter on which no decision had been made by the First-tier Tribunal and that an error of law therefore arose. To this extent I set aside the decision of the First-tier Tribunal in order for it to be re-made.

Decision

26. The decision of the First-tier Tribunal on the appellants' asylum and Article 3 ECHR claims discloses an error on a point of law to the extent set out above and is set aside accordingly to be re-made.

27. A further hearing will take place on Thursday 23 October 2014.

28. The parties are directed to file with the Tribunal and serve on each other **no later than 16 October 2014** a skeleton argument on the question of whether the evidence already provided shows that the appellant and his wife exited Eritrea illegally and the correct approach in law to that evidence following the country guidance cases on illegal exit from Eritrea.

Signed:  Date: 12 August 2014
Upper Tribunal Judge Pitt

Anonymity

I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants as a result of the content of the protection claim and in the best interests of the minor appellants.