Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08681/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 3 February 2016	**On 24 February 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

NA
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr K Smyth, Solicitor
For the respondent: Mr C Avery, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Eritrea and claims to be born on 21 June 1995. He appealed to the Upper Tribunal against the determination of First-tier Tribunal Judge Froom dated 29 October 2015 from the decision of the respondent dated 12 August 2013 refusing his claim for asylum and humanitarian protection in the United Kingdom.

The First-tier Tribunal's findings.

2. Permission to appeal was granted by First-tier Tribunal Judge Grant Hutchinson stating that it is arguable that the Judge failed to follow the approach in the country guidance case of **MO (illegal exit-risk on return) Eritrea CG [2011] UKUT 00190 (IAC)** by rejecting the appellant's account of having left Eritrea illegally. The Judge considered the appellant's claim to be of the Pentecostal faith which he found to be determinative and did not consider whether the appellant left Eritrea illegally. The Judge added that it must be borne in mind that the appellant was only nine years of age at the time when he claims to have left Eritrea illegally and only speaks Amharic.

3. The First-tier Tribunal Judge in summary are the following.

4. The Judge stated, "The submissions made by Mr Smyth focused on the case of **MO** on the appellant's claim that he made an illegal exit from Eritrea. It was argued that this in itself, was sufficient for his appeal to be allowed. The appellant's approach expressly acknowledges showed he had difficulty in answering questions about his religion at his asylum interview. However, the Judge was reminded of the appellant's age and experiences".

5. The Judge stated "having heard the appellant give evidence and having considered the evidence in the round, I am firmly of the view that he came to be a Pentecostal is a fabrication. This issue lies at the heart of the claim as it is the reason given by the appellant for his father's arrest and his mother's decision to flee the country".

6. The Judge further stated "The appellant was given ample opportunity to demonstrate that he had a reasonable grasp of the tenants of his claim to faith at his asylum interview. The appellant failed to give answers which would be expected of a person living with a Pentecostal mother who was instructing him in the faith and he would not know more about the key features of that religion, such as which book of the Bible it is taken from and the importance of the baptism of the spirit. The fact he was able to say what the word Pentecostal gift signifies also the meaning of the day of the Pentecostal are not sufficient to establish his claimed familiarity with the faith. It was found particularly significant that when offered the opportunity to talk about any part of the Bible which he liked, the appellant plainly floundered".

7. The Judge stated "The appellant's explanations in his witness statement dated 6 May 2013 explained his performance at the interview. Having considered the applications it is not accepted that a single visit to a church might not be enough to register the name. The main point being that the appellant has only been to church once despite professing to be a practising Pentecostal and the explanation he offered that it clashed with school is a decidedly poor one. There must surely be opportunities to attend church outside school hours. It would have been reasonable for the

appellant to have sought clarification if there was any doubt in the appellant's mind what he was being asked about Easter and at his age it might not be reasonable to have expected him to seek clarification. The recorded answer "once a year" does not answer the question asked which was "at which time of year is Easter celebrated". However, the question was repeated twice and the appellant's final answer was "I don't know". The possibility that the appellant had misunderstood the question is much reduced for the fact that the question was repeated twice and the appellant confirmed he had understood the interpreter at the end of the interview. The appellant also said he was feeling fit and well. The interview was conducted by an officer who is likely to have been trained in interviewing minors and the appellant was accompanied by his Solicitor and an independent interpreter. These factors reduce further the likelihood that the appellant's performance was affected by his becoming emotional, something which is usually recorded in the transcript but which was not in this case. I infer that the appellant has sought to justify his lack of knowledge but his explanations are not reliable.

8. The Judge found that in all the circumstances the appellant's claim to be a Pentecostal list, either as a result of his parents believe so because he was genuinely adopted the fate here in the UK is not believed and his credibility is very severely damaged.

9. The Judge stated "As to the issue of unlawful exit, as said, Mr Smyth submissions were directed towards this issue and sought to argue that, even if an adverse finding were made regarding the appellant's claimed faith, he should still succeed in showing entitlement to refugee status on this point alone. The appellant said he left Eritrea in the first month of 2005 at which time he would have been nine years of age. I do not therefore expect him to have clear personal recollections of the journey. At his interview, he was able to say only that they travelled in a lorry and the journey took two days. When he made his second witness statement in October 2013, the appellant remembered his mum packing a travel bag. He remembered the type of vehicle and that he had not known the driver. He remembered that they only travelled at night and the hid in the house during the day. He overheard his mother saying that they had to hide. He remembered the scant foliage in the desert. He remembered his mother talking to someone after they had arrived in Sudan. This new information is set out under a heading "illegal exit from Eritrea …". His evidence at the hearing was less detailed and similar to the interview record. He said, in answer to the question how he left Eritrea, that is mother told him they travelled in a vehicle. Asked where he went, he said he remembered seeing desert and then they went to Sudan".

10. The Judge remarked, "I found this vast and more detailed account given in the second witness statement to be inconsistent with his lack of knowledge of the time of the interview and again at the hearing. As said, a nine-year-old child would not remember much. The fact that this vastly more detailed account would be given and there has been no explanation for the increased capacity to recollect details indicates to me that the

second statement can be disregarded as embellishment. This undermines the appellant's credibility. Bearing in mind I have found the appellant give a fabricated account of his reason for leaving Eritrea, I do not accept the left Eritrea illegally either".

11. The Judge stated "I have carefully considered Mr Smyth submissions. In **MO** which was heard in February 2011, the Tribunal accepted Professor Kibreab's evidence, regarding the available categories of unlawful exit. Mr Smyth argued that the appellant did not appear to fit the profile of either of the two possible categories numbered (vi) highly trusted government officials and their families and (vii) (members of ministerial staff recommended by the Department to attend studies abroad). The Tribunal accepted the number of people who would fall into these categories were small but rejected an argument that there were fanciful or their existence could be wholly disregarded. The turning point for considering the situation was different from that previously appertaining in August/September 2008 when the authorities suspended exit visa facilities. This appellant therefore falls within the earlier period considered in **GM Eritrea and others v SS HD [2008] EWCA Civ 833** where the appellant approaching draft age who was found generally not credible would not be assumed to have left illegally. The Tribunal in **MO** confirmed the guidance given in **MA (draft evaders-illegal departures-risk) CG [2007] UKAIT 00059** that, for those who left before August/September 2008, illegal exit could not be assumed if they had been found wholly incredible. (See paragraph 16 and one 116)"

12. The Judge stated that "Mr Smyth argument were based on exceptions on the part of the appellant's evidence has been uncontentious such as his claim to have had little formal education, to have come from Assab and to be an Amharic speaker. It is true, that at least for 2008 cases, the Tribunal said that inferences might be drawn from uncontentious personal data as to whether legal exit within those two categories was feasible. However, other than the appellant's facility with Ahmaric, I do not see that the matters relied on are uncontentious. Whilst the appellant claims to come from Assab (where Ahamric is a lingua franca) and to be uneducated, it seems to me that these matters which are likely to stand or fall with my overall credibility assessment. If the appellant's account is a fabrication, then these facets of the account would be likely to have been woven into the narrative in order to enhance it. The fact that the appellant can speak Amharic does not mean he cannot be regarded as falling within categories (vi) and (vii). Such a person is likely to have travelled and to be well educated".

13. The Judge concluded "I conclude the appellant has not established he left Eritrea illegally or that, if he did leave in 2005, he fled with his mother after his father had been detained on account of the family Pentecostal beliefs. I find that the appellant has fabricated his evidence on both matters. The appellant is therefore not assisted by the country guidance case as set out above any has not established that there is a real risk he will come to harm in Eritrea. The appellant said he had two brothers,

although he did not live with them. Given the appellant's account of religious persecution has been found to be false, there is no reason why his father would have gone missing or that his mother would have left Eritrea. It is probable that the appellant's family remain in Eritrea and that he was sent abroad for other reasons. The appellant will be able to return and resume living with his family" on his return".

14. The Judge stated **"**The core of the appellant's claim is to be in fear of persecution on his return to Eritrea because she left the country illegally. In **MO (illegal exit-risk on return) Eritrea CG [2011]** supports the proposition that if anyone exits Eritrea illegally, they may face a real risk of persecution on return. However **MO** also makes clear that the year in which a person left Eritrea is relevant. This is because it was not until August of September 2008 that the highly restrictive bar on exit visas was imposed. The appellant left Eritrea before the 2008 restrictions were imposed.

Grounds of appeal

15. The appellant's grounds of appeal state the following, in summary. There are material errors in the determination. The first ground of appeal is the Judge's rejection of Pentecostalism and reasons for departure wrongly considered that determinative of the question of illegal exit. The First-tier Tribunal Judge rightly observed that the country guidance makes it clear that illegal exit cannot be assumed if an individual has been found wholly incredible. Nevertheless, the categories of people who can be considered to have been in a position to have left Eritrea unlawfully, prior to August/September 2008, are limited. These limited categories of people are initially set out in **MA** and then subsequently revised slightly in **MO**. The only category that the appellant could realistically fall under is the latter two categories. In (vi) highly trusted government official and their families or (vii) members of ministerial staff recommended by the Department to attend studies abroad. The Court of Appeal made it clear in **GM Eritrea and others with the Secretary of State for the Home Department [2008] EWCA Civ 833** that at paragraph 37 "when we know nothing about the individual situation of the appellants, the question becomes whether there is a reasonable degree of likelihood that any of them did not fall into any category".

16. In **MO** guidance was given as to how a decision maker should approach that question. It was stated, "We appreciate that in the context of this case the decision maker has found the appellant wholly lacking in credibility. It is difficult to see any basis of finding conclusively that they would not fall within one of the above two categories. But at least in a range of cases the evidence may be such as to make it clear that the claimant is concerned albeit, wholly or largely lacking in credibility, could not have had any links with the government officials of the regimes and could not have an education or skills profile making it likely they have been civil servants or have an educational bent. What may be involved here is sometimes clearer recognition by the decision maker that when

finding a treatment 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".

17. The Judge did not follow this approach and instead rejected the appellant's claim to have left illegally because he treated the incredible account of his reasons for leaving Eritrea is his claimed Pentecostal faith, as determinative. The approach taken by the Judge at paragraph 34 is contrary to the guidance given in **MO** in which the Upper Tribunal made clear that an individual's evidence regarding matters such as background and level of education did not necessarily stand and fall with the assessment of other aspects of the claim.

18. Further, the first-tier Tribunal Judge's reference to the appellant's ability to speak Amharic cannot be construed as an adequate reason to find that it is reasonably likely that he does not fall into the categories of people who may have left unlawfully. This is because the First-tier Judge refers to the appellant has somebody who can speak Amharic with the inference being that the appellant is bilingual and therefore has a profile of somebody who is "likely to have travelled and to be well educated". However the appellant only speaks Amharic, and a lawful assessment of whether it is reasonably likely that the appellant is not the family member of a highly trusted government official or a member of ministry staff recommended to study abroad must take into account the fact that the appellant does not speak the national language of Eritrea, Tigrinya".

19. The second ground of appeal is that failure to take into account the relevance of the appellant's age at the date of departure to his claim to have left Eritrea illegally. The appellant claims to have left Eritrea in 2005 aged nine years old. On two occasions the Judge appears to have accepted this claim as the date of departure. It was incumbent upon the Judge to assess whether it was reasonably likely that somebody who left Eritrea as a nine-year-old child is not the family member of a highly trusted government official or a member of ministerial staff recommended to study abroad. However nowhere does the Judge conduct such an assessment with the appellant's age at the date of departure in mind.

The hearing

20. I heard submissions from both parties as to whether there is an error of law in the determination.

Findings as to whether there is an error of law in the determination.

21. I have given anxious scrutiny to the determination of the First-tier Tribunal Judge and have taken into account the grounds of appeal. Permission to appeal was granted only on the bases that even if the Judge rejected the appellant's asylum claim, the Judge should have independently

considered, the appellants claimed illegal exit from Eritrea which leaves the appellant open to persecution in Eritrea on his return.

22. I have considered Judge Froom's determination with all due scrutiny and care. I find that the determination is sound, well-reasoned and without error, material or otherwise. I struggle to understand why permission was granted because the same submissions made to me at the hearing were made to Judge Froom who gave cogent reasons for why he did not accept the appellant's claim that he left Eritrea illegally would bring him into the risk category set out in **MO** on his return.

23. The very basis of the appellant's claim was that his father and brother disappeared due to their claimed persecution on account of being Pentecostal and as a consequence, he and his mother had to leave Eritrea unlawfully. The Judge did not accept the first part of the story that his family were persecuted because they were Pentecostal. The Judge was entitled to find that the appellant had not demonstrated that he was Pentecostal because he had very little knowledge of the religion which was not credible given his claim that he lived with a Pentecostal, mother who was teaching him about the faith. The Judge found that the appellant had fabricated his evidence in its entirety in respect of his claim that he is a Pentecostal and that his family were persecuted for that reason. It followed that the Judge did not accept that the appellant and his mother had any reason to flee or had fled Eritrea and stated that in all probability the appellant's family are still living in Eritrea. There is no perversity in these findings.

24. The Judge also took into account an alternative scenario, that even if the appellant and his mother had left the country, they did so before the exit procedures came into place in 2008. He took into account that the appellant left country in 2005 when exit procedures were not being enforced. On the evidence the Judge was not only entitled to but legally bound to come to the conclusion that he did of the evidence.

25. The only part of the submissions made by Mr Smyth which I accept is that notwithstanding rejection of the appellant's asylum claim, the Judge could nevertheless have found that the appellant exited Eritrea illegally. This does not mean that he had to so find but only that he could have. In this case the Judge did not find that the appellant exited Eritrea, at all or unlawfully. It was open to the Judge on the evidence to find that the appellant did not tell the truth about the reason why he and his mother fled Eritrea which was persecution on the bases of his religion. As this was the only reason given by the appellant for fleeing the country, the Judge was therefore entitled to conclude that the appellant and his mother did not leave the country, at all.

26. The Judge having found that the appellant's family were not being persecuted due to their religion and as day follows night, found that the appellant did not leave Eritrea with his mother for this reason.

27. The Judge also considered the appellant age of nine years. The Judge stated that even if he accepted this evidence, that his mother took him out of the country, which he did not, said that it is trite law that a child cannot be held responsible for an adult's actions. The appellant went where his mother took him and would not be held responsible by the authorities in Eritrea. There was no evidence before the Judge that a child is held responsible by the Eritrea authorities for his parent's actions of taking him out of the country when he is a child.

28. The very basis of the appellant asylum claim fell through the floor. The Judge very clearly stated in his determination that he does not believe the appellant exited Eritrea unlawfully the same way he did not believe his reason for why he exited unlawfully. These are perfectly sustainable findings on the evidence. I can find no material or other error of law in the determination, real, imagined, perceived or embryonic.

29. I find that the Judge was entitled and required to reach his conclusion based on his consideration and evaluation of the evidence as a whole. The Judge relied on the country guidance case of **MO** appropriately and followed the guidance faithfully. The Judge's reasoning and evaluation of the evidence in his determination has legal depth and understanding of the background and case law on Eritrea. I find that the Judge's reasoning is understandable, and not perverse. The arguments put forward by Mr Smyth have been properly rejected by Judge Froom as I also reject them.

30. Considering the evidence in this appeal in the round, I find that a differently constituted Tribunal would not come to a different conclusion on the facts in this appeal.

31. I find that no error of law has been established in the First-tier Tribunal's determination. I uphold his decision.

DECISION

Appeal dismissed

Signed by
A Deputy Judge of the Upper Tribunal

Dated this 16th day of February 2016

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Mrs S Chana