Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA119002015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal on 10 May 2017	**Decision Promulgated and sent on 22 May 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HAMA
(Anonymity direction in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Howard of Fountain Solicitors
For the Respondent: Mrs Aboni Senior Home Office Presenting Officer

ERROR OF LAW FINDING

1. This is an appeal against a decision of First-tier Tribunal Judge Lucas ('the Judge') promulgated on 17 October 2016, following a hearing at Taylor House on 15 September 2016, in which the Judge dismissed the appellant's protection and human rights appeals.

2. Permission to appeal was granted on a renewed application on the grounds it was arguable that the Judge made a material error of law regarding the risk on return to Eritrea as a woman of draft age.

Background

3. The appellant is an Eritrea national born in 1987. Having considered the evidence the Judge sets out relevant findings from [58] of the decision under challenge. The Judge states in [59] that the Tribunal is mindful of the current country guidance decisions and that the respondent accepted that the appellant is a citizen of Eritrea which is the country to which removal directions have been set.
4. The Judge did not accept the appellant is a witness of truth and formed the view that she had come to the UK for reasons other than a well-founded fear of persecution for a Convention reason [61].
5. The core of the appellant's account regarding events in Eritrea was not accepted and nor was it accepted that the appellant faced an adverse risk from the authorities in Eritrea. At [63] the Judge notes, on the appellant's own admission, that she was exempt from military service on account of her marriage to an Eritrean citizen.
6. At [67]–[68] the Judge finds:

> 67. The Tribunal forms the view that the Appellant had no profile at all when she left Eritrea and that her claim was without any foundation at all. She has produced no evidence to show that she has even lived in Eritrea recently and the Tribunal has noted that she has admitted owning an Eritrea passport. She has clearly sought to distance herself from the consequences of this admission in her Screening Interview because the possession of an Eritrea passport presupposes that it was legitimately issued to her. The consequence of this is that if she possessed and/or continues to possess an Eritrea passport, she had the ability to leave Eritrea with it. If therefore she was able to leave Eritrea with her own passport, it goes without saying that she must have been within an exempt category and could not have left that country illegally, whenever she did. The only evidence of her actually living in Eritrea in the recent past comes from her own evidence and those of her supporters who have attended this Tribunal to assist her claim. While the Tribunal does not doubt that those witnesses have attended this Tribunal in good faith, the Tribunal does not place great weight upon their evidence since the main purpose of their evidence is to assist the claim that is otherwise lacking in any substance or credibility.
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> 68. The Tribunal has carefully considered the objective information and Country Guidance relating to Eritrea. It does not regard the Appellant as a witness of truth. She has clearly come to the UK for reasons unrelated to a well-founded fear for Asylum. She is not at risk of military service upon Eritrea and the fact that she possessed an Eritrea passport means that she fell within an exempt category of citizens who are able to acquire a national passport. There would have been no point in the Appellant acquiring a national passport if it was not going to be used.

7. The Judge did not accept the appellant left Eritrea illegally and that an examination of the records in Eritrea would show the appellant was issued and possessed a valid Eritrea passport [71]. The appellant's account was rejected as lacking credibility and it was not accepted

she is a draft evader nor that she left the country illegally and therefore did not fall within any of the categories of risk identified in the relevant country guidance with regard to Eritrea [72].

Grounds

8. Permission to appeal was sought on four grounds.
9. Ground 1 asserts the Judge failed to apply relevant country guidance as it was accepted the appellant is an Eritrea national but it is claimed the Judge failed to appropriately consider whether the appellant would be perceived on return as a draft evader or deserter and hence face a real risk of persecution. It is asserted the Judge failed to explain whether the appellant will be perceived as having left illegally and therefore at persecutory risk and failed to explain which of the limited exception categories of person the Appellant is otherwise considered to fall within. It is also asserted the Judge failed to make findings in relation to the appellant's contention that passport expired and the effect that would have upon return to Eritrea.
10. Ground 2 asserts the Judge failed to give adequate reason as to why significant weight cannot be attached to the evidence of the appellant's witnesses particularly given that the Tribunal accepted that the witnesses attended the tribunal in good faith.
11. Ground 3 asserts the Judge failed to make findings as to the persecutory risk the Appellant faced on return to Eritrea as a member of a Particular Social Group namely a single loan female returning with a child and/or persecutory risk the appellant faces on return as a failed asylum seeker.
12. Ground 4 asserts the Judge failed to make findings in relation to the appellant's fear her daughter would be subject to FGM on return to Eritrea, failed to give reasons why paragraph 276ADE(1)(vi) of the Immigration Rules did not apply, and failed to address the respondent's duties under section 55 Borders, Citizenship and Immigration Act 2009.
13. The Secretary of Status filed a Rule 24 reply which asserts the Judge directed himself appropriately and has given adequate reasons for the finding the appellant did not leave Eritrea illegally and that overall the appellant was not credible in her account of events and that, given the findings by the Judge, the appellant cannot demonstrate that she would be at risk on return to Eritrea.

Error of law

14. The current country guidance case relating to Eritrea, judgment of which was handed down on 7 October 2016 between the date of the First-tier Tribunal hearing and promulgation of the decision under challenge, is *MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC)* in which it was held that:

(i) Although reconfirming parts of the country guidance given in MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059 and MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190 (IAC), this case replaces that with the following:

(ii) The Eritrean system of military/national service remains indefinite and since 2012 has expanded to include a people's militia programme, which although not part of national service, constitutes military service;

(iii) The age limits for national service are likely to remain the same as stated in MO, namely 54 for men and 47 for women except that for children the limit is now likely to be 5 save for adolescents in the context of family reunification. For peoples' militia the age limits are likely to be 60 for women and 70 for men;

(iv) The categories of lawful exit have not significantly changed since MO and are likely to be as follows: (a) Men aged over 54; (b) Women aged over 47 (c) Children aged under five (with some scope for adolescents in family reunification cases; (d) people exempt from national service on medical grounds; (e) People travelling abroad for medical treatment; (f) People travelling abroad for studies or for a conference; (g) Business and sportsmen; (h) Former freedom fighters (Tegadelti) and their family members; (i) Authority representatives in leading positions and their family members;

(v) It continues to be the case (as in MO) that most Eritreans who have left Eritrea since 1991 have done so illegally. However, since there are viable, albeit still limited, categories of lawful exit especially for those of draft age for national service, the position remains as it was in MO, namely that a person whose asylum claim has not been found credible cannot be assumed to have left illegally. The position also remains nonetheless (as in MO) that 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 adverse credibility findings. For these purposes a lengthy period performing national service is likely to enhance a person's skill profile;

(vi) It remains the case (as in MO) that failed asylum seekers as such are not at risk of persecution or serious harm on return;

(vii) Notwithstanding that the round-ups (giffas) of suspected evaders/deserters, the "shoot to kill" policy and the targeting of relatives of evaders and deserters are now significantly less likely occurrences, it remains the case, subject to three limited exceptions set out in (vii) (c) below, that if a person of or approaching draft age will be perceived on return as a draft evader or deserter, he or she will

face a real risk of persecution, serious harm or ill-treatment contrary to Article 3 or 4 of the ECHR.

(vii) (a) A person who is likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and/have signed (or are willing to sign) the letter of regret;

(vii) (b) Even if such a person may avoid punishment in the form of detention and ill-treatment it is likely that he or she will be assigned to perform (further) national service, which, is likely to amount to treatment contrary to Articles 3 and 4 of the ECHR unless he or she falls within one or more of the three limited exceptions set out immediately below in (vii)(c); (vii)(c)) It remains the case (as in MO) that there are persons likely not to face a real risk of persecution or serious harm notwithstanding that they will be perceived on return as draft evaders and deserters, namely: (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;

(vii) Notwithstanding that many Eritreans are effectively reservists having been discharged/released from national service and unlikely to face recall, it remains unlikely that they will have received or be able to receive official confirmation of completion of national service. Thus it remains the case, as in MO that "(iv) The general position adopted in MA, that a person of or approaching draft 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…"

(ix) A person liable to perform service in the people's militia and who is assessed to have left Eritrea illegally, is not likely on return to face a real risk of persecution or serious harm.

(x) Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (a) that he or she left illegally, and (b) that he or she is of or approaching draft age, is likely to be perceived on return as a draft evader or deserter from national service and as a result face a real risk of persecution or serious harm;

(xi) While likely to be a rare case, it is possible that a person who has exited lawfully may on forcible return face having to resume or commence national service. In such a case there is a real risk of

persecution or serious harm by virtue of such service constituting forced labour contrary to Article 4(2) and Article 3 of the ECHR;

(xii) Where it is specified above that there is a real risk of persecution in the context of performance of military/national service, it is highly likely that it will be persecution for a Convention reason based on imputed political opinion.

Discussion

15. In relation to Ground 1, the Judge found the appellant was exempt from military service based on the appellant's own evidence to this effect and the admission recorded in [63]. There is no challenge to this finding in the Grounds and the Judge was arguably not required to give further reasons when adequate reasons had been given for the finding on this point.
16. Whilst the country guidance case sets out guidance on those who may be at risk it is not suggested it is a definitive statement such as to warrant a finding that unless a person is specifically found to fall within one of the identified categories it must be found they are likely to face a real risk on return. The burden of proving entitlement to international protection falls upon the person so asserting. In this case, although that was the thrust of submissions made, such claim is undermined by the appellant's own evidence.
17. No arguable legal error is made out in the Judge placing reliance upon the appellant's own statement that she is exempt from national/military service, arising from the fact she is married to a soldier of the Eritrea army. The appellant claimed in her asylum interview that her husband joined the Army in 2006.
18. A paper from the Immigration and Refugee Board of Canada, titled, Eritrea: Military service, including age of recruitment, length of service, grounds for exemption, penalties for desertion from and evasion of military service, and availability of alternative service [ERI104179.E], available on the Refworld UNHCR website, notes "According to the British Embassy in Asmara, married women or women with young children are usually exempt from military service (UK 17 Aug. 2011, para. 9.44). Country Reports 2011 also states that girls who are already married are generally exempt from training at Sawa and military service (US 24 May 2012, Sec. 6). Sources indicate that pregnant women may also be exempt from national service (Bozzini 2011, 96; Human Rights Watch 16 Apr. 2009, 44) or reserve duty (ibid.). However, Bozzini indicates that pregnant women are not "promptly" issued demobilization papers to prove their exemption (16 Feb. 2012, 9). He notes, further, that some women in the national service do have children (Bozzini 16 Feb. 2012, 9)".
19. This view is reflected in the guidance in *MST* where it is found at [292]:

> 292. According to the 2015 UNCOI Report [395] – [398], there is a "practice of tolerance with regard to women's national service obligation when they are

> married or have children". However, very few women have been formally released or discharged which makes it difficult for them to get identity cards or travel permits, although married women can get travel permits issued at an officer's discretion.

20. It is arguable that such discretion would be exercised in favour of a person who is not only a married woman, and hence exempt in her own right, but also married to a member of the Eritrea military. It is noted in the appellant's screening interview of the 18 August 2015 that she described herself as "Mrs" in reply to question 5, at question 13a she described her status as "married", at 13b provided a date of marriage as 1 November 2010, and in reply to questions 14 and 15 provided her spouses fore name and surname/family name. There is no indication that the appellant does not remain a married woman.
21. If the appellant had been exempted she would not be perceived as a draft evader. The Judge accepted the appellant had left legally as she was in the possession of a valid passport which the Judge concluded she had used to leave Eritrea. As such there was no evidence to support a claim that the appellant would be perceived as having left illegally.
22. The appellant claimed she had been issued with a passport by the Eritrea authorities which she indicated in the Screening Interview had been left in Sudan. The appellant was born in Sudan but claims to have returned to the family home in Eritrea and in the asylum interview to have been issued with the passport in 1997. When asked why she had the passport the response was "just to have it". The applicant claims a question 162 that her passport expired before she used it and after that she became overage.
23. The Judge finds above that the appellant was in possession of a valid passport that she used to leave Eritrea. It is noted in the Refusal Letter that the appellant's evidence in relation to when she left has been contradictory, claiming on the one hand to have left in 2010 by foot, to have travelled to Sudan where she remained until 2015 in the screening interview, yet also to have left in 2014 travelled on foot across the border to Sudan where the applicant remained for one month before travelling on 24 November 2014 by air to Paris, France, via Qatar, then to Lille in France, Calais for four months and then by lorry to the UK, entering on 24 March 2015. If the appellant was issued with a passport in 1997 this indicates she was recognised by the Eritrea authorities as an Eritrean national. At this time, the appellant would have been aged 10. There have been a number of changes relating to the validity of passports in Eritrea some only being valid for five years prior to changes in 2010 reducing the period of validity two years which is observed by commentators as being used as a means by the Eritrea authorities to raise revenue by charging additional passport application fees.
24. One issue for the Judge in relation to this matter was the failure of the appellant to tell the truth. There is no challenge to the statement by the appellant, relied upon by the Judge, that as a result of the fact she is married to a soldier in the Eritrea army she is exempt from national

service or to her claim to have been issued with a passport. The restriction on travelling out of Eritrea is to prevent those who are eligible for national service from leaving, hence the categories mentioned in headnote 4 of *MST and Others*. It is for this reason those eligible for national service will find it difficult, if not impossible, to secure the necessary papers to allow them to leave Eritrea, hence the focus on risk arising from leaving illegally.

25. The Judge was arguably entitled to conclude that a person who wished to leave Eritrea, who had no issues with regard to military service or the Eritrean authorities, who is entitled to possess an Eritrean passport, had the ability to leave with it. The appellant has not discharged the burden upon her to show she had been denied a passport and clearly had available to her significant resources if she was able to fly from Sudan to Paris, France. The documentation the appellant relied upon for the purposes of that journey must have been sufficient to satisfy relevant immigration authorities in the airports through which she travelled both at the point of departure, in transit, and on arrival.
26. The appellant arguably failed to make out, in light of her profile as found, that she will be perceived to be a deserter/evader who left Eritrea illegally or a person who will be assigned to perform national service likely to amount to treatment contrary to Articles 3 and 4 ECHR.
27. Ground 2 challenges the weight the Judge gave to the evidence of supporting witnesses but weight to be given to that evidence was a matter for the Judge. The Judge considered the material made available with the required degree of anxious scrutiny and has given adequate reasons for the findings made. It has not been made out the weight given is in any way perverse or irrational when considering the decision as a whole. The appellant's core claim was rejected as not being truthful, including that relating to the alleged risk referred to in the appellant's statement dated 20 September 2016 that her daughter is at risk of FGM. The Judge has given adequate reasons for finding the appellant not to be a witness of truth who has not provided evidence to the Judge to support a claim that there is a real risk of FGM in the circumstances of this family unit.
28. Country guidance does not show that a sole woman with a child will face a persecutory risk as a result of membership of the alleged particular social group. The appellant is, in any event, married as both she and the Judge refer to her husband. The appellant's claim that country material supports an assertion of real risk requires further consideration.
29. It is not disputed that the situation for women in Eritrea is not as it is in the United Kingdom. The appellant's own country material records that whilst the law prohibits discrimination based on race, religion, political opinion, ethnic origin, social or economic status, disability, gender, age, and language, the government did not enforce such prohibitions. The law does not specifically criminalise spousal rape but no information was available on the prevalence of rape which it is

stated is seldom reported. Sexual violence against women and girls is said to be widespread in military training camps and that the sexual violence by officers in camps and the army amounted to torture and that the forced domestic service of women and girls who were also sexually abused in training camps amounted to forced sexual slavery. Domestic violence was reportedly commonplace but such cases rarely brought to trial due to societal pressures where women were normally refrained from openly discussing domestic violence.

30. In relation to FGM this is prohibited by the law of Eritrea and the UN Children's Fund are reported to have stated that the prevalence of FGM/C declined over time with the 2010 population health survey finding older cohorts had a higher prevalence than younger cohorts and with work being undertaken by the UN Population Fund and Government to discourage the practice.

31. The appellant failed to produce sufficient evidence to show there is a real risk to her daughter on return of being subjected to FGM, as it is not said that she or her husband are in favour of such practice or that there is likely to be strong societal pressures to have her daughter cut. The child was born on 2 July 2015.

32. In relation to the claim the Judge failed to make a finding in relation to the risk of persecution as a result of a membership of a PSG, is accepted there is no specific reference to this element of the claim but there is a decision by the Judge to dismiss the asylum claim. The question is, therefore, whether the material relied on by the appellant establishes a credible real risk of persecution for this reason, such as to make the dismissal finding arguably unsafe.

33. Paragraph 334 of the Immigration Rules states that:

> "An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
> (ii) he is a refugee, as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
> (iii) there are no reasonable grounds for regarding him as a danger to the security of the United Kingdom;
> (iv) he does not, having been convicted by a final judgment of a particularly serious crime, he does not constitute danger to the community of the United Kingdom; and
> (v) refusing his application would result in him being required to go (whether immediately or after the time limited by any existing leave to enter or remain) in breach of the Geneva Convention, to a country in which his life or freedom would threatened on account of his race, religion, nationality, political opinion or membership of a particular social group".

34. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006. Regulation 6 states:

> (1) In deciding whether a person is a refugee….
>
> (d) a group shall be considered to form a particular social group where, for example:
>
> (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
> (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
>
> (e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;

35. In *Shah and Islam and Others v SSHD HL (1999) INLR 144* Steyn LJ accepted that women in Pakistan were a social group based on the immutable characteristic of gender and the fact that, as a group, they were unprotected by the laws of Pakistan.
36. In *RG (Ethiopia) v SSHD [2006] EWCA Civ 339* the Court of Appeal said that for women in a country to constitute a particular social group their circumstances need not match exactly those of women in Pakistan in order to fall within the Shah and Islam principles. Widespread societal discrimination combined with inadequate protection by the police and the courts may suffice without any disability for women being enshrined in law. The Court of Appeal said that in each case the issue was fact specific.
37. There was no challenge by Mrs Aboni to the submission by Mr Howard that the appellant fell within a particular social group, but whether that group is as a single woman with a child is debatable in light of the adverse credibility findings made and the fact the evidence strongly suggests the appellant is a married woman whose husband serves in the Eritrea army, and therefore not single. The appellant has failed to establish that she falls within the social group it is claimed the well-founded fear of persecution arises in relation to.
38. In relation to the meaning of persecution under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, Regulation 5(1) states:

"In deciding whether a person is a refugee an act of persecution must be:

(a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).

(2) An act of persecution may, for example, take the form of:

(a) an act of physical or mental violence, including an act of sexual violence;
(b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;
(c) prosecution or punishment, which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under regulation 7.

(3) An act of persecution must be committed for at least one of the reasons in Article 1(A) of the Geneva Convention. "

39. The legal definition of the term "refugee" is set out at Article 1A(2) of the Refugee Convention, which defines a refugee as a person who:

> Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.
>
> The definition can be broken into constituent parts:
>
> - Possession of a fear that is well founded rather than fanciful
> - Of treatment that is so bad it amounts to being persecuted

- For one of five reasons, referred to as 'Convention reasons': race, religion, nationality, membership of a particular social group or political opinion
- Being outside one's country
- Being unable or unwilling to obtain protection in that country.

40. On the basis of the information before the Judge and although the appellant has established an argument for there being a real risk of discrimination and within the military setting ill-treatment for some, the appellant arguably failed to discharge the burden upon her to establish that she faces a real risk of an objective well-founded fear of treatment so bad that it would amount to persecution as a result of her being a member of the particular social group relied upon. Nor has the appellant established ill-treatment sufficient to amount to a breach of Article 3 what are entitled to a grant of Humanitarian Protection on this basis.
41. As such, the failure of the Judge to make specific detailed findings in relation to this element has not been shown to be arguably material as the outcome has to matter being considered would have been the same, that the appellant has not established that she was entitled to be recognised as a refugee for this reason. Accordingly, any error has not been shown to be material.
42. The country guidance case does not support an assertion the appellant faces a persecutory risk solely as a failed asylum seeker and in light of the findings that the core account lacked credibility the appellant failed to establish the existence of very significant obstacles preventing the appellant's return with her young child or that return would breach the respondents obligations pursuant to section 55, which are elements contained in the reasons for refusal letter in relation to which it has not been shown the resultant conclusions are in any way arguably irrational or unlawful.
43. The grounds of challenge fail to make out any arguable legal error material to the decision to dismiss the appeal which must therefore stand.

Decision

44. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

Anonymity.

45. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed
Upper Tribunal Judge Hanson

Dated the 17th of May 2017