Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03390/2017**

THE IMMIGRATION ACTS

Heard at Glasgow **Decision & Reasons Promulgated**
On 27 September 2017 **On 19 October 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL DEANS

Between

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Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L McCrorie, Loughran & Co
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against Judge of the First-tier Tribunal Kempton dismissing an appeal on protection and human rights grounds.

2. The appellant is a nineteen-year-old woman from Eritrea. She arrived in the UK in October 2016 and claimed asylum the day after her arrival. The appellant claims to be a Pentecostal Christian and to have been detained for this reason after reporting for national

service. She claims to have escaped from the training camp at Sawa and to have left Eritrea illegally by crossing the border to Sudan.

3. The Judge of the First-tier Tribunal was satisfied neither that the appellant was a Pentecostal Christian nor that she escaped from Sawa. The judge accepted the appellant's evidence that she had married in Eritrea and that she was allocated by the authorities to a group undertaking a commercial course. According to the judge, this implied that the appellant was not chosen for military training.

4. The judge observed from MST (national service – risk categories) Eritrea CG UKUT 00443 that national service is compulsory in Eritrea for those aged between 18 and 50. Evading or deserting from national service was not likely to be perceived as a political act but might result in arbitrary punishment. According to the judge the appellant would be able to regularise her position by paying a "diaspora tax" and signing a letter of apology. As the appellant would be able to regularise her position in this manner she would not be at risk on return.

5. The application for permission to appeal challenged the judge's findings in relation to risk on return. The grounds contended that the appellant was eligible for national service and would not be able to pay the diaspora tax. Permission to appeal was granted because it was arguable that the judge did not give adequate reasons for finding that the appellant would not be at risk arising from these particular aspects of her claim.

Submissions

6. For the appellant Miss McCrorie submitted that the judge had not fully engaged with the decision in MST. The judge erred by finding that the appellant could pay the diaspora tax and submit a letter of apology. Ms McCrorie referred to the headnote of MST at 7(i), where it was said that a person who was perceived as a deserter or evader would not be able to avoid a real risk of harm by paying the diaspora tax or signing a letter of regret. The judge did not find the appellant was a deserter, but the draft age was from 18 to 47 and the appellant was now aged 19. In addition the judge had failed to undertake an assessment of the consequences of illegal exit, as summarised in the MST headnote at 10. This was a crucial issue. The judge failed to look at humanitarian protection. The appellant's partner remained in Eritrea.

7. For the respondent, Mr Matthews submitted that the appellant was likely to have had an exemption from national service. This was a point addressed in the respondent's refusal letter at paragraph 31. The appellant had been at school and was sent to a different town for training of a nature which was other than military. As a married woman she might be exempt, such as exemptions mentioned in the

headnote of MST at 7(iii). Mr Matthews further submitted that in MST all the appellants were men and the position of married women did not feature greatly in the decision. It was said at paragraph 253 of the decision that married women might be exempt but in its conclusions at paragraph 431 the Upper Tribunal said nothing about married women. In KA (Eritrea) CG [2005] UKAIT 00165 married women were found not to be in a risk category, as also in MA (Eritrea) CG [2007] UKAIT 00059.

8. Mr Matthews acknowledged that there might be some confused points in the judge's decision. For instance, at paragraph 32 the judge referred to the appellant paying the diaspora tax although the judge had previously found the appellant was not undergoing military training. According to the decision in MST, at paragraph 345, illegal exit was no longer enough to place an individual at risk. In addition, if an appellant was found not to be credible it could not be assumed he or she had left illegally. In the present appeal the Judge of the First-tier Tribunal did not consider illegal exit one way or another but the position was that if the appellant was not an evader or deserter there was no risk factor.

Discussion

9. In my view the findings made by the judge are not adequately supported by the evidence accepted in MST and the judge did not adequately address the issues relating to risk on return. In her consideration of these matters the judge erred in law and the decision should be set aside.

10. In relation to risk on return the judge relied on the possibility of the appellant avoiding punishment by payment of a diaspora tax. Although the Upper Tribunal heard evidence in MST about payment of this tax, the Tribunal concluded at paragraph 334 that the evidence did not establish that payment of this tax and signing a letter of regret would protect draft evaders and deserters. Indeed, signing such a letter might mount to an admission of guilt in the eyes of the Eritrean authorities. The judge misdirected herself as to the evidence which was accepted by the Upper Tribunal in MST and as a result she did not properly apply the findings made in that decision. This in itself amounted to an error of law sufficient to result in her decision being set aside.

11. Mr Matthews' submissions depended to a considerable extent upon the assumption that as a married woman the appellant was exempt from national service. The findings and reasoning of the Judge of the First-tier Tribunal were, however, not sufficient to support such a conclusion. Although the judge referred at paragraph 32 to the appellant's marital status, it was not on this account that the judge found the appellant was not at risk. The finding to this effect was made, wholly erroneously, on the possibility of paying the diaspora tax and signing a letter of apology.

Indeed the judge referred at paragraph 32 to the compulsory requirement of national service for those aged between 18 and 50 and made no mention of exemptions.

12. The position of the respondent appears in part to be that even if the judge erred, the error was not material because of the likelihood of the appellant being exempt from national service and because the appellant's lack of credibility meant it could not be assumed she had left Eritrea illegally. Even if this were so, these were matters the judge should have addressed and made findings upon if her decision was to stand. As it is the findings and reasons on which the judge's decision is based are not sufficient to support it.

13. There were two issues in particular that the judge should have considered. The first was whether it was reasonably likely the appellant would have been exempted from national service as a married woman. The second was whether the appellant left Eritrea illegally and, if so, what consequences might arise from this on her return.

14. There are no adequate findings in relation to risk on return and because of this the appeal will be remitted to the First-Tier Tribunal for proper findings to be made at a hearing before a different judge. It has been pointed out both by the respondent and in the grant of permission to appeal that the judge's adverse credibility findings on the appellant's religious faith and alleged detention and escape from Sawa camp have not been challenged. Nevertheless, as there is to be a fresh hearing before the First-tier Tribunal I consider it both appropriate and desirable that the new tribunal should be able to consider all the evidence afresh and make findings on all the matters germane to the appellant's protection claim. Accordingly none of the findings made by Judge Kempton are preserved.

Conclusions

15. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

16. The decision is set aside.

17. The appeal is remitted to the First-tier Tribunal for hearing before a different judge with no findings from the earlier decision preserved.

Anonymity

The First-tier tribunal did not make an anonymity direction. As the asylum appeal is to be reheard I will make such a direction to preserve the positions of the parties until the appeal is decided. Unless or until a

tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant or any member of her family. This direction applies to the appellant and to the respondent. Failure to comply with this direction may lead to contempt of court proceedings.

Deputy Judge of the Upper Tribunal Deans 18th October 2017