



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA099652016

THE IMMIGRATION ACTS

Heard at North Shields
On 27 June 2017

Decision & Reason Promulgated
On 03 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

FILIMON SOLOMON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Boyle of Halliday Reeves Law Firm

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Robson promulgated on 9 March 2017, which dismissed the Appellant's appeal on asylum and ECHR grounds, but allowed the appeal on Humanitarian Protection grounds.

Background

3. The Appellant was born on 1st April 1990 and is a national of Eritrea. On 4 March 2016, the appellant arrived in the UK and claimed asylum. On 2 September 2016, the Secretary of State refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Robson ("the Judge") dismissed the appeal on asylum and ECHR grounds, but allowed the appeal on humanitarian protection grounds, because he found that the appellant is an Eritrean national who had left Eritrea illegally and would be perceived to be a draft evader if he returns to Eritrea.

5. Grounds of appeal were lodged and on 3 April 2017 Designated Judge Manuell gave permission to appeal stating

"1. First-tier Tribunal Judge Robson dismissed the appellant's asylum appeal, but allowed his humanitarian protection and human rights appeal in a decision and reasons promulgated on 9 March 2017. The appellant claimed that he was at risk if returned to Eritrea because of his illegal exit and escape from military service.

2. The grounds of onwards appeal dated 22 March 2017 were in time. In summary then mount a reasons challenge and assert that the Judge erred by failing to consider that the consequences of the finding of illegal exit and draft evasion gave rise to an unanswerable asylum claim.

3. The grounds are arguable in light of [55] of the decision. The Judge seems to have misunderstood the consequences of his findings, reluctantly reached as they obviously were given the largely adverse credibility assessment. It must be said that it is not easy to see why the Judge decided to allow the appeal on any basis."

The Hearing

6. Mr Boyle moved the grounds of appeal. He took me to [55] of the decision, where the Judge finds that the appellant is an Eritrean national of national service age who would be perceived as a draft evader if returned, and is a person who has exited Eritrea illegally. He reminded me of MST and Others (national service - risk categories) Eritrea CG [2016] UKUT 00443 (IAC) and told me that the Judge's findings at [55] alone establish that the appellant is entitled to succeed on asylum grounds and article 3 and 4 ECHR grounds. He told me that the fact that the Judge finds that the appellant is not a credible witness and rejects the substance of the appellant's overall account is entirely irrelevant. He urged me to set the decision aside and substitute my own decision allowing the appellant's appeal.

7. Mr Diwnycz told me that he could not resist the appeal. He told me that no challenge is taken to the Judge's findings at [55] of the decision, and confirmed that those findings indicate that there is a real risk to the appellant if he returns to Eritrea.

Analysis

8. In MST and Others (national service - risk categories) Eritrea CG [2016] UKUT 00443 (IAC) 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.

9. Between [39] and [55] of the decision, the Judge rejects the appellant's account and gives his reasons for doing so. At [55] of the decision, the Judge finds that the appellant is an Eritrean national, who left Eritrea illegally, who is of national service age and who will be perceived as a draft evader on return to Eritrea. MST says at headnote (vii) that a person with that profile is entitled to protection as a refugee, and succeeds on article 3 and 4 ECHR grounds.

10. Instead of finding that the appellant's appeal succeeds, the Judge dismissed the appellant's asylum appeal and allowed the appellant's humanitarian protection appeal. That is clearly a material error of law. I therefore set the decision aside. I am able to substitute my own decision.

11. MST tells me that if [55] of the decision stood on its own, the appellant's appeal on asylum and ECHR grounds would be successful. No challenge is taken to the findings at [55] of the decision. I therefore substitute my own decision allowing the appeal on asylum grounds.

12. As I have found the appellant is a refugee I cannot consider whether he qualifies for humanitarian protection.

13. Therefore, I find the appellant is not eligible for humanitarian protection.

14. As I have found the appellant has established a well-founded fear of persecution, by analogy I find that his claim engages article 3 of the Human Rights Convention because he would face a real risk of torture, inhuman or degrading treatment if he were returned to his country of origin.

15. Article 4 of the 1950 Convention is a prohibition on slavery. I have found that the appellant will be perceived to be a draft evader who left Eritrea illegally. In MST and Others (national service - risk categories) Eritrea CG [2016] UKUT 00443 (IAC) it was held (inter alia) that

“(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 ...”

I have found that return to Eritrea would breach the appellant's rights on article 3 ECHR grounds. By analogy I find the appeal succeeds on article 4 ECHR grounds.

Decision

16. The First-tier Tribunal decision promulgated on 9 March 2017 is tainted by material errors of law. The decision is set aside.

17. I substitute my own decision.

18. The appeal is allowed on asylum grounds

19. The appeal is dismissed on humanitarian protection grounds.

20. The appeal is allowed on article 3 and 4 ECHR grounds.

Signed *Paul Doyle*
Deputy Upper Tribunal Judge Doyle

Date 30 June 2017