Upper Tribunal
(Immigration and Asylum Chamber **Appeal Number: PA/10175/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24th October 2019	**On 26th November 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

HM
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Childs, instructed by Quality Solicitors A-Z Law
For the Respondent: Mr W Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was granted permission to appeal a determination of First-tier Tribunal Judge Chana, which allowed the appellant's appeal, on humanitarian grounds but which dismissed the appeal, against a decision of the Secretary of State dated 9th September 2016 on asylum grounds. The appellant is a citizen of Eritrea born on 1st January 1989

2. The appeal has a lengthy history. The appeal was dismissed by First-tier Tribunal Farrelly on 25th July 2017, but that decision was set aside on the basis that no or insufficient reasons had been given. The matter came

before the First-tier Tribunal again on 24th May 2019 and was dismissed on 17th July 2019.

Application for Permission to Appeal

3. The application for permission contended

   (i) the judge had improperly gone behind a concession of the Secretary of State stating that 'she [the appellant] had left the country due to her unsubstantiated speculation that the local administration wanted to arrest her'. In the decision of the 9th September 2016 it was pointed out that the Secretary of State had accepted that the appellant was wanted by the local authorities and that she was at risk on return because of this.

   (ii) the country guidance case of *MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC)* was promulgated shortly after the Secretary of State's decision but before the second decision of the First-tier Tribunal. It was argued that the appellant would be seen as a draft evader because he had never completed military service, and she was thus opposed to the government and would be questioned about her reason for leaving the country when she returned. The Secretary of State had accepted that the appellant was (a) of draft age, (b) had never completed military service (c) had left the country illegally. As such this placed her within the *MST* guidance and, further, with the Home Office published guidance for Eritrea dated July 2018

   (iii) the judge failed to consider the appeal further to *HJ (Iran)* and if asked about her views she could not be expected to lie.

4. Permission to appeal was granted by Upper Tribunal Judge Grubb on the basis that it was arguable that the judge failed to properly apply *MST* and that the appellant was at risk for a convention reason as a draft evader or owing to past illegal exit. He specifically refused permission on the third ground *HJ (Iran)* stating that it had not been argued before the First-tier Tribunal and added nothing to the claim.

5. Even following *Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC),* I consider that permission was granted on the first two grounds only, and not on the third ground which had clearly and unambiguously been refused permission in the body of the grant of permission by Upper Tribunal Judge Grubb.

6. I turn to the grounds in question.

7. The Secretary of State set out in her refusal letter of 9th September 2016 the following

'5. In order for your asylum claim to be considered under the Convention on the Status of (Refugees (Geneva Convention) 1951, you must be in possession of a valid convention reason. Your claim of persecution in Eritrea is based upon your fear of the Eritrean authorities, due to your being wanted for detention, and your illegal exit. It is not accepted that this falls under the convention ***as background evidence shows that such acts will be perceived as acts of political opposition****. As such your claim for asylum fails at the outset, as no convention reason has been met.*

6. However, it is considered that due to your profile as a person who is wanted for detention by the Eritrean authorities, it is considered likely that you will face this treatment by the national authorities upon return to Eritrea. It is considered such punishment would one gain breach article 3 of the European Convention on Human Rights'.

8. At the hearing I drew Mr Walker's attention to the contents of the Secretary of State's refusal letter which he agreed suggested an acceptance of the ingredients of a convention reasons and thus a refugee claim particularly in the light of the subsequent country guidance. This concession which I highlight above was not addressed by the First-tier Tribunal and contrary to *CD(Jamaica) [2010] EWCA Civ 768*. As set out at paragraph 15 therein.

> *' A tribunal can allow a concession to be withdrawn if there is good reason in all the circumstances to do so and if it can be done with the absence of prejudice. No principle will govern every case, but the most important feature of any decision is that the tribunal must put itself in a position in which the real issues of dispute on the merits can be decided, so long as that can be done without prejudice to one side or the other'.*

9. The failure to approach that concession, made on the facts, in accordance with *CD(Jamaica)* was an error of law which was material and I set aside the decision of the First-tier Tribunal.

10. The Secretary of State granted the appellant an Eritrean national humanitarian protection but rejected her asylum claim. The appeal was made on the basis of her actual or imputed political opinion. Ms Childs argued before me that the appellant, who is 30 years old, would be seen as a draft evader and that it had been accepted that she had exited illegally which on the authorities suggested on both counts imputed political perception by the authorities. This was specifically argued before the First-tier Tribunal. I have highlighted the relevant parts of MST and as they apply to the appellant.

11. The headnote of MST sets out as follows:

1. 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:

2. 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.

3. 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.

4. The categories of lawful exit have not significantly changed since MO and are likely to be as follows:

(i) Men aged over 54

(ii) ***Women aged over 47***

(iii) Children aged under five (with some scope for adolescents in family reunification cases

(iv) People exempt from national service on medical grounds

(v) People travelling abroad for medical treatment

(vi) People travelling abroad for studies or for a conference

(vii) Business and sportsmen

(viii) Former freedom fighters (Tegadelti) and their family members

(ix) Authority representatives in leading positions and their family members

5. 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.

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

7. 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 (iii) 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.***

> *(i) 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.*
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> *(ii) 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 (iii).*
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> *(iii) 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.*

8. 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…"

9. 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.

10. ***Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (i) that he or she left illegally, and (ii) 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.***

11. 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.

12. ***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.***

12. The appellant is within the age for mobilisation and does not fall into the exceptions' category. There was no suggestion that the appellant suffered with ill health.

13. In accordance with paragraph 12 of the headnote together with the acceptance by the Secretary of State that the appellant was wanted for detention by the authorities it was conceded by Mr Walker, rightly and sensibly in my view, that the appellant's reason for claiming asylum fell within the ambit of a convention reason. As a perceived draft evader, having undertaken an illegal exit and being wanted for detention by the authorities, all of which was accepted in the refusal letter, it is likely, on the lower standard of proof, she would be construed and perceived by the authorities as having imputed political opinion inimical to those authorities.

14. As set out in Respondent's own Country Policy and Information Note Eritrea: National service and illegal exit Version 5.0 July 2018

2. Consideration of issues

2.1 Refugee Convention reason

2.1.1 Persons who have evaded or deserted national service and / or left the country illegally in order to avoid national service are likely to be perceived by the government as holding a political view contrary to the state. Consideration should therefore be given to their claims on the basis of their imputed political opinion.

15. The Judge erred in law for the reasons identified, and, in a manner, which could have a material effect on the outcome. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and allow the appeal on asylum grounds for the reasons given above.

Order

The appeal is allowed on asylum grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 24th October 2019

Upper Tribunal Judge Rimington

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