Upper Tribunal
(Immigration and Asylum Chamber)

MST and others (Disclosure – restrictions – implied undertaking) Eritrea [2016] UKUT 00337 (IAC)

THE IMMIGRATION ACTS

Interlocutory Hearing at Field House	**Decision & Reasons Promulgated**
On 26 April 2016	.....

BETWEEN

MST

Appellant

and

Secretary of State for the Home Department

Respondent

MYK

Appellant

and

Secretary of State for the Home Department

Respondent

AA

Appellant

and

Secretary of State for the Home Department

Respondent

- and -

The United Nations High Commissioner for Refugees

Intervener

Interlocutory Hearing at Field House, London on 26 April 2016

Date of Promulgation of this decision: ..... May 2016

Before The Honourable Mr Justice McCloskey, President and Dr H H Storey,

Judge of the Upper Tribunal

(i) In some cases the overriding objective will dictate that the respondent's skeleton argument is served in advance of that of the appellant.

(ii) The test for disclosure is whether receipt of the material in question is necessary for the just and fair disposal of the appeal.

(iii) Where uncorroborated and/or anonymous evidence is received, the Tribunal's task is to scrutinise it with caution and to attribute such weight as is considered appropriate.

(iv) Documents obtained by a party pursuant to disclosure or production orders or directions are produced under coercion and, in consequence, are received subject to certain restrictions. In particular, they must not be deployed by the receiving party for any collateral or ulterior purpose not reasonably necessary for the proper conduct of the proceedings.

(v) The so-called implied undertaking, reflected in [iv] above, applies in Tribunal proceedings. However, it may be subject to modification to reflect (a) that the primacy of protecting a party's private documents and invading a party's privacy does not apply with full force in such proceedings, particularly where the custodian is the Secretary of State, (b) the duty of candour owed to the Tribunal and (c) the inquisitorial dimension of Tribunal proceedings.

(vi) In matters of disclosure and the provision and exchange of evidence, all parties are subordinated to the authority of the Tribunal, which is the ultimate arbiter of all procedural and substantive issues.

Representation

Appellants: Mr S Knafler QC, with Mr T Hussain and Ms A Benfield, both of counsel, instructed by IAS Solicitors and Fountain Solicitors on behalf of the Appellants.

Respondent: Mr B Rawat and Ms S Idelbi, both of counsel, instructed by the Government Legal Department on behalf of the Respondent.

Interlocutory Decision

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1. We begin by (reluctantly) drawing attention to the unhappy procedural history of these proceedings, as this has a bearing on the resolution of this interlocutory matter. The troubled history is reflected in the Tribunal's ruling dated 21 January 2016. This turbulent history is further reflected in the unprecedented number of case management directions which have been given (13 in total), the great majority of which belong to the period of the last four months. Furthermore, the dates for the substantive hearing of these appeals have altered four times and a further, fifth adjustment has materialised during the past few days. The appeals are now scheduled to be heard on 02, 03, 06 and 07 June 2016, with 09 June held in contingency reserve. We emphasise that these dates are unalterable: they are truly set in stone.

2. Against this background, an interlocutory application of some substance has developed. Having regard to the hearing timetable, its timing is unfortunate. The timing is directly connected with the egregious default of the Appellants' expert witness documented in the ruling appended. There is no adverse reflection on the Appellants' legal representatives.

3. By this interlocutory application, the Appellants seek the following measures:

(i) A direction requiring the Respondent (hereinafter the "*Secretary of State*") to state in writing "*what she considers warrants change in the current CG propositions and why*".

(ii) Disclosure of certain documentary materials, believed or assumed to exist, underlying and pertaining to the report generated by the recent so-called "Fact Finding Mission" of the United Kingdom Government to Eritrea undertaken on behalf of the United Kingdom (hereinafter the "*FFM report"* and the "*FFM material*" respectively).

(iii) An order authorising publication by the Appellants' representatives of the FFM Report and the FFM material.

The First Application

4. This application falls to be determined mainly by reference to the overriding objective and the Tribunal's evaluation of procedural fairness and the interests of justice. This evaluation is informed by the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, [11] whereof states that "*credible fresh evidence*" is required in order to vary an extant decision of the Upper Tribunal bearing the "Country Guidance" kitemark. Further guidance on the resolution of this discrete issue is found in Hoxha v Special Adjudicator [2005] UKHL 19, where it was held that:

> "*… the asylum authorities … bear the burden of proof that such changes are indeed fundamental and durable.*"

(At [63])

We have also taken into account the statements in MY (Country Guidance Cases – No Fresh Evidence) Eritrea [2005] UKAIT 00158, at [25].

5. Having regard to the above, we are satisfied that there is merit in the Appellants' application for the first of the measures sought. We consider it appropriate to effect a modest adjustment of the extant case management directions relating to the exchange of skeleton arguments. The fair and expeditious disposal of these appeals will be enhanced, without any unfairness to the Secretary of State, by requiring the Secretary of State's skeleton argument, addressing what she considers warrants change in the current CG propositions, to be submitted in advance of that of the Appellants. Accordingly:

(i) The Secretary of State's skeleton argument will be provided by 18 May 2016.

(ii) The Appellants' skeleton argument will be provided by 25 May 2016.

(iii) Any rejoinder on behalf of the Secretary of State to the Appellants' skeleton argument will be provided by 31 May 2016, in the form of a supplement, or addendum, to the principal skeleton argument.

The Second Application

6. The focus of this application is certain material underlying the UK FFM report which was generated during the course of these proceedings and has been served by the Secretary of State in her response to the Appellants' evidence, in compliance with the Tribunal's directions.

7. The materials which the Appellants' representatives seek to obtain by this discrete application consist of, in summary, planning and methodology documents, correspondence with the Eritrean Government, any correspondence with interviewees/interlocutors or the UK Ambassador to Eritrea, hand written notes and audio recordings of interviews, correspondence with interviewees, unredacted versions of all interview

transcripts, the identities of all sources and interviewees and documents bearing on the anonymity of interviewees. The extensive "shopping list" is contained in [17] of the Appellants' skeleton argument.

8. We consider that the test to be applied is whether the disclosure of this material to the Appellants' representatives is necessary for the just and fair disposal of these appeals. We do not understand the arguments on either side to have espoused any different test. The application of this test clearly involves questions of degree and evaluative judgment on the part of the Tribunal. We bear in mind what was stated in O v M [1996] 2 Lloyds Rep.347:

> "…. *The document or class of documents* [sought] *must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence ….*"

The test which we have formulated mirrors closely that which has been contained in successive editions of the Rules of the Supreme Court (Order 24), as explained in decisions such as R v Chief Constable of West Midlands Police, ex parte Wiley [1995] 1 AC 274, at 305 and Taylor v Anderton [1995] 2 All ER 420, at 432 F-I. In Disclosure (Third Edition), the authors comment at paragraph 1.03:

> "*Disclosure is not without its disadvantages. The principal one is that disclosure can be an expensive and burdensome process. The Courts are generally alert to the danger of oppressive disclosure and inappropriate requests for wide ranging disclosure are not infrequently dismissed for being not necessary for the fair disposal of litigation. The burden can not only fall on the party giving disclosure, but also on an opposing party presented with a mass of documentation of marginal relevance. In such a case disclosure can, far from clarifying the issues, operate as a cloud.*"

Within this passage one can readily identify the operation of the principle of proportionality, now enshrined in the overriding objective, in contemporary litigation. This passage has a further resonance in Tribunal proceedings, given the panel's familiarity with the phenomenon of the accumulation of vast quantities of documents upon which no party relies, particularly in country guidance appeals.

9. Finally in this context we turn to the decision in CM (Zimbabwe) [2013] EWCA Civ 1303 in which one of the grounds of appeal was based on a complaint about anonymous evidence generated, as in the present case, by a fact finding mission. Giving the judgment of the Court of Appeal, Laws LJ quoted the following passages from the Upper Tribunal's decision under appeal, EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC):

"[156] ..... *In asylum determinations there are sound reasons why sources who may have valuable information to give to diplomatic missions, international organisations like UNHCR or non-governmental organisations like Amnesty International would wish to do so under conditions of anonymity .....*

Providing information to an appellant or his legal team on a confidential basis may thus provide the source with satisfactory protection.

[157] *Anonymous material is not infrequently relied on by appellants as indicative of deteriorating conditions or general risk. The Tribunal should be free to accept such material but will do its best to evaluate by reference to what, if anything, is known about the source, the circumstances in which information was given and the overall context of the issues it relates to and the rest of the evidence available.*

[158] *The problem is not one of admissibility of such material as forming part of the background data from which risk assessments are made, but the weight to be attached to such data. It is common sense and common justice that the less that is known about a source and its means of acquiring information, the more hesitant should a Tribunal judge be to afford anonymous supported assessment substantial weight, particularly where it conflicts with assessment from sources known to be reliable ...*

[159] *The report of the FFM ..... was not a model of best practice in a number of respects ....*

We were, however, satisfied that informants with whom contact was made were selected in good faith by the Mission with the assistance of locally based diplomats. We were also satisfied that ultimately the interlocutors ... were content with the final version of the summaries of their information and knew the context in which it was being gathered ...."

Having reproduced these passages *in extenso*, Laws LJ stated, at [16]:

"*I regard that reasoning as irreproachable.*"

He continued at [17]:

"*There is no general rule at common law or inspired by the European Convention on Human Rights that uncorroborated anonymous material can never be relied on in a country guidance case or any other case. ....*

Generally of course the effect of anonymity will go to the weight to be attached to the material in question and care must always be taken in assessing the weight of such material."

Thus there is nothing intrinsically unlawful or unfair in receiving evidence of this kind in cases of this nature. A fair balance is struck by the duty imposed upon the Tribunal to scrutinise the evidence with caution and, taking into account any characteristics such as anonymity, to attribute to it such weight as is considered appropriate.

10. Skilful though the submissions of Mr Knafler QC on behalf of the Appellants were, we consider that this application suffers from the conspicuous frailty of having no solid foundation. The essence of the application, rejected to its core, is that most of the materials sought are likely to exist and have some connection with the FFM Report and, therefore, must be disclosed at this stage. The obvious weakness, in our judgment, is that this contention fails to engage meaningfully with the test to be applied. This shortcoming is not less than fundamental. Furthermore, this discrete application bears all the hallmarks of a fishing expedition or, as it has sometimes been called, a *"Micawber"* excursion viz an application driven in the main by the purely speculative hope that something of interest might turn up in the material if disclosure is ordered.

11. Finally, the Appellants do not attempt any convincing critique of the witness statement of the Secretary of State's official, Mr Stares, which addresses, *inter alia*, the planning of the recent FFM mission to Eritrea, its terms of reference and the methodology employed, including the *modus operandi* of interviews and the mechanism for finalising interview notes. To this we add that if the Appellant's representatives wish to cross examine the author of this witness statement it will be open to them to give notice to this effect. If this eventuates and further procedural issues arise in consequence, the Tribunal will deal with these. For the reasons given this application must fail.

12. We consider that this application falls to be refused on the further ground that to order disclosure at this stage risks jeopardising the hearing timetable. If disclosure is ordered it will inevitably result in further enquiries on behalf of the Appellants, involving their expert witness and perhaps others, including NGO's, and may result in the belated production of still further evidence. Elementary fairness would entitle the Secretary of State to respond to such evidence and, doubtless, UNHCR (the intervening party) would also wish to pursue further enquiries and, quite probably, extend its extant written submission. The prospects of the hearing timetable withstanding developments of this nature are minute at best.

13. We emphasise that to refuse this application will not occasion unfairness. Irremediable or otherwise, to any of the Appellants. Any unexpected or unpredictable issues arising at the hearing will be handled by appropriate case management measures and directions on the part of the

Tribunal. Furthermore, the Appellants will have the facility of recourse to their expert witness if information or materials not currently available should emerge. It will also be open to the Appellants, if so advised, to address arguments to the Tribunal based on the non-disclosure or unavailability of certain information or materials. As in Sufi and Elmi [2012] 54 EHRR 9, where the ECtHR was critical of the adequacy of certain country evidence, issues concerning the weight to be given to the FFM Report could conceivably arise. Lacking a crystal ball, beyond this one does not venture at present.

The Third Application

14. The Appellants' third application seeks an order from the Tribunal permitting the publication of the FFM report. While the Appellants' written formulation seeks the facility of unlimited and unrestrained publication viz "*publication to the whole world*", this was sensibly refined by Mr Knafler. In its reduced terms, the facility pursued is an order of the Tribunal permitting the Appellants to disclose the UK FFM report to specified NGO's, which will include in particular Amnesty International and Human Rights Watch.

15. The issue of principle which this discrete application raises is whether the well known implied undertaking is engaged. It is abundantly clear from the authorities that in all forms of litigation documents obtained by disclosure (formerly discovery) or production or any other coercive means are subject to certain restrictions. The issue was formulated by Lord Diplock in Harman v Home Office [1983] 1 AC 280, at 302 B-F, in these terms:

> "*… Whether it is the duty of the solicitor of one party to civil litigation who in the course of discovery in that litigation has obtained possession of copies of documents belonging to the other party to the litigation to refrain from using the advantage enjoyed by virtue of such possession for some collateral or ulterior purpose of his own not reasonably necessary for the proper conduct of the action on his client's behalf.*"

Their Lordships answered this question affirmatively. The duty which is triggered is owed to the court (or tribunal): per Lord Keith at 308 G.

16. The values promoted by the implied undertaking are confidentiality, candour and co-operation with the court. As emphasised in Riddick v Thames Board Mills [1977] 1 QB 881, at 986, the interests of the proper administration of justice require that there should be no disincentive to full and frank disclosure. It is also well recognised that the implied undertaking has the function of protecting privacy. As observed in Home Office v Harman at 300, 312 and 321 discovery (disclosure) is an invasion of the right of the individual to keep his own documents to himself. In summary, the implied undertaking furthers the interests of justice.

17. It is accepted, correctly in our view, that the implied undertaking applies as fully to Tribunal proceedings as to other forms of civil proceedings. While the procedural regime of Tribunals does not contain any provision comparable to CPR 31.22 (in the High Court), we consider this *lacuna* to be of no moment since the implied undertaking has emerged and evolved by the formulation of principles which have not been abrogated by statute or otherwise. We refer particularly in this context to the decision in Alterskye v Scott [1948] 1 All ER 469. We can think of no good reason in principle or otherwise for holding that the implied undertaking does not apply to the disclosure of documents in Tribunal proceedings and neither side suggested the contrary. Furthermore, the very limited extant jurisprudence supports this view: see Birdseye Walls v Harrison [1985] ICR 278, at 289 and McBride v The Body Shop International Plc [2007] EWHC 1658.

18. Given that the implied undertaking has developed in the context of private law proceedings, we consider that some caution is required in adapting it to the proceedings of this Chamber. In particular, the primacy of protecting a party's private documents and invading a party's privacy clearly does not apply with full force to documents in the possession, custody or power of the Secretary of State in a litigation context which has two particular features. The first is the Secretary of State's duty of candour to the Tribunal. The second is the quasi – inquisitorial nature of the proceedings, noted recently by Lord Carnwath in Secretary of State for the Home Department v MN & KY [2014] UKSC 30 at [25]. An alertness to these distinctive features will ensure that a Tribunal's adjudication of contentious issues of this kind will be designed to vindicate the right of all parties to a fair hearing and, ultimately, to further the interests of justice.

19. Next, we turn to analyse the Secretary of State's act of providing the UK FFM report to the Appellants and the Tribunal. If these had been private law proceedings between the parties, the Secretary of State's act of providing the report would, absent an order requiring her to do so, have been properly analysed as voluntary. We are satisfied that this analysis does not apply to the present context, for at least four reasons. First, this Tribunal, by its earlier directions, required the Secretary of State to respond to the Appellants' evidence and to do so by a specified date. Second, in thus acting, the Secretary of State was under a duty not to knowingly mislead the Tribunal: CM (Zimbabwe) v Secretary of State for the Home Department [2013] EWCA Civ 1303 at [20] – [25]. Third, the Secretary of State was acting under the rigours of the duty of candour recognised in this Tribunal's decision in Miah (Interviewer's Comments: Disclosure – Fairness) [2014] UKUT 00515 (IAC), where it is stated at [21]:

> "*Asylum, immigration and kindred appeals are a species of public law proceedings, in which the parties are the citizen (on the one hand) and the State (on the other).* ***I consider that these duties apply with full force in the context of such appeals. To suggest otherwise would be inimical to the administration of justice***,"

[Emphasis added.]

20. The close association with judicial review proceedings, where the duty of candour is deeply rooted, is unmistakable: see, most recently, R (on the application of Mohamed Shahzad Khan) v Secretary of State for the Home Department [2016] EWCA Civ 416. The final element in this analysis concerns the relationship between the parties to this appeal and the Tribunal. Given the nature of appeal proceedings, it is the Tribunal, and not the parties, which dictates the provision and exchange of evidence. None of the parties is acting out of whim or desire. Rather, all are subordinated to the authority of the Tribunal and are complying with what is required of them by the Tribunal, which is the ultimate arbiter and adjudicator of all procedural and substantive issues.

21. It follows from the above analysis that the Appellants are not at liberty to disclose the UK FFM report to any person or agency, other than their clients and expert witness, in the absence of an order of the Tribunal permitting them to do so. We detect nothing in the arguments of counsel to suggest that the test to be applied differs in substance from that governing the second limb of these applications, formulated above. The ambition which the Appellants' representatives seek to fulfil is to disclose the report to certain NGOs. It is a feature of the Appellants' application that they do not know where this might lead. Unavoidably, in our estimation, they have adduced no evidence to suggest otherwise. The reason for this is the quintessentially simple one that no one can lay claim to possession of a crystal ball.

22. We consider that, in common with the second of the Appellants' applications, this discrete application is infused with a mixture of speculative wish and hope. The speculative wish is that one or more of the NGOs will criticise the Secretary of State's report. The hope is that this criticism can be laid in proper evidential form before the Tribunal. The further hope is that the Tribunal will find this to be of some probative value. As this brief analysis makes clear, the application to the Tribunal is steeped in speculation. This being so, the governing test is manifestly not satisfied and this application must be refused for essentially the same reasons for which we have refused the second application.

23. Our second reason for refusing this application mirrors our second reason for refusing the second application. We repeat [10] above *mutatis mutandis*. Both the second and the third applications seek a form of relief which would be inimical to the overriding objective. Furthermore, we repeat that it will be open to the Tribunal to evaluate any unexpected developments as the evidence unfolds at the hearing and to give consideration to case management measures which will ensure fairness to all parties and promote the interests of justice.

Conclusion

24. For the reasons elaborated above:

(i) The Appellants' first application succeeds. To reflect this, Secretary of State's skeleton argument will be provided by 18 May 2016. The Appellants' skeleton argument will be provided by 25 May 2016 and any rejoinder on behalf of the Secretary of State will be provided by 31 May 2016.

(ii) The Appellant's application for disclosure of the materials summarised in [5] above is refused.

(iii) The Appellants' application for permission to disclose the Secretary of State's FFM report to non-parties is also refused.

25. We take this opportunity to remind the parties of the sacrosanct nature of all extant case management directions applicable to the forthcoming pre-hearing phase.

Signed: **Bernard McCloskey**

THE HON. MR JUSTICE McCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: **01 May 2016**