Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01021/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 31 July 2013	**On 5 November 2013**
Prepared on 19 October 2013	……

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ZECARIUS NERAYO HADGHU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr F Shibli, Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Eritrea who was born on 5 April 1967. He appeals against a decision of a panel of the First-tier Tribunal (First-tier Tribunal Judge Myles and Dr T Okitikpi, Lay Member) which had dismissed his appeal against the

respondent's decision, made on 6 November 2012, whereby the respondent had refused to revoke a deportation order made against him on 3 February 2009.

2. The factual background to the appeal is set out at paragraph 5 of the panel's determination, and can be summarised as follows. The appellant entered the UK on 3 September 2003, using a valid Eritrean passport endorsed with a student entry visa. He claimed asylum on 30 September 2003, which application was refused on 17 November 2003. An appeal against that decision was dismissed on 17 February 2004 and permission to appeal against that decision was refused on 7 June 2004. Further applications for asylum and human rights protection were submitted on 27 August 2004 and 31 August 2005.

3. On 16 December 2007, the appellant was convicted at Sheffield Crown Court of obtaining pecuniary advantage by deception and of using a false instrument, for which he was sentenced on 9 January 2008 to twelve months' imprisonment on each count, to run concurrently.

4. Following that conviction a notice of liability to deportation was served on him and on 12 January 2008 he was served with a notice of decision to deport on conducive grounds under Section 3(5)(a) of the Immigration Act 1971. The appellant appealed against that decision on 19 June 2008, and on 18 August 2008 his asylum claim was refused, following which his appeal against the deportation decision was dismissed on 11 November 2008. A High Court review of that decision was rejected on 27 November 2008 and his appeal rights became exhausted on 9 December 2008.

5. A signed deportation order was obtained on 3 February 2009, but prior to the service of that order the appellant left the UK voluntarily on 9 March 2009. However, he returned to the UK via Germany on 23 April 2009 and made a further claim for asylum on arrival. That application was treated as an application to revoke the deportation order, but was refused and certified with no right of appeal on 13 April 2010.

6. On 13 August 2010, the appellant submitted a further asylum and human rights claim dated 10 August 2010. This was followed by a separate claim, again on asylum and human rights grounds, which was made on 1 August 2011. The respondent treated these applications as an application to revoke the deportation order, and this was refused by the respondent on 6 November 2012. The appellant appealed against that decision, and it is this appeal which was considered by the First-tier Tribunal panel, sitting at Hatton Cross on 6 February 2013.

7. In the course of his appeal, the appellant submitted expert evidence from Dr Kibreab, who had given evidence in the country guidance case of *MA (draft evaders – illegal departures – risk) Eritrea CG* [2007] UKAIT 00059. In its determination, the panel noted (at paragraph 14) that the Tribunal in *MA* had stated that having regard to his evidence in general, the Tribunal had developed a favourable impression of Dr Kibreab, "for the most part, as a witness". However, the panel did note that that Tribunal in *MA* had also stated that "he was occasionally vague and speculative,

also, separately prone to exaggeration on the issue of exit visas, [and] on his view that all returning failed asylum seekers were as such at real risk". However, the panel did bear in mind that that Tribunal in *MA* had concluded, considering Dr Kibreab's evidence in its totality, and subject to the qualifications which it made, that considerable weight could be given to the opinion expressed in his report in that case.

8. In the course of an extremely thorough and detailed determination, the panel clearly considered the appellant's claim with care, but nonetheless gave reasons why his appeal had to be dismissed both under Article 3 and also Article 8. The panel reached this finding having considered Dr Kibreab's evidence in particular with great care.

9. The appellant has appealed against this decision, but permission to appeal was initially refused by First-tier Tribunal Judge Chohan. When setting out his reasons for refusing permission, Judge Chohan stated as follows:

> "…
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> 3. Grounds seeking permission submit that the panel erred in law by not adequately considering the report of Professor Kibreab and failing to consider the case of *MO (illegal risk – risk on return) Eritrea CG* [2011] UKUT 190 (IAC). It is further submitted that the panel failed to consider adequately the findings in the case of *MA (draft evaders – illegal departures – risk) Eritrea CG* [2007] UKAIT 00059. As such, it is argued that the panel's findings are flawed.
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> 4. The panel's determination is quite thorough in considering the facts and evidence. The relevant findings are at paragraphs 23 to 38. The panel found that the appellant had not left Eritrea illegally but had left legally as a student. The panel gives adequate consideration to Professor Kibreab's report and that is considered in light of the Tribunal's decision in the case of *MA*. Contrary to what the grounds submit, the panel did consider the case of *MO* at paragraph 32. Whilst I acknowledge that the Tribunal did not outline in any detail (which strictly is not a requirement) the case of *MO*, however, it is apparent that the panel gave due consideration to it in reaching its findings. The Tribunal further found that the sur place activities of the appellant did not put him at risk on return. The panel's findings in respect of Article 8 have not been challenged in the grounds. Nevertheless, I have considered the Article 8 findings and I see no error. The grounds seeking permission fail to mention that the appellant has been found not to be credible on two previous occasions…".

10. The appellant then appealed to the Upper Tribunal for permission to appeal, which was eventually granted by Upper Tribunal Judge O'Connor on 14 May 2011, who considered that "arguably, for the reasons given in paragraphs 9 to 24 of the grounds of application, the First-tier Tribunal erred in its assessment, and the reasons given as

a consequence of such assessment, of the expert evidence in the country guidance decisions of *MA*… and *MO*…".

The Hearing

11. The appellant did not attend, but his attendance was not necessary and I heard submissions on behalf of both parties. I made a contemporaneous record of these submissions, in which I took a note as well as I could of everything which was said to me, which note is contained in my Record of Proceedings. Accordingly, I will not set out verbatim everything that was said to me during the course of the hearing, but shall refer below only to such of the submissions as are necessary for the purposes of this determination. I have, however, taken into account everything which was said to me, as well as all the documents contained within the file, whether or not specific reference is made to any particular part of the submissions or evidence below.

12. On behalf of the appellant, Mr Shibli outlined the three grounds on which the appellant was appealing. There had been two key aspects of his appeal at the First-tier Tribunal. The first was his illegal departure from Eritrea, without an exit visa (at this time I noted that this had not been accepted previously). The second aspect of his appeal was that he had departed from Eritrea whilst under national service. There were mixed, irreconcilable findings which Mr Shibli would come to.

13. Although the case had a long history of previous determinations, there was new evidence before the First-tier Tribunal, in the form of the expert report from Dr Kibreab. In this case, particular emphasis needed to be put on his illegal departure.

14. The first ground was contained at paragraphs 9-17. In its determination at paragraph 24, in four lines, the panel had found that Dr Kibreab was exaggerating in his report when he said that "it can be safely concluded that the overwhelming majority of Eritrean nationals who leave Eritrea to seek asylum in the UK do so illegally". The reason the panel gave for saying this was an exaggeration was by comparing that statement with what Dr Kibreab had said in *MA*, which was that it was virtually impossible to obtain an exit visa if someone was between 10 and 50. At paragraph 24, the panel suggested essentially that he had said a similar thing in this case.

15. However, looking at *MO* at paragraph 131, it had been found that although failed asylum seekers are not per se at risk, they would be at risk if they had left illegally and the great majority had. It was submitted that Dr Kibreab's statement that "the overwhelming majority of Eritrean nationals who leave Eritrea to seek asylum in the UK do so illegally" was in fact consistent with the findings of the Tribunal at paragraph 131 of *MO*.

16. Developing that point, in its determination, the panel only referred to *MO* at one point, at paragraph 32 in its first sentence. It was referred to fleetingly in the context of the panel stating that failed asylum seekers were not per se at risk. There was no reference in the determination to *MO* in terms of now many people left Eritrea legally. Accordingly, when put in context, although the appeal at the First-tier Tribunal was one where illegal departure was at the heart of that appeal, and *MO*

was the most recent country guidance case dealing with that exact issue, in the determination it was referred to only once and then, in passing, on a different point. Their determination was significantly weighted towards *MA*.

17. The second ground of appeal was contained at paragraphs 18 to 24. At paragraph 357 of *MA*, a distinction is made between government scholarship students, who were sent abroad by the Eritrean Government for further studies and on the other hand, ordinary students. The former category of students may be granted exit visas, but the latter are people who are very unlikely to be granted exit visas. At paragraph 26 of its determination, the panel found that the appellant had a degree, worked for the government in the framework of national service, and concluded that therefore he was sent by the government for further studies in the UK. This was on the basis of his degree and his working for the government within the framework of national service.

18. In answer to a question at this point in his submissions from the Tribunal as to what happened to his passport, Mr Jarvis, on behalf of the respondent reminded the Tribunal that in his screening interview, the appellant had claimed to have lost his passport in Middlesbrough in 2004.

19. Continuing his submissions, Mr Shibli submitted that the panel's finding that the appellant had been a government scholarship student, on the basis of an inference from the fact that he had a degree and had worked for the government, amounted to speculation. In the grounds, at paragraph 22, there was reference to the relevant parts of Dr Kibreab's report and a reference (at paragraph 22(a)) to a section of his report which says that even of those highly trusted individuals "only a handful… could obtain exit visas".

20. There was nothing to suggest that the appellant was a highly trusted member of the government. He was head of administration of a division working under the framework of national service, and the expert evidence from Dr Kibreab is that exit visas are very rare indeed even for those high up in highly trusted positions. Accordingly, the finding at paragraph 26 was based on speculation.

21. Mr Shibli handed the Tribunal a copy of the decision in *MA (Somalia)* [2010] UKSC 49, which dealt with the situation of people who tell lies and the strength of objective evidence. In his submission, in *MA (Somalia)* the court was concerned with applicants who put forward no truthful material concerning what they had been doing, in other words they had lied about almost everything. However this was not such a case. This appellant was believed with regard to some of his evidence, such as that he joined the EPLF in 1983. In terms of his arrest, detention and illegal departure from Eritrea, Mr Shibli had to accept that his evidence was disbelieved. However, it had been accepted that from June 1998 he had been working under the framework of national service as the head of administration for an army division. Although Judge Hemingway had rejected a large part of his evidence, at paragraph 135 of Judge Hemingway's determination, there were various facts which were set out as accepted.

22. As regards the panel having said that he was a government scholarship student, this had been based on an acceptance that he was working for the government under national service. This was a key aspect of his claim, that he was under national service at the time. If he was sent as a government scholarship student to the UK ten years before, and had not returned, but claimed asylum in the UK, it was highly likely he would be regarded as a deserter. That point was not dealt with at all in the panel's determination.

23. Referring to paragraph 22 of *MA (Somalia)* it was clear from that decision that the facts in each individual case would have to be assessed in light of the background evidence as to illegal departure and what was probable or possible. In this case, it was submitted that this was an appellant who had been believed with regard to some of his evidence, such as that he had been doing national service. The evidence here also included an expert report specific to this appellant and his position as someone who had been doing national service and the prospect of being considered to have thereby exited illegally.

24. In answer to a question from the Tribunal as to whether or not the passport which the appellant claimed to have lost would have shown whether or not he had had an exit visa and whether this would have been relevant, Mr Shibli did not directly answer this question but submitted that as it was said that it was believed that he had left Eritrea as a government sponsored student, it would seem very likely ten years later, that having claimed asylum he would be at risk. This was not deal with in the determination.

25. The third ground, which was set out at paragraphs 25 to 30 of the grounds, concerned what it was submitted were "irreconcilable findings". At paragraph 28, the panel said that having found that the appellant had had an exit visa, it follows that the panel did not accept that he was still subject to military service (what the panel actually said was that the appellant had "also failed to establish [to the standard of reasonable likelihood] that when he left Eritrea he was still subject to military service"). However, at paragraph 26, on the previous page, the panel had suggested that he was engaged in national service.

26. In answer to an observation from the Tribunal that it appeared that what the panel was saying at paragraph 26 was that the appellant had obtained his degree within the framework of national service, Mr Shibli responded that he had first been studying, and had then been working for the government, within the framework of national service, and had been sent abroad for further studies.

27. In answer to a question from the Tribunal as to what country guidance had been give as to when these people were expected to come back, Mr Shibli responded that there wasn't any. What was material was what was in Dr Kibreab's report, which was that restrictions were placed later by the government. It was only highly trusted people who would be sent abroad to study.

28. The Tribunal at this point noted that the appellant had been an administrator within a division of the army and also had credibility problems, to which Mr Shibli said that his point was whether or not national service would end when the government sent someone abroad. It was the appellant's submission that he would still need to be within the framework of national service, so that was not consistent with the finding that he was not then doing national service.

29. It was not just draft evaders who were at risk on return, but deserters as well. As "national service" is wider than "military service", if one looked at the expert report and the categories set out there, further studies would be within the remit of national service. One cannot just drop out of this. So ultimately, a finding that he was sent abroad within the framework of national service (I note here that this was not necessarily the panel's finding) and that he was not subject to national service were inconsistent.

30. At paragraph 28 of the determination, there was a reference to "military service". However, there should not be a distinction between "military service" and "national service". If one deserted either, one would be at risk on return.

31. On behalf of the respondent, Mr Jarvis submitted that the panel's decision had been open to it. It was clear that this particular case had a long history. As already indicated above, there had been two judicial determinations relating to the appellant's claim before this panel presided over by Judge Miles had considered it, and these previous decisions (by an Adjudicator, Mr Trotter, following a hearing at North Shields on 2 February 2004 and by a panel presided over by Immigration Judge Hemingway sitting at Bradford on 27 October 2008) are mentioned at paragraph 10. It was also clear that this panel had endeavoured to bring together all of the findings in evidence, in order to do justice to the appellant's claim. In paragraph 10, the panel had brought out in great detail all of the previous findings both for and against the appellant.

32. The thrust of the appellant's claim before this panel really centred on the expert report of Dr Kibreab, which is dealt with from paragraph 14 onwards.

33. The appellant's first complaint concerned the reference to Dr Kibreab's evidence as having some quality of speculation. The appellant has effectively said that *MO* [2011] shows us that what Dr Kibreab was saying in his report about the small numbers of people who leave lawfully was borne out. However, the important thing to note, which was in the mind of the panel, is that this appellant's case was only marginally affected by the decision of the Tribunal in *MO*.

34. Turning to *MO*, at paragraph 132, it is clear that the thrust of the Tribunal's consideration in this case was the change which had occurred since August/September 2008, when *MA* had been determined. There was clear evidence that the authorities were taking a stricter line with regard to people leaving.

35. This case was a pre-August/September case and so necessarily the panel's attention focused on *MA*, which was the older case, in the context of whether he would have been allowed to leave.

36. Also, when considering the risk on return in *MO*, the Tribunal also said at paragraph 132 that the guidance in *MA* remained broadly applicable and if an applicant had been found to be wholly incredible, he was likely to be found not to have established a real risk of persecution.

37. So what is said in *MO* is that the authorities took a harder line in applications after 2008, with regard to people attempting to leave, so it had been easier to get exit visas before. So the language that Dr Kibreab used which is criticised related to evidence he gave in *MA* in relation to the numbers of people who would in fact have left lawfully. One example which had bee criticised was at paragraph 447 of *MA*, in respect of his evidence that all returning failed asylum seekers were at risk.

38. Although by the time *MO* was promulgated that kind of commentary was more in line with the evidence, because the position of the authorities in Eritrea had hardened, Dr Kibreab's report related to the period when the appellant had left (that is pre *MO*) and therefore the panel's comment at paragraph 24 (that "Dr Kibreab's expression that 'it can be safely concluded that the overwhelming majority of Eritrean nationals who leave Eritrea to seek asylum in the UK do so illegally' comes close to repeating what he stated in *MA*") is justified.

39. The Tribunal in *MO* was dealing with a later period. In that case the Tribunal were very careful to look at the question of risk relating to the restricted period after 2008. The way in which the Eritrean authorities would view someone who had left after then was different. The effect of *MO* is that they say that *MA* is still good law, so clearly more people could have left before 2008 and they would not have a problem on return if they fell into the categories of people who could lawfully have left.

40. Effectively, both *MA* and *MO* say the same thing, which is that if you had left illegally, you would be persecuted, but otherwise you would not.

41. So the appellant has focused on paragraph 26 of the panel's decision and had spent some time analysing the language used. However, it was important to understand where this paragraph fits into the determination as a whole, because the appellant had asked the Tribunal to compare paragraph 26 with paragraph 28, but that necessarily omitted paragraph 27. When this determination was read as a whole, what is happening is that in paragraph 27, the panel is saying that Dr Kibreab's report does not address relevant accepted facts. So the language at paragraph 26, the preceding paragraph, is couched in terms of "it appears that". In other words, in order to express its finding that Dr Kibreab had not considered the facts of the appellant's case properly, the Tribunal in the preceding paragraph in effect took the appellant's claim at its highest in terms of his professed military/national service background, before saying that Dr Kibreab had not dealt with this. That was a weakness in his expert report.

42. This Tribunal has to recognise that Dr Kibreab's report was the only weighty piece of evidence which was said to undermine the determination of Judge Hemingway's panel, made before this one, which would otherwise be the starting point on ordinary *Devaseelan* principles.

43. As the panel notes halfway through paragraph 27, Dr Kibreab appears not to have taken account of the fact this appellant had been found not to be credible on two separate occasions, and goes on to say that in relation to the previous hearing before Judge Hemingway's panel, on the basis that the appellant had himself accepted that he had lied in his earlier hearing before Judge Trotter in his evidence regarding the amount of time he spent in detention and also in relation to the manner in which he had entered into the UK, which the panel considered "went, in our judgment, to the core of his claim", the appellant's evidence must be treated with circumspection.

44. Then at paragraph 28, the panel say that they agree with Judge Hemingway's panel's conclusion that the appellant was not a credible witness and that his assertion that he was still subject to what he says is the equivalent of military service, is of no weight.

45. The panel also says at the end of paragraph 28 that Dr Kibreab had failed to consider whether or not the appellant may have qualified for demobilisation as a male former combatant due to his age. They note that there was some evidence to indicate that a group of 5,000 people had been demobilised in July 2002.

46. So, when read in context, the panel was bringing together previous judicial findings of fact as well as making lawful criticism of the deficiencies in the major piece of evidence before it, which was Dr Kibreab's report.

47. There was no internal inconsistency in the panel's finding with regard to the appellant's former status in Eritrea in terms of national service. The panel simply expressed the problem which arose when an appellant had so clearly failed to make out his case on material matters.

48. The approach which the panel had taken was in line with the decision of the Supreme Court in *MA (Somalia)*. It had been suggested that *MA (Somalia)* may not apply because it is dealing with people who have been found to be wholly incredible, but that is not correct. The respondent would refer to what was said by the Supreme Court at paragraphs 30 and 31 of *MA (Somalia)*. Also, reliance was placed on what was said at paragraph 32, which was that "where the appellant has given a totally incredible account of the relevant facts, the Tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence".

49. Accordingly, it was not a question of someone's evidence being wholly rejected, but of the core of his account being rejected. At paragraph 47 of *MA (Somalia)*, the issue boiled down to whether or not that applicant had made out his case that he did not have connections with influential actors within Mogadishu. It was not a question of whether that applicant's evidence was wholly rejected, because it had been accepted that the applicant in that case was from Mogadishu. What was important to note is

what was said in the third line down at paragraph 47 of *MA (Somalia)*, that "in our view, all that the AIT were saying at paragraph 109 was that, because MA had not told the truth about his links and circumstances in Mogadishu, the possibility that he was a person with connections in Mogadishu could not be excluded. In other words, he had not discharged the burden of proof which the AIT had correctly said rested on him". The Supreme Court at paragraphs 47 and 48 were saying that because MA was lying, unless there was background evidence to show that he had to be at risk, he had not discharged the burden of showing that he would be.

50. In this case, and in Eritrean cases generally, however small the numbers might be in terms of lawful exit, there is evidence that some people do leave lawfully. When a person is wholly incredible, he/she has failed to discharge the burden of proof that he would be persecuted.

51. The respondent would remind the Tribunal that the country guidance given in *MA (Eritrea)* was the country guidance which really bites, because *MO* reduces the categories of people who could have left legally after 2008, and does not address the situation pre-2008. If one looked at paragraph 348 of *MA (Eritrea)*, the various categories laid out by Dr Kibreab in that case were broader than stated in *MO* at paragraph 106. So where the panel in this case was expressing difficulty in accepting the appellant's claim of his material history of detention and leaving illegally, it was saying that there was no evidence which was weighty enough for Dr Kibreab to be able to show that this appellant could not have been in one of these older categories set out in paragraph 348.

52. As noted by the Tribunal in this hearing, at this point in the submissions, it was also the case that some of the appellant's evidence with regard to his detention had been admitted to be untrue, and that his evidence had been completely rejected previously as well.

53. In a later part of *MA (Eritrea)*, Dr Kibreab said (despite what appears at paragraph 348) that virtually no one was getting out of Eritrea, and the Tribunal there rejected that part of his evidence, saying that it found it to be exaggerated and speculative.

54. Accordingly, there was nothing unsustainable in the panel's findings which were *MA (Eritrea)* compliant, and there was no evidence strong enough to exclude the possibility that the appellant fitted into the pre-2008 categories of people who could have left lawfully. In answer to a question from the Tribunal, Mr Jarvis confirmed that it was the respondent's position that the effect of *MA (Somalia)* was that if someone was lying about his core account, then unless the background evidence could exclude the possibility of his having left lawfully, the appellant would not have discharged the burden on him.

55. It had also been submitted on behalf of the appellant that even if he had left lawfully, he had been here ten years, and if he had come as a student, he would not have complied with the purpose of having been sent out of the country. In other words, he would effectively be presumed to be a deserter. However, the respondent would

invite the Tribunal to bear in mind what was found by the Tribunal in *MA (Eritrea)* at paragraph 378, as follows:

> "A person who is permitted to leave Eritrea by the authorities, despite being of draft age and not medically unfit, may well not be at real risk on return even if he or she has made an asylum claim whilst abroad. There are many reasons why this may be so including the wish on the part of the Eritrean authorities to embed family members of their regime abroad in case trouble arises in Eritrea to infiltrate the Diaspora community or as a means of encouraging foreign remittances to Eritrea from those who are in reality, well-disposed towards it."

56. Having failed to establish that he left Eritrea illegally, the suggestion that he would be at risk for the reasons advanced is wholly speculative. The appellant had failed to discharge the burden which was on him.

57. Finally, reference was made to *MO (Eritrea)* and specifically to paragraph 115, where the Tribunal in that case had found as follows:

> "We appreciate that in the context of a case in which the decision-maker has found a claimant/appellant wholly lacking in credibility (save in relation to sex and perhaps age and/or date of departure from Eritrea and health), it is difficult to see any basis for finding conclusively that they would not fall within one of the above two categories (highly trusted government officials and their families or those who are themselves members of the military or political leadership; members of ministerial staff recommended by the department to attend studies abroad). But at least in a range of cases the evidence may be such as to make it clear that the claimant concerned, albeit wholly or largely lacking in credibility, could not have any links with government officials or the regime's inner circle and could not have an education or skills profile making it likely they have been civil servants or have an educational bent (e.g. if they are found to come from a rural part of Eritrea and have had no secondary schooling). What may be involved here sometimes is clearer recognition by the decision-maker that when finding a claimant wholly incredible they are not in fact meaning that they lack credibility in every conceivable particular, since they may in fact accept, for example, that they are from a rural background and lack education."

58. In this case the appellant had been found to have links to the civil service and educational attainments and degrees. So even on the basis of the decision in *MO* (made in 2011] the appellant would still be struggling to succeed in this appeal and it is important here to recognise that further restrictions were imposed since April 2008.

59. In reply, on behalf of the appellant, Mr Shibli submitted that what was important above all was how this appellant was perceived on his return to Eritrea, whether he would be perceived as somebody who had left legally or as having left illegally. In *MO* at paragraph 131 what was discussed there was the perception the authorities nowadays had with regard to failed asylum seekers who returned home. It discusses

the categories of failed asylum seekers saying they are not per se at risk, but a great majority would be perceived as having left illegally and therefore except for very limited exceptions, must still be at risk.

60. In answer to a question from the Tribunal, as to whether if the appellant had left legally, as found, he would be able to establish this on return, Mr Shibli said that the point he wanted to make was that it was the respondent's suggestion that Dr Kibreab had been referring to a situation in 2003 when the appellant had left when he said that the "overwhelming majority of people who left were refused exit visas". In fact, in that report, Dr Kibreab discussed both the present situation and the past situation over the last several years, but accepted there were no statistics for the year in which the appellant had left. If one looked at the sentences quoted at paragraph 24, "overwhelming majority" was not in the past tense, and was not said with reference to the pre-2008 position. The problem is that based on that sentence, the panel had said that he was exaggerating whereas all he did was give his opinion on the present situation which was in line with *MO*.

61. I noted at this time that this would not help the appellant now, because if that is right, Dr Kibreab's evidence did not relate to the time when he left.

62. Mr Shibli then repeated his submission that the previous Tribunal had largely accepted Dr Kibreab's opinions as to who would be allowed to leave legally, and the panel's assessment was flawed because it had not accepted Dr Kibreab's opinion on whether or not he had left legally.

63. Mr Shibli then reiterated the submissions he had made earlier.

Discussion

64. My starting point has to be that this appellant has previously been found to lack credibility and indeed admitted that evidence he had given before an earlier Tribunal had been dishonest. On previous occasions, his claim to have left Eritrea illegally was not accepted.

65. It has not been suggested before me that he would have any other basis of appealing against the respondent's refusal to revoke the deportation order which was made apart from his claim that he would be at risk on return. It is said that this risk would result in one of two alternative ways. First, it is said that he would be at risk because, contrary to what had been found before, he did leave illegally; secondly, even if he did not, it is said that he would be at risk because he had stayed in this country for ten years, and thus would be in breach of his obligation to complete his military service.

66. The evidence that he now relies upon is an expert report from Dr Kibreab, whose report has been discussed at length above.

67. I have set out the arguments advanced before me in some detail, and I am entirely satisfied that this panel considered the appellant's arguments with care and reached findings which were open to it on the evidence.

68. I deal first with the appellant's claim, which has always been rejected, that he left Eritrea illegally. If he had left without an exit visa, production of his passport, which contained a student visa for this country, would have shown that he had not also obtained an exit visa, which would have been supportive of his case. In light of his admission that he told lies at an earlier hearing, and the previous findings that his evidence was not credible, I do not accept his explanation that he lost his passport in Middlesbrough in 2004. In my judgment, the obvious inference from his failure to produce his passport is that if he had it would have undermined his case.

69. It was not only the passport which the appellant claimed not to be able to produce. The panel noted at paragraph 18 of its determination that the appellant had also claimed to have lost some of the photographs relating to his attendances at demonstrations when he was arrested. The panel referred again to this claim at paragraph 19.

70. The panel rightly considered that the starting point must be the findings made by the previous panel chaired by Immigration Judge Hemingway, in which adverse credibility findings had been made, but properly took into account facts that had arisen since that determination in relation to this matter, as is stated explicitly at paragraph 22. The panel took into account evidence relating to the appellant's claimed sur place activity against the Eritrean regime and also to the evidence of Dr Kibreab. However, having considered Dr Kibreab's report extensively and thoroughly, it gave its reasons why it could not accept his conclusions.

71. When considering these findings, I have in mind in particular the observations of the Supreme Court in *MA (Somalia)* extracts from which have been set out above. I take particular note of this judgment in the context that Dr Kibreab, as the panel noted at paragraph 27 of its determination, did not address a number of facts specific to this appellant. The panel considered that "it may be the case that Dr Kibreab was unaware of this background, but, whatever might be the reason the fact of the matter is that there is no specific consideration of these facts in the formulation of his opinion [that] the appellant's evidence that he did not have an exit visa is plausible".

72. I also note that Dr Kibreab, as also recorded by the panel at paragraph 27 "conceded that the finding of the panel, chaired by Immigration Judge Hemingway was sound on "the basis of formal logic", but concluded on the basis, in our judgment, of general information, that the appellant was credible in this regard". The panel goes on to find that Dr Kibreab "appeared not to have taken account of the fact that this appellant had been found not to be credible on two separate occasions in the previous determination and those findings were not simply made on the basis that his evidence was disbelieved, but, crucially, in relation to the last hearing, on the basis that the appellant himself accepted that he had lied in the first hearing in the evidence regarding the amount of time he spent in detention and also in relation to

the manner in which he had entered the United Kingdom… and the explanations he gave for the telling of those lies were not accepted by the panel".

73. At paragraph 31 of *MA (Somalia)*, when giving the judgment of the court, Sir John Dyson SCJ stated as follows:

> "31. What Laws LJ was saying at para 54 [of *GM (Eritrea)*] was that, where a claimant tells lies on a central issue, his or her case will not be saved by general evidence unless that evidence is extremely strong. It is only evidence of that kind which will be sufficient to counteract the negative pull of the lie….".

74. As the panel noted at paragraph 27 of its determination, "it may be the case that Dr Kibreab was unaware of this background, but, whatever might be the reason the fact of the matter is that there is no specific consideration of these facts in the formulation of his opinion that the appellant's evidence that he did not have an exit visa is plausible". With respect to Dr Kibreab, in the context of this appellant and in light of the Supreme Court decision in *MA (Somalia)* what needed to be considered was not whether or not the appellant's evidence, or account, was plausible, but whether his evidence was sufficiently strong to exclude the real possibility that he came within that category of persons, which clearly did exist, who would have been allowed to leave Eritrea legally.

75. When one considers that this appellant was a person whose credibility had been rejected previously and who claimed to have lost evidence hugely relevant to this case, in light of *MA (Somalia)*, it is simply not sufficient to assert that his explanation is plausible, without going on to consider that evidence in the context of the adverse credibility findings which had been made.

76. With regard to the appellant's exit from Eritrea, as the panel found, there was good reason to consider, for the reasons set out at paragraph 26 of the panel's determination, that this appellant came within the category of persons who would or could have been granted an exit visa. Similarly, there was good reason to reject the appellant's submission that when he left Eritrea he was still subject to military service. The panel was entitled to conclude, as it did at paragraph 28, that "Dr Kibreab's report fails to consider whether or not the appellant may have qualified for demobilisation as a male former combatant, given his evidence that "ageing women and male former combatants were the group of 5,000 immobilised in July 2002".

77. The panel clearly gave thorough consideration to Dr Kibreab's report, but were entitled nonetheless to consider, for the reasons it gave, that the appellant had not established either that he left Eritrea illegally or that he would be at risk now for failing to complete his military service (or its equivalent). As noted by Mr Jarvis in his submissions, the Tribunal in *MA* had also identified the category of persons who would not be at risk, people who could advance the "wish on the part of the Eritrean authorities to embed family members of the regime abroad in case trouble arises in

Eritrea to infiltrate the Diaspora community or as a means of encouraging foreign remittances to Eritrea from those who are, in reality, well-disposed towards it."

78. In my judgment, having considered Dr Kibreab's evidence, in light of the specific facts already found concerning this appellant, the Tribunal was entitled to reach the findings it did, and its determination contains no material error of law.

79. It follows that this appeal must be dismissed, and I so find.

Decision

There being no material error of law in the decision of the First-tier Tribunal, this appeal is dismissed.

Signed: Dated: 29 October 2013

Upper Tribunal Judge Craig