



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/06084/2014

THE IMMIGRATION ACTS

**Heard at Manchester
On 14th January 2015**

**Decision & Reasons
Promulgated
On 27th January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MS SELAMAWIT TEKLEMARIAM
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Faryl, Counsel

For the Respondent: Mr McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Eritrea born on 24th June 1987. The Appellant left Eritrea in January 2014 on foot, stayed in Sudan for one month before leaving by plane to France using a fake passport. The Appellant entered the UK clandestinely in a lorry on 26th April 2014 and claimed asylum on the same day. The Appellant's claim for asylum was based upon fear that if returned to Eritrea she would face mistreatment due to her Pentecostal religion and her failure to complete national service. The Appellant's

application for asylum was refused by the Secretary of State on 5th August 2014.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Lever sitting at Manchester on 25th September 2014. In a determination promulgated on 9th October 2014 the Appellant's appeal was allowed on asylum grounds.
3. On 16th October 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 27th October 2014 First-tier Tribunal Judge Holmes granted permission to appeal. Judge Holmes noted that the grounds complained that the judge found the evidence relied upon in support of the claim to be a genuine convert to the Pentecostal faith to be "extremely flimsy and unreliable" and that the evidence concerning her circumstances in Eritrea "raised real concerns as to credibility". In conclusion the judge found that the Appellant had not given a credible account of her life in Eritrea or the circumstances in which she left that country.
4. Judge Holmes considered that in the circumstances it was arguable that the judge had misunderstood or failed to properly apply the relevant country guidance decisions in relation to Eritrea of *MA (draft evaders - illegal departures - risk) Eritrea CG [2007] UKAIT 00059* and *MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 190 (IAC)*. Judge Holmes found there was no burden of proof upon the Respondent to show that either the Appellant was not who she claimed to be or that she was exempt from military service or that she had left Eritrea legally. In the light of the judge's findings that the Appellant had failed to prove her case in these key respects and in the circumstances it was well arguable that there was no proper basis for the judge's assumption that she must have left Eritrea illegally.
5. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law. This is an appeal by the Secretary of State and for the purpose of continuity throughout the legal proceedings the Secretary of State is referred to herein as the Respondent and Ms Teklemariam as the Appellant. The Appellant is represented by Ms Faryl. Ms Faryl is familiar with this matter having appeared before the First-tier Tribunal. The Secretary of State appears by her Home Office Presenting Officer, Mr McVeety.

Submissions/Discussions

6. Mr McVeety submits that it is clear from the Notice of Refusal that the Home Office contest the basis upon which the Appellant left Eritrea and that the judge was wrong to find at paragraph 33 that the Appellant's account of having left Eritrea illegally was in any way not contested by the Respondent. Further he contends that in finding at paragraph 32 that there was "no evidence that the Appellant falls within the highly restricted categories of people who could leave Eritrea lawfully as referred to in the case of *MO*" that it was trite law that the burden of proof lay with the

Appellant and that it was an error of law by the judge to require the Respondent to provide evidence to disprove the Appellant's account.

7. Further he contended that the judge had misdirected himself in his reference to the authority of *MO* and by concluding that the evidence available to him did not allow him to say that because the Appellant had been found to be entirely lacking in credibility it can be said that she had left the country lawfully. He submits this is exactly what the judge states at paragraph 34 and that in doing so he creates an error of law that is material.
8. Ms Faryl responds by stating that the judge's findings are robust and that he has considered quite properly the country guidance authorities. She submits there is no presumption that the Appellant would have left unlawfully if her account lacked credibility. She submits that Judge Lever had considered that the Appellant could have left in the manner that she did and therefore it is irrelevant if the Respondent accepts her account or not. She submits that the fact remains that the judge was entitled to make the findings that he did and that the Appellant's case fell into the limited category of people who could have left Eritrea illegally. She points out there is no medical issue here and that the judge was entitled to find that it was more likely than not that the Appellant had left Eritrea illegally.
9. She submits that *MO* gives a direction to the judge to consider whether or not she could have left legally and that the judge has done this and therefore even if the story is incredible it is for the judge to consider whether or not the Appellant left legally or illegally. She submits that the judge has done exactly this and therefore there is no error of law in the determination of the First-tier Tribunal Judge.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been

rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

The Authorities

12. *MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 190 (IAC)* is the authority for the following propositions.
 - (i) The general position concerning illegal exit remains as expressed in *MA*, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However 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 the adverse credibility findings.
 - (ii) The general position adopted in *MA*, that a person of or approaching draft age 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.
 - (iii) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons are likely to be perceived as having left illegally and this fact, save the very limited exceptions, will mean that on return they face a real risk of persecution or serious harm.

Findings

13. This is a detailed and well constructed determination from a very experienced Tribunal Judge. The judge has heard the evidence and that paragraph 31 has made findings that he was entitled to but the Appellant had not provided a credible account of her life in Eritrea or the circumstances surrounding her leaving that country. Having made that finding he then went on to consider the relevant case law in particular *MO* which he has analysed in considerable detail at paragraph 32.
14. At paragraph 33 he has analysed the evidence that was produced to him and that the only explanation provided as to how she left Eritrea is that she crossed the border from Eritrea to Sudan unlawfully and thereafter flew to France using false documents. He found as a matter of fact that that explanation had not been contested by the Secretary of State and made findings which he was entitled to that that account did not suggest a lawful exit from Eritrea.

15. At paragraph 34 the judge therefore made findings that when assessing *MO* he was bound to assume for the reasons that he had given that it was reasonably likely that the Appellant left Eritrea illegally and therefore would be at risk on return. In such circumstances the judge has followed a structured approach and made findings that he is perfectly entitled to. The submissions made by the Secretary of State consequently amount to little more than disagreement and the determination discloses no material error of law and the appeal of the Secretary of State is dismissed.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal Judge is maintained.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed

Date **14th January 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT **FEE AWARD**

The appeal is dismissed and no fee award is claimed nor one made.

Signed

Date **14th January 2015**

Deputy Upper Tribunal Judge D N Harris