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Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00505/2014**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 21 October 2015	**On 27 October 2015**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TK

ANONYMITY DIRECTION MADE

Respondent

Representation:
For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Reynolds, Counsel

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the respondent because this decision refers to his

asylum claim.

2. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge Davey dated 23 April 2015 in which he allowed the respondent's appeal on asylum and Article 8 grounds. In grounds of appeal the SSHD submitted that the decision contained three errors of law: (1) the judge failed to use the factual findings of a previous 2009 decision of the Asylum and Immigration Tribunal as his starting point; (2) no reference was made to the relevant and applicable country guidance decision of MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190 (IAC); the judge attached insufficient weight to the public interest and section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended).

3. I heard submissions from both representatives on each ground of appeal. After hearing submissions, I indicated that I was satisfied that the judge had materially erred in law in failing to direct himself in accordance with and apply Devaseelan [2002] UKIAT 000702, and that the appeal would need to be remade. Both representatives agreed that in these circumstances the matter should be remitted to the First-tier Tribunal. I reserved my decision regarding Article 8. I now give my reasons in full in relation to each ground of appeal.

Ground 1 – Devaseelan

4. The judge has simply failed to direct himself or apply the well-known Devaseelan guidelines, which includes the following: "*the first Adjudicator's determination should always be the starting-point".* The Devaseelan guidelines are always to be applied to the determination of a factual issue, the dispute as to which has already been the subject of judicial determination in an appeal against an earlier immigration decision involving the same parties – see Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398(IAC).

5. This is a case in which the Asylum and Immigration Tribunal had already considered and dismissed the respondent's appeal on asylum grounds in a decision dated 11 November 2009. That Tribunal conducted an in depth assessment of the respondent's claim that he participated in military service in Eritrea before departing the country unlawfully in 2009. That Tribunal accepted him to be Eritrean (this had been disputed by the SSHD) and that he had undertaken military service in the past. The Tribunal did not accept the credibility of the respondent's claim as to the length of his service in the military, the adverse attention he came to or that he escaped. Importantly, that Tribunal did not accept that he left Eritrea illegally.

6. By the time Judge Davey came to consider whether deportation would breach the Refugee Convention there was further guidance to assist in the determination of who left Eritrea illegally and who was likely to be at risk as a result of this. The headnote in MO summarises the position clearly:

> "(i) The figures relating to UK entry clearance applications since 2006 –

particularly since September 2008 – show a very significant change from those considered by the Tribunal in MA (Draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and are among a number of indications that it has become more difficult for Eritreans to obtain lawful exit from Eritrea.

(ii) The Eritrean authorities continue to envisage lawful exit as being possible for those who are above national service age or children of 7 or younger. Otherwise, however, the potential categories of lawful exit are limited to two narrowly drawn medical categories and those who are either highly trusted government officials or their families or who are members of ministerial staff recommended by the department to attend studies abroad.

(iii) 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.

(iv) The general position adopted in MA, that a person of or approaching draft age (i.e. aged 8 or over and still not above the upper age limits for military service, being under 54 for men and under 47 for women) 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 in respect of (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.

(v) 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 for very limited exceptions, will mean that on return they face a real risk of persecution or serious harm."

7. Whilst Judge Davey referred to the earlier 2009 Tribunal decision on two occasions he did not engage with it in any meaningful way or give reasons for not using it as a starting point for his own findings. I am satisfied this constitutes a material error of law. I acknowledge that the complexion of the asylum claim had changed and narrowed, and was supported by further country expert evidence regarded by Judge Davey to be cogent. There are prima facie persuasive reasons why this respondent is likely to have left Eritrea illegally, notwithstanding the findings of the 2009 Tribunal. Those findings must nonetheless be used as a starting point. It is noteworthy that the respondent was not found "*wholly incredible*" by the 2009 Tribunal.

8. In all the circumstances it is important that a very careful and more

nuanced assessment of the respondent's claim to have left Eritrea illegally is undertaken, using the previous findings as a starting point but having considered all the evidence that is now available, including the guidance contained in MO.

Ground 2 – CG

9. The judge has referred to considerable background evidence but failed to refer to MO. MO was included in the respondent's bundle and it is difficult to understand why it has been ignored by the judge. The judge was not assisted by the SSHD's representative who offered little assistance in relation to the Refugee Convention claim, asserting to be 'without instructions'. I accept that much of the background evidence contains similar evidence to that highlighted in MO. I am nonetheless satisfied that in failing to apply MO there has been a material error of law.

10. As MO makes clear it is important to assess when the respondent left Eritrea and if it was after August 2008. The respondent claims to have left on 21 August 2009 but this claim needs to be specifically addressed in light of the 2009 Tribunal findings and all the up to date evidence.

Ground 3 – Article 8

11. Mr Clarke focused his submissions on the failure on the part of the judge to direct himself to the very strong policy contained in the relevant legislation that those with a history of criminal offending should be deported unless there are compelling reasons, which must be exceptional – see McLarty (Deportation – proportionality balance) [2014] UKUT 00315 (IAC). The judge clearly took into account the low level nature of the respondent's single offence, which resulted in a sentence of eight months and regarded the case to be exceptional in many respects. It was entirely open to the judge to make the latter finding for the reasons he has provided. Indeed it is difficult to see how any judge could have come to any other conclusion regarding the exceptionality of the family situation. The respondent's marriage is a 'pre-flight' relationship that was long established in Eritrea. They were reunited in the UK and have lived together since December 2011. They have three children. The respondent's spouse is a refugee and there are therefore insurmountable obstacles to her returning to Eritrea.

12. Mr Clarke was correct to submit that the judge has not expressly directed himself to the importance of the policy of deporting criminals. However the judge was clearly aware of the SSHD's objectives in pursuing deportation and expressly referred to this at paragraph 43. This is not a case in which the public interest fell out of account when the judge conducted the balancing exercise. Not only did the judge refer to the SSHD's objectives (which are well known – there is a strong policy to deport those with criminal records) but he also referred to the nature of the respondent's offending. The judge was factually correct in noting that an eight month sentence of imprisonment meant that this was not an 'automatic' deportation case. When his reasoning is read as a whole I am

satisfied that the judge properly directed himself to the importance of the public interest. At the beginning of his assessment he addressed the key issue: the presence of exceptional features to the case. In order for the public interest to be outweighed in a case of this sort, there must be exceptional circumstances. That is also how he ended his assessment: he concluded that the public interest was outweighed by the exceptional circumstances of the case.

Remittal to the First-tier Tribunal

13. By paragraph 7.2 of the relevant practice statement for appeals on or after 25 September 2012, I must be satisfied that:

> "the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 it is appropriate to remit the case to the First-tier Tribunal."

14. I am satisfied that findings in relation to the Refugee Convention claim need to be entirely remade using the 2009 decision as a starting point, and this is most appropriately done in the First-tier Tribunal. In all the circumstances I am satisfied that it would be proportionate to remit the case to the First-tier Tribunal.

Decision

15. The decision of the First-tier Tribunal involved the making of a material error of law regarding the assessment of the Refugee Convention claim and I set this part of the decision aside.

16. The decision of the First-tier Tribunal did not involve the making of a material error of law in relation to Article 8 of the ECHR.

17. The claim arising under the Refugee Convention and Article 3 of the ECHR shall be remade by the First-tier Tribunal.

Directions

(1) The hearing shall be listed on the first available date before the First-tier Tribunal sitting at Taylor House. Tigrinya interpreter. TE 2.5 hours

(2) The respondent shall file and serve a comprehensive indexed and paginated bundle containing all evidence he wishes to rely upon together with a skeleton argument cross-referencing to that evidence 28 days before the hearing.

(3) The SSHD shall file and serve a summary of her updated position in light of that evidence 14 days before the hearing.

Signed:

Ms M. Plimmer
Judge of the Upper Tribunal

Date:
23 October 2015