



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/07508/2015**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Centre City Tower,
Birmingham
On 11 February 2016**

**Decision & Reasons
Promulgated
On 29 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**TESFALDET SOLOMON HAILE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza, Counsel instructed by Sultan Lloyd Solicitors
For the Respondent: Ms R Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge O'Hagan sitting in Birmingham on 19 August 2015) dismissing his appeal against the decision by the Secretary of State to refuse to recognise him as a refugee from Eritrea, but allowing his appeal against removal on the ground that he qualified for humanitarian protection under paragraph 339 of the Rules. The First-tier Tribunal did not

make an anonymity direction, and on the particular facts of this case I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Grant of Permission to Appeal

2. On 5 November 2015 Upper Tribunal Judge Rintoul granted permission to appeal for the following reasons:

It is arguable that, having found that the appellant is entitled to Humanitarian Protection [39] on account of the ill-treatment he would suffer on return to Eritrea, having left illegally and being of military age [37], First-tier tribunal Judge O'Hagan erred in concluding that the appellant had not established he [was] a refugee. There is arguably no proper consideration of whether the treatment would be for a Convention reason. It is, however, clear from the decisions 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)** that the reason for the ill-treatment is that those who exited illegally are perceived to be opposed to the regime, and thus the Convention reason is political opinion.

3. In the light of this reasoning, he proposed to dispose of the appeal without a further hearing, and to allow it on asylum and human rights grounds, unless either party objected to this course of action.

The Rule 24 Response

4. On 5 January 2016 Tony Melvin of the Specialist Appeals Team settled a Rule 24 Response opposing the appeal.

The Hearing in the Upper Tribunal

5. At the hearing before me, Mr Reza produced a skeleton argument in which he developed the case that the decision of Judge O'Hagan ran counter to country guidance authority. Ms Petterson agreed with Mr Reza's legal analysis and conceded that an error of law was made out for the reason given by Upper Tribunal Judge Rintoul. She also did not oppose the appeal being set aside and remade as envisaged by him.

Reasons for finding an Error of Law

6. As the parties are now in agreement, the reasons can be shortly stated. In accordance with the country guidance authorities cited by Upper Tribunal Judge Rintoul, the judge's primary findings of fact should have led to the appeal being allowed on asylum and human rights (Article 3 ECHR) grounds, instead of the appeal being allowed on an alternative basis under Paragraph 339 of the Rules.
7. The judge found that most of the appellant's claim was a fabrication. He did not accept that he was detained for opposing the government and had then escaped from captivity. He did not accept that the appellant had gone into hiding in the vicinity of his village for a period of over a year, while the authorities were searching for him; and that in the same period

he had got married at a wedding ceremony in the village organised by his family. But the judge accepted that the appellant was of military age and had left Eritrea illegally.

8. The judge misdirected himself in law at [37] in holding that these facts did not engage the Refugee Convention.
9. The judge went on to give sustainable reasons for finding that he should follow the country guidance cases of **MA** and **MO** on the issue of risk on return, in preference to the case advanced in the refusal letter that conditions for returnees had improved to the point where was no longer a real risk of serious harm for returnees who had exited the country illegally. Having reached this conclusion (which has not been appealed by the Secretary of State), the judge needed to ask himself whether there was anything in **MA** or **MO** which precluded the appellant being afforded refugee protection, as distinct from humanitarian protection in the alternative. The answer was, and is, no. As held by Upper Tribunal Judge Rintoul, the reason for the apprehended ill-treatment is that those who have exited illegally are perceived to be opposed to the regime, and thus the appellant faces a real risk of persecutory treatment for a Convention reason, namely imputed political opinion.

Notice of Decision

10. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal is allowed on asylum and human rights (Article 3 ECHR) grounds.

Anonymity

I make no anonymity direction.

Signed

Date

Deputy Upper Tribunal Judge Monson