



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

Appeal Number: PA/05999/2017

THE IMMIGRATION ACTS

Heard at Liverpool

On 18th September 2018

**Decision & Reasons
Promulgated**

On 5th October 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MISS BMT
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brown, Counsel

For the Respondent: Mr Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Eritrea born on 15th February 1984. The Appellant left Eritrea illegally in July 2012 travelling onward through Sudan, Kenya and Dubai prior to entering the United Kingdom on 12th December 2016 whereupon she claimed asylum. She arrived in the UK on a flight directly from Dubai. The Appellant's application for asylum was

based on a purported well-founded fear of persecution in Eritrea on the basis of her imputed political opinion. That application was refused by the Secretary of State by Notice of Refusal dated 8th June 2017. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Ransley sitting at Manchester on 21st July 2017. In a decision and reasons promulgated on 3rd August 2017 the Appellant's appeal was dismissed on all grounds.

2. On 15th August 2017 Grounds of Appeal were lodged to the Upper Tribunal. On 25th October 2017 Judge of the First-tier Tribunal Bird granted permission to appeal. Judge Bird noted that it was alleged that the judge failed to apply the country guidance decision in *MST (military service - risk categories) Eritrea CG [2016] UKUT 443* when deciding whether the Appellant had left Eritrea illegally. Judge Bird considered that it was arguable that in reaching her conclusion that the Appellant had left Eritrea illegally the judge had failed to take into account the list of those who can leave as mentioned in *MST* and *MO (illegal exit - risk on return) CG [2011] UKUT 00190* and that this amounted to an error of law. Secondly it was argued that the judge had made an arguable error of law in her assessment of Article 3 and the decision of the European Court of Human Rights in *Paposhvili*. Judge Bird considered that it was arguable that in assessing the evidence in relation to availability of medication the judge had failed to properly apply the guidance on this issue in *Paposhvili* and consequently an arguable error of law had been made as a consequence.
3. On 14th November 2017 the Secretary of State responded to the Grounds of Appeal pursuant to Rule 24. The Rule 24 response indicated that the judge relied on the evidence of the Appellant that she was exempted from national service and would therefore not be viewed as a deserter or draft evader by the Eritrean authorities and this was a finding open to her and that she had given adequate reasons. Further it was submitted that *Paposhvili* conflicted with the guidance in *M and GS (India)* and it was the Secretary of State's case that those cases are binding upon the Tribunal and that *Paposhvili* is not.
4. On that basis the appeal came before me to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. I found that there was and set the decision aside solely on the ground

“that the assumption by the First-tier Tribunal Judge that the exemption from national service on grounds of maternity meant that her departure would be regarded as lawful”

constituted an error of law and that the question to be answered on the rehearing of this matter was whether in the light of country guidance to be found in *MST and Others (national service - risk categories) Eritrea CG [2016] UKUT 443* the Appellant met the requirements to satisfy her claim for asylum.

5. I listed the matter to be retained reserved to myself, and it is on that basis that the appeal comes back before me. The Appellant is represented by Mr Brown of Counsel. Mr Brown is extremely familiar with this matter. He has appeared in this matter throughout and has been the author of Grounds of Appeal. In this instance the Secretary of State is represented by her Home Office Presenting Officer, Mr Whitwell.

Country Guidance

6. The law is to be found in the country guidance authority of *MST and Others (national service - risk categories) Eritrea CG [2016] UKUT 00443 (IAC)*. That case is authority for a number of propositions all set out in the head note. The relevant head note herein however is paragraph 10 which states:

“Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (i) that he or she left illegally, and (ii) that he or she is of or approaching draft age, is likely to be perceived on return as a draft evader or deserter from national service and as a result face a real risk of persecution or serious harm”.

Preliminary Issue

7. As a preliminary issue Mr Brown takes me to two letters from an organisation called Sahir House. These two letters are both dated 6th September 2018. One is from the Appellant’s specialist asylum support worker and the other is from the senior psychotherapist at Sahir House which supports people who are living with HIV. The psychotherapist advises that she has been working with the Appellant since June 2017. Those two letters are of only limited relevance to this rehearing. However, what they do indicate is that there is professional advice that the Appellant is a vulnerable person. Their content is not challenged by Mr Whitwell and I proceed on the basis that it is accepted that the Appellant is a vulnerable person. She is in attendance. She is not expected to give evidence today. Her asylum support worker also attends with her.

Submissions/Discussion

8. Mr Brown points out quite properly that the question extant before the Tribunal is whether or not the Appellant left Eritrea illegally and being of draft age would she be considered a draft evader. He reminds me that this was a finding not accepted by Judge Ransley in her decision although it is accepted that the Appellant left in 2012. He takes me to the Respondent’s bundle and to the question asked in the Appellant’s asylum interview as to how she left Eritrea and as to the explanation given and submits that that evidence needs to be weighed against and alongside paragraph 10 of the head note of *MST* referred to above.

9. He takes me to paragraph 308 of *MST* which sets out the categories of eligibility for national service and exit visas and those people who can lawfully exit Eritrea. He reminds me that the reason that the Appellant exited was due to her maternity and points out that it would only be possible for the Appellant to bring herself within the relevant category as set out at paragraph 328 of *MST* if it can be shown that the Appellant left on the basis of her mental health. He acknowledges that there is insufficient evidence to show this and submits that the Appellant does not therefore come within the categories who could legally exit as set out within paragraph 328.
10. He reminds me that the Appellant has not returned after some six years away from Eritrea and that had she been given permission to leave legally she would have been time-limited and therefore after six years it is not unreasonable to assume that her exit was illegal and she is unable to explain her absence under a category which would have justified her leaving.
11. In brief response Mr Whitwell, who I acknowledge comes very late to this matter, relies on previous submissions that have been made and the findings in the Notice of Refusal. He acknowledges that in the event that I am persuaded by Mr Brown's argument that the Appellant will succeed.

Findings

12. I am satisfied that the submissions made by Mr Brown above are sustainable. The First-tier Tribunal Judge did not deal with all this evidence. This is an Appellant who, on an interpretation of *MST*, exited illegally and who would be perceived as a draft evader. Six years have passed since she left Eritrea and she would not, I am satisfied, be able to explain her absence. It is appropriate that the Tribunal on rehearing this matter considers and assesses the Appellant's risk on return now. I am satisfied that following country guidance she would be at risk on return and consequently the Appellant's appeal succeeds on asylum grounds.

Notice of Decision

The Appellant's appeal is allowed on asylum grounds.

The First-tier Tribunal Judge granted the Appellant anonymity. No application has been made throughout the process to vary that order and I am satisfied that that order should remain in place, particularly bearing in mind the Appellant's vulnerability.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant

and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

01 October 2018

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris