Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06025/2017**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 18 December 2017	**On 4 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

KAMAL MOHAMMED OSMAM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L McCrorie of Loughran & Co, solicitors
For the Respondent: Ms M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kempton promulgated on 7 August 2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 16 May 1985. He is a national of Eritrea.

4. The appellant arrived in the UK on 8 August 2015. He claimed asylum that day. On 16 July 2017 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Kempton ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 25 October 2017 Judge Bird gave permission to appeal stating

> 3. It is arguable that in the conclusion that the Judge reaches at paragraph 20 that the appellant was a "recognised refugee in Sudan" the Judge failed to take into account and comment on what the appellant states in paragraph 25 of the WS. In doing so that Judge has misunderstood the evidence and thus made an arguable error of law,
>
> 4. Secondly it is alleged that the Judge erred in law in finding that the appellant has failed to provide a translated copy of his thesis to show how the Eritrean authorities would see it as being critical of them. Ground 2 alleges that in this the Judge failed to take note of chapter 3 which was translated was at annex C of the respondent's bundle.
>
> 5. It is arguable that in failing to assess whether what was contained in the respondent's bundle would be enough to bring the appellant to the adverse attention of the authorities, the Judge has made an arguable error of law.
>
> 6. All other grounds are arguable.

The Hearing

6. (a) Ms McCrorie moved the grounds of appeal. She told me that the Judge failed to take account of the appellant's witness statement. She told me that the Judge could not have made the findings that she makes at [20] of the decision if she had taken account of the appellant's witness statement, which details the appellant's circumstances in Sudan. She told me that [20], [21], [22] and [28] of the decision demonstrates that the judge has not taken account of the appellant's evidence.

(b) Mr McCrory took me to [23] of the decision where, she told me, the Judge misinterprets the importance of the appellant's thesis. She told me that chapter 3 of the appellant's thesis had been translated & was before the Judge, but the Judge says there is no translated copy of the whole thesis. She told me that the Judge should have made a finding on whether or not the appellant would be perceived to have a political opinion in Eritrea.

(c) She told me that the Judge failed to give adequate reasons for the findings at [24], [31], [32], & [33] of the decision. Ms McCrorie told me that the Judge incorrectly

placed reliance on the appellant's failure to produce corroborative evidence at [24], [29] and [30] of the decision.

(d) Ms McCrorie told me that the Judge failed to take account of background materials when considering whether or not the appellant could apply for Sudanese citizenship. She told me that the appellant's second inventory contained background materials which supported the appellant's claim that he could not make an application for Sudanese citizenship.

(e) Ms McCrorie told me that the Judge failed to understand that the appellant arrived in Sudan in 1988, before the Eritrean border was drawn in 1993. Ms McCrorie relied on MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC). She urged me to set the decision aside and remit the case to the First-tier to be determined of new.

7. For the respondent, Ms O'Brien told me that the decision does not contain errors, material or otherwise. She told me that what is argued for the appellant amounts to no more than a disagreement with the facts as the Judge found them to be, and the appeal is simply an attempt to re-litigate a matter which has been competently considered by the Judge. She told me that the Judge reached conclusions which were well within the range of reasonable conclusions available to the Judge, and that the Judge's finding that the appellant did not leave Eritrea illegally and can safely return to Eritrea is safe. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

8. The respondent accepted that the appellant is an Eritrean national but rejected his claim to have no status in Sudan, rejected his claim to have been politically active against the Eritrean government, rejected his claim to be of interest to the Eritrean authorities & refused to accept that the appellant had left Eritrea illegally. The respondent accepts that the appellant is an Eritrean national who has lived and studied in Sudan but returned to Eritrea in December 2009 remaining there until February 2015.

9. It is common ground that between December 2009 and February 2015 the appellant did not undertake national service. It is the appellant's position that he worked as a volunteer teacher in a school. The appellant was born in 1985 so he is now 32 years of age. The respondent's decision is to forcibly return the appellant to Eritrea.

10. The Judge's findings of fact start at [19] of the decision. At [24] the Judge declares that she finds the appellant's account to be incredible. The Judge bemoans the lack of supporting evidence for the appellant's account that he lived in Sudan and return to Eritrea. At [25] the Judge appears to be accepting that the appellant's uncle (in Saudi Arabia) paid a lot of money to arrange for the appellant's illegal exit from Eritrea. At [27] the Judge appears to accept that the appellant returned to Eritrea, but at [28] and

[38] it is not clear whether or not the Judge accepts that the appellant returned to Eritrea in 2009. At [31] the Judge says

> I do not accept that he left Eritrea illegally

11. At [32] the Judge appears to take the appellant's account at its highest, and then reject it. The Judge says that she is aware of the country guidance but does not name the country guidance case nor does she make an explicit self-direction.

12. The result is that the Judge makes conflicting findings of fact and it is not clear how the Judge reached her conclusions. I have to find that the decision is tainted by material errors of law because of inadequacy in reasoning and fact-finding. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

13. As I find that the decision is tainted by material error of law I must set it aside.

14. Although I set the decision aside, I find that there is sufficient material before me to substitute my own decision.

15. The undisputed facts are that the appellant is an Eritrean national. He is 32 years of age. The respondent intends to forcibly return him to Eritrea.

16. It was held in MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) that (i) Although reconfirming parts of the country guidance given 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), this case replaces that with the following: (ii) The Eritrean system of military/national service remains indefinite and since 2012 has expanded to include a people's militia programme, which although not part of national service, constitutes military service; (iii) The age limits for national service are likely to remain the same as stated in MO, namely 54 for men and 47 for women except that for children the limit is now likely to be 5 save for adolescents in the context of family reunification. For peoples' militia the age limits are likely to be 60 for women and 70 for men; (iv) The categories of lawful exit have not significantly changed since MO and are likely to be as follows: (a) Men aged over 54; (b) Women aged over 47 (c) Children aged under five (with some scope for adolescents in family reunification cases; (d) people exempt from national service on medical grounds; (e) People travelling abroad for medical treatment; (f) People travelling abroad for studies or for a conference; (g) Business and sportsmen; (h) Former freedom fighters (Tegadelti) and their family members; (i) Authority representatives in leading positions and their family members; (v) It continues to be the case (as in MO) that most Eritreans who have left Eritrea since 1991 have done so illegally. However,

since there are viable, albeit still limited, categories of lawful exit especially for those of draft age for national service, the position remains as it was in MO, namely that a person whose asylum claim has not been found credible cannot be assumed to have left illegally. The position also remains nonetheless (as in MO) that 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 adverse credibility findings. For these purposes a lengthy period performing national service is likely to enhance a person's skill profile; (vi) It remains the case (as in MO) that failed asylum seekers as such are not at risk of persecution or serious harm on return; (vii) Notwithstanding that the round-ups (giffas) of suspected evaders/deserters, the "shoot to kill" policy and the targeting of relatives of evaders and deserters are now significantly less likely occurrences, it remains the case, subject to three limited exceptions set out in (vii) (c) below, that if a person of or approaching draft age will be perceived on return as a draft evader or deserter, he or she will face a real risk of persecution, serious harm or ill-treatment contrary to Article 3 or 4 of the ECHR. (vii) (a) A person who is likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and/have signed (or are willing to sign) the letter of regret; (vii) (b) Even if such a person may avoid punishment in the form of detention and ill-treatment it is likely that he or she will be assigned to perform (further) national service, which, is likely to amount to treatment contrary to Articles 3 and 4 of the ECHR unless he or she falls within one or more of the three limited exceptions set out immediately below in (vii)(c); (vii)(c)) It remains the case (as in MO) that there are persons likely not to face a real risk of persecution or serious harm notwithstanding that they will be perceived on return as draft evaders and deserters, namely: (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; (vii) Notwithstanding that many Eritreans are effectively reservists having been discharged/released from national service and unlikely to face recall, it remains unlikely that they will have received or be able to receive official confirmation of completion of national service. Thus it remains the case, as in MO that "(iv) The general position adopted in MA, that a person of or approaching draft 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…" (ix) A person liable to perform service in the people's militia and who is assessed to have left Eritrea illegally, is not likely on return to face a real risk of persecution or serious harm. (x) Accordingly, a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (a) that he or she left illegally, and (b) 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; (xi) While likely to be a rare case, it is possible that a person who has exited lawfully may on forcible return face

having to resume or commence national service. In such a case there is a real risk of persecution or serious harm by virtue of such service constituting forced labour contrary to Article 4(2) and Article 3 of the ECHR; (xii) Where it is specified above that there is a real risk of persecution in the context of performance of military/national service, it is highly likely that it will be persecution for a Convention reason based on imputed political opinion.

17. The appellant is a national of Eritrea, of National service age. He has not participated in national service and faces forcible return to Eritrea. Headnotes (x) & (xi) of MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) tell me that with that profile the appellant would be at risk of persecution on return to Eritrea.

18. Given these conclusions, I find that the Appellant has discharged the burden of proof to establish that he is a refugee. **I come to the conclusion that the Appellant's removal would cause the United Kingdom to be in breach of its obligations under the 2006 Regulations.**

Humanitarian protection

19. As I have found the appellant is a refugee I cannot consider whether he qualifies for humanitarian protection. Therefore, I find the appellant is not eligible for humanitarian protection.

Human rights

20. As I have found the appellant has established a well-founded fear of persecution, by analogy I find that his claim engages article 3 of the Human Rights Convention because he would face a real risk of torture, inhuman or degrading treatment if he were returned to his country of origin.

21. Article 4 of the 1950 Convention is a prohibition on slavery. I have found that return to Eritrea would breach the appellant's rights on article 3 ECHR grounds. I have found that the appellant will be perceived to be a draft evader who left Eritrea illegally. In MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) it was held (inter alia) that

> (vii) (a) A person who is likely to be perceived as a deserter/evader will not be able to avoid exposure to such real risk merely by showing they have paid (or are willing to pay) the diaspora tax and/have signed (or are willing to sign) the letter of regret; (vii) (b) Even if such a person may avoid punishment in the form of detention and ill-treatment it is likely that he or she will be assigned to perform (further) national service, which, is likely to amount to treatment contrary to Articles 3 and 4 of the ECHR…

By analogy I find the appeal succeeds on article 4 ECHR grounds.

22. The appellant does not claim that any other articles of the 1950 Convention are engaged.

23. In the light of the above conclusions, I find that the Decision appealed against would cause the United Kingdom to be in breach of the law or its obligations under the 1950 Convention.

CONCLUSION

24. The decision of the First-tier Tribunal promulgated on 7 August 2017 is tainted by a material error of law. I set it aside.

25. I substitute my own decision.

26. The appeal is allowed on asylum grounds.

27. The appeal is dismissed on Humanitarian Protection grounds

28. The appeal is allowed on article 3 & 4 ECHR grounds.

Signed

Paul Doyle

Deputy Upper Tribunal Judge Doyle Date 28 December 2017