



Upper Tribunal
(Immigration and Asylum Chamber)
PA/09999/2017

Appeal Number:

THE IMMIGRATION ACTS

Heard At: Manchester Civil Justice Centre
On: 19th June 2018

Decision and Reasons Promulgated
On: 25th June 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AT
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr Holmes, Counsel instructed by Broudie Jackson Canter
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Eritrea born in 1967. She appeals with permission the decision of the First-tier Tribunal (Judge Holt) dated 23rd November 2017 to dismiss her protection appeal.
2. There are five grounds of appeal, and before me Mr Bates accepted on behalf of the Secretary of State for the Home Department that all but one were made out. Given that concession I need not deal with all of the grounds in great detail, but it is necessary that I set out the basis of the Appellant's case and the Tribunal's

reasoning at some length, in order to provide a background to my consideration of the fifth, contested, ground.

The Basis of Claim and the Respondent's Decision

3. The Appellant claimed asylum on the day that she arrived in the UK, the 26th March 2017. She said that she was at risk in Eritrea because her husband had deserted military service. She had been detained and ill-treated as a result. Her uncle had helped her leave the country illegally in January 2014. An agent then assisted her in travelling to Saudi Arabia. There she found employment with a family in Jeddah who treated her "very appalling". They would beat her and she only received any wages intermittently. The employers told her they were paying the 'middleman' who facilitated her travel and got her the job. It was this family who brought her to Greece. She managed to escape from them there and made her way to the UK. At her asylum interview the Appellant was asked whether she would like this aspect of her case to be referred so that she could get support. She declined, saying that she had tried to move on and "close that chapter".
4. In respect of her own eligibility for military service the Appellant said that when she was younger she had not been called up because of her circumstances. Her father had been shot by Ethiopian forces during their 'occupation' and her mother was disabled, so she was caring for both of them at home [Q77]. After she got married in 1997 she was exempted [Q81]. She also noted that at the same time the authorities denied her any rights such as the ability to inherit or claim land, on the grounds that she had not completed her military service. In the end she was also denied ration coupons.
5. Protection was refused on the 22nd September 2017. The Respondent accepted that the Appellant is Eritrean. The remainder of the account was rejected. It was not accepted that the Appellant is liable for military service in Eritrea because country background evidence indicates that as a married woman she would be exempt. The Respondent did not believe her account of having experienced difficulties with the Eritrean authorities because it was internally inconsistent. As for her claim to have left the country illegally, this was rejected on the grounds that she would have been eligible for an exit visa.

The Appeal to the First-tier Tribunal

6. When the Appellant's appeal came before the First-tier Tribunal the matters in issue were therefore a) whether her account of past persecution was credible b) whether she was eligible for military service and c) whether she had left Eritrea illegally. If the Appellant made any of these factual claims out, to the lower standard of proof, then it was common ground that she would face a real risk of persecution in Eritrea and as a result her appeal would be allowed.

7. Judge Holt did not accept that the Appellant had shown any of a), b) or c) to be true. Her reasons were as follows:
- i) The Appellant's evidence at interview was that she was exempt from military service. Her evidence at hearing was in stark contrast: she claimed that she had received call up papers in 1993 and that they had visited her regularly thereafter, including well after her marriage in 1997. This inconsistency weighed against her;
 - ii) She had given an inconsistent account of her husband's whereabouts. She variously said that he was in jail, that he was no longer in jail and that she did not know his whereabouts;
 - iii) She had given an inconsistent account of how she came to be released from detention. On the one hand she said that she was released after her husband came to find her, and also that her uncle had arranged for her to be bailed;
 - iv) The account of escape from Eritrea by car into Sudan was vague and inconsistent. She said that she had not encountered the authorities on her route out, and then that in fact she had been stopped at a checkpoint but the soldiers took no interest in her because she was ill. Judge Holt did not accept that soldiers at an international border would ignore the Appellant because she was ill;
 - v) The account is "significantly undermined" by the fact that the Appellant declined to have her claim to have been trafficked assessed within the NRM. An assessment and additional support would have done nothing to undermine the Appellant's claims, apart from "shine light on a dishonest claim if it was not accurate";
 - vi) Section 8 of the Asylum, Immigration (Treatment of Claimants etc) Act 2004 weighed against the Appellant because she did not claim asylum in Greece after allegedly escaping from a situation of domestic servitude.
8. The appeal was thereby dismissed.

The Appeal to the Upper Tribunal

9. The first ground concerned the First-tier Tribunal's finding that the Appellant's evidence was "significantly undermined" by her reluctance to have her case referred to the Competent Authority. The parties are in agreement that the Tribunal could not rationally draw adverse inference from that matter. The Appellant had explained in her evidence that she was seeking to 'close the chapter' on her exploitation in Saudi Arabia and Greece; she did not want to talk about it and nor was she relying on it as part of her claim. She was no longer in a trafficking situation, nor at risk of that situation arising again. There was, from her perspective, nothing to be gained from entering into the NRM. The evidence about what happened in Saudi Arabia was peripheral at best.

10. The second ground is that the Tribunal acted improperly in applying s8 of AI(TC)A 2002. Mr Holmes has a number of complaints. The Appellant had, it is claimed, escaped her traffickers in Greece, and flown directly to the UK. She did not therefore pass through any third countries where it would have been reasonable for her to make a claim for asylum. It was no doubt for that reason that the Respondent had not relied on s8 in the refusal letter. The Appellant was therefore quite unaware that the Tribunal was going to invoke the provision, and omitted to make submissions on it. As I indicated at the hearing, I can find no error in the Tribunal considering a statutory provision that it is obliged to apply; it makes no difference whether the Respondent has raised it or not. What is significant is the fact that no submissions were invited on the point. Had they been, the Appellant would have had the opportunity to address the Tribunal's concerns. Before me Mr Holmes gave some indication of what his submissions might have been: the Appellant had good reason to want to get as far away from Greece as possible, and on the present state of Dublin Convention jurisprudence, there is nothing reasonable about claiming asylum in Greece.

11. The third ground concerns the First-tier Tribunal's finding that the Appellant gave inconsistent evidence about her eligibility for military service. The Tribunal, quite properly, connected this issue to whether or not the Appellant had left the country illegally, so it assumed great significance in the overall risk assessment because it went to both issues (b) and (c) identified above. At paragraph 18 of its decision the Tribunal noted the answer recorded in the Appellant's asylum interview record at Q81, where she states that after her marriage in 1997 she was 'exempted' from military service. The determination then reads:

"This earlier assertion of being exempt is in stark contrast with the appellant's evidence at the hearing when she said that she received call up papers in 1993 and was visited regularly thereafter until they stopped asking her. She went on to imply that she was punished for failing to enlist by losing her rations and also by being forbidden from working. In cross-examination she claimed that she had continued to receive call-up papers well after 1997 (ie after getting married). I am not satisfied that what the appellant described was a "*de facto*" exemption as claimed by [Appellant's Counsel] Mr Greer. There is no rational explanation for the complete change of evidence between the interview and the hearing from the appellant on this key issue in the case".

12. Before me Mr Bates agreed that looking at the interview record it is hard to say where the 'stark contrast' in evidence was. That is because almost everything that the Appellant said at the hearing, she had already said at interview. Specifically, the Appellant mentioned being subject to sanctions such as losing her rations [Q78], receiving call up papers "at least twice a year" [Q77, Q78], and that every time she received them she would have to explain her situation to the authorities [Q77]. She confirmed that being married, or having to look after disabled relatives was treated as a reason to 'exempt' you but also explained that this was not a formal 'exemption':

“I was not exempted because there is no such thing but as and when I received my call up letters from the authorities I would explain to them my family circumstances so I was literally deferred”

The Appellant had therefore already explained that she was regularly required to report for duty, or give reasons why she should not be required to do so. The only omission in the interview record was that it is not specifically mentioned that this process continued after her marriage in 1997. As Mr Holmes points out, and Mr Bates very fairly accepts, this question was not put to her. There is nothing in the interview to the effect that the regular service of call up papers ceased after she was married.

13. The fourth ground is really an extension of the third. The grounds refer to the headnote in MST and Others (National Service – Risk Categories) CG [2016] UKUT 443 (IAC) to submit that the Tribunal failed to make clear findings on whether or not the Appellant had in fact completed her military service, and if not why not. As can be seen from the passage cited above, the Tribunal rejected the suggestion that the Appellant had been given *de facto* exemption, but since the reasoning underpinning that finding is agreed to be misconceived that finding must be set aside.
14. That is the extent of the agreement between the parties. The Secretary of State invites me to set aside the Tribunal’s findings on the NRM, section 8, and whether or not the Appellant was exempt from military service. Mr Bates was not however prepared to concede ground five.
15. Ground five is that the Tribunal failed to take material evidence into account when reaching its findings on the Appellant’s claimed illegal exit from Eritrea. The Appellant said that she was taken out of Eritrea into Sudan by car. Having initially claimed that she did not encounter the Eritrean authorities on this journey she then said in cross examination that the car had been stopped at a checkpoint but the driver had said that she was ill and so they had been waived through. Mr Holmes took me to country background material which indicated that the border is porous, and that the Eritrean authorities are well aware that many people travel to Sudan for medical treatment. He submitted that the Tribunal failed to have regard to that evidence when reaching its findings on the plausibility of the Appellant’s illegal exit.
16. Had the findings of the Tribunal been based on ‘plausibility’ I would have agreed. They were not, however, so premised. The point made at paragraph 19 of the determination is that the Appellant gave inconsistent accounts about her exit. The Tribunal was plainly entitled to draw adverse inference from that. I do not find ground five to be made out.
17. The question now arises: are the cumulative errors identified in grounds (1)-(4) so material that the decision overall must be set aside? Although in his submissions Mr Bates suggested that the real question was illegal exit, it is plain

from the reasoning that the Tribunal did consider credibility in the round. Having reached strongly adverse conclusions about the matters arising in grounds (1)-(4) I cannot be satisfied that the Tribunal was not influenced by those conclusions when it came to assess the evidence about the Appellant's departure from Eritrea. Nor can I be satisfied that the other undisturbed findings (see my paragraph 7(ii)(iii) above) are such that the decision can properly stand. I must therefore set the decision aside in its entirety. The parties invited me to remit the matter to the First-tier Tribunal for hearing *de novo*. Given the extent of judicial fact finding required, I accept that this is the proper disposal.

Anonymity Order

18. This appeal concerns the Refugee Convention. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“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 to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

19. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside.
20. The decision in the appeal will be remade following *de novo* hearing in the First-tier Tribunal.
21. There is an order for anonymity.

Upper Tribunal Judge Bruce
21st June 2018