Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13741/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 31st August 2018	**On 4th March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

BA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O'Ryan instructed by Parker Rhodes Hickmotts, Solicitors
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated 13 July 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for reaching that decision were as follows:

> "1. The appellant, BA, is a female citizen of Eritrea who was born in 1987. By a decision in the Upper Tribunal which I promulgated on 24 November 2017, I returned this appeal to the judge in the First-tier Tribunal (Judge Turnock) who

had heard the appeal initially. My reasons for returning the appeal to him were as follows:

> "1. There are several challenges to the judge's decision. First, the appellant complains that the judge's reasoning was too brief. Further, the appellant asserts that the judge failed to make findings in respect of the evidence of a witness (H). The appellant also asserts that the judge failed to have proper regard to a letter sent to the appellant by her mother and drew adverse inferences from the letter as regards the appellant's credibility as a witness which should not have been drawn. Secondly, the appellant submits that the judge has not, on the basis of the factual matrix which he had established, completed an assessment of the risk of return to this appellant. Unusually, the appellant claims to have left Eritrea legally for medical treatment and not as a consequence of having been released from military service. The appellant claims that the judge assumed that, because the appellant had been given an exit visa for medical treatment, she would not in any event face risk on return. The fact remains, however, the appellant is of military service age and could be re-drafted into the Eritrean Army. Such a possibility was acknowledged by the Upper Tribunal in country guidance case MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC) at head note [11]:
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> While likely to be a rare case, it is possible that a person who had exited lawfully may on forcible return face having to resume or commence national service. In such a case there is a real of persecution or serious harm by virtue of such service constituting forced labour contrary to Article 4(2) and Article 3 of the ECHR.
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> 2. As regards the first ground of appeal, I find it has no merit. The judge carried out a thorough analysis of the evidence. He has set out in some detail the evidence given by the witness. The witness had left Eritrea some four years before the appellant herself let the country. The judge dealt with the discrepancy in the evidence given by H which did not match that evidence given by the appellant herself [40]. The judge acknowledged at [40] that the evidence of H "supported the evidence of the appellant." It is difficult to see what else the judge might have said about the evidence of H given that she could provide little assistance concerning the account and circumstances of the appellant after H herself had left Eritrea. I find that the judge has not erred in his treatment of the evidence of the witness.
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> 3. The judge dealt with the letter from the appellant's mother to the appellant at [37]. The judge was entitled to make findings in respect of the physical nature of the letter which he found to be "remarkably well preserved" for a letter which it was claimed had been written in 2009. At [54], the judge gives sustainable and cogent reasons for rejecting the authenticity of the letter. The challenge to the judge's findings regarding the letter represent nothing more than a disagreement with those findings.
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> 4. I note that there is some uncertainty as to whether or not the appellant is still married. What is clear, however, is that the appellant has children with her in the United Kingdom who are British citizens. In practical terms, it seems unlikely that she will be returned to Eritrea in the foreseeable future. However, as regards her asylum appeal, it is necessary

> to deal with the hypothetical situation in which she is returned and whether or not she would be thereby exposed to a real risk. It is at this point that the judge's decision becomes problematic. Looking at the Record of Proceedings, it appears that a submission was made that, notwithstanding the fact the appellant has left Eritrea legally, she is still of military service age and may be exposed to risk on return. That assessment has not been made by the judge. Having established the factual matrix, the judge should then have considered risk on return by reference to that matrix. Because he did not do so, his decision is incomplete. In consequence, I find that the judge has erred such that the decision should be set aside. However, in this particular case I find that, save for the challenge to the decision as regards risk on return, the judge's decision is sound. I see no reason to interfere with his findings of fact, including his findings as regards the credibility of the evidence. I direct, therefore, that the decision is returned to the First-tier Tribunal and to Judge Turnock so that he may hear submissions in respect of risk on return and complete his decision. There will be no need for him to hear any evidence in respect of those matters upon which he has made findings.
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> *Notice of Decision*
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> The decision of the First-tier Tribunal which was promulgated on 11 May 2017 is set aside. All other findings of fact are preserved. The appeal is remitted to the First-tier Tribunal (First-tier Tribunal Judge Turnock) for that judge to remake the decision."

2. The appellant now challenges the second decision of Judge Turnock. She asserts that the judge has not completed the task which I required him to undertake because he has not made a definitive finding as to whether or not the appellant would be at risk on return to Eritrea as a potential draft evader. At [37] of his decision dated 12 February 2018, Judge Turnock wrote:

> "What is not addressed by or on behalf of the appellant is why, given the appellant had a passport and an entry exit visa with no entry to show when she was required to return or that it was granted with any restriction, that would not be consistent with her having been granted an exemption from military service. If she had been exempted from military service, which I find the most probable explanation for being granted an exit visa, then she would not be considered to be a draft evader or a deserter."

3. The judge went on to find [39] that the appellant had not discharged the burden of proving that she would be at risk on return. The problem with the judge's analysis is that he has not made a firm finding of fact that the appellant has been exempted from military service. He appears to have done no more than to conclude that "the most probable explanation" was that the appellant had been exempted. It was necessary for Judge Turnock to make an unequivocal finding regarding exemption which would, in turn, have enabled him to reach a firm conclusion as regards risk on return. Mr Diwnycz, who appeared for the Secretary of State, told me that he did not consider Judge Turnock had unequivocally settled the issue as regards risk on return.

4. In the circumstances, I set aside Judge Turnock's decision promulgated 12 February 2018. Findings of fact reached by Judge Turnock in his earlier decision promulgated on 11 May 2017 shall stand. The Upper Tribunal (Upper Tribunal

> Judge Lane) will remake the decision following a hearing at Bradford on a date to be fixed.
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> *Notice of Decision*
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> 5. The decision of the First-tier Tribunal promulgated on 12 February 2018 is set aside. The Upper Tribunal will remake the decision following a hearing at Bradford on a date to be fixed (Upper Tribunal Judge Lane). Both parties may adduce additional evidence but must file at the Upper Tribunal and serve on the other party copies of any evidence upon which they may respectively seek to rely at least ten days prior to the resumed hearing."

2. At the resumed hearing at Bradford on 31 August 2018 proceeded by way of submissions only. At the end of the hearing, I reserved my decision.

3. The appellant is now divorced. She has children living with her in the United Kingdom who are not British citizens. Both parties acknowledge and agree that the appellant left Eritrea in 2008 on a valid passport. The appellant claimed that he was granted medical leave from military service. The Secretary of State (Judge Turnock in the First-tier Tribunal) did not believe that she left from military service. This appeal turns on the question as to whether the appellant if returned to Eritrea would be required to undertake military service. She remains of draft age and is now not a married woman. Mrs Pettersen, for the Secretary of State, submitted that the hypothetical return of the appellant to Eritrea would be on the basis that she would return there with her children. It was submitted that the appellant would not be required to undertake military service with minor children in her care.

4. Mr O'Ryan, for the appellant, submitted that the hypothetical return of the appellant to Eritrea did not involve the children not parties to this appeal nor did they have separate appeals themselves. He relied on the provisions of the Section 84(1)(a) of the 2002 Act (as amended):

> **'84. Grounds of appeal**
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> (1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—
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> (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;'

5. I agree with Mr O'Ryan's submission. The Tribunal is required to consider the return of the appellant as required by Section 84(1)(a) and the consequences arising from her return to Eritrea. It is likely that if the appellant were required to return to Eritrea her children would return with her such a consequence is not inevitable. As I understand Mrs Pettersen's submission, only the presence of the children together with the appellant would exempt the appellant from a requirement to undertake military service if returned. She is no longer a married woman and remains of draft service age. Leaving aside the question as to whether the appellant has been granted a permanent exemption from military service (see below), then I hold that it is not correct to apply the provision of Section 84(1)(a) as referring to both the appellant and her children. It follows that if the appellant has not been granted a permanent

exemption from military service her return (without the children on a hypothetical basis that they did not return with her) would lead to her having to undertake military service as the Secretary of State accepts would lead to a breach of Article 3 ECHR. *MST and Others* (national service – risk categories) Eritrea CG [2016] UKUT 443 (IAC) is the relevant country guidance. Headnote (11) reads:

> "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."

6. Moving on to the question as to whether the appellant has been granted a permanent exemption from military service, I refer to Judge Turnock's second determination [37]:

> "What is not addressed by or on behalf of the appellant is why, given the appellant had a passport with an exit visa there was no entrance shown when she was required to return or that it was granted with any restriction, that it would not be consistent with her having been granted an exemption from military service. If she had been exempt from military service, which I find is the most probable explanation of being granted an entry and exit visa, then she would not be considered to be a draft evader or deserter."

7. Mr O'Ryan submitted that there is credible evidence to show that the appellant had been granted leave to exit Eritrea for medical reasons. He referred to the SEF and Asylum Interview Record in particular the latter at questions 17 and 20. The appellant had given evidence that she had "passed out" and also "blacked out" and needed medical treatment outside Eritrea.

8. I have to assess this evidence on the basis of the lower standard of proof. I am aware that the appellant had not been found to be a credible witness by Judge Turnock on two occasions. I note also the appellant did not give oral evidence (which might have been tested by cross-examination) in respect of her claimed illness. Bearing in mind these matters, I am satisfied, having considered the appellant's evidence as a whole and having set this in the context of the background material relating to Eritrea, that it is reasonably likely that she left Eritrea because she was unwell. It is not clear whether she left from military service or whether any illness for which she may have been suffering has led to her being granted a permanent exemption from military service. I have considered the expert evidence produced on behalf of the appellant by Dr Seddon. Having read that evidence carefully, I agree with Mr O'Ryan's submission that it remains unclear as to whether (i) different forms of exemption from military service (temporary or permanent) actually exist (ii) whether the grant of permission to leave Eritrea whilst of military service age amounted to a *de facto* permanent exemption from military service. The evidence provides no basis for Judge Turnock's conclusion that "the most probable explanation for [the appellant] being granted an exit visa" was that she "had been exempted from military service." The appellant remains of military service age and (for the reasons which I have given above) and she would not be entitled to any exemption from

military service on account of being a married woman or because she had minor children in her care. It *may* be the case that grant of permission to leave Eritrea has in some way entitled the appellant to be exempt permanently from military service; the fact is we simply do not know. I am reminded that the appellant need prove her case only to the standard of reasonable likelihood. We do know that the Eritrean regime adopts an oppressive policy of military service and that there was no reliable evidence that permanent exemptions are issued to those who are otherwise eligible to take part in that service. In my opinion, the appellant has established that there is a reasonable likelihood that she would encounter the real risk of ill-treatment if returned to Eritrea. In the circumstances, her appeal is allowed.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 25 November 2016 is allowed on asylum grounds and human rights grounds (Article 3 ECHR).

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 him or any member of their 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 12 November 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 12 November 2018

Upper Tribunal Judge Lane