Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/08222/2019(V)
PA/08225/2019(V)

THE IMMIGRATION ACTS

Decided at a Skype for Business Hearing Via Field House On 19th January 2021	**Decision & Reasons Promulgated On 15th February 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MJM (1)
IJM (2)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:

For the Appellant:	Mr B Hawkins, of Counsel, instructed by Wimbledon Solicitors
For the Respondent:	Mr T Lindsay, Senior Home Office Presenting Officer

Introduction

1. The appellants are siblings and citizens of Eritrea born, it is found by the First-tier Tribunal, in 1995 and 1996 in Riyadh in Saudi Arabia. They came to the UK on 21st March 2017. They claimed asylum on the same day, and their applications were refused on 13th August 2019. Their appeals were dismissed on all grounds by First-tier Tribunal Judge Hatton in a determination promulgated on the 13th January 2020. Permission to appeal was granted and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision which is appended to this decision as Annex A. I confirmed with the parties that neither of them had objections to the decision I took under Rule 34 finding an error of law in light of the decision in R (JCWI) v President of UTIAC [2020] EWHC 3103 (Admin). The matter comes before me now to remake the appeal.

2. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly this hearing takes place via Skype for Business, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing.

3. This re-making hearing focuses solely on the issue of whether the appellants are at real risk of serious harm on return to Eritrea due to an obligation to perform military service. It was accepted by Mr Lindsay that if the appellants could show to the lower civil standard of proof that they would have to perform military service if returned to Eritrea they were entitled to succeed in their protection appeals. He explicitly did not seek to argue that the appellants could find safety by returning to Saudi Arabia where they had previously held residence permits as family members of their father.

4. Directions were issued with the decision finding an error of law promulgated on 18th September 2020. A response was received on behalf of the appellants from their counsel, Mr B Hawkin, but not from the respondent. It was decided by Mr Hawkin that he did not need to call further evidence from the appellants, and so the appeal proceeded by way of submissions only. The appellants' solicitors had lodged a large bundle of background evidence at a late stage, but Mr Hawkin accepted that none of this went to the only issue to be determined as outline above, and he did not refer to it in his submissions at all. It was discussed with both parties as to whether the expert report of Dr Imranali Panjwani, which was before the First-tier Tribunal, was of assistance in the determination of the appeal before me but ultimately Mr Hawkin decided that it was not something which would assist the Upper Tribunal.

Submissions – Remaking

5. It is argued by Mr Lindsay, for the respondent, that as the appellants were not found to be credible witnesses therefore they cannot, to the lower civil

standard of proof, show that they are at risk of forced labour/military service as outlined in MST and Others at paragraph 431(7)(iii) because they have not shown that they do not fall into the exceptions to risk, namely: persons who are seen by the regime as giving Eritrea valuable service abroad or in Eritrea; persons who are family members of the regime's military or political leadership; or children of persons who fled Eritrea during the War of Independence

6. It is argued by Mr Lindsay that the First-tier Tribunal found that the appellants were born, in 1995 and 1996, and raised in Saudi Arabia and were granted lawful residence with their family to live there until 8th February 2020. They were not found to have been deported to Eritrea in 2016 and did not experience persecution there as they had claimed, and either they had not been there at all, or it was possible that the appellants' had travelled to Eritrea for two weeks and stayed there without issue. As a result, it is submitted, it was clearly found that the appellants had lied about their ages and their history and produced false documents to support their fabricated history of persecution, and so were rightly found by the First-tier Tribunal not to be credible witnesses. They only succeeded in convincing the First-tier Tribunal in relation to matters proven by evidence from the respondent.

7. As a result, it is argued, this appeal cannot succeed by virtue of the appellants own evidence as no weight can be placed upon it. Reliance is placed on the decision of the Supreme Court in MA (Somalia) v SSHD [2010] UKSC 49, particularly at paragraphs 21 to 48, in support of the contention that these appellants cannot succeed because the burden is on them to show that they do not fall into the three categories of exception as they lack any country of origin/ documentary evidence which could show that they do not fall within these exceptions, and given the lack of weight to be afforded to their own evidence. It is accepted that many Eritreans do not fall within these categories providing exemption from military service but this alone is not sufficient for the appellants to show to the lower civil standard that they do not.

8. Mr Lindsay did not, however, strongly argued that they cannot show that they are not persons who have given Eritrea valuable service abroad given their age. However, it is argued that there is no corroborating evidence of the work their father does in Saudi Arabia and so that they have failed to show that they are not family members of the regimes' military or political leadership. They could be the children of a diplomat, military attaché or a spy based in Saudi Arabia. The work permit documents for their father do not specify that he does a particular job, and there is no evidence that this is not the type of work permit held by those involved with diplomatic work in Saudi Arabia. Further it is also possible that their father travelled backwards and forwards from Saudi Arabia to Eritrea so was not permanently abroad. It is argued that there is also no evidence that they are not the children of

persons who fled Eritrea during the war of independence as there is no corroborative evidence of when their parents left Eritrea, and their own evidence that this was in the mid 1990s is not reliable as they are not credible witnesses and no weight should be given to that of their uncle, Mr S O, as he has not given oral evidence or even signed his statement.

9. It is argued for the appellants by Mr Hawkin that they would be at real risk of being forced to perform military service in Eritrea if returned there because they do not fall within the exceptions. They are not from an important family connected to the Eritrean military or political leadership. It is said by the appellants that their father was a driver for a big medical services company in Saudi Arabia who took businessmen from the airport in Riyadh to the company headquarters and who later had a different job filling water tanks with clean water. It is argued that it is not even possible that the appellants' parents are military or political leaders because such people would not be based abroad, and there is clear and accepted evidence that the appellants had work permits to be in Saudi Arabia and had lived there with their parents, possibly bar a couple of weeks in 2016. It is also argued that the family of the appellants did not leave Eritrea due to the war of independence between 1962 and 1991 but simply to work in low level employment in Saudi Arabia in the mid 1990s, just before the birth of the appellants. This is the evidence of their uncle, S O, although it is accepted that he did not give evidence and his statement was unsigned. In any case this exception is put forward with less certainty in the country guidance than the first two so it should be found that the appellants have done sufficient to show that they do not fall within it.

10. At the end of hearing I reserved my decision.

Conclusions – Error of Law

11. MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 finds that: "*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"*; and further at 7(iii)*: " 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*

12. The appellants are citizens of Eritrea and that they are of an age where they would be liable for military service, the upper age limit for military service

for men being 54; and the appellants having been found to have been born and lived all their lives in Saudi Arabia and so clearly not to have completed military service. It is rightly accepted by the respondent therefore that these appellants can succeed in their protection appeal if they can show that they do not fall into one of the 7(iii) categories.

13. Mr Lindsay has drawn my attention to MA (Somalia) v SSHD [2010] UKSC 49, which was relied upon in the submissions of Mr Jarvis challenging the application for permission to appeal. The Supreme Court finds that where an appellant tells lies he may well be unable to satisfy even the lower civil standard of proof as his evidence will not enable the Tribunal to make the relevant findings, and that this will be the case even, as in these circumstances, where the appellant needs only to show he does not fall into a number of small categories which not many appellants would be likely to be included within. It is also said that where an appellant tells lies they will only likely to be saved by very strong general evidence. I am guided by MA(Somalia) in determining this appeal, and start from the position that the appellants own evidence is to be given no weight beyond the facts accepted by the First-tier Tribunal, which in turn were those founded on the respondent's evidence, and that they will only be able to succeed if sufficient accepted country of origin evidence exists to show that they do not fall within the exemption categories or for other reasons relating to the facts found by the First-tier Tribunal it is demonstrated to the lower civil standard of proof that they do not.

14. The appellants are found to be 25 and 26 years old. They came to the UK in March 2017 when they were 21 and 22 years old, and have been found to have lived in Saudi Arabia with their family all of their lives, bar a possible couple of weeks, as their father had a work permit there and they were entitled to remain as his family. The appellants, I find, are therefore very young and in addition they are not well educated people: their educational achievements, as evidenced by their certificates for their examination results in the UK in the home office bundle before the First-Tier Tribunal, are not good, with the exception of their ability in Arabic which is clearly explained by their having lived all their lives in Saudi Arabia. Mr Lindsay did not argue strongly that the appellants should be found to fall within this category. I find that they have shown to the lower civil standard of proof on the basis of their youth and lack of substantial educational achievement in the UK that they are not persons who have given valuable service to the Eritrean government, either in Eritrea or abroad, and thus do not fall within the first exemption from military service.

15. The second category of exemption raises the question as to whether the appellants are trusted family members of the military and political leadership of Eritrea. This firstly raises the question as to what is meant by the Eritrean military or political leadership. Can diplomats or other servants of the Eritrean state living abroad properly be seen as part of the leadership

of Eritrea, or is this category of persons confined to senior members of the Eritrean government and army who are based within Eritrea? The Upper Tribunal in MST at paragraphs 244-245 found that Eritrea is a closed, one party state, and that there was no functioning legislature and the National Assembly was suspended. Eritrea has, since independence, been led by Isaias Afwerke, who is president and commander in chief of the armed forces. The dictionary definition of "leadership" is the leaders, or those in charge, of an organisation or country. Whilst it is possible that the appellants' father was not a low paid worker in Saudi Arabia with a work permits as they contend, and that he might have been a diplomat/military attaché or spy possibly moving between that country and Eritrea (although it is the position of the respondent in the reasons for refusal letter at paragraph 45 that the appellants' father lives and works in Saudi Arabia), I do not find that such people can properly be defined as those in charge of Eritrea, in light of the information about its political system as set out in MST and because such people are categories of civil servant who carry out the business of government rather than leaders deciding upon the policy of government. I find therefore on this basis that the appellants are not trusted family members of the military and political leadership of Eritrea.

16. Further, I find it would be highly unlikely that if the appellants' father was a trusted military or political leader in Eritrea that he would not have preferred to use legal routes, such as study, business or work, to move his sons to the UK if that had been his wish. I further find that it would be most improbable that he would have sent them to the UK to claim asylum using a most precarious illegal route via the Jungle in France with all the attendant dangers that would have exposed them too. It is clear that the respondent accepts that they travelled to the UK via Italy and France, as set out at paragraph 51 of the reasons for refusal letter and I find that there is evidence, which was before the First-tier Tribunal in the respondent's bundle, from Rosie Pope of Safe Passage UK in a signed statement of truth dated 6th February 2017 that she encountered both of the appellants in the Jungle as part of her work for Legal Shelter, as they were on a list of children who were been considered for transfer to the UK. It is also accepted by the respondent that the appellants were brought to the UK under EU Dublin III provisions from the reasons to refusal letters at paragraphs 27/ 29.

17. I am therefore satisfied to the lower civil standard of proof, having considered both the definition, the country of origin evidence set out in MST and the risks inherent in the appellants' route to the UK that the appellants do not fall within the exclusion from being at risk from military service based on their being trusted family members of the military and political leadership of Eritrea.

18. The final possible category by which the appellants could be exempt from risk from having to do military service is if they are family members of

those who left Eritrea during the war of independence, which lasted from 1962 to 1991. This is described more cautiously, as a possible exception requiring more case specific analysis. The appellants' own evidence is that their parents left Eritrea after this war in the mid 1990s, but I cannot place weight on this due to the negative credibility findings by the First-tier Tribunal. The evidence of their uncle, Mr S O, is that the appellants' parents married in Sudan in 1993 and travelled to Saudi Arabia in 1994. Again, I cannot place weight on this evidence, despite the potential consistency with the appellants position, as the statement is not signed and Mr S O, gave no evidence to the First-tier Tribunal or before me. Turning to the decision in MST at paragraphs 351-353 I find that the evidence in the country guidance case indicates that it was envisaged that the group potentially gaining protection in this way were the Eritrean diaspora who have settled abroad during the war of independence and naturalised in their country of exiled residence, or perhaps who have obtained settlement in that country, and who make up a substantial number of people going to and from Eritrea for holidays. They would of course be returning voluntarily and seemingly with the protective element of their other nationality or residency rights, or their useful generation of funds through tourism. I do not find that the appellants have other residency rights as the evidence before me is that their Saudi residence permits expired in February 2020, and it was not argued by Mr Lindsay that they could now return to Saudi Arabia, and I find that they hold no other nationality. Given the caution with which this exemption is put forward I find that the appellants have shown to the lower civil standard of proof that they do not fall into this category of person excluded from risk of military service on the basis of the material elucidating it in MST.

19. It follows that I find that the appellants are entitled to succeed in their protection appeal based on their liability to do military service placing them at real risk of serious harm under Articles 3 and 4 ECHR if returned to Eritrea.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I remake the appeal by allowing it under Articles 3 and 4 ECHR.

Signed *Fiona Lindsley* 25th January 2021
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellants are siblings and citizens of Eritrea born, it is found by the First-tier Tribunal, in 1995 and 1996 in Riyadh in Saudi Arabia. They came to the UK on 21st March 2017. They claimed asylum on the same day, and their applications were refused on 13th August 2019. Their appeals were dismissed on all grounds by First-tier Tribunal Judge Hatton in a determination promulgated on the 13th January 2020.

2. Permission to appeal was granted to the Secretary of State by Upper Tribunal Judge Coker on 3rd April 2020 on limited grounds on the sole basis that it is arguable that the First-tier Tribunal erred in failing to engage with the issue of military service.

3. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules to decide matters fairly and justly directions were sent out to the parties by email on 3rd April 2020 by Judge Coker with her grant of permission to appeal seeking written submissions on the assertion of an error of law with a view to determining that issue on the papers, and giving an opportunity for any party who felt that a hearing was necessary in the interests of justice to make submissions on that issue too. Responses were received from both parties: from Mr I Jarvis, Senior Presenting Officer, dated 21st July 2020 for the respondent and from Mr B Hawkins, of Counsel, dated 15th July 2020 and 29th July 2020 for the appellants.

4. I must determine whether it is in the interests of justice to decide this matter without a hearing, and if so then determine whether the First-tier Tribunal has erred in law. The respondent does not object to the matter being determined on the papers submitting that the appeals relate to a narrow issue perfectly capable of being resolved by written argument. The appellants request an oral hearing as it is said that the appeal is of overwhelming importance to the appellants given that it concerns their fundamental human rights. It is argued that in these circumstances counsel ought to be able to make oral submissions via video link on the core issues and other relevant matters. I give weight to the fact that serious human rights issues are raised in this appeal, but find that it is appropriate that this stage of the proceedings is dealt with on the papers as all the necessary arguments are put forward in writing and it is indeed a narrow discrete issue which can fairly and justly be decided in this way, with the advantage of providing swifter justice for the parties.

Submissions – Error of Law

5. As noted above the grant of permission to appeal was only in respect to it being arguable that the issue of military service had not been engaged with by the First-tier Tribunal. With respect to this issue it is argued by the appellants that they are found by that Tribunal to be of an age where they would clearly be liable to undertake military service in Eritrea and that in accordance with MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 that return to Eritrea was therefore likely to be a breach of the Refugee Convention and/or Articles 3 and 8 of ECHR. In the further submissions of 29th July 2020 it is argued that the error of law is highly material as the appellants do not fall within any of the exceptions to risk category outlined in MST and Others.

6. In the submissions for the respondent it is argued that permissions is only granted on the one ground in a way compliant with Safi & Ors (permission to appeal decisions) [2018] UKUT 388 and so there is no scope for the appellants to persist with the grounds other than the one related to military service. This is not challenged in the submissions put forward on behalf of the appellants.

7. It is argued by the respondent that it is properly found by the First-tier Tribunal that the appellants were born, in 1995 and 1996, and raised in Saudi Arabia and were granted lawful residence with their family to live there until 8th February 2020. They were not found to have been deported to Eritrea in 2016 and did not experience persecution there as they had claimed, and either they had not been there at all, or it was possible that the appellants' had travelled to Eritrea for two weeks and stayed there without issue. As a result, it is submitted, it was clear that the appellants had lied about their ages and their history, and produced false documents to support their fabricated history of persecution.

8. It is accepted for the respondent that the First-tier Tribunal failed to deal with the issue of military service directly in the decision. It is argued however that this was not a material error of law as the appeal could not have been allowed with reference to Articles 3 and 4 of the ECHR in any case for the following reasons. The appellants did not leave Eritrea illegally as they were born in Saudi Arabia. They have been found not to be credible witnesses and to have lied about having difficulties in Eritrea. They therefore cannot, to the lower civil standard of proof, show that they are at risk of forced labour/military service as outlined in MST and Others at paragraph 431(7)(iii) because they have not shown that they do not fall into the exceptions to risk namely: persons who are seen by the regime as giving Eritrea valuable service abroad or in Eritrea; persons who are family members of the regime's military or political leadership; children of persons who fled Eritrea during the War of Independence.

Conclusions – Error of Law

9. It is not argued by the respondent that the First-tier Tribunal determined the issue of whether the appellants would be at risk of a breach of their fundamental human rights by virtue of their obligation to perform military service in Eritrea. It is clearly accepted by both parties that the First-tier Tribunal found that the appellants are citizens of Eritrea and that they are of an age where they would be liable for military service, the age limit for military service for men being 54, and the appellants having been found to have been born and lived all their lives in Saudi Arabia and so clearly not to have completed military service. It is not the case that the lack of an illegal entry means that the appellants cannot be at real risk of serious harm for this reason if returned to Eritrea as it is found in MST and Others:

> *"11. 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."*

10. The respondent argues that the appellants have not shown that they do not fall within one of the exceptions to risk from military service at 7(iii) of the MST and Others country guidance head note but I do not find that there are any findings in the decision of the First-tier Tribunal which would lead to that conclusion. There are no findings that the appellants or there family are seen by the Eritrea regime as giving valuable service at home or abroad; there are no findings that they are family members of the regime's military or political leadership; or that they are children of persons who fled Eritrea during the War of Independence.

11. As such I find that it cannot be said that the error of law, in not determining the issue of whether the appellants are at real risk of serious harm if returned to Eritrea by reason of their having to perform military service, was not potentially material to the outcome of the appeal, as the relevant findings of fact have not been made and so the outcome of the appeal might be different, notwithstanding the issues with the appellants' credibility, particularly as the above factors appear to be ones which might be shown, in part at least, with reference to country of origin materials.

12. For the sake of clarity the decision of the First-tier Tribunal is set aside but all findings of the First-tier Tribunal are preserved bar that at paragraph 77 of the decision that refers in passing to military service and any other finding in so far as it may be taken as referring to a lack of risk of serious harm on return due to the appellants obligations to complete military service.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I adjourn the remaking of the appeal.

Directions

1. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], the parties are required to co-operate with the Tribunal in identifying the specific legal issues and the scope of the factual disputes.

2. I therefore make the following DIRECTIONS:

   (i) The parties shall, not later than **21 days after this notice is sent out** (the date of sending is on the covering letter or covering email), send to each other and file with this Tribunal their written submissions on:

   a. the legal issues, propositions and areas of factual dispute which the Tribunal should resolve in remaking the appeal. They appear, in this case, to be relatively narrow in scope, namely how it is argued that the appellants are/ are not at real risk of serious harm on return to Eritrea as a result of the obligation to do military service and how it is argued that they do not/ do fall within the exceptions to such risk;

   b. the nature of the evidence that they believe is necessary for determination of the legal issues, propositions and areas of factual dispute identified;

   c. their views on whether a resumed hearing is necessary, or whether remaking can be resolved on the basis of written evidence and submissions;

   d. if they believe that a hearing is necessary, their ability to participate in a resumed hearing via Skype, or another form of remote hearing, or their preference for a face to face hearing with reasons why this is to be preferred, and the available dates of their representatives and parties to attend a hearing in the period from 14 September to 18 December 2020.

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

e. The parties' representatives are required to confirm that they can participate in a hearing via Skype; and also to confirm the up-to-date contact details of the individual representative with conduct of the case, including Skype address and direct telephone number, at which they can be contacted.

(ii) On receipt of the parties' submissions, the Tribunal will then consider whether a case management hearing is necessary or whether the appeal can simply be listed for a remaking hearing, in one of the three potential forms outlined above, with a direction that the appellant file and serve a consolidated bundle of relevant documents 10 days prior to that hearing. Any case management hearing is likely to be either by telephone conference call or Skype.

(iii) Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. Service on the Secretary of State should be to [email] and to the appellant by way of any email address apparent from the service of these directions.

Signed *Fiona Lindsley* 28th August 2020
Upper Tribunal Judge Lindsley