IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-001709
First-tier Tribunal No:
PA/01081/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

OMMS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee , Counsel instructed by AASK Solicitors Ltd
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

Heard at Field House on 6 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a citizen of Eritrea. His date of birth is 1 July 1984.

2. In a decision dated 8 February 2023 I set aside the decision of the First-tier Tribunal (Judge I Ross) to dismiss the Appellant's appeal on protection grounds. My error of law decision reads as follows:-

"14. Ms Willocks-Briscoe conceded that the judge erred in law because he did not apply MST. She departed from the position of the SSHD in the Rule 24 because she went on to concede that the error was material and therefore the decision should be set aside and remade applying MST.

15. The judge found that the Appellant had not established that he exited Eritrea unlawfully. The judge found that the Appellant was exempt from national service on the basis that he had entered the UK as a businessman. The judge erred in conflating those who may be able to exit Eritrea lawfully and those who are exempt from national service. This was agreed by Ms Willocks-Briscoe. He did not properly apply the guidance in MST. I set aside the decision to dismiss the Appellant's appeal.

16. I discussed with the parties the remit of a resumed hearing in the Upper Tribunal. There are sustainable and therefore preserved findings made by the First-tier Tribunal. There is no reason to go behind what the Judge found at [25]:-

> 'I find that it is likely that the appellant has been deliberately vague about when specific events occurred and that he has not provided a true and accurate account. I find that it is likely that, notwithstanding that the appellant was born and brought up in Saudi Arabia, he has always maintained his Eritrean nationality and passport and was able to enter and leave Eritrea legally, probably as a result of being a businessman. Given the references made by the appellant in his witness statement to his father's connections and his father's ability to bribe officials, I also find that the appellant is well connected and has a network of people who can assist him in Eritrea'.

17. The judge also found that the 'untruths told by the appellant to obtain his visa to the UK seriously undermines his credibility and prevents me from knowing which parts of his evidence is true and accurate and which parts have been made up'. The judge's findings that the Appellant left Eritrea lawfully and that he would not be viewed as a draft evader are preserved.

18. The issues for the Tribunal on the next occasion are as follows:-

    (1) Whether despite the Appellant having exited Eritrea lawfully he will face having to resume or commence national service.

    (2) Whether the Appellant is exempt from national service.

19. The parties' request for an adjournment was granted to allow them to formulate skeleton arguments in order to address MST".

3. I made the following directions:-

"20. I make the following directions which were communicated orally to the parties at the hearing (save (iii)and (iv)):-

(i) Should the Appellant intend to rely on further evidence including a further witness statement he must make an application pursuant to Rule 15(2A) of the 2008 Procedure Rules by 31 January 2023.

(ii) The parties must prepare skeleton arguments which must be served not later than fourteen days before the resumed hearing dealing with any evidence submitted pursuant to Rule 15(2A) of the 2008 Procedure Rules.

(iii) The UT will decide at the resumed hearing any applications under Rule 15(2A) at the hearing. The parties should prepare for the hearing on the basis that any evidence subject to a Rule 15 (2A) application is admitted.

(iv) The Appellant's solicitors must inform the UT if an interpreter is required not later than 7 days before the resumed hearing".

4. The Appellant is a citizen of Eritrea. He was born and raised until 2019 in Saudi Arabia. As a matter of fact the Appellant on his own evidence returned to Eritrea in 2014. He arrived in the UK in July 2019. He made an asylum claim on 12 August 2019. His appeal against the decision of the SSHD refusing the application following further submissions was dismissed by the First-tier Tribunal. It was not accepted by the First-tier Tribunal that the Appellant would be at risk on return as a result of his involvement in political activities. It was not accepted by Judge Ross that he left Eritrea illegally. The Appellant was issued with an Eritrean passport on 30 January 2019.

5. The representatives both relied on skeleton arguments and made oral submissions. I will engage with the arguments in my findings and reasons.

6. If the Appellant would be required to do national service on return to Eritrea, he would be at risk on return properly applying MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 443. The headnote of MST reads as follows:-

"***Country guidance***

1. Although reconfirming parts of the country guidance given in MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 59 and MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190 (IAC), this case replaces that with the following:

2. 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.

3. 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.

4. The categories of lawful exit have not significantly changed since MO and are likely to be as follows:

(i) Men aged over 54

(ii) Women aged over 47

(iii) Children aged under five (with some scope for adolescents in family reunification cases

(iv) People exempt from national service on medical grounds

(v) People travelling abroad for medical treatment

(vi) People travelling abroad for studies or for a conference

(vii) Business and sportsmen

(viii) Former freedom fighters (Tegadelti) and their family members

(ix) Authority representatives in leading positions and their family members

5. 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.

6. It remains the case (as in MO) that failed asylum seekers as such are not at risk of persecution or serious harm on return.

7. 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 (iii) 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.

(i) 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.

(ii) 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 (iii).

(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.

8. 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…'

9. 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.

10. 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.

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.

12. 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".

Findings and Reasons

7. I accept that the Tribunal in MST did not conclude that a person who had exited lawfully disposed of the question of whether they might be subject to military service on return. If this were the case, the UT would not have needed to consider whether risk arises from having to commence or resume national service.

8. I accept that the exemption categories for lawful exit and entry are not the same as exemptions from national service. This First-tier Tribunal fell into error in this respect. I also find that the Respondent's skeleton argument discloses similar error. The First-tier Tribunal found it probable that the Appellant was able to exit and enter Eritrea as a result of being a businessman which is not a statutory exemption from national service.

9. Many of those who are able to lawfully exit are also exempt from national service. However, there are also categories including that are allowed to leave lawfully but do not necessarily fall into a defined exemption from national service.

10. There are two sources of risk on return. There is a risk of persecution to those who left unlawfully and who will be perceived as draft evaders. Those who left unlawfully will not be perceived as draft evaders if they are broadly speaking; (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 (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the War of Independence.

11. The judge found this Appellant did not leave Eritrea unlawfully. He found that he was probably granted a business visa. He also said that *given the references made by the appellant in his witness statement to his father's connections and his father's ability to bribe officials, I also find that the appellant is well connected and has a network of people who can assist him in Eritrea*. I do not find that the judge was specially addressing category 2 or else he would have made this clear. Moreover, the finding he made does not amount to an exemption in the terms of category 2. (Furthermore the Appellant was not found to fall into category at para 3 (ix) of the headnote of MST.) I do not understand this to be the Respondent's case. From the findings made by the judge, it is clear that he found that the Appellant fell into category 3. MST does not say that those who fall into category 3 are exempt from national service.

12. It is a fact that a person is not necessarily exempt from national service because he is not regarded as a draft evader (this was where the First-tier Tribunal erred). There are no statutory exemptions other than on medical grounds. However, it is important to note what the UT said at [294].

> "We note that there is wide recognition that (separate from the legal possibilities for exemption, which all agree are limited by legislation to medical cases), a significant number of people appear able to obtain exemptions based on contacts and/or bribes. We take the principal thrust of the evidence regarding such avenues as being that national service is not necessarily an unavoidable experience for everyone in Eritrea".

13. I have considered whether this Appellant is one of the significant number of those able to avoid national service, despite not falling into a statutory exemption. It is necessary for me to take into account the preserved findings of the judge in respect of contacts and/or bribes. MST does not say that all those who do not fall within the statutory exemption on medical grounds are at risk. There must be a nuanced assessment of the Appellant's circumstances, taking into account that he has been found to be a witness lacking in credibility. The Appellant's evidence at [20] of his witness statement was that his father had friends in Eritrea and one of his childhood friends was Sebhat Ephrem who was at

that time the Minister of Defence. The Appellant's account was that on the day his brother was deported to Eritrea in 2014 Sebhat Ephrem arranged for his men to meet with his brother so that he would not be badly treated. Elsewhere in his evidence the Appellant said that his father had a couple of friends in Eritrea. He has submitted evidence that Sebhat Ephrem was the victim of an assassination attempt and that he is no longer in a position of power.

14. The factors that would support that the Appellant would not be at risk are that he has had in at least up until 2014 a connection with someone who was then in a senior government position and that the family has in the past successfully bribed officials. I also take into account that the Appellant returned to Eritrea in 2014. That involved taking a risk. The judge rejected the reasons that he gave for this. I have considered the Respondent's case that this suggests that the Appellant has a network of people within Eritrea because of his ability true to traverse smoothly both when entering and exiting. In the Respondent's view this suggests that there is likely to be a link to the regime whether through the Appellant's father service whilst in Saudi Arabia or through their links with trusted family members within those groups. However, it is also relevant to consider that the Appellant is not so connected with the regime that he was found to have exited lawfully on the basis that he fell into the category at para (ix) of the headnote in MST; however, I take into account what MST said about business visas at [325]. While MST acknowledged that there are unofficial exemptions, the UT was unable to give any concrete guidance concerning who would benefit from these because of the arbitrary and random nature of exemptions generally. I take into account that this Appellant has not been found to be a credible witness in respect of the substance of his claim and that he took a risk in 2014 when he returned. However, from this and the findings that have been made by the First-tier Tribunal it is not possible for me to infer, on the basis of a historic link to the regime and the payment of bribes (and that the Appellant has an Eritrean passport issued in 2019) that this Appellant would on return to Eritrea in 2023 fall into a random unofficial exemption from national service. The SSHD's case, with which the First-tier Tribunal agreed is that the Appellant is a business person which would have allowed him to leave Eritrea lawfully. The risk that the Appellant took in 2014 when returning to Eritrea must be considered in this context.

15. I have considered what was meant by the UT at [11] of the headnote by the reference to a *rare case*. I do not accept Mr Lee's submission that this is a reference to the rarity of people being granted visas and therefore having exited lawfully as opposed to it rarely being the case that those who have exited lawfully would be at risk of having to resume or commence national service on forced return. The UT found that the categories of those granted visas are restricted but the numbers would not support that the grant of a visa is rare. It would however be rare that those who exited lawfully would have to commence of resume national service because most of the visa categories apply to those who are exempt from national service. However, I accept that this does not apply to the category of business people. Business people are not exempt from national service. I accept that the Appellant's case is rare in the sense intended by the UT in MST.

16. The Appellant is not at risk on return on account of his political real or perceived opinion. His account was rejected by the First-tier Tribunal and he did not leave Eritrea unlawfully. He is not a draft evader and nor would be perceived as such. However, I find applying the lower standard of proof, that this Appellant would be at real risk of having to commence national service on return. While he

has been found to lack credibility, he has not been found to have left Eritrea lawfully in a category (*Authority representatives in leading positions and their family member)* which would suggest a very strong with the regime. The Appellant's family has a historic connection with the regime, as found by the First-tier Tribunal. However, I must decide the position on return to Eritrea at the date of the hearing. Bearing in mind the nature of the regime, I find that there is a real risk or high likelihood of this Appellant being forced to do national service on return to Eritrea which would be contrary to and Article 3 of the ECHR.

17. The appeal is allowed under Article 3 ECHR.

Notice of Decision

The appeal is allowed under Article 3 ECHR.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 June 2023