IAC-FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06369/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 March 2016	**On 8 April 2016**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr B Rawat, Counsel instructed by the Government Legal Department
For the Respondent: Mr G Denholm, Counsel instructed by Immigration Advice Service

DECISION AND REASONS

1. I shall refer to the respondent as the appellant as he was before the First-tier Tribunal. He is a citizen of Eritrea and his date of birth is [ ] 1989. He made an application for asylum and this was refused by the Secretary of State on 24 March 2015. He appealed and his appeal was allowed by

Judge Thornton following a hearing on 22 June 2015. Permission was granted to the Secretary of State by Upper Tribunal Judge Jordan on 4 August 2015. Thus the matter came before me.

2. The appellant's evidence (in a nutshell) is that he is a deserter and illegally exited Eritrea. The Secretary of State accepted illegal exit, but did not accept that he was a deserter because of perceived internal inconsistencies in his evidence. The application was refused by the Secretary of State because it was decided that there had been a significant change in the country situation since MO (illegal exit - risk on return) Eritrea CG [2011] UKUT 00190 and MA (Draft evaders - illegal departures - risk) Eritrea CG [2007] UKAIT 00059 and reliance was placed on the Country Information and Guidance Reports of March 2015 which were informed by the Danish Immigration Service's ("the DIS") Fact-Finding Mission Report ("FFM report") in justifying a departure from the country guidance cases.

3. The Upper Tribunal in MO concluded that the general position adopted in MA, namely that a person of or approaching draft age, i.e. aged 18 or over and not above the upper age limits for military service, being under 54 for men and under 47 for women, and not medically unfit and who is accepted to have left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, subject to limited exceptions. The Upper Tribunal decided that the great majority of failed asylum seekers are likely to be perceived as having left illegally and this would mean, save for very limited exceptions, that they face a real risk of persecution or serious harm. Thus applying the guidance in MO (in the light of the concession made by the Secretary of State that the appellant has illegally exited Eritrea) the appellant's appeal fell to be allowed on asylum grounds.

4. The FFM report published in November 2014 recorded observations on penalties for illegal exit and likely treatment on return. The sources in the report were not identified by name, save Professor Kibreab, but referred to as international organisation or western embassy A, B and C etc. There was also an unnamed source described as a well-known intellectual. Reliance was placed by the Secretary of State on the conclusion in the report that an illegal exiter/draft evader/deserter who had paid 2% income tax and signed an apology letter would not face problems and that the authorities had become more relaxed and understanding towards the young people who have left Eritrea. Thus the conclusions indicated that a significant change had taken place since MO.

5. The Secretary of State's position is that the country guidance cases are inconsistent with the more up-to-date evidence, namely the March 2015 reports and FFM report, and should no longer be followed. Applying the March 2015 reports and the conclusions in the FFM, the appellant would not be at risk.

6. Professor Kibreab has distanced himself from the FFM report and following this the DIS has removed reference to him and his evidence in the report and reissued the report (in December 2014). Professor Kibreab and others (including UNHCR, UN and HRW) have extensively criticised the findings of the FFM.

7. The appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge of the First-tier Tribunal Thornton in a decision promulgated on 6 July 2015. The judge heard evidence from the appellant and considered whether there should be a departure from the country guidance cases.

8. The judge made the following findings at [14] and [15]:

> "14. It is therefore paragraph 12 of the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2 that is relevant here. In stating in the Reasons for Refusal Letter that I was allowed to depart from the country guidance cases of *MO* and *MA* in light of new evidence, the Respondent was relying on the Danish Immigration Service's Fact-Finding Mission (FFM) Report, published in November 2014 and updated in December 2014 (quoted in the Country Information and Guidance, Eritrea, National (including military) Service, 2.8.1 - 2.8.2, March 2015). However, in a press release on Tuesday 9 December 2014 the Danish Immigration Service said that it had changed its mind about the conclusions in its report, issuing a press release saying that this was due to reactions to its report raising doubts about the report; and that Eritreans were likely to be granted asylum in Denmark even if they weren't personally persecuted. Moreover, the findings in the DIS Report are not supported by recent background evidence from other sources, for example from Human Rights Watch and the UN Human Rights Report on Eritrea. (Appellant's bundle pages 6 – 32).
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> 15. I therefore find that I do not have before me such credible fresh evidence as to allow me to depart from the country guidance caselaw of *MO* and *MA*."

9. It is asserted by the Secretary of State that the judge failed to properly consider the FFM report and failed to give reasons for rejecting it. It is asserted that the evidence that was before the judge was not properly examined and analysed. It is asserted that the judge inaccurately stated that the DIS changed its mind about the conclusions of the report. The report was amended after the press release, but it has not been retracted. The reference to Professor Kibreab and his evidence has been removed from the report. Mr Rawat submitted that the grounds essentially amounted to a reasons challenge.

10. The appellant did not provide a bundle for the hearing before me. However, the Secretary of State provided a bundle which included the appellant's bundle that was before the First-tier Tribunal (and index). The following documents were before the judge;

    1. A document entitled "Statement on EU Asylum and Aid Policy to Eritrea of 31 March 2015". This document is signed by various academics including Professor Kibreab and the authors indicate that the FFM report has been the source of much controversy in Denmark after Professor Kibreab declared that he had been misquoted and that although the report has not been officially withdrawn its conclusions are no longer used as a reference for policy in Denmark.

    2. A document from Human Rights Concern Eritrea expressing concern about the findings of the FFM.

    3. A report from HRW dated 17 December 2014 entitled "Denmark: Eritrea Immigration Report Deeply Flawed - European Governments Should Rely on UN Reports, Support UN Inquiry". It is asserted that the FFM report is largely based on interviews with anonymous diplomatic and other sources in Eritrea and contains contradictory and speculative statements about Eritrea's human rights situation. It is asserted that the sources often qualify their statements about Eritrea's human rights noting that there is no independent access to detention centres and that the fate of people returned to Eritrea is unclear, but this is not reflected in the conclusions of the FFM. It is asserted that there is no indication that the authors of the report interviewed victims or witnesses of human rights violations in Eritrea and a prominent Eritrean academic consulted for the report has publicly criticised it.

    4. A press release from the DIS of 9 December 2014 documenting communication between them and Professor Kibreab. It is stated that the DIS received an email from Professor Kibreab in which he expressed objections to the report. Corrections and additions were made following this. On Tuesday 25 November 2014 the report was published and a copy sent to Professor Kibreab who sent the DIS an email in which he expressed his gratitude for a well-written and informative report. On Friday 28 November 2014 the DIS received an email from Professor Kibreab in which he expressed objections to the FFM report. On the same day the DIS received a copy of an email from Professor Kibreab addressed to a number of professionals in which he claimed that the DIS attributed information to him which was taken out of context. The same day the DIS asked Professor Kibreab to forward to them his objections, but he did not respond to this.

    5. A newspaper article of 10 December 2014 entitled "Denmark admits 'doubts' about Eritrea report" and in this document. It is reported that

the DIS has been under heavy fire since the report's release and the DIS now says that the feedback "raises doubts" and Eritreans can expect to be granted asylum in many cases. It is also stated that the DIS has changed its mind about the conclusions of the much criticised report after the report was criticised, by its only named source, Professor Kibreab. It is stated that according to the DIS sending deserters of Eritrea's compulsory military service back home does present a danger after all and the article states that in a press release the DIS stated that the reaction to its report "raises doubts about whether there are risks to people returning to Eritrea after illegally leaving the country and avoiding national service".

6. A document from UNHCR in which examples are given of where the FFM report ascribes statements to interlocutors that cannot be traced to their statements. The report gives four examples of this, one of which relates to Professor Kibreab. It refers to the following conclusion in the FFM report,

> "It is now possible for evaders and deserters who have left Eritrea illegally to return if they pay the 2% tax and sign the apology letter at an Eritrean embassy. Kibreab was aware of a few deserters from the national service who have visited Eritrea and safely left the country again."

The report states that according to the documented conversation that the authors of the FFM had with Professor Kibreab, he followed this sentence with the following qualification: "These are invariably people who have been naturalised in their countries of asylum." This qualification is not, according to UNHCR, included in the main text of the report on any of the three occasions that the statement is quoted. There are three other examples of similar problems with the report which do not relate to Professor Kibreab.

7. A printout from EIN summarising the UN human rights report on Eritrea which was published on 8 June 2015. It is summarised as follows, "UN finds Eritrea responsible for systematic, widespread and gross human rights violations, calls for international protection for those fleeing". The summary by EIN states, amongst other things, that the FFM report followed a Fact-Finding Mission undertaken due to a large increase in Eritrean asylum seekers in Denmark and that two DIS employees who were critical of the report resigned in protest.

11. The judge, in my view, properly directed herself in relation to the circumstances when a judge can depart from a country guidance decision. By any account the judge properly concluded that the findings of the FFM were not supported by the evidence from HRW and the UNHCR report. The judge did not summarise the conclusions of the reports from the various organisations, but there was no need for her to do so. I accept the judge has conflated the press release of 9 December 2014 and the

document from a Danish newspaper of 10 December 2014. However, I do not find that it is material. Whilst I accept that the quote from the newspaper report is not a direct quote from the DIS in the context of a press release, it is capable of undermining the findings of the FFM. It was a matter for the judge what weight to attach to it. The judge was entitled on the evidence before her to conclude that the DIS had changed its position in relation to the conclusions made by the FFM (whether or not the report had actually been withdrawn).

12. Whilst the judge may have confused the report from UNHCR and the summary of the UN report (EIN), I am satisfied that she took into account the evidence produced by the appellant and properly considered this in the context of the FFM. Both pieces of evidence are capable of undermining the FFM report. The judge was entitled to attach weight to the summary of the UN report. The Secretary of State's case was not advanced on the basis that the summary was inaccurate.

13. There is no reason to believe that Judge Thornton did not have the full press release of 9 December 2014 which documents the communication between Professor Kibreab and the DIS. Whilst the report has not been withdrawn by DIS there are significant criticisms of it which go beyond the issue relating to Professor Kibreab. The judge was entitled, on the evidence before her, to conclude that the background evidence did not support the FFM report. Albeit they are brief, the reasons given by the judge are adequate and grounded in the evidence. It was not necessary for her to engage with each and every piece of evidence in her written decision. There was a significant quantity of material that was capable of undermining the findings of the FFM report. The grounds amount to a disagreement with the findings of the judge.

14. The appeal of the Secretary of State is dismissed and the decision of Judge Thornton to allow the appeal on asylum grounds is maintained.

Notice of Decision

The Secretary of State's appeal is dismissed and the decision of the First-tier Tribunal to allow the appeal is maintained.

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 his 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 Joanna McWilliam Date 24 March 2016

Upper Tribunal Judge McWilliam