EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Eassie
Lord Menzies
Lord Emslie

[2008] CSIH 62
XA25/06

OPINION OF THE COURT

delivered by LORD EASSIE

in

Application for leave to Appeal

by

N B E (Eritrea)
Appellant;

against

A decision of the Asylum and Immigration Tribunal promulgated on 31 October 2005

_____

Act: Caskie; Drummond Miller, WS.
Alt (The Secretary of State for the Home Department); Lindsay; Solicitor to the Office of the Advocate General for Scotland

26 November 2008

Introduction

[1] The appellant is an Eritrean national who arrived in the United Kingdom on 1 September 2000. Initially she was a dependant on a claim for asylum made by her sister, but on 7 May 2004 she applied directly for asylum in the United Kingdom. The Secretary of State for the Home Department refused to grant her asylum. She therefore exercised her right under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to appeal to an adjudicator.

[2] Before the adjudicator the appellant advanced a claim to remain in the United Kingdom on the basis of both the 1951 Refugee Convention and the European Convention on Human Rights as incorporated into domestic law by the Human Rights Act 1998. Put very briefly, the appellant's description of the circumstances in which she left Eritrea was to the effect that her father had been clandestinely active with the ELF. When certain close relatives were killed, he and his daughters left for Ethiopia, where the father thereafter suddenly disappeared and has not been found again. The adjudicator was not persuaded by the account given by the appellant that she had any well-founded fear of persecution for a refugee convention reason and he refused the asylum claim. He did however consider that there was a real risk that if the appellant were returned to Eritrea she might be maltreated in a way which would infringe Article 3 ECHR. The adjudicator therefore allowed the appeal on human rights grounds.

[3] The Secretary of State then appealed to the Immigration Appeal Tribunal ("IAT") against the adjudicator's allowance of the human rights appeal. In terms of section 101 of the 2002 Act appeal to the IAT was confined to an appeal on a point of law. The appeal by the Secretary of State was not determined prior to the coming into operation of the Asylum and Immigration Tribunal ("AIT") and accordingly it became subject to the transitional provisions regarding pending IAT appeals. For present purposes nothing really turns on those provisions since it is accepted by both parties to this appeal that on a reconsideration by the AIT, as a first and essential requirement, the AIT had to decide whether the adjudicator had made a material error of law - rule 31(2)(a) of the Asylum & Immigration Tribunal (Procedure) Rules 2005. The AIT held that the adjudicator had made a material error of law; it then proceeded to allow the appeal by the Secretary of State; and to reverse the adjudicator's decision.

(There was no cross appeal by the current appellant respecting the adjudicator's refusal of the asylum claim). The central issue in this appeal is whether the error claimed in the Secretary of State's grounds of appeal, and subsequently accepted by the AIT, was properly a material error of law.

The adjudicator's decision

[4] With that introduction to this appeal it is convenient to turn to the basis of the adjudicator's decision, in so far as devoted to the human rights claim. In the course of her evidence before the adjudicator, the appellant disclosed that when she left Eritrea she was 22 years of age. That was an age at which, it was evident from the background materials, she would have been liable to conscription for national service. She stated however in evidence that she had not received any papers calling her up to perform national service. The hearing before the adjudicator was held on 18 October 2004. There was available to the adjudicator a number of recently published reports on the human rights situation in Eritrea, which he duly considered.

[5] First, there was an Amnesty International document dated 26 May 2004. The adjudicator discusses this in paragraphs 45 and 46 of his determination:-

> "45. There was produced to me an Amnesty International document being an extract from the full annual report and this indicated that torture continued to be used against some political prisoners and as a standard military punishment. Army deserters and conscription evaders were said to be tortured in military custody. They were said to be beaten, tied hand and foot in painful positions and left in the sun for lengthy periods. Reference was made to prisoners being kept in overcrowded shipping containers, in unventilated, hot

and unhygienic conditions and to prisoners being denied adequate food and medical treatment.

46. The Amnesty document from which I am quoting is dated 26th May, 2004 and in relation to refugees it says that most of the 100,000 or more Eritrean refugees in Sudan resident there for up to 30 years appealed against losing their refugee status as a result of the UNHCR cessation of refugee status in 2002 for pre-1991 and 1998-2000 war refugees. Amnesty noted that some 232 Eritreans who were deported by Malta in September/October 2002 were detained on arrival in Eritrea. Women, children and the elderly were reportedly released but the remainder were tortured and detained without charge or trial."

There was also a UNHCR document of January 2004, which also included discussion of the fate of the Eritreans deported from Malta to whom the Amnesty Report had referred. The adjudicator treats this report in paragraphs 50-52:

"50. There was produced to me the UNHCR position on return of rejected asylum seekers to Eritrea. UNHCR recommended in January 2004 that asylum claims submitted by Eritrean asylum seekers should undergo a careful assessment to determine their needs for international protection. UNHCR recommended that states refrain from all forced returns of rejected asylum seekers to Eritrea and grant them complementary forms of protection and stayed until further notice.

51. According to the UNHCR document 233 persons were deported from Malta to Eritrea. 170 of them were reported not to have sought asylum whereas 53 had been rejected in the asylum procedure (which was not known to UNHCR at the time). Apparently, those deported to Eritrea were reportedly

arrested immediately on arrival in Asmara and taken to detention incommunicado with the Eritrean authorities neither acknowledging the detentions nor revealing the whereabouts of the detainees to their families or to the public. Subsequent reports suggested that those with children and those over the age for conscription may have soon afterwards been released but the remainder were kept in incommunicado detention and secret places described as halls made of iron sheets and underground bunkers. According to different sources, UNHCR say that the detainees were deprived of their belongings, subjected to forced labour, interrogated and tortured.

52. I appreciate that Article 3 involves a high threshold but I consider that if someone were at risk of suffering incommunicado detention and being treated in the manner referred to in the UNHCR document in relation to those returned from Malta, that the Article 3 threshold would be met."

There were also reports from the US State Department and a UK fact finding mission to which the adjudicator refers in paragraph 53:

"53. Eritrea is a country which appears to have a poor record on human rights. The US State Department report apparently referred to Eritrea continuing to commit serious abuses. A UK fact-finding mission to Eritrea published its report in April of 2003 and stated that one western embassy in Asmara had described the general human rights situation within Eritrea as quite bad from the point of view that dissidents were taken into detention without trial and there was a general lack of democracy."

[6] In addition to those documents there was before the adjudicator a recent decision by the IAT, chaired by the Honourable Mr Justice Ouseley, namely *MA (Female draft evader) Eritrea CG* [2004] UKIAT 00098. It will be necessary to

examine this decision more closely at a later point but for the present we simply set out what the adjudicator says about *MA*:-

> "47. There was produced to me a copy of the decision of the Immigration Appeal Tribunal in 00098. Paragraph 16 of the Tribunal determination refers to the UNHCR 'position on the return of rejected asylum seekers to Eritrea'. Reference was made to the reports of severe ill-treatment against deserters and evaders, to the widespread searches and the fatalities which had in the past resulted from resistance during such searches. Information was apparently provided about those who were deported from Malta. It seems that detention took place without the detention being acknowledged. The conditions of detention were said to be congested, unsanitary and uncomfortable leading to disease and malnutrition which had led to some deaths. There were reports of some being tortured.
>
> 48. The Tribunal said in paragraph 17 of their determination that UNHCR had concluded that the human rights situation had deteriorated in the last two years, that the deportees from Malta may have faced persecution and that it could not be excluded that future deportees would not face persecution (*sic)*. Asylum claims were said to require careful consideration and UNHCR had recommended against the forced return of failed asylum seekers and in favour of them being granted another form of temporary protection.
>
> 49. The Immigration Appeal Tribunal said that the UNHCR recommendation for temporary protection while the situation was reviewed in mid-2004 was weighty."

[7] Having considered all these materials the adjudicator expressed his conclusion in paragraph 55 as follows:

"55. I consider that there is a real risk that these appellants on return might be treated in the same way as the individuals who were deported from Malta. I consider that an Article 3 claim by these appellants is well-founded. I shall allow the human rights appeals under Article 3."

The appeal/reconsideration

[8] As already mentioned, the Secretary of State sought and was granted leave to appeal against the allowance of the human rights claim. The grounds of appeal are in these terms:

"1. It is submitted that the objective evidence described at paragraphs 48, 49 and 50 does not demonstrate a real risk or reasonable likelihood of mistreatment contrary to Article 3 of the ECHR to this claimant and in the event of her return to Eritrea. The adjudicator has thus applied the wrong standard of proof in allowing this appeal.

2. The adjudicator inferred at paragraph 52 that returnees to Eritrea face a real risk of article 3 mistreatment. It is submitted that this inference is unsupported by the objective evidence.

3. At paragraph 55 the adjudicator has not explained why the claimant would face any risk of Article 3 mistreatment on her return to Eritrea.

4. It is submitted in light of the foregoing that the adjudicator has erred in law and that the approach of the Tribunal in *SE Eritrea* [2004] 00295 is to be preferred".

[9] At this point it is appropriate to note that between the date of the hearing before the adjudicator and the promulgation of the adjudicator's decision on 17 November 2004, the IAT published a decision *SE (Deportation - Malta - 2002 -*

General Risk) Eritrea CG [2004] 00295. The Tribunal in that case had before it most of the materials before the Tribunal in *MA* but also some additional, more recent, material. Reaching a different assessment of those materials from that reached in *MA*, the differently constituted Tribunal in *SE* stated (paragraph 27) that:

> "(1) We do not consider that the Tribunal determination in MA was intended to establish that all returnees to Eritrea are at risk;
>
> (2) the Tribunal position on this issue before and after this decision remains that the mere fact of being a returnee to Eritrea does not mean that someone will face a real risk of serious harm".

[10] While the Secretary of State's grounds of appeal made reference to this decision, it was of course not before the adjudicator at the hearing, having only been published after the date of the hearing. In its decision in the present case, to which we shall come in greater detail, the AIT said expressly, in paragraph 9, that the oversight of the adjudicator to note the decision in *SE* following the closure of the hearing (which, if he had noted it, would have indicated a need to reconvene the hearing), did not amount to a separate error in law. Before us, counsel for the Secretary of State similarly did not suggest that the omission of the adjudicator to note the publication of this decision after the date of the hearing and to re-open the hearing constituted any error of law.

[11] Accordingly, whether the adjudicator committed what may properly be categorised as an error of law has to be assessed having regarding only to what was available to him at the time of the hearing, which did not include the Tribunal decision in *SE*.

[12] Parties were at one in considering that the basis on which the AIT in the present case bore to identify a material error of law by the adjudicator was to be found essentially in paragraph 6 of its determination to the following effect:

> "We consider that the respondent's grounds of appeal are made out. There are manifest shortcomings in the Adjudicator's reasoning. While his determination does contain an explanation for why he considered that the Maltese returnees had met with persecutory treatment, he nowhere explains the basis of his assessment that the two appellants would meet a similar fate. Secondly, to the extent that he sought to base himself on Tribunal case law, he was correct to note that the Tribunal Country Guideline case of ***MA*** had expressed concern about the significance for returnees of the fate of the Maltese returnees. But that decision was not authority for the proposition that all returnees or female returnees of draft age were at risk. As the Tribunal has noted in subsequent cases, ***SE, GY (Eritrea - Failed asylum seeker) Eritrea [2004] UKIAT 00327*** *and* ***IN (Draft evaders - evidence of risk) Eritrea CG [2005] UKIAT 00166*** in particular, ***MA*** only found a real risk to female draft evaders. In our view the Adjudicator's mistaken approach to the significance of the fate of the Maltese returnees constituted a material error of law."

The AIT then went on to say in paragraph 7 that a factor contributing to the adjudicator's "misreading" of *MA* was his failure to note the *SE* case, but as already mentioned, the AIT then confirmed its view that the failure to note that case was not a "separate" error in law.

The parties' respective positions

[13] Counsel for both parties gave us well presented submissions, with helpful

reference to the statutory provisions; case law on what might constitute an error in law; the *sequelae* to *SE*; and the precision or specification that might be required in grounds of appeal. Unfortunately, it was not possible to conclude the submissions at the diet of the hearing of the appeal initially set down, which had to be continued to a further diet when all the *dramatis personae* could be reassembled. This is but one factor, among others, which has contributed to the highly regrettable delay in the disposal of this appeal. In the event however, once the issues were teased out and tested in the debate before us we think that the parties' positions can be summarised relatively shortly.

[14] In essence, counsel for the appellant disputed that there was no evidential basis for the adjudicator's decision that returning the appellant to Eritrea presented a risk of a human rights infringement, contending instead that the materials in the various reports respecting the Maltese returnees could properly justify the adjudicator's concern and his conclusion. The conclusion which he reached was one which he was entitled to reach. Further, the decision in *MA*, if properly understood and analysed, was to the effect that the applicant in *MA* was in a similar factual situation to that of the present appellant since the claim by *MA* to have been called up was rejected. The adjudicator could not be faulted for following that "country guidance" case. It was apparent that, having considered the material before the Tribunal in *MA*, and the conclusion reached by the Tribunal in that case, the adjudicator reached the same conclusion, namely that in the circumstances then obtaining, having regard to such reports as were available, there was a real risk that persons of an age at which they were liable to conscription and who were failed asylum seekers might be subject to a similar fate. The adjudicator's reasoning was amply explained and the "absence of reasons" ground which the AIT had sought to identify in the present case failed.

[15] Likewise in essence, the submission for counsel for the Secretary of State came to be firstly that the adjudicator had failed to give adequate reasons for considering that this appellant was at risk. In that respect counsel sought to examine some of the reported content of the materials available to and discussed by the adjudicator, and by the Tribunal in *SE*. The adjudicator, he said, had failed to have regard to the information that the women, children and elderly were released, although he accepted that on some reports that only occurred after three months of detention. The second principal submission was to the effect that the adjudicator was wrong to think that the decision in *MA* might apply to anyone other than a clearly identified "draft evader". In other words, he advanced a contrary view of *MA*, adopting *SE*.

Discussion

[16] As an important element in its conclusion that the adjudicator had fallen into a material error of law the AIT in the present case advanced the view that the adjudicator had misread or misunderstood the decision in *MA*. According to the AIT, that decision applied only to "draft evaders", and was not authority for the view that all female returnees of draft age were - at the time of the hearing - at risk. We find it convenient first to consider this aspect of the of the AIT decision.

[17] As counsel for the appellant pointed out to us, in *MA* the applicant for asylum advanced her claim on the basis that she had been required to report for compulsory national service, and had thus been called up, before she left Eritrea. Importantly, however, as counsel also pointed out, the adjudicator in that case rejected the claim by *MA* that she had received any call up papers. The case therefore did not proceed upon the factual basis that *MA* was a person who had been called up for national service

and who had left the country to avoid that call up. While we note that the adjudicator in *MA* thereafter proceeded on the basis that she would treat the appellant as either a draft evader or simply a person who required to complete military service on her return - see paragraph 3 - as counsel for the appellant pointed out, the latter basis equiparated with the position of the appellant in the case before us, namely someone who might be required to complete national service.

[18] Having noted the adjudicator's willingness to treat the claim on alternative bases, the IAT in *MA* thereafter discussed the claim to protection under the refugee Convention on those alternative bases. It reached its conclusion that the claim under that convention should be rejected in paragraph 22:-

> "22. The Appellant would not be persecuted for a Convention reason; her claim to a religious objection has been properly rejected and there is no complaint which can be made about that. There is no evidence that her illegal exit and failure to respond to the call up papers would lead her to have any political opinion imputed to her which would put her at risk of persecution. The issue is whether she would be at real risk of treatment which breached Article 3."

[19] The IAT then turned to the human rights aspect of a possible breach of Article 3 ECHR and said this:

> "23. The UNHCR recommendation for temporary protection while the situation is reviewed in mid 2004 is weighty. But the material which is the most troubling is that which concerns the forced return from Malta of those who were of draft age, and were in part at least failed asylum seekers. They appear to be held incommunicado, without charge or visits in conditions which do not appear to be simply the spartan ones to which CIPU referred for

civilian prisons. Although the UNHCR Report refers to '*dwellings'* where they are detained, the conditions which are described include forced labour, beatings, torture, and a lack of medical care, food or sanitation leading to disease and in some cases death. These conditions are quite likely to involve a breach of Article 3. Because this evidence relates to the experience of those who were actually returned, significant weight has to be given to it. We do not know all of their circumstances, why they left Eritrea and what measures were taken to prepare their return with the Eritrean authorities. The evidence is credible. There is no other evidence as to what happens to those who are returned and no better evidence as to what happened to those returned from Malta.

24. At present it appears to us from that evidence that there is a real risk that the Appellant would be subjected the same treatment as those deported from Malta and that her rights under Article 3 would be breached. That position may change with the UNHCR review or with other evidence as to how someone in the position of the Appellant would be treated on return, or other evidence as to the position of those deported from Malta.

25. Accordingly her appeal against the refusal of asylum is dismissed and her appeal in relation to human rights is allowed."

[20] We have much difficulty in understanding why what was said in those paragraphs must be read as applicable only to "draft evaders" - that is to say, those who had left Eritrea after being served with call-up papers. The UNHCR recommendation for temporary protection was made respecting failed asylum seekers generally. Moreover, what particularly weighed with the Tribunal in *MA* was the reported fate of those recently deported from Malta to Eritrea. The Tribunal noted that

the deportees were "of draft age, and were in part at least failed asylum seekers". Importantly it does not appear from what is narrated of the terms of the UNHCR report in question that those who were deported from Malta were to any material extent "draft evaders". Counsel for Secretary of State submitted to us that since the asylum issue had been considered by the IAT on the alternative bases (cf paragraphs 6 and 20) that the applicant MA was either a draft evader or simply someone of draft age, the passages relating to her human rights claim must be read as applying only with the inclusion of the former basis, namely that of her being a person who was a "draft evader", but to the exclusion of the latter basis. We are unable to accept that submission. No doubt the refugee claim was considered on alternate bases but the fact is that the adjudicator rejected the testimony from MA that she had been served with any call up papers. What moved the Tribunal to uphold the human rights claim was essentially the fate of those deported from Malta; those deportees were not "draft evaders" and nowhere in its discussion of the human rights claim in *MA* did the Tribunal suggest that the upholding of the human rights claim proceeded upon the applicant, MA, being a "draft evader". As the Tribunal in *MA* remarked of those deported from Malta, they, the Tribunal, "do not know all of their circumstances, why they left Eritrea and what measures were taken to prepare their return with the Eritrean authorities."

[21] The view which we thus take of the decision of the IAT in *MA* does not accord with what a differently constituted panel of the IAT stated respecting the *MA* decision in its later determination in *SE*. For the reasons already indicated (in contrast to what is said or indicated at paragraph 19 of the decision in *SE*), we do not consider that on a proper reading of the *MA* decision the references in paragraphs 6 and 20 of the *MA* decision, occurring in the discussion of the asylum claim, are properly to be carried

forward into the very different area of the human rights claim which was upheld on reports of the fate of those deported from Malta. In our view, on a reasonable reading of the decision in *MA*, what was said in that respect was not confined to "draft evaders" but applied more generally.

[22] Our attention was drawn to the first sentence in paragraph 20 of the Tribunal's decision in *SE* -

> "As already noted, the objective materials before the Adjudicator when he dealt with this case, albeit they did contain references to and commentary on the 2002 events affecting some 220 Maltese returnees, did not compel a conclusion that returnees generally were at risk...."

This sentence is possibly ambiguous as to whether it refers to the adjudicator in *SE* or the adjudicator in *MA* but, in either event, we agree with counsel for the appellant in his submissions to us that the question for the tribunal in *SE* was not whether the materials before the tribunal in *MA* "compelled" a conclusion, but the very different question whether the materials entitled the Tribunal in *MA* to draw the conclusions which the Tribunal drew. Further, and importantly, it is to be observed that the guidance which that Tribunal sought to give in *SE* proceeded albeit on a somewhat "fudged" basis on the basis of further, more recent, materials respecting the situation in Eritrea.

[23] We therefore reject the contention that the adjudicator dealing with the present appellant's claim committed an error of law in his reading, or his interpretation, of the relevant part of the IAT determination in *MA*. Notwithstanding what the Tribunal in *SE* subsequently stated in that later decision, with the possible benefit of further materials, we consider that the adjudicator in this case was entitled to found upon the reasoning in *MA* as being supportive of his decision.

[24] The remaining ground upon which it is said that the adjudicator fell into material error of law is a complaint of deficiency in the giving of reasons as to why the appellant was at risk, were she to be returned. This ground is in many ways interlinked with the contention that the adjudicator mis-read or mis-interpreted the reasoning of the Tribunal in *MA* in so far as it dealt with the human rights aspects of the claim by *MA*.

[25] In our view the adjudicator's decision in the present case is perfectly intelligible and no informed reader could be in any real doubt as to the basis of his decision. As respects his consideration of the human rights aspect of the case he had before him the various reports which we mentioned earlier. It is evident that he had particularly in mind the fate of those deported from Malta as discussed in the reports before him, especially the UNHCR report and the UNHCR recommendation against all forced return of asylum seekers for the time being. As we have already indicated, the deportees from Malta were not "draft evaders" but included people of both sexes whose age made them liable for conscription and failed asylum seekers. The appellant was, of course, in that age band and, if returned, would be a failed asylum seeker. The adjudicator therefore had before him materials which might justify his conclusion that if the appellant were to be forcibly returned there was a real risk that she might suffer maltreatment similar to that suffered by those deported from Malta. In our view the conclusion was one which the adjudicator was entitled to reach. He reached it on parity of reasoning with that of the IAT, including its president, in its decision, on basically the same materials, in *MA*. Put shortly, while those materials may not have dictated, as an inevitable conclusion, that the appellant would be mistreated in the same way as the returnees from Malta, they nonetheless allowed the conclusion, drawn by the adjudicator, that there was a real risk of that happening. The same

materials had been similarly construed by the Tribunal in *MA*. In these circumstances we consider that the adjudicator was entitled to reach the decisions which he did.

[26] For all of these reasons we do not consider that the adjudicator's decision was flawed by any material error of law. The appeal must therefore be allowed.

[27] There was discussion before us as to the appropriate disposal in the event of our allowing the appeal. Counsel for the Secretary of State moved us, in that event, to remit the case to the AIT for consideration *de novo* on the basis that the adjudicator's decision was as he put it "not a very satisfactory decision". Quite what he meant by that was a topic upon which he appeared unwilling to elaborate. Counsel for the appellant submitted that in the event of the AIT's decision being erroneous, technically one had to consider whether the Secretary of State's grounds of appeal properly raised any legitimate issue which had not been dealt with by the AIT and which might merit reconsideration by the AIT. But, in the event, were we to decide as we have effectively held, there was no substance in the grounds of appeal and bearing in mind the difficulties of litigating matters decided four years ago, it would be proper for the Court to exercise its power under section 103B(4)(b) and simply decide that no error in law existed.

[28] We are unmoved by the submission from counsel for the Secretary of State that matters should be remitted to the AIT on the basis that the adjudicator's decision was "not a very satisfactory decision". We do not consider that there is anything in the Secretary of State's grounds of appeal which in any way goes beyond the issues argued before us. Accordingly, we simply decided that the adjudicator's decision was not vitiated by any error of law and should stand *ex tunc*. We say nothing about its practical standing now in light of the changing circumstances in Eritrea and what may

have developed in the terms of the appellant's personal circumstances, or her immigration future in the light of this decision.

Decision

[29] We conclude that we should grant leave to appeal, allow the appeal and simply quash the decision of the AIT of 31 October 2005.