IN (Draft evaders – evidence of risk) Eritrea CG [2005]UKIAT OO106

IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
Date of hearing: 20 February 2005
Prepared: 28 February 2005

Date Determination notified
24th May 2005

Before:

Dr H H Storey (Vice President)
Mr H J E Latter (Vice President)
Dr A U Chaudhry

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation:
For the appellant : Mr C Jacobs, Counsel, instructed by White Ryland
For the respondent : Mr M Blundell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Eritrea, appeals against the determination of an Adjudicator, Mr Warren L. Grant, notified on 8 September 2004, who dismissed his appeal on both asylum and human rights grounds against a decision made on 26 May 2004 giving directions for his removal following the refusal of his claim for asylum.

2. This appeal raises the issue of the nature and extent of the risk of persecution or treatment contrary to Article 3 for actual or perceived draft evaders being returned to Eritrea and, if there is a risk, whether it extends to all those of draft age. This case will review in the light of the current evidence the country guidance cases *MA (female draft evader) Eritrea CG* [2004] UKIAT 00098, *SE (deportation – Malta – 2002 – general risk) Eritrea CG* [2004] UKIAT 00295 and the reported case *GY (Eritrea – failed asylum seeker) Eritrea* [2004] UKIAT 000327, *AT*

(return to Eritrea – article 3) Eritrea [2005] UKIAT 00043 and *NM (Draft evaders – evidence of risk)* Eritrea- [2005] UKIAT 00073. This appeal is reported as country guidance on these issues.

Background to the appellant's claim

3. The appellant is an Eritrean citizen. His account can briefly be summarised as follows. He was born on 1 April 1983 and was brought up in Ginda. He attended a private school from seven until the age of fifteen. He claimed that in 1991 his father left home. The family did not know where he had gone and it was not until the end of 1997 that his mother and uncle found out that his father had been arrested by the Eritrean government. His father had been a longstanding member of the ELF. In September 1998 when the appellant was at home, government armed police came and took him to do military service against his will. He was taken to Sawa training camp. Two days after he arrived he challenged one of the officers, demanding to know why he had been brought to do military service against his will. He was then detained and ill-treated. After four weeks he and two others were able to escape. They ran to a nearby road where they met a caravan which took them to Kassala on the border between Sudan and Eritrea. He was helped by one of his father's friends who took him to Khartoum where he stayed until arrangements were made with an agent who provided him with documents so that he could travel to the United Kingdom.

4. He left Sudan on 22 February 1999, entering the United Kingdom illegally. He claimed asylum on 26 February 1999. His application was refused for the reasons set out in the Secretary of State's letter dated 24 May 2004. It was his view that the appellant's unwillingness to undertake military service did not give rise to a claim under the Refugee Convention. The appellant had failed to provide any evidence that he would suffer disproportionate punishment for draft evasion. The application was refused on both asylum and human rights grounds. The decision to remove the appellant from the United Kingdom to Eritrea was made on 26 May 2004.

5. The appellant appealed against this decision to an Adjudicator who heard the appeal on 1 September 2004. He did not find the appellant to be a credible witness. He did not believe that he had been forcibly recruited into the armed forces in 1998 nor that he had escaped from detention. He rejected the appellant's story about his father's membership of the ELF and his subsequent detention. The appeal was dismissed on asylum grounds. The Adjudicator went on to consider the claim on human rights grounds. He summarised his findings in paragraph 17 of his determination as follows:

> 'The appellant is a failed asylum seeker. It is however implicit in Mr Jacobs' argument that the appellant is an Eritrean aged twenty-one who has not carried out his military service and that, on return, he would be subjected to the treatment meted out to returnees

> from Malta who are referred to in paragraph 23 of the IAT determination in *MA* Eritrea. I note however that in that case the appellant had been required to report at the age of sixteen for military training. The appellant in our appeal did not receive any call up papers and I have rejected his story about being forced to do military service. Even though he may well have been living in Eritrea during the time when fifteen year olds were subjected to forcible recruitment, he was not according to my findings ever recruited. He is someone who is liable to carry out military service. Mr Jacobs supplied me with a copy from the Africa director of HRW dated 3 August 2004 concerning refugees repatriated from Libya. It does not say what has happened to them but it refers to returnees from Malta. Mr Jacobs has helpfully supplied me with a marked bundle and I have read through it. The appellant is not someone who has fled Eritrea to avoid military service. He would have served in the armed forces to defend his country. I believe that this fact or attitude distinguishes him from the Malta returnees who were draft evaders. Upon return he will be able to declare his willingness to serve. As a result I find that there is no reason to believe that he will be subjected to the treatment referred to in paragraph 5.70 of CIPU. I do not believe that either of these Articles is engaged.'

The grounds of appeal

6. The grounds of appeal argue that the Adjudicator erred in finding that the appellant was not a draft evader. They repeat the assertion that the appellant was forcibly conscripted in September 1998 and argue that the Adjudicator erred in finding that the appellant's case was distinguishable from that of the Maltese returnees. It is also argued that he erred in finding that the appellant would willingly serve in the Eritrean army. He had never asserted that he would but only stated that he would fight to defend his country if invaded. The Adjudicator erred in finding that the appellant would be able to avoid ill-treatment as a suspected draft evader by declaring an intention to serve in the military upon return. The grounds argue that the Adjudicator misdirected himself on the objective evidence. The UNHCR have not alleged that only actual as opposed to perceived draft evaders were ill-treated amongst the Maltese returnees. As a failed asylum seeker of military age, the appellant would be suspected on return of draft evasion and would be interrogated and ill-treated as a suspected draft evader. The grounds rely on the UNHCR report dated 20 January 2004 and the country guidance case of *MA*. They further argue that the Adjudicator failed properly to consider the evidence relating to the return of 110 returnees to Eritrea from Libya who were detained and ill-treated as suspected draft evaders.

7. When granting permission to appeal, the Vice President commented that the Adjudicator's treatment of the facts could not be faulted but he granted permission on the basis that the grounds raised properly arguable issues as to the assessment of risk in the light of the facts relating to the Maltese and Libyan returnees and the Tribunal's determination in *MA*.

The submissions on behalf of the appellant

8. Mr Jacobs submitted that the Adjudicator had erred in law by distinguishing the facts in this case from those in *MA* where the Adjudicator had rejected the claim that the applicant had received her call up papers when she was sixteen but had accepted that she would be required to do military service. The second error of law was the failure to take into account the background evidence which showed that those of draft age would be perceived as draft evaders. The Adjudicator also erred in his finding that the appellant would be able to avoid the possibility of ill-treatment by declaring his willingness to undertake military service. He had also failed to take into account the implications arising from the treatment of not only the Maltese but also the Libyan returnees.

9. Mr Jacobs submitted that *MA* was correctly decided. The evidence about the Maltese returnees illustrated the risk to those perceived as draft evaders. This risk was confirmed by Amnesty International, Human Rights Watch and the UNHCR. All those returned from Malta were treated in the same way and no distinction was drawn between actual and perceived draft evaders. The fate of the returnees from Libya confirmed these concerns and demonstrated that the fate of the Maltese returnees could not be treated as a one-off incident. There was evidence that many Eritreans had fled the country in an attempt to evade military service. The authorities were responding by attempting to prevent those of draft age leaving Eritrea, actively seeking out suspected draft evaders or deserters and routinely ill-treated them. The reasoning in *SE* was undermined by the fact that the Tribunal failed to consider the evidence relating to the returnees from Libya. The Tribunal in *GY* had also failed to address this issue.

10. The risk to the appellant arose because he was of draft age. As someone who had not undertaken military service, he would face a real risk of detention and ill-treatment. That fear would not be removed by the appellant declaring his intention to serve in the military on return, which in any event was an intention he did not have. There was nothing in the background evidence to support a proposition that draft evaders could avoid ill-treatment on return by agreeing to undertake military service. The situation in Eritrea was such that the authorities treated draft evaders as political opponents and any ill-treatment arose for a Convention reason. The authorities attributed a political opinion to those who sought to evade the draft.

Submissions on behalf of the Secretary of State

11. Mr Blundell submitted that there was no error of law in the Adjudicator's determination. The appellant had not been given permission to a challenge the Adjudicator's findings of fact. His finding was that the appellant had not fled Eritrea to avoid military service and in these circumstances his position was distinguishable from the Maltese returnees who were draft evaders. The Adjudicator was entitled to distinguish between those who were draft evaders and those who would be required to undertake military service: paragraph 12 of *SE*. The assessment of risk on return must be set against the background of a large number of returns to Eritrea from Sudan: CIPU Report April 2004 paragraph 6.151-4. The UNHCR had facilitated the return of a large number of those who had fled from Eritrea and that must have included many of draft age.

12. There was no real likelihood of the appellant being treated in the same way as the Maltese returnees. where the circumstances of their return would have drawn them to the attention of the Eritrean authorities. It should be noted that many of those returned had failed to claim asylum in Malta. The returns from Libya demonstrated failures by the Libyan authorities towards those recognised as refugees but the evidence from the returns provided an insufficient factual basis to establish the risk category argued for in the present appeal that all returnees of draft age would be at risk. When assessing what would happen to this appellant, there was no evidence to support a contention that he would be at risk as someone potentially liable for military service. The Adjudicator had found that he had no good reasons for refusing to undertake such service. The evidence from Dr Campbell confirmed that someone who was prepared to carry out their military service would not be at risk.

13. Eritrea was not involved in hostilities with Ethiopia. Military service would involve fitness training and reconstruction work. There was nothing for most people to object to in principle. There was evidence that those who refused to undertake such service were put in detention but there was no proper basis for a finding that this appellant either would refuse to undertake military service or that he would have any good reason for doing so.

14 Before considering the Adjudicator's determination, the Tribunal will summarise the background evidence before us including evidence post-dating the hearing before the Adjudicator even though that evidence in so far as it relates to issues of fact will have no bearing on whether the Adjudicator erred in law.

The historical background

15. Eritrea was recognised as an independent state in 1993. Ethiopia historically regarded Eritrea as an integral part of its territory and in 1962 Eritrea was reconstituted as a province of Ethiopia. However,

from 1952, the end of the period of British military administration in Eritrea, there has been resistance to Ethiopian rule and following a dramatic deterioration of relations with Ethiopia in late 1997, fighting erupted in May 1998 between Eritrea and Ethiopian troops in the border region after both countries accused the other of invading their territory. A peace agreement was signed in December 2000 followed by the establishment of two separate independent commissions to delineate the border and assess compensation claims. The Border Commission has reported but the Ethiopian and Eritrean governments remain in dispute about the interpretation of its ruling. It appears that the Commission has decided that the small border town of Badne was Eritrean territory according to colonial treaties of 1900-1908 but Ethiopia refused to accept this. Eritrea has called for the United Nations to enforce the ruling. There have been widespread fears of a resumption of fighting although both governments have said that they would not start another war.

Human rights and military service

16. According to the US State Department Report 2003 the Eritrean government's human rights record remains poor and it continues to commit serious abuses. There were some reports that the police resorted to torture and physical beatings of prisoners, particularly during interrogations and that the police severely mistreated army deserter or draft evaders. Amnesty International reports have described the situation more graphically:

> 'Human rights violations continue in Eritrea on a massive scale. Thousands of government critics and political opponents – many of them prisoners of conscience who have not used or advocated violence – are detained in secret. Some have been held for several years. None has been taken to court, charged or tried. In some cases panels of military and police officers have reportedly handed down prison sentences in secret proceedings that flout basic standards of fair trial ... torture is systematically practised within the army for interrogation and punishment, particularly of conscription evaders, deserters and soldiers accused of military offences and members of minority churches. Torture is also used against some political prisoners. Furthermore, the atrocious conditions under which many political prisoners are held amount to cruel, inhuman or degrading treatment. ... The government dismisses the criticism from all sides of its appalling human rights record. It ignores the principle of the rule of law and flagrantly contravenes human rights safeguards in Eritrea's constitution and laws. (see: A40 and A41 extracts from the draft "Religious

> Persecution Eritrea: A Compilation of Commentary and Reports".

17. In the Amnesty report "Eritrea, You have no right to ask" (A82-108) it is reported that Eritrea is a de facto one party state where the only party permitted is the ruling People's Front for Democracy and Justice (PFDJ) which is the renamed former Marxist Leninist Eritrean People's Liberation Front (EPLF). This report records that several hundreds or even thousands of prisoners of conscience are imprisoned on account of their non-violent opinions, beliefs and criticisms of government: (A84). It identifies national military service as a key government policy of nation-building and representing a continuity of military oriented mobilisation by a predominantly EPLF government after the liberation war. There are exemptions from national service for EPLF veterans and the disabled and there is a postponement for those in higher education. Conscription is enforced by a regional administration through round-ups where police search houses, work places and streets and detain suspected evaders to check their identity documents.

18. There are reports of people trying to escape conscription. Young persons are required to register at the age of seventeen and are usually refused exit permits when they approach conscription age. Exit permits are only issued on proof of completion of national service or payment of a bond as security for return to Eritrea to perform national service. In addition, in measures related to the aims of national service, the government requires final year secondary students and all university students to do up to 2-3 months summer vacation service on development projects. In 2003 an extra final year was added to the school system which required all students to attend at Sawa military training centre reportedly under military authority and military type training. At the end of this final boarding year of secondary education there is competitive selection for higher education and immediate entry into national service for the rest (A94). This report identifies the categories of people Amnesty International regards as particularly at risk of arbitrary detention. These include people evading and refusing conscription on account of their opinions or beliefs and anyone suspected of disloyalty to the government – even the act of applying for asylum from abroad would be regarded as evidence of disloyalty and reason to detain and torture a person on return to Eritrea after rejection of asylum.

The Maltese Returnees

19. Concerns about the fate of those deported to Eritrea were highlighted by the return between 30 September and 4 October 2002 of 233 people from Malta to Eritrea. In the UNHCR Position Paper January 2004 this is summarised as follows:

> "Between 30 September and 3 October 2002, 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 the UNHCR at the time). They were reportedly arrested immediately on arrival in Asmara and taken to detention incommunicado. The Eritrean authorities neither acknowledged the detentions nor revealed the whereabouts of the detainees to their families or the public. Subsequent reports have suggested that those with children and those over forty (the conscription limit) may have soon afterwards been released but that the remainder were – and still are – kept incommunicado detention in secret places, described as halls made of iron sheets and underground bunkers. According to different sources, the detainees were deprived of their belongings (including shoes and clothes to change) subjected to forced labour, interrogated and tortured (e.g. by beating, tying up and exposing to sun as described above). The dwellings are said to be congested and lack any facilities for personal hygiene. Food and water provided for the detainees are inadequate and unclean. Consequently, many of the detainees have succumbed to illnesses, notably various skin conditions and diarrhoea. Medical treatment is said not to be available. Some detainees are believed to have died of their diseases and/or injuries. At least one person was allegedly killed by shooting during an escape attempt."

20. The Amnesty International Report (at A97) confirms that women and children and those over the conscription age limit of forty were released after some weeks in Adi Abeto prison but the rest of the deportees, mostly army deserters, were kept in detention and tortured. Some EPLF veterans among them were sent separately to 'Tract B' military prison in Asmara. The rest were transferred to the secret Dahoak Kebir island prison in December 2002. Later the civilians (about 95) were sent to secret mainland prisons in July 2003, leaving behind 85 conscription deserters in Dahoak Kebir. About 30 later escaped and fled to Sudan where they sought UNHCR protection. In his submissions Mr Jacobs emphasised the distinction between those identified as conscript deserters and civilians. He argued that the fact that it was only women and children and those over the conscription age who were released indicated that those of military service age, even if not deserters, were being detained and ill-treated.

The Libyan Returnees

21. In an Amnesty Report dated 28 July 2004 (A80-81) concerns were expressed about the reported forcible return of 110 people to Eritrea on 21 July 2004 and the fear that they were now detained in secret detention in military camps. This report says that most of the detainees

are believed to have either deserted from military service or evaded conscription. Returnees were reportedly taken to the remote Gelano prison in eastern Eritrea where conditions are harsh and temperatures extreme. By way of background information, it is said that thousands of young Eritreans have fled from military conscription in the past few years and that those caught deserting or evading military service are detained indefinitely without charge or trial in harsh conditions and tortured. This evidence is also referred to in the Amnesty Report 9 November 2004 (A4) which records:

> 'Many young people have tried to evade military service and thousands have fled the country or deserted after being conscripted. The usual punishment for evading or escaping from military service is torture, by beatings and being tied in painful and contorted positions for days and indefinite detention without charge or trial. Hundreds of Eritreans who fled the country were forcibly returned by Malta in 2002 and by Libya in July 2004. They were arrested on arrival back in Eritrea, reportedly tortured and sent to a secret prison on Dahlak Island where most are still detained incommunicado.'

These events have been the subject of a Human Rights Watch letter to the Eritrean President dated 3 August 2004: A78-79.

22. There was a further attempt by the Libyan authorities to remove 75 refugees to Eritrea on 27 August 2004 which led the returnees to hijack the aircraft, forcing it to land in Sudan: see A8-9, an Afrol News Report. A Human Rights Watch Report of 13 January 2005 (2A 17) refers to the fact that arbitrary arrests and prolonged imprisonment without trial have not been limited to political leaders and the press. The Eritrean government continues to detain about 350 refugees who fled Eritrea but were involuntarily repatriated in 2002 from Malta and in 2004 from Libya. They are held in detention centres on the Red Sea Coast and in the Dhalak Islands.

The evidence relating to other returnees

23. There is a report from Amnesty dated 7 January 2005 (A15-6) relating to the return from Djibouti to Eritrea on 28 December 2004 of four Eritreans including two army officers. It is asserted that they are being detained without charge at an unknown location. There are no further details about the fate of these returnees.

The expert evidence

24. The appellant relied on an expert report from Dr David Poole dated 15 February 2005. This confirms that, with the exception of married women and the medically unfit, all Eritrean citizens between the ages of eighteen and forty must undertake military service and that draft

evasion is punishable by imprisonment with decisions on the length of detention decided by secret military tribunals. The element of secrecy involved in the discipline and punishment of draft evaders makes it difficult to state with any certainty the length of sentencing. According to this report, military service in Eritrea is highly politicised and rather broader than the duty to serve the state. The Eritrean government has pursued a vision of making a new generation of Eritreans imbued with the characteristics of the EPLF liberation fighters using military service as an instrument of socialising a new generation into the values of the EPLF. The establishment of a final year of education at Sawa can only be explained by the will of the government to ensure all eligible for national service undertake it. This goes with the sweeps and round ups of young people of military age and the checks on those travelling across Eritrea by bus and car. There are also restrictions on travel abroad by those approaching military age. It is Dr Poole's view that if the appellant were returned to Eritrea he would be treated as either a deserter from military service or an evader of military service.

25. Dr Poole says that as the appellant has sought political asylum on this ground the authorities would be likely to place him in the category of a draft evader. The likely punishment for draft evasion has been taking place in secret and unaccountable ways within the Eritrean military. There is no free press and, other than through clandestine opposition pamphlets, information and news is strictly controlled by the government. It is Dr Poole's view that the government is determined to use military service for political purposes as well as national security purposes. This is demonstrated by its refusal to permit opposition from any quarter. Jehovah's Witnesses have been denied many rights of citizenship because of their opposition to military service. The concerns of the Muslim communities over the conscription of unmarried women have been disregarded. The Eritrean state and its institutions evolved from the practice of the EPLF where discipline within the guerrilla forces was extremely strict and fighters who broke disciplinary codes were harshly treated.

26. A further expert report from Dr Campbell of the School of Oriental and African Studies was also produced in evidence. This was prepared for a different appeal but put in evidence after enquiries were made to ensure that there were no objections from the author or those for whom it was prepared. This report deals generally with military conscription in Eritrea and confirms much that has already been covered in the background evidence. Dr Campbell deals with the position after the end of the border war as follows:

> 'Following cessation of the border war in the summer of 2000, it was widely expected that government would rapidly demobilise its armed forces to pre-war levels. However, despite the availability of international assistance for this task, no demobilisation of troops has occurred to date. Instead the government extended the length of

> service for an additional two years and it has been repeatedly prolonged. The government has not explained its decision but three reasons can be ascertained. First, political tensions with Ethiopia over the border remain high ... Second, in 2003 the government announced a new campaign – the 'Warsia Yakolo Plan' – to rehabilitate and reconstruct the nation which in the light of the refusal of the international community to provide funds will be undertaken by the armed forces. Third, conscription is apparently used to control dissent.'

27. Dr Campbell refers to the general public perception that police roundups in 2002 were directed at female draftees. He notes that, beginning in 2003, school students were required to complete their last year of schooling at military training camp at Sawa. The government refused to issue exit visas to adolescents and children as young as ten years of age, apparently on the grounds that they were approaching the age of eligibility for national service. In the context of compulsory military service extensive police/ military sweeps are taking place and there is a growing number of young people seeking to evade conscription and desert the military. In August 2003 it was reported that 5,000 Eritreans crossed the demilitarised zone into Ethiopia and were residing at a relief camp. Many were said to be deserters from the army and young people fleeing the military call up at home. This information is sourced to IRIN News.

28. When dealing with the risk to draft evaders, Dr Campbell expresses the view relating to the female applicant for whom the report was prepared that she would be detained indefinitely on arrival and would most likely be beaten and interrogated by the military. If she refused to be conscripted this treatment would carry on indefinitely or until her health failed. He comments that to date all known deportees have been treated in this manner. On the facts relating to the claim before him he said that he was forced to conclude that she faced a reasonable likelihood that she would be indefinitely detained on arrival and that during her detention she would be maltreated and tortured and that if her health prevailed she would be forced into national service. These comments are made in the context of draft evaders being defined broadly as meaning individuals who have evaded conscription, who may have failed to register, those who have previously served but who now may be compelled to serve a further period and conscientious objectors. The reality according to Dr Campbell is that those caught would be tortured and arbitrarily detained for several months with hard labour before being forced back into the army: paragraph 26 of his report.

The treatment of military deserters and draft evaders

29. There is a general consensus in the evidence that those identified as deserters or draft evaders are at risk of severe ill-treatment in Eritrea. This is referred to in the US State Department Report 2004 at A121-2 which records that the government continued to authorise the use of deadly force against anyone resisting or attempting to flee during military searches for deserters and draft evaders and that there were substantial but unconfirmed reports that hundreds of draft evaders and national service escapees were being held in makeshift prisons around the country. It confirms the continued detention of some of the Maltese deportees being held at secret locations without contact with their families and without formal charges and refers to reports that some who tried to escape were killed by security forces. The UNHCR report of January 2004 refers to the punishments used against deserters, conscript evaders and army offenders reportedly including measures such as tying of the hands and feet for extended periods of time and prolonged sun exposure at high temperature. The CIPU Report April 2004 at paragraphs 5.63-5.72 draws on these sources, confirming the risk of severe ill-treatment for army deserters and draft evaders.

The current country guideline and reported determinations

30. In *MA*, the Tribunal held that there was a real risk that the applicant would be subjected to the same treatment as those deported from Malta and that her rights under Article 3 would be breached. The appeal concerned a nineteen year old citizen of Eritrea who claimed to have left in September 2001 when she was required as a sixteen year old to report for compulsory military training. The Adjudicator rejected her claim that she had received her call up papers but it was accepted that she would be liable for military service on return. The Adjudicator had failed to indicate whether he regarded the applicant as either a draft evader or as someone required to do military service. In paragraph 20 of its determination the Tribunal identified the real question as the sort of treatment to which the applicant would be subjected as someone who would be identified as a draft evader. It held that she would not be persecuted for a Convention reason. The Tribunal commented that her claimed religious objection had been properly rejected. There was no evidence that her illegal exit and failure to respond to her call up papers would lead her to have any political opinion imputed to her which would put her at risk of persecution. However, on the basis of the evidence before that Tribunal, it was satisfied that there was a real risk that the applicant would be subjected to the same treatment as those deported from Malta and that her rights under Article 3 would be breached. The Tribunal commented that the position might change with the UNHCR review or with other evidence as to how someone in her position would be treated on return, or other evidence as to the position of those deported from Malta. The appeal was refused on asylum grounds but allowed on human rights grounds under Article 3.

31. This determination refers in its title to “female draft evaders” and the Tribunal did refer in paragraph 7 to the evidence that there was a general perception that the round-ups by the Eritrean authorities were

directed particularly at female draftees. However, in other passages the Tribunal did not limit its assessment of the risks to those identified as draft evaders solely to women or to any particular factors putting women at a greater risk than men. But whatever the extent to which the evidence was seen in *MA* as pointing to risks for draft evaders generally and not just female draft evaders, there is further evidence of the risks to those regarded as evading military service: the fate of the Libyan returnees and those returned from Djibouti and the fact the majority of the Maltese returnees remain in detention. The Tribunal in *MA* found that there was no evidence before it that a failure to respond to call up papers would lead to the applicant having any political opinion imputed to her. However, in the light of the evidence now before this Tribunal the issue of evading military service must be looked at in the context of its use by the Eritrean authorities as a means of rebuilding Eritrea in a way that reflects the values of the current authorities. The fact that a state may view military service in political terms does not without more engage the Refugee Convention but if the treatment of those who are regarded as draft evaders amounts to persecution it is likely to follow that it arises for a Convention reason.

32. The Tribunal now turn to *SE* which dealt primarily with whether there was a general risk to all returnees to Eritrea. The two issues before the Tribunal were whether the applicant would be at real risk as a female draft evader or as a mere returnee: paragraph 10 of *SE*. The Tribunal was not satisfied that it could be concluded on the evidence that the authorities upon return would view her as someone who had left in circumstances designed to avoid compliance with her duty to perform military service. It held that *MA* could not be regarded as authority for the proposition that returnees generally would be at risk. When considering what inferences should be drawn from the fate of the Maltese returnees, the Tribunal noted that their problems were closely linked with the perception by the Eritrean authorities that they were draft evaders or deserters. The authorities differentiated on the basis of both sex and age. Women and children and those over the conscription limit of forty were released. The Tribunal also noted that whatever the degree of adverse treatment meted out to the Maltese returnees in 2002, there had been no similar large scale incidents since. The Tribunal regarded this lack of repetition as very significant. The incidents involving subsequent returnees had been very few and in each case they had involved a small number of individuals largely confined to returnees with foreign citizenship. The Tribunal drew attention to the wording of the UNHCR Position Paper of January 2004 that in the light of the problems faced by the Maltese returnees, it could not be excluded that future deportees would face a similar risk. In the view of the Tribunal, that fell short of stating that all returnees faced a well-founded fear of persecution. It was the Tribunal's conclusion that there was no basis for a finding that returnees generally were at risk.

33. It is important when considering *SE* to keep in mind that the Tribunal made the point that the issue relating to whether the applicant would be perceived as a draft evader depended upon the evidence available

before the Adjudicator. The Tribunal commented that it was hard to accept on that evidence that the Eritrean authorities would classify someone as a draft evader if there was no evidence that they had taken steps to call someone up over a significant period of time during when that person was eligible. In *GY* the Tribunal confirmed that *MA* was not intended to be authority for a proposition that there was a real risk for returnees generally. The Tribunal considered that *SE* had correctly identified the limit of the scope of the Tribunal decision in *MA* in the following terms: *MA* was concerned with those who were of draft age who would be perceived as having evaded the draft in their departure (paragraph 8 of *SE)*. The Tribunal accepted the analysis of the background material in *SE* as satisfactorily demonstrating there was no real risk on return to the ordinary failed asylum seeker.

34. However, the present appeal has not been argued on the basis that there is a risk for all returnees but that this appellant would be at risk of being treated as someone who has avoided military service and as a draft evader. So far as the issue of risk to persons of draft age is concerned, we now have to take account of the further evidence concerning the Libyan returnees, those returned from Djibouti and the continuing plight several years on of the majority of the Maltese returnees.

Further comments from the UNHCR

35. At the hearing it was indicated that the UNHCR's comments were being sought, particularly in relation to the programme of voluntary repatriation from Sudan to Eritrea highlighted in the January 2004 position paper. The UNHCR response has now been provided in a letter dated 10 March 2005 which has been copied to both parties who have had an opportunity of making further submissions. This response confirms that the voluntary repatriation programme was specifically intended to facilitate the voluntary return of those Eritreans who had arrived in Sudan as a direct result of the protracted conflict preceding the Eritrean declaration of independence in 1993, some of whom had been forcibly displaced from Eritrea for up to thirty years. Following the Agreement on the Cessation of Hostilities on 18 June 2000 and the Comprehensive Peace Agreement in December 2000, a temporary security zone was established under United Nations supervision between the two countries. Many refugees who had fled the war wanted to repatriate and were encouraged to do so under UNHCR's voluntary repatriation programme. In May 2002 the UNHCR announced that the 'ceased circumstances' cessation clauses under Article 1C(5) of the Convention would be applicable to specific groups of Eritrean refugees as from 31 December 2002. The cessation clauses apply to Eritreans who fled their country as a result of the war of independence which ended in 1991, or the border conflict between Eritrea and Ethiopia which ended in June 2000. The application of the cessation clauses is limited in scope and does not extend to the refugees who fled or are not able to return to Eritrea on other grounds.

36. The UNHCR has monitored those who returned under this scheme and found that they had been generally well received and assisted to re-integrate. There have been some problems where a few returnees, apparently in error, have been drafted to national service prematurely. The Eritrean government had generally provided for one year leave from drafting for returning refugees but they had usually been released after interventions by the UNHCR. However, the UNHCR response confirms its previous position of having continuing concerns for the safety of asylum seekers who fall to be forcibly removed to Eritrea. Its comments on the successful monitoring and reintegration of refugees refer only to the group of refugees returned voluntarily under the auspices of the voluntary repatriation programme. Persons being deported to Eritrea have long been of concern to UNHCR. The reply refers to the situation of the returnees from Malta and also to the reports relating to those deported from Libya. The letter expresses the view that the deportees from Malta may have faced persecution owing to an imputed political opinion, conscientious objection or other reasons and it cannot be excluded that future deportees would face a similar risk. The situation in Eritrea has been kept under close review and so far as the UNHCR is concerned there has been no such change in the situation which would warrant taking a different view.

Consideration of the issues and conclusions

37. The Eritrean government is entitled to make provision for military service and to require its citizens to undertake such service. Liability for military service in Eritrea, save for limited exceptions, is for those aged between 18 and 40: see paragraph 11 of *NM*. A state is entitled to impose a proportionate punishment for a failure to carry out military service. We note that Eritrean law does not provide for conscientious objection but that issue does not arise in this appeal and the appellant does not claim to be a conscientious objector. On the basis of the further evidence made available in this case we consider that the current approach of the Eritrean authorities to the enforcement of its system of compulsory military service goes significantly beyond that of a conventional state and has acquired persecutory elements. The state of the evidence as it was before the Tribunal in *MA, SE* and *GY* already contained some worrying features. The further evidence before this Tribunal reinforces and significantly increases our concerns. On the lower standard of proof, the evidence now available leads to one conclusion: anyone, whether male or female, regarded as a draft evader, is at risk of being subjected to treatment contrary to Article 3.

38. The issues that also arise in this appeal are whether a returnee within the age of military service is for this reason at risk of being treated as a draft evader and whether a returnee who does not have any principled objections to the current form of military service in Eritrea is able to declare his willingness to serve on return. The Vice President, when granting permission, commented that the Adjudicator had found that the appellant would submit to military service like most other people with no principled objection to it and faced with sanctions for refusal.

He added that this finding made good sense. Indeed, it would in normal circumstances but the issue for the Tribunal is whether circumstances are normal at present in Eritrea in the light of the evidence currently available. In submissions the issue was raised as to whether there was a real risk for those who returned and undertook their military service even if reluctantly and so avoid the risk of either punishment or ill-treatment.

39. The Tribunal take into account firstly what has in fact happened to the specific groups of returnees identified in the background evidence. First there are the Maltese returnees. Those released from detention were those not liable for military service, whether because they are women, children or over the military service age. Even those who were not identified as draft evaders as such appear to have remained in detention. In *SE* the Tribunal attached importance to the fact that there had been no subsequent large scale incidents with similar results. However, in July 2004 over one hundred Eritrean citizens were return from Libya. This evidence was not before the Tribunal in *SE*. The evidence is that these returnees have also been detained in military camps. The Tribunal also take into account the evidence relating to the four Eritreans returned from Djibouti in January 2005.

40. It was submitted on behalf of the Secretary of State that an inference cannot be drawn from this evidence that all returnees of military age are at risk as it must follow that a large number of people between eighteen and forty must be travelling in and out of Eritrea. It was also argued that the fact that UNHCR in May 2002 declared the end of refugee status for certain categories of Eritreans, including those who had fled during the war with Ethiopia and the fact that many had returned voluntarily to Eritrea from Sudan indicated that it was unlikely that there was a real risk for a broad category of returnees of military age. These arguments must be assessed in the light of the evidence about the way returnees such as the Maltese, Libyan and Djibouti returnees have actually been treated. It must also be set in the context of the evidence that exit visas are routinely denied for those approaching the age of eligibility for national service, the evidence about the Eritrean government's determination to implement national service by periodic round-ups, the evidence that significant numbers of draft evaders are held in makeshift detention centres and the alteration of the education system to include arrangements requiring a further final year to be carried at Sawa. The evidence points to a determination by the Eritrean authorities to use military service as part of its planned reconstruction of Eritrea in accordance with the values of the present government.

41. The Tribunal have considered whether the proper inference to draw from Dr Campbell's report was that a returnee willing to undergo military service would be able to do so and avoid punishment. This arises from a comment in paragraph 27 of his report that individuals deported from Libya and Malta and those caught by security forces inside the country who are alleged to have evaded conscription or who

are conscientious objectors have been treated by the authorities in an identical fashion: they are detained indefinitely and beaten and tortured until they agree to be conscripted. It concluded that the applicant for whom the report was written faced a reasonable likelihood that she would be indefinitely detained on arrival and that during her detention she would be maltreated and tortured and that if her health prevailed she would be forced into military service.

42. However, to cite those passages as support for a proposition that a returnee would be able to undertake military service and avoid the consequence of being perceived as someone who has evaded conscription, would be taking them out of context. His report says that those who have failed to register or who have evaded the draft are tortured and arbitrarily detained for several months with hard labour before being forced into the army and it also refers to the fact that all known deportees have been treated in this manner. By implication, this appears to mean those liable for military service as opposed to all detainees as such. However, it does not necessarily follow that all returnees of draft age are at real risk of being regarded as draft evaders.

43. The Tribunal accept that the present Eritrean government is determined to use military service for political purposes as well as national security purposes. This is the view of Dr Poole and it is consistent with Dr Campbell's comment that conscription is apparently used to control dissent. At present military service in Eritrea is highly politicised and an actual or perceived failure to undertake military service is seen as an expression of a political opinion opposed to the present government. We are satisfied that there is a real likelihood that the government's treatment of the Maltese and Libyan returnees was motivated by a response to the fact that there have been widespread attempts to avoid military service and that most of those who have recently left Eritrea have done so in order to avoid their military service.

Summary of our conclusions

44. Bringing all these factors together, and applying the lower standard of proof, the Tribunal is satisfied that at present there is a real risk that those who have sought to avoid military service or are perceived to have done so, are at risk of treatment amounting to persecution and falling within Article 3. We summarise our conclusions as follows:

(i) On the basis of the evidence presently available, there is a real risk of persecution and treatment contrary to Article 3 for those who have sought or are regarded as having sought to avoid military service in Eritrea.

(ii) There is no material distinction to be drawn between deserters and draft evaders. The issue is simply whether the Eritrean authorities will regard a returnee as someone who has sought to evade military service or as a deserter. The fact that a returnee is

of draft age is not determinative. The issue is whether on the facts a returnee of draft age would be perceived as having sought to evade the draft by his or her departure from Eritrea. If someone falls within an exemption from the draft there would be no perception of draft evasion. If a person has yet to reach the age for military service, he would not be regarded as a draft evader: see paragraph 14 of *AT*. If someone has been eligible for call-up over a significant period but has not been called up, then again there will normally be no basis for a finding that he or she would be regarded as a draft evader. Those at risk on the present evidence are those suspected of having left to avoid the draft. Those who received call up papers or who were approaching or had recently passed draft age at the time they left Eritrea may, depending on their own particular circumstances, on the present evidence be regarded by the authorities as draft evaders.

(iii) *NM* is not to be treated as authority for the proposition that all returnees of draft age are at risk on return. In that case the Tribunal found on the facts that the appellant would be regarded as a draft evader and also took into account the fact that there was an additional element in the appellant's background, the fact that her father had been a member of the ELF, which might put her at risk on return.

(iv) There is no justification on the latest evidence before the Tribunal for a distinction between male and female draft evaders or deserters. The risk applies equally to both.

(v) The issue of military service has become politicised and actual or perceived evasion of military service is regarded by the Eritrean authorities as an expression of political opinion. The evidence also supports the contention that the Eritrean government uses national service as a repressive measure against those perceived as opponents of the government.

(vi) The position for those who have avoided or are regarded as trying to avoid military service has worsened since the Tribunal heard *MA*.

(vii) The evidence does not support a proposition that there is a general risk for all returnees. The determinations in *SE* and *GY* are confirmed in this respect. In so far as they dealt with a risk arising from the evasion of military service, they have been superseded by further evidence and on this issue should be read in the light of this determination.

The facts of the present appeal

45. We remind ourselves that an appeal now only lies on a point of law. However, we are satisfied that the Adjudicator did err in law by failing to take proper account of recent evidence regarding risks to persons

who would be regarded as draft evaders. The fact that the appellant may not have received call up papers and that the Adjudicator rejected his account of being forced to undertake military service does not alter the fact that he was liable to undertake such service. The issue is how he will be perceived on return and more specifically whether his departure from Eritrea would be regarded as an attempt to evade the draft. The fact that on the adjudicator's findings the appellant did not flee to avoid military service does not necessarily mean that the Eritrean authorities will take the same view.

46 As the Tribunal is satisfied that the Adjudicator materially erred in law in his assessment of risk, it is entitled to substitute its own assessment. The appellant has been out of Eritrea since 1998. He is now aged twenty-one (twenty-two in April 2005). In our view there is a real risk that if the appellant comes to the attention of the authorities on return he will be regarded as someone who has left Eritrea to avoid military service with a consequential risk of treatment amounting to persecution. He is not someone about whom it could be said that the authorities would not regard him as a draft evader because of his age, medical condition or lack of interest during a significant period when he was of eligible age for military service. For the reasons the Tribunal have already given, the background evidence before us does not support a contention that he will be able to avoid that risk by agreeing to undertake his military service.

Decision

47. It follows that this appeal is allowed on both asylum and human rights grounds.

H.J.E LATTER
VICE PRESIDENT

Appendix A:

Background materials placed before the Tribunal

CIPU Assessments Eritrea Country Report April 2004
Amnesty International Update on Detained Jehovah's Witnesses: 26 November 2004
Amnesty International report on Indiscriminate Arrests and Imprisonment of thousand of suspected draft evaders: 9 November 2004
BBC – Eritrean Death Jail Deaths Overblown: 8 November 2004
AFROL News – UNHCR slams Libya for expelling Eritrea refugees: 21 September 2004
US State Department International Religious Freedom Report: 15 September 2004
IAS Report on Inaccuracies in Eritrea CIPU Report 9/2004
Christian Today - Small denominations face persecution in Eritrea: 18 September
BBC Religious Persecution in Eritrea: 17 September 2004
Amnesty International Further Information on Eritreans Deported in July: 6 September 2004

BBC Expelled from Eritrea: 10 September 2004
Jubilee Campaign USA Religious Persecution in Eritrea: August 2004
Human Rights Watch letter about Eritreans deported from Libya: 3 August 2004
Amnesty International Over 110 Eritreans Forcibly returned from Libya: 28 July 2004
You Have No Right to Ask – Government resists scrutiny on human rights amnesty: 19 May 2004
Amnesty International Country Report April 2004
Enough – A Critique of Eritrea's Post Liberation Politics March 2004
US State Department Report 2003: February 2004
UNHCR Position on Return of Rejected Asylum Seekers to Eritrea : 20 January 2004
Eritrea Country Update Human Rights Watch January 2004
Letter from UNHCR 11 February 2005
Letter from UNHCR 16 December 2004
Amnesty International Report 23 December 2004
Amnesty International Report 7 January 2005
Human Rights Watch 13 January 2005
Letter from UNHCR 10 March 2005

Appendix B

Expert evidence
Report from Dr David Poole dated 15 February 2005
Report from Dr John Campbell dated 31 January 2005

Appendix C

Cases cited or referred to
MA (Female Draft Evader) Eritrea CG [2004] UKIAT 00098
SE (Deportation – Malta - 2002 – General Risk) Eritrea CG [2004] UKIAT 00295
GY (Eritrea – Failed asylum seeker) Eritrea [2004] UKIAT 327
YT (Kale Hiwot Church in Eritrea) Eritrea [2004] UKIAT 00218
AT (return to Eritrea – article 3) Eritrea [2005] UKIAT 00043
NM (Draft evaders – evidence of risk) Eritrea [2005] UKIAT 00073

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