Case No: C5/2013/2218

Neutral Citation Number: [2014] EWCA Civ 1608

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Froom
AA/09852/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2014

Before:

LORD JUSTICE MOORE-BICK
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE RYDER
and
MR JUSTICE DAVID RICHARDS

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Between:

MA (ERITREA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Ms Jessica Smeaton (instructed by **Trott & Gentry LLP**) for the **Appellant**
Ms Lisa Busch (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 16 July 2014

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Judgment

Lord Justice Ryder:

1. This is an appeal from the decision of deputy Upper Tribunal Judge Froom sitting in the Upper Tribunal (Immigration and Asylum Chamber) who on 11 June 2013 upheld the decision of First-tier Tribunal Judge Cope dated 14 December 2012. The effect of the decision is that the Secretary of State's refusal of MA's claim for asylum is upheld and the removal directions which the Secretary of State made in accordance with paragraphs 8 to 10 of Sch 2 to the Immigration Act 1971 will result in MA's removal.

2. Permission to appeal was granted at an oral hearing on 23 January 2014 in respect of two grounds. Those grounds are (a) whether Judge Froom erred in law in attempting to remedy what was said to be a deficiency in Judge Cope's determination and (b) whether Judge Froom applied the correct standard of proof in his own determination. At the conclusion of the hearing before this court, the decision was reserved. I would dismiss the appeal for the reasons which follow.

3. MA is a citizen of Eritrea who was born on 24 December 1988. She claims to have left Eritrea illegally in August 2010 crossing the border into Sudan. She obtained an Eritrean passport in Sudan on 12 October 2010 and travelled on to Abu Dhabi where she worked for a family as a domestic worker. She arrived in the United Kingdom on 26 May 2012 on a domestic worker's visa which was valid until 3 November 2012. She was accompanied by her former employer. MA fled her employer amid allegations of poor treatment and made an asylum claim on 2 July 2012.

4. MA's interview following her claim took place on 24 July 2012 and her application was refused by the Secretary of State on 17 October 2012 on the ground that she lacked credibility. She appealed to the First-tier Tribunal and her appeal was heard by Judge Cope on 30 November 2012. Her appeal was refused on 14 December 2012. She appealed the FTT's decision to the Upper Tribunal and was given permission to do so by Upper Tribunal Judge King on the basis that it was arguable that the FTT should have come to a more particular conclusion about how it was that MA was able to leave Eritrea legally. The appeal to the UT was heard on 5 June 2013 and the decision to refuse the appeal was made by Judge Froom on 11 June 2013.

5. The key issue in the case is whether MA is at risk of persecution for a Refugee Convention reason and the central factual question was whether she left Eritrea illegally. She alleges that she attended the Sawa military training camp for her education from 2009. She says that in July 2010 she was asked by the Eritrean authorities to spy on and monitor her fellow students. She says that she refused that request and that she was detained until 5 August 2010 when she was released as a result of the fact that she agreed to spy. She says that subsequently her father arranged for her to escape to Sudan (for which he was detained for three months) and her uncle paid a bribe to obtain for her a passport in Sudan.

6. MA claims that having left Eritrea illegally and thereby having in effect refused to spy, and being of compulsory draft age, she would be regarded as a draft evader there. She fears that she will be subjected to serious ill treatment if she returns.

MA relies upon *MO (illegal exit - risk on return) Eritrea CG* [2011] UKUT 190 (IAC) at [117] in support of her submission that if she left Eritrea illegally she would be at risk of persecution should she return.

7. There was evidence before Judge Cope that the family which had sponsored her entry into the United Kingdom had stated in the application made on her behalf for a visa that she had worked for them as a domestic worker in Sudan in 2008 and 2009. Judge Cope decided that MA had left Eritrea legally in 2008. He refused to accept her account as being credible, that is, she had not shown that it was reasonably likely that she was telling the truth about the events in Eritrea and her fear of persecution was subjective. In refusing her appeal, he dismissed her claim for humanitarian protection and her ECHR claims. His key finding on the question is as follows:

> "[61] I have found that the Appellant has not shown that she exited Eritrea illegally; and I consider it likely that she has been working for the family that sponsored her to come to the United Kingdom in 2008 and 2009. I am therefore not satisfied that she has demonstrated that she does not fall into the category of people who are allowed to leave Eritrea legally."

8. Judge Froom upheld the adverse finding about MA's credibility. As respects the question answered by Judge Cope above, Judge Froom held that:

> "[24] I take Ms Smeaton's point that leaving Eritrea to work as a domestic worker is not a category which has been spoken of as one which was treated leniently even before 2008. It would be an obvious route for young women, in particular, seeking to avoid military service to take. Nevertheless, I do not think the characteristics of the appellant were such that, had the judge considered them, and given reasons with greater particularity, he would have been forced to the conclusion that she could not have left Eritrea legally. A family link to the government or education could not be ruled out on these facts. Therefore, any failure on the part of the judge to give reasons was not material to the outcome."

9. Judge Froom decided that there was no material error of law in the determination of Judge Cope. A relevant fact is that although lawful exit from Eritrea was restricted during 2008, it was more likely before the blanket ban was imposed in August/September 2008. It was in that context that Judge Cope was not able to make a finding that MA left after the blanket ban had been imposed. Judge Froom went on to hold that Judge Cope was not in a position to make a positive finding about precisely when in 2008 she had left Eritrea. To have done so would have been pure speculation, since the only material before him, other than MA's discredited evidence, was the visa application mentioned earlier.

10. In considering the first ground of appeal, which relates to whether Judge Froom erred in attempting to make good an alleged deficiency in the reasoning of Judge Cope, it is necessary to consider whether Judge Cope's reasoning is clear and

sufficient to make the determination that he did. If it is, there would be no basis upon which Judge Froom could set aside the same and remake it. I have come to the conclusion that Judge Cope's decision was sound and that there was no error of law in the same. The extent of the findings of incredibility made by him are important to my reasons for this conclusion. The following findings are relevant:

a. "I find it highly implausible that they would be prepared to immediately allow her to leave Sawa upon her release from detention - it would [...] obviously give her the opportunity to make plans for escape"

b. "There is in addition a considerable difficulty for the Appellant in that her account of events, including the dates as to when she was asked to be a spy and when she was detained, do not accord with the documentary evidence that is before me"

c. The appellant's application was submitted on-line to the British Embassy in Abu Dhabi and the appellant said that it was submitted by her employers. However, "[T]he application stated at section 74 that the Appellant had travelled to Sudan to work from 2008 until 2009 and then to Saudi Arabia with her sponsor family [...] In addition ... it was stated that her parents were dead. I am satisfied that the information given in that application form does contradict what the Appellant has claimed in relation to having been in Sawa in 2009-2010; as well as her subsequent evidence that her parents were alive in Eritrea."

d. "As a result then I am not satisfied with (sic) Appellant has shown that it is reasonably likely that she was asked to be a spy for the Eritrea authorities, that she was detained when she refused, or that she was able to escape after she had been released from detention. It seems to me to be far more likely that the Appellant was working for the family in 2009 and 2010. This would be consistent with the receipts that the Appellant has produced from September 2010, which she says were sent by her uncle in Sudan, from the Eritrean embassy in Sudan for the issue of a passport to her."

11. The judge then went on to examine whether MA left Eritrea illegally. He accepted that her Eritrean passport was genuine and he considered the alternative possibilities which were that the passport had been issued to her as an escapee as had certainly occurred with others travelling on to the Arab Gulf states or following legal exit. The judge found that:

> "the passport was apparently issued by the Eritrean authorities even though at that time according to the Appellant her father was being detained by them because they were looking for her. I have to say I consider this to be very implausible..."

12. The judge's overall conclusion was damning:

> "I would make it clear that I simply do not believe that the events described by the Appellant as having happened to her actually took place. In particular I do not believe that the

> Appellant was asked to spy for the Eritrean authorities on her student colleagues; that she was detained when she [...] refused, and only released when she subsequently agreed to be a spy; that she was able to escape from Eritrea with the help of an agent in some five days after her release; that she is wanted in Eritrea for refusing to assist the authorities; or that she illegally left Eritrea to cross into Sudan."

13. Each part of that conclusion was reasoned by Judge Cope. It is immediately apparent from this that there was no part of MA's story that had withstood scrutiny. She had failed to make out her claim. She had not satisfied the burden of proof that is upon her. Judge Cope overtly referred to the correct burden of proof and applied it.

14. Judge Cope was well aware of the country guidance that applies to Eritrea. He considered both *MA (Eritrea) (Draft Evaders - illegal departures - risk) CG* [2007] UKAIT 00059 and *MO (Eritrea)* (above). The judge found as a fact that he was not satisfied that MA had established that she did not fall into the category of persons who could leave Eritrea legally in 2008. Furthermore, given his findings with respect to her credibility, he did not accept she would be of adverse interest to the Eritrean authorities as a draft evader.

15. Accordingly, the only question on the first appeal to the UT was whether Judge Cope erred in law in concluding that she had left Eritrea legally in 2008. It is an accepted fact settled by country guidance that the blanket ban on exit visas was imposed in August or September 2008. Prior to that there were less severe restrictions on exit. The country guidance in *MO (Eritrea)* contains the important conclusion that needs to be borne in mind:

> "[113] Nevertheless, we do think that the evidence now before us does require us to be less ready to conclude that non-credible Eritreans who left Eritrea after August/September 2008 did so lawfully. Put another way, we do consider that this evidence is now sufficiently strong in most cases to counteract negative credibility findings in relation to an appellant's evidence (see <u>MA (Somalia)</u> para 33). We regard August/ September 2008 as the turning point because there is credible evidence indicating that that was the point in time when the Eritrean authorities, angered by the growing number of cases of persons who had been granted exit visas who had then failed to return, decided to put their foot down by suspending exit visa facilities..."

16. The difficulty with the appellant's case on this ground is that it is so intricately bound up in the incredible and false story that she told about the manner and timing of her departure from Eritrea that the only evidence which survived was that she left in 2008 when she commenced work with a family as a domestic worker. Given that she had not established any other relevant fact to the standard of proof required, it follows that it is more likely that she left at a time when the blanket restrictions did not apply than when they did. Judge Cope specifically considered the country

guidance in *MO (Eritrea)* and on all the evidence that was available to the Tribunal was not able to find that MA had left after the blanket ban was imposed.

17. It would have been difficult for Judge Cope to draw any further inferences from the evidence that was available without being accused of speculation given the lack of material once MA's account was disbelieved. Further, unless the country guidance in *MO (Eritrea)* applied, he would not be required to make findings or inferences about which category of exempted persons she might have fallen into had that guidance applied in order to reason how she left. In that circumstance, the only error of law that it would be possible to allege is not that she was found without adequate reasoning to have left during the blanket ban but that she left before the blanket ban and that required further and better reasoning.

18. The environment that applied before August / September 2008 is described in the evidence given by Dr Kibreab that was accepted by the AIT in the country guidance given in *MA (Eritrea)* at [205]. His categories of those who were not affected by National Service visa exclusions included scholarship students and relatives of those in power. As was explained in *MO (Eritrea)* at [97] the position at the time of *MA (Eritrea)* was not clear in that having regard to the British Embassy evidence that was also accepted, there was an assumption of an open-ended category of students who could leave legally prior to *MO (Eritrea)*. The uncertainty of the position was helpfully analysed in this court's decision in *GM (Eritrea) & Ors v SoSHD* [2008] EWCA Civ 833 to which I shall now turn.

19. The appellant in this case is in a similar position to that of the appellant MY in *GM (Eritrea)* i.e. this is not a case where MA must have left illegally *whatever* the facts. As Laws LJ remarked at [52] and [53] in *GM (Eritrea)*:

> "[52] […] The categories of persons found by the AIT in *MA* (largely founded on Dr Kibreab's evidence) to be candidates, or promising candidates, for exit visas, were not held to be closed or watertight. That seems to me to be demonstrated by the tribunal's treatment of the British Embassy evidence […]. Moreover, I read paragraph 449, […] as showing that the AIT in *MA* itself considered proof of an appellant's particular circumstances to be an important factor in determining whether the appellant left Eritrea illegally.
>
> [53] In short, I do not consider that MY can demonstrate a reasonable likelihood that she left Eritrea illegally in the absence of some evidence, accepted by the fact-finding tribunal, upon which conclusions might be arrived at concerning her personal circumstances."

20. In this case, there is no accepted evidence about MA's personal circumstances which demonstrates that she left Eritrea illegally. Her appeal depends entirely on general evidence and the effect of the country guidance in *MA (Eritrea)*. There can only be one conclusion on the facts in that circumstance and that is the conclusion reached by Judge Cope. In support of that conclusion I need only repeat what was said by Dyson LJ (as he then was) agreeing with Laws LJ in *GM (Eritrea)*:

> "[59] Laws LJ says that where a case depends entirely on general evidence, it will only succeed if, fanciful exceptions apart, the claimant "must have left illegally *whatever* the facts" [52] and unless the "possibility that the particular facts may make a difference is effectively excluded" [55]. I agree."

21. There are no particular facts to exclude in this case and only the relatively uncertain general position referred to in *MA (Eritrea).* What was known about MA does not take her case outside the realm of speculation and accordingly, it was not necessary for Judge Cope to reason either a precise timeframe for her departure or a defined basis upon which that would have been legal. Accordingly, I am of the view that Judge Cope did not need to give further and better reasons for his decision. MA would have been one of 'the growing number of cases' of persons issued with exit visas referred to in *MO (Eritrea)* at [113]. I do not accept that Judge Cope made an error of law in not giving or being able to give further reasons and it follows I do not accept that Judge Froom was wrong to uphold that determination.

22. In so far as Judge Froom elaborated upon the finding that Judge Cope had made in referring to a 'family link to the government or education', I accept that such a shorthand summary is not an accurate reflection of Dr Kibreab's evidence in *MA (Eritrea),* but that is beside the point. He was in making that observation doing no more than reflecting the appellant's submissions about the available categories into which MA might have fallen before August 2008. If those categories are not inconsistent with such circumstantial material as exists (and they are not), then he would be entitled to refer to the same as being supportive of Judge Cope's finding.

23. That is no more than the exercise to which I have referred in [18] to [21] of this judgment. It is no more than an appropriate scrutiny of the particular and general evidence available to the FTT and is quite distinct from any process of substitution of reasoning which would have been inappropriate. Accordingly, I do not accept that Judge Froom went beyond the evidence or the function of an appellate court. There was no error of law on the part of Judge Cope that needed to be remedied and Judge Froom did not make an error of law himself in either his analysis of Judge Cope's reasoning or his scrutiny of the evidence that exists.

24. In my judgment, if MA fails to establish her first ground of appeal then the decision of Judge Cope stands and her second ground cannot avail her of any independent relief. Despite that, as I have come to the conclusion that MA fails on both grounds and out of respect for the careful submissions of Ms Smeaton, I shall explain why.

25. Ground two of the appeal is that Judge Froom applied the wrong standard of proof in his determination. The standard of proof is whether something is reasonably likely to have occurred. Given the nature of the issues that arise in asylum cases, and as a matter of legal policy, that standard is deliberately set at a level that is capable of being achieved by the genuine claimant. That was the standard that Judge Cope identified and applied to MA's account (see, for example, [57] and [58] of his determination and reasons). Given the fact that Judge Cope applied the correct standard of proof and accordingly any scrutiny of that by Judge Froom could only conclude as such, the submission is limited to whether Judge Froom

applied the wrong standard of proof to any circumstantial material which he compared with the findings made by Judge Cope.

26. I have already dealt with the submission about Judge Froom's analysis of the general evidence that arises out of the country guidance in *MA (Eritrea)*. That did not lead to a finding of fact (see [22] and [23] above).

27. It is correct that Judge Cope concluded that it was 'a possibility' that MA had obtained a passport in the manner described in a news article that described how some Eritrean escapees obtained passports through the Eritrean embassy in Khartoum. That is not a finding to the requisite standard of proof that MA was an escapee or obtained her passport in that way. It was clearly not intended to be. Quite the contrary, Judge Cope went on to consider whether MA obtained her passport on an ordinary basis following lawful exit and concluded that her story about obtaining a passport while in Sudan and while her father was detained for assisting her was simply implausible (see [46] to [49] of the determination and reasons).

28. In like manner to his observations about lawful exit, Judge Froom examined whether it was logically consistent to suggest that there was a possibility that MA obtained her passport in 2010 while leaving Eritrea lawfully in 2008. He was entitled to do that and to note that she could equally have been issued with a passport in 2008. There was evidence that Eritrean passports are valid for two years and the alternative possibilities were either that the 2010 passport was issued by a rogue official or the issuing of a passport in 2010 is consistent with MA not being of interest to the Eritrean authorities. None of that demonstrates that Judge Cope's reasons included findings that were made to the wrong standard of proof or that Judge Froom failed to identify findings made to the wrong standard.

29. Furthermore, Judge Froom did not overstep his remit as an appellate judge, indeed he regarded the passport issue as being neutral in its overall effect and did not make any findings that are susceptible of complaint.

30. In respect of both grounds of appeal, therefore, and for the reasons I have given, I have come to the conclusion that this appeal should be dismissed.

Mr Justice David Richards:

31. I agree.

Lord Justice Moore-Bick:

32. I also agree.