Case No: C5/2008/1672

Neutral Citation Number: [2008] EWCA Civ 1465
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No AA/11128/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 27th November 2008

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE WALL
and
LORD JUSTICE STANLEY BURNTON

- -

Between:

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

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr M Rudd (instructed by Messrs Barnes Harrild & Dyer) appeared on behalf of the **Appellant**.

Ms S Chan (instructed by The Treasury Solicitor) appeared on behalf of the **Respondent**.

- -

Judgment

(As Approved by the Court)

Lord Justice Stanley Burnton:

1. This is an appeal from a decision of Asylum and Immigration Tribunal consisting of Senior Immigration Judge Jordan and Immigration Judge Balloch, promulgated on 29 April 2008 on a second reconsideration of the claim of the appellant, a man who is citizen of Eritrea, now 32 years old, nearly 33.

2. He came to this country and claimed asylum. His claim was originally rejected by the Secretary of State in October 2005. There was an appeal which came before Immigration Judge Scobbie, who gave his decision in November 2005; the decision is dated 26 November 2005. The appellant claimed to have been a Pentecostal Christian in Eritrea; to have feared persecution and to have suffered ill-treatment as a result. He gave an account of his escape from Eritrea, which is described in paragraph 13 of Immigration Judge Scobbie's determination. In the previous paragraph the circumstances in which the appellant succeeded in escaping from custody in Eritrea were set out and there was also evidence as to what had happened to the appellant when he arrived in this country and claimed asylum.

3. Immigration Judge Scobbie rejected the appellant's account of his religious pursuits in Eritrea, of having been arrested in Eritrea. He said, having reviewed the evidence, ultimately:

> "Taking into account all of my above named concerns [those were concerns as to the credibility of the appellant], I concluded, even taking into account the lower standard of proof, that the Appellant while having a knowledge of the Pentecostal faith was not a member of the Pentecostal church in Eritrea nor had he been arrested and escaped as he claimed."

4. As a result of that, he determined that the appellant would not suffer a real risk of persecution if he returned to Eritrea. There was no specific finding of the legality or illegality of the departure of the appellant from Eritrea. There followed proceedings for the reconsideration of the decision, including a consent order for reconsideration of a subsequent decision on the basis that, regrettably, it had been made on the same day as a country guidance decision which it had been unable to take into account and therefore there had been no consideration of the circumstances of the departure of the appellant from Eritrea.

5. Ultimately the appeal came before, as I have mentioned, Senior Immigration Judge Jordan and Immigration Judge Balloch. The point before them was a narrow one referred to in paragraph 7 of their determination, where they said:

> "Mr Rudd, who appealed on behalf of the appellant, submitted that the appeal fell to be determined within a very narrow compass and arose from those

> words in the statement of reasons concerning the additional risk faced by someone who had left Eritrea illegally."

6. That was a reference back to the decision of the tribunal in MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059. It is worth summarising the effect of the decision in MA. The decision in MA was to the effect that those who leave Eritrea illegally, particularly if they are of the age when they are liable to conscription, indeed are serving a period of military service, are liable, if returned to Eritrea, to suffer ill-treatment. Such persons therefore should not be returned. In addition, the decision set out categories of persons who were likely to be able to obtain permission to leave Eritrea and, if of military age, to be exempted from conscription. Those categories do not include the appellant. However, those categories are not exhaustive.

7. The position of those who leave Eritrea, particularly of military age, was considered by the Court of Appeal in the cases of GM, YT and MY (Eritrea) v SSHD [2008] EWCA Civ 833. The case is important in the present context, in particular in relation to the appeal of MY. MY, like the appellant, was someone who had come to this country from Eritrea, was not in any of the categories of persons identified in the country guidance case as those who can, with some facility, obtain permission for departure and exemption from conscription, but her account of her departure from Eritrea had been disbelieved. The position was, therefore, that she may have left legally and may have left illegally, and there was no evidence accepted by the fact-finder as to in fact how she had left. On one view it could have been said that, since she was not within one of the categories identified in the country guidance case, there was a real risk that in fact she had left illegally and therefore would suffer ill-treatment on return. On the other hand it could be said -- and, indeed, was said -- that it was for her to establish the factors which rendered her liable for ill-treatment on her return. If she put forward a story to the tribunal which was rejected, so that there was no credible evidence as to whether she had left legally or illegally, whether she had been exempted from conscription or not, her case should fail because she had simply failed to discharge the burden of proof, albeit a qualified burden upon her. It was the latter argument which was upheld by the majority of the Court of Appeal. It seems to me the real case is whether the present appeal is on all fours with that case. Mr Rudd for the appellant says it is not. What he says is that the original determination of Immigration Judge Scobbie contained no finding as to the manner in which the appellant had left Eritrea. That was taken as a starting point by Senior Immigration Judge Jordan and Immigration Judge Balloch, but they made no such finding.

8. It is clear that Senior Immigration Judge Jordan and Immigration Judge Balloch were well aware of the point raised by Mr Rudd. They rejected the appeal of the appellant on the basis that, having regard to the original rejection of his credibility by Immigration Judge Scobbie, they were not prepared to accept the relatively little evidence he had put forward to them as

to the manner in which he had left Eritrea. That, in my judgment, is clear from a fair reading of paragraphs 11 and following of their determination.

9. It is important to recall that the appellant did give evidence to them, and it was for them to decide whether or not they accepted his evidence as credible and, if credible, to make an appropriate finding as to the facts to which it referred. It is in my judgment quite clear that they rejected his evidence on grounds of credibility. The purpose of his giving evidence was identified at paragraph 13 of the determination. They set out the substance of his evidence in paragraph 15, and concluded in paragraph 16 that he had put forward no credible evidence as to the true circumstances in which he left Eritrea. In the last part of that paragraph they said:

> "Given the comprehensive rejection of the appellant's account, both in relation to circumstances in Eritrea and as to the circumstances in which he came to make his claim in the United Kingdom, we are not prepared to accept as credible the appellant's assertion in his re-worked account that he is entitled to asylum by reason of the fact that he is of draft age and has left Eritrea illegally."

10. They continued at paragraph 17 to refer to the facts that Mr Rudd on behalf of the appellant was seeking to use the background material:

> "…to establish a case that he is unable to establish by credible evidence from the appellant's own mouth. In our judgment, it would be entirely speculative to reach any conclusions as to the true circumstances in which the appellant left Eritrea."

11. In paragraph 18 they refused to speculate and said that they were:

> "…not prepared to exercise from the appellant's discredited account that small part in which the appellant asserts he left Eritrea illegally and [found] that this passage alone is, the lower standard of proof, made out."

12. In my judgment it is clear, looking at the determination as a whole, that the tribunal examined the point that was before them and came to the conclusion that there was no credible evidence on the part of the appellant as to the crucial aspect of his claim, namely whether or not he had left Eritrea illegally. That being so, this case is on all fours with MY. In my judgment the tribunal made no error of law in coming to the conclusion it did. They were entitled to do so, having regard to the lack of any credible evidence from the appellant. I would therefore dismiss this appeal.

Lord Justice Mummery:

13. I agree.

Lord Justice Wall:

14. I agree.

Order: Application refused