Asylum and Immigration Tribunal

AH (Failed asylum seekers – involuntary returns) Eritrea CG [2006] UKAIT 00078

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 August 2006 and 9 October 2006	27 November 2006

Before

Senior Immigration Judge Storey
Senior Immigration Judge Latter
Mrs R M Bray JP

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Jackson, Counsel
For the Respondent: Miss S Leatherland, Presenting Officer (14 August 2006)
Mr M Chamberlain, Counsel (9 October 2006)

DETERMINATION AND REASONS

Neither involuntary returnees nor failed asylum seekers are as such at real risk on return to Eritrea. The country guidance on this issue in IN (Draft evaders – evidence of risk) Eritrea CG [2005] UKIAT 00106 and KA (Draft related risk categories updated) Eritrea CG [2005] UKIAT 00165 is confirmed. NB: This decision should be read with WA (Draft related risks updated – Muslim Women) Eritrea CG [2006] UKAIT 00079

1. This is the reconsideration of the appeal against the respondent's decision to remove the appellant as an illegal entrant made on 22 October 2004 following the decision that he was not entitled to asylum. The appeal was originally heard by an Adjudicator, Mr J.P. McClure, on 24 January 2005. He dismissed the appeal on both asylum and human rights grounds. Permission to appeal to the Immigration Appeal Tribunal was granted on 15 March 2005. By virtue of transitional provisions the appeal proceeded by way of a reconsideration.

2. Following a hearing on 8 December 2005 the Tribunal (Senior Immigration Judge Mackey, Mr S.J. Widdup and Mrs E. Morton) held that the Adjudicator had made a material error of law. Its reasons were as follows:

> "1. Permission was granted by a Vice President of the Immigration Appeal Tribunal and the matter now comes before us as a reconsideration under the transitional arrangements. The Appellant is a national of Eritrea and seeks reconsideration of the determination of an Adjudicator Mr John P McClure which was promulgated on 15 February 2005, wherein he dismissed an appeal against a decision of the Respondent, who had refused leave to enter and asylum and human rights claims.
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> 2. The Vice President in granting permission stated that:
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> > "Arguments are advanced on the generalised risks on return in ground 2 and these may merit further scrutiny. Criticism was made of various country guideline cases including SE [2004] UKIAT 00295."
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> 3. It is to be noted at the outset that the determination in SE was withdrawn as a country guidance determination in May 2004 *[in fact May 2005]*.
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> 4. We asked the parties to address us firstly on the issue of whether there was a material error of law in the determination of the Adjudicator.
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> The Appellant's Submissions
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> 5. Mr Jackson stated that he adopted the grounds which were presented in support of the application for permission. The risks "per se" are set out between paragraphs 3 and 17 of those grounds.
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> 6. He submitted that the Adjudicator had failed to address the lengthy arguments that had been put up by him as Counsel before the Adjudicator on the risks to this Appellant as a failed asylum seeker who, it would appear, would be forcibly returned to Eritrea. He noted that there was some reference to arguments he had presented between paragraphs 26 and 29 of the determination but that these failed to address the lengthy criticisms that he made in relation to the Tribunal determinations in SE and GY [2004] UKIAT 00327. At paragraph 26 the Adjudicator had referred to paragraph 27 of the decision in SE stating that "it is made clear that mere returnees are not at risk." The Adjudicator had also gone on to note that SE considered the May 2004 Amnesty International Report. Mr Jackson submitted that unfortunately this overlooked a critical distinction that needed to be made between a mere returnee and a failed asylum seeker who was forcibly being returned to Eritrea. He submitted that the Adjudicator had failed to give the

detailed consideration to this issue that was required. In the hearing before the Adjudicator, as set out in his grounds, he had challenged the findings in paragraph 26 of the determination in SE stating that it had a lack of rigour as it omitted to specifically address the potential problems for those who were forcibly returned. He advised us that he had given submissions on this issue for more than twenty minutes before the Immigration Judge and the arguments, as set out in the grounds, had been fully covered with the Adjudicator. Unfortunately they were simply not picked up at all in the conclusions of the Adjudicator. Some reference at paragraph 57 was made but again the Adjudicator had failed to address the very serious issues and challenges that had been made to the determinations in SE and GY. In this situation, particularly as the supporting information set out in the Amnesty International Report of May 2004, which had also been before the Adjudicator, had indicated that such persons who were forcibly returned "would particularly be at risk". He submitted that this was a very categoric statement. His submissions to the Adjudicator on this point, and his challenge to the validity of the determination in SE that flowed from this, simply were overlooked by the Immigration Judge. This he submitted was a material error of law.

The Respondent's Submissions

7. Mr O'Leary submitted that the Adjudicator did appear to have covered the evidence that was before him by making reference to it between paragraphs 26 and 30. He submitted it was not necessary for the Adjudicator to cover in detail all of the submissions that had been put to him and that his conclusions, reached in the round, could therefore be seen as sustainable. He asked us to note that the determinations in GY and SE had been considered by the Adjudicator, along with the objective evidence that was mentioned. The Adjudicator had found the Appellant largely lacking in truthfulness and accordingly had given no weight to his claim that he was a deserter or that he would be at risk as a returnee. He agreed that more detail may have assisted but submitted that the decision itself was not a perverse or unreasonable one. The Adjudicator had relied on SE, which at that time was good law, and possibly still continued to be so. Indeed he submitted that the situation for returnees had not altered and had been reinforced in the very recent country guidance determination in KA (Draft Related Risk Categories Updated) Eritrea CG [2005] UKIAT 00165 promulgated 25 November 2005. In this situation he submitted we should uphold the decision.

8. In reply Mr Jackson submitted that SE was not authority on the issue of failed asylum seekers and paragraph 27 of that determination did not engage with the issue of forced returnees. Most of that case was about risks to deserters. The reasoning within SE was substantively flawed particularly by reference to the objective material and the failure to consider the arguments in that regard. Accordingly that rendered the determination of this Adjudicator substantially flawed. He referred us, as an example, to the reports of the returnees from Malta which were covered in the Amnesty International Report (page 120 of the bundle). That report stated that some 95 of the persons returning were civilians and not army deserters, indeed they amounted to some 43% of the total number of forced returnees. However that 43% continued to be detained incommunicado and gave clear evidence of the burden of proof being established at the lower standard.

9. The decision and reasoning therefore was perverse and unreasonable in the light of the submissions presented.

10. At this point we briefly adjourned to consider the error of law point.

Conclusions on Error of Law Point

11. After very careful consideration of the grounds submitted by the parties, and the determination of the Adjudicator together with their own study of the determinations in GY and SE, we conclude that there has been a material error of law on the part of the Adjudicator. There has been a failure to consider the substantive arguments of the Appellant on the position of failed asylum seekers who are forced to return to Eritrea and their risks on return.

12. We then considered whether we should go on to determine the matter ourselves and hear further submissions or evidence. Before doing this we gave some consideration to the very recent determination in KA, which, on the face of it, appeared to state that it confirmed previous decisions that "returnees are not generally at risk." That decision also, specifically addressed that issue between paragraphs 54 and 59. From our brief consideration of those paragraphs we are not fully satisfied that the distinction raised by Mr Jackson between "mere returnees" and "failed asylum seekers who are forcibly returned" is determinatively spelt out. We therefore concluded that the most appropriate action for us to take was to adjourn this matter for the continuation hearing where that issue could be specifically addressed, particularly in the light of the very detailed and related issues set out in KA. We therefore direct that a for mention hearing be held at a mutually convenient date either before the end of the year or early after the New Year vacation. At the for mention hearing all of the issues that are to be considered can be settled and estimates of the time, necessity for interpreters and other relevant supporting information can be settled. It appeared appropriate to us that the matter should be set down before a full legal panel so that this somewhat specific issue, upon which country guidance would be valuable, could be settled."

Further Directions on the Country Guidance Issue

3. Following that hearing there was a directions hearing on 14 March 2006 at which directions were given for the second stage of the reconsideration so that the Tribunal, if appropriate, would be in a position to give country guidance on the issue of whether failed asylum seekers forcibly returned to Eritrea (as opposed to returning voluntarily) would be for that reason alone at real risk of persecution. This issue arises directly in this appeal as the adjudicator found that the appellant would not be at risk on account of his religion or as a suspected deserter or draft evader. In this determination the Tribunal will consider whether in the light of the current evidence the country guidance on this issue set out in IN (Draft evaders – evidence of risk) Eritrea CG [2005] UKIAT 00106 and KA (Draft related risk categories updated) Eritrea CG [2005] UKAIT 00165 should be reviewed. The relevant country guidance at the date of the hearing before the adjudicator was SE (Deportation – Malta – 2002 – general risk) Eritrea [2004] UKIAT 00295 (a country guidance case from 3 November 2004 until 24 May 2005 when it was superseded by IN).

Background

4. The appellant is a citizen of Eritrea born in January 1974. He claims to have entered the United Kingdom on 30 August 2004 using a passport provided by an agent to which he was not entitled. He claimed asylum on 31 August 2004. His application was refused for the reasons set out in the respondent's reasons for refusal letter dated 19 October 2004. He had based his claim on being a Pentecostal Christian and on the basis that he would be viewed by the Eritrean authorities as a draft evader. The respondent did not find the appellant's account to be credible and his application was refused.

5. He appealed to an Adjudicator and his appeal was heard on 24 January 2005. The first limb of the appellant's claim was that he had converted and become a member of the Pentecostal Church whilst in Eritrea. He said that he had carried out his military service from 1994 onwards for a period of about eighteen months. He then returned to Asmara and worked as a lorry driver. In 1998 the unresolved border war between Eritrea and Ethiopia led to the appellant being recalled for further military service. It was while in the military that the appellant met a member of the Pentecostal Church. He says that he converted in May 2001. He claimed that in April 2004 he was caught reading the Bible and then imprisoned for three months. He was released when he signed an agreement not to practise his faith any more. He was allowed to visit his uncle. He told him that he could no longer serve the government and asked his uncle for help so that he could leave Eritrea. An agent was found and arrangements were made for the appellant's departure. He left Eritrea on 20 July 2004 travelling to Sudan where he remained until 28 August 2004. He arrived in the United Kingdom on 29 August 2004, claiming asylum on 31 August 2004.

6. The Adjudicator did not find the appellant to be a credible witness. He was not satisfied that the appellant had converted to the Pentecostal religion as he claimed. He also rejected the evidence about the appellant's military service. He was satisfied that he may well have served a significant period of time in the army and that he would have completed his military service. The Adjudicator was not satisfied that the appellant would be of further interest to the Eritrean authorities. He would not be viewed as a deserter nor in point of fact was he a deserter from the army. The Adjudicator said that he was not satisfied that if this appellant were returned as a failed asylum seeker he would be viewed as a person who had deserted from the army and as such the Adjudicator was not satisfied that he would have any adverse interest from the authorities, whether by reason merely of him being a failed asylum seeker or otherwise. On this basis the appeal was dismissed on both asylum and human rights grounds.

7. At the hearing of the second stage of the reconsideration before this Tribunal the appellant produced a bundle of documents (A) indexed and paginated A1-E7 and 1-289. This bundle includes expert reports,

background evidence and a number of Tribunal determinations. The respondent produced three bundles R1, R2 and R3 setting out background evidence and determinations. At the adjourned hearing on 9 October 2006 a witness statement was produced from Mr James Bennett of the Country Specific Asylum Policy Team dated 6 October 2006 with a number of attached documents. After the hearing was concluded a statement dated 16 October 2006 was produced from Mr Nic Carlyle of the Country of Origin Information service providing further information about flights to Asmara from the United Kingdom and Europe including the route of travel and the frequency of flights. A full list of the reports, documents and determinations produced are set out in the Annex to this determination.

The evidence of Dr June Rock

8. The Tribunal heard evidence from Dr Rock, a senior lecturer/research fellow at the Centre for Development Studies and the School of Politics and International Studies at the University of Leeds. Her report is at A, E1-4 and her qualifications and experience at E5-7. She was asked to comment on the risk on return to Eritrea of a person forcibly returned as a failed asylum seeker and to consider in particular whether, if a person had commenced military service, the authorities' records would confirm this, the likelihood that a person would be able to leave the country illegally and what the terms would be of leaving legally and the consequences of breaching those terms. She was also asked to advise on the consequences of leaving illegally, of claiming asylum abroard and of not paying the diaspora tax.

9. Her report can briefly be summarised as follows. She refers firstly to the fate of the 223 Eritreans who were forcibly returned from Malta in September 2002 and the 100 Eritreans deported from Libya on 12 July 2004. She also refers to the arrest and detention of four army deserters deported from Djibouti on 7 January 2005. It is her view that the indiscriminate treament of these returnees clearly suggests a real risk of detention or worse for all failed asylum seekers whether viewed as draft evaders/deserters or otherwise. To confirm her view she reports that she has spoken with several former Eritrean colleagues who all assure her that 'failed asylum seekers are viewed by the authorities as opponents of the government and can expect to face arrest and detention on return'. One source has told her that "he knows of at least six failed asylum seekers deported from the US in 2002 who were immediately detained on return and remain in detention, their whereabouts unknown". This is taken from the affidavit of support from witness W (referred to again in paragraph 11 below).

10. Dr Rock says that in Eritrea military service officially lasts for eighteen months but in practice it can be extended indefinitely. Given the appellant's age together with the fact that he was allegedly still in the army, it is her view that it is highly unlikely that he would have been granted an exit visa and he would almost certainly face the risk of detention on return. She restates her view that asylum claimants are

viewed as opponents of the government and risk detention on return. Eritreans in the diaspora are required to pay 2% income tax to maintain their inherited family rights to land, housing, business licences and other properties within Eritrea. Failure to pay these taxes results in the loss of these rights. Dr Rock has no personal knowledge of what statistics are available for the numbers of forced returnees. She says that she is forced to conclude that there is a real risk of detention on return for all failed asylum seekers.

11. In her oral evidence she confirmed the contents of her report. She had not found any other expert who had been aware of any forcible returns save for a source we will identify solely as W in order to preserve anonymity. W has provided an affidavit of support setting out the circumstances in which he left Eritrea and was granted asylum. It is his view that anyone who has left the country and is in the age range of 18-60 would if returned be put in prison as the returnee would be a reserve even if not in the army. The witness adds that virtually everybody is a hostage. He refers to relatives who were caught crossing the border to a neighbouring country. He also refers to six failed asylum seekers including five male forced deportees aged 21-24 deported from the USA in 2002 when he was still in Eritrea. They were immediately detained on return, their whereabouts unknown and they are still in prison. Dr Rock confirms that she cannot find anyone else who knows of any forced returns to Eritrea. She was not aware of any individual returns.

12. In cross-examination Dr Rock accepted that she may not have heard about individual returns. Amnesty was not allowed into Eritrea and the only information came by word of mouth. Agencies operating in Eritrea could not criticise the government or get information from it. She regarded the comments of W as objective. He was someone who wanted to go back but took the view that the Eritrean government had betrayed the people. The six returnees he referred to had gone back in 2002. W was not an outspoken critic of the government as he had a family and friends in Eritrea.

13. The media in Eritrea was government controlled. The whole population between 18 and 60 would be perceived as reserves. The EPLF were a highly disciplined organisation. Anyone opposing it would be seen as opposed to the state. She was asked if someone who had completed their military service could make a voluntary return. She said that there was no evidence to suggest this. People were forced into the army after severe beatings. No one would be seen as having completed their military service.

14. In answer to questions from the Tribunal Dr Rock accepted that she had no idea how many people were able to leave Eritrea save that it would only be those trusted by the government. She had read the reports of voluntary returns from Sudan under the protection of the UNHCR. A returnee would be suspected of being a draft evader. She accepted that long term asylum seekers were going back to visit Eritrea. She said this

was a difficult issue but they could go in and out but not if they had left Eritrea since the war began in 1998. The issue then was whether they had left illegally or not. Anyone who had left illegally who went to the Eritrean Embassy for papers would be questioned. The Eritrean government kept records of dissidents. It was Dr Rock's view that failed asylum seekers could come under risk of general suspicion and detention on return.

15. In re-examination she said that Eritrea had local neighbourhood committees, the kebeles. They were run by the government and political zealots would know the history of everyone. There were very sophisticated records in addition to a sophisticated security apparatus.

The report of Dr Gaim Kibreab

16. Dr Kibreab's background and qualifications are set out at D19-25 and his report is at D1-18. He refers to the thirty years war of independence and the high ideals of the EPLF which promised to create a pluralistic constitutional government. However, instead of implementing those ideals, the government has severely curtailed political opposition and a number of basic human rights to the extent that Dr Kibreab describes it as a tyrannical regime in which power is exercised without constitutional restraint. In his view the government's tyranny is becoming worse from year to year. When commenting on the risk on return to failed asylum seekers he says that his knowledge is mainly based on the experiences of those who were forcibly deported from Malta to Libya as well as individual Eritreans caught in the act of fleeing to Sudan or Ethiopia. He says that if individuals caught fleeing are persecuted, a failed asylum seeker is likely to face a greater risk of torture and inhuman treatment. This would be because on top of evasion and desertion, such a person has demonstrably been disloyal to his country and government.

17. His report says that although all failed asylum seekers face a generalised risk on return, it is necessary to make distinctions between the different categories. The reason why a distinction may be necessary is because even though all failed asylum seekers face risks of persecution, the scale of the risks are likely to vary depending on the gravity of the crime as perceived by the government. He identifies at D12-13 of his report twenty-four categories who face risks on return. We need not set out the list in full but sufficient to note for the purposes of this determination that the first eleven categories relate in substance to military service and the following thirteen to members of particular religious organisations, political parties, human rights activists and others who might be perceived to be opponents of the government together with persons beyond the eligibility age who left Eritrea both legally and illegally. It is his view that every failed asylum seeker would face a rigorous questioning regime and that in a large majority of cases they would be transferred to an army prison for interrogation. He says that returnees who fall into certain categories (1-7 and 12-21 of the list of 24) face imminent risk of persecution. He comments that the fact that the reports do not directly mention failed asylum seekers and that he has not

heard about the risks that individual failed asylum seekers face does not mean that they would be treated any differently from political prisoners, draft evaders and deserters caught fleeing the country.

The written evidence from Mr Bennett

18. Mr Bennett is employed by the Immigration Nationality Directorate as a country policy officer covering sub-Saharan Africa including Eritrea. He confirms that there were two removals to Eritrea in 2005 from the United Kingdom and two further removals in the period January to June 2006. These returnees were nationals of Eritrea and held valid identity documentation. He produces statistics of returns from mainly EU states showing two returns from Canada, Germany and thirty-nine voluntary and three involuntary from Sweden. In 2006 the only returns apart from the two from the United Kingdom have been nine voluntary returns from Sweden. He produces a UNHCR briefing note dated 15 August 2006 referring to the repatriation of Eritrean refugees from Sudan passing the 50,000 mark and bringing to 50,479 the total number of returns to Eritrea since the beginning of the voluntary return operation in May 2005. These figures need to be set in the context of the UNHCR organised voluntary repatriation programme in which more than 118,000 refugees have returned since 2000.

The written evidence of Mr Carlyle

19. This evidence confirms that there are no direct flights to Asmara from the United Kingdom. However, indirect flights are available via Cairo, Milan and Rome. There are also flights from Sanaa and Jedda. According to information posted on a website “Virtual Tourist” in March 2004 about flights to Asmara it is said that getting to Eritrea can sometimes be difficult because there are not that many flights and they are often fully booked a long time ahead and that “the Eritrean diaspora has led to many Eritreans travelling. Especially true during Christian and Muslim holiday times”.

Submissions

20. Mr Jackson submitted that the appeal should be allowed on the basis that the appellant if returned as a failed asylum seeker would have a political opinion imputed to him and be ill-treated as a result. In Eritrea the position was that once conscripted, always conscripted. There had been no voluntary returns in recent times. The fate of the Maltese returnees emphasised the risk even to those not suspected of being deserters. If a returnee was detained it was standard practice that they would be ill-treated. The respondent could not point to any examples of a returnee not being subjected to ill-treatment on return. He submitted that the objective evidence painted a vivid picture of a paranoid government. The very act of claiming asylum abroad would demonstrate an opposition to the regime. There was no evidence of any significant demobilisation. The regime ruled by force and fear. The position had clearly changed since the Tribunal's determination in SE.

Given the objective evidence and the pattern of persecution and ill-treatment of returnees, anyone forcibly returned would be at a real risk of ill-treatment.

21. Mr Chamberlain reminded us that there was no challenge to the Adjudicator's findings of fact that the appellant was not someone who had converted to the Pentecostal faith, nor had he been found to be a deserter. The appeal related solely to the question of whether the appellant would be at risk as a returned failed asylum seeker. The recent reported and Country Guidance cases had all held that there was no such risk. He submitted that there was no adequate futher evidence to justify the Tribunal taking a different course. Neither the oral evidence of Dr Rock nor the report of Dr Kibreab added materially to the evidence previously available. Dr Kibreab's report was primarily based on the experiences of asylum seekers deported from Malta and Libya; this evidence had been considered extensively by the Tribunal in IN and KA. Dr Kibreab's report was premised on the assumption that the appellant was a deserter but this was not the finding of the Adjudicator. Similarly, Dr Rock's evidence was primarily based on matters which had been considered already by the Tribunal in the country guidance cases. The report placed considerable emphasis on assuming the appellant to be a deserter. It was accepted that there had only been a very small number of returns to Eritrea in 2005 and the majority were voluntary returns. The problems of returns arose from the fact that the majority of Eritrean failed asylum seekers lacked valid identity papers and the Eritrean authorities applied strict documentation criteria and would not grant entry to returnees who did not have valid documents.

Consideration of the issues

22. As the Tribunal has decided that the original Tribunal made a material error of law, we must now consider whether the appeal should be allowed or dismissed. We also note that on 9 October 2006 the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 came into force. These regulations implement in part EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees. By virtue of regulation 1(2) we are obliged to apply these regulations to all pending appeals. However, there has been no submission that the new regulations have any material bearing on this appeal.

23. The issue of whether a failed asylum seeker for that reason alone will face a real risk of persecution on return to Eritrean has been considered in a number of authorities. At the time when this appeal was heard the leading authority was SE which explains why the grounds of appeal in this case take the form of a sustained challenge to the Tribunal's reasoning in that appeal. However, there have been two subsequent country guidance cases, IN and KA, both still current in which there was a comprehensive review of the evidence relating to the situation in Eritrea. The general approach of the Tribunal in these determinations was approved by the Court of Appeal in Ariaya [2006] EWCA Civ 48.

24. In IN at paragraph 44 (vii), the Tribunal held that:

> '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. Insofar as they dealt with the 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 issue was considered again in KA which confirmed in its conclusions in paragraph 113 (c) that:

> 'The Tribunal continues to take the view that returnees generally are not at real risk of persecution or treatment contrary to Article 3. We do not consider it has been substantiated that failed asylum seekers would be regarded by the Eritrean authorities as traitors and ill-treated in consequence.'

We must now consider whether there is any proper basis on which we should revise that view.

25. In his report Dr Kibreab confirms not only the tyrannical nature of the Eritrean regime but also the fact that the situation at present is getting worse from year to year. When dealing in his report at paragraph 4.0 (A. D10) with the risk on return to failed asylum seekers and the questioning regime at the port of entry he says:

> 'Our knowledge concerning the real risks failed asylum seekers face at the port of entry is mainly based on the gruesome experiences of those who are forcibly deported from Malta and Libya, as well as individual Eritreans caught in the act of fleeing to Sudan or Ethiopia. The way the Eritrean government treated the deportees from Malta and Libya is well documented and shall not be repeated here. In the course of my research, I have interviewed many family members, relatives and friends of Eritreans who were caught by the army while fleeing the country to evade conscription, to desert from the army, or for fear of persecution on account of their religion (membership in banned evangelical churches, Jehovah's Witnesses and minority Muslim groups) political opinion, membership in or sympathy with banned political organisations or for other reasons. These interviews were conducted within and outside Eritrea. The interviewees invariably reported that although they knew that their loved ones or relatives were caught while trying to cross into Sudan or Ethiopia, they were unaware of their whereabouts. Most of them were not even sure whether they were still alive.

> Are the risks individual failed asylum seekers face on return identical to those risks faced by the failed border crossers and the deported from Libya and Malta? There is no reason to suggest otherwise. Some of the deportees from Malta were not evaders or deserters. That was why those who were not evaders, deserters and beyond the eligible age were released after some time. All those who were of eligible age and those who fled either to evade conscription or to desert from the army are still languishing incommunicado detention in unknown places and are most probably subjected to torture and other forms of inhuman treatment. The same is true of those who are deported from Libya and those who are caught fleeing the country. As we saw, in the first part of this report, torture and degrading treatment are common practice in Eritrean detention centres and prisons. Any person who flees the country to evade conscription or to desert from the army and is either caught in the act of fleeing or is returned because his/her application for asylum is rejected faces real risk of persecution upon return.'

26. The report goes on to say (A. D 11):

> 'Although all failed asylum seekers face generalised risk on return, it is still necessary to make distinctions between the different categories. The differences between the various categories of failed asylum seekers may emanate partly from their pre-flight age, status and activities and partly from their political activities and positions in the country of asylum concerned, e.g. UK. The reason why a distinction between different categories may be necessary is because even though all failed asylum seekers face real risks of persecution, the scale of the risks are likely to vary depending on the gravity of the "crime" as perceived by the government. In the following 24 categories of failed asylum seekers who face varied risk on return are identified.'

27. Despite the report's reference to the 24 categories of "failed asylum seekers" (to which we have already referred in paragraph 17) in our view when more closely examined these are not categories of failed asylum seekers as such but are rather sub-categories of those who may be at risk on return. A number of the categories identified by Dr Kibreab, such as deserters, draft evaders, members of a number of minority churches and political opponents, have been found by the Tribunal in country guidance cases to be at real risk on return.

28. Dr Kibreab says at paragraph 4.1 (A. D13) that every failed asylum seeker forcibly returned would face a rigorous questioning regime, adding that:

> ‘The central aim of this often hostile and violent questioning is to establish the identity of the person or persons concerned, when she left the country, under what circumstances, why and how as well as to document their political activities and position in exile. More often than not, this may involve soliciting of information from Eritrean embassies, PFDJ offices and individual agents aboard who keep records, including photos and audio visual evidence taken in association with demonstrations or public meetings.’

29. In our judgment this evidence when analysed carefully indicates that the Eritrean authorities are seeking to identify those of adverse interest to them. It does not support a finding that all failed asylum seekers forcibly returned are at a real risk of persecution. The purpose of the interrogation is not to establish simply whether they have made a failed claim for asylum but whether they are of adverse interest because of their actual or perceived political activities, religion opinions or evasion of military or national service.

30. We accept Mr Chamberlain’s submission that Dr Kibreab’s report does not add in any material way to the substance to the evidence considered by the Tribunal in IN and KA based as it is to a large extent on the experience of asylum seekers deported from Malta and Libya. Dr Kibreab’s opinion on the risks to the appellant is based on an assumption that the appellant would be seen as a deserter. He says in paragraph 9:

> “From [the appellant’s] statement, it is clear that he falls into the category of desertion. If he is returned to Eritrea, he is at real risk of persecution”

However, this was not the finding of fact made by the Adjudicator.

31. Dr Rock’s evidence is also based primarily on the experiences of asylum seekers deported from Malta, Libya and Djibouti. It is clear that she also placed considerable weight on the risks to the appellant as a perceived deserter. In paragraph 8 of her report she says:

> “Thus, given the appellant's age (thirty-two years old) together with the fact that he was allegedly still in the army, it is highly unlikely that he would have been granted an exit visa and will almost certainly face the risk of detention or worse as a deserter on return.”

If the Adjudicator had accepted that the appellant was at real risk of being viewed as a deserter, we would agree in accordance with the guidelines in IN and KA that there would be a real risk of persecution. In substance it seems to us that the point Dr Rock was seeking to make was that the Adjudicator was wrong to find that the appellant was not as a deserter because no-one can finally complete their military service because of the liability to recall for further service. However, this is a challenge to the Adjudicator’s findings of fact and it has not been shown that there is any proper basis for a challenge on legal grounds to those

findings. We also note from Dr Rock's oral evidence her comment that she is aware of long term "asylum seekers" returning to visit Eritrea and distinguishing between those who left the country before 1998 and afterwards. Although the matter was not explored in evidence, in the light of the lapse of time certainly since 1998, the likelihood is that those who return to visit will be those who have been granted asylum or some form of subsidiary protection. If it is the case that some people who have applied for asylum in the past are now able to return for a visit, this must inevitably undermine any submission that all failed asylum seekers would be at risk. If not even all successful asylum seekers are at risk, it cannot be argued that all failed asylum seekers are at risk.

32. We have been referred to the evidence from W who says that he knows of at least six failed asylum seekers including five male deportees who were detained on return from the United States. It is said that their whereabouts are unknown and that they had been in prison since 2002. We are not satisfied that this evidence adds anything of substance to the evidence of the Maltese and Libyan returns. There is no adequate evidence as to the basis on which their claims were made or refused and we cannot draw from this scant evidence a conclusion that all involuntary returnees would be at risk. The evidence from Dr Rock about the return of long-term asylum seekers draws a distinction between those who left before or after 1998 war with Ethiopia. In our judgment this distinction provides further confirmation that the Eritrean authorities' are not interested in returnees as such but with those suspected of evading military service.

33. We take into account the fact that there have been very few voluntary or involuntary returns from EU countries, Australia, Canada, New Zealand and Norway in 2005 and 2006. The figures appear in the annex to Mr Bennett's statement. There were two asylum removals to Eritrea from the United Kingdom in 2005 and two in the period January to June 2006. These returnees held valid identity documentation. Apart from the United Kingdom, only Canada (2), Germany (2) and Sweden (48 voluntary, 3 involuntary), have initiated returns of failed Eritrean asylum seekers in this period (numbers as indicated in brackets). There is no evidence that those returnees, limited though the numbers are, have been ill-treated on return. We would have expected that there would be at least some evidence or report of any ill-treatment on return.

34. We also note, although this is a very different category of return, the fact that there have been a substantial number of returns under the auspices of the UNHCR of Eritrean refugees from Sudan. We note the following from the Africa Dialogue October 2005:

> 'Between 2001 and 2004 some 121,000 Eritrean refugees returned to their homeland, the majority from Sudan. The government of Sudan currently estimates that close to 110,900 Eritreans remain in the country. Many have been there since the 1960s, one of the longest refugee situations UNHCR has ever had to deal with. Last year

> over 9,800 refuges returned to Eritrea from Sudan, less than the UNHCR had planned for.'

35. According to a tripartite agreement, the organised repatriation to Eritrea ended on 31 December 2004. Those registered refugees who return to Eritrea on an individual basis in 2005 and 2006 receive a returnee package from the UNHCR upon arrival in their home country. The UNHCR continues its presence in Eritrea with two field locations for regintegration purposes and to ensure sustainable reintegration. In the UNHCR news stories dated 15 August 2006 there is a report of a convoy of fifty-eight passenger buses leaving Sudan for Eritrea carrying 1,770 refugees into Eritrean under the escort of senior UNHCR and Sudanese officials. The convey is described as the biggest of the year and the fourth out of twenty-five return movements planned up to the end of June 2006. The report continues:

> 'It is part of a UNHCR organised voluntary repatriation operation designed to assist Eritrean refugees to return to their home country in safety and dignity after more than thirty years of exile in Sudan. So far, more than 118,000 refugees have returned home under this programme since it began in 2002 including more than 3,200 this year.'

36. In the briefing notes dated 15 August 2006 it is reported that:

> 'The repatriation of Eritrean refugees from Sudan passed the 50,000 mark last weekend when the ninety-first convoy in the year old return operation crossed from the eastern Sudan town of Kassala to Tesseney in western Eritrea. Sudan's convoy took home 960 Eritrean returnees, the majority of them from Port Sudan, Sudan's north eastern port city on the Red Sea. This brought to 50,479 the total number of returns to Eritrea since the beginning of the voluntary return operation in May last year.'

37. We accept that these returns are being made in very different circumstances and under the protection of the UNHCR and whilst this evidence does not detract from the evidence about the risks to those of adverse interest to the Eritrean authorities, it does in our judgment, particularly when taken with the evidence of returns by the Eritrean diaspora, indicate that the mere fact of having left Eritrea and then returning does not of itself make a returnee of adverse interest to the authorities.

38. We take into account the fact that these are voluntary returns and the argument put by Mr Jackson is that it is failed asylum seekers returned involuntarily who are at real risk. However, the fact that these returns have taken place in such numbers does tend to confirm that the Eritrean authorities are concerned not with returnees as such, whether voluntary or involuntary, but with those of adverse interest to them for specific

reasons. We are not satisfied that there is any basis taking into account the evidence as a whole for drawing a distinction between those who return voluntarily whether as visitors or otherwise and those returned involuntarily.

39. In summary we are not satisfied that there is any proper basis in the evidence for taking a different view of the risk to forcibly returned failed asylum seekers or to returnees generally from that set out in IN and KA. The evidence does re-emphasise the reality of the risk to those who can bring themselves within the currently identified risk categories but it does not support an abandonment of those categories as unnecessary on the basis that any Eritrean national known to have claimed asylum unsuccessfully for that reason alone is likely to be at risk on return as a perceived opponent of the Eritrean regime. The focus in claims by Eritrean nationals must continue to be on whether the individual appellant, in the light of his particular circumstances, background and profile, is at real risk of persecution on return. For these reasons we confirm the conclusions set out in IN and in particular in paragraph 113 of KA on the risk generally to failed asylum seekers.

Decision

40. The Adjudicator did make a material error of law. Having reviewed the evidence, we substitute a decision dismissing the appeal on asylum, humanitarian protection and human rights grounds.

Signed Date
Senior Immigration Judge Latter

ANNEX

Expert Evidence

Report prepared by Dr Giam Kibreab 1 August 2006.

Report prepared by Dr June Rock 4 August 2006.

Reports submitted by appellant relating to country situation in Eritrea.

US State Department Country Report 8 March 2006.

US State Department Report, "Supporting Human Rights and Democracy" 5 April 2006.

European Parliament: Motion for a Resolution on Human Rights Violations in Eritrea 15 November 2004

Human Rights Watch Country Report 18 January 2006.

Annual Report of US Commission on International Freedom 3 May 2006.

Amnesty International, "Eritrea Religious Persecution" 7 December 2005

Voice of America News, "Eritrea Orders Aid Group to Stop Activities. 23 March 2006.

International Press Institute, "2005 World Press Freedom Review" 30 March 2006.

Committee to Protect Journalists, "Ten most Sensitive Countries (Eritrea Excerpt) 2 May 2006.

Reporters Sans Frontieres, "Eritrea Annual Report 2006" 3 May 2006.

Interpress Service News Agency, 1 May 2006.

BBC News "Quick Exit: BBC Expelled from Eritrea", 10 September 2005.

Amnesty International "Eritrea you have no right to ask, government resists scrutiny on human rights" dated 19 May 2004.

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Royal African Society Lecture, "Refugees and African Development: the Case of Eritreans in the UK", 14 July 2005.

The voice of America News: "Eritrean Reportedly Detained Relatives of Military Service Evaders" 29 July 2005.

Reuters: "Eritrea Detained Thirteen UN Staff, Thirty More in Hiding UN" 14 February 2006

Middle East Times “Eritrea Free Nearly All Detained Local UN staff” 23 February 2006.

Reuters: “Eritrea Re-registering De-mobilised Soldiers” 23 February 2006.

COI Report Extract 28 April 2006.

COI Report, “Treatment of Returned Failed Asylum Seekers, 26 April 2006.

Human Rights Watch Letter 8 August 2005.

UNHCR letter re Validity of UNHCR Eritrea Position. 21 October 2005.

Home Office letter re Removals to Eritrea. 10 January 2006.

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International Organisation for Migration letter re voluntary assisted return reintegration programme to Eritrea. 5 April 2006.

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BBC News: “Horn Stalemate Shocks UN Envoy”. 7 April 2006.

Eritrea Daily.net “Eritrea: A Myth of Self Reliance”. 9 May 2006.

News 24.com “Eritrea Arrests UN Staff” 11 May 2006.

UK Home Office Science and Research Group COIS Eritrea Bulletin. March 2006
23 March 2006.

UN Economic and Social Council: “Civil and Political Rights including the Question of Religious Intolerance” 27 March 2006.

BBC News: “Eritrea Targeting Permitted Churches” 20 April 2006.

Open Doors USA, “Tragedy in Eritrea Hundreds of Christians Held in Squalid Prison Cells” 20 March 2006.

Compass Direct (USA) “Another Christian Pastor, Scores of Muslims Jailed in Eritrea”. 19 April 2006.

BosNewsLife News Centre: “Eritrea Jails Seventy Five Protestant Conscripts for Reading Bibles and Praying” 6 February 2006.

BosNewsLife News Centre: “Eritrea Arrests Dozens of Church Leaders” 8 January 2006.

Religious Persecution Eritrea August 2004.

Documents submitted by respondent relating to country situation in Eritrea

COIS Report Eritrea October 2005

COIS Report Eritrea April 2006.

Operational Guidance Note, Eritrea dated 5 May 2006.

US Department of State Report 2005, dated 8 March 2006.

Returns of Failed Asylum Seekers to Eritrea in 2005 and 2006 by the UK and by EU States and Others - undated annex to statement of Mr J Bennett 6 October 2006.

Africa dialogue October 2005 Update of main voluntary repatriation operations in Africa in 2005.

UNHCR News Story: Eritrea Receives the biggest group of Returnees: 15 August 2006.

UNHCR Briefing Notes, Eritrea: Returns from Sudan surpass 50,000, 15 August 2006.

COIS Country of Origin Information Request relating to flights to and from Asmara 16 October 2006.

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