Case No: C5/2009/0897

Neutral Citation Number: [2009] EWCA Civ 1412
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No: AA/00187/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 24th November 2009

Before:

LORD JUSTICE PILL
LORD JUSTICE WILSON
LORD JUSTICE RICHARDS

- -

Between:

BA (Eritrea)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr Jonathan Martin (instructed by Messrs Barnes Harrild and Dyer) appeared on behalf of the **Appellant**.
Mr Matthew Barnes (instructed Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Pill:

1. This is an appeal against the decision of the Asylum and Immigration Tribunal dated 9 December 2008. The tribunal dismissed an appeal against a decision of the Secretary of State for the Home Department refusing to grant asylum to BA, the appellant. The appellant also claims humanitarian protection under Rule 339C of the Immigration Rules and claims that a return to Eritrea would involve a breach by the United Kingdom of its obligations under Article 3 of the Convention for the protection of human rights and fundamental freedoms.

2. The appeal against refusal was first dismissed by the tribunal on 26 March 2007. Reconsideration was ordered on 8 October 2007 and proceeded to a second stage reconsideration. The decision promulgated on 3 January 2008 found no error of law in the original determination. However, permission to appeal to this court was granted and an appeal allowed by consent on 9 October 2008. The case was remitted for a further hearing. At the hearing in November 2008 the tribunal stated:

> "The only issue that comes before us is the issue identified at the 1st stage reconsideration as to whether or not the Appellant had exited Eritrea illegally."

   That has throughout been recognised as the crucial issue in determining this appeal.

3. It is appropriate to give some further detail about the findings at earlier hearings. In the decision of 13 February 2007 the tribunal stated:

> "I had the opportunity to observe the Appellant giving evidence, whilst in some respects he was able to answer sincerely there were some areas of his evidence where he was distinctly evasive, and much more vague than I would expect if his account were fully truthful … He says he did not expect to be mistreated. Bearing in mind his claimed earlier experiences, I find this not to be credible."

   At a later stage the Immigration Judge stated in relation to the appellant's exit:

> "If his account were true, he would be able to tell the truth without hesitation.
>
> 24. For all these reasons I find that the Appellant has failed to satisfy me that his account is true. I accept that the Appellant satisfies the burden of showing that he has served in the military, and I do not believe his account of his detentions or of his alleged escape. There is no satisfactory evidence that he has served in the military since 2001."

4. When ordering the reconsideration on 8 October 2007 the Senior Immigration Judge referred to that finding:

> "He further found the Appellant's account of escaping from the military and crossing the border into Sudan on foot also lacking credibility. Those findings are not challenged in the grounds for reconsideration. Indeed, those findings are properly made based on the evidence.
>
> 7. … It is not appropriate to guess what the Immigration Judge meant in his finding. His findings in the determination are perfectly proper but there does need to be a finding on whether the Appellant's departure from Eritrea is legal or illegal because that is the crucial matter.
> …
> 8. Given that the remainder of the determination reveals no errors and the Immigration Judge's findings are sustainable there is only one issue to be decided and that is whether or not the Appellant left Eritrea illegally and if so whether that would put him at risk on return."

At paragraph 9 the Senior Immigration Judge stated:

> "The Immigration Judge's findings of fact and credibility stand."

5. In the further determination on 14 December 2007 the Immigration Judge stated:

> "13. The overall findings relating to the Appellant's credibility do not assist. There is nothing in the evidence available before me that undermines the conclusions that had been reached. I am not persuaded by the evidence that the Appellant left in the way that he claimed and still claims. In those circumstances I do not accept that the evidence shows that the Appellant left Eritrea illegally. There is therefore no evidence to show that he would be at risk on return on this basis."

6. When giving permission to appeal to this court on the first occasion Laws LJ stated on 12 March 2008 in relation to that decision:

> "Although he heard oral evidence from the appellant the IJ appears simply to have relied on the earlier adverse credibility findings in deciding not

> to accept the applicant's account that he left Eritrea illegally. Arguably that will not do. It was the IJ's duty to assess the evidence before him on the one question left open by the order on the first stage consideration."

7. The appeal was allowed by consent. In the statement of reasons placed before the court it was stated at paragraph 6:

> "Accordingly, the parties now agree that it is for the Tribunal to reconsider the matter and to determine whether or not the Appellant demonstrated [a] reasonable degree of likelihood that he left illegally."

8. At the hearing in November 2008 the tribunal stated:

> "The only issue that comes before us is the issue identified at the 1st stage reconsideration as to whether or not the Appellant had exited Eritrea illegally."

9. The tribunal noted that it had heard evidence from the appellant and from a witness called on his behalf, Mr S Abraham. Bundles of in-country material were also before the tribunal and reference was made to parts of a COIS report. The tribunal referred to the country guidance case MA (Draft Evader -- Illegal Departures -- Risk) (Eritrea) CG [2007] UKAIT 00059. The guidance given in MA is that a person who is reasonably likely to have left Eritrea illegally will in general be at real risk on return if he is of draft age even if the evidence shows that he had completed active national service. But a person who fails to show that he left Eritrea illegally will not in general be at real risk even if of draft age and even if the authorities are aware that he has unsuccessfully claimed asylum.

10. It was common ground that the appellant had been in the Eritrean army doing national service until 2001 but it is disputed that he remained in the army after that year. The tribunal summarised the appellant's evidence about how he left Eritrea. During a heavy rainstorm he and another man managed to flee from a work party which was under military escort. The following night they crossed into Sudan at Ingerne. Mr Abraham gave evidence that he had met the appellant in 2004 when they were both serving in the army. He too had escaped and they had met by chance in the United Kingdom.

11. The tribunal placed weight on the absence of evidence of what the appellant was doing, or in what he was engaged in the military, between 2001 and 2006. The tribunal did not find the evidence of Mr Abraham about a meeting in the army in 2004 to be credible, given the unlikelihood, as they found it to be, of the two men knowing each other again in the United Kingdom when neither of them identified a particular event in 2004 which they might have remembered.

12. At paragraph 16 the tribunal stated:

> "Whilst it is clear from a reading of MA that exiting Eritrea legally is difficult, see paragraph 388, nevertheless paragraphs 205, 344 & 348 of that decision identify those who are or may be able to obtain an exit visa. Given the complete lack of evidence before us as to what the Appellant may or may not have been doing in the period when it is accepted he was in the Army and the date of his arrival in the UK it appears to us that he may well have been able to procure means of exiting Eritrea on a legal basis. We do not find that he exited illegally.
>
> The original tribunal made no material error of law."

13. When refusing leave to appeal the tribunal stated:

> "Proper findings were made on the evidence. The appellant had failed to show what he was doing between 2001 and 2006."

14. For the appellant, Mr Martin submits that men of military age, certainly those aged in their twenties as the claimant is, would not generally be given exit visas to leave Eritrea. No findings had been made about the actual route claimed to have been taken by the appellant when escaping, a route subsequently highlighted in MA. The in-country evidence showed that the Eritrean authorities were remobilising their armed forces in 2006. Mr Martin referred to passages in MA where the in-country situation is set out in considerably more detail including paragraph 312:

> "We would agree with Ms Quinn, who submitted that the World Bank had recognised within its reports, that demobilised soldiers remained subject to national service and were potentially returnable to the military."

Paragraph 399, referring to a report which the tribunal regarded as of value:

> "[It] demonstrates that the round-up of young students is only but a part of the overall policy of the Eritrean Government to ensure, if necessary by force, that the armed forces of Eritrea are maintained at optimum levels."

15. Mr Martin concentrated on one submission: whether or not he was in the army between 2001 and 2006 the appellant was liable to re-mobilisation. That on its

own, Mr Martin submits, is sufficient to show that the exit must have been illegal.

16. The appellant's liability to be remobilised is submitted to be relevant to the likelihood of the exit being unlawful. As a trained soldier, in particular an artilleryman, he would be refused an exit visa in any case. The tribunal, he submits, failed to grapple with the effect of the in-country evidence, particularly the evidence of liability to recall. Before they could reach the conclusion they did, they had to do more to consider the situation in Eritrea, especially the reconscription which was taking place. On the face of it the appellant was not in a category of persons who might be able to obtain an exit visa. There was an error of law in the failure to grapple with the in-country evidence and the probabilities, to put it no higher, he submits, which arise from it.

17. Mr Martin makes his submissions against the background of the judicial disquiet, to which I referred, about the lack of consideration by successive tribunals of the issue whether the exit was unlawful.

18. For the respondent, Mr Barnes refers to the evidential gap between 2001 and 2006. He describes it as an evidential vacuum, there being no evidence as to what the appellant was doing during that period. Mr Barnes refers to the paragraphs in MA cited by the tribunal. In paragraph 334 an expert witness is recorded as having expressed the opinion that "Asmara is a very small society and the top business people know the government and know the way to get visas, senior military officers, government spokespeople". In paragraph 348 the tribunal set out a series of categories of persons:

> "Dr Kibreab told us that those not affected by National Service and considered as trustworthy by the government, and thus unlikely to have difficulty in obtaining exit visas, comprised Ministers; ex-Ministers; Party Activists; Eritrean expatriates; namely those who could be British citizens working in Eritrea but of Eritrean origin; elderly people over fifty who were forty or over in 1994, those who wanted to go on Haj or visit relatives abroad; government officials; scholarship students … ; government employees who attended conferences … ; and relatives of those in power who might arguably obtain exit visas as a result."

19. Further assistance comes from the general statement in MA, Mr Barnes submits. Having accepted at paragraph 446 that "if he has completed Active National Service and has been 'demobilised' therefrom because, in the absence of special factors, he or she is still regarded as being subject to National Service", the tribunal went on to say at paragraph 449:

> "A finding as to whether an Eritrean appellant has shown that it is reasonably likely he or she left the

> country illegally, is therefore likely to remain crucial in deciding risk on return to that country (see paragraph 234 above). In making such a finding, judicial fact-finders will need to be aware of evidence that tends to show the numbers of those exiting Eritrea illegally appear to be substantially higher than those who do so legally and that distaste for what is effectively open-ended service at the behest of the state lies behind a good deal of the current emigration from Eritrea. Nevertheless, where a person has come to this country and given what the fact-finder concludes (according to the requisite standard of proof) to be an incredible account of his or her experiences, that person may well fail to show that he or she exited illegally."

20. That statement was followed in this court in GM, YT and MY (Eritrea) v SSHD [2008] EWCA Civ 833. Buxton LJ, giving the leading judgment, referred to an earlier decision of the tribunal in KA [2005] UKAIT 00165, cited with approval by Richards LJ in Ariaya and Sammy v SSHD [2006] EWCA Civ 40, and stated:

> "Persons who fail to give a credible account of material particulars relating to their history and circumstances cannot easily show that they would be at risk solely because they are of eligible draft age."

Buxton LJ continued at paragraph 31:

> "In every case it is still necessary to consider, despite the failure of the applicant to help himself by giving a true or any account of his own experiences, whether there is a reasonable likelihood of persecution on return."

21. Two of the appellants in that case, GM and YT, were in a position quite similar to that of the appellant in this case. They had done military service between 1999 and 2000 and there was an evidential blank during the period between 2000 and 2006. In relation to them, Buxton LJ concluded that it was "impossible to say that there is a reasonable degree of likelihood that during that period the appellants did not move into the student category". In relation to the third appellant, MY, who was 17 years old, there was a disagreement between members of the court. Buxton LJ stated:

> "…there must, if only by elimination of other possibilities, be a reasonable degree of likelihood that she had left illegally."

Laws LJ took a different view. He stated that at paragraph 53:

> "…this particular 17 year old girl did so. The reason is that the probability that a particular person has or has not left illegally must depend on the particular facts of her case."

Paragraph 55:

> "Is that the position here? I do not think that it is. 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 … Moreover I read paragraph 449, cited by Buxton LJ at paragraph 13, 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.."

22. Accepting that the finding that MY herself had given no credible evidence was not conclusive of the issue of the legality of departure. Dyson LJ went on to say at paragraph 61:

> "…whether it is reasonably likely that the exit by an individual 17 year old girl was illegal will depend on the facts of her particular case. Her failure to give a credible account of those facts may lead to the conclusion that she has not shown that there is a reasonable likelihood that her exit was illegal."

Thus the court has considerable material as to the situation in Eritrea and as to the approach to be adopted on appeal to decisions of the AIT.

23. In my judgment, following the guidance in MA and in GM, YT and MY, the tribunal was entitled to reach the conclusion that the appellant did not exit illegally. Their conclusion is not spelt out as clearly or as fully as it might have been, but the "complete lack of evidence" as the tribunal found it to be, of what the appellant was doing during a period as long as five years, his last five years in Eritrea, leaves that conclusion open to them. The appellant cannot succeed simply by relying on in-country evidence that it is difficult for young men to leave Eritrea lawfully.

24. This appellant was found by successive tribunals not to be credible. If he had been in the army during the five year period, he could have given further particulars of his service. If, and Mr Martin has realistically approached the case on this basis, he had lied and comprehensively lied about the entire period and was not in the army, ways were open to him to achieve in 2006 a lawful exit. Some are listed in MA. As Laws LJ stated in GM, the categories were not closed.

25. In the face of such lack of credibility about his last five years in Eritrea, the tribunal was entitled to find, as contemplated in judgments both in MA and GM, that "there was no reasonable likelihood that his exit was illegal". Moreover the tribunal was entitled to make that finding without being required to attempt to specify the means by which lawful exit had been achieved.

26. For those reasons I would dismiss this appeal.

Lord Justice Wilson:

27. I agree

Lord Justice Richards:

28. I also agree