Neutral Citation Number: [2009] EWHC 1660 (Admin)

CO/2287/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 19th June 2009

**B e f o r e:**

**MR JUSTICE HOLMAN**

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**Between:**
**THE QUEEN ON THE APPLICATION OF**
**MUSAD HASSANI AMEER**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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**Hugo Norton-Taylor** (instructed by YVA) appeared on behalf of the **Claimant**
**Charles Banner** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE HOLMAN: On 23rd March 2009 Sales J granted permission to this claimant to apply for judicial review. This is now the substantive hearing of that judicial review.

2. The claimant challenges a decision letter by the Secretary of State for the Home Department dated 11th December 2007, as supplemented by a further letter dated 18th December 2008. In each of those letters the Secretary of State has rejected an application by the claimant that he has raised a fresh claim to asylum which should be considered by the Immigration & Asylum Tribunal, notwithstanding an earlier decision of an adjudicator promulgated on 28th April 2004.

3. The essential factual background is as follows. It appears that the claimant was born in October 1973. He is thus now aged 36. He was born in Somalia and lived for the first several years of his life in Somalia. Later, he travelled to Eritrea and spent time in military service. He says that in 1999 he managed to bribe his way out of military service.

4. Sometime in the summer of 2001 — he says in July — he left Eritrea. He would then have been aged about 27. On 17th October 2001 he arrived in the United Kingdom and on 25th October 2001 he claimed asylum here. That claim was refused by the Secretary of State. He appealed to the Immigration Appellate Authority and, by a decision promulgated on 28th April 2004, that asylum claim was dismissed.

5. The Adjudicator concluded that he had not established a well-founded fear of persecution and that there was not a real risk that he would face serious harm if he were returned to Eritrea.

6. Before the Adjudicator, his very clear claim was that he was, at all material times, a citizen of Somalia. He gave an account, summarised by the Adjudicator in paragraph 5 of her determination and reasons, of his movement from Somalia to Eritrea when he was aged about 10, of his call-up, of his refusal to fight and return to Somalia, and of his return again to Eritrea in 1996, because of difficulties he was facing in Somalia.

7. Paragraph 5 of the determination continues:

> "In 1999 he was again called up for military service even though he showed his Somali ID which was subsequently destroyed. Conditions in the training camp were poor and he bought his release. In 2001 the Eritrean government warned that it would deport all residents without permanent residence permits, and he was open to call-up once more, so his family paid for him to leave for Kenya on 23rd July 2001. He spent 3 months there with an agent who kept postponing his departure. He left for the UK on 16th October 2001 although he was not aware of his destination."

8. One matter very strongly in issue before the Adjudicator was whether in truth he was a Somali, as he claimed, or an Eritrean, as the Secretary of State suggested.

9. At paragraph 10 the Adjudicator said:

> "I did not find the appellant a credible witness. Firstly, he is an Arabic speaker who cannot converse in Somali..."

10. The Adjudicator then analysed in some detail linguistic and other evidence, which plainly led her to be highly sceptical whether he was a Somali at all.

11. At paragraph 12 she said:

> "Even if the appellant is Somali, which is not accepted, there are vague and inconsistent aspects to his claim..."

12. At paragraph 18 the Adjudicator dealt with the circumstances of his departure from Eritrea, saying:

> "As with much of the appellant's evidence at the long, and at times rambling, hearing, there is confusion over the precise reason for his departure from Eritrea. According to his statement, the reason for his departure to Kenya appears to be further concern about call-up. However, if he was at risk of being called up, so were his sisters, as one of the most unpopular aspects of Eritrean call-up was the non-exemption of Muslim women. Yet they stayed, even if at least one of them had the opportunity to leave with her husband..."

13. At paragraph 20 the Adjudicator said:

> "If half Somali as claimed, the appellant could therefore have avoided any technical threat of deportation and regularised his position in a country where he has real ties of descent, family and property. He has not claimed that his sisters were threatened with deportation either because they are Somali or because they too failed to do their military service. It would therefore appear likely that the appellant did not want to claim Eritrean citizenship because he did not want to be called up. There has been no evidence that he declined to claim it because he wanted to be free to return to Somali as a citizen..."

14. The core of the final decision of the Adjudicator is to be found in paragraphs 21 and 22, where she said:

> "21. As military service is a legal requirement, the appellant therefore by his own evidence fears the consequences of draft evasion, and not persecution on any Convention grounds. His avenue to claim that he should not be called up twice is blocked because he has already escaped by a combination of bribery and claiming that he is a Somali. However, he does not face deportation as a Somali from Eritrea to a war zone, either because he is not one or because he has legal eligibility to become an Eritrean citizen. He does not face persecution in Eritrea for being the product of a mixed marriage, even if his father was Somali. He also is unlikely to face the call-up or any consequences given the prospective demobilisation. The war which he claims to have feared also ended a

year before he left Eritrea.

> 22... Given these findings, I conclude that the appellant has not established a well-founded fear of persecution for his ethnicity and that there is not a real risk that he would face serious harm... if he were returned to Eritrea at this time."

15. Since that decision, which was promulgated in April 2004, much has changed in Eritrea and in relation to our understanding of circumstances and conditions there. The war has continued and there have been very important country guidance decisions by the Asylum & Immigration Tribunal. The most important of those decisions are the cases of KA (draft-related risk categories updated) Eritrea CG UKAIT 00165, a decision of two Senior Immigration Judges notified in November 2005, and the case of MA (Draft evaders — illegal departures — risk) Eritrea CG [2007] UKAIT 00059, a decision of two Senior Immigration Judges and a lay member given on 2nd March 2007.

16. The effect of those decisions is well summarised in paragraphs 1 and 2 of the judicial headnote in the case of MA:

> "1. A person who is reasonably likely to have left Eritrea illegally will in general be at real risk on return if he or she is of draft age, even if the evidence shows that he or she has completed active national service... By leaving illegally while still subject to national service (which liability in general continues until the person ceases to be of daft age) that person is reasonably likely to be regarded by the authorities of Eritrea as a deserter and subjected to punishment which is persecutory and amounts to serious harm and ill-treatment.
>
> 2. Illegal exit continues to be a key factor in assessing risk on return. A person who fails to show that he or she left Eritrea illegally will not in general be at real risk, even if of draft age and whether or not the authorities are aware that he or she has unsuccessfully claimed asylum in the United Kingdom."

17. The claimant first applied to the Secretary of State for reconsideration in July 2005, by detailed representations which were plainly drafted by lawyers on his behalf and submitted at that time. It is in fact to those further representations that the decision letters of the Secretary of State in December 2007 and 2008, to which I have referred, specifically relate. Those representations, of course, preceded the decisions in both KA and MA, and, perhaps unsurprisingly, are not focused on points which have emerged from those later decisions. I do think that in those circumstances I should allow some latitude to the way in which the claimant's case is now put and ought not to tie him too much to the way in which the case was put in the representations made in 2005.

18. As I understand it, the way in which the case is now put is simply that the claimant is a citizen of Eritrea who did leave illegally in 2001, at a time when he was (as he still remains) of draft age, and accordingly that he is at risk of persecution following the guidance of KA and MA.

19. As I understand the position of the Secretary of State, if she (or he) felt that there was a realistic prospect of the claimant now establishing those facts, the Secretary of State would accept the existence of a fresh claim and permit a further appeal to the Asylum & Immigration Tribunal. But the stated position of the Secretary of State in the letter of 18th December 2008 is that the claimant has failed to provide any evidence at all that he exited from Eritrea illegally and, accordingly, that there is no realistic prospect of him mounting a fresh claim.

20. The approach to a fresh claim remains that described by Buxton LJ in the case of R (WM (DRC)) v Secretary of State for the Home Department [2006] EWCA Civ 1495. I do not feel that it is necessary to reproduce at any length passages from that now very well-known judgment in this judgment. At paragraph 11 Buxton LJ identified that the court must ask the following two questions:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return... Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

21. At paragraph 7 Buxton LJ had stressed that the relevant rule:

> "... only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second... the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution."

22. This very week, in the case of AK (Sri Lanka) v Secretary of State for the Home Department [2009] EWCA Civ 447, Laws LJ, with whom the other members of the court agreed, said at paragraph 34, in relation to that test, that:

> "A case which is clearly unfounded is one with *no* prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with *no more than a fanciful* prospect of success. 'Realistic prospect of success' means only more than a fanciful such prospect. [Counsel on behalf of the Secretary of State] accepted this

interpretation."

23. So what the Secretary of State had to do in the decision letters in this case was to consider whether the alleged fresh claim had objectively a realistic prospect of success, that is, a prospect which is more than merely fanciful.

24. At paragraph 21 of his helpful skeleton argument dated 12th June 2009, Mr Charles Banner, on behalf of the Secretary of State, has posed the relevant question at this judicial review as follows:

> "The central question is this: was it reasonable (in the Wednesbury sense) for the Secretary of State to conclude that, based on the representations the claimant had put forward, there was no realistic prospect of [a] tribunal holding that the claimant had discharged the burden of proving that he left Eritrea illegally?"

25. Ultimately, as it seems to me, that is a question which falls to be considered by reference to the facts and circumstances of this case. There are, however, some pointers to the approach to the facts and evidence in a situation such as this in the judgment of the Court of Appeal in the case of GM (Eritrea) and Others v Secretary of State for the Home Department [2008] EWCA Civ 833. Between paragraphs 7 and 10 the Court of Appeal summarised the position in relation to illegal exit from Eritrea, as established in the country guidance cases of KA and MA, which were plainly adopted and approbated by the Court of Appeal in the passage from paragraph 7-10.

26. At paragraph 9 Buxton LJ said:

> "First, there is no doubt that the availability of exit visas from Eritrea is closely controlled, and therefore large numbers of citizens who leave the country are obliged to do so illegally. Second, the AIT accepted the evidence of an expert... that it was unlikely that a male of military service age would be able to obtain a visa unless he came within one of a number of limited categories... [None of those categories seem to conceivably embrace or apply to this claimant]."

27. Buxton LJ then turned to the burden and standard of proof, which he considered in a passage from paragraphs 11-14. He said:

> "11. The burden of showing that he has a well-founded fear of persecution falls on the applicant, but the standard that he has to meet is not a demanding one... Persons who have left Eritrea illegally are in significant danger of Convention persecution on their return. The question in any particular case is therefore whether there is a reasonable degree of likelihood that the applicant did leave Eritrea illegally.
>
> 12. That question raises particular difficulties when... an applicant relies, or is obliged to rely, on evidence as to the general incidence of illegal exit rather than upon an account of his own actual exit..."

28. Buxton LJ then cited from a passage in the judgment of Richards LJ in the case of Ariaya and Sammy v Secretary of State for the Home Department [2006] EWCA Civ 40, in which he had cited with approval the following passage from KA:

> "... each case must be considered and assessed in the light of the appellant's individual circumstances. It may be, for example, that a person who is of eligible draft age, at least if he or she is still relatively young, will not need to establish very much more. However, we think that in all cases something more must be shown... 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."

29. That, however, requires qualification, in that Buxton LJ said at paragraph 31:

> "Third, the observation in Ariaya and Sammy and in MA that a person who has not given a credible account of his own history cannot easily show that he would be at risk as a draft evader or because of illegal exit is, with respect, a robust assessment of practical likelihood, but it is not expressed as, and cannot be, any sort of rule of law or even rule of thumb. 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."

30. Thus, in the last analysis, the question is not whether or not there is some sort of supportive or independent evidence, but whether or not the claimant will be able to show that he left Eritrea illegally. It is thus necessary to give careful scrutiny to the way in which he has put, and does now put, his case.

31. As I have said, upon arrival, and throughout the hearing before the Adjudicator, his case always remained that he is not Eritrean, but Somali. Further, in his witness statement dated 19th November 2001 (now at claimant's bundle pages 85-89) he said on internal page 4 (bundle page 88):

> "In 2001 the government of Eritrea issued a statement that anyone who does not have permanent residence in the country must leave. If not, they should participate in the war. My family paid for me to leave Eritrea. I could not return to Somalia as I feared the same persecution as before.
>
> I travelled to Kenya on 23rd July 2001 by plane. I remained in Kenya for 3 months with an agent who kept putting off when he would arrange for me to leave to a safe country..."

32. The clear implication in that passage is that he himself was someone "who does not have permanent residence in the country". He was therefore somebody who had to make a choice: either he leaves or he would have to participate in the war. It is true that

the passage says, "My family paid for me to leave Eritrea", but there is nothing in that proposition of itself to suggest that his departure from Eritrea was in any way illegal.

33. Now, in support of his fresh claim, he positively asserts, in a 180 degree-turn, that he is in fact a citizen of Eritrea. He asserts that at paragraph 1 of his representations of July 2005 (now at claimant's bundle page 27) and it is an essential ingredient of the way he puts his case today. Further, he positively asserts that he left Eritrea illegally.

34. In support of that latter assertion, Mr Hugo Norton-Taylor, on his behalf, particularly relies on some answers given when he was first interviewed in an asylum interview on 20th December 2001. In a passage beginning with question number 80 (coincidentally on claimant's bundle page 80) he said:

> "My family had used a smuggler to smuggle me out."

He was asked who paid the agent and he said it was the son of his aunt who lives in Cairo.

Over the page he was asked whether he could have stayed in Kenya. He said:

> "I couldn't live there, because the smuggler just ordered us not to leave the house where we were staying at that time. He said, if anyone leaves the house, we will be killed."

He was asked:

> "Did you use a false passport to enter the UK?"

and answered:

> "I don't know. The smuggler gave me a passport."

35. So Mr Norton-Taylor submits that there, in answers given in interview as long ago as December 2001, and long before the country guidance decisions to which I have referred, the claimant was referring to himself having been "smuggled" out of Eritrea.

36. A difficulty with reliance on those passages in the asylum interview is that before the Adjudicator in 2004, as recorded in paragraph 12 of her determination and reasons (now at claimant's bundle page 53), the position of the claimant was as follows:

> "Even if the appellant is Somali, which is not accepted, there are vague and inconsistent aspects to his claim. It should be noted that the appellant declined to adopt the interview statements of 8th November and 20th December 2001, on the basis that they had not been read back to him; he had no representative present; and he was coerced into initialling each line of the second interview. His evidence therefore consisted of his statement of 2nd March 2003 and that given at the hearing."

37. The dilemma for the claimant, so it seems to me, is, first, that the way his case is now put requires a diametric change in his original assertion and evidence about citizenship;

and second, that it requires a very positive assertion that he left illegally or was "smuggled out" when he did not adopt any part of that account in his evidence before the Adjudicator. Rather, his written statement, which I have already quoted, indicates that it was precisely because he did not have permanent residence in Eritrea that he left.

38. I quite accept that the whole question of the circumstances in which he actually exited Eritrea did not receive much consideration at the hearing in front of the Adjudicator. The reason for that was that the country guidance cases had not, by then, focused attention on whether or not exit was illegal. But the question is whether the Secretary of State has acted Wednesbury unreasonably in concluding that this claimant now has no realistic prospect of success of persuading an Immigration Judge that in truth he is an Eritrean who did leave Eritrea illegally.

39. It does not seem to me that the Secretary of State can be said to have acted Wednesbury unreasonably in reaching that conclusion, in view of the very considerable extent to which the claimant has already been disbelieved and the almost impossible task of completely reformulating his case from the way in which it was historically put.

40. For those reasons, I must, as I do, dismiss this application for judicial review.

41. MR BANNER: My Lord, I am very grateful for that. I do have an application for costs, with two qualifications. The first qualification is that my learned friend has informed me that his client is legally aided, so of course any order for costs would be not without leave of the court. The second qualification is that my instructing solicitor, who has conduct of this case, is on leave this week. So we have not been able to prepare a statement of costs. I mentioned this to my learned friend yesterday.

42. MR JUSTICE HOLMAN: That would go to assessment.

43. MR BANNER: Indeed, and my learned friend has no issue with that. That is why we do not have any figures before you.

44. MR JUSTICE HOLMAN: Patently I could not assess any costs.

45. What do you say, Mr Norton-Taylor? Not to be enforced without leave, of course.

46. MR NORTON-TAYLOR: My Lord, yes.

47. MR JUSTICE HOLMAN: I think I have to make the order, do I not?

48. MR NORTON-TAYLOR: My Lord.

49. MR JUSTICE HOLMAN: The claim for judicial review is dismissed and there will be an order that the claimant pays the cost to the Secretary of State of and incidental to the claim for judicial review, to be the subject of detailed assessment if not agreed but, in any event, not to be enforced without further leave of this court.

50. Is there any other matter?

51. MR NORTON-TAYLOR: My Lord, not on our side.

52. MR JUSTICE HOLMAN: Any other matter?

53. MR BANNER: No, my Lord, thank you very much.

54. MR JUSTICE HOLMAN: Well, I am very, very grateful to both of you for both your written and oral arguments. As you could patently see, my mind moved around, but I can only hope that by the end of the hearing I had correctly focussed on the relevant facts and have reached the right decision. I am very, very grateful to you both. Thank you very much indeed.