ASYLUM AND IMMIGRATION TRIBUNAL

MY (Country Guidance cases – no fresh evidence) Eritrea [2005] UKAIT 00158

THE IMMIGRATION ACTS

Heard at: Field House	Determination Promulgated
On 7 September 2005	On 14 November 2005

Before

Dr H H Storey (Senior Immigration Judge)
Mr S L Batiste (Senior Immigration Judge)

Between

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the appellant: Miss V Quinn, Counsel, instructed by White Ryland
For the respondent : Mr G Saunders, Home Office Presenting Officer

The AIT Practice Directions 2005 mean that a Country Guideline case is authoritative in any subsequent appeal so far as that appeal relates to the country guidance in question and depends upon the same or similar evidence: see also R (Iran) [2005] EWCA Civ 982. In a case depending, as did this, on the same or similar evidence, a party will not be permitted to challenge the country guidance findings except by the production of new evidence. Attempts to contest the findings in a CG case without such fresh evidence are not permissible.

DETERMINATION AND REASONS

1. The appellant is a national of Eritrea. By a determination notified on 3 June 2005 the Immigration Judge Mr T. Ward dismissed her appeal against a decision refusing to grant asylum and refusing to grant leave to enter. It is salient to mention at this point that Miss Quinn was also the representative before Mr Ward.

2. The Immigration Judge set out the basis of the appellant's claim as follows:

> '9. The appellant claims to be a member of the Eritrean Liberation Front (ELF). She claims to have fled to Addis Ababa when she heard that the Eritrean Government were to call her up for military service. She left Ethiopia and went to Bahrain in March 1998 to work as a domestic worker. She travelled there under a false name ... She returned to Bahrain and married her husband in January 2001. The appellant claims that her father, two brothers and her husband were members of the ELF. She claims that the Eritrean government supporters were harassing her to contribute financial assistance to the Eritrean government while she was in Bahrain. According to the appellant her father was arrested on 1 August 2004. He was killed. On 15 October 2004 the appellant went back to Eritrea to visit her mother. Whilst there her brother Y was arrested. He does not know what had happened to him. On 12 November 2004 she went back to Bahrain. Her employer arranged a visa for her in the UK. However, thereafter her employer cancelled her leave in Bahrain and terminated her work. She left Bahrain and went back to Eritrea on 7 January 2005. On 7 February 2005 while she was out with a friend Eritrean security went to her house and searched it. They were looking for the appellant and her brother. Her brother T was arrested. The security forces asked about the appellant's whereabouts. As a result of all of this the appellant decided to leave Eritrea and came to the UK.

3. The Immigration Judge did not believe this account: he found her whole account "a tissue of lies". It is not necessary to set out his reasons, since the grounds of appeal did not challenge his adverse credibility findings. Miss Quinn confirmed that the appellant's appeal was brought solely on the basis that the

Immigration Judge was wrong not to allow the appeal simply on the basis that she was a national of Eritrea who had applied for asylum in another country and who was still of military service age. It is not in dispute that the appellant is 29 years old.

4. The grounds of appeal raised four main points. Firstly they challenged the reliance the Immigration Judge placed on the Country Guidance case of ***SE (Deportation – Malta – 2002 – General Risk) Eritrea CG [2004] 00295***. They pointed out that it had been put to the Immigration Judge at the hearing that the Tribunal in ***SE*** overlooked that the Maltese returnees were not all draft evaders and deserters; 40% (95 out of 233) were civilians. It had also been put to the Immigration Judge that despite noting that all 233 of the Maltese returnees were detained for some weeks, the Tribunal in ***SE*** had failed to determine whether the detention involved (in Adi Abeto prison) arose in conditions that were persecutory and contrary to Article 3.

5. Miss Quinn's second challenge was to the Immigration Judge's assessment of the facts concerning the 111 Libyan returnees who arrived in Eritrea on 21 July 2004. Contrary to the significance the Immigration Judge appeared to attach at paragraph 38 to the fact that 'most' if not all of the Libyan returnees had deserted from military service or evaded conscription, the evidence was that to date *none* of them has been released.

6. Miss Quinn's third challenge centred on the comments of the Immigration Judge at paragraph 39, which again relied on ***SE***.

> 'In the case of ***SA*** it was stated that the Tribunal did not think that the contents of the May 2004 Amnesty International Report justified the conclusion that returnees generally were at risk. I was referred to that report by the appellant's representative since it stated that even the act of applying for asylum abroad would be regarded as evidence of disloyalty and reasons to detain and torture a person returned to Eritrea after rejection of asylum. For the reasons contained in the case of **SA** I do not accept that to be the case. I do adopt the Tribunal decision in that case to the effect that the mere fact of being a returnee to Eritrea does not mean that someone will face a real risk of serious harm.

[It is accepted on both sides that by ***SA*** the Immigration Judge meant here to refer to ***SE***].

7. Since ***SE*** in fact nowhere dealt with the relevant passage of the Amnesty International report mentioning treatment of persons known to have claimed asylum abroad, the Immigration Judge was wrong, said Miss Quinn, to reject the argument she raised concerning it by reference to ***SE***.

8. Miss Quinn's grounds also attacked the Immigration Judge's reliance on the most recent Tribunal Country Guideline case on Eritrea, ***IN (Draft evaders – evidence of risk) Eritrea CG [2005] UKIAT 00106***. That reliance was misplaced, she said, because she had identified to the Immigration Judge issues concerning the Maltese returnees and the Libyan returnees which ***IN*** had before it but failed to address.

9. We are not persuaded by Miss Quinn's grounds of appeal that the Adjudicator materially erred in law. We remind ourselves that we are not deciding whether the Immigration Judge's conclusions were the right ones, but only whether they were conclusions which were reasonably open to her on the evidence: see ***CA [2004] EWCA Civ 1165***.

10. At the time the Immigration Judge determined this appeal, viz 3 June 2005, the principal and only Tribunal Country Guideline case dealing with military service issues was ***IN***, which had been notified and placed on the AIT website on 24 May 2005. ***MA*** and ***SE*** were removed from the IAT website on the same day.

11. This state of affairs has considerable significance for Miss Quinn's grounds of appeal since much of their focus is on ***SE***, which by the time the Immigration Judge determined this appeal was no longer a Country Guideline case.

12. This state of affairs also has importance for our reconsideration of this appeal, since it is clear that the Immigration Judge, although he did refer to ***SE*** and other earlier Country Guidance cases, sought to reach his conclusions in the light of the latest Country Guidance case on Eritrea, i.e. ***IN***.

13. We first of all need to establish whether, on the basis of the Immigration Judge's findings of fact, he was entitled to conclude, in the light of the guidance given in ***IN***, that the appellant would not be at risk.

14. As we have already noted, the Immigration Judge made adverse credibility findings which Miss Quinn does not dispute. At paragraph 38 he found:

> ‘In my opinion the appellant is not being sought by the government for evading military service nor had she deserted. It is clear also in my opinion that she left the country on a genuine passport. If the authorities were interested in her she would not have been able to do so with such ease.’

15. As such the appellant’s only relevant characteristics were that she was (1) a woman, and (2) of draft age.

The guidance given by IN on persons of draft age

16. Miss Quinn initially appeared to argue that the Immigration Judge was wrong to consider that a woman of draft age could not succeed under current Tribunal country guidance because ***IN*** had not heard argument on the risks faced by individuals of draft age on return to Eritrea and issued no guidance on this category. This argument is plainly misconceived. ***IN*** did hear arguments relating to those of draft age, male and female, and did give relevant guidance. At paragraph 44(ii) it stated:

> ‘There is no material distinction to be drawn between deserters and draft evaders. The issue is simply whether the Eritrean authorities will regard a returnee as someone who has sought to evade military service or as a deserter. The fact that a returnee is of draft age is not determinative. The issue is whether on the facts a returnee would be perceived as having sought to evade the draft by his or her departure from Eritrea. If someone falls within an exemption from the draft there would be no perception of draft evasion. If a person has yet to reach the age for military service, he would not be regarded as a draft evader: see paragraph 15 of AT. If someone has been eligible for call-up over a significant period but has not been called up, then again there will normally be no basis for finding that he or she would be regarded as a draft evader. Those at risk on the present evidence are those suspected of having left to avoid the draft. Those who received call up papers or who were approaching or had recently passed draft age at the time they left Eritrea may, depending on their own particular circumstances, on the present evidence be regarded by the authorities as draft evaders.’

17. Given the terms in which ***IN*** had given guidance on the issue of risk to persons of draft age who were not reasonably likely

to be perceived as draft evaders or deserters, the Immigration Judge cannot be said to have erred in reaching a like-minded conclusion, on the basis of the primary findings of fact he had made.

18. Indeed, had the Immigration Judge chosen to *allow* the appeal based on his primary findings of fact, he would, in the absence of fresh evidence, have materially erred in law in failing to follow the applicable country guidance: see ***R (Iran) [2005] EWCA Civ 982***; AIT Practice Directions April 2005, paragraph 18.2.

The challenge to **IN**

19. Miss Quinn's view of this matter was that it was wrong to treat the proper framework for deciding this reconsideration as being limited to the issue of whether the Immigration Judge's principal findings were in line with applicable country guidance. We put to her that she was thereby effectively seeking, in most of her grounds of appeal, to re-litigate arguments pursued without success in ***IN***.

20. With that in mind we asked her to clarify whether she was seeking to challenge ***IN*** on the basis of any new evidence. She confirmed that she was not. Of course, had she sought to rely on new evidence, that would have been of no assistance in this reconsideration, since we are prevented from having regard to such evidence unless satisfied that the Immigration Judge has perpetrated a material error of law***: CA [2004] EWCA Civ 1165; R (Iran) [2005] EWCA Civ 982.***

21. Her point was different. It was that ***IN*** was unreliable, and should have been seen by the Immigration Judge as unreliable because it had failed to take into account highly relevant factors when assessing risk for those of draft military age and those who were failed asylum seekers.

22. Firstly, she said, ***IN*** had overlooked the fact that the evidence before it on the Maltese and the Libyan returnees furnished a different picture as regards risk on return, in particular the evidence indicating that 40% of the 233 returnees were civilians and that none of the Libyan returnees, including those who were civilian, has yet been released. These points of oversight were of great importance, she said, because of the strong indications in the background materials that any detention of returnees would be in conditions which were persecutory and contrary to Article 3.

23. It is not clear to us that Miss Quinn has appreciated the formal status given to Country Guidance cases by the 2005 AIT Practice Directions:

'The relevant paragraphs state:

"18.2: A reported determination of the Tribunal or of the IAT bearing letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence

18.3 A list of current CG cases will be maintained on the Tribunal website. Both the respondent and any representative of the appellant in an appeal concerning a particular country will be expected to be conversant with the current 'CG' determination relating to that country.

18.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for review or appeal on a point of law.'

24. These Practice Directions have applied since 4 April 2005, and so applied to the Immigration Judge dealing with this case.

25. We would for completeness note that even prior to 4 April 2005, in our view similar considerations applied. The only exceptions to the rule that country guidance cases should be followed, as identified by the Tribunal in ***NM & Others (Lone woman – Ashraf) Somalia CG [2005] UKIAT 00076*** at paragraphs 140 and 141, concerned: (i) evidence that circumstances have changed; (ii) significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any national change in circumstances; and (iii) the passage of time or substantial new evidence which warrants a re-examination of the position.

26. Accordingly we reject Miss Quinn's principal submissions. They amount to an impermissible attempt to relitigate country guidance. To permit submissions of this type would be to allow parties to challenge country guidance by the back door in every case. The country guidance system allows for challenge, but it must be through the front door, on the basis, that is, of fresh evidence having a material bearing on the findings of fact which comprise existing guidance.

27. It is quite clear in this case that Miss Quinn's submissions did not rely on new or fresh evidence. The evidence she identified regarding the Maltese returnees was before the Tribunal in ***IN***, a case which, as we have seen, the Immigration Judge relied on in this case. It is quite clear in this case that Miss Quinn could not invoke the passage of time: ***IN*** was only notified on 24 May 2005, just under two weeks before the Immigration Judge notified his decision in this case. Miss Quinn told us that the same arguments directed against ***IN*** and ***SE*** which comprised her grounds of appeal in this case, recently persuaded the Court of Appeal to remit an appeal to the AIT. It is unfortunate that she did not see fit to furnish us with any particulars beyond the name of the case. Be that as it may, we cannot see any error of law on the part of the Immigration Judge in the case before us and we would observe that the same AIT Practice Directions on which we have relied were cited with approval by the Court of Appeal in ***R (Iran) [2005] EWCA Civ 982***.

28. What we say above is sufficient to dispose of this case. The Immigration Judge based his analysis and assessment on current country guidance. The evidence before him was the same or similar to that which was before the Tribunal in ***IN***. For completeness, however, we shall proceed to explain why we do not consider Miss Quinn's submissions based on criticisms of ***IN*** and ***SE*** to possess any real cogency or merit.

29. Turning first to her challenge to ***IN*** then, it is true that this case does not contain any specific re-examination of the facts relating to Maltese returnees. But we fail to see that this is of decisive importance since ***IN*** was attempting to assess risk on return in May 2005 to individual returnees, based on a considerable body of background evidence, including further information now to hand about the mass return in 2002 of Maltese returnees. We bear in mind that for the purposes of this case, Miss Quinn would have to establish not only that the Tribunal in ***IN*** formed the wrong view but that the view taken by that Tribunal was beyond the range of reasonable responses. Her arguments come nowhere near establishing as much.

30. As regards the treatment by the Tribunal in **IN** of the implications for risk on return of the fate of the 2004 mass return of the Libyan returnees, similar considerations apply. This was a piece of evidence which the Tribunal had to weigh, alongside many other pieces and had to consider as to its implications for returnees returning individually or in families. It obviously saw it as justifying a different view being taken of those who would be perceived as draft evaders or deserters, but not as justifying a conclusion that returnees generally would be at risk. Once again we consider that on the evidence that was a view reasonably open to the Tribunal in ***IN***.

31. Insofar as Miss Quinn relied on flaws in the former Country Guidance case of ***SE*** rather than focussing on ***IN***, we would agree that the Immigration Judge did give her some encouragement, since he appeared to think in paragraphs 37 that in respect of the issue of risk to failed asylum seekers ***IN*** had simply 'confirmed' ***SE***. If what the Immigration Judge meant by 'confirmed' was 'reached the same conclusion based on the same evidence', that was obviously a mistake since ***IN*** had further evidence before it which ***SE*** had not had. If, however, he meant 'reached the same conclusion based on the latest evidence' then what he concluded was reasonably open to him. Either way, however, ***IN*** was the only applicable Country Guidance case and its guidance was the only current guidance on the issue of risk to failed asylum seekers.

32. As for Miss Quinn's argument that the Tribunal in ***SE*** overlooked that the Maltese returnees were not all draft evaders and deserters, even assuming that there was such an oversight, which we doubt, that was a flaw in a case that was no longer applicable country guidance.

33. Miss Quinn complains that neither in ***IN*** nor in previous country guidance cases on Eritrea has there been any consideration of the important piece of evidence furnished by Amnesty International in respect of failed asylum seekers, to the effect that the act of applying for asylum abroad would be regarded as evidence of disloyalty and reason to detain and torture a person returned to Eritrea after rejection of asylum.

34. Miss Quinn is simply wrong about this. Paragraph 26 of ***SE*** clearly did take this item of evidence into account.

35. Nor did ***IN*** overlook this issue. At paragraph 18, summarising the same 19 May 2004 Amnesty International report, it noted reference in it to failed asylum seekers.

> 'This report identifies the categories of people Amnesty International regards as particularly at risk of arbitrary detention. These include

> people evading and refusing conscription on account of their opinions or beliefs and anyone suspected of disloyalty to the government even the act of applying for asylum from abroad would be regarded as evidence of disloyalty and reason to detain and torture a person on return to Eritrea after rejection of asylum.'

36. Furthermore, even if ***IN*** had overlooked it, we do not consider that its principal conclusions are undermined as a result. We return here to the point that the Amnesty International reference was unsupported by any evidence relating to individual returnees and in any event was just one piece of a large body of background dealing with the issues of Eritrean returnees. The Tribunal in ***IN*** gave adequate reasons for concluding that the evidence as a whole did not establish a real risk to returnees generally.

37. Finally, we would point out that even had we seen force in Miss Quinn's submission concerning failed asylum seekers known to the authorities as such, we would not have seen it of assistance in this case since on the Immigration Judge's findings this appellant had left Eritrea on a genuine passport and it was reasonable to assume that a replacement passport could be obtained. There was no proper evidential basis for assuming she would be known to have claimed asylum abroad.

38. For the above reasons we conclude that the Immigration Judge did not materially err in law. Accordingly his decision to dismiss the appeal must stand.

DR H H STOREY
SENIOR IMMIGRATION JUDGE