HF (married women – exempt from draft) Eritrea [2005] UKAIT 00140

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2005
Determination promulgated: 6 October 2005

Before:

Mr L V Waumsley (Senior Immigration Judge)
Mr P Rogers JP
Mr A Smith

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Expert evidence that married women are exempt from call-up for compulsory military service in Eritrea

Representation:

For the appellant: Ms P Yong of counsel, instructed by White Ryland, solicitors
For the respondent: Mr C Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Eritrea, has appealed with permission against the determination of an adjudicator (now an Immigration Judge), Ms T Kamara, sitting at Taylor House, in which she dismissed the appellant's appeal on both asylum and human rights grounds against the respondent's decision to refuse her application for asylum and to give directions for her removal from the United Kingdom as an illegal

entrant. By virtue of article 5(1) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005, the appeal now takes effect as a reconsideration pursuant to article 5(2) of that Order.

Background

2. The appellant entered the United Kingdom on 28 September 2003 using a passport to which she was not entitled. She applied for asylum on the following day. The grounds on which she did so may be stated shortly. Her husband, who was an officer in the Eritrean Army, had been involved with the banned opposition party EPLF-DP (Eritrean People's Liberation Front – Democratic Party). As a consequence, he had been detained by the Eritrean authorities. About a month later, the appellant herself joined the EPLF-DP. However, she was informed by other members of the party that the Eritrean authorities had discovered her involvement, and were looking for her in order to arrest her. It was at that stage that she decided to leave Eritrea. She claimed asylum on the grounds that she would be at risk of being detained and ill-treated by the Eritrean authorities on return because of her known involvement with a banned opposition party.

3. The respondent rejected the appellant's asylum application on 24 November 2003, and three days later the appellant was notified of the respondent's decision to give directions for her removal from United Kingdom as an illegal entrant. The appellant exercised her right to appeal to an adjudicator against that decision. This is the appeal which came before Ms T Kamara on 9 February 2004.

4. In her determination, which was promulgated on 17 February 2004, the adjudicator accepted the appellant's evidence that she was married. However, she rejected the appellant's evidence in all other material respects. In particular, at paragraph 26 of her determination, she concluded, "the appellant's entire claim is an invention." She rejected in terms the appellant's evidence that her husband had any political involvement in Eritrea, that he had been arrested, and that the appellant had ever been of any adverse interest to the Eritrean authorities. It was on the basis of those findings that the adjudicator dismissed the appeal on both asylum and human rights grounds.

Permission to appeal

5. The appellant then sought, and was granted, permission to appeal to the former Immigration Appeal Tribunal. The grounds on which permission was granted read as follows:

> "The failure to adduce material before the adjudicator is entirely the fault of the representatives. However, there has been a recent country guideline case in respect of the material alluded to (MA (Female Draft Evader) Eritrea CG [2004] UKIAT 00098) and in the premises it is appropriate to grant permission."

Error of law

6. The appellant's appeal came before this Tribunal on 27 April 2005, albeit as a reconsideration, rather than an appeal. The Tribunal concluded that the adjudicator had made an error of law. Its reasons for arriving at that conclusion are recorded in the appeal file in the following terms:

> "E and R [2004] EWCA Civ 49 - paras 65 and 66. Risk on return generally not considered by adjudicator.
> a) Draft evasion noted by Adjudicator at paragraph 23 of determination. Not specifically raised as an issue before him [sic] and decision was before MA [2004] 00098. However issue obvious one to be considered.
> b) UNHCR "Position on Eritrea" Jan 2004 was not placed before Adjudicator raises Malta returns and urged states [to] refrain from all forced returns of rejected asylum seekers. Had Adjudicator had that doc (combined with US State Report which he had as evidence by para 23) his view on return may well have been different.
> Not easy issue. SE [2004] 00295, AN [2004] 00300, NM [2005] 00073 and 1 to come. Generous view of E and R to ensure that fairness is done."

Appellant 's submissions

7. We heard submissions first from Ms Yong on behalf of the appellant. She confirmed that she was relying principally on the risk which the appellant would face on return to Eritrea as a perceived draft evader. She was also relying on the latest CIPU (Country Information and Policy Unit) Report relating to Eritrea issued in April 2005 which gives no indication that married women are exempt from the obligation to perform military service in Eritrea.

8. She acknowledged that the appellant had not sought to appeal against the adjudicator's findings of fact as set out in her determination. Nevertheless, she submitted that the appellant would be at risk on return to Eritrea on the basis of the facts as found by the adjudicator.

9. In support of that submission, she referred us to a letter dated 10 March 2005 from the Office of the UK representative of the United Nations High Commissioner for Refugees to a member of her instructing solicitors, White Ryland. In that letter, the UNHCR representative had stated *inter alia*:

> "Persons being deported to Eritrea have long been of concern to UNHCR. Our position paper highlights the situation of deportees from Malta in particular. Between 30 September and 3 October 2002, 233 persons were deported from Malta to Eritrea. 170 of them were reported not to have sought asylum, whereas 53 had been rejected in the asylum procedure (which was not known to UNHCR at the time). They were reportedly arrested immediately on arrival in Asmara and taken to detention incommunicado. The Eritrean authorities neither acknowledged the detentions nor revealed the whereabouts of the detainees to their families or the public. Subsequent reports have suggested that those with children and those over 40 (the conscription limit) may have soon afterwards been released, but the remainder were - and many possibly still are - kept in incommunicado detention in secret places, described as halls made of iron sheets and underground bunkers. According to different sources, the detainees

were deprived of their belongings (including shoes and clothes to change), subjected to forced labour, interrogated and tortured (e.g. by beating, tying up and prolonged exposure to sun at high temperatures). The dwellings are said to be congested and lacking the facilities for personal hygiene. Food and water provided for the detainees is inadequate and unclean. Consequently, many of the detainees have succumbed to illnesses, notably various skin conditions and diarrhoea. Medical treatment is said not to be available. Some detainees are believed to have died of their diseases and/or injuries. At least one person was allegedly killed by shooting during an escape attempt."

10. Ms Yong also referred us to the Human Rights Watch World Report 2005 Index relating to Eritrea which stated *inter alia*:

> "The government detains about 350 refugees who fled Eritrea but were involuntarily repatriated in 2002 (from Malta) and in 2004 (from Libya). They are held incommunicado in detention centers on the Red Sea coast and in the Dahlak islands. Faced with the grim prospect of incommunicado detention and torture, a planeload of 75 Eritreans being forcibly returned to Eritrea from Libya commandeered their Libyan transport and forced it to land in Sudan."

11. She drew our attention to the second page of the same report which states, "All Eritreans between the ages of eighteen and forty-five must perform two years of compulsory national service." She pointed out that there was nothing in that report to suggest that married women or those who are medically unfit are exempt from that obligation. She acknowledged that Dr David Pool had stated in his report dated 4 August 2002 (to which we shall refer in further detail below) that married women and the medically unfit were exempt from the obligation to undertake military service. However, she pointed out that Dr Pool was the only expert who had asserted that married women were exempt from that obligation. In addition, she argued that the objective evidence showed that married women were amongst those individuals who had been detained and ill-treated on return to Eritrea from both Malta and Libya.

12. She referred to paragraphs 39 and 40 of the country guidance determination of the Immigration Appeal Tribunal in *IN (Draft evaders - evidence of risk) Eritrea CG* [2005] UKIAT 00106 (to which we shall also refer in further detail below). At paragraph 39, the Tribunal had stated in relation to the returnees from Malta, "Those released from detention were those not liable for military service, whether because they are women, children or over the military service age." That appeared to indicate that women, or at least some women, were exempt from military service. She then suggested that the hearing should be adjourned to enable further expert evidence to be obtained in relation to that issue. Mr Avery, who appeared for the respondent, opposed the application. He pointed out that the appellant 's own expert evidence, in the form of the report dated from Dr Pool, stated *in terms* that married women were not liable for military service.

13. We concluded that it would be wholly inappropriate to adjourn the hearing part-way through Ms Yong's submissions to give her the opportunity to obtain further expert evidence (if indeed such evidence was obtainable at all) to rebut the existing expert evidence adduced by the appellant herself, and on which she had relied at the hearing before the adjudicator. We therefore refused the application.

14. Ms Yong resumed her submissions. She referred us to the determination of the Immigration Appeal Tribunal in *NM (Draft evaders - evidence of risk) Eritrea* [2005] UKIAT 00073 at paragraph 15 in which the Tribunal had held *inter alia:*

> "The evidence of the returns from Malta and Libya indicate that the Eritrean government is exceptionally suspicious of those of military age who are returned. It is not only the draft evaders amongst the Maltese returnees who were detained. Those of military service age, even those not identified as evaders, remain in detention. A similar fate has happened to the Libyan returnees."

15. She submitted that the situation in Eritrea was not a normal one. The returnees from both Malta and Libya had been detained and ill-treated on arrival. The Eritrean authorities had not distinguished between those who were regarded as draft evaders and those who were not. She also referred us to two Amnesty International reports dated 28 July 2004 and 9 November 2004 respectively which confirmed the report from the UNHCR as to the detention and ill-treatment of the returnees from both Malta and Libya in 2002 and 2004. As those reports effectively duplicate the report from the UNHCR, we do not consider it necessary to set out the relevant extracts in this determination.

Respondent's submissions

16. We then heard submissions from Mr Avery on behalf of the respondent. He pointed out that the successful appellant in *NM* had been found to be at risk on return, not only because she was a returnee of draft age. In addition, the Tribunal had recorded at paragraph 16 of its determination that "She [the appellant] may be additionally vulnerable because of her family's political history, the adjudicator having accepted that her father had been a member of the ELF [Eritrean Liberation Front]." He argued that the situation of the appellant before us was different, as the adjudicator had rejected her claim that she and her husband had been involved in any opposition activities in Eritrea.

17. He also pointed out that at the time when she left Eritrea, the appellant was about 30 years old. According to the claim advanced on her behalf, she had been liable for call-up for military service since she was 18 years old. However, she did not assert that she had ever been required to report for military service during the intervening period of some 12 years. That was indicative of the fact that she was indeed exempt from military service by reason of her married status.

18. He also drew our attention to paragraph 44(ii) of *IN* (to which we shall refer in further detail below) in which the Tribunal had concluded, "If someone falls within an exemption from the draft there would be no perception of draft evasion." By her own account, the appellant is a married woman. She is therefore entitled to the exemption from military service referred to by Dr Pool in his two reports.

Appellant's reply

19. In reply, Ms Yong drew our attention once again to paragraph 15 of the determination in *NM* which discloses that previous call-up is not necessary to give rise to a risk on return to Eritrea for those of draft age. In addition, she submitted, albeit with palpable hesitation, the adjudicator had not made a clear finding in terms in her determination that the appellant was married.

Conclusions

20. During the course of her submissions, Ms Yong confirmed that the appellant's claim was based on two separate limbs, namely (1) that she would be at risk on return to Eritrea as a failed asylum seeker *per se*, and (2) that she would be at risk on return as a perceived draft evader. For the sake of completeness, we record that Ms Yong did *not* seek to argue that the appellant would be at risk on return by reason of her claimed involvement in political activities on behalf of the EPLF-DP since her arrival in the United Kingdom in the terms recorded at paragraph 6 of her supplementary witness statement dated 23 May 2005 as follows:

> "I have been politically active for the EPLF-DP in the UK since around May 2003. I participate in demonstrations and attend meetings in London whenever I can afford to."

As that is not an argument on which the appellant sought to rely before us, we do not find it necessary to consider it further.

General risk as failed asylum seeker

21. The first of the limbs on which the appellant relied was that she would be at risk on return to Eritrea as a failed asylum seeker *per se*. This is an issue which was considered by the Immigration Appeal Tribunal in its country guidance determination in *IN* notified as recently as 24 May 2005. The scope of the matters considered by the Tribunal in that determination is indicated conveniently at paragraph 2 of its determination in the following terms:

> "This appeal raises the issue of the nature and extent of the risk of persecution or treatment contrary to Article 3 for actual or perceived draft evaders being returned to Eritrea and, if there is a risk, whether it extends to all those of draft age. This case will review in the light of the current evidence the country guidance cases *MA (female draft evader) Eritrea CG* [2004] UKIAT 00098, *SE (deportation - Malta - 2002 - general risk) Eritrea CG* [2004] UKIAT 00295 and the reported case *GY (Eritrea - failed asylum seeker) Eritrea* [2004] UKIAT 000327, *AT (return to Eritrea - article 3) Eritrea* [2005] UKIAT 00043 and *NM (Draft evaders - evidence of risk)* Eritrea [2005] UKIAT 00073. This appeal is reported as country guidance on these issues."

22. The Tribunal's conclusions are set out in some detail at paragraph 44 of its determination as follows:

> "Bringing all these factors together, and applying the lower standard of proof, the Tribunal is satisfied that at present there is a real risk that those who have

sought to avoid military service or are perceived to have done so, are at risk of treatment amounting to persecution and falling within Article 3. We summarise our conclusions as follows:

(i) On the basis of the evidence presently available, there is a real risk of persecution and treatment contrary to Article 3 for those who have sought or are regarded as having sought to avoid military service in Eritrea.

(ii) 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 of draft age 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 14 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 a 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.

(iii) NM is not to be treated as authority for the proposition that all returnees of draft age are at risk on return. In that case the Tribunal found on the facts that the appellant would be regarded as a draft evader and also took into account the fact that there was an additional element in the appellant's background, the fact that her father had been a member of the ELF, which might put her at risk on return.

(iv) There is no justification on the latest evidence before the Tribunal for a distinction between male and female draft evaders or deserters. The risk applies equally to both.

(v) The issue of military service has become politicised and actual or perceived evasion of military service is regarded by the Eritrean authorities as an expression of political opinion. The evidence also supports the contention that the Eritrean government uses national service as a repressive measure against those perceived as opponents of the government.

(vi) The position for those who have avoided or are regarded as trying to avoid military service has worsened since the Tribunal heard *MA*.

(vii) 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. In so far as they dealt with a 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."

23. The issue of the general risk to returnees was dealt with by the Tribunal at paragraphs 44(iii) and (vii) of its determination. As will be seen from the extract set out above, at paragraph 44(iii) the Tribunal held, "*NM* is not to be treated as authority for the proposition that all returnees of draft age are at risk on return." At paragraph 44(vii), the Tribunal concluded, "The evidence does not support a proposition that there is a general risk for all returnees."

24. We see nothing in the evidence relied on by either party before us which casts any doubt on the correctness of the Tribunal's conclusions in those terms. The determination in *IN* is a country guidance determination. It is therefore one which we are required to follow, unless we are satisfied that there would be a good reason for not doing so. In the absence of *any* evidence to suggest that the Tribunal's conclusions are no longer correct, there is plainly no basis on which we could arrive at a different conclusion. We therefore find against the appellant on this issue.

Risk as perceived draft evader

25. We now turn to the second limb on which the appellant relied, namely that she would be at risk on return to Eritrea as a perceived draft evader. Whilst the adjudicator rejected the appellant's evidence in relation to most aspects of her claim, the one part of her evidence which the adjudicator *did* accept was the appellant's claim that she was married. The significance of this factor emerged only during the course of the hearing before us.

26. The documentary evidence adduced by the appellant before the adjudicator included a copy of a report dated 4 April 2004 prepared by Dr David Pool in the capacity of an expert witness. His qualifications to give an expert opinion appear from his CV at the end of that report. It discloses *inter alia* that he studied Middle Eastern and African politics, along with Arabic, for his MA at the School of Oriental and African Studies, London and for his doctorate at Princeton University. He taught politics at the University of Khartoum, Sudan from 1972 to 1976. Since 1978 he has been a lecturer in Government at the University of Manchester.

27. At the end of his report, Dr Pool stated *inter alia*:

> "With the exception of married women and the medically unfit, all Eritrean citizens must undertake military service. Draft evasion is punishable by imprisonment with decisions on detention taken by secret military tribunals. There is no provision for conscientious objection."

28. That view was expressed by Dr Pool in August 2002. The fact that it remains his view is clear from paragraph 24 of the determination in *IN* where the Tribunal recorded:

> "The appellant relied on an expert report from Dr David Poole [sic] dated 15 February 2005. This confirms that, with the exception of married women and the medically unfit, all Eritrean citizens between the ages of eighteen and forty must undertake military service and that draft evasion is punishable by

imprisonment with decisions on the length of detention decided by secret military tribunals."

29. It is unfortunate that Dr Pool has not disclosed his authority for his assertion in both those reports. It would clearly have been preferable if he had identified his source in terms. Nevertheless, he holds himself out as someone who is qualified to give expert evidence on the subject. Furthermore, it is the appellant herself who adduced his report of 4 August 2002 as part of the expert evidence on which she relied. It is expert evidence which was accepted by the Immigration Appeal Tribunal in *IN* some 2½ years later.

30. It is plainly not open to the appellant, having adduced expert evidence in support of her appeal, to seek to rely only on those parts of the evidence which assist her claim, and to resile from those parts of it which do not, at least not without adducing further cogent evidence to show why the parts of the earlier report resiled from are no longer to be regarded as correct. When this point was raised during the course of the hearing before us, Ms Yong was unable to direct us to any evidence tending to indicate that Dr Pool's assertion that married women are exempt from military service was not correct. We have taken due account of her submission that Dr Pool's assertion is not confirmed in any of the other objective evidence. However, the absence of such confirmation clearly does not in itself constitute a rebuttal of his assertion.

31. Dr Pool's statement that married women in Eritrea are exempt from military service is one which he made as long ago as August 2002. It is one which he was still making some 2½ later in February 2005. In the absence of *any* evidence to suggest that it is incorrect, it is one which we accept as an accurate statement of the true position. In addition, whilst it is not in itself a weighty factor, we nevertheless also take account of the fact that the appellant did not leave Eritrea until she was about 30 years old. She does not claim that she was ever called upon to perform military service prior to her departure. That in itself is consistent with Dr Pool's evidence that married women are exempt from military service.

32. As concluded by the Immigration Appeal Tribunal in *IN* at paragraph 44(ii), "If someone falls within an exemption from the draft there would be no perception of draft evasion. …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 a finding that he or she would be regarded as a draft evader." That is plainly the situation in which the appellant would find herself on return to Eritrea. In consequence, we are satisfied that she has failed to show that she would be at a real risk of persecution and/or ill-treatment on return to Eritrea as a perceived draft evader.

33. The appellant has failed in relation to both the limbs on which she sought to rely before us. As stated above, Ms Yong did not seek to argue that the appellant would be at risk on return to Eritrea for any other reason. Accordingly, we are satisfied that the adjudicator was right to dismiss her appeal on both asylum and human rights grounds. Her determination discloses no arguable error of law on her part. There is no basis for interfering with it.

Reporting

34. It is proposed that this determination should be reported for what we say in relation to the evidence regarding the exemption of married women from the obligation to perform military service in Eritrea.

Decision

35. The Adjudicator did not make a material error of law and the original determination of the appeal shall stand.

Signed Dated: 3 October 2005

L V Waumsley
Senior Immigration Judge

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