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IMMIGRATION APPEAL TRIBUNAL

AT (Return to Eritrea – Article 3) Eritrea [2005] UKIAT 00043

Date of Hearing :

28 October 2004

Date Determination notified:

25 January 2005

Before:

Dr H H Storey (Vice President)
Mr R A McKee
Mrs A J F Cross de Chavannes

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representatives: Mr R Solomon of Counsel instructed by Zaides Solicitors for the appellant (hereafter claimant); Mr C Buckley, Home Office Presenting Officer, for the respondent.

DETERMINATION AND REASONS

1. The claimant is a national of Eritrea. She appeals against a determination of Adjudicator, Mr P A Spencer, promulgated on 19 April 2004, dismissing her appeal on asylum grounds of appeal against a decision refusing to grant leave to enter.

2. There is a curious history to the promulgation of this determination. The Adjudicator originally promulgated it on 19 June 2003 and in that determination, whilst dismissing the appeal on asylum grounds, allowed it on Article 3 grounds. The Home Office then appealed stating that this

was a typographical error. It was then remitted back to the same Adjudicator by a Tribunal chaired by Mr Parkes on 6 August 2003 for correction of a possible typing error. Acting under Rule 59 of the Immigration and Asylum Appeals (Procedure) Rules 2003 the Adjudicator then repromulgated his original determination with a correction stating that "I dismiss the appeal on human rights grounds". Thus the appeal with which we are concerned is against a repromulgated determination dated 19 April 2004 dismissing the appeal on asylum and human rights grounds.

3. Since Mr Solomon conceded that the claimant would not be able to demonstrate that in respect of any real risk she faced it would be on account of a Refugee Convention reason or ground, the only remaining issue in this appeal is whether the Adjudicator erred in law in concluding that the claimant faced a real risk of treatment contrary to Article 3.

4. The Vice President who granted permission to appeal noted that the claimant's Article 3 claim was allowed by the Adjudicator "... largely because of a UNHCR recommendation, to be reviewed in mid-2004, following the return from Malta of about 220 Eritreans in 2002, some of whom were of draft age or failed asylum seekers".

5. This analysis of the reason why the Adjudicator allowed the Article 3 grounds of appeal appears mistaken, since the Adjudicator nowhere refers to the UNHCR recommendation. Furthermore, the Vice President appears not to have had his attention drawn to the fact that permission was being sought against the repromulgated determination, which had dismissed (not allowed) the Article 3 grounds of appeal. Nonetheless, it is only right, now the appeal is before us, that we consider as far as possible the grounds of appeal as they stand.

6. As Mr Solomon and Mr Buckley acknowledged, neither party had been able to obtain the expected mid-2004 UNHCR review. However, both sought to adduce materials which were not before the Adjudicator, in particular those to hand since the Adjudicator promulgated his determination on 19 April 2004. Following the Court of Appeal judgment in CA [2004] EWCA Civ 1165, we can only take these post-promulgation materials into account if we are first satisfied there is a material error of law in her determination.

7. For reasons given below we are satisfied that he did not make a material error of law.

8. Whilst he accepted the claimant's account of her adverse experiences in Ethiopia, removal directions had only been proposed in respect of Eritrea. Hence the claimant was only entitled to succeed on Article 3 (or asylum) grounds if she could show that removal to that country would expose her to a real risk of treatment contrary to Article 3.

9. Insofar as the claimant's position as a potential draftee into military service was concerned, the Adjudicator did not consider that in her case this would give rise to any real risk. The claimant had claimed to have been inducted into military service whilst still a minor. However, bearing in mind objective evidence showing that only a small number of children under 18 had reportedly entered military service, the Adjudicator did not find it credible that the claimant had ever been taken into the army or undergone military training. Nor did he accept that the claimant was in effect stateless. He noted Amnesty International concern that anyone deported to Eritrea who was suspected of opposition to the government or having evaded military service or deserted from the army would be arrested and possibly subjected to torture or ill-treatment. He concluded such concern was not relevant in this case:

'... this in my view does not apply to the appellant because she has not been required to perform military service'.

10. The grounds of appeal on behalf of the claimant contended firstly that having accepted that the claimant was still a minor who had fled military service by virtue of not completing it, the Adjudicator should have allowed the Article 3 grounds of appeal. Secondly, they contended that by virtue of her history of having been raped, the claimant would be particularly at risk on being drafted into the army in Eritrea. They referred to US State Department Report references to sexual harassment and ages of women in the army. Thirdly they submitted that the Adjudicator should have found she would be at risk simply as a failed asylum seeker. A fourth ground we extract from the draft of the ground is that the claimant would be at heightened risk, being a returnee of mixed ethnicity.

11. We have no hesitation in rejecting the first of these grounds. It presupposes that the Adjudicator found the claimant's account of having undertaken (and only partially completed) military service credible. He did not. No reasons are given in the grounds for challenging the Adjudicator's adverse credibility findings on this aspect of the claimant's account.

12. As for the second ground, it only has potential application if the claimant would face a real risk of being conscripted. However, the Adjudicator, as we have seen, found she would not face such a risk because she has not yet been required to perform military service.

13. We can see no basis for interfering with this finding of fact. We accept that it remains that, as a person soon to become of eligible age to perform military service, it is necessary to consider whether such women face a real risk of serious harm.

14. In considering this issue, Mr Solomon urged us to rely on the country guideline case of MA (Female draft evader) Eritrea CG [2004] UKIAT 00098. This decision was authority, he contended, for the proposition that all women of (or near) conscription age would be at risk. However, in our view, the President in this decision was careful to confine his findings to (female) persons who would be perceived as draft evaders or deserters. It cannot be said of the claimant in this case that she would be perceived as a draft evader or deserter, since, as the Adjudicator properly observed, she has yet to reach eligible age for conscription purposes.

15. Mr Solomon contended that, even if the claimant would not be perceived as a draft evader or deserter, she would face a real risk of serious harm since it was reasonably likely she would at some stage be conscripted. We would accept that this is not something the Adjudicator addressed in specific fashion. However, we do not think that this failure gave rise to any material error of law. Even though the objective country materials do highlight incidents of mistreatment of women in the army in Eritrea, they do not identify a consistent pattern of gross, mass or flagrant violations of the human rights of female conscriptees. It is also a relevant factor, in assessing the extent of risk, to bear in mind that it would appear that only a relatively small percentage of women of conscriptable age are in fact called up (the highest figure we can find for persons (male and female) who are conscripted is 10% of the population). We recognise that the claimant in this case has a history of sexual abuse at the hands of Ethiopian authorities, but we do not consider there is sufficient evidence to show that that would increase any risk to her of maltreatment by the Eritrean authorities.

16. Hence, we consider that the Adjudicator did not err in his conclusion as to risk arising in respect of the claimant's eligibility for military service.

17. That still leaves the issue of whether the Adjudicator was entitled to allow the appeal on the basis that the claimant would face a real risk of serious harm as a failed asylum seeker.

18. Mr Solomon sought to argue that the Adjudicator reached unsustainable conclusions. This was demonstrated in his view by the findings of the Tribunal in the Tribunal guideline case, MA. However, we were not persuaded by his arguments. Our reasons can for convenience be set out by quoting directly from the recent Tribunal country guideline case of SE Eritrea [2004] UKIAT 00295.

19. This determination was not before the parties in the case before us. However, it seems to us that the reasoning set out in it is as valid in respect of the state of the objective evidence as it was before us as it was before the Tribunal in that case. We note in particular the concluding observation in this decision that the considered Tribunal position, both before and after MA, has been and remains that failed asylum seekers per se are not at risk.

> '18. We are bound to say we have great difficulty with Mr Linstead's submission on this matter. In the first place, when the Adjudicator promulgated his determination (5 November 2003) MA had not been decided. By virtue of the case judgment in CA [2004] EWCA Civ 1165, save where there is a material error of law, we are not entitled to take into account Tribunal guidelines on country conditions which were not in existence at the time the Adjudicator promulgated is determination. When the Adjudicator dealt with this appeal it could not be said that he was compelled, either by the Tribunal guidelines or the objective evidence before him, to conclude that all returnees were at risk.
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> 19. Secondly, even if we were entitled to test for legal error in the Adjudicator's determination by reference to a subsequent country guideline case, we do not consider MA is or was ever intended to be authority for the proposition that returnees generally are at risk. At paragraphs 6 and 20 the

President made very clear that the "real question" he sought to address in this determination was "... the sort of treatment which she would receive as someone who would be identified as a draft evader". We do not think that the resolve to confine the issue to female draft evaders could have been made any clearer than that.

20. As already noted, the objective materials before the Adjudicator when he dealt with this case, albeit they did contain references to and commentary on the 2002 events affecting some 220 Maltese returnees, did not compel a conclusion that returnees generally were at risk. Nor at that time was there any Tribunal or court guidance stating that returnees generally were at risk. Mr Linstead asked us to consider two documents which were not before the Adjudicator or indeed before the Tribunal in MA, the CIPU April 2004 Report and the Amnesty International report May 2004. However, once again by virtue of the Court of Appeal judgment in CA [2004] EWCA Civ 1165, save where there is a material error of law, we are not entitled to take such items of evidence into account, since the came into being after the Adjudicator promulgated is determination (5 November 2003).

21. However in order to furnish guidance on this issue, we will go on to consider whether, even had we taken account of these very recent items of evidence, we would have fund returnees generally to be at risk.

22. Our conclusion is that these materials do not establish a risk for returnees generally. In the first place the problems relating to Maltese returnees were clearly linked closely with the perception by the Eritrean authorities that they were draft evaders or omit deserters. The May 2004 AI Report refers to the Malta deportees as

> "mostly armed deserters or conscription evaders" (see p.23)

23. Secondly, even within the group of Maltese returnees, the authorities plainly differentiated on the basis of both sex and age: the May AI Report notes that women, children and those over the conscription age limit of forty years were released after some weeks in Adi Abeto prison.

24. Thirdly, whatever may have been the degree of adverse treatment meted out to the Maltese returnees in 2002, there have been no similar large scale incidents since particularly given that the UNHCR has clearly been monitoring the situation very closely, we consider this lack of repetition very significant. It is true there have been incidents involving returnees since, but these have been very few and in each case they have only involved a very small number of individuals. Furthermore, they have largely been confined to returnees with foreign citizenships. Thus at p.22 of the May 2004 AI report there are references to five cases of difficulties facing Eritreans with foreign citizenships.

25. Fourthly, we find it important to take account of the precise wording the UNHCR position on the Return of Rejected Asylum Seekers to Eritrea" dated 20 January 2004. This letter does state that, in the light of the problems faced by the Maltese returnees "it cannot be excluded that future deportees would face a similar risk", and it goes on to recommend that "states refrain from all forced returns of rejected asylum seekers to Eritrea and grant them complementary forms of protection instead". However, it falls short of stating that all returnees face a well-founded fear of persecution; it leaves that issue for assessment based on the need of asylum seekers for international protection. Furthermore "protection is

itself is clearly viewed by UNHCR as a broader category than protection under the 1951 Convention or under Article 3 of the ECHR. In addition, the language of this Position paper is that of mere possibility ("... it cannot be excluded that ..."). It is not that of real possibility or real risk.

26. For reasons already given we do not think that the contents of the May 2004 AI Report justify a conclusion that returnees generally are at risk. We would note further that even in this report the position of Amnesty International is not unequivocally that all returnees are at risk. It does appear at pp.25-26 to suggest that anyone the authorities learnt was a failed asylum seeker would be at risk, but the formulation of the list of categories to be at more risk is otherwise more limited.

27. Accordingly, (1) we do not consider that the Tribunal decision in MA was intended to establish that all returnees to Eritrea are at risk; (2) the Tribunal position on this issue before and after this decision remains that the mere fact of being a returnee to Eritrea does not mean that someone will face a real risk of serious harm.

28. For the above reasons this appeal is dismissed.'

20. We consider these conclusions also have force in this case. In respect of the facts of the case before us, we note that the claimant is a woman and that the adverse treatment by the Eritrean authorities of the Maltese returnees was almost entirely confined to men. We would also note that we see no reason to consider that this claimant would be returned in the context of a large-scale return.

21. As regards Mr Solomon's further submission, that the claimant would be at risk by virtue of her mixed ethnicity, we do not find that there is any adequate support in the objective country materials for the view that persons of mixed ethnicity face a real risk of serious harm. We note that the Adjudicator found that the claimant's father had particularly strong ancestral links with Eritrea. In addition,

even on the claimant's own account she had been inducted into the army without any apparent concerns being expressed or demonstrated as to her mixed ethnicity.

22. For the above reasons we consider that it was open to the Adjudicator to dismiss the appeal on Article 3 grounds on the basis of a view as to the position of returnees generally. The Adjudicator's view was properly based on the objective evidence and accorded with Tribunal guidance.

23. The appeal of the claimant in respect of the Adjudicator's dismissal of the asylum and Article 3 grounds of appeal is dismissed.

H.H. STOREY
VICE PRESIDENT