

## **IMMIGRATION APPEAL TRIBUNAL**

Date: 24 November 2004  
Date Determination notified:  
30 December 2004

Before:

The Honourable Mr Justice Ouseley (President)  
Mr P R Lane (Vice President)  
Mr I Dove QC

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Appearances:

For the Appellant: Mr P Gunasekara, instructed by Athuraliyage Solicitors

For the Respondent: Miss L Dawes, Home Office Presenting Officer

### **DETERMINATION AND REASONS**

1. This is an appeal against the determination of an Adjudicator, Mr R N Barton, promulgated on 16<sup>th</sup> June 2004. It concerns an Eritrean in his middle to late forties from Asmara in Eritrea originally, but who has lived at some time also in Addis Ababa. He made an initial asylum claim shortly after his arrival in the United Kingdom in 1999 but his application was refused and in November 2001 the Adjudicator dismissed his appeal. He then lodged a second asylum claim reversing his first and second names and giving a different date of birth. He also changed many aspects of what he said had happened to him. He was granted four years Exceptional Leave to Remain. This was revoked by letter dated 1<sup>st</sup> October 2003 after a fingerprint check revealed him to be a multiple applicant who had given false details. Hence the appeal was against the decision that he be removed after the revocation of exceptional leave to remain and the refusal of asylum.

2. The Adjudicator set out the first and second asylum claims. The Adjudicator was told that the first account was the true account and the Appellant wished to revert to that. The Adjudicator said, unsurprisingly, that he found the Appellant's account to be completely unreliable. He pointed to the deceitful second application and to the significant changes in his account of what he said. The basis of his first account was that before he came to the United Kingdom in September 1999 he had been living in Addis Ababa with his wife and five children as a market trader. He had now been told that his wife and children were in Asmara. He maintained that he was involved as a branch treasurer in Addis Ababa with the ELF, that he was opposed to the current regime in Eritrea, was well known to them and would be killed by them should he return. His first asylum claim contended that he was born in January 1957 and had left Asmara in 1989.

3. The Adjudicator said:

“32. Considering the accounts of past events in the context of the country situation, and bearing in mind all of the foregoing, I cannot find the crux of Appellant's story (his claimed political involvement) to have been established to any acceptable standard. He has shown quite clearly that he is a person with a great facility to invent detailed stories and then to maintain them through thick and thin. That the second application was fraudulent and based on an entirely untruthful account of events, was only uncovered as a result of the fingerprint evidence. Faced with that irrefutable evidence, the Appellant had little choice but to admit the story had been fabricated.

33. His credibility has been completely undermined. There is no independent evidence before me to corroborate the truthfulness of the Appellant's earlier account. I am prepared to accept that the Appellant lived and worked as a businessman in Addis Ababa for several years just prior to coming to the UK. I am prepared to accept (on the basis of objective material concerning the Ethiopian authorities' policy of repatriation of ethnic Eritreans in 1999) that the Appellant's family was deported and that he fled here fearing that he too may be deported. I do not find it to have been established that the Appellant held any office for ELF or was anything more than an ordinary supporter who would be of no interest currently to the authorities in Eritrea.

34. I reach the above conclusion after anxious scrutiny of the objective material, most importantly the up-to-date **UNHCR Position on Return of Rejected Asylum Seekers to Eritrea**, of January 2004 and the IAT decisions in **Eritrea CG [2002] UKIAT 05039** and in **MA (Female draft evader) Eritrea CG [2004] UKIAT 00098**. There is an uncertain position that faces many returnees to Eritrea currently, but the Appellant is not a draft-evader (indeed he is well above the age for military service) and has not established that he has any political connection of any significance.”

4. The Adjudicator concluded that there had been no past political involvement of any significance. The fact that his mother was Ethiopian by birth, or that he failed to contribute to Eritrean funds when he was living in Ethiopia was not likely to cause him to be of adverse interest and for the reasons which he had given, dismissed both the asylum and human rights appeals.
5. The grounds of appeal take issue only with the position of risk which a failed asylum seeker would have on return to Eritrea. They contended that the Appellant was a plain and simple failed asylum seeker who would be in a vulnerable position on return. The UNHCR had said in its January 2004 position paper that rejected asylum seekers were entitled to some form of complementary protection, which position had been ignored by the Adjudicator. This was said to be the error of law.
6. Permission to appeal was granted because the Tribunal decision referred to in paragraph 34 of the Adjudicator's determination was thought arguably to go further than dealing with the position of those who would be perceived as female draft evaders on return.
7. Before us, Mr Gunasekara for the Appellant has added little to the grounds of appeal. He has referred us to some passages in the April 2004 CIPU Report for Eritrea. He referred to the January 2004 UNHCR position paper saying that it was a strong statement which remained effective today. Miss Dawes for the Secretary of State referred to the determination of the Tribunal SE (Deportation-Malta-2002-General Risk) Eritrea CG [2004] UKIAT 00295, which considered the Tribunal Determination in MA and concluded that it did not apply to the position of the ordinary failed asylum seeker and that the ordinary failed asylum seeker was not at risk of treatment in breach of Article 3. Both the Determinations in MA and SE had considered the January 2004 UNHCR paper. It was only in SE that the April 2004 CIPU Report was considered.
8. Insofar as the grounds of appeal contend that the UNHCR paper was ignored, that is obviously wrong in the light of paragraph 34. The point focused on by the Vice President granting leave was rather that either the position paper or the effect of the Tribunal decision in MA might have been misunderstood by the Adjudicator in the light of his conclusions. The Tribunal in MA was concerned with the position of a young woman who had left Eritrea at the point when she was required to report for compulsory military training. The Adjudicator had not examined properly what would happen were she to be seen as a draft evader. The Tribunal considered the position of female draft evaders. A piece of evidence which it had to consider in addition to the UNHCR recommendation concerned the forced return of 220 Eritreans deported from Malta in late 2002. The Tribunal considered the UNHCR recommendation but was most

troubled by the various reports which dealt with those returnees who, according to the US State Department Report, were believed to have fled Eritrea to escape or avoid national service. The UNHCR position paper had pointed out that those over forty or with children had been released quite quickly and some deported were not asylum seekers at all. The Tribunal in MA was concerned with those who were of draft age who would be perceived as having evaded the draft in their departure.

9. The Tribunal in SE, with the April 2004 CIPU Report and an Amnesty International Report of May 2004, considered the position again. Those materials were not before the Tribunal in MA. It pointed out that MA was not, and was never intended to be, authority for the proposition that returnees generally were at risk. It referred to two paragraphs in that determination which made clear that it was looking at a female identified as a draft evader. The Tribunal concluded that with all the materials before it there was no risk for returnees generally. It said:

- “22. ... In the first place, the problems relating to the 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 army 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 2004 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 of 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 individual needs of asylum seekers for international protection. Furthermore ‘*protection*’ is itself 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 risk is otherwise more limited."
10. We consider that SE has correctly identified the limit of the scope of the Tribunal decision in MA. We have not had the May 2004 Amnesty International Report cited to us other than what is to be found in SE. We accept the analysis of the background material in SE as satisfactorily demonstrating that there is no real risk on return to the ordinary failed asylum seeker. They are not generally at risk.
11. Mr Gunasekara submitted that the distinction drawn in paragraph 25 of SE between the existence of a real risk of a breach of Article 3 and the UNHCR comment that in the light of the problems faced by the Maltese returnees, "*It cannot be excluded that future deportees would face a similar risk*", was a matter of semantics and that the courts should reject such a limited interpretation of the UNHCR paper and accept instead what it said. We do not think that the Tribunal or the Adjudicator in this case misunderstood the scope and intent of the UNHCR position paper. That position paper focused on humanitarian considerations that go wider than the Refugee Convention and also wider than the considerations within Article 3. The language as to the degree of risk is also not that which is required for the purposes of Article 3. The UNHCR position paper is weighty insofar as it can be related to the issues which we consider, but the width of the humanitarian considerations with which it deals means that the UNHCR paper cannot simply be read as a statement that returning failed asylum seekers would breach either the Refugee Convention or the ECHR, as Mr Gunasekara was suggesting. The UNHCR often speaks of those who are not refugees under the Convention, and of those whose treatment on return would not breach Article 3. It does so out of broader humanitarian concerns.
12. The later determination in SE demonstrates that there was no error of law or even of appraisal by this Adjudicator in his application to the facts, as he found them, of the Tribunal decision in MA. Mr Gunasekara referred us to a number of passages in the April 2004 CIPU Report but that report was considered in SE and no passages to which we were referred supported any suggestion that the decision in SE did not remain sound for the generality of failed asylum seekers. Those passages cannot show that the Adjudicator made an error of law in his determination with paragraphs 6.3, 6.12,

6.132 are not relevant; paragraph 6.150 is not now relevant. Paragraphs 6.217 and 6.220, which deal with torture faced by particular groups and the treatment faced by prisoners and army deserters, are not germane in the light of the Adjudicator's conclusions and the age of the Appellant as he asserts it to be. Paragraphs 6.66 and 6.83 which deal with the ELF do not arise having regard to the grounds of appeal and in the light of the findings of the Adjudicator in paragraph 34. Paragraph 6.237 which deals with failed asylum seekers has already been dealt with in our consideration of SE and its impact on MA.

13. Accordingly, this appeal is dismissed. It is reported for what we say about SE and MA.

MR JUSTICE OUSELEY  
PRESIDENT