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SE (Deportation – Malta – 2002 – General Risk) Eritrea CG [2004] 00295

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 9 September 2004

Date Determination notified:

..29th October 2004...

Before:

Dr H H Storey (Vice President)
Mr A Jordan (Vice President)
Mr D C Walker

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representatives:
Mr P J Linstead of Counsel, instructed by Afrifa & Partners, Solicitors for the appellant; Mr G Saunders, Home Office Presenting Officer for the respondent

DETERMINATION AND REASONS

1. The appellant is a national of Eritrea. She appeals against a determination of Adjudicator, Mr J F Pullig, dismissing her appeal against a decision giving directions for removal following refusal to grant asylum.

2. The grounds of appeal to the Tribunal sought to argue that the Adjudicator was wrong to reject the appellant's account of being at risk by virtue of her fiancé's political activities. At the outset of the appeal, we accepted an application to amend the grounds of appeal so as to put in issue the additional matter of

whether, in the light of the country guideline case of MA Eritrea CG [2004] UKIAT 00098 heard on 11 April 2004 by a Tribunal chaired by the President, Ouseley J, the appellant was entitled to succeed on the basis that on return she would be classified as a female draft evader.

3. We are not persuaded that the Adjudicator was wrong to find the appellant's account of most matters not credible. It was entirely open to him on the evidence to find inconsistent her account that on the one hand she knew nothing about the identities of people who attended the meeting, yet on the other hand that she knew they were of mixed ethnicity and so were anti-government.

4. The Adjudicator was entitled to find it implausible, if the police had discovered documents at her home, that she would not have been asked questions about them, particularly if she had been suspected of collaborating with her fiancé. The Adjudicator took careful note of the appellant's attempts to explain these matters, saying in respect of the first that she knew of the documents but not the details they concerned and, in respect of the other, that she did not know yet it was possible they had enough evidence to bring her to a court of law. The claim that she knew the documents were anti-government was not consistent with her account at interview where she stated she knew nothing: see question 11. The possibility that the police did not question her because they had enough evidence already was correctly considered remote.

5. We acknowledge that, taken in isolation, there is a sentence at paragraph 39 of the determination which appeared to accept that the appellant was arrested. However, when read in context, it is clear that the Adjudicator was doing no more than considering aspects of her claim in respect of the documents on the hypothetical assumption of an arrest.

6. We see nothing in the argument that the Adjudicator failed to assess the appellant's story in the context of the evidence as a whole. The Adjudicator made detailed reference to a number of background sources, including the CIPU Report, the Amnesty International Report and the Human Rights Watch Report. It may be that these showed that those suspected of dissident activity during the relevant period did face arrests and detentions. However, the appellant's account failed to show that she was ever suspected of dissident activity either on her own account or through connection with a dissident fiancé.

7. The Adjudicator plainly considered the appellant's claim that her and her fiancé's bank account had been frozen. Once again, it may well be the freezing of bank accounts is a

measure used by the authorities against dissidents, especially those seen as Ethiopian or part-Ethiopian. However, this background evidence was not enough to overcome the appellant's failure to show that any part of her story, including that about her and her fiancé's bank accounts being frozen, was credible.

8. It is correct that the Adjudicator did not make specific findings on all aspects of the appellant's claimed adverse experiences in Eritrea. However, it was sufficiently clear, in the light of the findings he did make clear that he did not find her credible in any event.

9. Given the Adjudicator's primary findings of fact (which we have found to be sustainable) it was not necessary for him to address the issue of whether she would face prosecution by the authorities and whether such prosecution would be persecutory.

10. This leaves as the only outstanding grounds of appeal (1) whether the appellant would be at risk as a female draft evader and (2) whether she would be at risk as a mere returnee.

11. Mr Linstead on behalf of the appellant submitted that in the light of the country guideline decision, MA Eritrea C G [2004] UKIAT 00098, the appellant was entitled to succeed in her appeal on both grounds.

12. The facts in MA were that the appellant claimed to have left Eritrea having been required, as a sixteen year old, to report for her compulsory military training. The Adjudicator rejected her claim that she had received her call-up papers when she was sixteen but she said that the appellant was now over eighteen and on her return to Eritrea would be required to complete her military training. She found that the appellant would be seen either as a draft evader or as someone required to do military service. The Tribunal accepted that the Adjudicator put the appellant into one or other of the two categories, and that it may not have been possible to know into which category the Eritrean authorities would put her. It was, however, necessary for the Adjudicator to examine both of the possibilities. The Adjudicator did not do so and the Tribunal went on to consider the appeal on the basis that the appellant was a draft evader as found by the Adjudicator. There was no cross-appeal by the Secretary of State against the Adjudicator's finding that the appellant was a draft evader, although she had rejected her claim to have received call-up papers. The Tribunal then went on to consider the treatment that draft evaders were likely to face.

13. Dealing first with the female draft evader issue, Mr Saunders disputed this on two footings. Firstly, there was no evidential basis in this case for considering that the appellant would be perceived as a female draft evader. At no point had the appellant placed any reliance on this contention. Furthermore, the war with Ethiopia had started in 1998 and there was no suggestion that the authorities had viewed her as a draft evader, despite the fact that she had become eligible quite some number of years earlier. Mr Linstead countered that the fact of the matter was that she was still of eligible age and so had to be considered as someone who could be classified as an evader.

14. We agree with Mr Saunders on this point. If there is no evidence that the authorities have taken steps to call someone up, over a significant period of time during which such a person was eligible, it is it hard to accept they would classify him or her as an evader the first time they came into contact with such a person. If Mr Linstead were right, then the Eritrean government would view its entire population in the eligible age range as draft evaders. Plainly it does not.

15. Nor in this case do we think the appellant established that she had left Eritrea illegally. She spoke about crossing the border into Sudan, but has always maintained that her agent had a passport arranged for her. She had this passport when she left Sudan and it was this passport which she said was used by her agent to take her through UK controls. On the basis of that evidence, she had not established that her passport should be considered to have been false or in someone else's name.

16. Since the appellant failed to establish that she exited Eritrea illegally, it cannot be concluded that the authorities upon her return would view her has someone who had left in circumstances designed to avoid compliance with her duty to perform military service.

17. Mr Linstead urged us to allow the appeal in any event, since in his view the country guideline case of MA Eritrea went further than finding that female draft evaders were at risk and in effect found that all returnees, male or female, would be at risk. He based this submission on paragraphs of this determination wherein the Tribunal noted the evidence concerning the Maltese returnees: These paragraphs stated:

> '23. The UNHCR recommendation for temporary protection while the situation is reviewed in mid 2004 is weighty. But the material which is the most troubling is that which concerns the forced return from

> Malta of those who were of draft age, and were in part at least failed asylum seekers. They appear to be held incommunicado, without charge or visits in conditions which do not appear to be simply the spartan ones to which CIPU referred for civilian prisons. Although the UNHCR Report refers to "dwellings" where they are be detained, the conditions which are described included forced labour, beatings, torture, and a lack of medical care, food or sanitation leading to disease and in some cases death. These conditions are quite likely to involve a breach of Article 3. Because this evidence relates to the experience of those who were actually returned, significant weight has to be given to it. We do not know all of their circumstances, why they left Eritrea and what measures were taken to prepare their return with the Eritrean authorities. The evidence is credible. There is no other evidence as to what happens to those who are returned and no better evidence as to what happened to those returned from Malta.
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> 24. At present it appears to us from that evidence that there is a real risk that the appellant would be subjected to the same treatment as those deported from Malta and that her rights under Article 3 would be breached. That position may change with the UNHCR review or with other evidence as to how someone in the position of the appellant would be treated on return, or other evidence as to the position of those deported from Malta.'

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 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 into account Tribunal guidelines on country conditions which were not in existence at the time the Adjudicator promulgated his determination. When the Adjudicator dealt with this appeal it could not be said that he was compelled, either by Tribunal guidelines or the objective evidence before him, to conclude that all returnees were at risk.

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 has 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 they came into being after the Adjudicator promulgated his 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 recent items of evidence, we would have found 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 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.

27. Accordingly, (1) we do not consider that the Tribunal determination 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.

DR H H STOREY
VICE PRESIDENT