MA (Female draft evader) Eritrea CG [2004] UKIAT 00098

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 11th April 2004
Date Determination notified:
04 May 2004

Before:

The Honourable Mr Justice Ouseley (President)
Miss K Eshun (Vice President)

Between:

APPELLANT

and

Secretary of State for the Home Department
RESPONDENT

For the Appellant: Mr A Steadman, instructed by White Ryland
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, who was born on 12th March 1985 and is now nineteen, is a citizen of Eritrea. The Secretary of State refused her claim for asylum and gave directions for her removal on 7th August 2002. The Adjudicator, Miss G A Black, dismissed her appeal in a determination promulgated on 16th October 2003 but, following the refusal of leave to appeal to the IAT, Statutory Review was granted on the basis that there was an area of risk to the Appellant which the Adjudicator had not considered.

2. The Appellant claimed to have left Eritrea in September 2001 when she was required, as a sixteen year old, to report for her compulsory military training. She feared that she would be made to fight, to complete her military service and claimed also to be in fear because she had left Eritrea illegally. At her appeal, she also alleged that military service was against her religious beliefs as a Muslim, a claim which the Adjudicator rejected as not credible. The Adjudicator also rejected her claim to have been persecuted on account of her father's involvement with the ELF; he had been killed when she was three.

3. The Adjudicator rejected her claim that she had received her call-up papers when she was sixteen; children were not called up now that there was a peace agreement between Eritrea and Ethiopia. However, she said that the Appellant was now over eighteen and on her return to Eritrea would be required to complete her military training. She said:

> "I treat the appellant as if she were to be seen as either a draft evader or required to complete her military service upon return. I find that she has failed to establish a claim that her failure to do military service would amount [to] persecution for a Convention reason."

4. After rejecting the claim that the Appellant was a conscientious objector or that the fact that she would have to do military service itself amounted to a Convention reason for persecution, the Adjudicator said that a three-year prison term for failure to complete military service was not disproportionate. Neither her failure to do military service nor her objections to military service would cause her to face a real risk of treatment contrary to the ECHR.

5. Finally, the Adjudicator concluded that returning the Appellant as a single woman to the country where she had lived, established her life and had been educated, where she had at least one family member and would not be destitute or alone, would not contravene her Article 3 rights.

6. The nub of the Appellant's submissions to the Tribunal were that the Adjudicator, having found that the Appellant would be seen either as a draft evader or as someone required to do military service, did not examine the background evidence as to how the former might be treated. We accept that the Adjudicator put the Appellant into one or other of two categories, and that it may not have been possible to know into which category the Eritrean authorities would put her. It was then necessary for the Adjudicator to examine both of the possibilities. The Adjudicator did not do so but reached conclusions only relevant to someone who would be required to complete her service or who would simply face a prison sentence for her failure do so. But there is background material which calls for consideration as to how someone who is seen as a draft evader is in practice treated by the authorities, including those who exercise power or control over the military service and punishment of draft evaders. We have accordingly examined that material.

7. The October 2003 CIPU Report says (5.53) that since the beginning of the border war in 1998, more than six percent of the country's population had served in the armed forces, leading to severe manpower shortages. To overcome this, soldiers had served in local public works programmes while awaiting demobilisation.

Soldiers have however been checking on young men and women who have evaded the draft. In 2002, as in 2001, military police had been deployed at roadblocks and in sweeps and searches to find deserters and draft evaders and detain them. "*There was a general public perception that these round-ups were directed particularly at female draftees.*" (5.57) There was no exception available for religious or conscientious objection, nor any alternative form of service; the punishment for refusing to perform national service was a maximum of three year's imprisonment.

8. Paragraph 5.63 referred to the pressures put on young people to fulfil their national service:

> "The University of Asmara refused diplomas to students who had completed their studies unless they undertook their national service; additionally new graduates were occasionally pressured to work for government bodies. The army resorted to various forms of extreme physical punishment to force objectors, including some Jehovah's Witnesses, to undertake military service. The US State Department 2003 report notes that the police subjected deserters and draft evades to various military disciplinary actions that included prolonged sun exposure in temperatures of up to 113 degrees Fahrenheit or the tying of the hands and feet for extended periods of time."

9. The last passage was strongly relied on by Mr Steadman for the Appellant. It appeared in a number of background reports. It is sourced via the US State Department Report to an Amnesty International Report of 2003.

10. The CIPU Report later refers to torture specifically. Torture is prohibited by the Constitution but the USSD reports many observers as believing that the police at least occasionally resort to torture and physical beatings of prisoners particularly during interrogations. The CIPU Report (6.9) records that the 2002 UN fact-finding delegation found much disagreement about the prevalence of torture; western embassies said that they were not aware of its routine use and were clear that its use was not systematic, whilst recognising that they would not be told if it did happen. It was thought possible that it was used in particular circumstances such as against an Eritrean Jihad group. Others, including Amnesty International and Dr Gilkes, believed that its use was prevalent. The latter could not comment on the scale of its use but noted that there were several reports of its use in Asab and of beatings in the military and in prison. CIPU (6.12) refers to Amnesty International's attempts to research the issue of torture in Eritrea and to the disturbing reports which it has received from army deserters about two forms of torture both practised during the Menghistu regime, one of which, tying, is specifically identified as penalty given for going AWOL and other misdemeanours.

11. Women between 18 and 40 are required to perform national

service but, although women were involved in the fighting with Ethiopia in 1998 and 1999, during that year women began to be re-assigned away from the front line to other duties.

12. This re-assignment needs to be seen in the light of the end of hostilities between Eritrea and Ethiopia, which the Adjudicator set out (paragraph 20) as follows:

> "20. Relations with Ethiopia which were good following independence in 1993 deteriorated in 1997 as disagreements arose. Fighting erupted in May 1998 in the disputed border area around Badme and spread in June 1998 with both sides carrying out air raids against towns in each others territory. A ceasefire in aerial war fare was agreed in June 1998 and there was a lull in fighting until February 1999. There were clashes between Eritrean and Ethiopian troops throughout the late 1990's and early 2000. In April 2002 delegations from Ethiopia and Eritrea agreed to attend the Organisation of African Unity Peace Plans Sponsored Talks in Algeria although those talks ultimately collapsed. In May 2000 hostilities resumed with Ethiopia launching a major offensive and these continued into mid-June but following extensive negotiations both sides expressed their readiness to accept the AOU ceasefire agreement and finally on 19th June 2000 the agreement was signed. This provided for an immediate ceasefire and the deployment of a UN Peacekeeping Force in a buffer zone inside Eritrea. On 12 December 2000 in Algiers Ethiopia and Eritrea signed a comprehensive peace agreement ending the border conflict."

13. Other reports paint a not very dissimilar picture although varying in emphasis. The US State Department Report on Human Rights Practices 2003, of 25th February 2004, referred to the use of torture and beatings of prisoners and to the severe mistreatment of deserters and draft evaders; this included tying and prolonged sun exposure in high temperatures. This is what the CIPU Report draws on. Although deadly force was authorised against those fleeing during searches for draft evaders and deserters, there were no reports of such deaths in 2003.

14. The Report also referred to 220 Eritreans who had been deported from Malta in late 2002 and who were believed to have fled Eritrea to avoid military service. They were detained upon arrival and held in secret locations, incommunicado and without charge. There were reports that some had tried to escape and had been killed. Mr Steadman relied strongly on this as evidence of the risks to which the Appellant would be exposed.

15. It referred to the ages of those liable to do national service as 18 to 45 for men and 18 to 27 for women. This differs from the ages given for women in the CIPU Report (18 to 40). But the Government does not issue exit visas to those who are required to do national service though the Report states that during 2003 efforts to detain women evaders and deserters decreased. It noted some reports that those drafted were subject to sexual

harassment. It continued: *"In 2002, most women in the national service were scheduled to be demobilized; however, many were still serving at year's end. In addition, hundreds were required to continue serving in government ministries."* Amnesty International refers to the announcement of that demobilization. A UN Report of the position in May 2003 said that demobilization was still awaited.

16. The UNHCR "*Position on the Return of Rejected Asylum Seekers to Eritrea*" dated 20th January 2004 took 18 to 40 as the service period for both men and women and said that no meaningful demobilization had taken place. It referred to the reports of severe ill-treatment against deserters and evaders, to the widespread searches and the fatalities which have in the past resulted from resistance during such searches. It provided further information about those who were deported from Malta, some of whom were not asylum seekers at all. They were detained without the detention being acknowledged; but those over forty or with children had been released. The conditions of detention were congested, unsanitary and uncomfortable, leading to disease and malnutrition, which had led to some deaths. One had been killed trying to escape. There were reports of some being tortured. It drew upon the earlier US State Department Reports and an Amnesty International Report for 2002 in this context, much as CIPU had done. The Human Rights Watch Report of January 2004 referred to them as refugees and said that they were still in detention incommunicado.

17. It concluded that the human rights situation had deteriorated in the last two years, that the deportees from Malta may have faced persecution and that it could not be excluded that future deportees would not face persecution. Asylum claims should receive careful consideration and it recommended against the forced return of failed asylum seekers and in favour of them being granted another form of temporary protection.

18. The Amnesty International Report for 2002 referred to the severe punishments for those caught evading conscription including torture and detention for hard labour followed by military service.

19. We, like the Adjudicator do not consider that the fact that the Appellant will be required to do national service and may face a maximum three year prison term for failing to answer her call up would amount to a breach of either Convention and the contrary was not argued. The conditions in civilian prisons are not such as to lead to create a real risk of a breach of Article 3 or of persecution. CIPU describes them (5.48) as spartan with family visits but no international monitoring. There were no reported deaths from lack of medical care, although it was thought that the police did occasionally resort to torture and beatings during

interrogation.

20. The real question is as to the sort of treatment which she would receive as someone who would be identified as a draft evader. She would not fall into those categories who refuse to undertake their national service for religious or conscientious reasons such as Jehovah's Witnesses, who face the harshest of treatment in order to break their defiance of the regime's requirements. She would not be a deserter from the frontline because she has not served and women are no longer required to serve there. Nor in view of the state of peace, or at least the absence of active hostilities, would she be seen as someone trying to evade her wartime duty. Deserters in wartime, those who refuse to serve at all, who resist when apprehended are all likelier to be the more harshly treated. Women may serve for a lesser period, a decision not to use them on the front line has been implemented and a decision to demobilize them has been taken but not apparently implemented. They are required to do various forms of work for the Government.

21. The reports do not differentiate between those various circumstances when referring to those who experience treatment which breaches Article 3 or is persecutory. The reports do not indicate the frequency of occurrence of such treatment, whether it is routine for all or an infrequent occurrence arising when a more serious deserter was apprehended or someone with a conscientious objection refused to fight or work. It would be surprising, in view of the need for labour and the extent of the call up, with attempts at evasion so widespread that there are roadblocks, sweeps and searches commonly undertaken, if the serious treatment were not reserved for those whose conduct was seen as the most serious or who were continuing to refuse to serve. It might be random but that is unlikely to mean that a return would be in breach of either Convention.

22. The Appellant would not be persecuted for a Convention reason; her claim to a religious objection has been properly rejected and there is no complaint which can be made about that. There is no evidence that her illegal exit and failure to respond to her call up papers would lead her to have any political opinion imputed to her which would put her at risk of persecution. The issue is whether she would be at a real risk of treatment which breached Article 3.

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 detained, the conditions which are described include 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.

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.

25. Accordingly her appeal against the refusal of asylum is dismissed and her appeal in relation to human rights is allowed.

MR JUSTICE OUSELEY
PRESIDENT