**Upper Tier Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: AA/00093/2015

**THE IMMIGRATION ACTS**

**Heard at Birmingham**
**On 18 April 2016**

**Decision & Reasons Promulgated**
**On 19 April 2016**

**Before**

**Deputy Upper Tribunal Judge Pickup**
**Between**

**KH**
**[Anonymity direction made]**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the appellant: Mr Howard, instructed by Morden Solicitors LLP
For the respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant has appealed against the decision of First-tier Tribunal Judge Boylan-Kemp promulgated 11.3.15, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 26.11.14, to refuse his asylum, humanitarian protection and human rights claims, and on 27.11.14, to removed him from the UK. The Judge heard the appeal on 16.2.15.

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2. First-tier Tribunal Judge Clayton refused permission to appeal on 9.4.15. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Smith granted permission to appeal on grounds 2, 3 & 4 only.

3. Thus the matter came before me on 18.4.16 as an appeal in the Upper Tribunal.

**Error of Law**

4. For the reasons set out briefly below, I find such error of law in the making of the decision of the First-tier Tribunal as to require the decision of the First-tier Tribunal to be set aside.

5. It follows from the grant of permission that grounds 1, 5 and 6 cannot be pursued and the judge's findings that the appellant did not leave Eritrea illegally, that he was over the age of 18, and that article 8 ECHR is not engaged must stand as made.

6. What remains arguable is that the judge failed to adequately address the following: the risk on return as a failed asylum seeker; the risk on return on the basis that he may be perceived to have left Eritrea illegally; and the risk on return of persecution by reason of liability to indefinite national service in the military and the conditions under which he would have to serve. Grounds 2, 3, and 4 set out the appellant's case very simply on these issues. In summary it is that there was ample background information in relation to each of these issues before the judge, contained in the appellant's bundle. Mr Howard took me to the appellant's bundle and the background information in the OGN section 3.12.3 to 3.12.20, and the COIR 9.19 to 9.25 to show that there was material supporting the appellant's case on these issues. The judge may have reached the conclusion that notwithstanding this evidence there was no risk on return, but the fact is the judge did not address the evidence and made no reasoned findings in respect of these issues.

7. Ms Pettersen did not in fact resist the appeal, accepting that the background material referred was before the judge. She conceded that notwithstanding the judge's clear credibility findings rejecting the appellant's factual account, the judge failed to adequately address the risk on return.

8. In specific relation to the risk on return for the appellant being required to undertake national service, Ms Pettersen accepted that §45 of the decision was inadequate. The judge's statement that no evidence had been provided that the conditions of military service themselves would be so harsh as to amount to persecution. In fact, the OGN states that Eritreans who are forcibly returned, or return voluntarily, will be subject to conscription in the military service if they satisfy the age criteria and are medically fit. It is also repeatedly stated that the period of national service is frequently extended indefinitely and those who face being drafted into military service may be exposed to forced labour for an indefinite period of time, given inadequate food and medical care and suffer arbitrary arrest and detention for minor infractions. Punishment for military offences is carried out extra-judicially. This applies whether or not an individual left Eritrea illegally.

9. In relation to the issue of potentially being perceived as having left Eritrea illegally, Mr Howard pointed me to §133 MO (Illegal exit-risk on return) Eritrea CG [2011] UKAIT 190 (IAC), where the Upper Tribunal stated that on present evidence the great majority of returning failed asylum seekers "are likely to be perceived as having left illegally and this fact, save for very limited exceptions, will mean that on return they face a real risk of persecution or serious harm." The point is that even though the judge found the appellant's claim that he left Eritrea illegally was not credible, the judge failed to identify which of the very limited categories of exceptions, mainly comprising government officials and their families, who will be able to demonstrate that they did not leave illegally. On the evidence of the appellant's background, it appears that he would not meet any of those categories. I do not make such a finding, but it is clear that the judge failed to take this risk of 'perception' of illegal exit into account in a risk on return assessment.

10. In relation to returning failed asylum seekers, at §6.5 the OGN records Amnesty International reports of numerous cases of returned asylum seekers arbitrarily detained and subjected to torture or other ill-treatment, "and it is believed that this may apply to a significant majority of forcibly-returned asylum seekers." Mr Howard drew my attention to other similar information contained in the background material. It does not follow that the First-tier Tribunal Judge would necessarily have reached the conclusion that there was such a risk on return, but the fact remains that it was not considered at all.

11. In the circumstances, the decision of the First-tier Tribunal cannot stand and must be set aside.

12. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where crucial issue at the heart of an appeal have not been resolved, as in this case, effectively there has not been a valid decision on the appeal.

13. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh in accordance with the attached directions.

14. As stated above, the remaining findings of the First-tier Tribunal as to the appellant's age, the human rights decision, and that the appellant did not leave Eritrea illegally

as claimed must stand. In effect, all the credibility findings must stand. It follows from that it is only the risk on return that will be at issue in the First-tier Tribunal.

**Conclusions:**

15. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the making of the decision in the appeal to the First-tier Tribunal to be remade.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**

Deputy Upper Tribunal Judge Pickup

**Consequential Directions**

16. The appeal is remitted to be remade in the First-tier Tribunal sitting at Birmingham;

17. The appeal is to be limited to the sole issue of risk on return on the basis of the judge's findings as to credibility, including that the appellant did not leave Eritrea as claimed, was over the age of 18, and that his human rights are not engaged on the basis of the evidence that was then before the First-tier Tribunal.

18. However, if significant further evidence as to the claimant's private and/or family life is adduced so as to demonstrate the circumstances have changed since the date of the First-tier Tribunal appeal hearing, the Tribunal may need to reassess that issue as at the date of the appeal hearing;

19. The appeal may be listed before any First-tier Tribunal Judge other than Judge Boyan-Kemp and Judge Clayton;

20. The estimated length of appeal is 3 hours;

21. It is anticipated that the claimant and one other person will give evidence;

22. Not later than 10 working days before the listed appeal, the claimant must submit a single revised, consolidated, indexed and paginated bundle comprising all subjective and objective materials to be relied on, together with copies of any case law or skeleton argument. The Tribunal will not accept materials submitted on the day of hearing.

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. Mr Howard requested anonymity. The First-tier Tribunal did not make an order. Given the circumstances, I make an anonymity order.

**Fee Award** **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

**Signed**

**Deputy Upper Tribunal Judge Pickup**

**Dated**