



Upper Tribunal

(Immigration and Asylum Chamber)  
AA/08060/2015

Appeal Number:

THE IMMIGRATION ACTS

Heard at Bradford  
On 14<sup>th</sup> March 2016

Decision & Reasons Promulgated  
On 13<sup>th</sup> April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR T. A. B.  
(Anonymity Direction made)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Mr Hussain (Counsel)

For the Secretary of State: Ms Petterson (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Bircher promulgated on the 25<sup>th</sup> August 2015, in which she allowed the Claimant's appeal against the refusal of his protection claim on asylum grounds under the Refugee Convention 1951.

2. Permission to appeal against that decision was granted by First-tier Tribunal Judge Ford on the 16<sup>th</sup> September 2015.
3. Within the Grounds of Appeal, it is argued that the Judge made a material mistake as to fact which amounted to a material error of law. It is argued that the Judge was mistaken within the decision in finding that it had been accepted by the Secretary of State that the Claimant had left Eritrea illegally at [36] of the decision. It is said that within the reasons for refusal letter the Claimant's claim that he had left Eritrea illegally was specifically rejected at [38 and 39] of the refusal letter. It is said that the Judge having considered that it had been accepted by the Secretary of State that the Claimant left illegally, the Judge had then decided the case on the wrong basis and at [73] explicitly found that "However, by virtue of the fact that it is accepted that the Claimant left Eritrea illegally, he will be at risk of return by virtue of the fact that he will be perceived as a draft evader."
4. Within the permission to appeal grant, Judge Ford in granting permission found that it was arguable that Judge Bircher had erred at [36] and [73] of the decision in deciding the case on the basis that the Secretary of State had conceded the issue of illegal exit, when in fact the refusal letter made clear that no such concession was being made.
5. Mr Hussain on behalf of the Claimant at the oral appeal hearing conceded the fact that there was an error, in that the illegal exit had not been accepted by the Secretary of State, but told me that he would be arguing that although there was an error of law, that error was not material, given that the Judge had considered the case properly including consideration of the Country Guidance case of MO (Illegal Exit – Risk on Return) Eritrea CG [2011] UKUT 00190 (IAC) and that at [78] the Judge had dealt with the question as to whether or not in any event, the Claimant fell within any of the exceptions contained with MO, such as to mean that he would be a person who would have been able to exit Eritrea legally, when he was of draft age.

6. Ms Petterson on behalf of the Secretary of State argued that the Judge had mistakenly considered the Claimant's appeal on the basis that the question of illegal exit had been conceded by the Secretary of State when he had not. However, she conceded on behalf of the Secretary of State that in light of the Judge's consideration of the case at [78] wherein she considered, "for the avoidance of doubt" whether or not the Claimant fell within the exceptions contained within MO and explicitly found that there was insufficient evidence before her to indicate the Claimant would be perceived by the regime's military and political leadership as having given them valuable service; insufficient evidence to indicate the Claimant was a trusted family member of the regime's military or political leadership and was not a personal charge or parents who fled what later became the territory of Eritrea during the war of independence. She conceded that although the Judge had erred in considering that the Secretary of State had conceded the question of illegal exit, given these findings at [78], she could not argue that the error in this regard was material. She conceded that in such circumstances she could not point to any material error of law within the decision of First-tier Tribunal Judge Bircher.

My findings on Error of Law and Materiality

7. In light of the concessions quite properly made by Ms Petterson on behalf of the Secretary of State, I do find the decision of First-tier Tribunal Judge Bircher did contain an error of law on the basis that Judge Bircher had wrongly assumed that the Secretary of State had conceded the question of illegal exit, when in fact the reasons for refusal letter makes it quite clear that the Secretary of State had not conceded that issue and that indeed, illegal exit was not accepted. This was a mistake as to a material fact which could be established by objective and unconscientious evidence in the form of the refusal letter, and the Claimant and his advisors were not responsible for that mistake.
8. However, although the Judge had approached the case on that mistaken basis, again given the concession properly made by Ms Petterson on behalf of the Secretary of State, I do not find that the error in this regard

was material. The Judge had quite properly set out the findings of the Upper Tribunal in the Country Guidance case of MO (Illegal Exit – Risk on Return) Eritrea CG UKUT [2011] 00190 (IAC), and also considered the evidence sought to be relied upon by the Secretary of State saying that there had been a change of circumstance since that Country Guidance. However, having rejected that further evidence as being sufficient to establish that there had been material change in circumstance, and the Judge then quite properly relied in those circumstances upon the case of MO.

9. The Judge properly did go on to consider whether or not the Claimant would have fallen within one of the exceptions contained within MO at [78] and found specifically that there was insufficient evidence before her to indicate the Claimant would be perceived by the regime's military and political leadership as having given them valuable service; insufficient evidence to indicate that the Claimant was a trusted family member of the regime's military or political leadership, and that he was not a person or child or parents who fled what later became the territory of Eritrea during the war of independence. The Judge further found at [1] that the Claimant is a national of Eritrea he was born on the 12<sup>th</sup> February 1991 and he left Eritrea on the 25<sup>th</sup> June 2014, such that he would have been aged 13 at the time, and therefore of draft age as found by the Country Guidance case of MO, as dated within that Country Guidance case at [iv] that "The general position in adopting MA, that a person of or approaching draft age (i.e. aged 8 or over and still not above the upper age limits for military service, being under 54 for men and 47 for women) and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, is reconfirmed, subject to limited exceptions in respect of (i) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (ii) persons who are trusted family members of, or are themselves part of, the regime's military or political leadership. A further possible exception, requiring more case-specific analysis, is (iii) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the war of independence."

10. The Judge having made specific findings that the Claimant did not fall within any of the exceptions, and being above draft age, and not within the categories of people who were able to exit legally, the error of the Judge in assuming that the Secretary of State conceded the issue of illegality was not material. In light of the Judge's findings at [78] and the concession by Ms Petterson that thereby the Judge's decision did not contain a material error, she having considered the issue of illegal exit in any event, the decision of First-tier Tribunal Judge Bircher stands, the same not disclosing any material error of law.

Notice of Decision

The decision of First-tier Tribunal Judge Bircher does not contain a material error of law and is maintained.

Signed

Dated 26<sup>th</sup> March 2016

R McGinty

Deputy Upper Tribunal Judge McGinty