IAC-FH-KH-V3

Upper Tribunal
Immigration and Asylum Chamber

MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 25 February 2011	**On 27 May 2011**

Before

LADY DORRIAN
SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE P R LANE

Between

MO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Palmer, Counsel, instructed by Barnes Harrild & Dyer
For the Respondent: Mr C Avery, Home Office Presenting Officer

(i) The figures relating to UK entry clearance applications since 2006 – particularly since September 2008 – show a very significant change from those considered by the Tribunal in MA (Draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and are among a number of indications that it has become more difficult for Eritreans to obtain lawful exit from Eritrea.

(ii) The Eritrean authorities continue to envisage lawful exit as being possible for those who are above national service age or children of 7 or younger. Otherwise, however, the potential categories of lawful exit are limited to two narrowly drawn

medical categories and those who are either highly trusted government officials or their families or who are members of ministerial staff recommended by the department to attend studies abroad.

(iii) The general position concerning illegal exit remains as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be, that inferences can be drawn from their health history or level of education or their skills profile as to whether legal exit on their part was feasible, provided that such inferences can be drawn in the light of the adverse credibility findings.

(iv) The general position adopted in 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 under 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 (1) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (2) persons who are trusted family members of, or are themselves part of, the regime's military or political leadership. A further possible exception, requiring a more case-specific analysis, is (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the war of independence.

(v) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons 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.

DETERMINATION AND REASONS

1. This case is one that was identified by the Upper Tribunal as an intended country guidance case some time ago. It concerns a national of Eritrea born on 19 May 2008 whose claim for asylum was refused by the respondent on 16 February 2009 and whose subsequent appeal to an Immigration Judge (IJ) Page was dismissed in a determination notified on 15 April 2009. Following a reconsideration hearing that took place on 13 November 2009, Senior Immigration Judge P R Lane's subsequent decision on 16 March 2009 that the IJ had materially erred in law (see Appendix A) stated that the parties were in agreement with him that the case was a suitable vehicle for giving country guidance. The Tribunal's direction to the parties made at the time, specified that the issues were confined to:

    1) risk on return where there has been illegal exit from Eritrea; and/or

    2) [risk on return] where a person has claimed asylum in the United Kingdom (regardless of status of exit).

2. As is increasingly the practice of the Tribunal it was then subject to case management. Sometimes exchanges during the case management process can lead to the country guidance issue(s) being refined or altered, but this did not prove necessary in this case. We are grateful to both parties for their diligence

in identifying and assembling relevant evidence. Following the replacement on 15 February 2010 of the Asylum and Immigration Tribunal (AIT) by a two-tier system, the Upper Tribunal, Immigration and Asylum Chamber is required to re-make the decision in the appeal.

3. Except for one point of clarification we have not sought to re-examine in this appeal the issues of the nature of military and national service in Eritrea, demobilisation and risk on return to persons who are or would be perceived as draft evaders or deserters which are the subject of the guidance given in MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059. Nor do we need to re-examine the question of whether MA reflected a correct legal approach: in GM (Eritrea) & Others v Secretary of State for the Home Department [2008] EWCA Civ 833 it was held that the approach in MA was correct. In MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 the Supreme Court agreed.

4. On the issues we shall re-examine, the position as stated in MA was set out at paras 445-449 of that decision:

> "445. It is clear that a person of military service age or who is approaching military service age who leaves Eritrea illegally before undertaking or completing Active National Service (as defined in Article 8 of the 1995 Proclamation)... is reasonably likely to be regarded by the Eritrean authorities as a deserter and punished accordingly. The evidence of a "*shoot to kill*" policy in respect of deserters, the imprisoning of parents and the process known as "*the giffa*", together with the more general objective evidence regarding the oppressive nature of the Eritrean regime, confirms that any such punishment is likely to be both extra-judicial and of such a severity as to amount to persecution, serious harm and ill-treatment.
>
> 446. What also emerges plainly from the evidence, is that a person of draft age, who has left illegally and who is not medically unfit will be similarly regarded even if he has completed Active National Service and has been "*demobilised*" therefrom because, in the absence of special factors, he or she is still regarded as being subject to National Service. The country guidance in IN (Draft evaders – evidence of risk) Eritrea CG [2005] UKIAT 00106, KA (draft-related risk categories updated) Eritrea CG [2005] UKAIT 00165 and AH (Failed asylum seekers – involuntary returns) Eritrea CG [2006] UKAIT 00078 is therefore modified so as to include this category of persons amongst those who are in general at real risk.
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> 447. As stated in paragraphs 371 - 374 above, we do not find that all returning failed asylum seekers are as such at real risk. That is so even if the returnee is of draft age (or approaching it). If the position were otherwise, we should expect to see some evidence in the background materials. Dr Pool did not advance such a view in his evidence. The only specific evidence was in the comments of Dr Kibreab, recorded in paragraph 374 above. Although we have found him in general a witness whose testimony carries weight, his comments on this issue are unrelated to any specific case history and struck us as unacceptably vague.
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> 448. A person of or approaching draft age who fails to show that he or she left Eritrea illegally is not reasonably likely to be regarded with serious hostility on return, even if the authorities are or would be reasonably likely to be aware that that person had made an unsuccessful asylum claim abroad.
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> 449. A finding as to whether an Eritrean appellant has shown that it is reasonably likely he or she left the country illegally is therefore likely to remain crucial in deciding risk on return to that country.... In making such a finding,

judicial fact-finders will need to be aware of evidence that tends to show the numbers of those exiting Eritrea illegally appear to be substantially higher than those who do so legally and that distaste for what is effectively open-ended service at the behest of the state lies behind a good deal of the current emigration from Eritrea. Nevertheless, where a person has come to this country and given what the fact-finder concludes (according to the requisite standard of proof) to be an incredible account of his or her experiences that person may well fail to show that he or she exited illegally."

5. Although these findings noted some points of disagreement with Professor Kibreab, the Tribunal had attached significant weight to his evidence (as stated at para 205) that those able to obtain exit visas were limited to eight categories:

- Ministers
- Ex-ministers
- Party activists
- Eritrean expatriates, namely those who would be British citizens working in Eritrea but of Eritrean origin
- Elderly people over fifty who were forty or over in 1994 who wanted to go on Haj or visit relatives abroad
- Scholarship students (the government now restricted their movements as many did not return)
- Government employees who attended conferences (although D Kibreab maintained this had recently stopped)
- Relatives of those in power might arguably obtain exit visas as a result.

6. Professor Kibreab's evidence then was that, otherwise, no one under fifty for whatever reason could lawfully obtain an exit visa and would have to walk to Ethiopia or the Sudan, which was risky, and try to cross the border (para 206).

Procedural history

7. At a CMR hearing on 25 March 2010 SIJ P R Lane issued directions designed, inter alia, to assist the appellant's representatives in making a request to the respondent for information regarding student and other visas issued by the UK Embassy in Eritrea and the number of persons entering the UK pursuant to such visas (there being Freedom of Information considerations).

8. The respondent's response confirmed, inter alia, that since 2005 there had been eleven successful applications for entry clearance visas issued to students by the British Embassy in Asmara. A further direction following CMR hearings on 11 August 2010 and 24 November 2010 specified the need for the respondent to provide a further breakdown of the figures already furnished relating to the eleven students concerned, in particular with a view to establishing whether they actually entered the UK and for the appellant's representative's expert, Dr (now Professor) Kibreab, to produce his report and

confirm whether he would be giving oral evidence. Subsequent responses clarified that, of these eleven, seven had been granted leave to enter.

9. In response to Tribunal directions the respondent also produced two letters from the British Embassy in Asmara dated 11 October 2010 and 22 February 2011, whose contents are described below.

10. One other procedural matter we should note is that in response to oral directions given by the Tribunal on 24 February 2011, the respondent wrote on 15 April 2011 producing and commenting on the latest US State Department report, 8 April 2011, making three observations: (1) in the section on disappearances the sources quoted were not necessarily reliable or [were] very vague. It was not clear that the paragraph referring to the two Eritreans returned from Germany was factually accurate. Other background evidence suggested that the two Eritreans returned by Germany subsequently fled again and were granted asylum in Germany; (2) the section on academic freedom contains a paragraph suggesting that children of "liberation fighters" are sometimes required to serve 5 months military service. It was the view of the respondent that this may well be a relevant factor as to exit permits and how they might be perceived by the state should such a person be returned as a failed asylum seeker; and (3) the section on freedom of movement is substantially the same as before but it seems even less clear on the issue of exit permits. On 21 April the appellant's solicitors wrote commenting (with obvious reference to (2) above, that "we are of the opinion that the reference to potentially different service obligations for children of liberation [fighters] requires further attention in relation to service obligations and the obtaining of exit visas." Given this they sought to submit an addendum expert report and written submissions by Friday 13th May asking that at that stage the Tribunal and the respondent consider whether the case needed relisting for further hearing. On 10 May 2011 the Tribunal sent a response to the parties making clear that it would not receive further evidence and that the case would not be relisted for further hearing.

<u>The Appellant</u>

10. The appellant entered the UK on 13 November 2008. He claimed asylum based on an account that the Eritrean authorities had accused him of being a Pentecostalist, that he had deserted from the army and that he had left Eritrea illegally.

11. In dismissing the appellant's appeal IJ Page found the appellant's account not credible in all save two respects. These were that the IJ accepted (1) that the appellant had done military service; and (2) that the appellant left Eritrea in September 2009. On the basis of those findings the IJ did not accept the appellant left Eritrea illegally or that he would be at risk of persecution on return for any other reason. When SIJ P R Lane subsequently found that the IJ had materially erred in law it was on the basis of the inadequate reasoning on the issue of illegal exit. He emphasised, however, the importance of the IJ's finding that the appellant left Eritrea in September 2009, given the US State Department Report reference to the government of Eritrea suspending exit visas in August 2008 (see again Appendix A).

12. It is instructive to note at this juncture that even though it is common parlance to refer in asylum appeals to persons found wholly incredible as "failed asylum

seekers", in the Eritrean context there is an especial need to have regard to such persons' basic physical characteristics - in particular their age and sex – as well as to their likely date of departure from Eritrea. Age and health history of course may or may not be accepted as established, but they, together with sex, are key characteristics because of Eritrea's unique military and national service system and the way it impacts on the possibilities of legal exit. Why the date (if any can be established) an appellant is to be taken to have left Eritrea is important is already hinted at in SIJ PR Lane's above observation, but we will say more about it later. The importance of Immigration Judges so far as is possible making careful and specific findings in Eritrean cases on age and date of departure and health if relevant (see below para 115) cannot be overstated. (A person's sex is also a key matter in the context of Eritrea, although that will almost always be uncontentious.) For reasons we shall come to later, it may also be relevant to look at uncontentious personal data recorded about an appellant to see if it indicates anything further about his or her profile.

Professor Kibreab: written evidence

13. We do not need to set out Professor Kibreab's qualifications and experience as he was an expert in the MA case, which noted them. It suffices to note that he is currently working at London South Bank University as a Professor and Director of Refugee Studies. Professor Kibreab's report dated 8 January 2011, emphasises how in order to compensate for the fact that the Eritrean regime makes it acutely difficult for analysts to obtain information about its workings, he has built up networks of informants inside and outside the country, including former and current civil servants. He has a practice of counter-checking every source.

14. In his report Professor Kibreab stated that the four out of eleven students confirmed by the respondent in response to Tribunal directions to have been granted visas by the UK Embassy in Asmara between 2005 and 2009 but who never entered the UK, were probably denied exit visas by the Eritrean authorities. From the fact that the figure was so tiny it can safely be assumed that the overwhelming majority of Eritrean nationals who leave Eritrea to seek asylum in the UK do so illegally. It seems that as a result of the British Embassy in Asmara curtailing its visa services in the second half of September 2006, no Eritrean citizen was able to get entry clearance to come to the UK. After this curtailment, those Eritrean nationals who were unaffected by the military and national service obligations who wanted to apply for entry clearance to the UK often went to Nairobi, Dubai or Cairo.

15. The possibility for national service-aged Eritreans to be issued exit visas by the Eritrean government – and so to leave the country legally - was extremely restricted or non-existent. Being granted entry clearance by the British Embassy had nothing to do with whether one will be granted an exit visa.

16. Professor Kibreab referred to the figures provided by the respondent relating to the numbers of Eritrean nationals granted leave to enter the UK since 2005. These showed that a total of 771 Eritreans had applied. Professor Kibreab said he found these figures revealing, as they were fairly constant, remaining at the same level despite the sharp decline in the number of applications for entry clearance made to the British Embassy in Eritrea after 2005/6. This suggested in his opinion that it has remained the case for some time that Eritreans

coming to the UK have been persons who had already left Eritrea illegally and gone somewhere else.

17. Given the Eritrean leadership's record of ignoring its own laws when it suits it he could not rule out that leaders would be able to arrange the grant of exit visas to their loved ones and those who served their interests.

18. A key part of Professor Kibreab's report was his identification of those who still had the potential to apply for exit visas. Referring to his previous list as given in MA which contained eight categories he stated that one, ex-Ministers, no longer obtained and all the rest were now more narrowly drawn than when he had given evidence in MA. Even when a person came within one of them an exit visa was still often denied. In relation to the category of government official on a short course or scholarship or seeking workshop or conference attendance, he stated that at present no male Eritrean citizen under 54 or female Eritrean citizen under 47 can leave Eritrea legally.

19. As to the exit visa service in Asmara, Professor Kibreab stated that in 2008 the government suspended its activities, but according to his sources inside Eritrea it has now re-opened albeit its activities are now limited to providing services to (i) men and women who are older than 54 and 47 respectively; (ii) seriously ill citizens whose ailments cannot be treated within the country, as certified by the government medical board; (iii) diaspora (British citizen) Eritreans who live and work in Eritrea; and (iv) an extremely limited number of foreign nationals living and working in the country.

20. Professor Kibreab stated that the procedure for Eritrean residents who wished to apply for exit visas was that (1) they had to apply (to a different department) for a valid passport; (2) they had to apply, using this passport, to be issued entry clearance from the country concerned; and only then were they able (3) to apply for the exit visa, filling out a form supplying certain information and enclosing supporting documentation (e.g. birth certificates, tax clearance, neighbourhood committee clearance documentation, and, for non-service aged persons wishing to attend overseas courses or workshops, a letter of approval from the President's office). Medical categories had to submit a letter of certification from the state's medical board. In cases where the applicant has a spouse or partner abroad it was also necessary to provide evidence of payment of the 2% diaspora tax and certain other contributions. Exit visas are stamped on passports and the Immigration Department would keep records to that effect.

21. Professor Kibreab's report also dealt with the appellant's personal circumstances. Leaving aside those found not to be credible by the IJ, these related to his age and the fact that he had completed military service and the date when he left Eritrea. The professor considered that the Tribunal's conclusion in MA that no demobilisations were taking place in Eritrea, coupled with his own studies, demonstrated that the appellant would still have been engaged in national service when he left Eritrea in September 2009. At that time the exit visa service was most probably suspended; that was the view of the US State Department Report 2010 and the UNHCR 2009 Guidelines. Hence the likelihood of him having been granted an exit visa was almost non-existent. At para 11.40 Professor Kibreab stated that "the appellant as a deserter and as a person who most likely left Eritrea illegally and as a failed asylum seeker forcibly returned to Eritrea is most likely to face imminent risk of

persecution…" The Eritrean authorities run rigorous checks on returnees (as they do on those seeking to depart). If they have reason to suspect a returnee has left illegally and/or sought asylum elsewhere, that person is kept in custody until they check records or interrogate him:

> "11.2 … The degree of checks is more rigorous when the person concerned is of draft age, does not have a residence permit in the country where he is returning from, if deported or if there is any indication to suggest he left Eritrea after 1994.
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> …
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> 11.33. Whenever the security people need to investigate further, the usual routine is to detain the person concerned either at Aid Abeto or at Corscelli in Asmara. In the meantime, the authorities investigate the matter to see whether the person left illegally, whether they have any political/military profile or engaged in anti-government activities – demonstrations, meetings etc or had sought asylum."

Professor Kibreab states that in cases of doubt persons are subjected to interrogation which includes ill-treatment.

22. Professor Kibreab says he agreed with the Tribunal in MA that it cannot be ruled out that the Eritrean government is likely to send people abroad in pursuit of its different interests "without incurring any costs as this will be met by the country of asylum". However, "these are likely to be very few" and "the large majority of failed asylum seekers, including those who left the country legally, are likely to face risk of being persecuted for seeking asylum and consequently for having 'washed the government's dirty linen in public'."

23. Professor Kibreab said it was clear from the accounts given to Amnesty International by two Eritreans forcibly returned by Germany to Eritrea in 2008, that the mere act of seeking asylum was taken seriously by the Eritrean security officials (who told such returnees that they were traitors (11.29)).

Professor Kibreab's Oral Evidence

24. Professor Kibreab was asked to comment on the observation made by the British Embassy, Asmara in its letter of 22 February 2011, that in relation to those who had left illegally the Eritrean authorities did not always take action against them on return. He said such persons must exclusively be those who had fled during the war of independence. The Eritrean authorities encouraged the return of such persons and their lack of valid documentation would not matter to the Eritrean authorities, so long as they could show pre-independence residence.

25. Professor Kibreab said it was possible for Eritreans who had left Eritrea illegally post-independence and gone to Sudan to obtain Eritrean passports there, although only a few were able to do this. Such people would want passports so they could move on to countries such as Kenya and Uganda who required passports. They would need contacts inside the Eritrean embassy in Khartoum: they would have to sign a form regretting their betrayal of Eritrea and stating that they were willing to accept any punishment. Asked why the Eritrean authorities would be prepared to issue passports to such persons, Dr Kibreab said it was to "cut their losses". Such a move enabled them to help disperse expatriates who might otherwise form oppositions in the Sudan, to keep tabs

on such people and also to extract money from them in the form of the 2% tax. It had proved an effective tactic. Some of those concerned were recruited as informers.

26. Professor Kibreab said that Eritreans abroad were liable to pay the 2% tax wherever they were in the world. If you did not pay you would not get key services, e.g. the documentation necessary for expatriates to inherit from their parents in Eritrea or the permission for them to build houses in Eritrea. He said that even if an Eritrean had got hold of a passport after having exited illegally, e.g. through bribery, the authorities on return would still scrutinise the returnee to see if he left illegally. He thought that having signed a repentance form would have no impact on the attitude of the Eritrean authorities at the point of return.

27. Professor Kibreab was asked to comment on the categories of those he had listed in his evidence to the Tribunal in MA in 2007 as potentially able to get exit visas (see above para 5). He confirmed that he would now delete the "Ex-Ministers" category altogether and draw each of the remaining categories more narrowly. Ministers and government officials and employees were now less likely to get exit visas due to the regime's reaction to the fact that significant numbers of persons in these categories who had been given exit visas in the past never returned. He also considered the category, "friends/relatives of those in power", was likely to be narrower now; the President did not let his own son leave the country, so as to set an example. The regime's leadership, being aware of abuses, had imposed random checks. People who might hope to get exit visas through bribes now faced greater scrutiny and severe punishment if caught. He accepted, however, that the inner circle might be able to arrange exit for their own family members and friends secretly.

28. In cross-examination he was asked why he had concluded in his report that the number of scholarship students given exit visas would be very few. Surely, Mr Avery asked, the fact that since 2006 the British Embassy in Asmara's facilities had been scaled down could not be used as the sole test of this. Professor Kibreab agreed but said that the very small numbers corroborated evidence from elsewhere pointing to the same conclusions. He pointed to his note of caution about this matter at paragraph 43 of his report. When the Tribunal decided MA, there were more students who were making applications and their outcome was unknown. Now we knew that since then only two had been successful, one in 2007 and one in 2009. Therefore he considered this category would really just be a limited opportunity for people working for the government and would be for study in places such as China and Qatar. The decision would be made by the President's office, that being a further filter.

29. Professor Kibreab was taxed about his opinion that there was no correlation between being granted entry clearance by the British Embassy and being granted an exit visa by the Eritrean authorities. Mr Avery pointed out that applicants for entry clearance would need to have valid passports. Why would the regime issue passports, he asked, if they were set against granting recipients exit visas? Professor Kibreab said that to get a passport the level of scrutiny was less rigorous.

30. Dr. Kibreab said he agreed he had no direct evidence to back up his claim that almost all returnees would be mistreated - because his information was that no-one returns.

31. Asked why he thought the Eritrean authorities would be prepared to issue passports to those who had illegally exited and gone into Sudan, when that might seem to give a green light to others in Eritrea to flee to that country, he thought that the regime relied on people considering the risk of being shot on sight during the exit enough of a deterrent. In any event, only a few were able to get such passports.

32. In re-examination Professor Kibreab said he thought it likely that the Eritreans claiming entry clearance in Cairo and Khartoum used Eritrean passports; he assumed the majority would have left Eritrea illegally.

33. In reply to questions from the panel he agreed that it was seemingly odd that the Eritrean embassy in Sudan would sometimes issue passports to Eritreans who had left Eritrea illegally, but the matter had to be looked at in the light of how it worked on the ground. He estimated that around 10,000 Eritreans a year exited illegally and went to Sudan. Those who did not want to stay were usually young Christians (also some young Muslims) who did not speak the language in Sudan. Most originated from rural areas. Only a few obtained passports. He had no evidence but his experience led him to think some of these would have been asked to act as informants amongst the Eritrean diaspora or as mobilisers or recruits. In the UK a great many more Eritreans attend pro-government meetings/events than anti-government meetings/events (he gave the example of a pro-government meeting or event attended by approx. 2,500 Eritreans), but he believed that quite a few of the former were doing it for appearances only. Professor Kibreab said he believed almost all Eritreans in the UK were or had been asylum-seekers. Although the great majority professed to be pro-government, this did not mean that they truly were and the regime knew this.

34. Asked about the procedure for applying for an exit visa in Eritrea, Professor Kibreab said the form required you to state which country or countries you proposed to travel to. I was easier to get a visa to the Gulf States and countries with whom Eritrea had close political ties such as China, but the very stringent restrictions outlined in his report would still apply.

35. He was asked about the likely numbers of Eritreans in Sudan who had fled there in the war for independence; he said around 600,000. Encouraging them to return to Eritrea helped the Eritrean government show it was not unpopular.

36. Professor Kibreab said he was adamant the latest list of categories he had given of those potentially able to get exit visas were exhaustive. Because of highly embarrassing defections, sportspersons were now barely able to travel.

37. Asked how people in Eritrea who were family members of persons in Western countries managed to achieve family reunion in a Western country, Professor Kibreab said they would almost all have exited Eritrea illegally first.

38. Professor Kibreab said he considered that the attitude of the Eritrean authorities to Eritreans who had claimed asylum abroad would be hostile. If they had exited illegally they would have severe problems; if they had exited legally they would still have serious problems unless they were people who had been sent abroad by the regime and/or they were seen to have done service for them. The attitude of the authorities was that such persons had been given a

huge favour and so were expected to be ardent supporters of the regime. The government suspected expatriates of betrayal and disloyalty. He did not know of any such persons having returned except for the few cases he recorded in his report and such cases strongly suggested that persecution was the norm. The only exception would be people who had fled Eritrea during the war of independence and their children.

39. Asked what he thought would happen to the children of people who had fled Eritrea during the war of independence if they went back having claimed asylum in the UK, Professor Kibreab said that may not be an issue for them, but they would be required to do military service if within the stipulated age ranges.

Background Evidence

40. The major country reports concur in painting a grim picture of present day Eritrea. In its April 2009 report Human Rights Watch notes that Eritrea is one of the world's youngest countries but has rapidly become one of its most repressive. Reporteurs San Frontieres in its 2008 Press Freedom Index ranked Eritrea ahead of all other countries in terms of the absence of freedom of the press and expression. President Isaias Afewerki, who piloted the country through its 30 year war of independence (which ended in 1994) and its 1998-2002 conflict with Ethiopia, runs it as a one-party state controlled by the People's Front for Democracy and Justice (PFDJ) apparatus. He uses the unresolved border dispute with Ethiopia to keep the country on a permanent war footing. According to the International Crisis Group, "Eritrea: The Siege State" of September 2010, he is no longer seen as the "beloved leader of the nation-at-arms" but as a "mentally unstable autocrat". Following the imposition of UN Security Council sanctions on 23 December 2009 (at the behest of the African Union) for its support of the Somali Islamic insurgency and Al-Shabab (UNSC 1907 (2009)), Eritrea has become increasingly isolated internationally.

41. According to the International Institute of Strategic Studies, Eritrea's population (around 4 million) is the world's second most militarised. Thousands of Eritrean soldiers remain massed on the border with Ethiopia. According to Europe World accessed on 12 May 2010, it is estimated that of the 2.2 military reservists and current military conscripts, about 1.7 million are fit for military service. The introduction in 2002 of the Warsai Yekalo Development Campaign (WYDC) has seen the system of compulsory military service mutate into a programme of indefinite mobilisation of most of the able-bodied adult population to do national service or reserve duty. The repressive apparatus required to keep so many unwilling people conscripted is increasingly unpopular and has led to tens of thousands fleeing the country. In consequence Eritrea is currently among the top refugee-producing nations in the world.

42. Repression in Eritrea is multi-faceted. The Human Rights Watch World Report 2010 (20 January 2010) states that:

> "Eritrea remains a country in shackles. Arbitrary arrests and detention, torture, extrajudicial killings, severe restrictions of freedom of expression and worship, and forced labour are routine. Despite government efforts to veil abuses from scrutiny, Eritrean refugees provided consistent first-hand accounts of widespread

abuses. Thousands of people fled the country in 2009 due to Eritrea's serious human rights violations and indefinite military conscription".

43. According to the US State Department Report (USSD) for 2009 (11 March 2010):

> "Human rights abuses included abridgement of citizens' right to change their government through a democratic process; unlawful killings by security forces; torture and beating of prisoners, sometimes resulting in deaths; abuse and torture of national service evaders, some of whom reportedly died from their injuries while in detention; harsh and life-threatening prison conditions; arbitrary arrest and detention, including of national service evaders and their family members; executive interference in the judiciary and the use of a special court system to limit due process; and infringement of privacy rights, including roundups of young men and women for national service, and the arrest and detention of the family members of service evaders. The government severely restricted freedoms of speech, press, assembly, association, and religion. The government also limited freedom of movement and travel for citizens in the national service, foreign residents, employees of diplomatic missions, the UN, and humanitarian and development agencies. Restrictions continued on the activities of nongovernment organizations (NGOs) and the International Committee of the Red Cross (ICRC). Female genital mutilation (FGM) was widespread, and societal abuse and discrimination against women, members of the Kunama ethnic group, homosexuals, and persons with HIV/AIDS were problems. There were limitations on worker rights, including forced labor."

44. Several major reports contain either express or implicit assessment of risk facing Eritreans who are facing forcible return to Eritrea.

45. We mention first of all the Amnesty International report dated 17 November 2010 (written by Paul Dillane of the Refugee Programme UK (AIUK) for the purposes of this hearing) which was furnished to the Tribunal as part of the appellant's bundle of evidence. This report covers risks due to evasion or military service, exiting the country illegally and the risk due to having sought, or being suspected of having sought, asylum aboard. The report states that the information in it is sourced from Amnesty International's Eritrea Team, part of the AFRICA Programme at the International Secretariat, which carries out research and advocacy work on Eritrea. It also sets out the methodology Amnesty uses in compiling its reports. Having set out its assessment of the widespread abuses of human rights committed by the Eritrean government, the report states that:

> "AI recommends that governments hosting Eritrean asylum seekers refrain from forcibly returning any rejected or non-assessed asylum–seeker to Eritrea, where they would be at serious risk of arbitrary arrest, incommunicado detention, torture and other ill-treatment, including as a direct result of their rejected asylum claim. …All forcibly returned Eritreans are at risk of torture and other forms of ill-treatment during interrogation. According to accounts given by escaped detainees, Eritrean security officials are particularly interested in what rejected asylum seekers have said about Eritrea during their asylum application process. Under torture, or threat of torture, returnees have been forced to state that they have committed treason by falsely claiming persecution in asylum applications. Leaving the country is itself considered by the authorities as an act of treason. "

46. An e-mail from the Horn of Africa team leader for Human Rights Watch dated 23 February 2011 stated that:

> "This is to confirm… that HRW has been monitoring the situation in Eritrea for many years and is extremely concerned about the human rights situation there and the grave risks facing anyone forcibly returned in violation of UNHCR guidelines.
>
> 1. The Eritrean state considers anyone without an exit visa to be a traitor and deserter. Since most of the population is eligible for military conscription, desertion is a serious charge.
>
> 2. HRW spoke to many people in 2008/2009 who had been in detention in Dahlek maximum security prison who had spent time with failed asylum seekers returned from Malta who told us that the returnees were among those tortured the worst.
>
> 3. There is much anecdotal evidence of people being detained and tortured or mistreated upon return to Eritrea but such cases are extremely hard to document because of the impossibility of doing research inside Eritrea, the extremely secretive nature of the prison network in Eritrea, the paranoia of the citizens remaining there and the surveillance by the state of most communication with the outside world. A lack of public record of violations of persons who have been returned should in no way be taken to mean that persons returned to Eritrea are not at risk. The presumption should be very much the other way around: anyone returned to Eritrea is at a very high risk of mistreatment and torture in our view."

47. The materials before us did not contain an express policy statement from the International Crisis Group on the same issue but it is clear from items we have from this body that their position on failed asylum seekers is very similar to that of Amnesty International and Human Rights Watch.

48. The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Eritrea April 2009 note the rise in the numbers of Eritreans seeking asylum, Eritrea having become in 2007 the world's third largest country of origin for individual asylum-seekers, after Iraq and Somalia. The Guidelines state that among those routinely denied exit visas are men up to the age of 54, regardless of whether they have completed national service, and women under the age of 47, as well as students wanting to study abroad:

> "Individuals of, or approaching, draft age who leave Eritrea illegally, will be at risk of persecution as a (perceived) deserter or draft evader upon return to Eritrea. This is equally true for those who have completed active military service or have been demobilised, given that all persons of draft age are subject to national service and, as such, are liable to be recalled."

49. Under the sub-heading, "Forcible return to Eritrea", the Guidelines state:-

> "Eritreans who are forcibly returned may, according to several reports, face arrest without charge, of detention, ill-treatment, torture or sometimes death at the hands of the authorities. They are reportedly held *incommunicado,* in over-crowded and unhygienic conditions with little access to medical care, sometimes for extended periods of time. According to credible sources, 1,200 persons were forcibly returned from Egypt to Eritrea in June 2008, where the majority was detained in military facilities. UNHCR is aware of at least two Eritrean asylum-seekers who have arrived in Sudan having escaped from detention following

deportation from Egypt in June 2008. Eritreans forcibly returned from Malta in 2002 and Libya in 2004 were arrested on arrival in Eritrea and tortured. The returnees were sent to two prisons on Dahlak Island and on the Red Sea coast, where most are still believed to be held *incommunicado*. There are also unconfirmed reports that some of those returned from Malta were killed. In another case, a rejected asylum-seeker was detained by the Eritrean authorities upon her forcible return from the United Kingdom on 14 May 2008. German immigration authorities forcibly returned two rejected asylum seekers to Eritrea. They were reportedly detained at Asmara airport upon arrival and are being held *incommunicado*, and believed to be at risk of torture or other ill-treatment.

For some Eritreans, being outside the country may be sufficient cause on return to be subjected to scrutiny, reprisals and harsh treatment. Individuals may be suspected of having sought asylum participating in diaspora-based opposition meetings or otherwise posing a (real or perceived) threat to the Government, particularly where they have exited the country illegally. It has been reported that, as of September 2008, a blanket restriction on passport and exit visa requests had been imposed by the Government. Given the efficiency and reach of the State intelligence apparatus, there is a reasonable possibility that those in possession of exit visas obtained through bribery would be identified as having illegally left the country.

In light of the above, UNHCR urges States to exercise caution when considering the return of individuals not found to be refugees under the criteria of the 1951 and/or OAU Convention following a determination of their claims in fair and efficient refugee status determination procedures, including the right of appeal. UNHCR further advises against the return of Eritrean asylum-seekers to countries they may have transited or in which they may have been granted status, but from which there is a risk of *refoulement* or deportation. Should an individual demonstrate other needs for which a complementary form of protection would be appropriate the appropriate response should be assessed accordingly. In this regard, States' obligations under international human rights law remain unaffected."

50. UNHCR summarises its general approach as follows:

UNHCR considers that most Eritreans fleeing their country should be considered as refugees according to the criteria contained in the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol, and/or the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), particularly on the grounds of "political opinion" (both real and imputed) and "religion". In this respect, the groups considered to have a presumption of eligibility include, but are not limited to, draft evaders/deserters, political opponents or dissidents (real or perceived), journalists and other media professionals, trade unionists and labour rights activists, members of religious minorities, women with particular profiles and homosexuals. In countries in which asylum claims are determined on an individual basis, they should be so duly considered in light of the 1951/OAU Conventions' criteria. All claims by Eritrean asylum-seekers should be considered on the basis of their individual merits according to fair and efficient refugee status determination procedures. In countries where Eritrean asylum-seekers have arrived in very large numbers, represent a discernible and similar pattern in the nature of their claims, and where refugee status determination exceeds the local capabilities, UNHCR encourages the adoption of a *prima facie* approach in processing claims."

<u>British Embassy</u>

51. In response to questions asked by the appellant's representatives the British Embassy in Eritrea has written two letters dated 11 October 2010 and 22 February 2011 (we also had before us the 2010 COIS report which quoted from extracts of earlier letters from this embassy). Their general tenor was to say that although the Eritrean authorities operate a 'shoot to kill' policy on their borders to seek to deter or stop those attempting to leave, it was difficult to say what action if any would be taken against those returning who were found to have left illegally; it seemed dependent on circumstances and age. As regards failed asylum seekers, this was a "grey area" as "there is little experience of failed asylum seekers". The Eritrean authorities had said no action would be taken except against those who had committed a criminal offence, but given that it was an offence to leave the country illegally, returnees would be liable to detention and questioning: "Some have been released without further action but those who have not undertaken military service could be sent to a military training camp. Some have been fined and some detained". It is also stated that "There are also some Eritreans who have returned 'illegally', i.e. returned from Sudan or Ethiopia without documentation, where no action has been taken."

52. The Embassy said it had not heard of any suspension by the Eritrean authorities of the issue of passports and exit visas in 2008. "Passports are issued only to those who can prove they have completed their national service and 'to those travelling on behalf of the Government of Eritrea." Details were also given of the reduction of UK visa services in July 2006, the number of student visas (see above para 14) and the nature of Khartoum's and Cairo's visa work. Figures for these two posts showed that between June 2008 and May 2009 there were 422 decisions (282 to issue entry clearance) and, between 2009 and May 2010, 522 (359 to issue entry clearance).

53. As regards the extent to which the Eritreans hold records relating to the mode of exit, the same British Embassy letter states that the airport in Asmara maintains a list, believed to be paper rather than IT records, which lists all of the passports and exit permits issued legally: "These lists are checked on arrival – we assume, but cannot confirm, they would be able to determine if someone had left illegally".

US State Department report, 8 April 2011

54. Section 1.b of the latest US State Department report, 8 April 2011 (which we directed be produced to us as soon as it became available after the hearing), under the heading Disappearance, states:

> "Eritrean refugees and asylum seekers repatriated from other countries during the year reportedly disappeared and an unknown number of persons assumed to be in government detention have also disappeared. The government does not provide information on disappearances, and does not regularly notify family members or respond to information requests regarding the status of persons in detention.
>
> In February, according to an opposition Web site, 12 of 67 Eritreans deported from Libya disappeared. There were unconfirmed reports that nine of the deportees were detained incommunicado in Embatkala prison before its closure. Their names are: Zigta Tewelde, Asmelash Kidane, Captain Zeraburuk Tsehaye, Second Lieutenant Zewde Teferi, Yohannes Tekle, Ghebrekidan Tesema, Tilinte Estifanos Halefom, Nebyat Tesfay, and Tilinte Tesfagabre Mengstu. Additional

unconfirmed reports state that Habte Semere and Yonas Ghebremichael, who worked for the President's Office before they left Eritrea, are being detained incommunicado in Ghedem prison near Massawa.

During the year a number of imprisoned journalists disappeared, according to NGO Reporters Without Borders.

In January 2009 the government of Egypt refouled several hundred Eritrean refugees and asylum seekers, all of whom were returned to their families, according to the government. Nevertheless, there were numerous reports from family members of missing individuals, mostly young men and women who had not completed national service.

In 2008 approximately 1,200 Eritreans were repatriated from Egypt, many of whom remained missing at year's end. Similarly in 2008 German immigration authorities returned two Eritrean nationals, neither of whom had been seen since their arrival in Asmara."

55. Section 2.d states in its relevant parts:

"Citizens required government permission for most travel within the country and to change their places of residence. The government severely restricts travel to the border regions and does not even offer bus services to towns near the border. The government continually modified its requirements to obtain passports and exit visas, sometimes suspending passport or exit visa services without prior warning. During the year the government introduced a new, machine-readable passport at a cost of 4,000 nakfa ($267) valid for two years. It costs a citizen in national service approximately 40 percent of his gross yearly salary just to maintain a valid passport. The prohibitive cost of the passport deters many citizens from foreign travel.

Citizens participating in national service were often denied internal travel permits, passports, and exit visas. Many persons who previously were issued passports were not allowed to renew them, nor were they granted exit visas. Military police periodically set up surprise checkpoints in Asmara and on roads between cities to find draft evaders and deserters. Police also stopped persons on the street and detained those who were unable to present identification documents or movement papers showing they had permission to be in that area.

Citizens and some foreign nationals were required to obtain exit visas to depart the country. Persons routinely denied exit visas included men under the age of 54, regardless of whether they had completed national service; women under the age of 47; members of Jehovah's Witnesses and unregistered religious groups; persons who had not completed national service; and other persons out of favor with, or seen as critical of, the government. In 2006 the government began refusing to issue exit visas to children 11 years old and older. During the year some children as young as five years of age were denied exit visas either on the grounds that they were approaching the age of eligibility for national service or because their foreign-based parents had not paid the 2 percent income tax required of all citizens residing abroad. The government did not in general grant exit visas to entire families or the male and female parents of children simultaneously in order to prevent families from fleeing the country. Some citizens were given exit visas only after posting bonds of approximately 150,000 nakfa ($10,000). Exit visa policies are frequently adjusted in nontransparent ways to specifically benefit the relatives of high-ranking government officials, such as the unannounced posting of public notices in locations that the public cannot access."

56. The same report also refers to the matters highlighted by the respondent in para 10 above (relating to disappearances, preferential treatment for children of liberation fighters and exit permits).

Specific matters in more detail

57. The nature of our inquiry necessitates that we consider in the one place the state of the evidence about specific matters, even though this does mean some overlap with our earlier summary of the evidence so far.

Exit Visas

58. We have already noted the evidence of Professor Kibreab, the major country reports and the British Embassy in Asmara relating to exit visas. There is broad consensus that the siege mentality of the present regime has led it to restrict considerably the possibilities for Eritreans to leave the country. Professor Kibreab stated that the Eritrean authorities had probably suspended its exit visa service in September 2008. The British Embassy, Asmara letter of 22 February 2011 states that it had not heard of any such suspension. However, the Awate.com report 'No Legal Exit, No Limit on Exodus' dated 25 September 2008 (cited in the COIS report June 2010 at para 32.12) stated that the regime had"now" issued a "blanket denial for all passport and exit visa requests from Eritrea". UNHCR's 2009 Guidelines also mentioned September: see para 49 above. According to the USSD Report for 2009 (and the latest report dated 8 April is to similar effect), passports and exit visas have been increasingly difficult to obtain:

> "While citizens could generally travel freely within the country and change their places of residence, the government restricted travel to some areas within the country, particularly along the borders with Sudan and Ethiopia. The government continually modified its requirements to obtain passports and exit visas, sometimes suspending passport or exit visa services without prior warning. Citizens participating in national service were often denied internal travel permits, passports, and exit visas. Many persons who previously were issued passports were not allowed to renew them, nor were they granted exit visas. Military police periodically set up roadblocks in Asmara and on roads between cities to find draft evaders and deserters. Police also stopped persons on the street and forcibly detained those who were unable to present identification documents or movement papers showing they had permission in that area.
>
> Citizens and some foreign nationals were required to obtain exit visas to depart the country. Persons routinely denied exit visas included men up to the age of 54, regardless of whether they had completed national service; women under the age of 47; members of Jehovah's Witnesses; and other persons out of favour with, or seen as critical of, the government. In 2006 the government began refusing to issue exit visas to children 11 years and older. The government also refused to issue exit visas to children, some as young as five years of age, either on the grounds that they were approaching the age of eligibility for national service or because their expatriate parents had not paid the 2 percent income tax required of all citizens residing abroad. Some citizens were given exit visas only after posting bonds of approximately 150,000 nafka ($10,000)."

59. The precise scope that remains for persons to obtain exit visas has become a key issue in asylum appeals brought by Eritrean nationals. We recall that in his evidence to the Tribunal in the MA case in 2007, Professor Kibreab was recorded as stating that the categories of those able to obtain exit visas was

limited to eight categories: ministers; ex-Ministers; party activists; Eritrean expatriates, namely those who would be British citizens working in Eritrea abut of Eritrean origin; elderly people over fifty who were forty or over in 1994 who wanted to go on Haj or visit relatives abroad; scholarship students ; and government employees who attended conferences; and relatives of those in power (para 205).

60. In his recent report and oral evidence to us Professor Kibreab said the categories potentially able to get an exit visa were now seven in number (in his report he first refers to there being 11 categories but later compresses them to seven):

    (i) a male of 54 years or over;

    (ii) a female of 47 years or over;

    (iii) children of 7 or younger;

    (iv) a person declared by an official committee to be unfit on medical grounds to perform any military or national service;

    (v) a person certificated by an official committee to be unable to receive appropriate medical treatment in Eritrea;

    (vi) highly trusted government officials and their families;

    (vii) members of ministerial staff recommended by the department to attend studies abroad.

61. Some of the country reports placed before us, e.g. the latest US State Department report, do not descend to the level of detail given by Professor Kibreab in his latest evidence on these categories, but his updated description appears broadly consistent with much of the evidence before us, although, as we will come to below, Mr Palmer drew attention to the fact that the latest British Embassy, Asmara letter appeared to consider they were more limited.

The Eritrean diaspora

62. The way that the Eritrean regime has been supported by and has made use of its diaspora links has been the subject of much commentary: see e.g. COIS report, June 2010, para 15.06. In MA at paras 368-9 the Tribunal found that the Eritrea diaspora was sizeable, referring to the CIOS Report, at paragraph 31.10, noting that over 100,000 Eritreans have lived in lived in Sudan for up to 25 years and the evidence of Dr Pool that at the time of the UN-monitored referendum in April 1993, which resulted in independence for Eritrea, Eritreans were living in Ethiopia, Sudan, Saudi Arabia and Europe. We have already noted Professor Kibreab's evidence to us on Eritreans in the UK: see para 33 above. The ICG report highlights the fact that the Eritrean diaspora are expected to pay a voluntary 2% of their monthly salaries to the government, an extraterritorial income tax mainly managed through local embassies and consulates. Such taxes are required in order to maintain their full rights as citizens, particularly if they later wish to return or open a business. The report notes that: "Many do pay, but increasing numbers, especially of the newly arrived, do not, whether because of their economic situation or hostility to the

regime". What is clear, however, is that the funds collected through the tax are a crucial source of revenue for the Eritrean government. The Human Rights Watch Report, under the sub-paragraph-head, "Coercion of Eritreans in Exile" states:

> "The tragic reality for Eritreans who flee the country is that once they have escaped, they -and particularly their families- are still not entirely safe from repressive actions by the Eritrean government. In a small country with a relatively small population (4 million), the local administrations in towns and rural areas usually have a clear idea of who is where. And as described, the government has made it clear that it considers every Eritrean who leaves the country illegally to be a traitor to the nation. Once a person leaves the country they are, in effect, treated as fugitives by the government and if returned are treated as criminals who will face detention, torture, and sometimes death.
>
> There are a variety of ways in which the Eritrean government exerts pressure on exiles for both financial and political reasons. The government expects all Eritreans in the diaspora to pay a two percent tax on income. While taxing expatriates may be a legitimate state function, the manner in which the Eritrean government coerces individuals into paying this income presents serious human rights concerns. If refugees or other Eritrean expatriates do not pay the two percent tax then the government typically punishes family members in Eritrea by arbitrarily detaining them, extorting fines, and denying them the right to do business by revoking licenses or confiscating land.
>
> The two percent tax is not only a financial mechanism, however. The government also uses it to consolidate its control over the diaspora population by denying politically suspect individuals essential documents such as passports and requiring those who live in Eritrea to provide 'clearance' documents for their relatives who live abroad – essentially coercion to ensure that their relatives have paid the two percent expatriate income tax demanded by the government."

63. The same report under the sub-head "Collective punishment of deserters' families" describes the families of those who flee national service (including those who go abroad) being jailed or forced to pay fines. This analysis is supported by observations made in the USSD report for 2008 and 2009.

64. The USSD report for 2008, in the course of describing how citizens are forced to attend PFDJ meetings irrespective of membership notes that: "There were reports that similar meetings were mandatory for Eritrean communities abroad, with names of those not in attendance being reported to government officials."

65. The COIS report June 2010 at para 32.08 cites an Awate.com article of 21 May 2008 stating:

> "A small privileged group composed of the children and families of high government officials and ministers as well as of loyal cadres, some in need of specialised medical diagnosis and treatment, are allowed to travel via Asmara Airport and encouraged to acquire permanent residence permits in the West, posing as paperless political asylum seekers. When granted refugee status they travel frequently to Eritrea and remain ardent supporters of the regime from whom they have sought 'asylum'. Likewise, many of the pepetuators [sic] of human rights violations in Eritrea have their entire families transferred abroad and travel regularly to visit them."

<u>Evidence of Returns</u>

66. As we know from previous country guidance cases there was a forcible mass return of Eritreans to Eritrea by Malta in 2002 and by Libya in 2004. In KA the Tribunal stated:

> ”56. In IN the Tribunal had before it considerable evidence relating to the fate of the 223 persons whom Malta had returned en masse to Eritrea in 2002 (see paras 19-20), and the fate of the 111 persons returned from Libya in July 2004 (see paras 21-22) and the case of several individuals Djibouti (see para 23).
>
> 57. The background evidence before us also covers these incidents in great detail. The Amnesty International report of 25 May 2004 notes that some of the 232 Eritreans who were forcibly returned to Eritrea from Malta in 2002 continued to be detained incommunicado without charge on the main Daklak Island in the Red Sea or at other military detention centres. There is no mention in the evidence before us of any further incidents of mass return.
>
> 58. We can see no reason to take a different view on this issue than the Tribunal did in IN. Essentially the Tribunal's view continues to be that although the Maltese and Libyan mass return incidents are particularly serious, we do not consider they are sufficient to establish that there is a real risk of serious harm to returnees generally. Most returns to Eritrea continue, as far as we are aware, to take place on an individual or family basis, not on a mass basis. Given the extent to which human rights bodies have been able to obtain information about what is happening inside Eritrea, despite the regime`s efforts to suppress dissent and reportage of abuses, we consider that if individual returnees were routinely encountering serious harm or ill treatment, that fact would have been identified and documented to a greater or lesser extent. “

67. There is considerable evidence relating to returns by Egypt in 2008-2009. According to the Human Rights Watch Report 2009:

> “In June 2008 Egypt returned to Eritrea up to 1,200 Eritreans who had crossed into Egypt from Sudan. As of late 2008, at least 740 of those returnees were still imprisoned in Wi’a, the military detention facility in Eritrea.”

The same report refers to the forcible return of “dozens more” Eritreans in December 2008 and January 2008, but without noting any feedback on what happened to them.

68. An Amnesty International communiqué of 29 May 2008 states that on 14 May German immigration authorities forcibly returned Eritrean nationals, Xonas Haile Mehari and Petros Aforki Mulugeta, to Eritrea. Neither man was said to have been seen since. The latest US State Department report, 8 April 2011 appears to refer to information to similar effect.

69. Professor Kibreab’s report, however, contains a recent update on their situation. According to a document given to him by Amnesty International, both men had been transferred to Aid Aeto prison, Mulugeta being transferred to Wi’a and Mehori, classified as a military deserter, having been transferred to an unknown military unit where he was held incommunicado. But they then managed to escape for a second time. He recounts that:

> “The two were allowed to enter Germany in April and June 2010 respectively because their applications for asylum had been recognised on the basis of confirmed reports about their detention.…”

70. In interviews with Amnesty International staff both described being subjected to detailed questioning relating to how they left Eritrea and what they said to the German authorities about Eritrea when claiming asylum.

71. In a short report dated 29 November 2009 AI stated that the UK authorities had forcibly returned Miskir Semerab Goitom to Eritrea on 21 October 2009, she was said to have arrived in the UK via Sudan on 24 January 2007 and claimed asylum, which was refused:

> "She was sent via Saudi Arabia to the airport in the capital, Asmara. She was ordered to report to airport security the following day where she was detained. [She] has not been seen since. She is reportedly held in Aid Abeto military prison near Asmara and [AI] believes she is at risk of torture."

72. Professor Kibreab's written report referred to further evidence relating to Ms Goitom. At 11.9 he records that since the AI report he had been informed by a Ms Elsa Churm, a London-based human rights activist, that this woman had been removed from Aid Abeto prison to an underground cell outside the Wi'a military training camp where conditions are likely to be inhumane.

73. The Amnesty International report of May 2010 having referred to forcible return by Egypt of at least 64 Eritreans trying to cross into Israel; and, by Sweden, of 8 people, states that:

> "According to accounts by escaped detainees, Eritrea security officials were particularly interested in what failed asylum seekers had said about Eritrea during their asylum application process. All statements about persecution in Eritrea were perceived as acts of treason against the state."

74. Professor Kibreab cites an A1 document titled 'Sent Home to Detention and Torture' stating that by late 2008, up to 1,200 asylum seekers were returned by Egypt to Eritrea and detained on arrival: "the vast majority of those returned asylum seekers were reportedly transferred to Wi'a prison, a remote desert faculty, and other detention facilities."

75. We recall that the 23 February 2011 e-mail from the Horn of Africa team leader for Human Rights Watch cited earlier noted, inter alia, that:

> "HRW spoke to many people in 2008/2009 who had been in detention in Dahlek maximum security prison who had spent time with failed asylum seekers returned from Malta who told us that the returnees were among those tortured the worst".

Submissions

76. Mr Palmer averred on the general issues that we should continue to take the view that a crucial factor in assessing risk on return was previous illegal exit but should now recognise that the "high majority" of Eritreans in the UK will have exited illegally. Whilst he accepted that the evidence still fell short of establishing that all such persons must have left illegally, we should find that very few could have done otherwise. The government's control of emigration had been tightened further. Professor Kibreab's evidence made clear that the categories of those still potentially able to obtain exit visas were now more

tightly drawn. Therefore we should find that males and females of or approaching military age when they left would not have left legally.

77. In the light of the evidence that the possibilities of legal exit for Eritrea have shrunken even further, the Tribunal should modify its approach to the cases of Eritrean appellants found to be wholly incredible. In GM Laws LJ had clarified that, where the Tribunal finds a claimant's account wholly incredible, he could be assumed to have left Eritrea legally unless there was sufficiently strong general evidence that persons in the claimant's position would not have left legally. The Tribunal in MA had properly found that the general evidence was not of this character. However, in Mr Palmer's submission the general evidence could now fairly be said in most cases to be sufficiently strong to counteract negative credibility findings. The respondent had not adduced any rebuttal evidence undermining the strength of the general evidence pointing to a presumption of illegal exit.

78. In consequence, Mr Palmer urged, the Tribunal should hold that a finding that a person left illegally (or obtained legal departure through bribery) was sufficient to establish that on return he would face a real risk of persecution.

79. Finally, submitted Mr Palmer, the Tribunal should take the position that irrespective of whether it considered a person had exited legally or illegally, failed asylum-seekers would face a real risk of persecution on return. In support of this argument Mr Palmer placed considerable reliance on major country reports. These demonstrated, he said, that it is reasonably likely that the act of claiming asylum abroad will be treated by the Eritrean authorities as an act of opposition or treason against the Eritrean state. He highlighted the Human Rights Watch observation (as stated in a 23 February 2011 email) that the Eritrean state considers anyone without an exit visa to be a traitor and deserter and the ICG Report's reference at page 189 that those the regime jailed as enemies of the state "include first failed asylum seekers". For asylum seekers from the UK there would be the further problem that the Eritrea regime heaps opprobrium on the UK as a key ally of Ethiopia and the US. It was particularly important, he submitted, to attach weight to the evidence relating to the ways in which the Eritrean regime keeps tabs on Eritreans in exile, through the 2% extraterritorial tax especially. Even if the Tribunal was not persuaded failed asylum-seekers per se would be at risk, it should find that those of or approaching draft age when they left would be.

80. So far as the appellant's case was concerned, Mr Palmer said he was entitled to succeed either on the basis that he fell into the category of those who were at risk because they left illegally or, alternatively, even if the Tribunal did not accept that, because he was a failed asylum-seeker.

81. It was important to bear in mind, added Mr Palmer, that the appellant was not found incredible in every particular. The IJ had accepted that he had served in the military.

82. In the light of the findings made by the Tribunal in MA relating to demobilisation, we should find, Mr Palmer argued in conclusion, that he would not have been formally demobilised and would therefore have been under a continuing duty to serve in either military or national service. Particularly bearing in mind that he left Eritrea post-August 2008, it was not reasonably likely that he left Eritrea legally. He was of draft age.

83. For the respondent, Mr Avery submitted that whilst the background evidence shows that it is difficult for an Eritrean national to obtain an exit visa, it does not show that every Eritrean in the UK must have left illegally. Indeed, the figures relating to the number of visa applications made to the British Embassy in Asmara (more than half of which had been granted entry clearance), indicated that a significant number of Eritreans must have expected to be able to be able to leave Eritrea legally. Otherwise they would not have pursued their applications. The lower figures for applicants since July 2006 was due to the Embassy reducing its visa service and it was clear that Khartoum and Cairo continued to receive and process entry clearance applications at significant levels. The continuing possibility of Eritreans being able to obtain exit visas was supported by the latest COIS report at para 32.04.

84. Mr Avery asked us to attach significant weight to the evidence that came to light during oral examination of Professor Kibreab, that the Eritrean Embassy in Sudan sometimes issued passports to nationals who had left Eritrea illegally. That did not suggest as hard-line an approach to illegal exit as Mr Palmer argued for.

85. Mr Avery said the respondent accepted that the Eritrean regime appears to have made it more difficult to obtain exit visas, but on Professor Kibreab's evidence the categories still possible were largely unchanged.

86. In any event, submitted Mr Avery, the proposition that Eritreans who left Eritrea illegally would be at risk of persecution now stood in need of revision in the light of evidence from the British Embassy in Asmara showing that although some returnees had been detained, some have been released without further action being taken, some have been fined, some have been sent to do national service (which was not in itself persecutory) and that some returnees from Sudan and Ethiopia who had returned illegally had no action taken against them. Hence the evidence was far from amounting to what Laws LJ referred to as "sufficiently strong" general evidence countering negative credibility findings.

87. So far as concerns failed asylum-seekers this meant that the respondent did not accept, Mr Avery clarified, that they would be at risk even if it were found that they had left illegally. Those who were found not to have established they left illegally, would, a fortiori, not be at risk of persecution on return. The respondent accepted, however, that those who had left illegally and who were or were approaching draft age when they left Eritrea would be at risk on return.

88. The Tribunal should be attentive, said Mr Avery, to the fact that much of the evidence in this case had lacunae and even Professor Kibreab and the authors of the major country reports confessed to having difficulty obtaining hard evidence.

89. Mr Palmer's response observed that even though the British Embassy letters rejected the view that illegal exit always attracted ill-treatment by the Eritrean authorities, they identified that some returnees had had serious difficulties. The Embassy's reference to some Eritreans who had left illegally not facing problems on return from Sudan had been shown by Professor Kibreab to most likely be confined to historical cases linked to the war of independence. As regards the significance of the evidence that had come to light about some

Eritreans who had exited illegally into Sudan being able to obtain Eritrean passports there, Professor Kibreab had said they would be few in number and he had given a sound analysis of why the Eritrean authorities were prepared to do this. Given the strong evidence that the Eritrean leadership was becoming increasingly paranoid about the role of Eritrean exiles in trying to overthrow it, it was necessary to view the category of those returnees the regime would not ill-treat on return as being strictly confined to the "highly trusted" and, in order to be satisfied that someone fell into that category, the Tribunal should require very hard evidence.

OUR ASSESSMENT

90 In deciding the issues before us in this appeal we take into account the entirety of the evidence, the background country sources being specified in Appendix B.

Professor Kibreab's Evidence

91. Like the Tribunal in MA, we consider that Professor Kibreab should be considered as a serious expert on country conditions in Eritrea. However, like that Tribunal we have some limited reservations about his evidence. Theirs were expressed at paras 262-263 and alluded to some of his opinions being vague and speculative: see e.g. para 4 above).

92. Ours relate mainly to his tendency to state conclusions that do not obviously follow from his immediately preceding analysis. For example, why he should think it could safely be concluded, merely from the fact that in five years only seven Eritrean students had been granted UK entry clearance, that "the overwhelming majority of Eritrean nationals who leave Eritrea to seek asylum in the UK do so illegally" (para 1.11) is difficult to follow. He seeks to supply the missing steps to his argument elsewhere, but the reader should not be expected to unpack his report in this way. There is a similar difficulty with the way that he deals in his written report with the categories of Eritreans still able to obtain lawful exit visas. At paras 5.15-5.16(a)-(j) he identifies 11 such categories, yet at 5.16(k), without expressly noting that he is doing so he then refers back to the 8 categories in MA and reduces them by one. The list he then gives in 5.16 (m) is not in precisely the same terms as either of those he had given at 5.15-5.16(k). Nor are the details he gives for some of the categories always easy to follow. For example, having stated in categorical terms in para 5.16(g) that "[a]t present no male Eritrean citizen who is younger than 54 years and a woman who is younger than 47 years can leave Eritrea legally for a course, conference or scholarship", he immediately adds "[h]owever, there are extremely few exceptions". On balance we consider we are able to reconstruct his overall position, in the light of the clarifications he gave in his oral evidence but, once again, the reader should not be expected to have to untangle matters of such importance.

93. We note that his written report does not make his precise position clear on all important issues, particularly that concerning failed asylum seekers. After discussing major country reports, including the UNHCR Guidelines of 2009, he concludes at para 11.47 that "All these reports by the world's most reputable human rights and humanitarian organisations clearly suggest that failed asylum-seekers…are likely to face high risk of being treated inhumanly". That is an accurate description of the Amnesty International and Human Rights Watch position but is an inaccurate summary of the position set forth in the

UNHCR Guidelines: see paras 48-50 above. Nonetheless, having noted these difficulties, we observe the care that he took in his report to source his evidence on various matters and were impressed by the way he was able in oral examination to explain and clarify his written evidence and tackle difficulties that arose. Whilst we do not find his opinions on some matters persuasive we accord his evidence generally considerable weight.

94. We take heed of the broad agreement voiced by serious analysts of Eritrean politics that the closed nature of its political system and its repressive policies makes it one of the most difficult countries to research and obtain properly verifiable evidence about. Professor Kibreab was explicit about that and in our view, as it seems to us Mr Avery conceded, the British Embassy evidence implicitly accepted much the same. The fact that there are significant lacunae cuts two ways: it reminds us of the perils of deducing a lack of risk from a lack of evidence but also makes us wary of assuming difficulties exist that are not substantiated.

95. As already noted, save for one clarification (which we will come to shortly), we do not seek in this case to revisit the issues of the nature of military and national service in Eritrea, demobilisation and risk on return if a person is perceived as a draft evader or deserter. Of course we have more up-to-date evidence before us relating to these matters, but we do not consider that it is such as to require any modification of the guidance given on them by the Tribunal in MA. The only point we would note is that it does not seem to us that both sets of submissions always kept fully in mind that in MA at para 447 it was found that even if a person has completed military service/active national service he remains subject to an ongoing obligation to perform national service until he or she ceases to be of draft age. We see no reasons to depart from what the Tribunal said in MA about that.

Those who have exited Eritrea illegally and gone to the Sudan in recent times

96. We have not found easy the question of what significance to attach to Eritrean nationals who had left Eritrea illegally being able to obtain passports in Sudan. We had not only Professor Kibreab's evidence about that but also other references, in particular the Aware report of September 2008 cited at para 32.06 of the COIS report for 2010. On the one hand it is difficult to understand why the Eritrean regime would countenance it, since news of it must surely act as an incentive to people in Eritrea thinking of leaving. Given the likely profile of such persons as stated by Professor Kibreab (see above paras 24, 25, 31-33) we also doubt that the regime would seriously worry they might end up joining anti-regime elements in Sudan, since according to that profile they were largely young persons intent on moving out of Africa (the COIS report refer to Eritrean escapees securing visas "mostly to the Arab Gulf States"). On the other hand, discontented Eritreans know that in order to leave they still have to run the gauntlet of a 'shoot to kill' policy. As to those who have got to the Sudan, we agree with Professor Kibreab that being prepared sometimes to grant them passports increases the chances they will disperse and is likely to further the regime's interests in more than one respect, not least making it possible to impose and collect the 2% extraterritorial tax in years to come. That is also supported by the evidence of the Awate report just referred to. On balance it seems to us that this practice, particularly bearing in mind that it is

only given to relatively few, does not establish anything either way in relation to the broader issue of how easy it is to obtain an exit visa for those in Eritrea.

UK Entry clearance/visa applications

97. The evidence we now have does, however, require us to revisit the position relating to student visas. In MA the Tribunal, in concluding that it still appeared to be the case that Eritreans could leave Eritrea on student visas, relied on the British Embassy evidence that student visas were being granted (paras 353 and 363). In GM the Court of Appeal attached significant weight to the fact that such evidence was significantly uncertain as to whether they left illegally. We now know that in fact there has not been any student visa granted since 2006 apart from one in 2007 (relating to a 2005 application successful on appeal) and another in 2009, which was apparently issued in view of the applicant's government service profile. We agree with Mr Palmer that the MA Tribunal's assumption of an open-ended category of students or scholarship students has fallen away.

98. Less clear is the state of the evidence relating to visas generally. Here a main point of contention between the parties has been the significance of the evidence relating to entry clearance applications as a whole made to the British Embassy in Asmara. Mr Palmer seeks to rely heavily on Professor Kibreab's evidence (which was to very similar effect to that which he gave in MA) that being granted entry clearance by the British Embassy has nothing to do with whether the Eritrean authorities will grant exit visas, and that there is no significance at all to be attached to the figure of 771 applications having been made to the British Embassy, Asmara since 2005. Mr Avery argued to the contrary, reminding us that the Tribunal in MA had already rejected much the same argument.

99. We accept that the increasingly repressive nature of the Eritrean regime has meant that disillusioned inhabitants have been prepared to go to great lengths to try and leave. However, on Professor Kibreab's own evidence, supplied by his sources inside and outside Eritrea, a person who intends to seek an exit visa from the Eritrean authorities in Eritrea knows they have got several hurdles to surmount. In particular, even before applying for such an exit visa they must first obtain an Eritrean passport and then apply to the British Embassy in Asmara for entry clearance/a UK visa. In our judgment it is unlikely that such persons would proceed with the first two steps, unless they thought there was at least a colourable chance they would succeed, especially as the process of obtaining an exit visa entails the Eritrean authorities scrutinising them closely.

100. Nevertheless, we cannot see that a finding that there is some correlation between applications for UK entry clearance/visas and perceived prospects of success in an application for an exit visa from the Eritrean authorities much helps Mr Avery's cause. That is because of the significant decline in the number of applications since 2006. In MA the Tribunal at paras 355-6 took the view that the figures for visa applications to the British Embassy in Asmara made in 2006 show that 230 people applied for entry clearance with 150 being successful and the fact of there being a significant number of applicants aged between 10 and 50 indicated that there were opportunities to gain exit visas without falling within the very restrictive categories outlined by Professor Kibreab.

101. The evidence we have covering the years since 2005/6 paints a very different picture. Since 2006, when there were 209 applications (presumably a revised figure from the figure of 230 given to the Tribunal in MA), the number of applications has reduced very considerably in number – falling to 20 in 2007, 19 in 2008 before rising slightly to 22 in 2009 and then going down to 14 in 2010.That is a dramatic decline.

102. Mr Avery sought to persuade us that this decline was primarily a function of the British Embassy in Asmara limiting its visa service in mid 2006. However, we do not think that this reduction makes the steep fall in numbers any less significant. There is no suggestion that the Embassy imposed a quota or even made known that only applications of certain kinds would be accepted. And the fact that the numbers of applications made in Khartoum and Cairo is still significant tells us little because, according to Mr Avery, Khartoum is only for applicants who have travelled to Sudan, i.e. those who have already left Eritrea. (We assume, although we have scant evidence to help us, that most Eritreans who apply in Khartoum have an Eritrean passport but even if that assumption is right we do not know how recently they obtained it or whether it was issued in Eritrea.) Secondly, we observe that the Tribunal's assessment in MA seems to have been predicated on the belief that Eritreans obtained exit visas before applying for entry clearance (see para 355). The evidence before us indicates that that is incorrect: the Eritrean exit visa application must be made after entry clearance has been applied for and obtained. Professor Kibreab was adamant that this was the case (see his written report at paras 7.1-7.3 in support of which he cited sources inside Eritrea) and we observe that the respondent did not seek to challenge this part of his evidence. There has been no British Embassy, Eritrea evidence to the contrary.

103. Thirdly, although we now have a table produced by the respondent showing that the number of Eritreans given leave to enter the UK has remained roughly at the same level it was when the Tribunal heard MA (the Tribunal in MA was given the figure for 2006 of 1,750) - with there being 1,595 in 2007 and 1,670 in 2008 (the majority being visitors) - we do not find that they indicate, as Mr Avery sought to persuade us they did, that a significant number of Eritreans continue to be able to obtain Eritrean exit visas. Rather we agree with Mr Palmer that, being figures for Eritreans from all over the world, and being silent as to whether such persons (i) applied from Eritrea rather than from elsewhere and (ii) had obtained Eritrean exit visas, this table establishes very little. Around a quarter of these were, in any event, people returning to the UK after a temporary absence and we know, of course, that Eritrean diaspora communities exist in many countries.

104. Our overall conclusion on the significance of the figures relating to UK entry clearance applications is that they do not shed very much light at all on the underlying issue of to what extent there remain avenues of legal exit from Eritrea, but, to the extent that they point in any direction, it is towards the view that since 2006 – particularly since August/September 2008 - it has become gradually more difficult for Eritreans to obtain lawful exit from Eritrea. We say "August/September" because there have been references to both months in different reports (SIJ P R Lane noted in the decision finding a material error of law that the US State Department report for 2008 refers to the Eritrean government suspending exit visa and passport services "in August [2008]";

and, looking at the language used in the various reports, we cannot exclude that the change may have commenced in the month prior to September 2008.

105. We have given consideration to whether references in the latest US State Department report, 8 April 2011, indicating that children of liberation fighters are treated preferentially in terms of length of military service, being required, it is said, to serve only 5 months. In a 15 April 2011 letter Mr Avery suggested that this may well be a relevant factor in respect of exit visas and the scope of the categories able to obtain them. We note that evidence suggesting favouritism being shown the children of liberation fighters is not new, but the question we have to address is whether this impacts on categories of lawful exit. We would accept that there is a possible link but in the absence of any evidence to indicate that such favouritism is also applied to applicants for exit visas, we consider it unsafe to regard this as a new and distinct category. The parties have had sufficient opportunity to adduce further evidence on this matter and we were not minded to adjourn in order for either of them to search further.

Categories of lawful exit

106. It seems to us that in deciding on the continuing scope for lawful exit from Eritrea, the most significant piece of evidence remains Professor Kibreab's latest evidence on what he considers to be the remaining categories of lawful exit, together with his opinion on their likely ambit. We remind ourselves that according to his revised formulation the remaining categories are:

(i) a male of 54 years or over;

(ii) a female of 47 years or over

(iii) children of 7 or younger;

(iv) a person declared by an official committee to be unfit on medical grounds to perform any military or national service;

(v) a person certificated by an official committee to be unable to receive appropriate medical treatment in Eritrea;

(vi) highly trusted government officials and their families;

(vii) members of ministerial staff recommended by the department to attend studies abroad.

107. His current reformulated list can be seen to delete one category from his MA list (see above para 27) entirely (ex-Ministers), and view others as more narrowly applied.

108. Three initial observations are in order about this list even as now slimmed down. The first is that it demonstrates to our satisfaction that the Eritrean authorities continue to envisage lawful exit as being possible for those who are 7 or under and those who are over national service age. Putting matters in this way also serves as a useful way of clarifying the purport of the reference in MA to persons being "of or approaching draft age". Odd as it may seem at first sight, that must now be understood to mean (and it seems to us to have been implicit in MA already) persons being seven or over and still of draft age. This

clarification must be borne in mind when applying this part of the MA guidance presently. The second observation, which is partly related, is that in terms of gauging whether an Eritrean asylum claimant might have had a basis for lawful exit, the categories are relatively straightforward except for the last two. In respect of the first three categories, being based on sex and/or age, it should be readily ascertainable whether a person has a qualifying basis for obtaining exit legally or not. In respect of the fourth and fifth categories (on the basis that medical evidence from medical experts in the UK should in principle be obtainable to corroborate them), it should likewise be relatively straightforward to establish whether legal exit was possible. The last two categories raise greater problems since, applying GM principles, the evidence still does not appear to show conclusively that appellants cannot fall within them (but see para 115 below). Furthermore, it may be, in relation to category (vii), that the regime's interest in maintaining close ties with its few international friends (the Human Rights Watch report specifies Qatar, China, Iran and Libya) means it is more confident that those students granted exit visas to study in those countries will not defect. [We are aware, of course, that recent events in Libya might require some reconsideration of whether it remains a friend of Eritrea]. In other words it may be that Professor Kibreab's evidence focuses too much on persons who wish to exit to study in Western countries. A final initial observation is that it is implicit in Professor Kibread's description and analysis of category (vi) that it must include those who are themselves members of the military or political leadership.

Illegal exit and risk on return in the context of those found wholly incredible

109. At paras 444-448 in MA the Tribunal formed the view that a person of or approaching draft age and not medically unfit who is accepted as having left Eritrea illegally is reasonably likely to be regarded with serious hostility on return, but will not be so regarded if it is concluded he left legally. However, the Tribunal did not consider that illegal entry by a person of or approaching draft age and not medically unfit could be assumed if they had been found wholly incredible. As already noted, both the Court of Appeal and the Supreme Court have subsequently found that such an approach to the evidence was valid. However, in GM, a key criterion for deciding such matters was identified. Proceeding on the assumption that, if it was accepted that such a person left Eritrea illegally he or she would be at risk of serious harm, the Court of Appeal decided by a majority that even MY, who was a 17 year old girl – and so someone approaching military service age - could not be taken to have left illegally. At para 54 Laws LJ stated:

> "The position would only be otherwise if the general evidence was so solid as to admit of only fanciful exceptions; if the court or Tribunal concluded that the 17 year old must have left illegally whatever the particular facts."

110. Mr Palmer submits that things are now different and that the general evidence as to conditions in Eritrea is now such that it can be assumed that anyone of or approaching draft age who is medically fit would have left illegally.

111. We are unable to accept that submission. As already noted, Professor Kibreab's own list of persons potentially able to obtain exit visas continues to include at least two categories:

(vi) highly trusted government officials and their families; and

(vii) members of ministerial staff recommended by the department to attend studies abroad.

112. We would accept that both categories are likely to be relatively small in number. And indeed it seems to us that some of those in these categories may, since 23 December 2009, be deterred from trying to apply to travel by the terms of the UN Security Council Resolution 1907 of 2009. This refers to "individuals and entities, including but not limited to Eritrean political and military leadership, governmental and parastatal entities and entities privately owned by Eritrean nationals living within or outside of Eritrean territory". At Article 10 it requires that all Member States "take the necessary measures to prevent the entry into or transit through their territories…" of such individuals. But in our judgement it still cannot be said that they are fanciful or that their factual existence can be wholly disregarded. In view of these two categories the test set out by Laws LJ at para 54 of GM remains unmet.

113. Nevertheless, we do think the evidence now before us does require us to be less ready to conclude that non-credible Eritreans who left Eritrea after August/ September 2008 did so lawfully. Put another way, we do consider that this evidence is now sufficiently strong in most cases to counteract negative credibility findings in relation to an appellant's evidence (see MA (Somalia) para 33). We regard August/ September 2008 as the turning point because there is credible evidence indicating that that was the point in time when the Eritrean authorities, angered by the growing number of cases of persons who had been granted exit visas who had then failed to return, decided to put their foot down by suspending exit visa facilities. (We put the date at August/September to reflect the fact that some reports, e.g. the US State Department report for 2008, locate the date of this suspension as being August). We are aware that the British Embassy, Asmara letter of 22 February 2011 seeks to cast doubt on whether there was ever such a suspension. However, we note that Professor Kibreab's evidence that there was such a suspension is supported by several other sources, in particular UNHCR, the US State Department report for 2008 and the Aswate.com website, which the Tribunal in MA at para 336 found reliable, noting that it was described by Dr Pool (another expert in that case on whom that Tribunal found they could place reliance) as independent of opposition political parties and although critical of the Eritrean Government, one that he found:

> "… to be one of the most reliable because it is rare to see a website that corrects itself if subsequently proven to be wrong on factual errors and it is a website on which the Home Office often relies, indeed it is exemplified by the fact that it is quoted in this COI".

114. It is true that Professor Kibreab's evidence is also that since that suspension the exit visa facility has re-opened, but it is also that it has done so on a more limited basis.

115. We appreciate that in the context of a case in which the decision-maker has found a claimant/appellant wholly lacking in credibility (save in relation to sex and perhaps age and/or date of departure from Eritrea and health), it is difficult to see any basis for finding conclusively that they would not fall within one of the above two categories (highly trusted government officials and their families

or those who are themselves members of the military or political leadership; members of ministerial staff recommended by the department to attend studies abroad). But at least in a range of cases the evidence may be such as to make it clear that the claimant concerned, albeit wholly or largely lacking in credibility, could not have any links with government officials or the regime's inner circle and could not have an education or skills profile making it likely they have been civil servants or have an educational bent (e.g. if they are found to come from a rural part of Eritrea and have had no secondary schooling). What may be involved here sometimes is clearer recognition by the decision-maker that when finding a claimant wholly incredible they are not in fact meaning that they lack credibility in every conceivable particular, since they may in fact accept, for example, that they are from a rural background and lack education.

116. The general position concerning illegal exit remains, therefore, as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be that inferences can be drawn from uncontentious personal data recorded on an appellant as to their level of education or their skills profile as to whether legal exit was feasible.

Illegal exit and risk on return

117. In MA the Tribunal considered that at least in relation to those of or approaching draft age who were medically fit, a finding that they had left illegally sufficed to show that they would face a real risk on return of persecution or ill treatment. On the evidence before us, we think that although the numbers affected may be relatively small, it is necessary to qualify that guidance for several reasons. We set them out by reference to Professor Kibreab's evidence but would observe that we consider his evidence on these matters finds support in the background evidence considered as a whole. (Our reasons necessarily link back to what we have just said about the remaining scope for lawful exit but because our focus is now on the likely *effect* of illegal exit on risk on return, there are wider considerations that have to be taken into account.)

118. First of all, it is clear from Professor Kibreab's evidence that any issue of apparent illegal exit will not necessarily be regarded adversely by the regime if the persons concerned fled (what later became the territory of) Eritrea during the war of independence; indeed it would appear such persons are welcomed back and it is generally understood by the regime that such persons would have had valid reasons in the former's eyes for having exited (what later became Eritrean territory) when they did.

119. Second, it is also clear from Professor Kibreab's evidence that having left illegally will not result in adverse treatment when those concerned are persons whom the regime's military and political leadership perceives as having given them active service (either in Eritrea or abroad). He gave the example of someone who left Eritrea illegally and went to Sudan where in exchange for a passport the person has agreed to act as a party activist or mobiliser in the diaspora in countries such as the UK.

120. Third, based on what Professor Kibreab told us, the same is likely to be true of someone who exited illegally but who is a trusted family member of, or is himself/herself a member of, the regime's military or political leadership. It may be that it is unlikely such persons will have exited illegally but the professor was quite clear that at least for such family members whom the military and political leadership trusts, blood is thicker than illegality. To some extent this exception was identified in the evidence before the Tribunal in MA, although not very clearly, perhaps because it was considered the numbers of those involved would be relatively small.

121. So far as concerns risk on return, then, it seems to us that whilst the central proposition in MA remains correct as a general rule (that if an appellant establishes that he left illegally or establishes that he would be perceived as having left illegally - e.g. because it comes to light that he used bribery to obtain an exit visa - he will very likely be able to show he faces a real risk of persecution on return), it must now be seen as subject to a number of exceptions. Those exceptions relate to persons (and their children born afterwards) who fled Eritrea during the war of independence (but see below para 129); those whom the regime considers have rendered them valuable service; and those who are trusted family members of, or who are themselves part of, the regime's military and political leadership.

Failed Asylum-Seekers

122. In para 377 of MA the Tribunal rejected the view that Eritrean failed asylum-seekers as such were at real risk of persecution on return. It took into account but did not find determinative the evidence from Amnesty International and Dr Kibreab (as he was then known) that the regime regarded the fact that a national has applied for asylum abroad as an act of disloyalty and reason to detain and torture a person returned to Eritrea after rejection of asylum. The Tribunal stated:

> "If the position really were that returning failed asylum seekers were, as such, being persecuted in Eritrea, absent any other factors such as actual or perceived desertion, we would have expected that to be reflected to some extent at least in the background evidence before us and it is not."

123. Amongst the reasons why the Tribunal considered its conclusion was justified was "the wish on the part of the Eritrean authorities to embed family members of their regime abroad in case trouble arises in Eritrea, to infiltrate the diaspora community or as a means of encouraging foreign remittances from those who are, in reality, well-disposed towards it".

124. Mr Palmer submitted that we should now take a different view, namely that "there is a reasonable likelihood of persecution for failed asylum-seekers". However, it is noteworthy that the evidence he marshalled in support actually fell into two categories: (a) sources that espouse this view (e.g. Amnesty International and Human Rights Watch in particular), and (b) sources that, whilst considering that the large majority of failed asylum seekers are at risk, draw short of stating that all are: e.g. UNHCR in its April 2009 Eligibility Guidelines and sections at least of Professor Kibreab's report which identify at least one exception and also parts of his oral evidence which seemingly identified two others. The category of exception which he set out at paras 11.21-11.23 of his report relates to those sent abroad by the Eritrea

government in pursuit of its specific interests (he specifies family members whom the regime chooses to embed abroad ("in case trouble arises in Eritrea to infiltrate the diaspora community or as a means of encouraging foreign remittances to Eritrea from those who are, in reality, well-disposed towards it"). It is difficult to see that this category would not also include (or overlap heavily with) the category we have just identified as an exception to those who would not be at risk despite having left illegally, namely those who are family members of the regime's military and political leadership, regardless of how they came to be in the UK. Then there is the category also discussed in the same previous context, namely persons whom the military and political leadership considers as having given them valuable service. A third seeming category of exception identified by him in his oral evidence before us consists in persons who fled Eritrea during the war of independence or their children. Admittedly he did not identify them as an exception in this way, perhaps because he considered it unlikely that such persons would be failed asylum seekers, but that it seems to us is the logic of his own analysis and we cannot rule out that amongst such persons there are those who in one way or another have come to the UK – or being born in the UK - and claimed asylum.

125. In considering whether to agree with (a) we are mindful of the evidence before us from Amnesty International, Human Rights Watch and the International Crisis Group among other sources, including the ICG evidence highlighting the fact that the Eritrean regime has become extremely suspicious of the outside world and paranoid about any Eritrean associated with external influences and not fully committed to the national cause; and the fact that the regime sees the UK as a key ally of Ethiopia and the US.

126. We also take into account the specific post-MA evidence relating to cases of failed asylum-seekers who have been returned to Eritrea (which includes in particular the important Amnesty International evidence about them). We exercise a degree at least of caution regarding these cases, however. The Tribunal generally holds reports from Amnesty International in high esteem, but bearing in mind the standards which it states that it applies to its own evidence-gathering, we are struck by the lack of any sourcing of its conclusion that the two Eritreans who were forcibly returned by Germany to Eritrea on 29 May 2008 were detained, ill-treated but managed to escape (for a second time) and return to Germany. Their reports appear to rely on their general opening statement declaring that individuals' stories are properly checked and cross-checked. But the actual accounts regarding these two are not themselves sourced. As a result, questions inevitably spring to mind: e.g. were they granted asylum in Germany on the basis that their accounts were accepted as credible? Was this on the basis of a proper testing of their evidence? We simply do not know the answers to such questions. It may well be that Amnesty International has cogent reasons for treating their cases as verified, but we are not told what they are. We are also struck by the lack of any indication of the reliability of the source of its information regarding Ms Goitom who it reports as having been forcibly returned by the UK to Eritrea on 21 October 2009, detained back there and not seen since. From Professor Kibreab's report it would appear that the source is a human rights activist in the UK, but we simply do not know; nor, if it is this activist, do we know what her own evidential basis for that report is. In relation to the forcible returns by Egypt in 2008, we note that once again we are not given any indication as to the source of that information, although the fact that among other international bodies, UNHCR, who have been closely involved in processing asylum-seekers

in Egypt, have accepted this information, enables us to attach significant weight to it.

127. On the other hand, there is an element of persistency about the reports of problems that have faced those who have been the subject of mass forcible returns from Malta, Libya (and now Egypt) and we note in this regard that there are still references being made to the continued ill-treatment of those returned by Malta in 2002. In our judgement, persistency of this kind must be seen as adding weight to the evidence. At the same time – in relation to the mass returns by Malta in 2002 and Libya in 2003 and now it would appear the large-scale returns made by Egypt in 2008-9 – we continue to take the same view as the Tribunal in MA that when faced with high-profile collective returns of visible numbers the Eritrean authorities may well feel impelled to take an oppressive approach irrespective of how they treat individual returns. In UK asylum appeals we of course are only concerned with the latter and we cannot assume that the same approach would apply.

128. Mr Palmer sets considerable store by the evidence indicating that the Eritrean authorities regard the claiming of asylum as an act of disloyalty. We have no doubt that in cases where the individual concerned cannot show any pre-end of war of independence origins or pro-regime activity, claiming asylum is likely to be viewed adversely. But we cannot accept that claiming asylum would particularly trouble the Eritrean authorities if someone is able to show (or is known to have shown) pro-regime activity. Indeed, given the further evidence we now have regarding the Eritrean diaspora, including that from Professor Kibreab, our doubts for considering that the Eritrean authorities would regard the mere act of claiming asylum an act of disloyalty are, if anything, stronger. Many Eritrean exiles pay the 2% extra-territorial tax and offer contributions demanded by the regime through its embassies abroad. According to the professor the great majority of Eritrean nationals in the UK are or have been asylum seekers. Also according to Professor Kibreab, the numbers of them who attend pro-regime meetings and events are far greater than those attending anti-regime meetings and events. Whilst he said he was sure quite a few of them only do so for appearances and others no doubt for social reasons such as companionship with fellow-Eritreans, it illustrates the fact that at the point of return Eritrean nationals may be able to satisfy officials of their active loyalty notwithstanding it coming to light that they claimed asylum and did so in a country (the UK) seen by the regime as pro-Ethiopia.

129. Whilst we have in the foregoing paragraph bracketed those with pre-end of war of independence origins with those able to show pro-regime activity, we would add that we consider that in relation to the former there would be a greater need for a case-specific analysis. We are able to follow why the regime would be kindly disposed towards those with pre-end of independence origins and their children, but at the same time, if the regime learns they have claimed asylum in Western countries, it may be that it would not take much for the regime to regard them in the same way as other failed asylum-seekers, albeit being unconcerned that they left illegally.

130. Given the foregoing we consider that if a decision-maker is faced with an Eritrean asylum claimant whose evidence has been found wholly incredible (save in relation to sex –self-evidently- and possibly age, date of departure from Eritrea and health), it cannot be simply assumed that such a person would be perceived on return to have committed an act of disloyalty merely by virtue

of having claimed asylum in the UK. Unlike the position when it comes to deciding whether a person has exited illegally (where we consider that the categories have reduced considerably and so it would be exceptional at least for a person of or approaching draft age to be considered to have left lawfully) the position in respect of this issue is that a very significant number of Eritreans are likely, on Professor Kibreab's evidence, to be able to at least show they have been pro-government – e.g. by paying the 2% tax and/or attending pro-government meetings.

131. Whilst therefore we are not persuaded that failed asylum seekers as such are at real risk of persecution on return, we recognise that for reasons given earlier that on present evidence the great majority of such persons are likely to be perceived as having left illegally; and that this fact, save for very limited exceptions, will mean that on return they face a real risk of persecution or serious harm.

132. That brings us back to the significance of determining, if at all possible, whether a person left Eritrea before or after August/September 2008. If they left before, it seems to us that the guidance given in MA remains broadly applicable and that, even if of or approaching draft age, if they have been found wholly incredible, they are likely to be found not to have established a real risk of persecution or serious harm on return. If, however, it is determined that they left Eritrea after August/ September 2008, then, bearing in mind that from that date the regime decided to take a much more restrictive approach to issuing exit visas, we consider that decision-makers should be alert to examine whether the claimant's personal circumstances, in particular whether he comes from a rural area or has any educational profile, make it reasonable to infer that they could not fall within one of the limited exceptions.

Summary of conclusions

133. From the foregoing we derive the following conclusions:

(i) The figures relating to UK entry clearance applications since 2006 – particularly since September 2008 – show a very significant change from those considered by the Tribunal in MA (Draft evaders-illegal departures-risk) Eritrea CG [2007] UKAIT 00059 and are among a number of indications that it has become more difficult for Eritreans to obtain lawful exit from Eritrea.

(ii) The Eritrean authorities continue to envisage lawful exit as being possible for those who are above national service age or children of 7 or younger. Otherwise, however, the potential categories of lawful exit are limited to two narrowly drawn medical categories and those who are either highly trusted government officials or their families or who are members of ministerial staff recommended by the department to attend studies abroad.

(iii) The general position concerning illegal exit remains as expressed in MA, namely that illegal exit by a person of or approaching draft age and not medically unfit cannot be assumed if they had been found wholly incredible. However, if such a person is found to have left Eritrea on or after August/September 2008, it may be, that inferences can be drawn from their health history or level of education or their skills profile as to whether legal exit on their part was feasible, provided that such inferences can be drawn in the light of the adverse credibility findings.

(iv) The general position adopted in 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 under 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 (1) persons whom the regime's military and political leadership perceives as having given them valuable service (either in Eritrea or abroad); (2) persons who are trusted family members of, or are themselves part of, the regime's military or political leadership. A further possible exception, requiring a more case-specific analysis, is (3) persons (and their children born afterwards) who fled (what later became the territory of) Eritrea during the war of independence.

(v) Whilst it also remains the position that failed asylum seekers as such are not generally at real risk of persecution or serious harm on return, on present evidence the great majority of such persons 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 appellant

134. We have already outlined the fact that the appellant was found wholly incredible save that that the IJ accepted (1) that he had done military service; and (2) that he left Eritrea in September 2009. We have also noted that there was clearly also an acceptance that he was male and of draft age. Mr Palmer has also submitted that in the light of the findings made by the Tribunal in MA relating to demobilisation, we should find that the appellant would not have been formally demobilised and would therefore have been under a continuing duty to serve in either military or national service. We accept Mr Palmer's submission. Applying the approach outlined earlier, we ask ourselves whether the respondent's and IJ's approach to the appellant's account sheds any light on whether the appellant was involved in any way with government officials. It appears uncontentious that he had education up to grade 11 or 12 (roughly equivalent to a high school education). That on its own might suggest it was possible he had some connection with government officialdom or ministerial staff, but in the context of this case we have to bear in mind (i) that he left Eritrea post-August/September 2008; and (ii) in the immediately preceding years he was involved in doing ordinary military service. In such circumstances, we consider it highly unlikely that he was a government official or was involved directly or through family with government officials. It is also not reasonably likely that he left Eritrea legally.

135. For similar reasons we are also satisfied that prior to or at the point of leaving, Eritrea, he was not a student with government backing.

136. For the above reasons we conclude that the appellant must be considered as someone who left Eritrea illegally and is likely to be subjected to ill treatment in consequence, given in particular that he was still of draft age when he left and even though he had already done his military service. Notwithstanding that he gave an account that was wholly incredible in almost all respects, we consider that he would be at risk on return.

137. To summarise:

138. The First-tier Tribunal materially erred in law. The decision we remake is to allow the appellant's appeal on asylum and Article 3 ECHR grounds.

Signed Date

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)

Appendix A

DECISION BY SIJ P R LANE THAT THERE IS AN ERROR OF LAW 16 NOVEMBER 2009

1. At the reconsideration hearing on 13 November 2009, Mr Walker, for the respondent, informed me that the respondent conceded there was a material error of law in the determination of the Immigration Judge, who had dismissed the appellant's appeal.

2. The Immigration Judge found the appellant's account of his alleged problems in Eritrea not to be credible. Those findings have not been successfully challenged. Indeed, the only criticism made in the grounds accompanying the application for reconsideration, turn on the assumption that, in paragraph 20 of the determination, where the Immigration Judge found that the appellant had "completed his military service", that the Immigration Judge was thereby finding that the appellant had been demobilised. I do not consider that this criticism is sound. As the Tribunal explained in MA (Draft evader – illegal departure – risk) Eritrea CG [2007] UKAIT 00059, a distinction has to be drawn between active military service in Eritrea, and the requirement to be continuously available for such active service. It cannot be said that the Immigration Judge found the appellant to have been "demobilised" in this latter sense.

3. The reason why Mr Walker conceded a material error of law, however, lies in what can be described as the inadequate reasoning to be found in paragraph 28 of the determination. That paragraph reads as follows:-

> "28. I find that given that I have made adverse credibility findings against this appellant, I cannot find to the lower standard of proof, that the appellant left the country illegal as I am being asked to. I cannot assist him by way of an assumption made in his favour that the appellant did not fall into the categories of persons that do obtain exit visas. The fact is that this appellant did embark on a very expensive agent-assisted journey to the United Kingdom to claim asylum and has claimed asylum upon a false basis. I am unable to accept the submission made that I should assume that the appellant left illegally and would be at risk upon return as someone who had done so."

4. It is entirely unclear what "categories of persons that do obtain exit visas" from Eritrea were in the mind of the Immigration Judge. There is a reference to the country guidance determination of MA in his determination. There is only reference to the judgments of the Court of Appeal, which considered MA, in the case of GM (Eritrea) & Others [2008] EWCA Civ 833. It possible that, in saying what he did, the Immigration Judge was relying on the US State Department Report of 2008 on Eritrea, described in paragraph 27 of the determination, and submitted by the appellant as part of his claim to be in need on international protection. But the Immigration Judge did not say so; and, on a matter of such pivotal importance, this must constitute a legal error.

5. It therefore falls to this Tribunal to substitute a fresh decision to allow or dismiss the appeal. In so doing, the Tribunal must have regard to the present position regarding the treatment of those who are reasonably likely to have left Eritrea illegally. The evidence before me was, necessarily, somewhat old (the

hearing before the Immigration Judge having taken place in March). The parties were in agreement that, in the circumstances, this appeal might provide a suitable vehicle for giving country guidance in relation to illegal exit from Eritrea and the consequences thereof. To that end, I stated that I considered that the issue at the adjourned reconsideration hearing should be risk on the return in those circumstances, on the basis that the appellant's particular account of his experiences in Eritrea was not credible, but that, having regard to the Immigration Judge's findings in paragraph 23 in particular, the appellant was a person who had exited Eritrea in September 2009. This is relevant, given the evidence in the US state department report that in August 2008 the government suspended exit visas and passport services to its citizens.

Appendix B
Background materials

Item	Document	Date
1	Amnesty International, “Urgent Action 319/07 – Eritrea: Fear of torture/incommunicado detention/forcible return (military service evader detained following forcible return from UK)”	29 November 2007
2	Amnesty International, “Urgent Action 145/08 – Eritrea: Fear of torture/incommunicado detention/forcible return (German immigration authorities forcibly return Eritrean nationals)”	29 May 2008
3	Human Rights Watch, “Egypt: Stop Deporting Eritrean Asylum Seekers”	8 January 2009
4	US Department of State, “2008 Human Rights Report: Eritrea”	25 February 2009
5	UNHCR, “UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea”	April 2009
6	Human Rights Watch, “Service for Life: State Repression and Indefinite Conscription in Eritrea”	16 April 2009
7	UK Parliament House of Commons, “Commons Hansard Debates 05 January 2010 (Written Answers): Eritrea	05 January 2010
8	Human Rights Watch, “Libya, Don’t Send Eritreans Back to Risk of Torture”	15 January 2010
9	Refugee Documentation Centre (Legal Aid Board, Ireland), “Treatment of returned failed asylum seekers”	21 January 2010
10	US Department of State, “2009 Human Rights Report: Eritrea”	11 March 2010
11	Christian Solidarity Worldwide (UK), “Uganda: refugee in hiding following threat from Eritrean official”	12 May 2010
12	Amnesty International, “UK: Refused Eritrean asylum-seeker still at risk: Further information”	25 May 2010
13	Amnesty International, “Amnesty International Report 2010: Eritrea”	27 May 2010
14	UK Border Agency, “ Country of Origin Information Report: Eritrea”	8 June 2010
15	International Crisis Group, “Eritrea: The Siege State”	21 September 2010
16	British Embassy Asmara, “Information About Passport Controls, Military Training in Sawa, National Service Round-Ups and Exemptions, and Treatment	11 October 2010

Item	Document	Date
	of Homosexuals”	
17	Human Rights Watch, “World Report 2011: Eritrea”	24 January 2011
18	US Department of State, “2010 Human Rights Report: Eritrea”	8 April 2011