Neutral Citation Number: [2008] EWCA Civ 833

Case No: C5/2007/2600/2818/2723

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
Immigration Judge Levin
Senior Immigration Judge Freeman
Immigration Judge Sacks
AA/08938/2006
AA 00137-05
AA/05941/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2008

Before :

LORD JUSTICE BUXTON
LORD JUSTICE LAWS
and
LORD JUSTICE DYSON

- -

Between :

GM(ERITREA); YT(ERITREA); MY(ERITREA)	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Andrew Nicol QC and Miss Victoria Quinn (instructed by **White Ryland**) for **GM and YT**

Mr Andrew Nicol QC and Mr David Chirico (instructed by **Wilson and Co**) for **MY**

Mr Ben Collins (instructed by **The Solicitor to Her Majesty's Treasury**) for **the Respondent**

Hearing date : 7 May 2008

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Judgment

Lord Justice Buxton :

These appeals

1. All of these appeals concern persons seeking to claim the protection of the Refugee Convention against deportation to their native Eritrea. They involve one common issue of some general importance. The present policies of the authorities in Eritrea, and their treatment of their fellow citizens, have been the subject of a series of detailed and anxious enquiries by the Asylum and Immigration Tribunal. It is impossible to understand these or other Eritrean cases without reference to that background, which is now authoritatively to be found in the AIT's Country Guidance decision in *MA (Draft evaders-illegal departures-risk)Eritrea CG* [2007] UKAIT 00059

The current position in Eritrea: *MA*

2. In what follows, references to paragraph numbers are to the judgment in *MA*.

National Service

3. All Eritrean citizens between the ages of 18 and 50 are, subject to exemptions for those who had already taken part in earlier national wars [§280], liable to perform "National Service". That expression is put in inverted commas, because the AIT accepted that there was a conceptual distinction between *military* and *national* service [§ 272]. Active military service consists of six months training, and then twelve months work [§283], either on military service as such or in development work in the national interest, albeit often in the private sector [§§ 287-288]. The latter group remain under the authority of the Ministry of Defence and continue to receive only their military stipend rather than pay at civilian levels [§ 295]. It is strongly in the economic interests of the Eritrean government to retain this source of cheap labour, and the possibility exists in Eritrea of an indefinite extension of the tasks allocated to the citizen under the umbrella of national service [§307].

4. There was a good deal of debate in *MA* about the concept and the occurrence of "demobilisation". It is accepted at least for the purpose of these appeals that any attempts at demobilisation in the sense of the termination of any national service obligations have been abandoned since about 2000, the state as we have seen claiming to be able to retain persons in national service beyond the formal periods referred to above. Witnesses however suggested that demobilisation in a more "Eritrean" sense would occur when a person was released from specifically military service, but was assigned to the civil sector under the compulsory arrangements also referred to above [§ 296].

5. Additionally, even those no longer working under national service, or who had not been called up in the first place, would remain liable for return to such service until they reached the age of 50.

6. The conclusions of the AIT as to the risk factors for persons undertaking or liable for national service should they leave Eritrea are set out in several places in the determination and are not entirely easy to summarise, but are most easily found in §§ 338-339 of the AIT's determination:

> …the government releases individuals from NS but requires them to undertaken compulsory employment either directly through the Ministry of Defence or with designated employers within the private sector but still on military pay….Such people are, it is plain from the evidence, at real risk of being regarded as deserters on return to Eritrea and seriously ill-treated….It must thus be considered as to whether those that we shall describe as "*on reserve*", as members of the NS, are likely to be perceived as deserters if they were returned following an illegal exit from Eritrea.

Illegal Exit

7. The AIT thus saw the issue of whether persons in what they described as the "reserve" category had left Eritrea illegally as crucial to deciding whether, on return, they would suffer the ill-treatment, agreed to amount to persecution for Refugee Convention purposes, that is directed in Eritrea at deserters. The same issue arises in the case of persons who would otherwise be seen as draft evaders, on the basis that they had left the country with the object or effect of avoiding their national service obligations. That was a logical conclusion, because a person who is permitted to leave is hardly likely to be perceived as having deserted from an extant national service duty, or to have wrongfully avoided that duty in the first place.

8. The AIT accordingly examined the evidence as to who and in what circumstances were permitted to leave Eritrea. Their conclusions are, again, to be found in several parts of the determination, but can be summarised as follows.

9. First, there is no doubt that the availability of exit visas from Eritrea is closely controlled, and therefore large numbers of citizens who leave the country are obliged to do so illegally [§ 361]. Second, the AIT accepted the evidence of an expert, Dr Kibreab, that it was unlikely that a male of military service age would be able to obtain a visa unless he came within one of a number of limited categories [§ 357]. Those categories in Dr Kibreab's view comprised a number of types of person not affected by national service: party activists, Ministers and ex-Ministers, persons over 40 who wished to visit relatives or go on Haj and government officials [§ 348].

10. Third, there was some conflict of evidence as to the position of students. Dr Kibreab said that exit visas had been available to persons on scholarships, as opposed to mere students, but that that policy had now been restricted owing to the substantial proportion of those studying on scholarships abroad who had decided not to return to Eritrea [§348]. The AIT at its §357 appears to have accepted, or at least noted, the distinction between scholars and ordinary students, but it also noted the evidence of the British Embassy that many applications continue to be received for entry clearance, the implication being that persons would not go through that process if it was futile because they could not obtain an exit visa [§§ 355 and 363]. The AIT concluded:

> while it is plainly the case that many of those who exit Eritrea do so illegally, the evidence regarding visas issued by the UK Embassy in Asmara, read with the evidence regarding the range of categories of persons whom Dr Kibreab considered would be

> allowed to leave legally, shows that it cannot simply be assumed that an Eritrean claimant who has left Eritrea has done so illegally.

The issue in the light of the facts found in these cases

The burden and standard of proof

11. The burden of showing that he has a well-founded fear of persecution falls on the applicant, but the standard that he has to meet is not a demanding one. Its most convenient expression is in terms of a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country: *R v Home Secretary Eritrea p Sivakumaran* [1988] 1 AC 958 at p 994F, per Lord Keith of Kinkel. Persons who have left Eritrea illegally are in significant danger of Convention persecution on their return. The question in any particular case is therefore whether there is a reasonable degree of likelihood that the applicant did leave Eritrea illegally.

12. That question raises particular difficulties when, as in these appeals, an applicant relies, or is obliged to rely, on evidence as to the general incidence of illegal exit rather than upon an account of his own actual exit. That problem was underlined by this court in another Eritrea case, *Ariaya and Sammy v SSHD* [2006] EWCA Civ 40 (a case that concerned draft evasion rather than illegal exit as such), when Richards LJ at §10 cited with approval some observations of the IAT in *KA* [2005] UKAIT 00165:

> each case must be considered and assessed in the light of the appellant's individual circumstances. It may be, for example, that a person who is of eligible draft age, at least if he or she is still relatively young, will not need to establish very much more. However, we think that in all cases something more must be shown. It would be quite wrong, for example, for someone who has in fact obtained an exemption from military service, to succeed simply on the basis that he has shown he was of eligible draft age. Persons who fail to give a credible account of material particulars relating to their history and circumstances cannot easily show that they would be at risk solely because they are of eligible draft age.

13. That approach was echoed in the present context of illegal departure in §449 of *MA*:

> 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 and 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.

14. In each of the present appeals the appellants gave a highly circumstantial account of their experiences in Eritrea and of how they left the country which was almost wholly disbelieved by the respective Immigration Judges. It is therefore first necessary to consider what is left of the appellants' account of the facts relevant to their own case. That will not take long in the cases of GM and YT, because they do not seek to challenge, even if they could have done so, the Immigration Judges' findings of almost total lack of credibility. MY does argue before us that the Immigration Judge was wrong in law in his findings in her case, and her arguments to that effect will have to be investigated more fully.

The facts as found: GM

15. GM was born on 1 February 1980. He was called up for military service in 1998. He entered the UK clandestinely on 11 May 2006. He gave a detailed account of his conversion to the Pentecostal faith while in military service, of his military arrest and ill-treatment because of his faith, and of his escape from custody and from Eritrea. He claimed asylum on the basis of feared persecution because of his faith and because he had left Eritrea illegally.

16. In her Refusal Letter the Secretary of State said that it was not disputed that GM had been called up for military service, but that it was considered that that service had been completed before GM left Eritrea. Immigration Judge Levin did not directly address that concession when he found, at his §33, that GM had "given an account of events in Eritrea which from start to finish is not credible". In particular, the Immigration Judge found that the claim of conversion to Pentecostalism had been fabricated, and at his §28 he found

> the Appellant's claim not to be credible that he has escaped from military detention and consequently I am not satisfied even to the low standard of proof that he will be considered to be a military deserter upon his return to Eritrea.

17. Accordingly, and taking the findings at their most favourable to GM, the only proven facts in his case are that he was born in 1980 and called up for military service in 1998.

The facts as found:YT

18. YT was born on 10 September 1980, and entered the UK on 4 January 2005. His evidence was that he was called up for military service in 1998, and served in the war against Ethiopia, in connexion with which he was in 2000 reprimanded for alleged cowardice. He remained in service until the end of 2004, when his rifle was stolen, for which he suffered a form of field punishment. He escaped from that and made his way across the border into Sudan, which he was enabled to leave with the help of an agent. He claimed to fear persecution as a deserter from the military if he were returned to Eritrea.

19. Senior Immigration Judge Freeman said, at his §4, that

> I see no reason to disbelieve the appellant's account of the earlier part of his service with the Eritrean Army, including the incident in 2000.

But, having analysed the history in some detail, and pointed to some elements in it that were not, taken in isolation, necessarily incredible, he held, at his §§ 22-24, that

> Given the other serious difficulties with his history of detention, ill-treatment and escape, then despite what I might have been prepared to accept in isolation, I cannot regard it, taken as a whole, as even reasonably likely to be true…..I am not prepared to regard him as a witness of truth about any of his personal circumstances which are seriously in issue.

20. Accordingly, the only proven facts in the case of YT are that he was born in 1980 and called up for military service in 1998, where he remained until 2000.

The facts as found:MY

21. MY was born on 16 September 1985. She claimed to have arrived illegally in the United Kingdom on 8 December 2002. She applied unsuccessfully for asylum in 2003, and then made a fresh application which was dismissed in 2006. Reconsideration was ordered of the latter decision, the decision on reconsideration of Immigration Judge Sacks being the decision now under appeal.

22. MY had claimed asylum on the basis of being successively a Jehovah's Witness and a Pentecostalist. She was disbelieved on both counts by Immigration Judge Sacks's predecessors. She said in the present proceedings that she had been born in Ethiopia, but in 2001 was deported to Eritrea with her family because of her father's activities in contributing money to the Eritrea government. She gave what the Immigration Judge considered to be conflicting accounts of how the deportation was effected. On arrival in Eritrea she did not want to perform military service, so was helped by an uncle to leave the country. He made all the arrangements with the agent, in whose company MY flew to the United Kingdom from Asmara airport. She has had no contact with her family since arriving in the United Kingdom in 2002. She now has a child by a man whom she has met in the United Kingdom. Her case is not put on the basis of her family situation, but solely on her fear of being persecuted as a draft evader if returned to Eritrea.

23. Immigration Judge Sacks pointed out in his §§26-28 that he was unable to ignore the fact that MY had been found not to be credible by two Immigration Judges; that MY had given inconsistent accounts of her deportation from Ethiopia; and that a previous history of ill-treatment by the authorities in Eritrea had not been repeated or supported before him. He then said, at his §29:

> The prime issue that I must decide is whether on the evidence I can find that this Appellant did leave Eritrea illegally. I find it difficult to accept that a person seeking to leave Eritrea illegally would attempt to do so by a route that would bring her to the

> attention of the authorities. If the Appellant left via Asmara airport as claimed then I would have expected having regard to her age that she would have been subject to the scrutiny of the officials at the airport. I do not accept that she would have been allowed to have left with the ease that she claims.

And the judge went on in some detail to find as incredible the details of MY's account of her departure, including that she did not know what name she was travelling under; never had her travel documents; and was out of hearing of the agent when he dealt with the immigration authorities both at Asmara and on arrival in the United Kingdom.

24. Those conclusions were criticised before us as irrational or unfair. First, it was said to be unfair to complain that MY had not repeated in her latest account the allegations of ill-treatment in Eritrea. She had properly abandoned them because they had been found to be untrue by previous Immigration Judges. Second, it was procedurally unfair to have relied on discrepancies between the various accounts of the deportation from Eritrea without putting the appellant on notice that that would be done and inviting submissions. I am not impressed by those complaints. An appellant who is professionally represented can hardly be surprised if the court in a review of credibility refers to earlier findings and discrepancies.

25. But in any event these complaints fall away in the face of the judge's approach in his §29, set out above. It is quite clear that he rejected the appellant's account because of its inherent implausibility, and not because it had been given by someone found by others or thought by him to have lied about other matters on other occasions. There was nothing perverse or unfair in his conclusion on the question that he correctly posed for himself, of whether he could find that MY left Eritrea illegally.

26. The appellant also complained that evidence had been given by a Dr Love to the effect that the appellant would almost certainly have required false documents if she was to leave Eritrea. The judge, even if rejecting the evidence as to exit via Asmara, should have gone on to consider whether a different, and according to Dr Love unlawful, exit had occurred. There is an element of paradox about that argument, which amounts to saying that quite apart from his general suspicion of the history the Immigration Judge should additionally have disbelieved the appellant because what she testified to was inconsistent with the evidence of Dr Love. It was not wrong of the Immigration Judge to have rejected that case as it was put to him, but as I shall demonstrate below there is a more sophisticated version of that argument that does need further consideration.

27. The evidential position as to exit from Eritrea in MY's case was, therefore, as stated by the Immigration Judge in his §33:

> Having found the Appellant not to be credible as to the evidence as to the circumstances in which she left Eritrea I am left in the position whereby there is no evidence to satisfy me as to the means by which the Appellant did indeed leave Eritrea.

Three preliminary matters

28. Before addressing the cases now advanced by the appellants I should dispose of three preliminary issues.

29. First, in each of the cases the Immigration Judges found that the appellants had fabricated a large part of their evidence, the only object being to deceive the immigration authorities both administrative and judicial. In the preliminary process in this court some reserve was expressed about the continued reliance on the asylum system by persons who had subjected it to serious misuse in the past. That same concern was raised by the Immigration Judge in §33 of his determination in GM. However, that consideration cannot in itself weigh with us, because the obligation of the court is to respect the international obligations of the United Kingdom towards persons who do in fact fall within the protection of the Refugee Convention, however little such persons may have assisted their case by lying or acting in bad faith: see *Mbanga* [1996] Imm AR 136 at p142 per Millett LJ; and more generally *Danian v SSHD* [2000] Imm AR 96.

30. Second, in none of the appeals has any indication at all been given of what evidence about their individual cases the appellants would now wish to give, having been disbelieved in what they originally said. Mr Nicol QC austerely said that there was no forum in which the appellants' true case could be advanced. Accepting that that is so, or at least that that is the perception adopted by the appellants, the outcome is that this court is in the same position as the tribunals below, of knowing virtually nothing about the individual experience of these three appellants.

31. Third, the observation in *Ariaya and Sammy* and in *MA* that a person who has not given a credible account of his own history cannot easily show that he would be at risk as a draft evader or because of illegal exit is, with respect, a robust assessment of practical likelihood, but it is not expressed as, and cannot be, any sort of rule of law or even rule of thumb. In every case it is still necessary to consider, despite the failure of the applicant to help himself by giving a true or any account of his own experiences, whether there is a reasonable likelihood of persecution on return. In all of the present cases the appellants argued that the totality of material before the respective tribunals, even though it included almost no contribution from the appellants themselves, required a positive answer to that question. To those arguments I now turn.

The effect of conscription in the cases of GM and YT

32. Mr Nicol QC argued that in the cases of GM and YT there was sufficient accepted evidence about their individual experience to enable, indeed require, a finding that they qualified for international protection. It had been accepted that both GM and YT had been conscripted into national service. Accordingly, they would simply by their presence in the United Kingdom be perceived as deserters. It was not necessary to say more, or to give any further evidence of what they had been doing in Eritrea or what had in fact happened to them there. As Mr Nicol put it in his skeleton argument:

> It was accepted that GM and YT were young men who had been called up for national service in Eritrea. The Tribunal

> found in MA that, with immaterial exceptions, national service continued until the age of 50 (which plainly neither of these Appellants were). While the particular accounts which they gave of how they had come to desert were disbelieved, the Appellants submit that the Tribunal on the *MA* findings should nonetheless have concluded that they were deserters, that they could not have obtained exit visas to leave Eritrea lawfully and, therefore, on return they would have faced a real risk of ill treatment.

33. Mr Collins was however able to demonstrate from *MA* that the distinction relied on between persons actually conscripted for military service and those merely eligible for such service was not one formulated by the AIT. The summary of the AIT's conclusion that illegal exit is a crucial consideration (*MA* at §449, set out in §13 above) comes at the end of a passage in which those who have completed active national service and those merely eligible for such service are considered by the AIT on equal terms. It may well be the case that those who are engaged in *active* military service (as to which see §3 above) will never be given permission to leave the country and thus the service, and will be treated as deserters. But although it was accepted that both GM and YT entered upon such service, there is only their own word, which has not been accepted, that they were still in such active military service when they left Eritrea: see §§ 17 and 20 above. Accordingly, and contrary to the assumption in the argument set out in §32 above, the factor that in GM and YT's cases is alleged to make it impossible that they would have been granted exit visas has not been proved.

34. Their cases accordingly have to be considered only on the basis of the more general contention that is advanced by all of the appellants, to which I now turn.

The evidence about and assessment of illegal exit from Eritrea

35. As we have seen, *MA* assumed that the crucial factor that would lead to persecution on return was previous illegal exit. I did not understand that proposition to be in issue before us. The appellants however contended that even though there was no accepted evidence before the tribunals as to their own means of exit, the material before the tribunals should have led them to conclude, applying the *Sivakumaran* standard, that there was a reasonable degree of likelihood that each appellant had left illegally; or, alternatively, that whether or not that was the case, a reasonable degree of likelihood that on return the appellants would be perceived by the Eritrean authorities as having left illegally.

36. The argument is short and simple. It is accepted that a large proportion of those who leave Eritrea do so illegally. The only persons who are permitted to leave are those who fall within a very limited number of categories: see §§ 9-10 above. It was most unlikely that any of the present appellants would fall within any of those categories, and in the absence of any evidence from the Secretary of State suggesting the contrary it must be assumed that they did not do so. Accordingly, the fact that the appellants had said nothing about themselves did not matter: there was more than a reasonable degree of likelihood, but rather a probability or even certainty that they had left illegally.

37. This argument would be compelling if it could be shown that none of the appellants could fall within the classes of permitted leavers, because then the mere fact that they had left Eritrea would establish of itself that they had left illegally. But the evidence does not go that far. While I would readily accepted that young people such as the appellants are unlikely to fit into most of the categories, including Ministers and government officials and probably also party activists, the evidence as to the position of students that was apparently accepted by the AIT (see §10 above) shows a much greater degree of uncertainty. When we know nothing about the individual situation of any of the appellants, the question becomes whether there is a reasonable degree of likelihood that any one of them did not fall into any category, particularly students, who are permitted to leave.

38. I have not found that question easy to answer, and have reached different conclusions on it in the different appeals that are before us.

39. So far as GM and YT are concerned, their lives are an evidential blank between 2000 and their arrival in the United Kingdom, in 2006 in the case of GM and 2005 in the case of YT. Both Immigration Judges rightly thought that it was not their task to speculate as to what the appellants had been doing during that period. And in any event such enquiry would indeed have been entirely speculative. While they are unlikely to have fallen into any of the categories reported in §9 above, they were of an age to have moved into the student category envisaged by the AIT. Since they put forward no truthful material about what they were doing in the relevant period, it is in my view impossible to say that there is a reasonable degree of likelihood that during that period the appellants did not move into the student category.

40. At the same time, it is equally impossible to say that it is likely that they did enter that category. That however is not the test. Mr Nicol was wrong in suggesting that it was for the Secretary of State to produce evidence to that effect. That would indeed be to reverse the burden of proof. As this court put it in *Ariaya and Sammy*, cited in §12 above, it may not be necessary for the appellant in such circumstances to say much, but he must say something, adduce some evidence that puts him in a vulnerable position, before the effective burden of contradicting his case passes to the Secretary of State.

41. Nor is the position different if the question is asked of whether GM and YT would be perceived as having left illegally. If they did not in fact leave illegally, which is a conclusion that on the evidence in this case they have not been able to counter, then they will or should be able to demonstrate that fact to the Eritrean authorities.

42. For those reasons I would therefore dismiss the appeals in the cases of GM and YT.

43. The case of MY is much more difficult. Like the other two appellants, she is in the position of having given no acceptable evidence about the way in which she left Eritrea. I accept that the burden of proof, in this case of the fact that she left Eritrea illegally, is on her, and that when a person bearing the burden can point to no evidence at all then her case necessarily fails. But I do not accept that it follows as a rule that at least some of that evidence must be given by the party herself. The question must be whether on all the material before the court the burden has been discharged. In MY's case it was accepted that she was 17 years and 4 months old when she left Eritrea and came to the United Kingdom. That fact alone makes it very

difficult indeed even arguably to fit her into any of the categories of person who might obtain exit visas, including the student category discussed above. A girl of 16, or at best 17, is a very implausible member of any of the categories identified by Dr Kibreab and accepted by the AIT: see §9 above. And as to a position as a student, MY's age makes it very unlikely that she would be sufficiently advanced in her studies to have entered the limited class recognised in *MA* to which I refer in §10 above.

44. In my view, therefore, it was incumbent on the Immigration Judge to consider on the basis of all the evidence, including the findings as to country conditions that were made in *MA*, whether there was a reasonable degree of likelihood that during her period of residence in Eritrea MY did not fall into one of the categories that could or might leave the country legally. That is not how the judge dealt with the matter. In §34 of his determination he quoted a statement in §448 of *MA* that expresses the same sentiment, though in slightly different terms, as §449 of that determination (set out in § 13 above):

> 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 has made an unsuccessful asylum claim abroad.

The Immigration Judge continued:

> In this case I have found as a fact on the evidence before me that this Appellant has failed to show that she left Eritrea illegally. Having made that finding I must therefore go on to apply the reasoning of the Tribunal in paragraph 448 of their decision and arrive at the decision that this Appellant is not reasonably likely to be regarded with serious hostility on return.

45. However, the finding that the Appellant has failed to show that she left Eritrea illegally was based entirely upon, and was seen as following from, the fact that MY herself had given no credible evidence as to the means by which she left Eritrea. To regard that as conclusive upon the issue that the court has to decide is, with respect, to make the error identified in §31 above: the failure of the case advanced by the appellant does not lead as a matter of necessity to the failure of her case if there is other evidence of general circumstances or probabilities against which what little is known about the applicant can be assessed.

46. The judge having taken an incorrect approach to the evidence, it falls to this court to reconsider the case on the basis of that evidence. The evidence referred to above, and despite MY's failure to give truthful evidence either about her activities in Eritrea or about her actual exit from that country, drives me to the conclusion that even though I cannot say how MY actually left Eritrea, there must, if only by elimination of other possibilities, be a reasonable degree of likelihood that she had left illegally.

47. I note the concern expressed by Dyson LJ, whose judgment I have had the benefit of reading in draft, that my reasons for holding as I do in the cases of GM and YT should apply equally to the case of MY. I accept that as a matter of strict logic that may be

so. However, the issue as I have sought to formulate it in §37 above was whether there is a reasonable degree of likelihood that a particular applicant did not fall into any of the categories that are known to be permitted to leave. The long gap in GM and YT's history, and their failure to provide any truthful evidence to fill that gap, meant that it was not possible confidently to answer that question in their favour. If that question is asked in the case of MY, I find it so unlikely, on what is known about her, that she could have fallen into any of those categories that, despite the lack of positive evidence, I do not feel similarly inhibited from making that assessment of likelihood in her favour.

48. Accordingly, and respectfully recognising the difficulties of the case as set out by my Lords, I would allow the appeal in MY's case and substitute the foregoing conclusion for that reached by the judge.

LORD JUSTICE LAWS:

49. I have had the opportunity to read Lord Justice Buxton's judgment in draft, and I adopt with gratitude his account of the facts and circumstances of these appeals. I agree with him that the appeals of GM and YT must be dismissed for the reasons he gives. As Buxton LJ says (paragraph 43) the case of MY is much more difficult. With some diffidence I have reached the conclusion that her appeal also should be dismissed.

50. The duty of the immigration judge was to decide whether MY had established, to the standard of proof explained in *Sivakumaran* [1988] 1 AC 958, that she would suffer persecution within the meaning of the Refugee Convention (or ill-treatment in violation of ECHR Article 3) if she were returned to Eritrea. He had to ask himself whether there was a reasonable likelihood of such an outcome – that is to say, a real or substantial likelihood as opposed to a merely fanciful possibility. The standard is lower than the conventional balance of probability. Proof of a 51% chance (or greater) is not required.

51. In this case, as Buxton LJ has explained (paragraph 11), the concrete question for the immigration judge was whether there was a reasonable degree of likelihood that MY had left Eritrea illegally. As her positive account had been disbelieved she had to rely (like her co-appellants) on general evidence about the relative frequency of illegal exit. Buxton LJ attaches importance (paragraph 43 ff) to the undisputed fact that she was no more than 17 years and 4 months old when she left Eritrea and came to the United Kingdom, and with respect one at once understands why. He considers that the fact of her age poses great difficulty in the way of placing her within any of the categories of persons who on the evidence might receive exit visas, and concludes (paragraph 46) that "there must, if only by elimination of other possibilities, be a reasonable degree of likelihood that she… left illegally". He holds (paragraph 45) that the immigration judge wrongly treated the fact that MY had given no credible evidence as to the means by which she left Eritrea as conclusive of the question that the court he had to decide.

52. I accept that there may be cases where the appellant's testimony is disbelieved but other evidence proves his/her asylum claim; and Buxton LJ has cited authority

(paragraph 29) to show that the court's duty is to vindicate a good asylum claim even though the appellant may have lied or otherwise acted in bad faith: see *Mbanga* [1996] Imm AR 136, 142 and *Danian v SSHD* [2000] Imm AR 96. But here, the consequence of MY having been disbelieved is that there is no material on which the immigration judge or this court can make any finding as to how MY left Eritrea.

53. In my judgment that circumstance poses great difficulties for MY's case. The fact (if it be so) that it is reasonably likely that any 17 year old girl from Eritrea, about whom nothing else relevant is known, left the country illegally does not entail the conclusion that *this particular* 17 year old girl did so. The reason is that the probability that a particular person has or has not left illegally must depend on the particular facts of her case. Those facts may produce a conclusion quite different from that relating to illegal exit by members of such a class of persons about whose particular circumstances, however, the court knows nothing more than their membership of the class. There may indeed be a general probability of illegal exit by members of the class; but the particular facts may make all the difference. I think with respect that this consideration lies behind the observations approved by Richards LJ in *Ariaya and Sammy v SSHD* [2006] EWCA Civ 40, and paragraph 449 in *MA*, which Buxton LJ cites at paragraphs 12 and 13.

54. 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.

55. Is that the position here? I do not think that it is. The categories of persons found by the AIT in *MA* (largely founded on Dr Kibreab's evidence) to be candidates, or promising candidates, for exit visas, were not held to be closed or watertight. That seems to me to be demonstrated by the tribunal's treatment of the British Embassy evidence at paragraphs 355 ff and culminating in the closing sentence of paragraph 363, cited by Buxton LJ at paragraph 10. It is also notable that the AIT's conclusion about the chances of a young male obtaining a visa is expressed (paragraph 357) in terms of unlikelihood only. Moreover I read paragraph 449, cited by Buxton LJ at paragraph 13, as showing that the AIT in *MA* itself considered proof of an appellant's particular circumstances to be an important factor in determining whether the appellant left Eritrea illegally.

56. In short, I do not consider that MY can demonstrate a reasonable degree of likelihood that she left Eritrea illegally in the absence of some evidence, accepted by the fact-finding tribunal, upon which conclusions might be arrived at concerning her personal circumstances. The case is a stark one. MY indeed gave specific evidence as to the manner of her leaving Eritrea, through Asmara airport. The immigration judge found (paragraph 29) that was incredible unless (in effect) she had left *legally*: she would have been subject to the scrutiny of officials at the airport. It is quite impossible to suggest that the immigration judge was wrong to take that approach. I agree entirely with Buxton LJ's rejection (paragraphs 25 and 26) of criticisms of paragraph 29 advanced on MY's behalf.

57. Had the immigration judge actually found that she had left through the airport but legally, that would of course have been the end of her case. I do not think her appeal to this court can now prosper on the basis that the immigration judge was

right to reject her own account of her departure, but should have proceeded to hold that she must have left illegally by some other wholly unidentified means. I do not say there could not be such a case. But it would require much tighter, more comprehensive evidence of the general position relied on than is to be found in *MA* or this case. That conclusion does not offend the low standard of proof given by *Sivakumaran*, for that must be applied to the individual case; it cannot be done by general evidence, unless as I have said the possibility that the particular facts may make a difference is effectively excluded.

58. I would dismiss all three appeals.

Lord Justice Dyson :

59. I agree that the appeals of GM and YT must be dismissed for the reasons given by Buxton LJ, but I agree with Laws LJ that MY's appeal should be dismissed too.

60. At [32] of his determination, the immigration judge rejected MY's account of her exit from Eritrea as incredible. He was entitled to do so for the reasons that he gave. He concluded, therefore, that there was no credible evidence as to how she left Eritrea. It followed that MY had failed to show that she had left the country illegally [34]. Although the judge said at [37] that in reaching his decision he had considered all the evidence that had been presented to him, it is clear from [38] that he regarded the lack of credibility in MY's account as determinative of the question whether her departure from Eritrea had been illegal.

61. In substance, the issue for the judge was whether MY had established that there was a reasonable likelihood that she had left Eritrea illegally. I agree with Buxton LJ that the fact that MY herself had given no credible evidence as to how she left Eritrea was not conclusive of that issue, which had to be determined on the basis of all the material that was before the judge. But I agree with Laws LJ that the fact that there is a reasonable likelihood of illegal exit by members of a particular category, say 17 year old girls, does not necessarily entail the proposition that there is a reasonable likelihood that the exit by a particular member of that category was illegal. Unless it can safely be said that exit by *any* 17 year old girl is illegal, whether it is reasonably likely that the exit by an individual 17 year old girl was illegal will depend on the facts of her particular case. Her failure to give a credible account of those facts may lead to the conclusion that she has not shown that there is a reasonable likelihood that her exit was illegal.

62. Laws LJ says that where a case depends entirely on general evidence, it will only succeed if, fanciful exceptions apart, the claimant "must have left illegally *whatever* the facts" [52] and unless the "possibility that the particular facts may make a difference is effectively excluded" [55]. I agree.

63. Even if the only category of 17 year old girl who could leave Eritrea legally was students in receipt of scholarships, I would be disposed to dismiss MY's appeal because there is no evidence as to the percentage of girls of that age who fall into that category and the judge made no relevant findings . But as Laws LJ points out, the evidence in *MA* was that the categories of persons who were candidates for exit visas was not closed. The evidence obtained from the Visa section of the British Embassy was that a "wide range of paid applications were made to the British

Embassy for entry clearance to the United Kingdom"; it was "not credible that these people would waste their money if they had not already obtained exit visas from the authorities" and a significant number of these people were between the ages of 10 and 50: see [355]. This evidence was accepted by the AIT at [363]: "the evidence regarding visas issued by the UK Embassy in Asmara, when read with the evidence regarding the range of categories of persons whom Dr Kibreab considered would be allowed to leave legally, shows that it cannot simply be assumed that an Eritrean claimant who has left Eritrea has done so illegally."

64. Nothing is known about MY except that she left Eritrea in December 2002 when she was 17 years of age. The burden was on her to show that there was a reasonably likelihood that her exit was illegal. In my judgment, she did not discharge this burden. I note the finding at [357] in *MA* that it is unlikely that a male of military service age would be able to obtain an exit visa unless he came within one of the specified categories. But there is no similar finding in relation to young women. With respect to Buxton LJ, it seems to me that his reasoning at [39] and [40] above (with which I agree) should lead to same conclusion in respect of MY as in respect of GM and YT. In her case as in theirs, any enquiry as to what she had been doing would be speculative. The only known differences between her case and theirs were their sex and age. But in my judgment, once her account was rejected as incredible, the fact that she was female and 17 at the material time does not take her case out of the realm of speculation. She might have been a student in receipt of a scholarship. There was no evidence about the number of student scholars or the age at which scholarships were awarded. And that is to leave out of account the possibility that, even if she was not a student, MY was one of the significant number of a wide range of paid applications from people between the ages of 10 and 50 referred to by the British Embassy. It was entirely possible that MY left Eritrea legally.

65. I would dismiss all three appeals.