



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06072/2013

THE IMMIGRATION ACTS

Heard at Manchester
On 10 October 2013
Reserved judgment

Determination Promulgated
On 1 November 2013

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
and
UPPER TRIBUNAL JUDGE PERKINS

Between

MOHAMMAD ABSOLAH ELHABIB ABOSALAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Patel (of counsel) instructed by Broudie Jackson & Canter
For the Respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

INTRODUCTION

[1] This appeal originates in a decision of 7th June 2013 made by the Secretary of State for the Home Department (*“the Secretary of State”*) whereby the Appellant’s application for asylum was refused. The Appellant was then notified of a decision to remove

him from the United Kingdom. His ensuing appeal to the First-Tier Tribunal (“*the Tribunal*”) was unsuccessful.

THE APPELLANT’S IMMIGRATION HISTORY

- [2] The salient facts are uncontentious and we summarise them thus. The Appellant is a Libyan national, born on 14th January 1978. On 27th December 2008, he was granted leave to enter the United Kingdom, as a student, expiring on 29th October 2009. He then entered the United Kingdom in March 2009 for a relatively brief sojourn. On 26th October 2009, he was again granted leave to enter the United Kingdom, as a student, expiring on 30th December 2010. Subsequently, he entered the United Kingdom on 1st December 2009. His movements and whereabouts during the following year are unclear. On 25th January 2011, he was granted leave to enter the United Kingdom for a third time, again as a student, expiring on 31st October 2011. On 27th January 2011, he flew from Libya to the United Kingdom. Having made a timeous application for extended leave to remain in the United Kingdom, as a student, his leave was extended to 30th March 2013. On 1st May 2013, his leave to enter the United Kingdom having expired, he claimed asylum.

THE APPELLANT’S CLAIM FOR ASYLUM

- [3] The record of the screening interview conducted on 1st May 2013 discloses that the risk of persecution on return to Libya asserted by the Appellant had two strands. The first was his claim to have been a member of Colonel Gaddafi’s Revolutionary Guard. This, he claimed, entailed pro-Gadaffi activism, including the promotion of the so-called “Green Book”. His membership dated from 1999 to 2007. He suggested that around half of the Libyan population were members of the Revolutionary Guard. Members wore a green military uniform and headgear, loaned to them, only on the occasion of Gaddafi speeches in public. Membership conferred certain social and economic benefits and enhanced the Appellant’s prospects of going abroad to study. This aspiration was realised in 2008, when he was granted a scholarship to study for a MA in the United Kingdom.
- [4] The second element of the asylum claim advanced by the Appellant was his Touareg ethnicity. He suggested that this was the reason for the claimed suspension of his scholarship and his asserted consequent inability to complete his course in the United Kingdom. In interview, he stated:

“... Gaddafi brought some Touareg fighters from Africa to fight with him and we were affected badly by this.”

He confirmed that the Touareg people had no involvement in the anti-Gadaffi movement. The ensuing two questions and answers are noteworthy:

"So are you saying that you have a problem now because you are perceived to have been pro-Gadaffi? Yes

A: Are all Touareg facing this problem, all perceived to be pro-Gaddafi? Yes in the south, from my city where I came from."

[A reference to Al Uwaynat city.]

The Appellant also stated:

"My brother called and informed me in the beginning of Feb 2011 that I was wanted by the Libyan government. I don't know why. If I go back my life will end."

The Appellant answered "No" when asked whether he was subject to an arrest warrant or wanted by any law enforcement authority for an offence in any country.

- [5] In a subsequent letter, his solicitors indicated that having taken his instructions they wished to make the following "clarification":

"I am wanted by the Militias now in control of Libya as I and my family are now identified as supporters of the former President Gaddafi. Also we are being persecuted on account of our ethnicity as black tribes members from the south of the country as we are suspected of being affiliates of the former regime."

This encapsulates the Appellant's application for asylum. Finally, the Appellant's explanation for his delay in claiming asylum was that he was ill following the "first interview" viz the screening interview, which preceded the substantive interview by 15 days. Duly analysed, he provided no explanation for his failure to claim asylum prior to the expiry of his student visa on 30th March 2013. The formulation of the Appellant's case gained momentum following the lodgement of his appeal to the Tribunal. In a witness statement compiled for the purpose of the first instance hearing, he added the following:

"..... All Libyans know that the very fact of being black and Touareg places you at great risk now in Libya. The Militias link your ethnicity with Gaddafi regardless of any so-called evidence. I am actually associated with Gaddafi but even if I was not I would be at risk and I know this I would have to travel back to the south of Libya with all the dangers of being stopped or killed present The case worker is failing to engage with how I would arrive back at Tripoli and then travel 1,000 miles to my home area without being stopped

My ethnicity will place me in the eyes of those who are concerned about these things in Libya as a friend of Gaddafi and therefore a traitor and a person who should be killed."

Two material facts which have at all times been undisputed are the Appellant's Libyan nationality and his Touareg ethnicity.

DECISION OF THE FIRST-TIER TRIBUNAL

- [6] The Tribunal made two principal conclusions. First, there was a finding that the Appellant's case was incredulous. This was a carefully reasoned finding. Second, the Tribunal considered that the Appellant could travel safely from Tripoli airport to his home district. As this latter conclusion developed into the centrepiece of the appeal to this Tribunal, it is appropriate to identify its several ingredients, which were the following:
- (a) Given the Appellant's evidence that his parents and siblings continued to live in his home area, apparently enjoying a peaceful life, the Judge considered this to contraindicate any persecution of Touareg people on account of their ethnicity.
 - (b) There was no evidence that Touareg people are "*automatically at risk of persecution or treatment prohibited by Article 3*" at Tripoli airport.
 - (c) The Appellant will be able to fly from Tripoli airport to the airport at Ghat, in his home district. From there he will be able to travel home.
 - (d) There are friends and family members available to assist the Appellant with his internal travel arrangements. This travel will be feasible, even though it "*may not be entirely comfortable*".
- [7] As highlighted above, the Appellant's claim for asylum had two elements. The first of these, the "pro-Gaddafi" element, was dismissed by the Judge in uncompromising terms. While this aspect of the Determination formed one of the three grounds of appeal, it features nowhere in the grant of permission to appeal and was not pursued by Ms Patel (of Counsel). For the avoidance of any doubt, we consider this aspect of the first instance Determination unimpeachable. It is cogently reasoned and exhibits no semblance of an error of law.

THE GROUNDS OF APPEAL

- [8] The two grounds of appeal which were pursued actively are inter-related. They are formulated in these terms:

- (a) The Tribunal erred in finding that Touaregs are not at risk of persecution in Libya by virtue of their ethnicity.
- (b) The Tribunal erred in finding that the Appellant could access a safe area in Libya.

It is appropriate to observe that, as formulated, neither of these grounds complains of any identifiable **error of law**. Properly analysed, and subject to this observation, we consider that these two contentions combine to form a single, omnibus contention, namely the Tribunal erred in failing to conclude that the Appellant is a refugee. At this juncture, we draw attention to the grant of permission to appeal, which is couched in admirably clear and reasoned terms :

“The grounds are arguable, particularly in relation to the country evidence The Judge records that he has taken into account material contained in the Appellant’s bundle. There is no substantial mention of this evidence, or of the country evidence before the Tribunal, thereafter

*It is arguable that the Judge has, with respect, not engaged with the country evidence in the Appellant’s bundle which shows, as contended in the grounds, that many Libyans tend to identify all Touareg people as supporters of the Gadaffi regime **and that there is a Militia presence at Tripoli airport, with the central government acting as bystanders**. It is arguable that the Judge’s conclusion that there is no risk at Tripoli airport is insufficiently reasoned as there may have been no engagement with this relevant country evidence.”*

[Emphasis added.]

As the grant of permission to appeal clearly demonstrates, the focus of attention for the First-Tier Tribunal was:

- (a) the claim that all Touaregs are at risk of persecution in Libya on account of their ethnicity; and
- (b) the claim that the Appellant could not safely travel through Tripoli Airport en route to a safe haven in the south of the country.

THE COUNTRY EVIDENCE

[9] The country evidence was contained in a bundle which had been presented to the First-Tier Tribunal. Those aspects of this evidence which featured prominently upon the hearing of the appeal in this Tribunal were the following:

- (a) An Amnesty International report dated 23rd May 2013.

- (b) A UK Border Agency Operational Guidance Note (“OGN”) concerning Libya, dated May 2013.
- (c) Extracts from a UKBA Country of Origin Information (“COI”) report dated 19th December 2012.

The evidence also included certain internet materials documenting the activities of Militia members at Tripoli airport on two dates, 4th June 2012 and 4th August 2013. In addition, the Secretary of State’s refusal letter (dated 7th June 2013) rehearsed certain “background information”:

“Background information indicates that during and immediately after the Libyan uprising, all dark-skinned people were subject to intense distrust and racism due to the Touareg involvement in the battle for Libya and that this led to including violent attacks, robbery, beatings and abuses such as sexual violence against sub-Saharan nationals and dark-skinned civilians. In relation to the situation of the Touaregs, background information indicates that many Touareg were forced to leave their home town Ghadames in the west of Libya and a number of them have not been able to return [following a period of armed conflict between Touareg Militia and Ghadames Brigades men] Background information indicates that there were reports of Touaregs being removed from their homes in Tripoli and held in detention centres and prisons, in the year 2012. Despite searches of reports by the US State Department, Crisis Group International and internet searches no evidence can be found to indicate that Touareg people in your home area of Al Uwaynat, or elsewhere in Ghat district, have been subjected to persecutory treatment because of their ethnicity, or for any other reason, during or since the Libyan uprising.”

These passages constituted the foundation for the “return assessment” articulated in the next succeeding paragraph in the refusal letter:

“It is considered that this background evidence does not demonstrate that there is a general level of ill treatment of Touaregs in your home area of Ghat district which gives reason to consider that you will be subjected to such treatment on return there.”

Notably, as these passages demonstrate, the Secretary of State’s refusal letter concentrated on the second of the two issues identified above viz the ability of Touaregs to live safely in certain parts of southern Libya but failed to engage with the first viz the ability of the Appellant to safely negotiate Tripoli Airport and thereafter to safely access one of these safe havens.

[10] We turn to consider the country evidence in a little greater detail. The Amnesty International Annual Report for Libya, dated 23rd May 2013, contains the following summary:

“Armed militias continued to commit serious human rights abuses with impunity, including arbitrary arrests, arbitrary detention, torture and unlawful killings. Thousands of people suspected of formerly supporting or fighting for Gaddafi’s Government, over thrown in 2011, remained detained without charge or trial and with no means of remedy. Most were beaten or otherwise ill treated in custody; ten died after torture. Tens of thousands of people were forced to leave their homes in areas perceived to have supported [Gaddafi] remained internally displaced and were at risk of revenge attacks and other abuses

Impunity remained entrenched, both for gross human rights violations committed in the past and for ongoing human rights abuses by armed militias”

Elaborating, the report recounts the emergence of large numbers of militias which filled the security vacuum following the overthrow of the Gaddafi regime in 2011 and their continued activity :

“Armed militias continued to seize or abduct individuals they suspected of having supported or fought for Gaddafi’s government, taking them from their homes, workplaces, streets or check points. Many were immediately beaten and had their homes looted and damaged

Detainees were frequently moved from one makeshift place of detention to another ...

The fate and whereabouts of some individuals abducted by militias remains unknown...

Torture and other ill treatment remained widespread, particularly in detention facilities controlled by militias.”

In a brief reference to Tripoli Airport, the report states:

“Four men from Tawargha [one of the black Libyan tribes] were arrested at Tripoli Airport on 6th May [and] were still detained without trial at the end of the year.”

The report also records that some 58,000 people were reported to be internally displaced.

[11] The UKBA Operational Guidance note on Libya was also published in May 2013. This report records the continuing prevalence of revolutionary militias outside the main urban centres such as Tripoli. In many cases, these groups acted as self-appointed security forces. The emergence of properly controlled and functioning central military and police forces was sluggish. The pace of re-establishment of the judicial and prosecution systems was slow. The interim government had declared

much of the southern part of the country, including the area around Ghadames, a “closed military zone”, in an apparent attempt to control population movements. The militias, numbering low to mid hundreds, constitute “*the country’s most important security threat*”. Their activities, motivated by revenge, include “*torture against individuals and communities suspected of being loyal [to] Gaddafi*”. These militias are described as “*heavily armed*” and “*a law unto themselves*”. They are prominent particularly in the east and south of the country. This report cautions:

“The security and humanitarian situation in Libya remains fluid and some individuals may fall into an enhanced risk category on the basis of certain characteristics. Each case must be considered on its individual merits.”

In this context, it highlights the indiscriminate detention by militias of persons suspected of having supported the Gaddafi regime, including easily identifiable targets such as black Tawarghas. These activities were considered to be of diminishing frequency. It was believed that there were maybe 7,000 such detainees.

[12] The OGM Guidance note also contains the following noteworthy passage:

“Some minority groups and tribes associated with the Gaddafi regime remain internally displaced and have been targeted by rival groups, such as the Touareg and Tebu ethnic groups

It is likely that applicants in this category will be able to show a need for international protection. Perceived supporters of Gaddafi and his regime are at risk of extra-judicial execution, arbitrary detention, torture, ill treatment and death in detention, both by authorities of the Interim Government or its armed affiliates, as well as by armed militias operating without government control. Communities perceived to be loyal to Gaddafi have also experienced forced displacement, indiscriminate shelling, looting and the burning of homes.”

[Our emphasis.]

Given the issues raised by this appeal, this is a key passage in the report. In the next section, the improbability of safe internal relocation by those belonging to this category is acknowledged. In other passages of the report one finds the following:

“Applicants may make asylum and/or human rights claims based on a fear of mistreatment by either a state or non-state actors due to their membership of an ethnic group

The principal minorities were Amazigh, Touareg and Debou

*There was societal discrimination and violence originating in ethnic differences. Racial discrimination existed against dark-skinned Libyans' in particular due to allegations that Gaddafi used African mercenaries during the conflict. There were reports of dark-skinned Libyans as well as **Touaregs** being removed from their homes in Tripoli and held in detention centres and prisons. In a section specially devoted to the Touareg tribe, the report states:*

'Libya is home to a Touareg community of roughly 100,000 people Many Libyans tend to identify all Touareg as regime supporters. Near the desert town of Ghadames local Touareg were threatened by rebels seeking to expel them

*The Touareg tribes have been subjected to ethnic cleansing for the past 8 months. the Ghadames tribe, which is backed by forces affiliated with the National Transitional Council, is allegedly carrying out these acts. The latter burned and destroyed hostels and stables belonging to **the Touareg tribe** and expelled them from the city, forcing them to flee to Algeria. According to the escapees, **many Touareg members** were subjected to illegal detention in secret locations under inhumane conditions. They added that members of the Ghadames tribes are searching for **Touareg members** everywhere, even in hospitals, to kill and torture them.'*

Having rehearsed this evidence, the report advises case workers in the following terms:

"Where it is accepted that an individual applicant is likely to be perceived as supporting Gaddafi and that this places them at risk of attracting the adverse attention of militias brigades allied to the Libyan authorities, a grant of asylum will generally be appropriate, subject to any exclusion considerations under Article 1F of the Refugee Convention It is unlikely that a claimant of this profile will be able to internally relocate in order to escape the risk of persecution."

[Paragraphs 3.12.31/32.]

[Our emphasis]

- [13] The third, and final, component of the country evidence is the UKBA Country of Origin ("COI") report. This is of somewhat greater vintage than the other two, being dated December 2012. This also contains (in paragraphs 19.17/19) a section specially devoted to the Touareg tribe. This records not only the widespread recognition that many Touareg Nomad tribes had supported Gaddafi during the war but also the additional factor that they were alleged to have committed rape in certain northern cities.

CONSIDERATION AND CONCLUSION

- [14] The three country reports are demonstrably consistent *inter se*. They contain much material supportive of the Appellant's claim that, if obliged to return to Libya, he would be at risk of persecution there on account of his Touareg ethnicity. In deciding this appeal, it is necessary to juxtapose the country evidence with the Determination of the First-tier Tribunal.
- [15] The Judge stated that he had considered all the evidence, including the country evidence. He then made a finding that the Appellant was "*a most unimpressive witness*". He specifically found that the Appellant's claim lacked credibility. All of the several factors which he articulated in support of this finding were of the subjective variety. They related to matters touching on the timing and content of the Appellant's claim for asylum, its evolution and manifestations and the supporting documentary evidence presented. The analysis that the Judge did not engage at all with the country evidence is uncontroversial. His focus was exclusively on various subjective aspects of the Appellant's asylum claim. The Judge neglected entirely the objective aspects, namely the country evidence.
- [16] It is common case that the Judge was under a specific duty to address, and resolve, the discrete issue of whether the Appellant could safely negotiate Tripoli Airport and, thereafter, safely travel to a Touareg occupied area unaffected by persecution risks. The Judge stated:

"..... There is nothing I can see before me to establish that Touaregs are automatically at risk of persecution or treatment prohibited by Article 3 there [ie Tripoli Airport]. There is an Airport at Ghat in his home district to which he could make his way and from thence to his home. He has friends and, indeed, his family in the area who could assist him. While the journey may not be entirely comfortable, it is feasible. In the light of my general finding as to the Appellant's credibility, I am also not prepared to accept what he says on this aspect of the case."

[Emphasis added]

We have two reservations about this important passage. The first is the Judge's continued heavy emphasis on the subjectivity of the Appellant's case. The second, inter-related, is the Judge's failure to address **the objective country evidence** and, in particular, how it sounded on his assessment of safe internal travel. Furthermore, there is no engagement with the case specifically made in the Appellant's witness statement **or** the "*background information*" rehearsed in the Secretary of State's refusal letter **or** the documentary evidence containing a report of an incident where armed militias seized control of Tripoli Airport, on 4th June 2012. We acknowledge that the further documentary evidence of a similar incident, occurring on 4th August 2013, which we are prepared to admit in the exercise of our discretion under Rule 15[2A], was not before the Judge.

[17] We consider that, in making his decision, the Judge was obliged to address the country evidence, make an assessment of it and spell out his findings and conclusions accordingly. There was a failure to do so. This is a freestanding error of law. We further consider that a related error of law occurred consequently, namely a failure to provide an adequately reasoned judgment. We are also of the opinion that the Judge erred further in law in his failure to appreciate that his credibility findings adverse to the Appellant were not determinative *per se* of the asylum claim, as this was underpinned by a body of not insubstantial objective evidence. These three errors are inter-related. Their materiality is beyond question.

DECISION

[18] For the reasons elaborated we set aside the decision of the First-Tier Tribunal.

DIRECTIONS

[19] In principle, we are of the view that this Tribunal should remake the decision. However, we shall afford both parties an opportunity to make written representations on the following issues:

- (a) whether the remaking exercise should be conducted in this forum or upon remittal to a differently constituted First-Tier Tribunal.
- (b) whether, in the event of retention in this forum, a further oral hearing is required.

The parties' written representations on these issues must be lodged within 21 days of the date of promulgation hereof. On a purely prosaic note, both parties should take care to ensure that their representations are clearly marked for the attention of the President and Upper Tribunal Judge Perkins.

Signed: 

Mr Justice McCloskey,
President of the Upper Tribunal

Dated: 30 October 2013