Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04925/2014

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 27 January 2015	**On 3 February 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

NMS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Neale instructed by Migrant Legal Project
For the Respondent: Mr I Richards, Home Office Presenting Officer

REMITTAL AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Libya who was born on 26 March 1976. She arrived in the United Kingdom on 26 June 2008 with a valid student visa. That leave was extended first to 31 October 2009 and then until 27 November 2014.

3. The appellant's husband and their two children also live in the UK. On 22 August 2011, the appellant's husband claimed asylum. The Secretary of State refused that claim on 21 November 2011 and, following a hearing on 25 March 2013, in a determination dated 11 April 2013 the First-tier Tribunal dismissed the appeal of the appellant's husband. Subsequently, permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 24 May 2013 and by the Upper Tribunal on 3 July 2013.

4. On 25 November 2013, the appellant claimed asylum in her own right with her husband and children as dependants upon that claim. The basis of her claim was that having graduated from university in Libya in 1998, she had taught in a school and had then become a lecturer in university. Whilst there, she was a member of the Revolutionary Committee.

5. In June 2008, she came to study for a PhD in the UK and the fees were paid by the Libyan government. However, following the change of regime in 2011, those fees were not paid because she was associated, through her membership of the Revolutionary Committee, with the former Gaddafi regime. She claims that if returned to Libya she would be perceived as an opponent of the current regime and would likely be imprisoned or killed.

6. On 1 July 2014, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and on the basis that her removal would breach Art 8 of the ECHR. The Secretary of State, in consequence, on 1 July 2014 refused to vary the appellant's existing leave and made a decision under s.47 of the Immigration, Asylum and Nationality Act 2006 to remove the appellant to Libya.

7. The appellant appealed to the First-tier Tribunal. That appeal was against the removal decision under s.47 of the 2006 Act by virtue of s.82(ha) of the Nationality, Immigration and Asylum Act 2002.

The First-tier Tribunal

8. The appeal was heard by Judge A Cresswell on 21 August 2014. In a determination promulgated on 26 August 2014, Judge Cresswell dismissed the appellant's appeal on all grounds. He rejected the appellant's account that the appellant had been a lecturer and a member of the Revolutionary Committee at her university and that her tuition fee for study in the UK had been stopped by the Libyan government as a result of her perceived association with the former Gaddafi regime.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal. On 30 September 2014, the First-tier Tribunal (Judge Frankish) granted the appellant permission to appeal.

10. Thus, the appeal came before me.

The Submissions

11. Mr Neale, who represented the appellant, relied upon the single ground of appeal upon which permission to appeal had been granted.

12. Mr Neale submitted that the judge's adverse credibility finding could not stand, in particular his reasoning at para 21(viii) and (xix). Mr Neale submitted that prior to the judge's promulgation of his decision on 26 August 2014, the appellant's representative had sent to the Tribunal a number of documents which supported the appellant's evidence that the Libyan government had failed to pay her tuition fees since the change of regime in 2011. He submitted that, in the light of the background evidence, the fact that this had occurred not just in the immediate aftermath of the change of regime and the crisis that existed in Libya, but up until 2014 supported the appellant's claim that her fees were stopped because she was perceived to be an opponent of the current regime and a supporter of the previous Gaddafi regime. He relied on a letter dated 21 August 2014 from a Senior Research Finance Officer at the University of the West of England ("UWE") and attached invoices which show outstanding fees of £27,500 covering the period 2011 to 2014. He referred me to para 2.2.13 of the Country Information and Guidance,

> "Libya: Actual or Perceived Gaddafi Clan Members – Loyalists" issued by the Home Office on 19 August 2014 which referred to a "decree" passed to punish Libyan students and state employees abroad who engaged in "activities hostile to the '17 February Revolution' by withdrawing their scholarships, salaries and bonuses".

13. Mr Neal relied upon the decision of the AIT in SD (Treatment of Post-Hearing Evidence) Russia [2008] UKAIT 00037. There, the President of the AIT (Hodge J) recognised that post-hearing evidence was admissible applying Ladd v Marshall principles namely: (1) the evidence was obtained with due diligence; (2) would probably have an important influence on the result; and (3) was apparently credible.

14. Mr Neale submitted that the evidence concerning the non-payment of fees arose in the course of the appellant's evidence when she referred to documents that she might have. He relied upon the witness statement of the appellant's (then) Counsel (Mr Hoshi) dated 15 January 2015 which established that the appellant showed to Mr Hoshi immediately after the hearing on her telephone emails concerning the issue of fees and she was advised to forward them immediately to her solicitors. Mr Hoshi advised the solicitors to submit the emails as post-hearing evidence of the Tribunal as soon as reasonably practicable. Mr Neale submitted that those emails together with

the supporting letter from UWE and the invoices were submitted promptly on 26 August after the bank holiday weekend following the hearing on Thursday 21 August. He submitted that was promptly; the evidence was significant to the judge's reasoning in reaching his adverse credibility finding; and the evidence was from a reliable source, namely the appellant's university, and was therefore credible.

15. Mr Neale submitted that had the judge seen this evidence prior to his determination being promulgated, on the basis of the principles set out in SD, it was likely that he would have admitted that evidence. Further, despite the judge's other reasons, it cannot be said that his adverse credibility finding would necessarily have been the same such that there was no material error of law.

16. On behalf of the Secretary of State, Mr Richards first submitted that there was no error of law. He submitted that the judge did not have the evidence and he was not accountable for not taking it into account.

17. Secondly, in any event, any error was not material given his other findings in para 21 leading to the adverse credibility finding. Mr Richards made no objection to the admission of the new evidence but he submitted that there was nothing in the new evidence which indicated why the appellant's fees had been stopped. That was precisely what the judge had said in para 21(xviii) in relation to the evidence before him. He submitted that it was inconceivable that the judge would have come to a different conclusion even if he had received the evidence prior to the hearing.

Discussion

18. There is no doubt that the failure of a Tribunal to consider evidence submitted after a hearing can amount to an error of law. In E & R v SSHD [2004] EWCA Civ 49, the Court of Appeal recognised at [92(i)] that:

> "The Tribunal remains seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties."

19. That was said in the context of the Immigration Appeal Tribunal but is no less applicable to the First-tier Tribunal or, indeed, the Upper Tribunal.

20. In SD, the AIT was concerned with a case in which an Immigration Judge refused to consider evidence submitted after the hearing but before his determination was promulgated. The AIT concluded that that amounted to an error of law. At [15] – [17], Hodge J (President) said this:

> "15. In his second reason for refusing to consider the late submissions, the immigration judge said he did not have jurisdiction to consider them. He was wrong. *E and R* makes it plain that he was "at liberty to admit further evidence". The late submission contained evidence which suggested that the Tribunal had been wrongly told that the appellant had not had "any form of leave after his temporary admission". The Court of Appeal in *E and R* left it open as to whether the Tribunal in such circumstances is under

a duty to admit further evidence. But it did give guidance as to how to proceed.

16. As is well known, in *E and R* the Court of Appeal accepted that a mistake of fact giving rise to unfairness was a separate head of challenge on an appeal on a point of law in the context of asylum and immigration appeals "where the parties shared an interest in cooperating to achieve the correct result". In relation to the then Immigration Appeal Tribunal, the Court concluded at para 92 that, in exercising the discretion to direct a rehearing in relation to new evidence received before the decision had been formally notified to the parties, 'the principle of finality would be important" and:

> "To justify reopening the case the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence it should be guided by *Ladd v Marshall* principles, subject to any exceptional factors."

17. Hence, in the rare case where an immigration judge, prior to the promulgation of a determination, receives a submission of late evidence, then consideration must first be given to the principles in *Ladd v Marshall* [1954] 1 WLR 1489. Under those, a tribunal should not normally admit fresh evidence unless it could not have been previously obtained with due diligence for use at the trial, would probably have had an important influence on the result and was apparently credible. If, applying that test, the judge was satisfied there was a risk of serious injustice because of something which had gone wrong at the hearing or this was evidence that had been overlooked, then it was likely to be material. In those circumstances, it will be necessary either to reconvene the hearing or to obtain the written submissions of the other side in relation to the matters included in the late submission."

21. The AIT went on to consider whether the particular error in that case was material and concluded that it was not.

22. The circumstances in this appeal are not precisely on all fours with SD. It is clear that the appellant's representatives did forward the documents concerning the non-payment of her fees by the Libyan government to the Tribunal which were received, according to the facsimile report, at 09:52 a.m. Mr Richards did not suggest that the documents were received after the promulgation of the judge's determination on that day. I proceed, therefore, on the basis that the relevant documents were in the possession of the Tribunal prior to the judge's determination being promulgated. It is, however, obvious that the judge did not receive the document prior to the promulgation and, indeed, it is not clear that he has ever seen the documents. His failure to consider them cannot, therefore, reflect any failing on his behalf. Indeed, it is difficult to fault the Tribunal staff given that the documents arrived on the very morning that the determination was promulgated. Nevertheless, the documents were in the possession of the Tribunal.

23. On the face of it, the issue in this appeal is whether that procedural irregularity (not providing the judge with the relevant documents in time to consider them before his determination was promulgated) resulted in a procedural irregularity and unfairness and therefore amounted to an error of law.

24. In SD, however, the AIT did not analyse the situation in that way. Rather, it considered whether, applying Ladd v Marshall principles, the evidence would be admissible as "new evidence". That reflects the approach of the Court of Appeal in E & R to which I have referred above and which is cited in the AIT's determination. I propose to adopt the same approach. It may well be that when a judge expressly (as in SD) or through no personal fault (as in this appeal) fails to consider post-hearing evidence submitted prior to promulgation, that evidence is properly seen as "fresh evidence" and unless admissible as such any failure to consider it cannot be unfair. However, a failure to consider it may, at least prima facie, be unlawful on the basis of a procedural irregularity.

25. In applying the Ladd v Marshall principles in a public law case, I bear in mind the view expressed by Carnwath LJ (as he then was) in E & R at [82] that in a public law case:

> "they remain the starting point, but there is a discretion to depart from them in exceptional circumstances".

26. Applying the Ladd v Marshall principles, I accept Mr Neale's submission that the substance of them is met.

27. First, it is clear from Mr Hoshi's witness statement that the issue of documents concerned with the non-payment of fee arose during the course of the appellant's evidence at the hearing. I accept that some of the invoices were, at least, in the possession of the appellant prior to the hearing. One is, for example, dated 9 August 2011 and another is dated 4 June 2014 shortly before the hearing. It is not clear why these documents were not produced earlier. It may well be that their significance only became clear as a result of the appellant's oral evidence. The letter from UWE is dated 21 August 2014 – which is the date of the hearing – and so could not possibly have been available at the hearing. In the circumstances, even though some were technically available, I am satisfied that these documents could not have been obtained with reasonable diligence for use at the date of the hearing.

28. In any event, it seems to me that the rigid application of Ladd v Marshall, relevant to the admission of evidence at a subsequent appeal hearing following a trial, has less potency when the issue concerns submission of documents post-hearing of the original trial. I bear in mind Carnwath LJ's cautionary comment in E & R. I also bear in mind that, following the hearing, the documents were submitted without any significant delay. Tuesday, 26 August 2014 was the first working day after the August Bank Holiday following the hearing on Thursday, 21 August 2014.

29. Secondly, there is no doubt in my mind that the documents were relevant and potentially had a significant bearing upon the central issue in the appellant's appeal,

namely whether she was perceived as a Gaddafi supporter. I do not accept Mr Richards' submission that the documents do no more than show that the Libyan government has failed to pay the appellant's fees between 2011 and 2014. It is clear from the Home Office's own document, to which I have already made reference, that a decree of the new Libyan government seeks to punish students who are perceived as Gaddafi supporters by withdrawing support for their studies abroad. Even if non-payment in the immediate aftermath of the change in regime in 2011 could be explained by that very crisis, it was certainly open to the judge to take the view that the most recent non-payment reflected, consistently with the background evidence, an adverse political view taken of the appellant by the current Libyan government.

30. The judge's reasoning at paras 21(xviii) – (xix) is as follows:

> "(xviii) The Appellant told me that the Libyan government stopped paying her university fees in the year 2011/12. *"This happened after the new government and the Embassy stopped payments for most of the students."* She said that this applied to all students who had connection with the previous regime. It then turned out that the information, such as she had had come from the University of West England, as she had not contacted the Embassy, and related to the non-payment of her fees. She provided no documentary evidence to show that this was the case, but reported that the university appeared unconcerned and believed that payment would be forthcoming. She said that she had emails about it, but none were produced by her. I am mindful that government in Libya was in crisis at the time of and in the interregnum beyond the uprising against Colonel Gaddafi and find it not at all surprising that fees would not be paid for students abroad. It was also significant that as well a seeking to suggest that her fees were not paid because she was perceived to be a Gaddafi supporter, she related how others in a similar position had returned home to Libya, presumably without reason to fear for their safety. She then went on to alter her version of what happened by now saying that fees were paid for that majority of students apart from a minority whose fees had not been paid, i.e. a change from most to minority. Such inconsistency damage her credibility.
>
> (xix) I could see no grounds for associating the non-payment of fees following a period of crisis with the reference in the Respondent's Country Information and Guidance paper of 19 August 2014 to a decree passed more recently to punish those students opposing the uprising by withdrawing scholarships, salaries and bonuses when I consider this issue in the round with all of my other findings."

31. Undoubtedly relevant to that reasoning was the appellant's case in respect of the non-payment of fees by the government. It is also noteworthy that the repeated request to the Libyan Embassy in relation to the appellant's fees (set out in the email exchanges in 2011 and 2013) may well be relevant to an assessment of their attitude towards the appellant.

32. Thirdly, as regards the credibility of this evidence I accept Mr Neal's submission that the evidence is credible given its source, namely the appellant's university administration. Mr Richards sought to put some weight upon the judge's finding in para 21(xiv) that he did not find the documents "individually and together" to be ones to which he could attach any weight. That is reasoning which could not, in my judgment, rationally be applied to the documents submitted after the hearing.

33. In my judgment, had Judge Cresswell seen this evidence prior to his determination being promulgated, he would have been bound to take it into account. It was relevant and credible evidence. He might, of course, have invited submissions from the respondent on it before reaching his decision but, subject to that, he would have had to consider it. Although through no fault of the judge, his failure to consider this relevant and credible evidence amounted to a procedural irregularity and, in my judgment, an error of law.

34. Whilst it is true that the judge gave a number of reasons in para 21 for his adverse credibility finding, I am unable to conclude that the error which tainted his reasons in para 21(xviii) and (xix) was necessarily immaterial to his adverse credibility finding. If the judge had seen the evidence and he might have inferred that the non-payment, at least in the most recent period, of the fees by the Libyan government was consistent with the Secretary of State's own background information that the appellant was being targeted by the current Libyan government for her perceived association with the Gaddafi regime, that would have undoubtedly supported the appellant's account and her overall credibility. I do not say that the Judge was bound to make that inference or, if he did, that he was bound to find in favour of the appellant. But, so far as materiality is concerned, I cannot be confident that he was bound, as Mr Richards submitted, to reach the same adverse conclusion.

35. For these reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of a material error of law. Its decision cannot stand and it set aside.

Disposal

36. Both representatives indicated to me that if that was my conclusion, it would be proper to remit this appeal to the First-tier Tribunal.

37. Consequently, I set aside the First-tier Tribunal's adverse credibility finding and its decision. Having regard to para 7.2 of the *Senior President's Practice Statements*, given the nature and extent of the fact-finding, it is appropriate that the appeal is remitted to the First-tier Tribunal for a fresh *hearing de novo* before a judge other than Judge A Cresswell.

Signed

A Grubb
Judge of the Upper Tribunal