



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/05980/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 6th February 2015**

**Decision & Reasons
Promulgated
On 23rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**YOUSEF YOUNIS ALI SHTEWI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sellway of Christian Gottfried & Co Solicitors

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge of the First-tier Tribunal Lloyd Smith promulgated following a hearing on 5th November 2013.
2. The Appellant is a male Libyan citizen born 24th November 1988 who arrived in the United Kingdom as a student on 5th August 2012. His leave was due to expire on 28th May 2013, and on 10th May 2013 he claimed asylum. The claim was based upon his political opinion as he claimed to

have been a first lieutenant in Exterior Security in the Investigation Bureau working for the Gaddafi regime. The Appellant also claimed, in the alternative, that he was entitled to humanitarian protection, and that to remove him from the United Kingdom would breach Articles 2, 3 and 8 of the 1950 European Convention on Human Rights.

3. The Appellant's applications were refused by the Respondent on 7th June 2013 and his subsequent appeal dismissed by Judge Lloyd-Smith on all grounds. Judge Lloyd Smith heard evidence from the Appellant and found that his account lacked credibility, and it was on credibility grounds that the appeal was dismissed.
4. The Appellant applied for permission to appeal to the Upper Tribunal. There was no challenge to the credibility findings made by the First-tier Tribunal, and the only Ground of Appeal was that the judge had failed to consider an Article 3 risk to the Appellant in view of the chaotic security situation as set out in an expert report prepared by Dr George, which referred to the general insecurity in Libya.
5. It was contended that Judge Lloyd-Smith had erred in finding the Appellant's Article 3 claim either stood or fell together with the asylum and humanitarian protection claim, as that was not the case, as the Article 3 claim did not depend upon the Appellant's credibility, but was based upon the general insecurity in Libya.
6. Permission to appeal was granted. Judge of the First-tier Tribunal Levins found it arguable that there should have been a separate Article 3 assessment based upon the country conditions in Libya.
7. On 16th December 2013 the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 indicating that the Appellant's application for permission to appeal was not opposed, and suggesting that there should be a fresh hearing to consider Article 3.
8. The appeal came before Deputy Upper Tribunal Judge Bruce on 1st July 2014. The decision of the First-tier Tribunal was set aside, and the hearing adjourned so that the decision could be re-made by Judge Bruce. It appears that there was no written decision following this hearing.
9. The appeal was re-listed before Judge Bruce on 21st October 2014 but could not proceed as the Presenting Officer had to leave the hearing centre prior to the commencement of the hearing, due to a family emergency. The hearing was adjourned once again, and was subsequently re-listed for hearing on 6th February 2015.

The Upper Tribunal Hearing - 6th February 2015

Preliminary Issues

10. The Appellant did not attend the hearing. Mr Sellway appeared on his behalf, and candidly informed me that the Appellant had failed to attend the two previous Upper Tribunal hearings on 1st July, and 21st October 2014, and had also failed to keep appointments with his solicitor.

11. Mr Sellway stated that his office had advised him that telephone contact with the Appellant had been established this morning at just after 11am, and that he had overslept and was still in Wigan. It was believed that he intended to make his way to the hearing in Manchester but no indication could be given as to his proposed time of arrival.
12. At this point Mr McVeety referred to the bundle of documents submitted on behalf of the Appellant by fax dated 5th February 2015, and the Appellant's application for these documents to be admitted pursuant to rule 15(2A) of the 2008 Procedure Rules, and advised that he had only received these documents this morning and wished to consider them.
13. Mr Sellway indicated that he was content to proceed by way of submissions. I retired to allow Mr McVeety to consider the documents.
14. When the hearing resumed Mr McVeety indicated that he would not oppose the application to admit the documents but would make submissions as to their relevance, as the expert report prepared by Dr Cherstich appeared to make credibility findings, contrary to unchallenged credibility findings made by the First-tier Tribunal. In the circumstances, and in the interests of justice I decided to admit the documents into evidence.
15. Mr Sellway then made a formal request for an adjournment to enable the Appellant to attend. Mr McVeety opposed this, submitting that there was no reason why the hearing should not proceed without the Appellant, who had previously failed to attend, because the issue before the Upper Tribunal was relatively narrow, and related to the country conditions in Libya.
16. I considered the guidance given in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). I had to decide whether proceeding without the Appellant in attendance would deprive him of the right to a fair hearing. I decided it would not. This is because the credibility findings made by the First-tier Tribunal had not been challenged and were preserved. Mr Sellway did not argue against this, accepting that there had been no challenge in the application for permission to appeal, to the adverse credibility findings made by the First-tier Tribunal. The grant of permission was limited to consideration of Article 3 and the country conditions in Libya. On that basis I decided that it was appropriate to proceed without an adjournment, and to hear submissions from both representatives.
17. I clarified the issues in the appeal and although the grant of permission referred to Article 3 only, it was my view that I should consider both humanitarian protection and Article 3, in relation to the country conditions in Libya, and neither representative disagreed with this proposal.
18. Before hearing submissions I ascertained that I had received all documentation upon which the parties intended to rely, and that each party had served the other with any documentation upon which reliance was to be placed. I had the Respondent's bundle that had been before the First-tier Tribunal, with Annexes A-E, and the Appellant's bundle comprising section A with 53 pages, and section B with 258 pages. In

addition I had a skeleton argument prepared on behalf of the Appellant dated 21st October 2014, and AT and Others (Libya) CG [2014] UKUT 00318 (IAC). I also had the Appellant's bundle that had been submitted by fax on 5th February 2015 which comprised 29 pages.

The Appellant's Submissions

19. Mr Sellway relied upon the skeleton argument. He accepted that the starting point should be consideration of the country guidance case law, but pointed out that there was no consideration within that decision, regarding tribal affiliations. Mr Sellway relied upon the expert report prepared by Dr Cherstich contained at pages 5-16 of the Appellant's bundle. I was asked to note the supplementary statement made by the Appellant dated 13th January 2015 in which he claimed that he is a member of the Alwani Tribe from the Tarhunah Province of Libya, and that his tribe had supported Gaddafi, and used to obtain guns and ammunition which would be traded with other tribes loyal to Gaddafi.
20. Mr Sellway pointed out that the expert report found the Appellant's narrative to be credible, and that he did come from the Alwani Tribe who dealt in weapons, and that his account was credible and believable. The expert also found that two militias mentioned by the Appellant were tracking down and persecuting individuals perceived to have been supporters of the Gaddafi regime, and concluded that his fears on this were well-founded and found that the Appellant's statement that he had previously been arrested by the Al Zintan militia tribe was credible, and that there would be no reasonable option of relocation to another area in Libya.
21. I was asked to note that the expert found the Appellant's account to be highly credible, plausible and believable and that he had a genuine and well-founded fear of persecution based on his links with the former Gaddafi regime, and that if returned to Libya he would be tortured, detained under inhumane circumstances and killed.
22. I was also asked to accept, notwithstanding that the First-tier Tribunal had found an identification card submitted by the Appellant not to be reliable, that the expert believed this ID card to be authentic.
23. Mr Sellway noted that the expert differed from the country guidance decision, as to the risk of being detained at a checkpoint within Libya, and I was asked to prefer the expert report over the country guidance case on this issue. Mr Sellway submitted that I should find that the Appellant would be at risk if returned to Libya because of his tribal affiliation, in that his tribe had been loyal to the Gaddafi regime.

The Respondent's Submissions

24. Mr McVeety referred me to AT, and pointed out that the Appellant did not fall within any of the risk categories set out in that decision.
25. The First-tier Tribunal had made a finding regarding the identity card that had never been challenged, and that issue was therefore not before me.

26. The tribal affiliation issue had been raised for the first time before the Upper Tribunal. Mr McVeety submitted that the expert report did not say that anybody who was a member of that tribe would be at risk, and submitted that background information showed that if the Appellant did belong to this tribe, it was in fact the biggest tribe in Libya, containing one-seventh of the population.
27. I was asked to find that there was no evidence that being a member of this tribe put an individual at risk, and the expert report did not go that far.
28. Mr McVeety submitted that there was no objective evidence to indicate that membership of this tribe put an individual at risk, and the expert had based his assessment of risk upon the Appellant being a member of the security services loyal to Gadaffi, which according to the unchallenged findings made by the First-tier Tribunal, was not the case. I was asked to note that the expert had accepted the Appellant's credibility despite findings made to the contrary by the First-tier Tribunal, which findings were preserved in the absence of challenge.
29. The expert had referred to the Appellant as originating from Tarhuna which conflicted with the Appellant's own evidence in his screening interview that he was from Tripoli and had lived there all his life. I was asked to make a finding that it had not been proved that the Appellant was a member of the Alwani Tribe, a sub-branch of the Tarhuna Tribe.
30. Mr McVeety submitted that raising the issue of the Appellant's tribal affiliation at a late stage, was an attempt to re-argue the appeal on a different footing. I was asked to follow the country guidance decision of AT and to dismiss the appeal.

The Appellant's Response

31. Mr Sellway pointed out that tribal affiliations were not considered in AT. I was asked to conclude that there should be no negative inference on comments made by the Appellant in his screening interview, in which he had no representation and which was simply a preliminary interview before a substantive interview took place.
32. In relation to Tarhuna, there was some background information at page 17 of the Appellant's latest bundle which indicated that this was a town 40 miles to the south east of Tripoli, although it was in the Tripolitania region.
33. I was also asked to note that the expert had commented upon the Appellant's name as indicating that he came from the Alwani Tribe, and this would lead to him being detained by militia.
34. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

35. The issues before me relate to humanitarian protection and Article 3 of the 1950 European Convention on Human Rights.
36. The Appellant would be eligible for humanitarian protection under paragraph 339C of the Immigration Rules if he establishes substantial

grounds for believing that if removed from the United Kingdom, he would face a real risk of suffering serious harm, and is unable or, owing to such risk, unwilling to avail himself of the protection of the country of return.

37. Article 3 of the 1950 Convention states;

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

38. The First-tier Tribunal rejected the Appellant’s account on credibility grounds. There was no challenge to those findings which are therefore preserved. The grant of permission referred to assessment of the country conditions in Libya, and Article 3 of the 1950 Convention. With the agreement of both representatives, I have found it appropriate to consider humanitarian protection in relation to those country conditions. Set out below are preserved findings of fact;

First-tier Tribunal Preserved Findings of Fact

“31. The appellant’s account of why he returned to Libya when he was at risk is addressed in his witness statement where he says ‘I entered Libya clandestinely ... I feared that I could come to the attention of the militia in Libya but I had no other choice but to return to Libya ... I could have escaped Libya without a passport but I did not want to leave Libya for the UK illegally’ (AB para 19).

This explanation lacks credibility. The majority of asylum seekers who are in real fear of persecution leave their country by whatever means they can and invariably illegally. It is not credible, as is supported by the expert evidence, that the Appellant would place himself at risk by entering Libya on two occasions just to enable him to leave on his passport.

32. Various aspects of the appellant’s claim I find are not plausible and lack credibility. They can be summarised:

- (a) the inaccurate information he gave regarding his brother’s employment as identified in the expert report.
- (b) the implausibility of the militia aiding his flight from Tripoli Airport as identified in the expert report.
- (c) the appellant’s delay in making a claim because he did not understand the process. The appellant said that he went to stay with a man in Wigan who was himself applying for asylum. It lacks all credibility that he would not have asked his advice and discussed the process with him or enquired where to go to claim. It is quite apparent that the appellant delayed the application for as long as possible and I find that it is no coincidence that it is timed shortly before his leave to remain expires.
- (d) his deceit in his visa application. The appellant accepts that he lied to obtain his visa and never intended studying in this country. Likewise he lied on entry when he told the Immigration Officer that he intended to study. Whilst asylum seekers often have to use deception to seek refuge, when one looks at the implausibility of his account about travelling to Libya to get the visa and the other areas in which his credibility has been affected, this is an aspect that has affected my assessment of his credibility.

- (e) the documents. It is apparent from, and I accept, Dr George's assessment of the documents and his finding that the arrest warrant is counterfeit and the confiscation order probably is counterfeit. In light of the other credibility findings and having considered the case of Tanveer Ahmed I am satisfied that these documents have been fraudulently produced in an attempt to bolster his claim and I reject his assertion that the expert has made a mistake. This is further supported by the fact that the wrong date is on the documents and the Appellant failed to provide a credible explanation for this. As far as the ID card is concerned, when one considers the damaged credibility in other areas, the inaccurate account of his brother and his implausible actions, I have little difficulty in finding that this is not a document upon which I can rely, particularly given the expert's comments on the features that are lacking.
 - (f) I do not accept the Appellant's account of the difficulties he has experienced in this country being as a result of his activities in Libya. Whilst the evidence has not been formally tested it is worth noting that the crime report's summary was that 'reference was made to the fact that the Aps father worked for Colonel Gadaffi and that his family in Libya would be targeted.' There is no mention of the Appellant working for the regime in that initial account. The notes from the restorative justice meeting state that the accused blame Mr Shtewi for the incident and no reference to problems from Libya is raised. Like I say this has not been evidence that has been tested in court but given his damaged credibility it is a factor I have considered.
 - (g) I find it implausible that the Appellant would have failed to mention the kidnapping of his younger brother in October 2013 prior to me asking him some questions about his family. If this had occurred then I would have anticipated that he would have raised it with his solicitor and it would have been adduced in his evidence as opposed to it being an afterthought during his evidence. I note his statement is dated 23rd October 2013 and therefore post dates the alleged incident. This I find to be a further area in which the Appellant is seeking to bolster his claim.
 - (h) The Appellant contends that his main concern is the welfare of his son and wife. If this was the case I see even more reason that he would have made a timely application for asylum if his fear was genuine.
 - (i) I do not accept the Appellant's account of getting the name of someone in Wigan who would be prepared to house the Appellant and let him stay there. It is not a plausible account.
33. It follows therefore given my findings as set out above that I do not accept the appellant's account that he was a member of the Exterior Security Services, was detained by them and released after a bribe and taken to the airport. I likewise do not accept that the incident that occurred in this country was in any way linked to this. Given the case law and comments I am satisfied that the Appellant would not be at risk returning as a failed asylum seeker, particularly as he had a student visa when he left."

39. The latest evidence submitted on behalf of the Appellant, on 5th February 2015, is in my view an attempt to rely upon an issue never previously raised by the Appellant, that being that he would be at risk if returned to Libya because of his tribal affiliation. This was never mentioned in either his screening interview on 18th May 2013, his substantive asylum interview which took place on 31st May 2013, or in his witness statement dated 23rd October 2013. It was therefore never considered by the Respondent in the reasons for refusal letter dated 7th June 2013, nor was it raised before the First-tier Tribunal.
40. Not only did the Appellant not mention his tribal affiliation, he did not mention that his tribe were involved in arms dealing in support of the Gaddafi regime, which is mentioned for the first time in his witness statement dated 13th January 2015.
41. I accept that Dr Cherstich, the author of the expert report, is an expert in his field. I do not however attach significant weight to his report. This is because he has based his findings upon his conclusion that the Appellant has provided a credible account. Credibility should be determined by the Tribunal if it is in dispute, and in this case, although I accept that it appears Dr Cherstich was not aware of this, the First-tier Tribunal had made adverse credibility findings, which had never been challenged, and therefore were preserved.
42. The identity card referred to in Dr Cherstich's report, had already been found to be unreliable, by the First-tier Tribunal, having considered Dr George's report. There had been no challenge to that finding, and permission to appeal was not granted on that issue, and therefore I have no jurisdiction to consider the identity card.
43. If I did have jurisdiction, taking into account the findings made by the First-tier Tribunal and having considered the evidence in the round, I would not find that the identity card could be relied upon. I note that Dr Cherstich was only supplied with a scanned copy, and not the original and his findings in relation to the card are extremely brief, concluding it to be authentic because it conformed to the standard style, regulations and format of Libyan documentation. In my view this would be insufficient to change the findings made by the First-tier Tribunal, but as indicated previously, my view is that the issue of the identity card was not before me.
44. Dr Cherstich records in paragraph 8E of his report that the Appellant is from Tarhuna. This conflicts with the Appellant's evidence that he was born in Tripoli and lived in Tripoli. This evidence was contained not only in the screening interview, but in the Appellant's witness statement dated 23rd January 2013 in which in the first paragraph he records being born in Tripoli. I am satisfied that the Appellant was born in Tripoli not Tarhuna.
45. I find that the expert does not state that the Appellant would be at risk simply because he is a member of the Alwani Tribe, the finding of risk is based upon the conclusion that the Appellant worked for the Gaddafi regime as an officer. This was specifically rejected by the First-tier Tribunal and was not the subject of any challenge.

46. There is a reference to the Appellant's surname identifying him as coming from the Tarhuna Tribe and in paragraph 6E of the report the expert states that the tribal surname 'Alawani' which is the Appellant's tribal surname, is found both in the Tarhuna Tribe and in one other tribe. The expert does not state whether this surname is found in other tribes, but in any event I was not pointed to any evidence that indicated that the Appellant used the surname 'Alwani.' I am not satisfied that the Appellant is a member of the Tarhuna Tribe, but even if he is, I do not find that he would be at risk simply because of membership of that tribe.
47. The expert report in paragraph 8 does refer to the Appellant being stopped at a checkpoint by militia men if returned to Libya and indicates that it is not a question of if he is stopped at a checkpoint, but when he is stopped. This opinion differs from that expressed in AT, which is a country guidance decision, and I intend to follow AT. In my view I have not been provided with any cogent evidence to indicate that it would be appropriate to depart from the findings made in AT.
48. In not attaching weight to the expert report, I wish to make it clear that I am not questioning the expertise of the report author, but I am attaching little weight, because of the credibility findings made by the First-tier Tribunal which are preserved, and it is the role of a Tribunal to assess credibility and plausibility.
49. I do not find that the Appellant falls within any of the risk categories set out in AT. The Appellant was not found to be a former high-ranking official within the intelligence services of the Gadaffi regime, nor did he have any association at senior level within that regime. The Upper Tribunal found in AT that the majority of the population of Libya either worked for or had some association with or had a member of the family who worked for or had an association with the Gadaffi regime. Such employment or association alone is not sufficient to establish a risk of persecution or Article 3 ill-treatment on return.
50. The Appellant would be returned to Libya as a failed asylum seeker, and paragraph 11 of the head note to AT confirms that failed asylum seekers are not, for that reason alone, at real risk on return.
51. With reference to checkpoints, after an individual has passed through the airport, the Tribunal found that it is possible to travel overland from Tripoli Airport to other destinations without a real risk of persecution, serious harm or Article 3 ill-treatment. The evidence does not reveal such a level of arbitrary or irrational conduct on the part of militias at checkpoints such as to put the ordinary traveller, which is the category into which the Appellant would fall, at real risk. In any event, the Appellant having arrived at Tripoli Airport, would not need to travel a great distance to another part of Libya, as he would be able to return to his home in Tripoli.
52. The Tribunal found in AT, and the finding is summarised in paragraph 2 of the head note, that there is not such a high level of indiscriminate violence in Libya, within the meaning of Article 15(c) of Council Directive 2004/83/EC (Qualification Directive) so as to mean that substantial

grounds exist for believing that an individual would, solely by being present there, face a real risk which threatens his or her life or person.

53. I therefore conclude, that the Appellant has not proved that if returned to Libya, he would face a real risk of suffering serious harm, nor would he face a real risk of being subjected to torture or inhuman or degrading treatment or punishment. The First-tier Tribunal's findings that the Appellant is not entitled to asylum, that there would be no risk of a breach of Article 2 of the 1950 Convention, nor Article 8, stands.

Decision and Reasons

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

I dismiss the appeal on asylum grounds.

The Appellant is not entitled to humanitarian protection.

The appeal is dismissed under the Immigration Rules.

The appeal is dismissed on human rights grounds.

Anonymity

The First-tier Tribunal did not make an anonymity direction. There was no application for anonymity to the Upper Tribunal, and an anonymity order is not made.

Signed

Date 9th February 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date 9th February 2015

Deputy Upper Tribunal Judge M A Hall