Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: PA/01263/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons promulgated**
On 16 November 2017	**On 21 November 2017**

Before

UPPER TRIBUNAL JUDGE GILL

Between

A A A M
(ANONYMITY ORDER MADE)

Appellant

And

SSECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
The parties at liberty to apply to discharge this order, with reasons.

Representation:

For the appellant: Ms R Kotak, of Counsel, instructed by Pickup Solicitors.
For the respondent: Ms Z Ahmad, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Libya born on 2 January 1986, has been granted permission to appeal the decision of Judge of the First-tier Tribunal Boylan-Kemp

MBE who, in a decision promulgated on 20 April 2017 following a hearing on 7 March 2017, dismissed his appeal against a decision of the respondent of 25 January 2017 by which she refused his asylum claim of 27 July 2016. The appeal was brought under s.82 of the Nationality, Immigration and Asylum Act 2002.

Summary of basis of asylum claim

2. The appellant claimed to fear persecution at the hands of a powerful pro-Gaddafi family in Libya. The following summary is taken from paras 9 and 10 of the judge's decision:

3. The appellant lived with his parents and four brothers and four sisters. Two of the appellant's brothers were imprisoned for two years in 2006 for writing anti-Gaddafi slogans in a public place. The appellant and his family took part in anti-Gaddafi demonstrations in early 2011 and as a result he was detained by the authorities on 15 May 2011 for one day before being released. The appellant and his family went into hiding in Tripoli before returning home in November 2011 after the fall of Gaddafi.

4. A powerful pro-Gaddafi family found out that the appellant and his family had taken part in anti-Gaddafi demonstrations and began to target him and his family; they fired shots at the appellant's house on 1 April 2011 and again on 19 May 2011. On 30 January 2013 they tried to run the appellant's father off the road. On 3 April 2013 they attacked the appellant's family in their home. On 16 October 2013 they again attacked the appellant's family and the appellant's brother, W, was shot and killed. The incidents were reported to the police but no action taken. The appellant's father sold their land and moved to Tripoli in December 2013. When the appellant's father returned to the family home in May 2015 he was again threatened by the family. The appellant's family received threatening phone calls in January, May and June 2016 and have had to change their phone numbers as a result. The appellant fears being killed by this family upon his return to Libya.

The judge's decision

5. The judge rejected the entirety of the appellant's account. She gave several reasons. However, it is plain that she placed emphasis on the fact that the appellant had travelled to the United Kingdom to undertake studies with Libyan government sponsorship. She said, at para 25, that she placed "*particular emphasis"* on this point. At paras 20 and 21, she said:

> "20. The appellant's account must be viewed in the light of the fact that he was employed by a state-run university and that his studies in the UK have been funded by the government from his initial application made on 14 April 2012 through to the expiration of his student visa on 1 August 2016….
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> 21. I do not accept as plausible the fact that appellant was able to obtain paid employment and then an ongoing scholarship for overseas studies from the Libyan government, especially as his employment was obtained, if not commenced, during the period when Gaddafi was in power. I can see the logic in Mr Scott's submission that who he now fears is a family separate to the state and so this would not have affected his ability to obtain state support. However, the appellant's claim is that he was a known Gaddafi opponent even whilst he was at university and was monitored by the authorities as a result. Therefore, I do not find his evidence as to the interest the authorities have historically held in him to be consistent with the with [sic] the fact that he was able to obtain employment at a state-run institution and then continue to be funded by the state to undertake overseas studies. I do find that the appellant has provided a reasonable explanation for this inconsistency in either his witness statement or in his oral evidence.

> Therefore, I find the fact that he has received ongoing state support to undermine the credibility of his account of being involved in anti-Gaddafi activities which resulted in his family being targeted by a pro-Gaddafi family."
>
> 25. Overall, upon taking all of the evidence in the round, and placing particular reliance upon the fact that he has been in the UK with government sponsorship, then I find that the appellant has not satisfied me, even to the lower standard, that he is at risk of persecution as claimed due to his imputed political opinion, and therefore I find that he has failed to demonstrate even to this lower standard that there would be a reasonable degree of likelihood of persecution upon his return to Libya. Accordingly, I find that he cannot be granted refugee status under the Convention on this basis."
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> (My emphasis)

6. Having rejected the appellant's account of the basis of his asylum claim, the judge found that the appellant was not at real risk of persecution in Libya and dismissed his appeal on asylum grounds.

7. In relation to humanitarian protection, the judge applied the then applicable country guidance case of FA (Libya: art 15(c) Libya CG [2016] UKUT 00413. Although she accepted that there was civil unrest in Libya, she noted that the appellant's family live in Tripoli which she considered was not in an area of civil unrest. She found that there were no particular factors present relevant to the appellant that would put him at risk in Libya, as he could once again return to his family there as he has done on two previous occasions without incident.

8. For the same reasons, the judge dismissed the appeal in relation to Articles 2 and 3. The appellant did not rely upon Article 8 before the judge.

9. I shall use the spelling "Gaddafi", as the judge did, to refer to the regime of the former dictator who fell from power in August 2011, for consistency. I shall refer to the judge as "judge".

The grounds and the grant of permission

10. The grounds challenged the judge's assessment of credibility on the ground that the judge had misapprehended the appellant's case. The appellant's studies were not funded by the Gaddafi government. They were funded by the Libyan transitional government. The grounds rely upon two letters which are said to confirm that the appellant received a scholarship from the National Transitional Council ("NTC").

11. The grounds did not challenge the judge's assessment of the appellant's humanitarian protection claim.

12. In granting permission, Judge of the First-tier Tribunal Norton-Taylor raised an issue not raised in the grounds, i.e. in relation to the judge's decision to dismiss the appellant's appeal on humanitarian protection grounds. He referred to the country guidance case of ZMM (Article 15(c)) Libya CG [2017] UKUT 263 (IAC). Although he acknowledged that this decision was promulgated some two months after the judge's decision, he considered that its impact raised an obviously arguable point and he therefore said that he granted permission primarily on this basis. In addition, Judge Norton-Taylor said that he did not limit the grant of permission, although he was plainly not impressed by the challenge to the judge's assessment of credibility.

Assessment

13. I should make it clear that I reject the ground in respect of which Judge of the First-tier Tribunal Norton-Taylor granted permission. It is clear that the judge applied FA which was the applicable country guidance case. She was obliged to apply that country guidance. The grounds did not challenge her application of that guidance. She simply cannot be said to have erred in law by failing to apply country guidance that had not been promulgated. I appreciate that Judge Norton-Taylor considered that the impact of ZMM nevertheless should be considered. However, the reality is that the Upper Tribunal can only set aside a decision of the First-tier Tribunal if the First-tier Tribunal had materially erred in law.

14. Ms Kotak submitted that there was a material error of law in the judge's consideration of the humanitarian protection claim because (in her submission) the risk falls to be assessed as of today. I reject this submission which ignores the fact that the judge must be shown to have materially erred in law before the assessment of risk falls to be considered on the basis of the current country guidance.

15. However, in view of my decision on the credibility ground (see below), this ground falls away.

16. I turn to the credibility ground.

17. Ms Kotak submitted copies of the two letters referred to in the grounds. The first was a letter dated 19 December 2011 from the NTC stating that the appellant had been awarded a scholarship for an English language course and post-graduate study in the United Kingdom majoring in "*Political Science*". The second was a letter dated 10 March 2012 stating that the appellant was sponsored by the Scholarship Department at "*The ministry of higher education and scientific research*" in Libya for the English language course and postgraduate study in the United Kingdom.

18. Ms Kotak submitted that the documents were admissible in order to show that the judge had made a mistake.

19. In my judgment, these two documents are inadmissible and cannot be relied upon to show that the judge erred in law. The two documents do not establish that the judge has made a mistake as to an existing incontrovertible fact. Whether or not the documents are reliable as to their contents depends on the credibility of the appellant. It cannot be said to be an inconvertible fact that he was sponsored by the NRC.

20. Judge Norton-Taylor gave his reasons for not being impressed by the credibility ground. He said that they ignore the fact that the judge made it clear at para 21 that she was relying on the fact that the employment *and* funding was *initiated* by the Gaddafi regime which the grounds appeared to overlook. Ms Kotak did not address me on this point notwithstanding that it was specifically raised by Judge Norton-Taylor. However, I could not find any evidence before the judge to the effect that the appellant's scholarship to the United Kingdom was initiated by the Gaddafi regime. This is an important point in respect of which there was simply no evidence before the judge.

21. The evidence before the judge included the Bio-data form at B36-38 of the respondent's bundle. At B37, the appellant said that his last employer in Libya was the University of Law and Political Science where he was employed from 2010-2011. In view of this evidence, the judge was fully entitled to find it lacking in credibility that the appellant had been able to obtain and continue his employment at a state-run university if, as he claimed, his brother were imprisoned for two years in 2006 for writing anti-Gaddafi slogans in a public place, if he (the appellant) and his family took part in anti-Gaddafi demonstrations in early 2011 and if he was detained by the authorities on 15 May 2011 for one day before being released.

22. However, there was a lacuna in the evidence before the judge as to whether the appellant's studies in the United Kingdom were sponsored by the NTC. By the time he arrived in the United Kingdom on 13 September 2012, the Gaddafi regime had fallen. It is therefore difficult to see that his studies could have been actually paid for by the Gaddafi regime if that regime had fallen by the time he arrived. There was also a lacuna in the evidence before the judge as to whether the appellant's scholarship was initiated by the Gaddafi regime when it was still in power.

23. Whilst the judge would have been fully entitled to find it incredible that the appellant had been able to obtain and to continue his employment at a state-run university, she specifically said that she placed particular reliance upon the fact that he has been in the United Kingdom with government sponsorship. I have explained that there was a lacuna in the evidence before the judge in this respect. Accordingly, whilst I do not accept that the two letters described above establish that the judge made a mistake of an existing fact, I am satisfied that the judge may have erred in law by speculating, in that, she assumed that his scholarship was initiated and funded by the Gaddafi regime. Given that she placed particular reliance on this point, I am satisfied that her error was material to her adverse credibility assessment notwithstanding my observations at para 21 above.

24. I therefore set aside the judge's credibility assessment. Credibility will need to be re-assessed since this is relevant to the appellant's asylum claim. In relation to the humanitarian protection claim, the judge hearing the appeal will need to apply ZMM, unless this is replaced by another country guidance case by then. On the basis of ZMM, the appellant's appeal falls to be allowed on humanitarian protection grounds.

25. At the next hearing, the appellant and the respondent must ensure that the documentation submitted in support of the appellant's application for entry clearance as a student prior to his arrival in the United Kingdom on 13 September 2012 is made available to the judge. The appellant would also be well advised to deal with sufficiency of protection and why, even if he does have a genuine fear of a powerful pro-Gaddafi family, he would not be able to obtain protection from the authorities in Libya.

26. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

27. In my judgment this case falls within para 7.2 (b).

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This case is remitted to the First-tier Tribunal for re-hearing on all issues on the merits by a judge other than Judge of the First-tier Tribunal Boylan-Kemp MBE.

Signed Date: 20 November 2017
Upper Tribunal Judge Gill