Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06629/2017**

THE IMMIGRATION ACTS

At: Manchester Piccadilly	**Decision Promulgated**
On: 3 April 2018	**On: 14 June 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

EMAJ
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr McIndoe, Latitude Law
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Libya born in 1980. He appeals with permission against the 21st December 2017 decision of the First-tier Tribunal (Judge Chambers) to dismiss his protection appeal on the Refugee Convention grounds.

Anonymity Order

2. This appeal concerns a claim for international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

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> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Decision of the First-tier Tribunal

3. The Appellant made a claim for international protection on the 3rd August 2012. The basis of his claim was that he had been a member of the Revolutionary Committee (RC), and a supporter of Colonel Gaddafi. He now asserted a well-founded fear of persecution for reasons of his political opinion.

4. The Respondent interviewed the Appellant and researched country background information on the RC. She determined that the primary purpose of the organisation was to "stamp out any opposition". They did this by committing gross human rights violations, including the "physical elimination" of political opponents. Having reviewed the reports on the RCs the Respondent determined that the Appellant should be excluded from international protection on the grounds that he has committed a crime against humanity, and invoked Article 1F of the 1951 Refugee Convention. It followed that the Appellant was also excluded from a grant of humanitarian protection, with reference to Article 15(c) of the Qualification Directive: see paragraph 339D of the Immigration Rules. As to the absolute protection that might be offered by Article 3 ECHR - from which no person can be excluded – the Respondent concluded that the Appellant was at best a low-level member of the RC who did not progress beyond the rank of 1st lieutenant. He was not associated with the Gaddafi regime at a high level and did not therefore fall within one of the risk categories set out in the country guidance case of AT & Others (Article 15(c); risk categories) (CG) [2014] UKUT 318 (IAC). Article 3 protection was therefore refused.

5. On appeal the First-tier Tribunal was not satisfied that the Respondent had discharged the burden of proof in respect of the exclusion clause. For the purpose of this summary, its conclusions can be shortly stated. What the Respondent had done was to assimilate all of the human rights abuses alleged in various country background reports and lay them at the door of a man who had made no admissions as to having tortured or killed anybody. At its highest the evidence of the Appellant demonstrated that he was complicit in "hard" interview techniques, such as asking people questions for "long hours", handcuffing and blindfolding suspects, and placing people in solitary confinement. The Tribunal was not satisfied that these were the types of interrogation techniques that the drafters of Refugee Convention had in mind when they entered an exclusion for crimes against humanity. The Respondent has not appealed against those findings and they stand.

6. The Tribunal went on to consider the general country background situation in Libya and having done so concluded that the violence in the country has reached such levels that there are substantial grounds for believing that a returning person would, solely on account of their presence there, face a real risk of being subjected to serious harm. The appeal therefore fell to be allowed on humanitarian protection grounds. The Respondent has not appealed against those findings and they stand.

7. The subject of this onward appeal is rather the conclusions that the Tribunal reached on Article 1A of the Refugee Convention. Having found that Article 1F should not apply, the Tribunal nevertheless determined that the Appellant would not face a real risk of persecution for reasons of his political opinion, (or that imputed to him). It based its findings, as it was bound to do, on the 'risk categories' set out in AT & Ors. It noted that the Appellant's representative had expended a lot of effort in establishing that he had risen to only modest rank in a security services job that his father had got him. He did not have a significant profile, nor could it be said that he had been a high-ranking official within the regime. Since the majority of the population of Libya at one time worked for Gaddafi in some capacity, it could not be said that there was a particular risk pertaining to someone in the Appellant's position.

8. The Appellant challenges those findings on the grounds that the Tribunal failed to take material evidence into account, in particular the fact that the Appellant comes from a tribe that is widely known to have been pro-Gaddafi. The Appellant's wife had given evidence that she had been stopped at a checkpoint in 2014 and questioned about her son's name; an expert, Dr Cherstich, had given evidence to the effect that the Appellant would be at risk because of his family's association with the former regime. The Appellant submits that none of that evidence was weighed in the balance.

Error of Law

9. Before me Mr Bates accepted that the determination does not expressly address the evidence of Dr Cherstich on the question of risk arising from imputed political opinion. The Tribunal mentions this expert's evidence in the context of the exclusion clause but not when it considers the specific dangers faced by the Appellant. The Tribunal based its assessment exclusively on the criteria in AT & Ors, and finding that the Appellant was not a 'high-ranking official' in the Gaddafi government, dismissed the appeal. Dr Cherstich had given evidence some three years after the decision in AT & Ors, to the effect that this man would face a real risk of harm today simply by virtue of his tribal associations and his limited role. That evidence was not considered and as such Mr Bates accepted that the 'error of law' alleged in the grounds was made out. He invited me to remake the decision in the appeal.

The Re-Made Decision

10. By way of email dated the 4th April 2018 Mr Bates for the Secretary of State for the Home Department indicated that he did not wish to make any further submissions, beyond relying on the 'Country Information and Guidance' notes in the public domain. Mr McIndoe relied on the material in his bundle, and specifically the expert report of Dr Igor Cherstich dated 26th September 2017.

11. In respect of Libyan asylum claims the extant country guidance remains that given in AT & Ors. The relevant part of that guidance reads as follows:

Former regime members and associates

(3) Having regard to the generally hostile attitude of society to the former regime, the following are, in general, at real risk of persecution or Article 3 ill-treatment on return to Libya: -

(a) former high ranking officials within the intelligence services of that regime;

(b) others with an association at senior level with that regime.

(4) As a general matter, the closer an individual was to the centre of power within the former regime, the more likely that the individual will be able to establish a risk of persecution or Article 3 ill-treatment on return.

(5) The majority of the population of Libya either worked for, had some association with, or has a member of the family who worked for or had an association with the Qadhafi regime. Such employment or association alone is not sufficient to establish a risk of persecution or Article 3 ill-treatment on return.

(6) In general, family members of those described in (3) and (4) above are not at risk of persecution or a breach of their protected rights on return. It is possible, however, that an individual will be able to establish such a risk but this will need to be demonstrated by specific evidence relating to the individual's circumstances. Mere assertion of risk by association as a family member would not be sufficient without fact-specific evidence of the risk to that particular family member.

12. The Tribunal's conclusions were based on evidence pre-dating November 2013 (when the case was heard). In respect of the 'risk categories' under the Refugee Convention the guidance remained unaffected by the subsequent decision in ZMM (Article 15(c)) Libya CG [2017] UKUT 263 (IAC) which only addressed Article 15(c). All claims must today however be assessed in light of the findings made in ZMM about the prevailing security situation: *"The violence in Libya has reached such a high level that substantial grounds are shown for believing that a*

returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person".

13. Dr Cherstich is a recognised expert on Libya. He is an anthropologist with a doctorate from SOAS who has specialised in the study of that country. He was the first anthropologist to visit Libya after the fall of Gaddafi and he has conducted extensive fieldwork there; he maintains a close connection with informants from various walks of life including journalists, academics and militiamen. He has researched, written and taught widely on the subject of contemporary Libyan society. The salient features of his evidence in this appeal are as follows:

    - The evidence must be assessed in light of the fact that Libya is currently in a state of civil war;

    - There is every indication that the various militias competing for power will continue to do so for the foreseeable future;

    - The Appellant would not be able to live in Libya, or move freely, without encountering militia checkpoints;

    - The militia at such checkpoints have, in the past six years, compiled lists of Gaddafi associates, which they make use of when stopping travellers;

    - These lists have been compiled by using official records held in government offices, ransacked in the aftermath of the overthrow of the regime, and by word-of mouth;

    - The situation in Libya has gravely deteriorated since the Tribunal heard the evidence in AT & Ors;

    - The lists are not now confined to 'high-ranking' officials, but extend to persons employed by the former security agencies and members of the RCs, such as the Appellant;

    - Although past membership of the RC is not in fact necessarily a sign of loyalty to Gaddafi, it is perceived as such by the militias in charge of the checkpoints;

    - Amnesty International and others have documented cases of persons similarly situated to the Appellant being stopped, detained and tortured because their name appears on a 'list';

    - The Appellant's name reveals his tribal identity, which in turn connotes an association with the former regime. His tribe were well-known to be close supporters of Gaddafi. Libyans generally

have a very good knowledge of surnames and tribal affiliation, so the Appellant's name would be immediately recognised by any militiaman at a checkpoint;

- If the militia identify that the Appellant and his wife have been in the UK (for instance by searching them/finding their passports) this will further increase the risk since this would be an indication to the militia that they were seeking to evade justice by coming to the UK.

14. The Appellant's bundle contains a statement by the Appellant's wife dated 13th September 2017 in which she relates that during 2014 she took her young son back to Libya in order to meet with family members. They were stopped at a checkpoint and the commander questioned her about the child's name. She appends to her statement a letter, purportedly issued by the head of security at Sabha Airport and written in July 2012. It issues instructions to all security personnel to locate the persons named on an attached list, identified as "renegades and supporters of the former regime". The list includes the name of the Appellant's father. The Appellant's wife avers that this letter, and list, was given to her father-in-law by a distant relative who was employed at the airport and therefore received these instructions.

15. I have had regard to the Respondent's Country Policy and Information Note *Libya: Actual or perceived supporters of former President Gaddafi* published in March 2017. In brief summary this guidance maintains the position taken in AT & Ors but it does say this:

> 3.1.5 A person who was linked to the Gaddafi regime at a low level is unlikely to be at risk of persecution or serious harm, although each case must be considered on its specific facts.

16. I consider this case on its specific facts. The First-tier Tribunal found that the Appellant had been a member of the RC and rose to the rank of first lieutenant in the Libyan military. His family were all supporters of Gaddafi; his brother was killed fighting for him during the 2011 uprising. The Appellant's father was formerly a lieutenant colonel working directly under the head of the Intelligence Forces: his profile was such that since the overthrow of Gaddafi his name has appeared on a 'stop list' distributed to personnel at checkpoints. The uncontested evidence of country expert Dr Cherstich is that the Appellant's name would be instantly recognisable, and indelibly associated with a tribe who were supporters of Gaddafi.

17. On these facts I do not think I need to depart from the country guidance given in AT & Ors to resolve this appeal in the Appellant's favour.

18. The evidence before the Tribunal in ZMM was that there are many thousands of checkpoints throughout the country. They can be erected without notice and it is not possible to move around, even street to street in urban neighbourhoods, without passing through them. The checkpoints are manned by heavily armed militiamen who have very little to no accountability. I am satisfied that the Appellant would, like any other Libyan, have to cross a checkpoint at some point.

19. Although the Appellant was not himself a 'high-ranking' official in the former regime, I am satisfied that he has produced specific evidence that would bring him within paragraph 6 of the headnote in AT (see above). That 'specific evidence' is threefold: the testimony of his wife that their infant son's name was recognised by militiamen at a checkpoint in 2014, the fact that his father's name appears on a 'stop list' as a 'criminal' and the expert opinion of Dr Cherstich. On the basis of the latter, I am satisfied that the Appellant would be at risk as the family member of his father and there is a reasonable likelihood that he would be apprehended at a checkpoint as a result. As Dr Cherstich explains, the likely consequences of that would be detention and torture. On the particular facts I am further satisfied that the Appellant falls within the category posited by the Respondent at section 3.1.5 of the CIG. Although only a relatively low level member of the RC, on the specific facts he has demonstrated, to a lower standard of proof, that he would face a real risk of serious harm if returned to Libya. That serious harm would be motivated by the belief that the Appellant was a supporter of Gaddafi; it therefore falls under the rubric of the Refugee Convention and the appeal must be allowed on that ground.

Decisions

20. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside to the extent identified above.

21. The decision in the appeal is remade as follows: the appeal is allowed on protection (refugee) grounds.

22. There is an order for anonymity.

Upper Tribunal Judge Bruce
3rd June 2018