Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02122/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 14 July 2014	**On 19 December 2014**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H U

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr O Furner, Legal Representative from Birnberg Peirce Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent. Breach of this order can be punished as a contempt of court. I make this order because the respondent's case depends on his alleged need for international protection and, in the circumstances of this case, publicity could have the unfair consequence of making his claim stronger that it would otherwise be.

2. I make it plain at the outset that this is an unusual case that is very fact sensitive and is not authority for anything except that, in my judgement, the First-tier Tribunal did not err in law.

3. The respondent, hereinafter "the claimant", is a citizen of Libya who was born in 1962. He entered the United Kingdom as a student of aeronautical engineering in 1981. Save for a short return to Libya from August 1993 until October 1994, he has lived in the United Kingdom since 1981. The claimant is an alcoholic and, largely and possibly exclusively, as a consequence of his alcoholism, he has behaved disgracefully and has been convicted of 78 different offences on a total of 52 different occasions. The appellant, hereinafter "the Secretary of State" served a total of five letters warning him about his behaviour but he could not, or did not, improve.

4. On 1 July 2008 the claimant was served with a notice of intention to make him the subject of a deportation order. He appealed successfully against that decision on Article 3 and Article 8 grounds. A further notice of intention to make a deportation order was served on 25 March 2010 and then withdrawn in May 2010. The claimant continued to offend. On 30 November 2012 a decision was made to make the claimant the subject of a deportation order. That was served in January 2013. He applied to have the deportation order revoked. The application to revoke was refused on 9 October 2013 and he appealed that decision relying on Article 3 and Article 8 of the European Convention on Human Rights.

5. His appeal was successful before the First-tier Tribunal. The Secretary of State sought permission to appeal. Two reasons were given by the First-tier Tribunal Judge who gave permission and I set them out below:

> "2. The grounds assert that the panel failed to provide adequate reasons for finding that the [claimant] would be at risk if returned. As paragraph 19 does not give any reason for finding that the [claimant] would be able to obtain alcohol and refers only to unspecified objective evidence in concluding he would then be arrested, I am satisfied that it is arguable that the panel made an error of law.
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> 3. As the determination does not appear to address the public interest in deterrence or the need to prevent disorder and crime in the Article 8 proportionality consideration that too may be argued."

6. In fairness to the Secretary of State I agree that the determination would have been better if more had been said but there can be very few judgments written that could not have been improved in some way. That is not at all the same as saying that the determination is wrong in law.

7. The First-tier Tribunal allowed the appeal both on Article 3 grounds and on Article 8 grounds. I look carefully first at the decision to allow the appeal on Article 3 grounds. Clearly if that decision is sound there is little point in saying more.

8. This was dealt with particularly at paragraph 19 of the determination. The First-tier Tribunal decided that the claimant is alcohol dependent and that he would be reasonably likely to consume alcohol in Libya, attract the attention of the authorities (such as they are) and be subjected to ill-treatment so severe that it would be contrary to his rights under Article 3 of the European Convention on Human Rights. The First-tier Tribunal was particularly concerned that there was a real risk of his being whipped and detained for an indefinite period without judicial process.

9. The reasons given for these findings are, frankly, rather thin. However, they were supported by expert evidence which is identified and considered in the determination. The report came from one Belal Ballali who identified himself as a British citizen of Libyan origin. He described himself as a researcher who provided services for "law firms", university law departments and a range of NGOs. He had researched matters in Libya both before and after the revolution and had spent a total of seven months in Libya where he maintained a wide network of contacts.

10. He said commercially produced alcohol is widely available in Tripoli and the surrounding area but not beyond. It is largely bought and consumed by western foreigners living in the capital. Cheaply made "moonshine" is readily available and cheap to buy outside the capital.

11. The report showed that officially the law provides custodial sentences for anyone found consuming alcohol in Libya. However, in early 2013 the "New Revolutionary Brigades" were involved in the surveillance and seizure of large quantities of alcohol all across the country. Some quite influential people including a Deputy Minister of State and a military chief of staff were arrested and the reports were that they were all subjected to severe beating and imprisonment. Additionally officials were subjected to public humiliation by social media. The influential people were released. It was widely believed they could rely on the support of a network of friends. A person without that protection, he opined, would face the risk of harsher penalties and longer detention. Under the rule of militia the usual routine for a person found drinking was arrest, possible whipping and detention for a few days.

12. Mr Ballali thought that there was a chance of virtually permanent detention in the case of an habitual drunk without support but it was also "almost certain" that a person arrested for consuming alcohol would be subjected to whipping and arbitrary detention.

13. There is a Country Report on Human Rights Practices for 2013 produced by the United States Bureau of Democracy, Human Rights and Labour. This notes that although there is a constitutional declaration making many reassuring utterances about the right to resort to the courts and the illegality of torture, it was clear that many people who were detained were detained by the militia who were not in practical terms accountable to the rule of law and had their own detention centres and the report refers to there being "widespread abuse". There are also references in the reports

to detainees in all establishments, including regular establishments, being tortured and abused. Reported abuses included beatings with belts, sticks, hoses, rifles and other horrible and serious acts.

14. I have considered carefully Mr Deller's measured submissions. There really is nothing to be said against the contention that a person who faces a real risk of the beatings described faces a real risk of treatment contrary to his rights under Article 3 of the European Convention on Human Rights.

15. Save for one important point, which I consider below, I can see no possible basis for criticising this Tribunal's finding that this claimant faces such a risk. It was never suggested that the expert opinion was valueless or that the Tribunal was somehow perverse in accepting it. However Mr Deller did say that it was incumbent upon the Tribunal to explain why the claimant could not avoid these horrible consequences by abstaining. Abstinence is a requirement of the laws of the country of which he is a national and it is disconcerting that he should seek international protection because he does not like the consequences of his decision to commit an illegal act.

16. I do not accept this argument. Firstly, it is trite international protection law that a person cannot be returned to a country where there is a real risk of that person being executed. Thus, a person cannot be returned to the United States of America to face trial in a state where execution is a possible outcome even if there is compelling evidence that that person is a murderer. In reality the situation rarely occurs and when it does it is met by the authorities in the United States entering into a solemn obligation not to execute the person in the event of conviction. Similar arrangements probably do not exist with Libya and certainly have not been canvassed here. If a person can be protected from the adverse consequences of a decision to kill a person he can surely be protected from the adverse consequences of a decision to drink alcohol.

17. The Tribunal were not unaware of this tension but, again at paragraph 19, summarised its findings. The fact is the claimant has had many years of trying to deal with alcohol dependency and recognises that he cannot. No doubt the condign punishment that awaits him in Libya is intended to act as a sharp deterrent but his experiences in the United Kingdom of the consequences of excess drinking have not been encouraging but he has continued to drink. It is very easy for a person not addicted to a substance to take the moral high ground and pontificate about how easy it is for the addict to alter his lifestyle but it clearly is not easy. If it were easy there would not be so many alcoholics, smokers and overweight people.

18. I am not at all sure that it actually matters that a person seeking international protection *could* avoid the risks of ill treatment by avoiding a particular kind of conduct, even if that conduct is illegal. What matters is whether he does in fact face a risk of ill treatment. A Tribunal would not find easily that a person is reasonably likely to be subjected to horrific ill treatment because of something he chose to do. It will only be in unusual circumstances where a Tribunal will conclude rationally that a person will

expose himself to such a risk. An addict is an obvious example of how this may occur.

19. However I do not have to decide the point here. This claimant's history of addiction is such that he cannot abstain from consuming alcohol when alcohol is available. No meaningful question of choice arises and the Tribunal was entitled to find that there is a real risk of his being ill treated in Libya in a way that would be intolerable in international law because he *would* consume alcoholic drink. This claimant cannot stop himself.

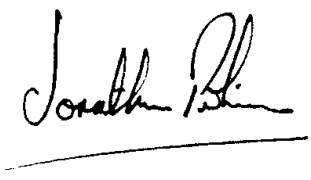
20. This is not a case of a person having cynically having a drink of alcohol to make himself irremovable. Rather it is a case of a person who faces a real risk of unlawful detention in conditions that either are or are close to being internationally unacceptable with the added risk of unacceptably savage corporal punishment.

21. It follows that on reflection I do not agree that the Tribunal erred in any way by not addressing specifically the question of whether the appellant could avoid the problem by abstaining. Its conclusion that he would not avoid the risk because he is an addict was reasoned and open to it.

22. It follows therefore that I see no error of law in the decision to allow the appeal on Article 3 grounds.

23. It is hard to see how the appeal could have been allowed under the Rules except on an exceptional basis. Although the claimant has been in the United Kingdom for a long time he has never managed twenty years continuous residence either because of the return trip in the 1990s or because of his imprisonment. Nevertheless, it will almost always be the case (it might in fact necessarily be the case) that removing someone that exposes him to a risk of ill-treatment contrary to their rights under Article 3 of the European Convention on Human Rights will interfere disproportionately with his private and family life.

24. It follows that I see no error of law in the decision to allow the appeal on Article 8 grounds either. It follows therefore that I dismiss the Secretary of State's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 17 December 2014