Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12926/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision and Reasons Promulgated**
On 16 February 2018	**On 23 February 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

SA
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Dr E Mynott, instructed by Latitude Law
For the respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge McGinty promulgated 21.4.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 4.11.16, to refuse his protection claim based on imputed political opinion in Libya.

2. First-tier Tribunal Judge Bennett refused permission to appeal on 6.9.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Coker granted permission on 17.10.17.

3. Thus the matter came before me on 16.2.18 as an error of law appeal in the Upper Tribunal.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the decision should be set aside.

5. After hearing the submissions of the two representatives, I reserved my decision, which I now give.

Preliminary Matters

6. The appellant's representatives had written to the Tribunal requesting that counsel's note of the oral evidence be agreed as admissible without the need for Dr Mynott to become a witness. Due to the lateness of the request, it was not possible for the matter to be considered by a judge prior to the error of law appeal hearing. However, I considered Judge McGinty's typed note of the evidence in comparison to those parts of counsel's note relied on in the grounds and found that they accorded close enough so that the matter could proceed without Dr Mynott becoming a witness in the appeal.

7. In respect of the article 15(c) risk by reason of indiscriminate violence, Judge McGinty noted that in FA (Libya) CG [2016] UKUT 00413 (IAC), the Upper Tribunal concluded that the country guidance of AT and others (Libya) CG [2014] UKUT 318 (IAC) was unreliable and held that pending an analysis of current evidence, each case should be decided on its own evidence rather than relying on the out of date Country Guidance.

8. That is what Judge McGinty did, from [32] onwards of the decision. However, since promulgation of the decision of the First-tier Tribunal, the Upper Tribunal has now reviewed the article 15(c) situation in Libya and in ZMM (Article 15(c)) Libya CG [2017] 263 (IAC) considered the more recent country background information, including that considered by Judge McGinty, but come to an entirely different conclusion, namely that indiscriminate violence in a situation of internal armed conflict in Libya has reached such a high level that there are substantial grounds for believing that a returning civilian would face a real risk of serious harm or death, solely by reason of his presence there.

9. In those circumstances, Mr Bates conceded that there was an error of law and that the appeal would have to be allowed on humanitarian protection grounds. However, there remains a contested issue as to whether there is an error of law in respect of that part of Judge McGinty's decision relating to the asylum grounds.

10. After hearing submissions on the issue I reserved my decision, which I now give.

11. For the reasons summarised below, and after considering the grounds and the respective oral submissions of the representatives, I am not satisfied that there is any material error of law in the decision of Judge McGinty relating to the asylum grounds.

12. The first ground asserts that the First-tier Tribunal failed to accord the appellant the benefit of a positive factual finding in the previous Tribunal appeal decision of Judge Lever (AA/10389/2012). At [34] of his decision, Judge Lever was prepared to accept "as a possibility" the claim that the appellant's father and two brothers served in the army before and after the civil war but concluded that nothing turned on that issue and ultimately rejected the asylum claim that the appellant was entitled to refugee status on the basis of his father and two brothers being loyal members of the Libyan Army supporting Gaddafi, or that one of the brothers had been killed in the civil war in Sirte, or that the appellant was from a specific tribe with a surname linking him to the Gaddafi regime.

13. In addressing this at [25], Judge McGinty recognised that Judge Lever had been prepared to accept the possibility that the appellant's father and two brothers served in the army before and after the civil war but found that neither alone nor in combination with other factors did this create any real risk of persecution on return. The judge also took into account the additional evidence, said not to have been before Judge Lever.

14. Dr Mynott submission, reflecting the first ground, was that Judge Lever had found as a fact that the father and two brothers served in the Libyan Army. The significance of that, it is argued, is that it infects Judge McGinty's consideration of the new evidence: the new witness evidence, the documentary evidence including the arrest warrant, and the country background evidence. It is submitted that contrary to Devaseelan, the judge had not taken as a starting point a factual finding in the appellant's favour.

15. I do not agree with Dr Mynott's interpretation of the decision of Judge Lever on this issue. This was not a positive finding of fact in the appellant's favour. Although at the end of [34] Judge Lever stated that, "The fact that the appellant's father and two brothers served in the military and were therefore seen as being overtly loyal to Gaddafi is neither surprising nor an uncommon feature for Libya," I do not accept that the judge was there making a positive finding of fact in the appellant's favour. A possibility does not discharge the evidential burden. Reading the paragraph as a whole, the judge was in effect saying that even if that had served in the army that fact would not be material, for the reasons amply set out in [34] through [37], including the country background evidence.

16. I am satisfied that at [24] Judge McGinty had properly directed himself as to the Devaseelan principles and went on to carefully consider whether the additional evidence described at [25] was sufficient to go behind Judge Lever's conclusion. I do not accept that there was any positive finding that was omitted and thus do not accept the submission that the other findings

of Judge McGinty were “infected” as claimed. In effect, even taking the further evidence into account, Judge McGinty reached the same conclusion as Judge Lever on the issue of service in the army and the other factors relied on as creating a risk of persecution.

17. I have considered but reject as without merit the second ground of appeal, which is to the effect that Judge McGinty was in factual error in stating at [29] that, “…no explanation has been given as to how Mr Elfghi’s cousin who was said to be a member of the Tripoli Rebels Brigade would be able to know or obtain details of an arrest warrant issued by the Arada Martyrs Battalion, or how that information would be available to him.” The grounds and Dr Mynott submitted that the judge ignored the oral evidence of Mr Elfghi on this issue. In response to questioning as to how the one group could get a document from a different group, the witness explained, “They all part of each other. They all belong to the same area.”

18. Reading [29] as a whole, I am not satisfied that there has been any material error on the part of Judge McGinty in this regard. The very first sentence plainly explains that the judge did not accept the explanation of Mr Elfghi, which the judge had recorded both in the record of proceedings and at [17] of the decision: “... as they were all part of each other and all belonged to the same area.” Quite contrary to the submission, the judge had not ignored the evidence but taken it into account, but gave reasons set out within [29] for not accepting that explanation. The ground is disingenuous in seeking to criticise one phrase rather than applying a fair consideration of the paragraph as a whole and the sense of the judge’s meaning and reasoning. Ultimately, as the judge pointed out, it was for the appellant to demonstrate the reliability of the document. The judge has given adequate reasoning for the conclusion that no weight could be placed on the document. That conclusion was open on the evidence.

19. Neither do I accept the complaint at [13] of the grounds that the finding was flawed because the judge did not put to the witness the objection that there was no evidence how the Arada Martyrs Batallion would have been in a position to issue an arrest warrant to be circulated in all land and naval access routes. Even if this had been put to the witness it was not an issue capable of being addressed by a witness who was not responsible for the issue of the warrant, only its obtaining. He was not a country expert witness on the matter and any answer would have been entirely speculative with no probative value. The judge was entirely correct in observing that there was no evidence that the Battalion would have been able to circulate a warrant as widely as the wording is drawn. The suggestion in the grounds that whether it was circulated as widely as intended did not render “A’s account of his own actions in obtaining the document unreliable,” is neither here nor there.

20. In the circumstances, I find no merit in the grounds in as far as they relate to the Convention claim for asylum. The findings of the First-tier Tribunal were entirely open on the evidence and justified by clear and cogent reasoning. No error of law is disclosed.

Conclusion & Decision

21. It follows from the above that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside, but effectively only in respect of the humanitarian protection claim.

I set aside the decision.

I re-make the decision in the appeal as follows:

I dismiss the appeal on asylum grounds.

I allow the appeal on humanitarian protection grounds.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I consider it appropriate to make an anonymity direction.

Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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 their family. This direction applies both to the appellant and to the respondent. Breach of this direction may result in proceedings for contempt of court.

Fee Award *Note: this is not part of the determination.*

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated