Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05505/2019

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 23 January 2020	**On 14 February 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr P Nathan instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (MS). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience, I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Libya who was born on 10 February 1990.

4. The appellant arrived in the United Kingdom on 30 October 2013 and claimed asylum. The basis of his claim was that he had been working for the Gaddafi regime in the Internal Security Service ("ISA") from the beginning of 2010 until October 2011. Between March and June 2011, the appellant had written reports on six individuals: four students and a lecturer (whilst he was himself a student) and also a neighbour. Those individuals were subsequently arrested and detained by the security services. Following that, the appellant worked for about a month at checkpoints, checking and searching cars and passengers. Then he had worked in the Jdeida Prison. The appellant claimed to fear arrest, imprisonment and torture if he returned to Libya by those who would want revenge against him due to his former work with the Gaddafi regime.

5. On 28 May 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the European Convention on Human Rights.

6. The Secretary of State accepted that the appellant would be at risk, and that it would breach Art 3 of the ECHR, if he returned to Libya. However, the Secretary of State concluded that the appellant was excluded from the Refugee Convention and from humanitarian protection because Art 1F(a) of the Refugee Convention applied. The Secretary of State was satisfied that the appellant's activities for the Gaddafi regime amounted to aiding and abetting crimes against humanity contrary to Art 7 of the Rome Statute of the International Criminal Court (the "ICC"). The Secretary of State relied upon background evidence that the Gaddafi regime engaged in widespread or systematic attacks directed against the civilian population, namely by detaining, torturing and killing (in particular by the ISA) opponents of the regime with particular reference to the period leading up to the Libyan Revolution in 2011. The Secretary of State concluded that, despite the appellant's statements to the contrary, he had knowledge of the abuses carried out by the ISA and the Gaddafi regime.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. It was accepted before Judge O'Rourke, that the appellant was at risk on return to Libya. However, Judge O'Rourke found that the Secretary of State had not established that there were "serious reasons" for considering that the appellant had aided and abetted crimes against humanity. Judge O'Rourke accepted, as credible, the appellant's evidence in relation to his involvement with the ISA (which he joined essentially for patriotic reasons) and that he had no knowledge of the abuses, relied upon by the Secretary of State being carried out by the ISA or more generally by the Gaddafi regime. In addition, the judge found that, the information that the appellant passed on could at least theoretically have been provided for the purpose of both lawful and unlawful

activities, that was unlikely to amount to "aiding and abetting" the commission of international crimes by the regime.

8. As a consequence, the judge allowed the appellant's appeal on asylum grounds.

The Appeal to the Upper Tribunal

9. The Secretary of State sought permission to appeal to the Upper Tribunal on two grounds.

10. Ground 1 challenges the judge's credibility finding in favour of the appellant. In essence, that ground contends that the judge reached that finding wrongly treating the expert opinion (of Dr Joffe) as determinative and failed to reach the finding by taking into account the background evidence concerning the abuses and brutality of the Gaddafi regime. The ground asserts that it was impossible to conceive how the appellant would not have known about the use of torture given his circumstances and the background evidence.

11. Ground 2 argues that the judge erred in finding that the appellant's activities could not amount to "aiding and abetting" the international crime in passing on the identity and activities of those upon whom he informed.

12. On 9 October 2019, the First-tier Tribunal (Judge Loke) granted the Secretary of State permission to appeal.

13. On 14 November 2019, the appellant filed a rule 24 response seeking to uphold the judge's decision.

The Law

14. Before me, with one exception in Ground 2, it was not contended that Judge O'Rourke had misunderstood or misapplied the applicable legal framework under Art 1F(a) of the Refugee Convention. That provides that:

> "1(F) The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; ..."

15. In applying that provision, as Judge O'Rourke did, the international criminal law provisions in the Rome Statute of the ICC were crucial (see JS (Sri Lanka) v SSHD [2010] UKSC 15). In particular, Art 7 sets out the definition of "crimes against humanity" as including, murder, imprisonment or other severe deprivation of liberty in violation of fundamental rules of community, enforced disappearance of persons, and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

16. It was not in dispute before me that the background evidence relating to the workings of the Gaddafi regime, including the ISA at the relevant time when the appellant was working for the ISA in 2010 – 2011, involved the commission of acts falling within the definition of 'crimes against humanity'.

17. Article 25 of the Rome Statute sets out the circumstances in which a person shall be "criminally responsible" for a crime, such as that set out in Art 7 of the Rome Statute. Suffice it to say, for the purposes of this appeal, "criminal responsibility" includes those individuals who commit such a crime, whether as an individual or jointly with another; facilitate the commission of crime, or aids, abets, or otherwise assists in the commission of the offence or in any other way contributes in a significant way to the commission of that offence by a group of persons acting with a common purpose and that contribution is made intentionally either with the purpose of furthering the criminal activity or purpose of the group or is made with the knowledge of the intention of the group to commit the offence (see MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC)).

18. It is also common ground that the Secretary of State has the burden of proving that there are "serious reasons" to consider that the appellant was, applying those provisions, guilty of a crime against humanity. That requirement is stronger than a requirement to establish "reasonable grounds" and that any evidence must be "clear and credible" or "strong" (see Al-Sirri v SSHD [2012] UKSC 54 at [75]).

19. Further, it was common ground that the appellant had not personally carried out any acts which amounted to crimes against humanity. The Secretary of State's case against him was that his actions, in passing on reports, with the knowledge of what was likely to happen to anybody who was detained as a consequence, amounted to aiding and abetting crimes against humanity. Apart from the point raised in ground 2, it was common ground that the issue turned upon whether the judge's credibility finding in relation to the appellant was legally sustainable such that the Secretary of State had, as a consequence, failed to establish that the appellant had knowledge of the Gaddafi regime's abuses.

20. During the hearing I enquired from Mr Howells whether the Secretary of State's position was that the appellant was guilty as an aider and abettor of a crime against humanity committed against the six individuals upon whom he had informed and who had been detained. Mr Howells indicated that that was not the Secretary of State's case and he accepted that there was no evidence that any of those individuals had, in fact, been subjected to any torture or like abuse which could be described as a crime against humanity. Instead, Mr Howells indicated that the Secretary of State's case was that the appellant's involvement, as an informer, was of such a nature that it amounted to practical assistance or contribution to the commission of crimes against humanity more generally. That is, indeed, consistent with the way in which the respondent dealt with the exclusion in paras 88 – 96 of the refusal decision.

21. Whichever way the appellant's participation as an aider and abettor is framed, in this appeal the crucial issue was whether he had knowledge of the abuses – the crimes

against humanity – which were perpetrated by the Gaddafi regime and, as accepted, documented in the background material.

Discussion

22. With those matters in mind, I now turn to Ground 1 and the Secretary of State's challenge to the judge's positive credibility finding and conclusion that he accepted the appellant's evidence that the appellant did not have knowledge of the abuses which the Secretary of State relies upon as being carried out by the Gaddafi regime at the relevant time.

23. At the centre of the appellant's case before the judge was a report of Dr Joffe. With one exception, the judge accepted Dr Joffe's conclusion in that report. The judge summarised the report at para 25 of his determination as follows:

> "25. Expert Evidence. I summarise the main relevant points of Professor Joffé's report [App C], using its paragraph numbering as follows:
>
> i. He is a widely-published and acknowledged expert on Libya [1-3].
>
> ii. There are reports that the regime in Jdeida prison did not ill-treat or torture prisoners [10].
>
> iii. The Appellant's tribal background (the Warfalla, heavily associated with the Gaddafi regime) is also a factor in his fear of return [11 and 48].
>
> iv. There is still profound instability in Libya and supporters of the Gaddafi regime continue to be persecuted [18 and 71(iii)].
>
> v. The regime (until its downfall) was all-powerful and controlling of the mechanisms of state. The ideology of the Green Book was a key school test that had to be studied from the end of primary school. The regime also went to considerable efforts to exclude knowledge of information that might criticise it and supporters simply considered that any such criticism was anti-regime propaganda. Arrests and detention of critics of the regime were justified as protection against terrorists and religious extremists. Any failure by servicemen to obey orders would be dealt with most severely [71(iv)]."

24. Then at para 26, the judge reached the following conclusions in respect of Dr Joffé's report:

> "26. Conclusions on Expert Evidence in relation to Appellant's Account. I conclude the following:
>
> i. The Appellant's account of having been raised in a dictatorial state and being effectively 'brainwashed' by propaganda into seeing no fault (and indeed a lot of good) in the regime is entirely plausible.
>
> ii. Similarly, for the same reasons and also his then young age and relative immaturity, it is plausible that he will not have perceived the regime as acting unlawfully towards opponents and detainees, but instead merely protecting itself against 'terrorists' and religious fundamentalists, out to destroy it.

iii. In that context, 'signing up', to help protect his country against such perceived threats will, plausibly, have seemed like the patriotic (and potentially career-enhancing) thing to do.

iv. The Appellant will be under personal (as opposed to indiscriminate Article 15(c)) threat, from now-dominant militias, due to his involvement with the regime, tribal membership and informing on suspects.

v. While I generally give due weight to Profess Joffé's report, as to the above issues, I comment that he does, as Ms Rawlings [the Presenting Officer] correctly points out, exceed his remit in paragraph 71(i), where he seeks to come to an apparent juridical view on the applicability of Article 1(F) to the Appellant's circumstances. He has not heard evidence on the facts in this matter, is not in a position to come to findings in respect of them, or of the application of the law to those facts. That is the role of this Tribunal and not that of an expert. Nonetheless, I don't consider this error on his part to undermine the main thrust of his report, as to the background context in Libya, in relation to the Appellant's circumstances and which, frankly, is readily available from open-source objective evidence and from judicial notice of historical events in Libya."

25. In a very detailed para 27 of his determination, the judge reached the following conclusions on the application of Art 1F(a) to the appellant:

"27. Application of Article 1F. I find that the exclusion from the applicability of the Refugee Convention to the Appellant's circumstances, contained in Article 1F, is not engaged in this appeal, for the following reasons:

i. Credibility. I found the Appellant a credible witness, for the following reasons:

a. His account, over three interviews in a three-year period and now in evidence at this Hearing was entirely internally consistent.

b. His evidence is also externally consistent, both with background and expert evidence.

c. I did not consider it implausible that a young man, barely out of his teens and having been brought up in a dictatorial regime and subject to propaganda all his life, would consider, at the time, that the Gaddafi regime was a force for good for the Libyan people and that by joining the security services he was doing his patriotic duty.

ii. I remind myself that the burden of proof in this respect rests on the Respondent and I don't consider that they have discharged that burden, for the following reasons:

a. I had no reason to doubt the Appellant's account and in particular, bearing in mind his age and no-doubt indoctrinated education, his state of knowledge of the true extent of the evils of the regime. While, as the Respondent would argue, they 'assume' or 'perceive' a high level of knowledge on his part that is nothing like sufficient to meet the test in **JS** that:

'because of the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously; and (iv) that

more than mere membership of an organisation is necessary to bring an individual within the article's disqualifying provisions'.

The Appellant's evidence was not shaken on the extent of his involvement with the security services, or state of knowledge of the regime's activities and therefore, in the absence of compelling evidence to the contrary, I accept it.

b. Dealing with the questions raised in **JS**, in consideration of the factors applicable to the application of Article 1F, I find as follows:

(1) There is no doubt that the former security service would have been a large and intimidating organisation. The part of the Appellant seems to have been concerned with was that of information-gathering, rather than say, the more 'direct' aspects of arrests, detention or interrogation.

(2) The organisation was not proscribed and indeed was a central part of the regime and protecting its interests.

(3) The Appellant volunteered for is role, in, as I have found, a naïve view that he was serving his country and people.

(4) His service was relatively brief and until the regime began to crumble, he would have had no realistic opportunity to leave it, as had he deserted before the collapse of the regime, he could no doubt have been located and severely punished.

(5) His rank, standing and influence was minimal. He was merely one of very many informers in the regime and I note, in this respect, the Respondent's reference to potentially 10 to 20% of the population being such. While that does not excuse his actions, it puts them into some reasonable context. By way of contrast, I take judicial notice of the widely-reported incidence, in the former East Germany, of informing on other citizens to the Stasi, estimated by many to run to over a million citizens, which, in regimes such as that becomes routine and perceived as the duty of 'loyal' citizens. Very many of those persons will now be carrying on their lives, uninterrupted, in Germany.

(6) I accepted his evidence of his lack of awareness of any war crimes/crimes against humanity and that he believed those he reported on would be dealt with lawfully.

(7) There is no evidence that he engaged in any other potentially criminal activity.

c. Applying **Al-Sirri**, there is nothing like the 'strong or clear and credible evidence' necessary to establish the 'serious reasons' necessary to find that that Appellant had individual responsibility for acts engaging Article 1F.

d. I consider that Article 33 of the Rome Statute is engaged, in that it was unchallenged evidence that the Appellant was under a legal obligation to obey lawful orders; that he did not know that those

orders were unlawful and that such orders were not manifestly unlawful.

e. Finally, applying **Perišić** (with consideration of **MT (Article 1F)**, the information the Appellant was passing on, could, at least theoretically, have been provided for the purpose of both lawful and unlawful activities and therefore is unlikely, of itself, to amount to 'aiding and abetting' the commission of crimes, for which alleged crimes there is, in this appeal, in any event, no strong, clear credible evidence."

26. Mr Howells submitted that the judge had treated Dr Joffé's report as determinative of the appellant's credibility and, linked to that, had failed to take into account the background evidence set out in the refusal letter attesting to the abuses etc. by the Gaddafi regime. He drew particular attention to para 27(i)(b) of the judge's reason where, Mr Howells submitted, the judge had wrongly stated that the appellant's evidence was "consistent, both with the background and expert evidence". He submitted that it was not consistent with the background evidence.

27. I do not accept Mr Howells' submission that the judge blindly applied the opinion of Dr Joffé without reference to any other evidence. It is plain from para 22 of the judge's decision, where he summarised the refusal decision, that he had well in mind the Secretary of State's case, in particular that the appellant's claim that he had no knowledge of the abuses by the Gaddafi regime was inconsistent with the background evidence. It is helpful to set out para 22 of the judge's determination which is in the following terms:

"22. The refusal is very detailed, but I summarise its main conclusions as follows:

i. The Gaddafi regime was authoritarian in nature and human rights abuses were widespread. Details of such activity are provided in paragraphs 18 to 49. Prisoners were frequently subject to arbitrary detention and routinely tortured and mistreated. Jdeida prison was one such detention facility.

ii. Anybody suspected of any opposition to the regime could be subject to arrest, or worse. The regime oversaw an extensive network of informants, with one observer estimating that 10 to 20% of the population was engaged in surveillance [para. 42].

iii. As the regime came under greater threat, the oppression and killings increased. The security services were heavily involved in such activities. There are accounts of persons being mistreated, detained, or worse, at military/security forces' checkpoints.

iv. The nature of the above-mentioned abuses engages Article 25 of the Rome Statute, by commission of crimes against humanity.

v. It is believed that the Appellant, *'made a substantial contribution to the ability of the Libyan government to commit these abuses and crimes'* and that *'the activities* (he) *had undertaken for the ISA during the period from early 2010 to August 2011 in perceived full knowledge of how* (the regime) *... treated those considered to be opposed to the regime.'* [para. 86].

vi. That, applying **MT (Article 1F(a) – aiding and abetting)**, he had provided *'practical assistance to the commission of crimes against humanity by the ISA'*, his role being fundamental to identifying and targeting its opponents.

vii. His account of being unaware of the abuses committed by the regime and his supposition that those he had informed on, who he saw in prison, had not been tortured, was not accepted and it is the case that he is merely seeking to distance himself from such acts."

28. The Secretary of State's position is again recorded in the submissions of the Presenting Officer at para 23 of the judge's determination.

29. The judge did not explain at para 27(i)(b) why the appellant's evidence was consistent with "background ... evidence". The material is set out at paras 17-77 of the refusal decision. I do not consider it necessary to set it out. The judge's summary, though relatively brief, captures its essence. That evidence does not state that the abuses were necessarily known by Libyan citizens or, indeed, by everyone who worked for the Gaddafi regime.

30. This was a case where the judge had an opportunity to hear the appellant give evidence and I am wholly unpersuaded that in reaching his positive credibility finding he ignored the background evidence concerning the abuses carried out by the Gaddafi regime. Here, the judge had evidence from the appellant as to his involvement with the ISA. He worked for a short time making reports (whilst a student) and then acted as a guard at checkpoints and worked in a prison. His evidence was that he had not seen any abuses in his work. Indeed, as Mr Nathan pointed out, his evidence was that he had seen a number of the people upon whom he had informed subsequently, either in prison or after their release unharmed. The judge had to assess the plausibility of the appellant's account that, having joined the ISA as a young man with patriotic aims, he was not to be believed that he did not know about the abuses.

31. Mr Howells sought to argue that Dr Joffé's report (at page 24) did not support the judge's conclusion. Both relied upon it being plausible that regime supporters denied the evidence of such crimes or took the view that they were justified as a necessary response to the hostility towards the Gaddafi regime in 2011. The appellant's evidence was that he fell into the former category. There is no basis, in my judgment, for the claim in the Secretary of State's grounds that, it is inconceivable that the appellant would not have known about the use of torture generally. On the basis of Dr Joffé's report, it is plainly conceivable. The appellant's case was, throughout, consistent on his lack of knowledge. It has not been suggested that he has ever participated in or been a witness to any abuses himself. The appellant's own evidence was that he had never seen any abuse in any of the roles he played in the ISA and, indeed, he had seen a number of those upon whom he had informed without any signs of torture etc.

32. The background evidence did not drive the judge to reject the appellant's evidence as incredible. In my judgment, he had it well in mind when reaching his positive credibility finding. It is important to bear in mind that the Secretary of State bore the

burden of proving that there were "serious reasons" for considering that the appellant had, as an aider and abetter, committed crimes against humanity. Dr Joffé's report was supportive of the appellant's claim that he did not, in fact, have the guilty knowledge required for that international crime.

33. In those circumstances, I am satisfied that the judge reached a rational finding for sustainable reasons that the appellant was to be believed and that, as a result, it had not been established that there were "serious reasons" to consider that he was guilty of a crime against humanity through his involvement in the ISA between 2010 and 2011. The judge was entitled to reject the Secretary of State's reliance on Art 1F(a) and to allow the appellant's appeal on asylum grounds.

34. Given that conclusion, it is unnecessary to explore the Secretary of State's second ground of appeal which challenges the judge's alternative reason for concluding that Art 1F(a) did not apply in para 27(ii)(e) that the appellant's involvement could not amount, in itself to "aiding and abetting". There was considerable discussion during the respective submissions of the parties as to what level of involvement could amount to "aiding and abetting". The point is not without some difficulty. The judge's finding in para 27(ii)(e) is not, however, material to his decision that Art 1F(a) does not apply. Without the requisite knowledge, Art 1F(a) did not apply even if the appellant's involvement, as an informer, was sufficient to amount to 'aiding and abetting'. In those circumstances, it is unnecessary to resolve whether the judge's conclusion in para 27(ii)(e) was correct.

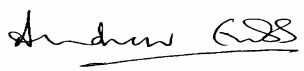
35. For the above reasons, therefore, Judge O'Rourke did not materially err in law in allowing the appellant's appeal on asylum grounds on the basis that Art 1F(a) did not apply to the appellant.

Decision

36. The decision of the First-tier Tribunal to allow the appellant's appeal on asylum and humanitarian protection grounds did not involve the making of a material error of law. That decision stands.

37. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb
Judge of the Upper Tribunal

13 February 2020