Case No: C5/2007/1370

Neutral Citation Number: [2008] EWCA Civ 145
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No AA/10853/2005]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 5th February 2008

Before:

SIR MARK POTTER, PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE THOMAS
and
LORD JUSTICE HOOPER

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Between:

MM (Libya)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Miss D Jones (instructed by Tyndallwoods Solicitors) appeared on behalf of the **Appellant**.

Miss J Maxwell-Scott (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved)

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Lord Justice Thomas:

1. This is an appeal against the determination of Immigration Judge Brookfield dated 21 March 2007 on the basis that the decision was perverse. Permission to appeal was granted by Sir Henry Brooke.

<u>The facts</u>

2. The basic facts which are not in dispute in relation to the appellant can be briefly summarised:
   - (i) The appellant was born in Libya in 1978. He is now just under 30 years of age. He was in the Libyan military, resigned from the military and worked in employment in the construction industry.
   - (ii) On 4 May 2005, he came to the United Kingdom with his mother to visit his sister who lived here and was expecting a baby. He was granted leave to stay as a visitor until October 2005.
   - (iii) The baby was born on 21 July 2005.
   - (iv) On 5 August 2005, the appellant's mother returned to Libya.
   - (v) On 8 August 2005 the appellant claimed asylum on the basis that he had a well-founded fear of persecution on account of his political activities if he returned home to Libya.
   - (vi) His application was rejected and a letter setting out the reasons was dated 27 September 2005. An appeal was brought. The determination by an immigration judge made in December 2005 was set aside and a hearing *de novo* ordered.
   - (vii) That hearing took place before Immigration Judge Brookfield and it is against her decision, rejecting the claims to asylum and on other grounds, against which this appeal is brought.

<u>The issue</u>

3. Permission to appeal was sought on two grounds. First, perversity in the decision and secondly, bias on the part of the immigration judge. Permission was refused by the AIT but granted by Sir Henry Brooke on the ground relating to perversity. He refused the application for permission to appeal on the basis of bias and that application was not renewed.
4. In essence, it is the contention on the part of the appellant that the immigration judge, in rejecting the appellant's evidence, acted in a way that was perverse and her conclusions were perverse. First, it is said that in finding that his account was implausible, she had acted on the basis of conjecture and speculation. Secondly that the immigration judge had approached the matter on her subjective view and failed to take proper account of the in-country information and other objective evidence. The immigration judge had finally not evaluated the account against the objective factors. I will return in a moment to deal with those points in detail, but before doing so it is necessary to refer to the legal principles.

<u>The applicable legal principles</u>

5. Both skeleton arguments set out extensive citation of the decisions of this court as to the proper approach to be followed by a tribunal required to make findings of fact where credibility is an issue. These included <u>HK v SSHD</u> [2006] EWCA Civ 1037 and <u>Y v SSHD</u> [2006] EWCA Civ 1223. Attention was also drawn to rule 339L of the Immigration Rules. I would not wish to add any further observations on this subject. I do not believe it assists anyone to express again the well known principles in what no doubt will be construed by others as being in

slightly different terms and giving rise to yet further argument. The principles are clear. This case concerns their application.

6. For the same reasons it is unnecessary to add any further elucidation of the well known principles in relation to perversity. They are set out for example in E v SSHD [2004] EWCA Civ 49 and R (Iran) v SSHD [2005] EWCA Civ 982. Again, I do not wish to add any further observations for the reason that I have given.

7. This case can therefore be approached upon the basis that all it involves is the application of well known principles of law to the particular decision under appeal. I therefore can turn directly to the appellant's submissions. Before doing so, it is necessary to set out in a little detail the appellant's account of why he should have been granted asylum.

The appellant's evidence

8. His father had been a high-ranking military officer. He had been sent to a military academy in 1997. He had graduated as an officer in September 2001 in the airforce; he was a pilot. He sought to resign in December 20001 and again in March 2002. His resignation was accepted in July 2002. He was therefore only in the military forces of Libya for an exceptionally short time as an officer. His reasons for resigning were that he had never wanted to be part of the Libyan armed forces; it had not been his choice but he had been forced to do so. He gave reasons why he thought, due to the then current political circumstances, his resignation had been accepted.

9. He then began working for a relative's construction company in Benghazi. He moved in January 2005 to work for a construction company at Tobruk. At Tobruk, he met up with two childhood friends who were also his relatives named S and R. They frequently discussed politics. They were involved in anti-government activities and they asked him to join them in those activities. The activities were the making and distribution of leaflets between March and November 2004 which exposed corruption in the Tobruk area. He visited the university on about four or so occasions. He stopped in November 2004 as he had to travel to Tripoli to work and the authorities had arrested one of his friends. He was also involved in a petition relating to the arrest in January 2005 of N.

10. He came to the United Kingdom to see his sister, as I have already set out. He booked his return on 3 August 2005 but his brother had rung him by telephone on 28 July 2005 and told him in code that S and R had been arrested. He told him that the authorities had been to see his employers and to his house in Benghazi. They had realised he was in the United Kingdom and they had left orders for him to be sent to the military police in Benghazi. If he returned, he would be tried in a military court as a former member of the military of Libya. He had also said he would be tortured or killed if he returned; because of his position as a former military officer, his activities would be regarded as treasonable.

11. He produced a number of documents on appeal. It is only necessary to refer to two of them. First, a photograph of himself that showed him in military uniform as a pilot and secondly what was said to be a letter dated 28 July 2005 from the military police asking him to be sent to the police. This was a document in original form which was sent to him by his brother.

The finding on credibility

12. The appellant gave evidence at the hearing before the immigration judge and was questioned extensively on his account. The immigration judge had, as is usual, the in-country information and documents provided by the appellant to two of which I have already referred, as well as the usual bundle provided by the Home Office. The immigration judge in what is a detailed judgment rejected a substantial part of the appellant's evidence. She did not find his account to be credible. She found he had played no part in any political activity and that he was of no adverse interest to the authorities in Libya. There was no credible evidence he was wanted in Libya and there was nothing to show there were substantial grounds for believing he would face a real risk of suffering serious harm on his return to Libya. She considered, therefore, the appellant did not have a well-founded fear of persecution for a Refugee Convention reason and he would not face a real risk of persecution. He was therefore not entitled to asylum and his Convention Rights would not be violated by his return.

The appellant's submissions

13. The submission that the conclusion was perverse was set out under a number of headings, both in the skeleton argument before us and in Mr Jones' careful submissions before us today. The broad thrust of those submissions was that the immigration judge had approached the issue of credibility by adopting her own subjective views of what was reasonable and had failed to look at the political, social and cultural environment of Libya which was quite different to that which she had applied.

14. Before returning to that overall submission, I think it is useful to set out the detailed points under a number headings.

(i) The failure to use in-country information

Four separate points were made under this heading.

(a) The probability of detection

15. One of the reasons given by the immigration judge for the rejection of the appellant's account about distributing materials at the university was the high probability of detection because Libya had an effective security service and employed informants. Specifically, she rejected his evidence that he had distributed leaflets at the university without real risk to himself because he had done so at night and because there was only one gatekeeper on the campus which was outside town.

16. In her reasons, the immigration judge expressly referred to the report of a fact-finding visit to Libya in June 2004 under the auspices of the Norwegian Directorate of Immigration and the Danish Immigration Service. However, it was submitted that the judge did not refer to the full passage in the report dealing with the effectiveness of the security services and did not analyse properly that information. If she had done so, then she would not have reached the conclusion that there was an effective security service and sufficient informants amongst the populace which was her principal reason for rejecting the account given by the appellant.

17. We have been taken to the passages in the report by Mr Jones and have had an opportunity of considering them. In my view, the report did provide sufficient support for the immigration judge's conclusion, given that what she was judging

was the likelihood of detection on a university campus. Obviously it was for her to look at the weight to be attached to the different passages in the report, but in my view she approached that task correctly. The argument advanced on behalf of the appellant comes nowhere near showing any incorrectness of approach or error of law on her part, let alone any element of perversity.

(b) <u>The conclusions in relation to the type of political activity in which the appellant claimed to have been engaged</u>

18. The immigration judge rejected the appellant's evidence of the activity on which it was said he was engaged in Tobruk. She rejected his involvement with S and R. It was submitted that she was wrong to do so because his evidence as to the type of activity was again supported by the in-country information. At page 128 of the report there appear the following paragraphs:

> "The diplomatic sources with whom the delegation spoke unanimously confirmed that no organised political opposition exists in Libya. Two diplomatic sources [7/9] emphasised that any hint of opposition has been harshly suppressed so far. One of these sources added that this has primarily involved Islamic opposition groups. Another diplomatic source [2] stated that in the Benghazi area in eastern Libya there are groups of 'disgruntled persons' who are in opposition to the authorities. They include Islamists, but also elements from the historical elite in Libya, i.e. those clans have held positions of power under the monarchy and that still have traditional legitimacy, especially in the Benghazi area. These 'disgruntled' groups do not officially exist, nor are they organised in any way."

19. It was submitted on behalf of the appellant that the evidence that he had given was entirely consistent with this passage in the in-country information. It had been his evidence that he had been engaged with S and R and no one else; he had not belonged to a larger group; that it is said was consistent with the report. It is right to say that the immigration judge made no express reference to this particular passage, but it seems to me that the analysis that the immigration judge carried out in relation to the activity in which he said he was engaged and the form in which this activity took place, namely the very small group, is not in any way supported by the in-country report. Although it is right to say that Tobruk is also in eastern Libya, the in-country report expressly refers to elements in Benghazi and there is nothing in the in-country reports that suggests it is the type of activity in which the appellant claims to have been involved. In my view, the fact that the immigration judge did not refer specifically to these paragraphs in the report did not indicate an error of law on her part and again does not amount to anything that can go towards the submission there was perversity.

(c) <u>The drafting of the petition in respect of N</u>

20. It was the appellant's evidence that he had drafted a petition in respect of N who had been arrested in January 2005 but he had not signed it because of the risk of him being detected and punished in the way in which he alleged. It was his

evidence, given as a result of his brother's conversation that the two friends who had been involved in this, S and R, had been arrested in July. The immigration judge rejected the account he had given. First, she concluded that he would not have engaged in the risk of drafting a petition. Secondly, that he had no knowledge of what had happened to N. Thirdly, that he had never in any event spoken to N, although he may have met him; fourthly that no action, she felt, had been taken against him or friends in relation to N. In her determination, she referred to the fact the in-country information referred to the arrest of N. It seems to me her approach again is entirely consistent with a careful approach of evaluating the evidence against that one piece of information in the in-country report. I can find nothing that indicates an error of law in her approach, let alone anything amounting to perversity.

(d) The decisions of the AIT that show that there is no general risk to persons returning to Libya

21. It is said that in making her findings in relation to the mother's return, the immigration judge failed to take into account the decisions of the AIT in relation to the absence of risk in returning. The judge found that the fact that the mother returned without being arrested or without anything happening to her was inconsistent with the position that the appellant was taking, namely that he was at risk of persecution if he returned to Libya. She said she did not find it credible that the appellant would allow his mother to return if he was genuinely being sought by the Libyan authorities; she also said that she did not find it credible the appellant's mother would choose to return to Libya alone if the Libyan authorities were genuinely looking for her son. She also found that the mother's return on 3 August 2005 and the lack of problems at the airport on her return did not support the appellant's claim. It seems to me that in this respect, what the immigration judge was doing was looking at the specific facts in relation to the mother; although there is no general risk of persons returning to Libya, she was entitled to take into account the probabilities of what might have happened in relation to the mother if the appellant was under the risk which he claimed.

(ii) The evidence that there is of infiltration of the Libyan political groups in the United Kingdom

22. The appellant's evidence was that he had not undertaken any political activity in the United Kingdom since his arrival. He gave two reasons. First, that he might want to return to Libya and he did not want to put himself at risk by engaging in such activity in the United Kingdom and secondly, such groups can be infiltrated. The immigration judge found that the failure to undertake political activity did not support his claim that he was motivated to engage in political activities in Libya.

23. It has been submitted on behalf of the appellant that there was clear objective evidence from the in-country information to show that groups were infiltrated. That is accepted by Mr Maxwell-Scott on behalf of the Secretary of State. It is therefore right to say that there was objective information that supported the account of the appellant in this one respect. It is also right to say that the immigration judge did not take that into account. It would therefore appear that, on the basis of the submission made by Mr Jones on behalf of the appellant, when one examines the findings made, it is difficult to see how they can be supported. I will turn to this when coming to my overall conclusions.

(iii) The failure to take account of what are said to be material considerations

24. Under this heading, two separate points are made.

(a) The evidence in relation to a code of communications

25. The appellant's evidence was that in his telephone conversation with his brother to which I have referred, which took place on 28 July 2005, his brother had used coded language to refer to the arrest of S and R. He said they had "gone to visit their aunt". The appellant's evidence was that each member of his family understood that when someone says of a person that "he has gone to visit his aunt", that means they have been arrested. The appellant also gave evidence that no member of his family had been arrested since 1978, the year of the appellant's birth. The immigration judge concluded that the family would not have had a code in these circumstances because there would have been no need for one as no one in the family had been arrested during the appellant's lifetime. The appellant's evidence, therefore, in this respect was not credible.

26. It was submitted on behalf of the appellant that the learned judge had failed to take into account the fact that in Libya there is a fear of arrest and detention for anyone who engages in political activity; that therefore, looking at the matter objectively, the immigration judge should have concluded that the appellant's account that the family had a code was supported by looking at the position in country. I cannot accept that submission. It seems to me that the immigration judge was entitled to take into account the facts relating to this family which were not in dispute, namely that no one had been arrested and that therefore there was no basis for the family to have such a code relating to that family. It seems to me that the immigration judge showed no error of law in her approach and again there is nothing to support an allegation of perversity.

(b) The appellant's evidence of the type of political activity in which he claims he was engaged

27. The immigration judge concluded that the appellant was not involved in the distribution of leaflets about corrupt practices in Tobruk. She gave a number of reasons for that conclusion. First his evidence was that he would not risk the harsh penalties that would be imposed upon him because of his military background; that was because he would be treated as a person who, on account of his background, would be regarded as a traitor for engaging in such activities. Secondly, she took into account the evidence that he had given that, although he had drafted the petition to which I have referred to secure the release of N, he would not sign it because his military background would put him at risk. Thirdly, she took into account the fact that the leaflets described corrupt practices, but these were common knowledge and talked of in Tobruk. She concluded that in the light of those matters, it was not credible that the appellant would put himself at risk of the severe penalties to which he had referred by engaging in a political activity when the activity consisted of distribution of information about which everyone in Tobruk knew.

28. It was submitted originally on behalf of the appellant that the appellant had not given evidence that everyone knew of corrupt practices in Tobruk. It is right to record that in his answers in his interview he had explained his role by saying that the people needed to be made aware of matters; but it is now accepted that when

he gave evidence before the immigration judge, he did in fact give evidence in relation to the effect that everyone in Tobruk knew of these corrupt practices and discussed them. It seems to me therefore that on that factual basis, the judge was entitled to reach the conclusion that she did. What she was saying was that, having heard his evidence, and taking into account the position in Libya, he would not have taken the risk as it was not proportionate to the gain. It seems to me that that does not disclose any error of law or anything that could be said to support a case of perversity.

(iv) <u>The application of a wrong standard of proof: the immigration judge had required supporting evidence</u>

29. The principal matter relied on in relation to this heading was the judge's rejection of the appellant's evidence that, as a former military officer and a member of the reservists, he was subject to the jurisdiction of the military authorities in respect of matters committed by him as a civilian; all the activities in which he said he was engaged would have been committed in his capacity not as a military officer but as a civilian.

30. It was the appellant's evidence that nonetheless he would be subject to the jurisdiction of the military tribunal and it was the military who would deal with him on his return. The immigration judge found that there was no background information to support the claim he would be subject to military jurisdiction on his return; this was something she was entitled to take into account. It is submitted that what the immigration judge was in effect doing was requiring him to provide corroboration. I do not read her determination in that way. All the immigration judge was saying was that, if this was in fact the position, she would expect it to be in the in-country information.

31. There is also made under this heading a number of points in relation to the documents dated 28 July 2005, the original of which was sent to the appellant in London, the document having been left with the appellant's brother in his house. It is said that the judge approached this document by applying the wrong approach to it. However, what the immigration judge did was go through very carefully the points that obviously arise in relation to that letter. She set them out very carefully in her determination and it is difficult to see how it is possible to criticise points that self-evidently arise upon that document. I can see no error in her approach to that document and no basis for criticising what she concluded.

32. Thirdly, under this heading a criticism is made of the immigration judge's rejection of the appellant's brother's account of the arrest of S and R. The judge, in her determination, set out very clearly the evidence that was given by the appellant and why she concluded that that evidence could not be accepted. It seems to me that the way in which the judge approached this was perfectly clear, that the analysis was one that was open to her and there is no ground for criticising her approach to it on the basis she had set the standard of proof too high.

<u>The overall criticism of the judge</u>

33. I turn then against those specific headings finally to what is the substance of the criticism as an overall approach, namely, that it is said that the immigration judge looked at it subjectively, did not take into account the objective and in-country information and, if one looks at it all in the round, it is said that her determination

could not be sustained as she had looked at it in a subjective way. She had not dealt with his evidence in the manner in which she should.

Conclusion

34. I have considered each of the specific matters raised and stood back and asked myself the question, looking at the determination as a whole, and putting aside that one reason which in my view does not sustain analysis, can this decision be said to have been perverse? In my view it clearly was not. The judge looked at the matter objectively. She looked at it as best she could, through the eyes of that country, taking into account the position in Libya. She did not look at it through what might be described as "Anglo-centric" eyes. Her reasons are cogent and I cannot find any error of law in her approach. I cannot say that this appellant has come anywhere near advancing, on analysis, a case that the decision was in any sense perverse. This conclusion is one I have reached by applying the well known principles to the facts and reasons for this particular determination. The case raises no issue of law outside those well known principles. For those reasons I would dismiss this appeal.

Lord Justice Hooper :

35. I agree.

Sir Mark Potter P :

36. I also agree. It will therefore be dismissed.

Order: Appeal dismissed