



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/01227/2012

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 25 April 2013**

Determination Sent

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

Z N A-S

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Knorr instructed by Ty Arian, Solicitors
For the Respondent: Mr K Hibbs, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

The Background

2. The appellant is a citizen of Libya who was born on 30 December 1990. He arrived in the United Kingdom on 19 April 2011 and claimed asylum on 4 May 2011. The appellant claimed to fear return to Libya because he would be killed by rebels as he had assisted his brother and cousin who were employed in the internal security service with the Gaddafi regime and he had identified persons to them involved in demonstrations so that they could be apprehended.
3. On 20 January 2012, the Secretary of State refused the appellant's claim for asylum under para 336 of the Immigration Rules (HC 395 as amended) and for humanitarian protection under para 339C of those Rules. The Secretary of State concluded that there were serious reasons for considering that the appellant had been involved in crimes against humanity in Libya. As a consequence, the Secretary of State concluded that Art 1F(a) of the Refugee Convention applied and the appellant was excluded from protection under that Convention. Further, the appellant was also excluded from humanitarian protection by virtue of para 339D(i) of the Immigration Rules. The Secretary of State certified the appeal under s.55 of the Immigration, Asylum and Nationality Act 2006. Finally, the Secretary of State concluded that, even if the appellant's account was accepted, he would not be at risk on return to Libya because it would be open to him internally to relocate safely away from his home area in Tripoli.
4. The appellant appealed to the First-tier Tribunal. In a determination dated 11 April 2012, Judge Page upheld the respondent's certification under s.55 of the 2006 Act. Consequently, he dismissed the appeal on asylum and humanitarian protection grounds. The focus of the appeal was on the risk, if any, to the appellant on return under Arts 2 and 3 of the ECHR. Before the judge, the Secretary of State accepted that the appellant would be at risk in his home area of Tripoli. The central issue was whether the appellant could internally relocate within Libya. The judge found that the appellant could do so safely and so also dismissed the appeal under Arts 2 and 3 of the ECHR.
5. The appellant sought permission to appeal to the Upper Tribunal on the sole basis that the judge had erred in law in finding that the appellant could internally relocate safely within Libya. On 9 May 2012, the First-tier Tribunal (Judge E B Grant) granted the appellant permission to appeal on the ground that it was arguable that the judge had failed to engage with the background material dealing with the risk to suspected Gaddafi supporters in finding that the appellant could safely relocate to anywhere "away from his immediate locality where he lived in Tripoli" and, in particular, to Benghazi.
6. The appeal initially came before me on 30 October 2012. In a decision dated 8 November 2012, I concluded that the First-tier Tribunal had erred in law in reaching its finding that the appellant could safely internally

relocate within Libya. It is unnecessary to repeat here my reasons which are set out in full in my decision. In essence, I concluded that the judge had failed to take into account the background evidence relevant to the appellant's risk on return outside his home area in Libya. At paras 21-22 of my decision I summarised my conclusions as follows:

"21. In my judgment, [the] background material was highly relevant to the judge's assessment of the risk to the appellant outside his home area of Tripoli on the basis of the case that he was putting forward at the hearing, namely that because of his tribe he would be perceived as anti-Gaddafi and that might put him at risk whether in itself or because it drew attention to him and there was a risk that he would be connected with his brother and cousin's actions and revenge sought by the militia.

22. This point was simply not grasped by the judge who failed to grapple with the background evidence in reaching his finding that the risk to the appellant was "fanciful" outside of Tripoli and further that he was safe in any other part of Libya, in particular Benghazi. I do not accept Mr Hibbs' submission that the background material, in effect, recognises Benghazi as a safe haven. As Ms Knorr submitted, the Amnesty report was, in part, based upon research carried out in Benghazi. In my judgment, without further exploration, it would be wholly wrong to interpret the widespread nature of the activities of the militia against those perceived to be anti-Gaddafi to exclude Libya's second largest city. Nothing in the Amnesty International report expressly excludes Benghazi and, given the research base included Benghazi, it would be wrong to infer necessarily that what is said in that report (and which was relevant to the appellant's claimed risk outside Tripoli) did not extend to Benghazi. In any event, this was a matter not explored by the judge because he did not consider the background evidence at all."

7. Consequently, I set aside the decision in order that the Upper Tribunal could, at a resumed hearing, remake the decision. The appeal was listed before me on 30 October 2012 in order to do so.

The Issues

8. At the previous hearing, Mr Hibbs, who (then and now) represented the respondent, indicated that he might wish to revisit the concession made by the Presenting Officer before the First-tier Tribunal that the appellant was at risk in his home area because of his connection with his brother and cousin. In effect, that would have raised the issue of the appellant's credibility. At the resumed hearing, Mr Hibbs did not seek to reopen the issue of the appellant's credibility in general and, in particular, whether he was at risk in his home area. He did, however, not accept the appellant was a member of the Mashashiya tribe as he claimed. Membership of that tribe (which the appellant says supported the former regime headed by Colonel Gaddafi) is part of the factual matrix which he claims puts him at risk on return to Libya.
9. Apart from that issue, there is no dispute about the relevant personal facts to this appeal. The issues I must decide are as follows:
 - (i) Has the appellant established that he is a member of the Mashashiya tribe?

- (ii) Has the appellant established that outside his home area in Libya there is a real risk that he will be subject to serious ill-treatment (or of being killed) by militia and/or others on the basis that he faces identification as a former Gaddafi supporter due to his tribe, surname and family links with the Gaddafi regime including his family's work with the internal security service under Gaddafi and that he had identified persons for them involved in demonstrations so that they could be apprehended.
10. As the appellant's claim lies wholly under Arts 2 and 3 of the ECHR, the only issue is risk on return and no submissions were made on the basis that, absent any risk, it would not be unreasonable or unduly harsh for him to live elsewhere in Libya.

Discussion and Findings

11. As I have indicated, with the exception of the appellant's claimed tribe, the personal facts are accepted. They are helpfully set out in Ms Knorr's skeleton argument and were not disputed by Mr Hibbs. They are as follows:
- (i) The appellant is a national of Libya who was born on 30 December 1990. He is, therefore 22 years of age.
 - (ii) Prior to coming to the UK on 19 April 2011, the appellant lived in Zansoor in Tripoli. He lived with his family, including his parents. The appellant's family was pro-Gaddafi. The appellant's family were financially well-off. His father worked for an oil company and had five houses in Libya, including Zansoor, Yefran and Tripoli.
 - (iii) The appellant's brother, older sister and cousin worked for the Libyan Government. The appellant's brother was head of a team in the intelligence section of the internal security services and his job involved collecting information on those who opposed the Government. The appellant's cousin also worked in the internal security service of Colonel Gaddafi. The appellant's sister was a school teacher and worked for the Revolutionary Committees
 - (iv) In early 2011, the appellant attended protests and demonstrations in Zintan, Al Kala'a and Yefran at the request of his brother and took photographs and videos of people including persons burning a picture of Colonel Gaddafi. He gathered names and addresses of individuals which he passed on to his brother. As a result of his actions, he believes, a number were detained and killed.
 - (v) The appellant's cousin was detained and killed by the rebels during the revolution.
 - (vi) The appellant's family home in Yefran was burnt down during the revolution.

- (vii) The appellant believes that his brother is now living in Tunisia as he could not return safely to Libya having been involved in war crimes. The appellant's sister has claimed asylum in this country.
12. In the course of the hearing and the representatives' oral and written submissions, I was referred to a number of background documents in relation to Libya. For the appellant, these are contained within the original bundle submitted at the First-tier Tribunal ("app's FtT bundle") and an additional bundle submitted for the hearing in the Upper Tribunal ("app's UT bundle"). That latter bundle was admitted under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) without objection by Mr Hibbs. That bundle includes two documents which featured large in the parties' submissions, namely, an expert report from Mr Emile Joffé dated 3 December 2012 and a further letter from him dated 17 April 2013. For the respondent, Mr Hibbs also referred me to two *Country of Information Reports on Libya*, dated 7 March 2012 and 19 December 2012. In addition, I was provided with a copy of the *Operational Guidance Note for Libya* dated 7 September 2012. A number of other background documents are also contained within the respondent's bundle although I was not directly referred to any of those.
13. In reaching my findings in this appeal it is not possible to separate out precisely the material concerned with the factual issue of the appellant's claimed membership of the Mashashiya tribe and the risk to him, if any, on return. In fact, it would be artificial to do so. In particular, Mr Joffé's report, as will become clear shortly, intertwines the two issues.
14. In his asylum interview on 18 May 2011 at question 12, the appellant says that, "Originally I am Amazige ethnicity, Berber. My tribe is Mushushi". The reference to the tribe "Mushushi", it is accepted, is a reference to the differently spelled tribe referred to in the background documents as "Mashashiya" and "Mshashiya". In his statement submitted at the First-tier Tribunal the appellant says at para 24 (page 1F of app's FtT bundle: "The name of the tribe I am from is called Yefran. My surname indicates that I am from that tribe." Because of the need for anonymity, I will refer to the appellant's name hereafter as "S".
15. The appellant then goes on to say that if he moved elsewhere in Libya, his family name would inform others about which tribe he is from. In his statement dated 3 December 2012 submitted for the Upper Tribunal hearing (page 75 of the app's UT bundle) the appellant explains his earlier evidence about his tribe and his name linking him to that tribe at paras 1-6:
1. My name is [Z N S]. I am providing this statement to further explain the issue of my tribe.
 2. I am aware that my Appeal Statement which I signed on 26 March 2012 stated at paragraph 24 that my tribe is Yefran.

3. In Libya, when we were asked about our tribe we can say Yefran or Mashashiya. Everyone from my family originate from Yefran. There are other tribes that originate from Yefran, but one thing that we all have in common is that we are all Berber.
 4. When I stated that my tribe is Yefran, I did not think it was important to make a distinction between Yefran and the precise name of my tribe. I thought that by informing my adviser that my tribe is Yefran, it would be easier for her to research my case because this place is easily identified on the map of Libya. The Mashashiya tribe is the biggest tribe in Yefran. Yefran is also one of the biggest cities in the mountainous region of Nafusa, and is located about 130-140 kilometres from Tripoli.
 5. I wish to reiterate the information that I provided during my asylum interview. In response to Q.A 12, I responded that originally I am of Amazighi ethnicity, and a Berber. My tribe is Mashashiya (spelt Mushushi in the interview record).
 6. My surname '[S]' will identify me as being from the Mashashiya tribe. It will also identify me as being the family member of my brother and my cousin who were directly responsible for carrying out orders under the Gaddafi government. I believe that I will be immediately killed if I am returned to Libya, not directly because of my tribal affiliation, but because of association with my brother and my cousin."
16. As part of her submissions, Ms Knorr relied upon the appellant's evidence that he was from the Mashashiya tribe and that that tribe was pro-Gaddafi. His name would link him with that tribe and if he moved elsewhere it would become known that he was from that tribe. She relied upon the background evidence that, she submitted, demonstrated that members of that tribe were at risk but, in this case, she submitted the appellant would personally be at risk because it would draw attention to his history of his family's (and indeed his own) involvement with the Gaddafi regime and put him directly at risk. She relied in particular upon Mr Joffé's report supporting the appellant's claimed membership of the Mashashiya tribe, the association of his name with that tribe and the risk to which that would put him on return.
17. Mr Hibbs submitted that the appellant's claim to be a member of the Mashashiya tribe was not sustainable in the light of the background evidence, in particular he also relied on Mr Joffé's report. He submitted that the appellant claimed that his tribe was "Berber". First, he submitted, on the basis of the background material, that the Berber tribes were not supporters of Gaddafi but rather were hated and persecuted by him. Secondly, he submitted that the Mashashiya tribe was an "Arab" tribe rather than a Berber tribe and this contradicted the appellant's claim that his tribe - the Mashashiya - were Berber. He submitted that I should not accept the appellant's evidence as to his tribe and, if I did, in any event that would not put him at risk as being a pro-Gaddafi tribe.
18. Despite his sustained and carefully crafted arguments, I do not accept Mr Hibbs' submissions. Mr Joffé's report is a very detailed one running to over 70 pages. It sets out, in considerable detail, the political history including the tribal allegiances within Libya. Mr Joffé is a recognised expert and Mr

Hibbs did not argue otherwise; indeed, as I have said, he relied in part upon Mr Joffé's report. It is difficult in a judgment to do justice to the extensive learning of Mr Joffé's report.

19. The appellant explains in his most recent statement that when he described his tribe as "Yefran", he did so only because that was the easiest way of describing where he had come from in Libya. Yefran is, in fact, a town where the Mashashiya tribe lives as a result of being "rewarded with access to confiscated land around Yffren" because it was "loyal to the [Gaddafi] regime" (see para 205 of Mr Joffé's report).
20. Mr Hibbs relied upon Mr Joffé's report, in particular paras 135, 139-141. These paragraphs, Mr Hibbs submitted, established that those of "Amazigh" ethnicity - which the appellant claimed to be - were "Berber". Mr Hibbs submitted that the Berber tribe were, in the words of Mr Joffé at para 31, "profoundly disliked" by the Gaddafi regime. If, therefore, the appellant claimed to be Berber, the appellant was a member of a tribe which was not pro-Gaddafi, rather it was anti-Gaddafi.
21. In my view, this argument cannot be sustained on the basis of the background material including Mr Joffé's expert report. It is quite clear from Mr Joffé's report that the "crucial tribe-state interrelations" are "complex" (see para 202 of Mr Joffé's report). What Mr Joffé's report shows at paras 203 *et seq* is that the Mashashiya tribe is "Berber in origin". Its name, however, is derived from Arabic "despite the tribe's claimed Berber origins". That latter phrase, of course, reflects the appellant's evidence. He claims that it has Berber origins. However, despite its Berber origin and despite the fact that in general the Berber tribes were anti-Gaddafi and were treated as such by that regime, the Mashashiya tribe were a tribe that was, in the words of Mr Joffé, "seen to be loyal to the [Gaddafi] regime" (see para 205 of his report). That is consistent with the appellant's evidence of his own family's position under the Gaddafi regime. His brother and cousin were part of the internal security services and his family were clearly affluent, owning a number of houses in Libya.
22. Mr Hibbs referred me to the two *COI Reports* of 7 March 2012 and 19 December 2012. As regards the 7 March 2012 report, neither refers to Mashashiya under the heading "The Main Arab Tribes of Libya" or under the heading "The Berber Tribal Groups of Libya" at para 19.04 and 19.05 respectively. At paras 19.20 and 19.21, however, under the heading "Mesheshiya" (another spelling of the appellant's claimed tribe), the March 2012 *COI Report* identified the Mashashiya as being "accused of past loyalty to Gaddafi" and which Gaddafi "imported to the area [of Zintan] decades ago" as being forced out of their homes and area because of their past loyalty:

"19.20 Npr radio in a bulletin of 9 November, 2011 *In Post-Gaddafi Libya, Enmities Continue To Smoulder*, reported on the Mushashya in the Nafusa mountains:

'In Libya's Nafusa mountains southwest of Tripoli, the sight of abandoned villages and idle fighters hanging onto their weapons gives bleak testament to the fact that not everyone in the country is ready for the violence that overthrew former dictator Moammar Gaddafi to end ...

'The village [outside the city of Zintan] used to be populated by members of a nomadic southern tribe called the Mushashya whom Gaddafi imported to the area decades ago.

'Now, a sign in the town bears a handwritten scrawl that says, 'Mushashya: Gaddafi dogs.' Local residents are hoping the pro-Gaddafi families who were driven out don't come back...

'Matoug Merdassi, an anti-Gaddafi fighter from Zintan, says the Mushashya families can never come back because when Zintan rose up against the dictator, they joined with the loyalist forces against their neighbours.

'Massoud al-Keesh, 55, says that when the uprising began, Mushashya people gave the village to the army, which used it to rocket and shell Zintan and the surrounding towns.'

19.21 The Human Rights Watch World Report 2012 - Libya, released on 22 January 2012 and covering events of 2011, noted, 'Members of the Mesheshiya tribe in the western mountains, accused of past loyalty to Gaddafi, also reported harassment and revenge attacks.'

23. Those passages are entirely consistent with, and supportive of, the appellant's claim that his tribe, the Mashashiya, are perceived as pro-Gaddafi despite his claim that the tribe has Berber origins and that there is widespread violent targeting of them (and other pro-Gaddafi).

24. Turning to the December 2012 *COI Report*, again, no specific reference is made of the Mashashiya tribe in the catalogue of tribes set out at section 19 headed "Ethnic Groups". However, at para 19.10 the report refers to the tribes from Zintan as having "targeted Mashashiya towns, perceived as loyalist". That it, of course, consistent with the appellant's claim that his family home in Yefran was burned down. The report then goes on to identify ill-treatment of Mashashiya detainees in the following terms:

"The [International Commission of Enquiry] was able to confirm reports that Mashashiya detainees have been tortured, towns looted, and property burnt. Mashashiyans who have attempted to return to their homes have reportedly been beaten. In December 2011, Zintani thuwar reportedly shelled a town containing Mashashiya IDPs. The Military Council twice refused to allow the Commission to enter one of the towns. Nonetheless, damage was visible. Graffiti was written on the town signs, including 'Mashashiya - Qadhafi's dogs'."

25. At para 19.11, the *COI Report* goes on to refer further to the International Commission of Enquiry and states that: "The Commission finds that Zintan Thuwar have killed, arbitrarily arrested and tortured members of the Mashashiyan community ...".

26. In my judgment, those extracts from the *COI Reports* are entirely supportive of the appellant's claim to be member of the Mashashiya tribe which, although Berber in origins, was one that supported the Gaddafi regime and, as a result since that regime's fall, been subject to retribution in the form of torture, loss of lands and its members being killed.
27. That is further supported by the *Amnesty International Report* entitled, "Militias Threaten Hopes for New Libya" dated 16 February 2012 (see pages 5-30 of the app's FtT bundle). At page 12 of that report (page 16 of the app's FtT bundle) the report refers to members of the Mashashiya clan (spelt in the report as "Mshashiya") as being targeted by militia for their alleged support of Gaddafi forces during the revolution. The report is as follows:

"DETAINEES OF MSHASHIYA ORIGIN

Members of the Mshashiya and from Qawalish tribes in the Nafusa Mountain area have similarly been targeted by militias because of their alleged support for al-Gaddafi forces during the conflict. People from the Mshashiya tribe and Qawalish village are particularly targeted by militias from Zintan.

B11 is a 20-year-old soldier who originates from the Mshashiya region but lives with his parents in Tripoli. Amnesty International saw him in January 2012 soon after his release from detention when he was being treated in hospital for torture injuries and was hardly able to talk. His elder brother reported:

'On 16 January in the evening about 10 armed men with two vehicles - apparently from a militia from Zintan - came to our family house Tripoli. The armed men did not show an arrest warrant. There was a man accompanying them [who was apparently related to one of the militia men] and he accused my brother of having pulled a knife on him in an incident that occurred about seven months ago and in which no one was injured. The armed men took my brother away. The next day my father and I looked everywhere for my brother and were finally able to collect him from a detention centre near the Tripoli International Airport. After his release my brother told me that he was initially taken to a farm near the airport where he was abused. He said he was tied to a post and beaten, including on his back, legs and genitals. The armed men who abused him were apparently the same who had taken him from the house.'

28. Further, that report at page 4 (page 8 of the app's FtT bundle) states that:

"Similarly, thousands of people have been evicted or fled their homes in the Nafusa Mountains, mainly people from the Mshashiya and Qawalish tribes, as well as in Sirte and Bani Walid and remain targeted by militias because of their alleged support for al-Gaddafi forces during the conflict."

29. The threat to the Mashashiya is also referred to in the *Human Rights Watch "World Report 2012: Libya"* dated 22 January 2012 (at pages 53-56 of the app's FtT bundle). At page 3 of that report (page 55 of the app's FtT bundle) it is stated that:

“Members of the Mesheshiya tribe in the western mountains, accused of past loyalty to Gaddafi, also reported harassment and revenge attacks.”

30. The *Amnesty International Report* goes on to deal with “‘Outsiders’ Targeted” and states that (at page 23 of the app’s FtT bundle):

“In al-Zawiya, a town that also saw violent confrontations between supporters of the uprising and al-Gaddafi forces, hardened feelings against those who are known to have or are suspected of having supported the former regime and its forces have also resulted in revenge attacks and reprisals by local militias.”

31. In short, the background material refers to widespread targeting of those perceived to be pro-Gaddafi (including the Mashishya) and to their detention and ill-treatment by militia.

32. Mr Joffé sums up the position in para 215 of his report as follows:

“(215) [The appellant’s] claims must, therefore, be set against this complex tribal background, in which there have been longstanding animosities between his tribal community and surrounding tribes, some Arab (Zintan) and some Berber. His tribal group was committed to the Qadhafi regime as well, a position it has manifested even after the regime itself had been defeated and destroyed. In a similar manner, the proven loyalty of his family to the regime would certainly have facilitated family members being inculcated into the security organisations and services of the Qadhafi regime. In these circumstances, the position he adopted in February 2011 is best explained as a consequence of the intrinsic group loyalties of which he was a part, which would not have allowed him to act other than he did. In short, his tribal ethos was a major factor in encouraging him into the stance towards the revolution in Libya and towards those who sympathised with its aims that he adopted.”

33. Mr Hibbs submitted that the appellant’s surname was not consistent with his claimed tribal origin. He referred me to a Middle East News report dated October 12 2011 where a council member from Yefran described as a “predominantly Berber town” with the surname “A-S” clearly identifies himself as anti-Gaddafi. That, in itself, is not sufficient to suggest to me that the appellant’s name is inconsistent with his claimed tribal background. At para 15 of his report, Mr Joffé, although he is not explicit about it, refers to the impracticality of the appellant relocating in Libya for two reasons, one of which is that “surnames in Libya, as Mr [S] suggests, often identify tribal origins”. There is no suggestion that the appellant’s name is inconsistent with him being a member of the Mashashiya tribe.

34. On the basis of this material, I find that the appellant is a member of the Mashashiya tribe. Although that tribe has Berber origins and in general Berber tribes were and are perceived as anti-Gaddafi, the appellant’s tribe was one that was favoured by the Gaddafi regime and aligned with it. The tribe gained lands and other social and economic benefits entirely consistent with the appellant’s family’s position in Libya before the fall of the Gaddafi regime. I find that members of the Mashashiya tribe are perceived as pro-Gaddafi.

35. In the light of that finding, what, if any, is the risk to the appellant on return to Libya. I have already set out some of the background material showing the serious ill-treatment of those perceived as pro-Gaddafi, including members of the Mashashiya tribe. In this appeal, Ms Knorr submits that if the appellant relocates within Libya, both his tribal origins (in part because of his name) and his family's involvement with the Gaddafi regime and the appellant's own involvement with the Gaddafi regime will eventually emerge and, as a consequence, he will be subject to treatment contrary to Art 3 and, possibly, Art 2 of the ECHR by anti-Gaddafi militia. Ms Knorr relied upon Mr Joffé's report, in particular his conclusions at para 216 but also his letter dated 17 April 2013. She submitted that the anti-Gaddafi militia were widespread throughout Libya and the government was unable to provide a sufficiency of protection. She relied upon, in particular, paragraphs 79-80, 87 and 110. At para 110 she drew attention to Mr Joffé's view that the "Zintan and Misurata militias remain as effectively independent powers within the state". The background material demonstrated, she submitted, that the Zintan were a major militia in Libya and that they targeted pro-Gaddafi individuals including members of the Mashashiya tribe.
36. Ms Knorr, in her skeleton argument, referred me to background documents in the appellant's FtT bundle at pages 2-3, 6-8, 14, 21, 23, 26, 36, 39, 41, 47, 53, 55, 56, and the appellant's Upper Tribunal bundle at 78, 88, 91, 121. She submitted that there was extensive evidence that suspected Gaddafi loyalists are targeted by the militia who operate with impunity in Libya. Further, there was extensive evidence, she submitted, that members of the Mashashiya tribe are specifically targeted, referring to the appellant's FtT bundle at pages 8, 16, 22-23, 37, 38, 55. Finally, she referred me to para 3.7.15 of the Home Office's *Operational Guidance Note for Libya* dated 7 September 2012 which stated that:
- "... given that those perceived to be supporters of the Gaddafi regime cannot access effective protection from the interim government and that torture is being carried out by officially recognised military and security entities, it is unlikely that a claimant of this profile will be able to internally relocate in order to escape the risk of persecution."
37. The reference to "a claimant of this profile" is to "perceived Col. Gaddafi supporters and fighters" (see para 3.7.13).
38. Ms Knorr submitted that, to the extent it was suggested by Mr Hibbs that the appellant could relocate to Benghazi, there was nothing in the evidence to suggest that the reach of the militia and risk to the appellant did not extend there.
39. I begin with Mr Joffé's conclusions in his report at para 216 as follows:
- “(216) I am now in a position to respond to specific questions that have been put to me. These cover issues of the risk of return, sufficiency of protection and possibilities of internal relocation. I also comment on how knowledge of [the appellant's] participation in the February 17, 2011 demonstration might have become public knowledge in Libya.

Quite apart from [the appellant's] specific involvement in events of the Jabal Nafusa, there are many generic risks and risks associated with social status throughout the country. These have persisted and have shown little hope of improvement since the end of the civil war in late October 2011.

- (a) There are undoubted risks upon return to Libya. As described above, security at present is highly fragmented and individual security dependent on purely arbitrary behaviour from the many militia that still operate there. Even formations ostensibly under government control actually operate with their own separate chains of command, even if their formal commanders are army officers. There is still no proper process of law, despite attempts to render the courts independent of the state, and detention services are still largely in the hands of independent militias. A person accused of support for the former regime cannot, therefore, anticipate objective treatment by the Libyan state, in accordance with due process of law.
- (b) Nor can the Libyan state provide a sufficiency of protection to persons accused of political or criminal offences linked to the previous regime. It simply lacks the forces by which this could be done and, until the security conundrum is resolved, this situation will persist. It is difficult, from the anodyne statements made by officials in Tripoli, to judge just how poor security in Libya really is. However, the continued existence of over 350 militias and of militias ostensibly disbanded, such as Ansar ash-Shari'a and Ansar ed-Dine – both with links to al-Qa'ida – is evidence enough of the real state of security inside the country.
- (c) Internal relocation is, in theory, possible. However, it should be noted that Libya essentially consists of two urban complexes and a rural hinterland which is currently highly unstable. In the urban complexes of Tripoli and Benghazi considerable damage was done to housing, so there is now a housing shortage and there are major problems of distribution of food and goods. So there are severe practical problems of relocation, quite apart from the arbitrary behaviour of the militias. In general, in practice, relocation is not a viable option unless an individual has family located at the site of relocation which can help in an individual's or family's relocation process. By definition, in [the appellant's] case, this will be virtually impossible because of the suspicions levelled against the Mashashiyya and against [the appellant's] family for their past links with the Qadhafi regime. Burglary is a growing threat in all urban centres and, in the hinterland, robbery, carjacking and indiscriminate killings are constant threats, to such a degree that Fezzan has been placed under martial law.
- (d) [The appellant's] role in identifying ringleaders amongst the demonstrators in the Djabal Nafusa will have been very easily established by demonstrators and rebels alike. Firstly, his family was well-known in the region, secondly, it was well-known as sympathising with the Qadhafi regime, according to [the appellant's] own statements. Thirdly, his brother and cousin were also known to have been involved in the security services – indeed, his cousin appears to have been killed in this connection subsequent to [the appellant's] activities. Fourthly, [the appellant's] tribe, the Mashashiyya, was also known as being supporters of the Qadhafi regime. In such circumstances, the

arrest of ringleaders in demonstrations in which [the appellant] was known to have taken part would have been bound to have attracted suspicions towards him as a source of information that had led to the arrests. It seems to me that, irrespective of [the appellant's] own volitions, he would have suspected of betraying those known to be opposed to his interests and beliefs on those grounds alone."

40. Although, as Mr Hibbs pointed out, Mr Joffé states at para 216(d) that internal relocation is "in theory possible" for the appellant, Mr Joffé gives, in my judgment, convincing reasons as to how it is likely that the appellant's background, which puts him at risk from militia opposed to Gaddafi, might surface.
41. Mr Joffé also records the inability of the Libyan government to control and provide a sufficiency of protection against the "independent militias". That latter point reflects what Mr Joffé says at para 110 that militia, such as the Zintan, are "effectively independent powers".
42. At para 15 Mr Joffé refers to the militia from the area of "Jabal Nafusa" which includes the town of Yefran and where the appellant assisted his brother by photographing and establishing the addresses of demonstrators. There, Mr Joffé comments that those militia are: "widespread throughout Libya, given the highly fragmented nature of the security situation in Libya". In that paragraph, Mr Joffé goes on to state:

"Even if he were to avoid direct contact with the militias, other security representatives might well recognise his origins from his name and therefore treat him as hostile, irrespective of what his personal activities might have involved."
43. Mr Joffé returned to the potential risks, if any, to the appellant, as a former regime loyalist or member of the Mashashiya tribe in his letter dated 17 April 2013. There, he refers to the "ample evidence" of attacks on tribal members, particularly members of tribes linked to the former regime and also to the inability of the Libyan government to control or dismantle the militia. Mr Joffé said this:

"... whilst there is ample evidence of attacks on former regime loyalists, identifying attacks on members of a particular tribe is far more difficult because reports of such attacks normally do not mention tribal affiliation.

However, having said that, there is also ample evidence of attacks on certain tribal members, particular the members of tribes linked to the former regime - the Qadhadhfa, the Warfalla and the Maghraha. The same has been true of tribes known to have been particularly loyal to the regime - the Touareg (who were expelled from Ghadames for allegedly forming part of the regime's forces). The Tawargha (who have been expelled and brutalized from Tawargha in their tens of thousands by the Misurata militia for the same reason, an expulsion that has attracted the attention of the United Nations, the Warshafanna, now victimized by the Zuwara militia and the Mashashiyya who have been particularly targeted by the Zintan militia. I cite below a typical case from a recent report by the International Crisis Group, perhaps the most respected of the human rights monitoring organisations, alongside Amnesty International and Human Rights Watch.

The citation forms a footnote (No: 92) to the main report and relates to a comment in the main body of the text on page 22 as follows:

...a core problem plaguing the judicial system is the virtual collapse of the state security apparatus and the widespread availability of weapons. Armed groups that emerged victorious simultaneously took on the roles of police, prosecutors, judges and jailers. Armed brigades set up investigation and arrest units; drafted lists of 'wanted' (*matlubin*) individuals; set up checkpoints or forced their way into homes to capture presumed outlaws or people suspected of aiding the former regime; and, in some cases, ran their own detention facilities.

In implementing their policy, the armed brigades went after a large number of suspects. The mere possession of pro-Qadhafi songs or photographs saved on a mobile telephone often justified immediate detention, as did hailing from a town or community accused of siding with Qadhafi forces during the war.

That citation would seem to respond to your client's generalized fears very precisely and reflects the current situation in Libya, even though many of the specific examples it cites refer to the recent past. The Libyan government, as I explained in my main report, is still quite incapable of controlling or dismantling the militias and the militias are still the main force using violence or the threat of violence to ensure public order and to mete out their own variant of 'justice'. Even the bodies that it claims to control, such as the Supreme Security Committee forces, which are operated under the aegis of the Ministry of the Interior to carry out the responsibilities of the police, or the Libyan Shield forces, in theory under the control of the Ministry of Defence to collaborate with the Libyan army, are actually made up of the major militias which - in reality - respond to their own command structures and not those of the Libyan government. The result is hundreds of people from for instance, Bani Walid, detained in Misurata simply because they were members of the Warfalla (footnote 91 in the ICG report cited above).

More striking, as far as your client is concerned is the account contained in footnote 92 to this report, which I quote in extenso below:

Emhamed Ali Mohammed Elaheemer, an elderly man of the Mashasha tribe, which has a long history of communal tensions with Zintan, said that his son, Fathi, was killed after being tortured in captivity at the end of 2011. His story is a rare insider's account of torture in detention. Fathi reportedly disappeared on 5 October 2011, and two days later armed men showed up at his Tripoli home demanding that his brother Youssef follow them back to their headquarters. Youssef complied and discovered that Fathi, who had been abducted on his way home, also was being held at the brigade's headquarters. 'Youssef said that they gave him electric shocks and that later Fathi was brought in and tortured there in front of him in order to force Youssef to reveal the names and addresses of his brother's friends,' the father said. Since Youssef said nothing, 'they took Fathi outside the room and threatened him with something other than beating, and when they brought him back in the room, Fathi started to confess without even waiting for the questions to be over.' Youssef was released but they heard nothing about Fathi for days. '50 days after his arrest we found him dead in Tripoli's central hospital. All over his body were signs of torture'. Crisis Group interview, Emhamed Ali Mohammed Elaheemer, Sghegha 12 July 2012.

There is, in effect, abundant evidence of the victimization and persecution of groups alleged to have supported the Qadhafi regime. Human Rights Watch,

for instance, published a major press release on the case of Tawargha as recently as March 20, 2013 in which the organisation called for United Nations Security Council intervention after the chief prosecutor of the International Criminal Court warned the Council in her last report in November 2012 that the treatment of the population of the town might amount to collective punishment and warrant a reference to the Court itself. It seems to me that, in the light of the material cited above and the copious evidence now generally available of the increasing victimization of supporters of the former regime, your client has legitimate concerns about his safety upon return. It might finally be noted that Libya's General National Congress – the country's interim parliament, is currently discussing a law which it is very likely to pass, which would exclude from all public function anybody who had had formal or informal engagement with the former regime. The Personal Isolation Law is, in effect, a draconian piece of legislation that will exclude tens of thousands of Libyans from public life in the future."

44. In reaching my finding I also bear in mind the background material I referred to earlier in relation to the Mashashiya tribe. In my judgment, the background evidence establishes a high level of insecurity in Libya. It also establishes the free range which the anti-Gaddafi militia have in Libya which is beyond the control of the Libyan government. As the Amnesty International document entitled "Libya: 'out of control' militias commit widespread abuses a year from uprising" dated 16 February 2012 (at page 2 of app's FtT bundle): "armed militias operating across Libya commit widespread human rights abuses with impunity, fuelling insecurity and hindering the rebuilding of state institutions ..." That report refers to the militia committing, "widespread and serious abuses, including war crimes" against "suspected Al-Gaddafi loyalists, with cases of people being unlawfully detained and tortured – sometimes to death."
45. It is unnecessary to cite further like material to which I was referred. I have already earlier in this determination, referred to background material showing the targeting of Mashashiya because they are perceived as pro-Gaddafi (see in addition, Amnesty International, "Militias Threaten Hopes for New Libya" dated 16 February 2012 at pages 16 and 22-23 of the app's FtT bundle). That is, in reality, a facet of the risk faced by all those perceived as pro-Gaddafi.
46. In my judgment, if the appellant is returned to Libya there is a real risk that outside his home area that through his name or otherwise by enquiry his tribal background will become known. The appellant cannot be expected to lie about his background (see HJ (Iran) [2010] UKSC 31).
47. The background evidence demonstrates the widespread reach of anti-Gaddafi militia and that they commit serious human rights abuses including torture, detention and killing of those who are perceived as pro-Gaddafi.
48. I reject the submission that Benghazi is a safe haven for those perceived as pro-Gaddafi. Mr Hibbs recognised, in his submissions, that any suggestion that Benghazi was a safe place was not his strongest point. The evidence does not support any differentiation between Benghazi and other areas outside Tripoli. Repeating what I said in my earlier decision,

the *Amnesty International Report* (at pp2-30 of the app's FtT bundle), to which I referred above, was in part based upon research carried out in Benghazi (see page 9 of the app's FtT bundle). The widespread reach of the anti-Gaddafi militia does not exclude Benghazi.

49. There is a real risk that the appellant's family and his own history will be discovered. There is a real risk that he will be perceived as a pro-Gaddafi supporter (which of course he was) by virtue of his tribal and family background. There is a real risk that his (and his family's) involvement with the Gaddafi regime (which the respondent classifies as amounting to 'war crimes') will become known. There will, as a consequence, be a real risk of serious harm to the appellant or even his death at the hands of anti-Gaddafi militia.
50. Further, the background documents and Mr Joffé's report establish, in my judgment, that these militia are, in effect, "a law unto themselves". In my judgment, the Libyan government is unable or unwilling to control them and provide those who would be at risk from them with a "sufficiency of protection" as required by international law (see Art 7 of the Qualification Directive and *Horvath v SSHD* [2001] 1 AC 489). The latter is, in fact, expressly recognised in the UKBA's own *Operational Guidance Note* dated 7 September 2012 at para 3.7.15 which I set out above.
51. Given the appellant's tribal and personal profile and given the risk of that being identified, I am satisfied that on return to Libya, not only in his home area but throughout Libya, there is a real risk that he would be subject to serious ill-treatment contrary to Art 3 of the ECHR or a real risk of being killed contrary to Art 2 of the ECHR.
52. For these reasons, the appeal is allowed under Arts 2 and 3 of the ECHR.

Decision

53. The First-tier Tribunal's decision to dismiss the appellant's appeal on asylum and humanitarian protection grounds stands.
54. The First-tier Tribunal's decision to dismiss the appellant's appeal under Arts 2 and 3 of the ECHR involved the making of an error of law. That decision cannot stand and is set aside.
55. I remake the decision allowing the appellant's appeal under Arts 2 and 3 of the ECHR.

Signed

A Grubb

Judge of the Upper Tribunal