

Heard at Field House
On 20 May 2004
Written 20 May 2004

IMMIGRATION APPEAL TRIBUNAL

Date Determination Notified

27 May 2004

Before

Mr S L Batiste (Vice-President)
Mr J Perkins (Vice-President)
Mr G H Getlevog

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Respondent

DETERMINATION AND REASONS

1. The Respondent is a citizen of Libya. The Appellant appeals, with leave, against the determination of an Adjudicator, Mr D R Garratt, allowing the Respondent's appeal against the decision of the Appellant on 13 August 2003 to issue removal directions and refuse asylum
2. Ms R Brown, a Home Office Presenting Officer, represented the Appellant. Mr R Arkhurst represented the Respondent.
3. The Respondent arrived in the UK on 15 April 2002 and applied for asylum on the same day. The Adjudicator, who heard the appeal on 27 November 2003 and prepared his determination on 8 December 2003, reached properly reasoned and comprehensive adverse credibility findings concerning the factual basis of that claim. However he went on to conclude that, as a returned asylum seeker who left Libya illegally, the Respondent would be at real risk of ill-treatment amounting to persecution. In reaching that conclusion he had before him and considered a report on Libya dated 25 March 2003 by the Dutch Immigration Authorities.
4. Although the Adjudicator was unaware of this, a full legal panel of the Tribunal chaired by the President was considering this precise point with a view to providing country guidance, in much the same way as it had previously done, with the approval of the Court of Appeal, in **SK (Return – Ethnic Serb) Croatia* [2002] UKIAT 05613** and in other subsequent cases. The Tribunal hearing took place on 29 October 2003 and the determination was promulgated on 17 December 2003. In that case the Tribunal took into account not only the material that was before the Adjudicator in

this appeal but also had the benefit of a wider range of evidence. It conducted a careful analysis of the country evidence as a whole, including the advice of UNHCR. The Tribunal's key conclusions were

“It is plain that people who are suspected of serious involvement with anti-Libyan political groups are at risk in the event of their return. Then it is argued that there is evidence before us that this risk extends to everyone because the act of seeking asylum abroad is seen as an act against the government of Libya. It is plain that this cannot be right. The Dutch report shows people who have been returned as failed asylum seekers now going about their business in Libya. They had not being persecuted on their return and are not persecuted now. If it were the case that every failed asylum seeker was risk there would be no examples of people being returned safely. The examples of people being seriously ill treated all appear to relate to those who have been involved, or at least seriously suspected of being involved, in serious political activity or are radical Islamic supporters.

It must be the case that the bald assertion that any returned asylum seeker will be persecuted because they will be perceived as someone taking a stance against the government is wrong.”

5. Ms Brown argued that the only reason given by the Adjudicator in this appeal was that he would be at risk as a failed asylum seeker. The Adjudicator had rejected his claim of involvement in any activities that could arouse the adverse attention of the Libyan authorities. His assessment of the significance of the Dutch report was wrong. This appeal should be allowed in line with E Libya. Indeed there was further evidence since E Libya was decided confirming its conclusions. A report by Amnesty International dated 27 April 2004 reported on the first visit in many years by representatives of that organisation. It recorded a speech by Colonel Gaddafi to the Supreme Council of Judicial Bodies on 18 April 2004 in which he called for a number of legal and institutional reforms, in response to issues raised by Amnesty International. The report also noted that during 2003 international travel restrictions on thousands of Libyan nationals had been lifted and that the Libyan authorities were embarking upon a policy of actively encouraging Libyan nationals residing abroad to return to Libya with guarantees that they will not face persecution after return. Against this, they reported one case where a Libyan national, Mustapha Krer, who returned in May 2002 after assurances from Libyan officials abroad that he could returned safely, was arrested at the airport and had been charged with affiliation to the Libyan Islamic Fighting Group. Ms Brown submitted that these developments reflected the view taken by the Tribunal in E Libya on the risk on return.
6. We invited Mr Ackhurst to explain to us why E Libya was wrongly decided, or whether there had been a change of circumstances in Libya requiring a review of it, or whether there were any other reasons why we should not follow E Libya on facts of this appeal.
7. He argued first that the Adjudicator was entitled to make his decision at the time he did on the basis of the evidence before him, even though the situation may have changed subsequently. However there is no validity in this submission. The Adjudicator had before him the Dutch report and the conclusions he reached from it were plainly wrong, having regard to the analysis and reasoning of the Tribunal in E Libya. In any event, the Court of Appeal in **Subesh & Others [2004] EWCA Civ 56** has recently given guidance to the Tribunal concerning the proper approach to be taken by it to challenges against an Adjudicator's findings. In paragraph 43, Laws LJ

stated it as follows.

“In every case the Appellant assumes the burden of showing that the judgment appealed from is wrong. The burden so assumed is not the burden of proof normally carried by a claimant in first instance proceedings where there are factual disputes. An Appellant, if he is to succeed, must persuade the appeal court or tribunal not merely that a different view of the facts from that taken below is reasonable and possible, but that there are objective grounds upon which the court ought to conclude that a different view is the right one. The divide between these positions is not caught by the supposed difference between a perceived error and a disagreement. In either case the appeal court disagrees with the court below, and indeed may express itself in such terms. The true distinction is between the case where the court of appeal might prefer different view (perhaps on marginal grounds) and one where it concludes that the process of reasoning and the application of the relevant law, require it to adopt a different view. The burden which an Appellant assumes is to show that the case falls within this latter category.”

8. We find that the Appellant has shown us that this is a case where the process of reasoning and the application of the relevant law, requires us to adopt a different view from that taken the Adjudicator. We adopt E Libya and its reasoning and conclusions.
9. Mr Arkhurst then submitted that the Amnesty report showed that there was still some risk to returnees such as Mr Krer, who had been arrested and charged despite having assurances that he could return safely. However the situation of Mr Krer is very different, in that he was suspected by the authorities of having links to an Islamic militant organisation. The Tribunal in E Libya fully recognised that people who were suspected of activities against the Libyan regime would still be at risk and should not be returned. In this appeal however the Adjudicator has reached a comprehensive adverse credibility finding concerning any such activities by the Respondent, which has not been challenged on his behalf. We conclude therefore that there is no real risk that the Respondent would face ill-treatment amounting to persecution or a breach of Article 3 on return, bearing in mind that he will be returned as a failed asylum seeker who has been out of Libya now for some two years and has not established that he is of any adverse interest to the Libyan authorities as a consequence of any activities in or outside that country.
10. Accordingly and for the reasons given above this appeal is allowed outright, the Adjudicator's decision to allow the asylum and Article 3 appeal is set aside, and the Appellant's original decision is upheld.

**Spencer Batiste
Vice-President**