



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

Appeal Number: AA/03029/2015

THE IMMIGRATION ACTS

**Heard at Bradford
On 29 January 2019**

**Decision & Reasons Promulgated
On 12 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**NJM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Capel, instructed by Duncan Lewis & Co

For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 23 November 2017, Upper Tribunal Judge Taylor found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. Her reasons for so finding were as follows:

“2. The appellant is a citizen of Egypt born on 7th November 1995. He arrived in the UK on 17th January 2015 and claimed asylum on the same day. He was refused on 16th February 2015 and placed in the detained fast track. His subsequent appeal was dismissed but that decision was subsequently set aside by the President of the First-tier Tribunal on 6th October 2015. The appeal then came before Judge Batiste.

3. The basis of the appellant's claim was the risk which he said that he faced on return to Egypt of unlawful killing. The judge accepted that there had been a blood feud, and indeed that the appellant had been ill-treated by the police as a consequence of being caught up in the feud as he claimed. He also found it credible that in 2011 there may have been attempts to exact further revenge on the appellant's family, either by shooting at the household or by attempting kidnaps. However he rejected the claim that the feud had continued since 2011 and consequently was satisfied that the appellant was not at risk on return due to any form of blood feud.

4. The judge recorded that the second limb of the appellant's claim was that he faces an Article 3 risk due to his failure to conduct military service. He claimed that he had left Egypt in June 2014 and was due to carry out military service on 1st August 2014. The judge said that he had not been provided with any copy of the letter setting out that requirement, evidence which could have been made available.

5. He then wrote as follows:-

"37. I note that conscription usually takes place when someone is 18 years of age but people can enlist from the age of 16. While it is possible for a delay for people studying, for the reasons I have indicated, I do not accept the appellant's account that he was studying on an internet course from his home between 2011 and 2014. As such I am not satisfied on the evidence that the appellant has not already completed his military service. This view is supported by my general credibility issues with the appellant's account. As a result I am not satisfied that the appellant will be at risk of imprisonment on return due to his failure to undertake military service.

38. As such the issue of treatment in prison does not arise. However I have considered the good deal of material relating to the treatment people receive in Egyptian prisons. This is both on video and in other background materials. I accept that these illustrate that the conditions in Egyptian prisons leave a great deal to be desired. It is clear that there is overcrowding, on occasion severe ill-treatment and there have been deaths in custody. However I do not accept that the general treatment that someone would face for evading the draft (given the relatively short sentence likely to be imposed) reaches the threshold necessary to engage Article 3. As a result even if the appellant did demonstrate that he was a draft evader (which he has not) Article 3 would not be engaged."

6. On that basis he dismissed the appeal.

The Grounds of Application

7. The appellant sought permission to appeal on the grounds that the judge had reached a conclusion that the appellant had already completed his military service in a manner which was procedurally unfair.

8. It had never been a part of the respondent's case that the appellant had completed his military service and/or voluntarily enlisted. He had given evidence that he had studied at home during

the relevant period, but at no stage was it put to him that the evidence was relevant to his claim not to have undergone military service. The questions relating to what he was doing at that time were asked in the context of how he had managed to avoid harm emanating from the blood feud. Moreover, the questions put in cross-examination implicitly accepted that the appellant had not undergone military service, for example asking whether it would be open to him to pay a fine in order to avoid prison for evasion.

9. Accordingly, the appellant was given no opportunity to address the issue. Whilst it is for the appellant to prove his case he was entitled to know what the case against him was, either as set out in the refusal letter or in cross-examination or, if it has not been dealt with there, by being raised by the judge.

10. The error was material because his findings with respect to prison conditions were insufficiently reasoned given the objective evidence before him.

11. Permission to appeal was initially refused but granted by Upper Tribunal Judge O'Connor on 13th September 2017.

Consideration of whether there is an Error of Law

12. Mr Diwyncz accepted that this case needs to be looked at again.

13. First, the appellant was not on notice of the fact that the judge might conclude that he had already completed his military service because it was never put to him either in the refusal letter or under cross-examination or by the judge himself.

14. Second, this is not a case where the appellant's account has been rejected in its entirety. Indeed the basis of his claim, namely the blood feud and the ill-treatment which he suffered in consequence, was accepted. This decision cannot therefore be saved on the basis that the judge had disbelieved the entire account and was therefore entitled to reach the view that his claim to fear the Egyptian authorities on return as a draft evader should be rejected on the grounds that he was a person who was generally untruthful.

15. The error is material because, both in general terms, caution should be exercised in concluding that such a procedural irregularity would have made no difference, and more importantly, the judge did not consider the case law which was put before him, particularly *Mursic v Croatia* [2016] ECHR which held:-

“137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space”.

16. There was evidence of severe overcrowding in Egyptian prisons with which the judge did not engage.

Decision

17. The original judge erred in law. His decision is set aside.

Directions

18. It was agreed between the parties that the case should remain in the Upper Tribunal.

19. No challenge has been made to the judge's findings of fact in relation to the blood feud.

20. At the next hearing findings of fact will be made as to whether the appellant has already completed his military service and whether, if he has not, he would be perceived as a draft evader on return to Egypt. If he was so considered, it will have to be decided what the consequences for him will be.

21. The parties are directed to adduce all evidence upon which they seek to rely seven days before the hearing to be served on both the Tribunal and the other party.

2. Following the making of a transfer order, I conducted the resumed hearing at Bradford on 29 January 2019.
3. At the resumed hearing, the appellant gave evidence in Arabic with the assistance of an interpreter. He was cross-examined by Mrs Pettersen, who appeared for the Secretary of State. I heard submissions by both representatives; Ms Capel of counsel appeared for the appellant. I reserved my decision.
4. The issues remaining to be determined in this appeal in the Upper Tribunal are limited. The First-tier Tribunal's findings regarding a claimed blood feud were ordered to stand by Judge Taylor. I have considered whether the appellant left Egypt legally or illegally, whether he would be prosecuted and imprisoned as a draft evader upon return to Egypt and whether the conditions which he would encounter on prison and in Egypt would constitute a breach of Article 3 ECHR.
5. Dealing with the last question first, Mrs Pettersen told me that the Secretary of State agreed that, if he is imprisoned for draft evasion, the appellant will be subjected to conditions in breach of Article 3 ECHR.
6. Secondly, having considered the submissions very carefully and having also examined in detail the evidence upon which the appellant relies, including the expert evidence, I find that, whether or not the appellant left Egypt legally will have no material impact upon the likelihood that he will be perceived as a draft evader and prosecuted as such on return. Much of the cross-examination of the appellant at the resumed hearing was taken up with a discussion of his passport. The appellant claims to have lost the original passport *en route* to the United Kingdom but he had retained a photocopy. As Mrs Pettersen pointed out, the photocopy indicates that the passport remains valid until 2020. This raises the question as to whether

the appellant needed to leave Egypt illegally given that he had a valid passport at the time of his departure. The appellant claims that he had to apply for an exit visa and that this had been denied by the military authorities. He therefore had to leave illegally.

7. Whatever the truth, it would appear from the expert evidence that the crucial question as regards the likelihood that the appellant will be prosecuted on return is whether he had finished his studies rather than whether he left Egypt legally or illegally. The expert witness evidence indicates that the appellant will be perceived as a draft evader in any event. I do not consider that it is necessary, therefore, to make a formal finding as to whether the appellant left legally or illegally.
8. The appellant relies upon an expert report prepared by Mr Karim Medhat Ennarah of the Egyptian Initiative for Personal Rights, Cairo which is dated 25 May 2018. The expert acknowledges that he had not previously examined graduation certificates issued by the particular educational division with which the appellant claims he undertook his studies and achieved graduation specialising in carpentry and furniture making. He has, however, examined other graduation certificates and is of the opinion that the appellant's certificate is authentic. There is no evidence to suggest that the expert's assessment may be inaccurate and I accept it. The expert went on to say [15];

"The college certificate states that the appellant has passed his exams in the regular term (spring) 2014. According to his claim, he left Egypt through regular channels in June 2014 for the college certificate was even issued. As a graduate of a technical three year college and, unless he subsequently enrolled into a university or unless one of the exceptional circumstances qualify an Egyptian male between the ages of 18 - 34 exemption from service apply, the appellant would have had to serve at least 18 months after graduation as an army conscript... It is unlikely the appellant would have been able to leave Egypt through regular channels before 2016 or even 2017 because of the mandatory draft and it is impossible that he would have managed to complete his military service before 2016 or even 2017. It is therefore very likely that he has evaded military draft as stated in his claim"

9. Mr Ennarah went on to conclude:

"As the appellant is in his early 20s (within the age of military fitness) and following my assessment that it is claimed to be a draft evader is plausible (upon examination of the documents and his testimony) it is not unlikely he will be detected at the checkpoint in Egypt. But as a draft evader returning to a deportation process, you will automatically be detected port of entry, taken into custody and put on military trial unlikely sentenced to prison and an extended term of military service as further punishment after release in addition to serving his original military service term. This appears to be the most probable - if not the only probable - scenario for any draft evader returned to the country within the age bracket of military fitness."

10. As I have stated above, I am satisfied that, if the appellant is at risk of prosecution as a draft evader, it is likely the risk will arise irrespective of

how he left Egypt. Mr Ennarah is an Egyptian expert operating out of Cairo; I am not aware that he has provided expert evidence in other appeals before the IAC nor am I able to check his qualifications. However, I find his expert testimony to be both lucid and compelling. Ultimately, unless he has obtained special exemption (of which there is no evidence) the evidence indicates that the appellant will be required to explain why he has evaded military service at the very age when he would have been expected to have completed it and instead travelled to the United Kingdom to claim asylum. Only if the military authorities are satisfied that he has yet to complete his college studies is he likely to be able to escape punishment which will necessarily involve him spending time in prison where he will be exposed to Article 3 ECHR ill-treatment. I am reminded that I need to consider the evidence by reference to the standard of reasonable likelihood. Whilst I agree with Mrs Pettersen that some of the appellant's evidence left questions begging, his claim to have completed his studies, evidenced by documentation which the expert witness in Cairo considers to be authentic, would seem to be accurate. I find as a fact that the appellant has sought to evade military service by leaving Egypt, whether legally or illegally, that he remains eligible to carry out that service and that it is reasonably likely that he will face prosecution and imprisonment upon conviction draft evasion. It follows from those findings that the appellant's appeal against the decision to deny him international protection should be allowed.

Notice of Decision

11. This appellant's appeal is allowed on asylum and Article 3 ECHR grounds.

Signed

Date 2 March 2019

Upper Tribunal Judge Lane