



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/07476/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 4 July 2016

Decision and Reasons Promulgated
On 21 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**ENAS ELMAGTOF
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Mynott for Broudie Jackson and Cantor

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this

Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
3. This is a resumed hearing following a decision made by me promulgated on 11 March 2016 that the First-tier Tribunal failed to determine whether it could depart from the country guidance in AT and others (Article 15c: Risk Categories Libya) CG [2014] UKUT 318 (IAC) on the basis of the additional country material placed before it,
4. The Appellant did not attend the appeal but Dr Mynott appeared on her behalf. There was no explanation for her non attendance .Dr Mynott indicated that she was aware of the hearing date and the solicitors remain instructed. He was content to proceed by way of submissions only as he was relying on all of the documentary material before the court. Mr Harrison indicated that he was content to proceed in the absence of the Appellant.
5. At the hearing I heard submissions from Mr Harrison on behalf of the Respondent that :
 - (a) The issue to be addressed was whether the court could go behind the decision in AT.
 - (b) He acknowledged the two documents produced by Dr Mynott were of relevance: the case of MTMA in which he stated his 'provisional view' was that the authority of AT as country guidance should be removed and the June 2016 Version1.0 COI Report 'Libya : Security and humanitarian situation..
 - (c) He acknowledged that no enforced returns were being made because the FCO advice was that it was unsafe for British citizens to go to Libya so there could be no British escorts but this did not mean that a Libyan could not return.
 - (d) He accepted that given the Appellants husband and child were British citizens he was not arguing that they should return with the Appellant so the factual

basis on which the case should be addressed was that she would return alone.

(e) He accepted that Tripoli airport was still closed.

6. On behalf of the Appellant Dr Mynott submitted that :

(a) He relied on the material that was before the previous Judge together with the new bundle.

(b) He relied on the new COIS just published by the Respondent a matter of days ago. The new policy acknowledged that a number of areas in Libya breached Article 15(c) and the importance of assessing individual risk factors. Paragraph 2.4.1 acknowledged the restrictions on travel which raised the question of how someone could enter the country or travel to their home area.

(c) He highlighted and detailed those aspects of the new evidence that he had adduced which showed the escalating violence and the causal link between civilian security and the conflict.

(d) He referred to the material that was before the First-tier Tribunal that showed particular problems for women and that lone women were at greater risk in Libya.

(e) He summarised by stating that the evidence showed that there were high levels of indiscriminate violence throughout Libya. There was no safe route for the Appellant as a lone woman to even enter or travel within the country.

Legal Framework

7. Paragraph 339C of the Immigration Rules states that an applicant, who does not qualify as a refugee, will be granted humanitarian protection if the provisions of that paragraph apply. The burden of proof rests on an Appellant to satisfy me that he or she is entitled to humanitarian protection under paragraph 339 of the Immigration Rules. In essence, an Appellant will have to show that there are substantial grounds for believing that, if returned, the Appellant would face a real risk of suffering serious harm and that he or she is unable or, owing to such risk, unwilling to avail himself or herself of the

protection of the country of return. Serious harm in this context is defined as the death penalty or execution, unlawful killing, torture or inhuman or degrading treatment or punishment or a serious and individual threat to a civilians life by reason of indiscriminate violence in situations of international or internal armed conflict

8. Article 15(c) of Council Directive 2004/83/EC ("the Qualification Directive") defines serious harm within the Directive as:

“serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

9. The Court of Justice of the European Union (“CJEU”) gave judgment in Diakité (Case C-285/12) in which it was held that:

“on a proper construction of Article 15(c) of Directive 2004/83, it must be acknowledged that an internal armed conflict exists, for the purposes of applying that provision, if a State’s armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as ‘armed conflict not of an international character’ under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.”

10. The CJEU has highlighted the 'exceptional situation' needed for Article 15(c) to apply to civilians generally. In Elgafaji v. Staatssecretaris van Justitie, C-465/07 at paragraph 37, the Court made clear that, for this to be the case-

‘[...] the degree of indiscriminate violence characterising the armed conflict taking place ... [must reach] such a high level that

substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.'

11. The current country guidance case on Libya is AT and Others (Article 15c: risk categories) Libya CG [2014] UKUT 318 (IAC). It was held in AT that there is not such a high level of indiscriminate violence in Libya, within the meaning of Article 15(c) of Council Directive 2004/83/EC ("the Qualification Directive") so as to mean that substantial grounds exist for believing that an individual would, solely by being present there, face a real risk which threatens his or her life or person. It is noteworthy that it was promulgated in July 2014 but is based on country evidence up to and including November 2013. The Tribunal stated-
 - a. There were limited enforced returns at the time but what returns took place went via Tripoli International airport using scheduled airlines.
 - b. Checkpoints had more than one purpose with the militia using them to charge protection money, searching for drugs or alcohol as well as checking who was actually passing through. Not everyone was stopped as evidenced by the personal evidence of one of the experts. Road travel had improved throughout 2013 and it was now possible to travel by car throughout most of the country despite there being the possibility of harassment from militias.
 - c. The airports of Tripoli and Benghazi were for the most part safe with little immediate danger flying into them or transiting them. At the time numerous international carriers, including British Airways, Alitalia, Air France and Lufthansa, operated with a reasonable regularity.
12. In relation to the status of CG cases in SG (Iraq) v SSHD; OR (Iraq) v SSHD [2012] EWCA Civ 940 the Court of Appeal said that the CG procedure was aimed

at arriving at a reliable and accurate determination and it was for those reasons, as well as the desirability of consistency, that decision-makers and tribunal judges were required to take country guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, were adduced justifying their not doing so (paras 43 – 50).

Findings on Article 15(c)

13. I have looked at the evidence in the round taking into account all of the evidence both oral submissions and written material whether I refer to it specifically or not. In the light of my analysis of the evidence above I make the following findings
14. I am solely concerned with an appeal under article 15(c) of the Qualification Directive (2004/83/EC). All of the Appellant's other appeals have been previously dealt with by the First-tier Tribunal including her applications for asylum, articles 3 and 8 ECHR.
15. The findings made by the First-tier Judge as to her family circumstances in Libya, that she did not accept the credibility of her account, remain unchallenged. The Appellant has married a British citizen Fareid Ali and they have a baby born in November 2015. The Appellants case is that her husband and child would not return with her to Libya as it is in her husband's words a 'war zone'. Their intention, even if she were to return, would be for her to re-join her husband in the UK under the Immigration Rules and therefore I accept that they would not wish to subject their child to the risks inherent in living in Libya even on any assessment of the situation there and even if it were for a limited time. Mr Harrison furthermore did not seek to argue this case on any other basis than that the Appellant would be returning to Libya as a lone female. The First-tier Judge found that she had immediate and extended family living in the Tripoli area. That would therefore be the basis on which I assess this case.
16. I am satisfied that I have been provided with strong grounds supported by cogent evidence that conditions in Libya have significantly deteriorated such that I can depart from the guidance in AT in respect of a lone female returning to the Tripoli area which, if I were following the guidance in AT, would not have breached Article 15(c).

17. I note that AT that the case was underpinned by an assertion that there were limited enforced returns at the time and these were via Tripoli International airport using scheduled airlines. This Appellant, it was found, was from Tripoli so at the time of AT there would have appeared to be a safe route of return. That is no longer the case as Tripoli Airport shut on 13 July 2014 after extensive fighting and the Respondent in their FCO advice acknowledge on 20 June 2016 that all airports in the country are closed and some border crossings are closed which I am satisfied is a reflection of the deteriorating security situation in the country. The USSD advice talks of the danger to flights as there are anti-aircraft weapons in the hands of armed groups (page 12 Appellants bundle) No clear argument was advanced by Mr Harrison how in practical terms the Appellant could return to Tripoli if there are no flights and border crossings are closed. Even if she were able to travel overland the suggestion in the FCO that a number of border crossings are also closed and the deteriorating country situation puts the safety of alternative routes in issue and I was not told of any border crossing that would have allowed the Appellant a safe route of return. I am satisfied that there is no longer a route to Libya that does not pose an unacceptable risk and particularly one to a lone female and there is reference to the increased risk posed to women since the revolution (Page 70 AB1), in a UN document dated 15 May 2015 at page 90 of the first bundle and by militias now at page 24 of the Appellants second bundle .
18. There is clear evidence from both the Respondent and in the Appellants bundles of the increasing levels of indiscriminate violence since AT was promulgated. There was persuasive material from a number of independent organisations including the FCO at the high number of deaths and injuries amongst civilians as a result of the conflict (page 36-37 AB 2) At the time of this document, March 2015, the FCO itself conceded that the worst fighting was in Tripoli. There is also a report from Amnesty International dated 24 February 2016 that also highlights the causal link between the conflict and the indiscriminate nature of the violence.
19. The June 2016 COIS, the Respondent's own policy guidance document, produced by Dr Mynott acknowledges that the security situation generally in

Libya has deteriorated since AT was promulgated. It summarises the situation in this way at 2.3.14

“During 2015 and into 2016 multiple armed conflicts have contributed to a further breakdown of law and order. All parties to the conflicts have continued to commit violations of international humanitarian law, and abuses of human rights. Warring factions have caused multiple civilian deaths and injuries, and civilians have comprised up to 79% of casualties from the use of explosive weapons in some populated areas. Exact figures on the number of civilian casualties are not available, and the data that is available may be an underestimate, but sources have reported that out of a population estimated to be 6.4 million, there were over 1,500 deaths (of combatants and civilians) and 20,000 injured in 2015 (approximately 0.02% killed and 0.31% injured of the total population)”

20. The guidance acknowledges that some cities are more violent than others and are now likely to breach Article 15(c) but Tripoli is asserted at 2.3.15 to be less so although it goes on to say at 2.3.18:

“Even where there is no general Article 15 (c) risk, the decision maker must consider whether there are particular factors relevant to the person’s individual circumstances which might nevertheless place them at risk. Such factors might include-but are not limited to- the person’s age, gender and health.”

21. There is an HRW report dated January 27 2016 (Page 13-14 AB) which talks of a deepening political and security crisis and that included fighting in and around Tripoli:

“Forces engaged in the conflict continued with impunity to arbitrarily detain, torture, unlawfully kill, indiscriminately attack, abduct and disappear, and forcefully displace people from their homes.....

Warring factions indiscriminately shelled civilian areas, arbitrarily seized people, tortured and looted, burned, and otherwise destroyed civilian property in attacks that sometimes amounted to war crimes .”

22. In considering whether the Appellant would face a risk of indiscriminate violence I have considered all of the evidence served in this appeal. I have taken as my

starting point the findings of the Tribunal in AT and Others and but I have then considered the additional evidence that post dates that decision and that includes not only the reports on fighting but also the fact the numbers of displaced persons has increased. I have accepted that in practical terms the closure of all airports and the deteriorating security situation which is well evidenced reflects the increasing levels of indiscriminate violence. I am satisfied that as a lone woman returning even if some safe route were available would make the Appellant that much more vulnerable than a male.

23. I am satisfied that the additional evidence, post AT and Others, would result in a breach of article 15(c) if the Appellant were returned

DECISION

24. The appeal is allowed

Signed

Date 20.7.2016

Deputy Upper Tribunal Judge Birrell