



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA010992015

THE IMMIGRATION ACTS

**Heard at Manchester Piccadilly
On 19 May 2017**

**Decision Promulgated
On 1 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

**SALEH F I ELSHWIDI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chaudhry of Broudie Jackson and CantOr

For the Respondent: Mr A Mc Vitie 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. The Appellant, a national of Libya was born on 3 May 1974. The Appellants wife and 6 children are dependents in his appeal. The children's ages range from the youngest aged 3 to the oldest aged 15.
3. The Appellant appealed against the decision of the Secretary of State dated 2 September 2015 to refuse to grant a protection claim and. First-tier Tribunal Judge Heynes refused the appeal on all grounds. The Respondent refused the application because it was not accepted that he belonged to the Elshwidi Tribe and would be targeted on return; the Appellant was not in any risk categories of the then caselaw for risk on return; the Appellants claim for asylum was not made promptly; there was no other basis for a grant of leave.
4. The Appellant appealed the decision and his appeal was dismissed by First-tier Tribunal Judge Heynes. At an error of law hearing on 20 March 2017 I set aside that decision on the basis that his assessment of risk as to whether having conceded that there was such a high level of indiscriminate violence in Benghazi, within the meaning of Article 15(c) of Council Directive 2004/83/EC ("the Qualification Directive") so as to mean that substantial grounds existed for believing that an individual would, solely by being present there, face a real risk which threatens his or her life or person relocation to Tripoli was reasonable and whether such conditions existed in Tripoli. All other findings were preserved. The matter was adjourned to enable the parties to gather more up to date material.
5. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.
6. Mr Mc Vitie on behalf of the Respondent relied on the refusal letter and Mr Chaudhury relied on his bundle of documents.

The Law and Background Material

7. The Appellant bears the burden of proving that Article 15(c) is engaged by the decision. 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."

8. 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.”

9. 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.'

10. The level of violence has to be assessed by its quantity as well as by its quality.

There can be no doubt that a substantial quantity of violence is a necessity without which subsidiary protection shall not be granted. However, defining the threshold of Article 15(c) is not a simple matter of analysing quantitative data.

Three principles govern this assessment:

- a. First, the approach must be holistic and inclusive. Courts and Tribunals must take into account a wide range of relevant variables.
- b. Second, Courts and Tribunals should not limit themselves to a purely quantitative analysis of figures of civilian death and injuries etc. The

approach must be qualitative as well as quantitative. When assessing quantity and quality, courts and tribunals should bear in mind the likelihood of unreported incidents and other uncertainties.

- c. Third, building on the case law, Courts and Tribunals should look in particular to see what the evidence tells us about the indicators of situations of violence and conflict (the following is intended as a non-exhaustive list):
 - i. The ECHR 'Sufi and Elmi criteria': – the parties to the conflict and their relative military strengths and regard should be had to methods and tactics of warfare applied (risk of civilian casualties); type of weapons used; the geographical scope of the fighting (localised or widespread) and the number of civilians killed, injured and displaced as a result of the fighting.
 - ii. The ability or lack of it by the State to protect its citizens against violence (where practicable, it will assist to set out the various potential actors of protection and to address their actual role/the degree of State failure).
 - iii. Socio-economic conditions (which should include assessment of economic and other forms of assistance by international organisations and NGOs).
 - iv. Cumulative effects of long lasting armed conflicts.

11. In relation to Article 15(c) in FA (Libya: art 15(c)) Libya CG [2016] UKUT 413 (IAC) at paragraph 11 it states:

“In fact, as it seems to us, there have been numerous changes in Libya since November 2013, and that they are sufficient to render unreliable the guidance on art 15(c) given in AT. Amongst those changes are the cessation of direct flights from the United Kingdom, the ebb and flow of fighting in Libya, the rise of Daesh, and the issue of numerous reports and advice, not least by the Foreign and Commonwealth Office. It may be that some of this evidence, the last in particular, would not by itself throw any real doubt on the accuracy of the assessments in AT, but the evidence taken as a whole leads us to say that the Tribunal needs to undertake a new analysis of the art 15(c) risk”

12. In the CIG dated January 2017 at 2.3.8 and 2.3.21 it is acknowledged that the individual characteristics of the Appellant must be examined in order to determine

if there are additional risk factors and vulnerable groups include children and those with disabilities. I also note that in the UKBA Document(publicly accessible) headed Humanitarian Protection dated 2013 at Section 4 in relation to Article 15(c) it states:

“The sliding scale/enhanced risk categories If applicants do not meet the above tests, they may also be applied on a sliding scale. That is to say, the more the applicant is able to show that he or she is specifically affected by factors particular to his personal circumstances (e.g. a child or someone of advanced age, disability, gender, ill-health, ethnicity or, for example, by virtue of being a perceived collaborator, medical professional, teacher or government official), the lower the level of indiscriminate violence required for him to be eligible. “

Findings

13. I have looked at the evidence in the round taking into account all of the evidence both oral and written whether I refer to it specifically or not. The refusal letter relies on the decision in AT which is clearly out of date. No other up to date material has been provided by the Respondent although they have clearly had an opportunity to produce it. I took into account the material provided in the Appellants bundle but I am satisfied that his case is in fact largely made out on the basis of the Respondents own material set out in the most recent CIG provided by the Appellant. In the light of my analysis of the evidence I make the following findings.
14. The difficulty in making the assessment in this case is the acknowledged volatility of the situation in Libya. The decision in FA makes plain that AT is no longer good law in so far as it relates to the security situation and I must consider each case based on the background material produced and the individual circumstances of the Appellant. Humanitarian conditions in Libya it is accepted have continued to deteriorate since the fall of former President Gaddafi in 2011. There has been extensive damage to civilian homes and public infrastructure, including health, education, roads and administrative facilities, severely disrupting basic services including the provision of safe drinking water, gas and electricity. There are large numbers of IDPs. The Respondent acknowledges that the Appellant and his family could not safely return to Benghazi their hometown but the refusal letter suggests that they could reasonably relocate to Tripoli.

15. The latest policy summary by the Respondent therefore puts the case in relation to Article 15(c) in this way:

“3.1.4 However, in general, the humanitarian conditions are not at such a level as to make return a breach of Article 15 of the Qualification Directive but may do so in relation to some persons, particularly vulnerable people, e.g. displaced, female-headed households, children, persons with disabilities and the chronically ill.

3.1.5 In general the security situation across Libya is not such that a person would, solely by being present there, face a real risk which threatens his or her life by reason of indiscriminate violence. There may be particular factors relating to the individual’s circumstances that nevertheless place them at risk. Each case must be considered on its individual facts and merits.”

16. I must therefore consider on the basis of all the material before me including any factors that may be personal to the Appellant is there 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.

17. The material in the Respondents latest CIG argues that at 0.025% of the overall populations the deaths in Libya do not disclose a generalised risk of violence and indeed the figure quoted is in accordance with the figure given in November 2015 to the UN Security Council (9.2.1) and would therefore not suggest an escalation of the levels of violence either generally or specifically in Tripoli. Indeed, the CIG argues that Tripoli is less violent (2.3.19) and that while the number of civilian deaths remains unacceptably high they are focused in other areas of the country particularly Benghazi, Sirte and Derna (9.2.2) However I note that it concludes that the *trend* of the figures paints a different picture in that at 9.3.8 it states:

“The levels of violence documented by ACLED in 2016 are similar to 2015 for Benghazi, Darnah, and Surt. However Tripoli is on course, if levels of violence remain constant for the remainder of the year, to almost double its number of fatalities compared to 2015, albeit from a much lower base line compared to the other cities.”

18. I take into account that again the Respondents own CIG acknowledges the use imprecise weaponry in densely-populated residential areas in what often amounted to indiscriminate attacks, leading to civilian fatalities and damage to civilian infrastructure (9.1.2)
19. In making that assessment in relation to this Appellant it is acknowledged that it is not safe for him and his family to return to Benghazi as it accepted that the levels of violence there engage Article 15 (c). As to whether it would be reasonable for him and his family to relocate to Tripoli I take into account that he was originally from Misrata and then worked in Benghazi. He has no family or other close connections in Tripoli and originating from Misrata or Benghazi could potentially make him the subject of adverse interest within a triable society. I take into account that while the Appellant is a highly educated man he has never lived or worked in Tripoli and with the general breakdown of the Libyan infrastructure that must limit the ability, particularly of an outsider in a largely tribal society, to gain employment.
20. I am also required to take into account the fact that the Appellant has 6 children under 15 and a wife and indeed this factor is referred to in the Respondents own policy documents as justifying a 'sliding scale' to the assessment of risk ('Humanitarian Protection 2013'). The material before me makes plain that both the humanitarian situation generally and the violence puts women and children at a high risk (10.5.6).
21. The vulnerability of the Appellant and his family is significantly increased because the Appellants daughter (DOB 22 May 2006) has *"significant learning difficulties, social and communication difficulties, high anxiety levels, behavioural difficulties ...and epilepsy, which is controlled by medication..... she has a lack of awareness of how to keep herself safe -road safety, strangers etc and this puts her at risk -she is a vulnerable girl."*(page 1 supplementary bundle. She clearly has a wide range of needs that are currently met at the school she attends but it appears that stability and routine are central to her continued improvement. I note in the material in the Appellants bundle both the impact of the fighting and unrest on adult hospitals but also on children's services. I note in the UNHCR report dated 11 January 2017 at page 68 'The high level of behavioural changes

reported by parents, is a clear symptom of the chronic level the situation of instability is reaching, which seems currently not addressed by the humanitarian community.'

22. There is no single universally recognised stable government in a position to protect the citizens of Libya from the impact of this internal armed conflict either in relation to the violence or the humanitarian needs that have arisen.

23. I am therefore satisfied that taking into account all of the findings set out above and applying the sliding scale referred to by the Respondent to the Appellants own circumstances that it would be a breach of Article 15(c) to require the Appellant and his family to relocate to Tripoli.

CONCLUSION

24. On the basis of the facts found in this appeal, the Appellant has discharged the burden of proof on him to show that on his return he would face a real risk of suffering "serious harm" by reference to paragraph 339C of the Immigration Rules (as amended).

Decision

25. The appeal is allowed on humanitarian grounds.

Signed

Date 30.5.2017

Deputy Upper Tribunal Judge Birrell