



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00340/2016
PA/00566/2016
PA/00567/2016
PA/00568/2016
PA/00569/2016**

THE IMMIGRATION ACTS

**Heard at North Shields
On 9 June 2017**

**Decision & Reasons Promulgated
On 21 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**H M A
A E S S
M E S
K E S S
S E S S**

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Brakaj of Iris Law Firm

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellants because four of the appellants are children.

2. These are cross appeals. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. These are appeals by all parties against a decision of First-tier Tribunal Judge Moran promulgated on 29 December 2016.

Background

3. The first appellant is the mother of the remaining appellants. All of the appellants are Libyan nationals. On 30 December 2015, the Secretary of State refused the Appellants' protection claims.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Moran ("the Judge") allowed the appeals against the Respondent's decision on article 8 ECHR Grounds, finding that the appellants met the requirements of paragraph 276ADE(vi) of the rules, but dismissed the appeals on all other grounds. Grounds of appeal were lodged by both the appellants and the respondent and, on 20 February 2017, Upper Tribunal Judge Kebede gave permission to appeal stating *inter alia*

"2. There is arguable merit in the assertion in the appellant's grounds that the Judge arguably erred in his assessment of risk in light of the positive findings made. Arguably, furthermore, the context in which the Judge considered risks to family members differed from the circumstances in this case, but it was found that the father of the family was at risk and where the respondent would be considering the return of the family together as a unit.

3. It seems to me that the respondent's grounds in relation to the Judge's findings on "very significant obstacles" are inextricably linked to the assessment of the appellant's grounds of challenge and therefore, in granting permission to the appellant's I also grant permission to the respondent. There is, in any event, arguable merit in the assertion in the grounds that the Judge has arguably treated paragraph 276ADE(vi) as a lower threshold article 15(c) test."

The Hearing

5. (a) Mr Whitwell moved the respondent's grounds of appeal. He told me that he would be relying on SSHD v Kamara [2016] EWCA Civ 813 and referring to the respondent's own immigration directorate instructions on the interpretation of appendix FM of the immigration rules.

(b) Mr Whitwell told me that the Judge took an incorrect approach to paragraph 276 ADE(vi) of the immigration rules. He reminded me that the

second, third, fourth and fifth appellants are all children, so that subparagraph (vi) of paragraph 276 ADE(1) cannot apply to them. Their cases should have been considered under 276 ADE(1) (iv). He told me that that, in itself, is undoubtedly an error of law.

(c) He took me to [40] of the decision, where the Judge makes it clear that no submissions were made in relation to article 8 ECHR. He told me that the Judge embarked on his own assessment of article 8, which was not a ground of appeal relied on by the appellant's. He told me that the Judge's reasoning is flawed and that the Judge has not considered the relevant factors which make up article 8 private life. He told me that what the Judge considered at [40] of the decision mitigates against a breach of article 8 private life and referred me to SSHD v Kamara at paragraph 14.

(d) Mr Whitwell then took me to [41] of the decision, where, he told me, the Judge specifically records that he has not considered article 8 outside the rules, but argued that the Judge's finding at [43] appears to be a finding that the appellants will succeed on article 8 ECHR grounds outside the rules even though the five step test set out in Razgar has not been followed by the Judge and no consideration is given to section 117B of the 2002 Act.

(e) Mr Whitwell told me that these are material errors of law and urged me to set the decision aside.

6. (a) For the appellants, Ms Brakaj told me that the decision does not contain errors in relation to the article 8 ECHR assessment. She told me that [41] contains a finding which corrects any potential error in the Judge's treatment of paragraph 276ADE(1) of the immigration rules. She told with is at [40] the Judge took account of all relevant factors in finding that article 8 private life exists, and that as the Judge finds that there are insurmountable obstacles to the first appellant returning to Libya, and it is a matter of concession that the father of the children (the husband of the first appellant) is present in the UK, then the four minor appellants cannot be expected to return to Libya alone. She told me that the factors considered by the Judge at [40] are entirely consistent with what is said at paragraph 14 of SSHD v Kamara

(b) Ms Brakaj reminded me that at [20] the Judge sets out the five stage test of Razgar, and told me that the Judge followed those steps. She urged me to dismiss the respondent's appeal and allow the decision to stand insofar as it relates to article 8 ECHR grounds of appeal.

7. (a) Ms Brakaj opposed the respondent's appeal and moved the appellant's grounds of appeal. She told me that the Judge finds as a fact that the first appellant's husband would be at risk on return to Libya, and that the Judge found the appellants to be credible. Having found the appellant's to be credible, (Ms Brakaj argued that) the Judge did not give adequate consideration to the effect of return of this family as a unit. She told me that that the Judge had incorrectly interpreted the evidence of the confiscation of each appellants'

passport, and that although the Judge finds at [33] the first appellant's husband would be perceived to have links to the former Gaddafi regime, the Judge has not adequately considered the impact of that finding on the profile of each of the appellants.

(b) Ms Brakaj took me to [34] where the Judge sets out his findings of fact. She told me that the fact finding made by the Judge is inadequate. She told me that there were matters put in evidence from which the Judge has not made findings of fact despite finding the appellant's credible. She told me that the Judge's findings at [40] are an indication that there is a risk to each of the appellants on return to Libya and that the finding that the risk exists is not reflected in the conclusion that none of the appellants are entitled to refugee status.

(c) Ms Brakaj took me to [38] and [39] of the decision and told me that there the Judge makes generic findings in relation to article 15(c) of the Qualification Directive, but does not consider the individual facts and circumstances of each appellant. She told me that the lack of focused findings demonstrates that the Judge's decision in relation to the refugee Convention and article 15 (c) are flawed.

8. Mr Whitwell relied on the rule 24 notice and told me that between [37] and [39] the Judge makes adequate findings of fact. He told me that there is no criticism of the guidance in law taken by the Judge and that the Judge reach conclusions which were well within the range of reasonable conclusions available to the Judge. He took me to the terms of the appellant's witness statement and argued that some of the matters which are put to me now are not matters which were argued before the First-tier tribunal. He urged me to allow the decision in relation to the refugee Convention and article 15(c) to stand.

Analysis

9. Between [1] and [3] the Judge sets out the background to these cases. Between [4] and [7] he summarises the respondent's reasons for refusal of the appellant's protection claims. Between [8] and [10] he summarises the grounds of appeal. The first sentence of [10] of the decision records that the Judge was told that no submissions would be made on article 8 ECHR grounds.

10. Between [11] and [22] the Judge sets out the law. Between [23] and [30] the Judge summarises the evidence. The Judge's findings of fact are contained at [33] and [34] of the decision only.

11. Despite the fact that the Judge records at [10] of the decision that none of the appellants rely on article 8 ECHR grounds, and despite the fact that the notice of appeal to the First-tier did not raise article 8 ECHR grounds of appeal, the Judge states at [36] of the decision that the issues before him are

- (i) Risk on return to Tripoli

- (ii) Whether or not article 15(c) or article 3 ECHR are engaged
- (iii) Whether there are very significant obstacles to the appellant integrating on return to Libya and
- (iv) Whether there are compelling circumstances for allowing the appeals on article 8 ECHR grounds outside the rules.

12. At [33] and [34] the Judge finds that the first appellant's husband is perceived to have links to the former Gaddafi regime. At [37] the Judge finds that the first appellant's husband's profile is such that he would be at risk on return and he has been sought. Relying on AT and Others (Article 15c; risk categories) Libya (no longer a CG case) [2014] UKUT 318 (IAC) the Judge finds the none of these appellants face the same risk as the first appellant's husband. At [38] and [39] the Judge considers both article 3 ECHR grounds and article 15(c) of the qualification directive.

13. In FA (Libya: art 15(c)) Libya CG [2016] UKUT 413 (IAC) it was held that the question of whether a person is at art 15(c) risk in Libya should, until further Country Guidance, be determined on the basis of the individual evidence in the case. This decision replaces AT and Others Libya CG [2014] UKUT 318 (IAC) in respect of assessment of the art 15(c) risk. The Tribunal explained that there had been "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".

14. Although the Judge reaches his conclusions between [37] and [39] of the decision, his conclusion is not adequately supported by the brief findings of fact contained at [33] and [34]. Although the Judge finds at [34] that the first appellant encountered "problems" along with her husband in Libya, and although he finds that all five appellants no longer have their passports, those findings of fact are not factored into any reasoning to support the conclusions that the Judge reaches. The Judge makes a clear finding that the first appellant's husband (the father of the remaining appellants) would be at risk if returned to Libya, but he makes no findings about what would happen if this family were returned as a unit. The Judge appears not to consider the impact of separating this family.

15. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

16. I therefore find that because of inadequacy of findings of fact and because of the absence of reasoning to support the conclusions that the Judge reaches, the decision in relation to the protection claim appeal is tainted by material errors of law and must be set aside.

17. The Judge carried out his own assessment of article 8 ECHR grounds of appeal. He found that all five appellants succeed under paragraph 276 ADE(1) (vi). In order to meet the requirements of Paragraph 276ADE(1)(vi) the appellant must meet the following requirement,

(vi) subject to paragraph 276ADE(2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

18. None of the second, third, fourth and fifth appellants have yet reached their 18th birthday. They cannot succeed under paragraph 276ADE(1)(vi). The Judge's conclusion at [43] is clearly wrong.

19. It is at [40] that the Judge sets out his reasons for finding that there are very significant obstacles to reintegration in Libya. His findings there cannot have relevance to the second, third, fourth and fifth appellants and can only be relevant to the first appellant. At [41] the Judge makes findings that the first appellant's husband cannot return to Libya, and touches on the separation which would be forced on this family by the respondent's decision in one sentence only. A fair reading of [37] to [41] of the decision makes it clear that the Judge applies different thresholds to each of article 3 and article 8 ECHR grounds of appeal and 15(c) of the qualification directive.

20. Paragraph 276 ADE(1) relates to article 8 private life. The "very significant obstacles... to integration" test relates to an ability to re-establish and then maintain private life in the country of return. At [48] the Judge confuses the test for article 3 ECHR and article 15(c) of the qualification directive with the very significant obstacles test. In Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test) [2017] UKUT 13 (IAC) it was held that mere hardship, mere difficulty, mere hurdles, mere upheaval and mere inconvenience, even where multiplied, are unlikely to satisfy the test of "very significant hurdles" in paragraph 276 ADE of the Immigration Rules.

21. Four of the appellants are children. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that in every balancing exercise, the scales must be properly prepared by the Judge, followed by all necessary findings and conclusions, buttressed by adequate reasoning.

22. I have to find that the entire decision is tainted by material errors of law. There is an inadequacy of fact finding at [33] and [34], and, to the impartial

objective reader, it is not entirely clear what test has been applied by the Judge, nor what standard of proof has been applied, nor where the threshold lies each of the legal tests. A fuller fact-finding exercise might have resulted in a different outcome to this appeal. I must, therefore, set the decision promulgated on 29 December 2016 aside.

23. I have already found material errors of law in the fact-finding process carried out by the First-tier in the decision promulgated on 29 December 2016. I therefore find that I cannot substitute my own decision because of the extent of the fact-finding exercise required to reach a just decision in this appeal.

Remittal to First-Tier Tribunal

24. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

25. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

26. I remit the matter to the First-tier Tribunal sitting at North Shields to be heard before any First-tier Judge other than Judge Moran.

Decision

27. The decision of the First-tier Tribunal is tainted by material errors of law.

28. I set aside the Judge's decision promulgated on 29 December 2016. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle

Date 18 June 2017

Deputy Upper Tribunal Judge Doyle