



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/10222/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Manchester

Decision & Reasons

On 14th August 2017

Promulgated

On 15th August 2017

Before

UPPER TRIBUNAL JUDGE REEDS

Between

FA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, Counsel instructed on behalf of the Appellant
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

**Direction Regarding Anonymity - Rule 13 of the Tribunal Procedure
(First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellant is a citizen of Libya.

2. Both parties, with permission, appeal against the decision of the First-tier Tribunal (Judge T. Jones), who, in a determination promulgated on the 10th March 2017, dismissed FA's claim for protection.
3. The Appellant's immigration history is set out within the determination and the decision letter of the 8th September 2016. The Appellant is a national of Libya and he is married with children all of whom are Libyan citizens and are presently within the United Kingdom. In terms of his immigration history, he applied for a student Visa on 5 May 2008 valid until August 2009. He entered the United Kingdom on 27 July 2008 and then applied to further leave to remain as a student which was granted in 2009 and his leave was extended to 2010. He then made an application for a student dependent Visa and was issued from April 2010 until January 2011. He entered the UK using this Visa in April 2010. He applied for a second visa on 31 May 2011 and this Visa was issued and valid from 6 June 2011 until 31 July 2015.
4. Whilst in the UK with extant leave he made a claim for asylum on 27 May 2015. Thereafter he was interviewed on the 24th November 2015 and he provided documentary evidence in support of his claim. His claim was refused in a decision letter of the 8th September 2016.
5. The basis of his claim is set out in the decision letter and in the determination at paragraphs 11-19. In essence it was claimed that he had formed an association in Libya in order to educate people to distance themselves from the Islamic militia groups. It was common ground that he had minimal involvement with the group as he had been studying in the UK and had only spent two or three weeks in Libya since 2013 but that he had kept in touch with that particular group. The Appellant claimed that as a result of this group IS were looking for him and gave an account of them having detained and questioned his brothers and cousin and that three members of his group had died in two separate incidents.
6. The Secretary of State did not accept the factual basis of his account relating to the protection claim. The documents that he provided were considered at paragraphs 27 to 35 but it was found that those documents did not give weight to his claim. Whilst it was not accepted that he was of any adverse interest to IS, the decision letter went on to consider internal relocation at paragraphs 43 to 48 it was considered that he could relocate to another city in Libya. It was further considered that there were no substantial grounds for believing that he faced a real risk of serious harm and that he was not entitled to humanitarian protection. The decision letter also considered Appendix FM and paragraph 276 ADE and leave outside of the Rules relating to an Article 8 claim. In this respect, in the light of his individual circumstances it was decided that there were "exceptional circumstances" and that it would be appropriate to grant him discretionary leave outside of the rules for a limited period. Thus his claim for protection was refused on asylum grounds and that he was not entitled to humanitarian protection, but that it was decided to grant him

discretionary leave to remain in the United Kingdom outside of the rules until March 2019. It appears that that also applies to his family members who are his dependents.

7. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 23rd February 2017. The judge had the opportunity of hearing the evidence of the Appellant and for his evidence to be the subject of cross-examination. The findings are set out at paragraphs 31 to 48. He made reference to the Country Guidance decision of AT and Others(Article 15c; risk categories) Libya CG [2014] UKUT 00318 and set out the head note to that decision.
8. At paragraph 33 he made reference to the Home Office country information guidance dated June 2016 and at paragraph 34 cited the decision of the Tribunal in FA (Libya: Art 15 (c)) Libya CG [2016] UKUT 00413 to the effect that the country guidance case of AT was heard as long ago as November 2013 and that situation in Libya is “ever-changing”.
9. His findings of fact relating to the protection claim are set out at paragraphs 30 to 41. In summary, the judge rejected his factual claim in its entirety. It is not necessary for me to set out those findings as there is no challenge to the judge’s credibility findings in this regard in the written grounds of appeal.
10. At paragraphs 42 to 48 he considered the issue of humanitarian protection. In this context he considered the argument advanced on behalf of the Appellant that the indiscriminate violence in Libya constituted a risk which met the Article 15 (c) threshold. In reaching his conclusions, the judge at paragraph 43 rejected the Appellant’s argument that the situation throughout Libya amounted to an armed conflict that raised a risk of serious harm. He found as follows “ I do not find the country guidance decision to support this. I do not have the benefit of background material or country experts report to assist me to determine otherwise.”
11. At paragraph 44 he considered the issue of return being “unduly harsh or unreasonable”. He made reference to a FCO annual report regarding Libya for 2015 which made reference to “armed groups continue to act with impunity” and described “indiscriminate weapons fire, including shelling by Armed Forces on both sides of the national conflict, caused high numbers of civilian casualties, particularly in Benghazi, and in the suburbs of Tripoli.” He then set out the country information at paragraph 2.4.1 which referred to travel within Libya being restricted by violence and conflict. It made reference to roadblocks control points and that the south of the country was subject to checkpoints and roadblocks operated by the government by militias.
12. At paragraph 45 of the determination he noted that there were no enforced returns to Libya and that whilst there was one airport that he had been told of, but in the absence of documents from the Secretary of State, he recalled flights being very limited and intermittent given the “ever-

changing security situation". He recorded that "I take as an indication of the dangerous situation in Libya".

13. The judge made reference to the head note in FA(Libya) (as cited) and in particular, that the question of whether a person is that Article 15 (c) risk in Libya should, until further country guidance, be determined on the basis of the individual evidence in the case concluded as follows:

"48. I have considered all the individual evidence in this case, including the circumstances of the Appellant. I understand and taken account all that has been said as a difficulty with travel and checkpoints, and its overview, have read the reference noted above is to no enforced returns in light of this {52 above} is such-that whilst I am not satisfied there is an Article 15 (c) risk if he were to be returned at this time to his home area. I find that any endeavour to do so, would be unreasonable or unduly harsh - though in saying this, it has to be recognised situation is ever-changing. The Appellant and his family situation will doubtless be revisited in the due course and in light of their circumstances at the time."

14. In the notice of decision he dismissed the appeal under the 1951 Convention and the 1950 convention but stated as follows;

"I do not allow the appeal under the qualification directive, but I ALLOW the appeal due to return being unreasonable or unduly harsh for the Appellant at this time."

15. The Appellant sought permission to appeal that decision on the basis that the First-tier Tribunal Judge erred in law. It was submitted that the judge at paragraph [44 had noted from the evidence from the FCO regarding the country conditions in Libya and concluded that they were "unduly harsh and unreasonable". Furthermore, the judge found this to be an "indication of the dangerous situation in Libya" (see [45)). It was arguable that the finding that the Appellant could not return to Libya because it was "unduly harsh and unreasonable" was due to risk persecution/breach of humanitarian protection. Thus it was concluded that the determination disclosed material errors of law.

16. The Respondent also sought permission to appeal on the following grounds.

- (1) It was submitted that it was unclear on what basis the judge had allowed the appeal. Having found the Appellant did not satisfy the Refugee Convention nor the Qualification Directive, he allowed the appeal on the basis that return would be unduly harsh. It was asserted that that was error of law.
- (2) Furthermore the judge had failed to give adequate reasons as to why the Appellant would be unable to return given the

fact that he has no specific profile which would place him at any enhanced risk.

- (3) It was submitted that the judge had failed to apply the relevant case law and had set out the country guidance decision of AT and others, however in allowing the Appellant's appeal on the basis the return would be unduly harsh, he failed to apply the findings in the country guidance to his decision. The Appellant is a person with no enhanced profile and does not satisfy the refugee or humanitarian protection conventions and thus he fits within the categories of failed asylum seeker only and as such, country guidance indicates that it will be up to return safely to Tripoli and would either travel overland to his home area or relocate to another area (paragraph 15 and 21).
- (4) As the Appellant had been granted discretionary leave valid until 2019, it was submitted that the question of return at the date of hearing being unduly harsh does not arise. It is a matter for the Secretary of State to consider the point of removal.

17. On 29 March 2017, First-tier Tribunal Judge Nightingale granted permission to both parties for the following reasons:

“ the Appellant's grounds argue that the judge erred in concluding that the harshness of the conditions did not meet the qualification directive. The respondent argues the judge's reasoning is unclear and the basis upon which the appeal was allowed is unclear. The respondent also argues that the country guidance of AT and others was not followed.

AT and others have now been replaced as country guidance by FA. This ground is not arguable. It is arguable, however, that the basis upon which the appeal was allowed is unclear. The Respondents ground one is arguable.

It is also arguable that the judge failed to have regard to the “unduly harsh and unreasonable” conditions in assessing humanitarian protection. The Appellant's grounds are also arguable.

It is also arguable that the judge had no jurisdiction to allow the appeal on the basis stated.

Permission is granted to both the Appellant and the respondent as indicated above.”

18. Since the promulgation of the First-tier Tribunal's decision in March 2017, there has been a further Country Guidance decision issued by an Upper Tribunal presidential panel reported on 28 June 2017 as as ZMM (Article 15 (c) Libya CG[2017] UKUT 00263 (IAC).

19. The head note to that decision reads as follows :

“the violence in Libya has reached such high-level but substantial grounds are shown believing that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person.”

20. Since the decision of the First-tier Tribunal, and the grant of permission a letter was sent on 3 August 2017 to the Respondent making reference to the decision in ZMM (as cited) and requesting that the appeal should be allowed at the hearing on humanitarian protection grounds.

21. At the hearing before me, there was agreement between the parties that there was a material error of law in the decision of the First-tier Tribunal and that the decision should be set aside and remade by this Tribunal by substituting a decision to allow the appeal on the basis of Article 15 (c) and allowing the appeal on that ground.

22. In the light of the submissions made by the parties in their written grounds and in the agreement reached before the Tribunal, that there was a material error of law in the determination of the First-tier Tribunal, it is the case that the decision reached cannot stand and must be set aside. I am satisfied that the judge did error in law as both parties have submitted. It is plain from reading the determination and the grounds from each of the parties that there is no challenge to the judges finding that the Appellant had not demonstrated that he would be at risk of persecution for a Convention reason and thus had dismissed his claim for asylum based on the factual account given. However there was an alternative argument advanced on behalf of the Appellant which related to the issue of humanitarian protection and Article 15 (c). In this respect the judge appeared to find that the Appellant was not entitled to humanitarian protection but allowed the appeal due to return being “unreasonable or unduly harsh for the Appellant at this time” which made reference to the route of return. As the respondent submitted it was unclear how the judge could allow the appeal in those terms having found the Appellants did not satisfy the Refugee Convention nor that he was entitled to humanitarian protection. Similarly, as the Appellant submits, if the judge found, as he appeared to do that the circumstances were such that the circumstances were dangerous for returnees to Libya (having referred to the country materials and in particular, the FCO report) then he should have allowed the appeal having found an Article 15 (c) risk.

23. In the light of the decision of the most recent country guidance as referred to in the preceding paragraphs, the Appellant’s appeal will be remade. Both advocates submit that the correct course and outcome is that the appeal should be allowed on the basis of Article 15 (c).

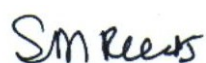
Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and remade as follows; I remake the decision in respect of Article 15 (c) by allowing the appeal on that ground.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed



Date 14/8/2017

Upper Tribunal Judge Reeds