The Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: AA/05398/2014**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On September 3, 2015	**On September 7, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MR MKBM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ficklin, Counsel, instructed by Broudie, Jackson & Cantor Solicitors
For the Respondent: Mr Harrison (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant is a citizen of Libya. The appellant first entered the United Kingdom as a student on December 13, 2009 with leave to enter until December 30, 2010. He applied for further leave to remain but this was refused and on July 20, 2011 he claimed asylum. The respondent refused this claim on June 30, 2014 under paragraph 336 HC 395 and at the same time took a decision to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on July 17, 2014 arguing that if returned he was at risk or

persecution and relocation was not possible. He also sought to remain under Articles 2, 3 and 8 ECHR.

3. The matter came before Judge of the First-tier Tribunal De Haney (hereinafter referred to as the "FtTJ") on October 13, 2014 and in a decision promulgated on November 3, 2014 he refused the asylum and humanitarian claims but allowed the appeal under Article 15(c) and under Article 8 ECHR.

4. The respondent lodged grounds of appeal on November 5, 2014 and on November 14, 2014 Judge of the First-tier Tribunal Kelly gave permission to appeal finding there were arguable grounds that the FtTJ had erred by failing to give adequate reasons for departing from the country guidance case of AT and others (Article 15c: Risk Categories Libya) CG [2014] UKUT 318 (IAC).

5. The appellant's representative filed a Rule 24 response and accepted the FtTJ's findings were deficient and invited the Tribunal to list the matter for a full re-hearing of the Article 15(c) claim with each party being permitted to file further evidence as to the current situation in Libya.

6. This case originally came before me on March 26, 2015 and on that occasion the representatives invited me to find an error in law in respect of the Article 15c issue and to adjourn the matter for a further mention date on the basis that AT and others (Article 15c: Risk Categories Libya) CG [2014] UKUT 318 (IAC) was supposed to be before the Court of Appeal on April 30, 2015 and further country evidence would have to be served due to the fluid circumstances existing in Libya.

7. The appellant's representative on that first occasion suggested this appeal could form the basis of a further country guidance case but I indicated that more information would have to be submitted to the appropriate senior Judge before any decision could be taken on that submission. Upper Tribunal Judge Allen indicated on July 28, 2015 that there was no need to list this appeal as a country guidance case and the matter has now been listed before me for disposal today.

PRELIMINARY ISSUES

8. I was handed a large bundle of documents that contained numerous reports, case law and a skeleton argument. Mr Ficklin confirmed the appellant was not in attendance and he was authorised to deal with this matter in his absence.

9. Mr Ficklin indicated that he would be inviting me to depart from the existing country guidance decision of AT and he would be arguing the respondent had failed to identify any safe method of return and there was a tangible risk of indiscriminate violence.

SUBMISSIONS

10. Mr Harrison relied on the existing Foreign Office Policy on travel and submitted that whilst there were currently no enforced returns to Libya this was not the same as

saying there was a risk of indiscriminate violence to the appellant. As an employer, the respondent had to have regard to employees' safety bearing in mind they would be foreign nationals in uniform in a foreign country. Although there were no flights to Libya from the United Kingdom this did not mean the appellant could not fly back to Libya as it was possible to fly to another country and then a connecting flight could be taken to a city in Libya. Voluntary returns are taking place on a regular basis and whilst no route had been identified he submitted the evidence submitted on behalf of the appellant was not sufficient to allow the Tribunal to depart from the country guidance decision of AT.

11. Mr Ficklin adopted his skeleton argument and submitted:

    a. I should depart from the country guidance decision of AT because the evidence provided demonstrated that the matters considered in July 2014 were different from the current position.

    b. An appeal under Article 15(c) has to be considered as at the current date.

    c. There was clear evidence that there were no international flights into Libyan and the main airports formerly utilised by the respondent were now closed (Tripoli International airport closed in August 2014 and Benghazi airport closed in May 2014). There was evidence of regular air strikes on airports and these airstrikes ultimately led to the last foreign airline, Turkish airlines, ceasing operations in January 2015 when missiles landed around the airport 30 minutes after a flight left. Whilst there were functioning airports none of these were under the control of the internationally recognised government save for the airport at Bayda. However, the fact all airports were vulnerable to air strikes meant there was a real risk of serious harm to civilians.

    d. There was no method to return the appellant to Libya and bearing in mind the Tribunal in AT were considering the position when Tripoli International airport was open he submitted that I could depart from the earlier findings as long as I was satisfied there was a real risk of indiscriminate violence.

    e. Accordingly, returning the appellant to Libya by plane was neither feasible nor possible and even if a flight via Tunisia was arranged there was still a real risk that the plane could be struck during an air strike.

    f. The fact the respondent claimed there were voluntary returns was of no significance.

    g. The only other method of returning the appellant was overland and it was only possible to travel into Libya from certain areas. If the appellant were returned to Tunisia he would have to travel through areas controlled by the Tuareg militia and the Libya Dawn Militia Alliance- such travel was contrary to foreign office advice and there was evidence contained in the appellants bundle that the population as a whole were being subjected to indiscriminate violence. The UNHCR had not altered its position that were set out in December 2014. Various militia were carrying out indiscriminate violence and there was no way of returning to Libya without travelling through a contested area.

h. Libya had 434,000 internally displaced persons and he submitted that based on the numbers that had left Libya this figure represented 10% of the population.

i. The threshold of risk was lower than the threshold for Article 3 ECHR and if the appellant cannot return because of the risk of indiscriminate violence then he was entitled to humanitarian protection.

j. The Court of Appeal made clear in J1-v-SSHD [2013] EWCA Civ 279 that it was unlawful for the respondent to delay making a decision on return. The respondent had failed to identify any proposed route to return the appellant. The respondent cannot wait until the conflict was over to identify a route. If the respondent wishes to return the appellant she must set out how their return would be possible. To merely say we are unsure how the appellant would be returned is unlawful.

k. In the circumstances the appellant's appeal under Article 15(c) should be granted.

DISCUSSION AND FINDINGS

12. 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 his applications for asylum, Articles 3 and 8 ECHR.

13. Although the respondent has yet to issue the appellant with the appropriate leave under Article 8 ECHR Mr Harrison, on behalf of the respondent, assured me that this would be done when this appeal had been concluded.

14. I have been assisted by the appellant's representatives who submitted an extremely detailed bundle of country evidence and in reaching my decision I have had full regard to that evidence.

15. The current situation in Libya is described by both representatives as "fluid' because the situation on the ground changes as one faction gains or regains control of areas. However, before an assessment of this appeal can be undertaken it is necessary to understand what the Tribunal has to consider and the approach it must take when looking at this issue.

16. Mr Ficklin has included a number of relevant cases in the appellant's bundle and these cases include Sufi and Elmi v UK (Applications nos. 8319/07 and 11449/07), Elgafaji v. Staatssecretaris van Justitie, C-465/07 and AMM and others (conflict; humanitarian crisis; returnees; FGM) [2011] UKUT 445.

17. 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."

18. 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."

19. 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.'

20. 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.

21. AT and Others 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.

22. Mr Ficklin's submitted it was no longer possible to fly direct to Libya from the United Kingdom and even if an indirect flight was taken there was a risk that the plane could be struck by a missile due to the ongoing fighting.

23. The Foreign and Commonwealth Office's (FCO) latest travel advice advises caution to people travelling to Libya but precautionary travel advice in relation to a relatively newly post-revolutionary country which is "awash" with arms is advice I would expect from any government. This does not mean that returning Libyans need international protection. The FCO advice is targeted at British citizens considering visiting a country where fighting continues. That situation, Mr Harrison argues, is different to the situation facing returnees who are being returned to their home country.

24. Mr Ficklin argued that Libya has changed since the Tribunal in AT and Others considered the risks and even if the appellant could safely fly back to Libya or travel overland to Libya he would then face a tangible risk from travelling within the country. Mr Ficklin submits it must appropriate to review the conclusions in AT and Others given in light of the fact the country evidence is almost two years old and a lot has changed since that case was heard.

25. Having considered the material placed before me I accept the decision of AT and Others should be further considered in light of the passage of time and the new evidence.

26. Whilst control of Libya may have altered since AT and Others the actual position remains the same in the sense that no single group has overall control of the country. When the Tribunal considered the position in 2013/2014 it concluded that central government had struggled to maintain authority and had to rely, to a greater or lesser extent, on various militias to undertake certain security functions that traditionally fell within a government's sole remit. Today, the country is run by various militias including Libya Dawn Militia alliance, Toubou militia, Tuareg militia, IS allied groups, Ansar-al-Sharia, the incumbent government and other jihadists. The groups with the largest control are the incumbent government and Libya Dawn Militia alliance who seized power of Triploi and surrounding areas from the incumbent government after July 2014.

27. Mr Ficklin argued that this separation of power in Tripoli was something that placed people at risk. However, this very same argument was argued by both him and his co-counsel before the Tribunal in AT and Others. The Tribunal at that time concluded that the fractured state of the country did not give rise to a breach of Article 15(c) and stated at paragraph [72]-

> "… The situation currently in Libya is that of a highly decentralised state in which the primary sources of protection are localised, through family and tribe. In these circumstances, and given the need to take a factual approach, we are satisfied that there is a general sufficiency of protection for the ordinary citizen."

28. The Tribunal in AT and Others from paragraph [86] onwards made clear that although different factions/groups ran various parts of the country this did not mean a person would be at risk of indiscriminate violence simply by travelling from one part of the country-

> "86 … Depending on the facts, for the reasons we have given, we consider that it is in the main viable for a person to be able to travel to another area to seek safety.
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> 89 … Dr George's written evidence was that in recent years tribalism, whilst still important, has become less significant than it had been in the past. He goes on to state that while particular tribes have traditional territories where they are the dominant element in the population, most if not all Libyan communities have a populace that is at least to some extent mixed. In the largest cities a significant proportion of the population never belonged to any tribe."

29. The Tribunal concluded at paragraph [211]-

> "… we are able to conclude on the evidence before us that a claim to international protection is unlikely to succeed simply on the basis of the risk of travel to any particular area of Libya, again quite apart from the question of internal relocation. Area specific evidence would have to be adduced which establishes such a risk."

30. Mr Ficklin argues the position on the ground has changed and that the guidance in AT and Others is no longer good law. Mr Ficklin quite properly drew my attention to

what had been happening in Libya and I have considered all of the evidence including reports from UNHCR, UN Reports and newspaper articles.

31. The UNHCR report (pages 30 to 55 of the appellant's bundle) considered the position on returns to Libya in November 2014. That report is of course now some 10 months old but the report in reality tells us nothing different from what the Tribunal had been told twelves months earlier. The report makes clear there has been damage or injury caused to services, airports, hospitals and civilians but all this was happening when the Tribunal considered the position in 2013/2014. The fighting may be in different places and involve different groups but the events are similar to that facing the Tribunal in 2013/2014. This report along with other documents highlight increased risks based on political affiliation or nationality but the First-tier tribunal has already rejected any increased risk for this appellant. The number of internally displaced persons has increased but the Tribunal in AT and Others had to deal with this problem, albeit on a smaller scale. The UNHCR recognised that despite the ongoing violence some institutions continued to operate.

32. In August 2014 Amnesty International (page 56 of the appellant's bundle) called upon the warring factions to stop indiscriminate shelling in August 2014 in both Tripoli and Benghazi. However, such shelling was mirrored in reports presented to the Tribunal in AT and Others albeit the names of the towns affected may have changed. Such actions, whilst condoned, do not automatically give rise to a claim under Article 15(c).

33. There is no doubt there has been an increased intensity to the hostilities with the different groups continuing to try to exert a larger control although a lot of the groups' activities is targeting people based on their tribal affiliation or presumed allegiances but in considering this risk to the appellant I have to consider his situation based on the findings of fact made by the First-tier Tribunal about his claim. The appellant's asylum claim was rejected by the First-tier Tribunal and no challenge was made to those findings. The First-tier Tribunal found the appellant did not have a profile that would place him at risk.

34. The Tribunal made clear in AT and Others that it was possible, in practical terms, for a male to relocate to another area of Libya, for example Tripoli or Benghazi, particularly if he had tribal or family connections there. I remind myself that the First-tier Tribunal found that the appellant's two sisters continued to live in Tripoli and his parents intended to return. Although Mr Ficklin has submitted a large number of reports none of these suggest that the appellant would be unable to travel within Libya. I acknowledge there are heightened tensions in Libya but these very same tensions existed when the Tribunal in AT and Others considered the situation.

35. Accordingly, whilst I accept Libya is not a country the appellant desires to return to (an in light of his successful appeal under Article 8 ECHR he will not) I am satisfied that the material submitted does not, after careful consideration, alter what the Tribunal previously found in relation to conditions on the ground.

36. Mr Ficklin argued no safe route of return has been identified by the respondent and he forcefully argues that the respondent is both unable to return failed asylum seekers or identify an actual route of return. He pointed to the fact major airports, such as Tripoli International airport and Benghazi airport, remain shut to airplanes and have done so since July and May 2014 respectively. No foreign airline has flown into into Libya since January 2015 when Turkish airlines ceased flights to Misrata because of security concerns.

37. This situation has to be contrasted with the conditions facing the Tribunal in AT and Others because at that time there were both scheduled flights to Libya and enforced returns taking place albeit enforced returns were on a limited basis. According to the evidence submitted to the Tribunal there were 11 unescorted returns to Tripoli between January 2011 and May 2013 whereby the travel arrangements were made by the Home Office, there were 11 enforced returns between June and August 2013 by flight to Tripoli using scheduled airlines and there were three enforced escorted returns since August 2013; one in September 2013 and two in October 2013.

38. The situation has changed since At and Others. No foreign airline has flown into Libya since January 2015. Flights into Libya are in the main from Tunisia using an airline that is effectively state owned. Mr Ficklin submitted that the airline could not provide any safeguards but despite a large bundle of country evidence there was no evidence that identified any ongoing incidents or risks to people using that airline. The fact the airline continued to fly suggested both a use and a need for the flights. Neither party provided any evidence as to the amount of flights taking place or the regularity of those flights but both agreed flights were taking place.

39. Mr Ficklin submitted that the Libyan airline, being state owned, would take risks to ensure Libya had access to the outside world. International commercial airlines have chosen for operational and security reasons not to fly to Libya but this does not mean there is a risk of indiscriminate violence. Different factors would govern a foreign airline's decision to fly into Libya.

40. There is ongoing fighting taking place but reports of recent attacks on airports are limited. An airstrike on Mitiga airbase in Tripoli in November 2014 reveals an area near the runway was hit and flights to that airbase were temporarily suspended but later resumed (See pages 124-125 of the appellant's bundle). There were reports of separate airstrikes on both Zintan and Mitiga airports in April 2015 but there were no casualties during either attack.

41. Mr Ficklin argues that anyone flying to Libya would be at risk but having considered all of the evidence I am satisfied that whilst there have clearly been some attacks on areas near to the airports these incidents are fortunately few and far between. There is no regularity to such incidents and the absence of reports of such incidents is not something I can overlook. I am not satisfied the level of risk on the ground reaches the required level to amount to a breach of Article 15(c).

42. Mr Ficklin's argument is that the respondent has no proposals for returning people to Libya. He submits simply saying "he can be returned" is insufficient.

43. The Court of Appeal in HH (Somalia) v SSHD [2010] EWCA Civ 426 concluded that if the route or method of return is unknown, the court or tribunal may in appropriate cases leave this matter for later decision by the Secretary of State. If the Secretary of State fails to address the matter properly, the claimant's remedy is by way of making a fresh claim or bringing judicial review proceedings.The court or tribunal cannot, however, delegate to the Secretary of State the resolution of any material element of the legal claim which the claimant has brought before that court or tribunal for determination.

44. Mr Ficklin invited me to find that the respondent's failure to identify a safe route of passage meant that the appellant would be at risk and he referred me to the decision of J1-v-SSHD [2013] EWCA Civ 279. Elias LJ stated-

> "106. … questions of the risks arising from the route of return are quite distinct from the question whether in principle the asylum seeker would be safe in his home territory. Frequently the route of return is unknown at the time when the asylum status of the applicant is being considered because removal directions have not been set, and the court cannot then engage with the question whether the method of return of itself poses an unacceptable risk to the applicant. SN Iraq (referred to by Jackson LJ at para 51 above) is such a case, and other cases to like effect include GH v Secretary of State for the Home Department [2005] EWCA Civ 1182 and Gedow v Secretary of State for the Home Department [2006] EWCA Civ 1342. As Jackson LJ points out, they are not cases where the courts are relying on any undertaking from the Secretary of State; they are cases where the route, and therefore the risks, are not yet known and cannot be assessed. Nor is the court delegating to the Secretary of State the right to make a decision relevant to the question whether the applicant should in principle be granted refugee status or leave to remain on human rights grounds."
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> 108. This principle was again confirmed in the most recent authority on route of return, HH, in which the Court of Appeal held that where safety on return is an issue raised by the applicants, the court should determine it. Sedley LJ, giving the judgment of the court (Sedley, Smith and Elias LJJ), after considering various route of return cases, including GH and Gedow, to which I have referred, observed (para 58):
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> > "… in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the AIT is required by law to consider and determine any challenge to the safety of that route or method."
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> 109. The court noted in this regard that the intention of the Qualification and Procedures Directives (EU instruments dealing with the position of refugees) appears to be that the Secretary of State should make a decision on entitlement to refugee status within a reasonable time of the application being made. This is inconsistent with accepting the general undertaking from the Secretary of State that he or she will not remove the asylum seeker until it is safe to do so.

> Moreover, the court in HH went on to express the provisional view, *obiter*, that if there is a real issue on safety of return, the Secretary of State should engage with that question and identify what the proposed route will be so that it can be challenged on appeal.
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> 110. … It is not now legitimate to deny an applicant leave to remain in this country, if only for a limited period, on the grounds that an undertaking of the Secretary of State will ensure that his or her safety is not put at risk.
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> 113. In my view, therefore, the route of return cases are not directly relevant to the issues before us ... The question here is whether, in the determination of the primary issue whether the appellant would be at risk on return to Ethiopia, SIAC has wrongfully delegated the determination of part of that question to the Secretary of State. I am satisfied that it has, and that if it had asked itself whether at the time of its decision the appellant could be safely returned, the only possible answer was that he could not."

45. Mr Harrison's position and that of the respondent has always been that the appellant is not at risk from anyone upon return. The respondent cannot identify a specific route that enforced returns would take because no returns are currently being undertaken. I am satisfied that this position is not the same as the position facing the Court in J1.

46. On the facts of J1 SIAC found that appellant would be at risk of detention and interrogation and given Ethiopia's record on human rights there would be a real risk he would suffer torture or ill-treatment but based on an undertaking/agreement found returning him would not be a breach of his human rights. The Court of Appeal rejected the undertaking argument because there was an actual risk to that appellant. Those facts have to be compared to the facts of this current appeal in which both the respondent and the First-tier Tribunal found the appellant would not be at risk on return. The rejection of his claim under Article 3 ECHR and asylum have not been challenged. The respondent in this case has always stated that having lost those claims he could return and it is his choice whether that is "enforced" or "voluntary".

47. There are currently functioning airports in Libya namely Zuwara, Zintan Misrata, Triploi Mitiga and Beida Al Abraq airports. He lived in Tripoli and Mitiga airport is the airbase operating in Tripoli. My findings on risk at the airport are set out above.

48. 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 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. However, his account of what he claimed happened was rejected by the Tribunal and no appeal was brought against that decision. His sisters remain in Tripoli and his evidence to the First-tier Tribunal was his parents were considering returning as well. This appellant therefore has both family and a home to return to and unless a risk indiscriminate violence is identified his appeal must fail.

49. The issue ultimately is the safeness of his return and having considered all of the above including Mr Ficklin's skeleton argument I am satisfied that the additional evidence, post AT and Others, would not lead to a breach of Article 15(c) and consequently the decision of AT and Others remains good law and I dismiss the appellant's appeal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

No fee has been paid.

Signed: Dated:

Deputy Upper Tribunal Judge Alis