Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/40304/2014
IA/40305/2014
IA/40306/2014
IA/40307/2014
IA/40308/2014
IA/40309/2014
IA/40310/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 22nd July 2015	**On 29th July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

(1) DR NAJAT GIRERA MARIEE
(2) MR GOMA A MARE
(3) JURIE GOMA MARE
(4) SAJEDA GOMA MARE
(5) GIRERA GOMA MARE
(6) AMNA GOMA MARE
(7) JOMANA GOMA MARE
(ANONYMITY NOT DIRECTED)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Siddique, Solicitor
For the Respondent: Mrs R Fell, Home Office Presenting Officer

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DECISION AND REASONS

1. The appellants are citizens of Libya. The first and second appellants (respectively born on the 1st January 1971 and the 9th August 1963) are married to each other. The other appellants are their children whose ages currently range between 15 years and 22 months. They each appeal against the decision of Judge Dearden, promulgated on the 23rd January 2015, to dismiss their appeals against the respondent's refusal to grant them leave to remain in the United Kingdom on private and family life grounds. Permission to appeal was granted by the Upper Tribunal (Judge Murray) upon a renewed application following refusal by the First-tier Tribunal (Judge Garratt).

2. Anonymity was not directed in the First-tier Tribunal and I therefore consider that it would serve no purpose to direct it at this stage.

3. The appellants were granted successive periods of limited leave to remain following their arrival in the United Kingdom on the 2nd July 2006. Their last grant of leave to remain expired on the 1st August 2014, since when they have remained in accordance with statutory leave to remain pending the determination of their current applications and outcome of their appeals against the respondent's refusal thereof. The respondent had previously granted limited leave to remain to the first appellant for the purposes of study and of post-study work and had granted leave to remain to the other appellants in line with that of the first appellant as her dependents.

4. Judge Dearden concluded that the appellant's putative removal in consequence of the respondent's refusal to grant their applications was both in accordance with the Immigration Rules and compatible with their rights under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. For ease of exposition, I will consider each of the criticisms that are made of the reasoning that led to this conclusion in turn.

5. Firstly, it is said that Judge Dearden "failed to take to take into account material matters (viz the evidence of the country situation in Libya in relation to the best interests of the children)" [see the renewed application for permission to appeal]. However, it is clear that the Judge Dearden did in fact consider the situation in the country of return. Thus, at paragraphs 30 and 31 of his decision, he said this:

> 30. I now examine whether the State of Libya is in such a state of instability that it would put the United Kingdom in breach of its obligations under Article 8 if the adult Appellants (and their children) were returned to that country. I first of all observe that in **AT and Others [2014] UKUT 00318** it was said when considering Article 15C of Directive 204/83/EC,
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> "There is not such a high level of indiscriminate violence in Libya within the meaning of Article 15C of Council Directive 204/83/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".

I observe that the principal Appellant has several relatives still in Libya and that it is possible to travel overland from Tripoli Airport to other destinations without a real risk of persecution, serious harm or Article 3 ill-treatment. The country guidance decision in **AT** was delivered on 14th July 2014 and I am to follow it unless good reasons to the contrary are established. Mr Cole says that the information contained at the back of his bundle does persuade that the situation in Sirte is distinctly dangerous for the Appellants. He relies firstly on page 3 of his bundle being a report from the United Nations Children's Fund indicating that 40% of the schools in Libya were damaged in the 2011 revolution. This is the internet article which is before the decision in **AT**. On a similar basis the report from the Global Coalition to Protect Education from Attack is dated before the decision in **AT**. Whilst schools have been attacked there is no specific information that indicates that schools in Sirte have been attacked. The Article at page 8 of the bundle is a general one about children falling prey to terrorists but again is dated before the decision in **AT**. Page 10 of the Appellants' bundle indicates that armed confrontations have taken place in several areas but Sirte is not mentioned. Whilst the report at page 12 of the Appellants' bundle is dated after the decision in **AT** this refers to children in Aleppo rather than children in Sirte.

31. However principal reliance is placed on the report from the UN High Commissioner for Refugees dated 13th November 2011 to be found at page 14 onwards of the Appellant's bundle. This indicates that since the overthrow of Gaddafi there has been instability and chaos and the country has seen intense clashes between armed groups involving bombings and kidnappings. It is indicated that hundreds of thousands have been forcibly displaced across the country and that the price of foodstuffs has risen sharply. The UNHCR urges that all States should suspend forcible returns to Libya until the security and human rights situation has improved considerably. However, the extended family of the principal Appellant are not reported to have encountered any of these difficulties. The Appellant indicated to me in her evidence that her brother aged 40 had been kidnapped and killed "last Saturday". Whilst some might say that there has been no opportunity to obtain any documentary evidence to support the contention made by the Appellant I observe that no application for adjournment of the proceedings was made to me. Indeed even if the brother has been killed that in itself does not mean that the country of Libya is in a state of general insecurity or that this family would be targeted by anyone. I find that whilst the report from the UNHCR is to be respected it may well apply a different test to that which I am applying to these cases. There is nothing specific in any of the reports filed by Mr Cole on behalf of the Appellants to suggest that the city of Sirte is the subject of sustained instability sufficient to persuade that a flagrant breach of the Appellants' Article 8 rights would take place if they were returned to that city.

6. It is right to say that the above passage appears under the heading: "The Position of the Principal Appellant and her Husband". They are thus not specifically referenced to the best interests of the children. This is however immaterial given that the assessment of the compatibility of the children's removal with their best interests was one that was rightly conducted upon the assumption that the children would remain with their parents.

7. Mr Siddique argued strenuously that the unstable political and military situation in Libya was a material consideration in assessing the children's best interests. I disagree. Article 8 cannot be considered to provide an alternative and more accessible means of seeking humanitarian protection to that provided by Article 15(c) of the Qualification Directive (as incorporated into domestic law by paragraph 339C of the Immigration Rules). Indeed, I would venture to suggest that this was implicitly accepted by Mr Cole, who sought to persuade Judge Dearden to depart from the finding of the Tribunal in AT and Others [2014] UKUT 318 (IAC) which is to the effect that conditions in Libya do not currently meet the threshold for engagement of Article 15(c). Had it been Mr Cole's argument that a lesser threshold sufficed for Article 8 purposes, then it it would have been unnecessary for him to persuade the judge that AT and Others ought not to be followed. I therefore hold, as a matter of law, that for the political and military situation to have been relevant for Article 8 purposes it was necessary for the appellants to show that there was such a high level of indiscriminate violence in Libya as to give rise to substantial grounds for believing that the appellants would, solely by reason of their presence there, face a real risk of danger to life or person. Judge Dearden found that the evidence did not demonstrate that that threshold had been reached, and there is no suggestion that this finding was not reasonably open to him. It follows from this that I must refuse Mr Siddique's application to admit further evidence relating to the country situation in Libya as irrelevant to the question of whether Judge Dearden erred in his assessment of the evidence that was before him at the time of his decision.

8. Secondly, it is said that "the Judge has made perverse findings on the sole issue in this appeal (viz that is reasonable (& in their best interests) for the children who have lived in the UK for more than 7 years to return to Libya" [see the renewed application for permission to appeal]. According to Mr Siddique, the "perversity" of Judge Dearden's findings in this regard arises from the fact that the older children are settled at schools in the United Kingdom and are otherwise thoroughly integrated into British society by reason their respective periods of residence and the ages at which they first entered the United Kingdom. This however wholly ignores the fact that, as non-British citizens, none of the children in this appeal have a right (and thus a legitimate expectation) to future education in the United Kingdom at public expense. It also contrary to the legally correct approach to the assessment of a child's best interests, which is neatly encapsulated at paragraph 58 of the judgement of Lewison LJ in EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA Civ 874:

> 58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

9. Mr Siddique argued that this could not be the correct legal test because its application would necessarily mean that it was always in the best interests of a child to return to the country of origin. That is not however the case. As Lewison LJ pointed out, the facts in ZH (Tanzania) [2011] UKSC 4 provide an example of where this would not be the case:

> 59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

10. That of course is an example of a situation in which one of the parents has a right to remain in the United Kingdom and the other does not. However, even where neither parent has leave to remain, as is here the case, there are bound to be instances in which it would nevertheless be unreasonable for a child to follow his or her parents to the country of return. An obvious (but by no means the only) example of such a case would be where the child has been taken into local authority care due to abuse at the hand of the parents who are to be removed. In such a case, it would neither be reasonable nor in the child's best interests to expect him or her to follow the abusive parent to the country of origin.

11. Mr Siddique further argued that neither paragraph 276ADE nor Section 117C of the Nationality, Immigration and Asylum Act 2002 framed the issue of 'reasonableness' of a child leaving the UK within the context of following his or her parents to the country of return. However, whilst it is true that there is no express reference to it in either provision, it was held by the Tribunal in AM (s 117b) Malawi [2015] UKUT 0260 (IAC) that the question of reasonableness must be posed and answered within the context of whether it is reasonable to expect the child to follows its parents to their country origin. That is precisely what Judge Dearden did. It follows that he did not err in law by doing so.

12. Thirdly, it is said that "the Judge has given weight to immaterial matters (viz the Judge's 'experience in families of this sort')" [see the renewed application for permission to appeal]. That complaint arises from paragraph 24 of Judge Dearden's decision:

> It is said that the four eldest children speak some Arabic but that their standards are poor. Obviously the eldest child speaks Arabic better than the youngest child. The principal Appellant would have me accept that English is spoken at home and obviously English is spoken with friends and acquaintances at school and outside the house. I did not accept that I was told the truth about the ability of the children to speak Arabic. In my experience in families of this sort Arabic is spoken at home, but English is spoken outside the home. The parents of these children are both from Libya and in my conclusion would be keen to ensure, for cultural and heritage reasons, that their children also spoke Arabic. The children's Arabic in my conclusion might not be quite up to scratch with the Arabic spoken by children of the same age in Libya, but they obviously have an understanding of Arabic, they are young and adaptable, and in my conclusion if returned to Libya could soon get their Arabic up to the

> required standards. It is not as if the children are going to have to learn Arabic from scratch. In my conclusion they already have a decent understanding and would be able to build on that. The principal Appellant was obviously trying to persuade me that Arabic is not spoken to any decent standard by the children to give the impression that enormous difficulties would follow if they were returned to Libya. I do not accept that such is the case.

I agree that it was an error of law for the judge to disbelieve the first appellant's evidence concerning her children's limited facility in the Arabic language, solely on the basis that it did not accord with his own experience of "families of this sort". It is a trite but nevertheless accurate statement of the law to say that it is impermissible for a judge to rely upon knowledge and experience gained from evidence in other cases. Still less is it permissible for a judge to rely upon matters of personal experience that he cannot reasonably be assumed to possess. The reason for this is well expressed within the original application for permission to appeal:

> It is not understood what the Judge's 'experience' is in this matter of culture and linguistics as the Judge does not disclose his 'experience', nor did he provide an opportunity for the Appellants to comment on this matter.

To put it another way, the knowledge and experience of the judge are entirely opaque and thus prevent the party against whom they are brought to bear from understanding the reasons that lie behind it. Moreover, it was quite unnecessary for the judge to make this particular finding given his general reasoning in paragraph 13. This is because - as Mrs Pettersen rightly pointed out - his general observation that the adult appellants were in a position to assist their children with any language difficulties they may face on return to Libya was one that applied irrespective of the level of those difficulties. I therefore conclude that this error, standing alone within an otherwise well-reasoned and evidence-based decision, is not one that can be considered to have affected the soundness of the judge's ultimate conclusion, namely, that it was reasonable and in the best interests of the children to expect them to follow their parents to Libya.

Notice of Decision

13. The appeal is dismissed.

Anonymity is not directed

Signed Date

Judge Kelly

Deputy Judge of the Upper Tribunal