



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: AA/08498/2015

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly

Decision & Reasons Promulgated

On 13 February 2017

On 13 June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

W E

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Johnrose for Broudie Jackson and Cantor

For the Respondent: Mr Whitwell Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. I am satisfied that such an order should be made.
2. The Appellant is a national of Libya born in [] 1972. His wife (date of birth [] 1982) and four children (dates of birth [] 2006; [] 2008; [] 2012; [] 2014) are dependents in his appeal.

3. The background to this appeal is that the Appellant entered the United Kingdom on 11 March 2009 as a student. He returned to Libya after and extension to his visa was refused but returned as a student and an extension was granted until 27 November 2014 to finish his PhD.
4. On 27 November 2014 he claimed asylum on the basis that he was at risk on return for his political opinions in that he would be viewed as an extremist because he was from Derna and Islamist extremist controlled town and would be viewed as a supporter of Gaddafi.
5. The Respondent refused the application because it was not accepted that he would be viewed as someone with close links to the Gaddafi regime and it was not accepted that originating from Derna would put him at risk. The general security situation was considered in the light of the country guidance in AT and Others and the levels of violence were found not to be at Article 15(c) levels. There was no basis for leave under Article 8 inside out outwith the Rules.
6. The First-tier Tribunal Judge heard oral evidence from the Appellant. The Judge concluded that there was nothing about his work or activities in Libya that would suggest he was closely linked to the Gaddafi regime and the fact that he had recently visited Libya did not suggest being from Derna made him a target. He dismissed the appeal on all grounds.
7. At a hearing dated 22 November 2016 I set aside Judge Nicols decision on the basis that his assessment of risk as to whether there was 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 existed for believing that an individual would, solely by being present there, face a real risk which threatens his or her life or person was inadequate. All other findings were preserved. The matter was adjourned to enable the parties to gather more up to date material.
8. In order to avoid confusion, the parties are referred to as they were in the First-tier Tribunal.

The Law

9. 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.”

10. 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.”

11. 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.'

12. 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.

13. In relation to Article 15(c) circumstances in Libya had moved on since the Respondents June 2016 CIG-Libya :Security and Humanitarian Situation and this was conceded in FA (Libya: art 15(c)) Libya CG [2016] UKUT 413 (IAC) where 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”

14. I heard oral evidence from WE and his wife who adopted the contents of their witness statements and were cross examined by Mr Whitwell and there is a full note of their evidence in the record of proceedings.

15. At the hearing I heard submissions from Mr Whitwell on behalf of the Respondent that :

(a) He relied on the refusal letter dated 13 May 2015 which dealt with Article 15(c) at paragraphs 31-34 although he conceded that AT was no longer good law in so far as it related to the security situation.

(b) Each case was fact specific but the Respondents case was that the Appellant and his family could reasonably relocate to Tripoli.

(c) He suggested that I was required to examine what difference there was between the situation set out in the CIG for June 2016 and that dated January 2017. He suggested, for example, that the figures suggested an improvement in the figure for IDP's

16. On behalf of the Respondent Ms Johnrose submitted that :

(a) She relied on the skeleton argument that was before the First-tier Tribunal and argued that the situation had deteriorated since both AT and FA.

(b) It was not disputed that the Appellant and his family were from Derna and that he had been on the Revolutionary Committee all of which added to his risk factors.

(c) She disagreed with Mr Whitwells reading of the CIGs and suggested that in fact they showed a deteriorating situation and that rather than the airport being open as he suggested it appeared still to be closed according to the latest CIG.

- (d) The situation in Tripoli was referred to in the bundle she had produced : there were now two governments and the UN backed Government was struggling to hold on to Tripoli.
- (e) Civilians were shelled and the situation was not improving but rather more devastation was predicted with no end in sight.
- (f) It was also relevant that the Appellant was from Derna and because of the link to ISIS it was a risk factor to be affiliated to that city.
- (g) Also in relation to the 'sliding scale' the Appellant had a wife and four young children and the material produced suggested they were the most vulnerable groups with examples of the kidnapping of children and militia forcing Islamic rule on women and children.
- (h) At the current time internal relocation was not viable.

Background Material

17. 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. I note that in the UKBA Document 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. "

18. The Appellants bundle relied on by Ms Johnrose included the Country Policy and Information Note dated January 2017; a Human Rights Watch Report dated 12 January 2017 (page 55) and a report from the Washington Institute for Near East Policy dated 11 January 2017 entitled 'After the Islamic State in Libya: All Out War?.' I have read these and taken them into account.

Findings

19. 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. In the light of my analysis of the evidence I make the following findings. 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.

20. 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. The Respondent acknowledges that the Appellant and his family could not safely return to Derna their hometown but could reasonably relocate to Tripoli.

21. 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.”

22. 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.

23. 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 as argued by Ms Johnrose 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."

24. While Mr Whitewell argues that the reduction in the number of IDPs does not suggest a deteriorating situation again the Respondents own policy document accepts that this was due to an improvement in the security situation around Benghazi and Sirte (2.3.7) and does not therefore suggest an improvement in the situation generally or specifically in Tripoli.

25. 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)

26. In making that assessment in relation to this Appellant as to whether it would be reasonable for him to relocate to Tripoli I take into account that he has never lived or worked there 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. While it is suggested that the Appellants brother in law lives there and could provide a level of social support I found the Appellant and his wife's account of how he has no long term fixed address and had moved from area to area limits in my view the amount of practical support that he would be able to provide.

27. I am also required to take into account the fact that he has four very young children 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) I am satisfied that I should also take into account the fact that the Appellant and his family would be expected to relocate from their home area Derna which I accept on the basis of the material before me and as accepted by the Respondent in the CIG (7.8.1) was an area seen as being characterised by the strength of extremist groups and ISIS. A link to such a place of origin would, I accept, make the family more vulnerable.

28. I finally take into account that 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.

29. 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

30. 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

31. The appeal is allowed on humanitarian grounds.

32. Under Rule 14(1) the Tribunal Procedure (Upper Tribunal) rules 2008 9as amended) the Appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order for anonymity was made in the First-tier and shall continue.

Signed

Date 20.2.2017

Deputy Upper Tribunal Judge Birrell