Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11505/2015**

THE IMMIGRATION ACTS

Determined on the papers	**Decision & Reasons Promulgated**
On 13 November 2017	**On 15 November 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR F E B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. It is appropriate to continue the order. 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.

DECISION AND REASONS

Background

1. This appeal came before me first on 16 January 2017 at a hearing in Liverpool. By a decision promulgated on 25 January 2017, I determined

that the First-tier Tribunal decision of First-tier Tribunal Judge Lloyd-Smith promulgated on 3 May 2016 should be set aside insofar as it determined the issue relating to Article 15(c) of the Qualification Directive ("Article 15(c)"). That decision is annexed hereto for ease of reference.

2. The First-tier Tribunal Judge had proceeded to determine the Article 15(c) issue on the basis of the country guidance decision in AT and others (Article 15(c); risk categories) Libya CG [2014] UKUT318(IAC) ("AT"). By the time of the hearing before me but after the First-tier Tribunal's decision, the Upper Tribunal promulgated its decision in FA (Libya: art 15(c)) Libya CG [2016] UKUT 00413 (IAC) ("FA"). The Upper Tribunal declined to give updated country guidance in FA due to the fluidity of the situation in Libya but determined that AT was out of date and should no longer be followed. I concluded that there was an error of law in the First-tier Tribunal's decision for failure to explain why the volume of material produced by the Appellant in relation to the current situation in Libya did not justify a departure from AT.

3. In accordance with directions given in my error of law decision, on 20 February 2017, the Appellant submitted a volume of country information relating to Libya under cover of a skeleton argument dated February 2017.

4. The appeal came before me next on 30 March 2017 at a hearing in Manchester. On that occasion, I drew attention of the parties to a further country guidance case in relation to Libya which was scheduled for hearing on 3 and 4 May 2017. Both parties agreed that it would be sensible to adjourn the hearing on 30 March 2017 to await that further country guidance decision and to proceed by way of written submissions following the promulgation of that decision with a CMR or decision to follow depending on the outcome.

5. By a decision promulgated on 28 June 2017 the Upper Tribunal (McCloskey J and UTJ Bruce) determined the appeal in ZMM (Article 15(c)) Libya CG [2017] UKUT 00263 (IAC) ("ZMM"). The headnote reads as follows:-

> "The violence in Libya has reached such a high level that substantial grounds are shown for 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."

Submissions and discussion

6. On 3 July 2017, the Appellant's representatives made written submissions. It is accepted by those submissions that the adverse credibility and factual findings of the First-tier Tribunal are preserved and that accordingly the Appellant could not succeed in establishing refugee status. It is submitted however, that, following ZM, the Appellant is entitled to subsidiary protection. The submissions draw

attention to the headnote in ZMM as quoted above and also to the following passage at [92] and [93]:-

> "[92]... The situation is complex and fast-moving but two features stand out: there is at present a manifest failure of state protection for the ordinary citizen and indiscriminate violence is liable to erupt anywhere, at any time. In the context of this extreme volatility we are satisfied that the cumulative effect of the evidence is such that the Article 15(c) test is satisfied.
>
> [93] In light of our findings we have not considered it necessary to conduct a region by region review. We do not doubt that there are in Libya today towns and villages which are relatively calm where, notwithstanding the absence of effective government, people are going about their 'normal' lives. We cannot however be satisfied that the peace in these oases is stable or durable, or that the notional returnee to Libya would be able to safely access such locations. In April 2017 the Secretary-General of the UN reported the freedom of movement of ordinary Libyans to be "severely affected" by violence and lawlessness. Ms Pargeter agreed. As her addendum report illustrates, travel across the country is a dangerous enterprise. Those few airports that do remain open are under the control of various militias. Even if the arriving passenger were able to talk his way out of the airport without being robbed, assaulted, detained or worse, we cannot be satisfied that the risks he would face on his onwards journey would be acceptably low. The evidence before us indicates that the situation throughout Libya is extremely unstable, that lawlessness and violence are widespread, and that there is not a sufficiency of protection for the ordinary civilian. We are satisfied that the Article 15(c) risk is made out."

7. The Appellant submits therefore that he is entitled to subsidiary protection by reason of the levels of indiscriminate violence in Libya and that there is no area of Libya to which he could be expected to relocate in light of the findings of the Upper Tribunal in ZMM. The Appellant submits that he is entitled to succeed also on human rights grounds applying paragraph 276ADE(1)(vi) of the Immigration Rules on the basis that there are very significant obstacles to his integration in Libya.

8. The Respondent made written submissions under cover of a letter dated 7 September 2017. Those accept that the Appellant is entitled to humanitarian protection by reason of Article 15(c) being satisfied. It is pointed out in those submissions that the appeal in ZMM (where the appellant was similarly found not to be credible) was dismissed on asylum and human rights grounds.

9. Following those submissions, the Appellant's representatives wrote on 11 October 2017 indicating that, in light of the Respondent's concession, the appeal should be allowed on the basis that the Appellant is entitled to humanitarian protection.

10. It is agreed between the parties that the Appellant is entitled to humanitarian protection. The Respondent's concession is clearly consistent with the findings in ZMM. The appeal is therefore allowed on

that basis. I gratefully adopt the Upper Tribunal's findings in ZMM. I allow the appeal on that basis.

11. The Appellant submits that his appeal should also be allowed on human rights grounds as there are very significant obstacles to integration in Libya at the present time. The Respondent points out that the appeal in ZMM was not allowed on that basis. I note however that this is because no error of law had been found in that regard as it was not a ground of appeal. That was not therefore an issue for determination.

12. At the error of law hearing, it was accepted by Counsel for the Appellant that the Article 8 claim stood or fell with the Article 15(c) case (as recorded at [3] of that decision). However, having revisited the permission grant in this appeal, I note that, as in ZMM, there were no grounds challenging the Article 8 consideration by the First-tier Tribunal Judge. Although UTJ Kopieczek when granting permission did note that "technically" the FTTJ's conclusions in relation to Article 8 may need to be revisited, depending on the outcome of the Article 15(c) issue, since there were no grounds of challenge, I do not consider that I need to deal with this issue. I note also that the Appellant's representatives letter dated 11 October makes no mention of this issue as requiring determination (following the Respondent's submissions). For the sake of completeness, however, I repeat my view as expressed at the error of law hearing, that an Article 8 claim based on "very significant obstacles" stands or falls with the Article 15(c) issue. As such, I would have allowed the appeal on human rights grounds also.

DECISION

I re-make the decision in this appeal allowing the appeal on the basis that the Appellant is entitled to humanitarian protection applying Article 15(c) of the Qualification Directive.

Signed  Dated: 13 November 2017

Upper Tribunal Judge Smith

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11505/2015**

THE IMMIGRATION ACTS

Heard in Liverpool	**Determination Promulgated**
On 16 January 2017	**On 25 January 2017**

Before
UPPER TRIBUNAL JUDGE SMITH

Between

MR F E B
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Evans, Counsel instructed by WTB solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

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ERROR OF LAW DECISION AND DIRECTIONS

Background

13. The Appellant appeals against a decision of First-Tier Tribunal Judge Lloyd-Smith promulgated on 3 May 2016 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 13 August 2015 refusing his protection and human rights claims.

14. The Appellant is a national of Libya. He arrived in the UK on 14 October 2010 as a visitor with leave. He claimed asylum on 18 February 2015. The Appellant claimed asylum on the basis of various factors particular to his situation. I do not need to set those out because the claim was not believed and, although the adverse credibility findings were challenged, permission to appeal was not given in relation to that challenge.

15. The Appellant challenges the Decision on the basis of the findings in relation to Article 15(c) of the Qualification Directive and the Judge's refusal to depart from the country guidance in relation to Libya promulgated in 2014 (AT and others (Article 15(c); risk categories) Libya CG [2014] UKUT 318(IAC) ("AT and others")). The Appellant also challenges the Judge's dismissal of his human rights claim on the basis that the Judge was not entitled to find that there were not "very significant obstacles" to his reintegration in Libya. However, Miss Evans fairly accepted that the Article 8 claim stood or fell with the Article 15(c) case. Accordingly, the ground with which I am concerned is only that the Judge was not entitled to follow the 2014 country guidance case based on the background evidence before her and/or failed to provide sufficient reason for finding that this evidence did not represent strong grounds to depart from the country guidance case.

16. Permission to appeal was granted by Upper Tribunal Judge Kopieczek on 27 June 2016. That sets out the issue in the following terms:-

> "…I do consider it arguable that the FtJ failed to explain with reference to the country background material provided, why she concluded that she was unable to depart from the guidance given in *AT and Others* in terms of the potential risk to the appellant with reference to Article 15(c). There is no identification of the material to which her attention was drawn and arguably inadequate engagement with that material. To that extent only therefore, I consider that the grounds are arguable."

Judge Kopieczek also identified that the Article 8 issue may also need to be revisited in the event that the Article 15(c) argument were found to have merit.

17. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Submissions

18. Miss Evans accepted that the recent decision of the Upper Tribunal in FA (Libya: art 15(c)) Libya CG) [2016] UKUT 00413 (IAC) ("FA (Libya)") post-dates the Decision and the grant of permission. In that decision, the Tribunal found that the country guidance in AT and others is out of date and should no longer be followed but declined to offer updated country guidance on the basis that the situation in Libya is too fluid to offer any lasting guidance as to general risk. The Tribunal therefore gave guidance that each case should be determined on the facts and evidence before the Judge in each appeal. However, since that decision was not before the Judge, she cannot be criticised for not adopting that approach, provided she has correctly considered the evidence which was before her.

19. Miss Evans drew my attention to the volume of background evidence at [38] to [162] of the Appellant's bundle. She submitted that, although the Judge indicates at [13] of the Decision that she has considered all of the background information, this was not borne out by her assessment at [23] of the Decision. Miss Evans submitted that the material in the Appellant's bundle clearly showed a marked deterioration from that recorded in AT and others. The decision in that case relied on evidence dating back to before November 2013 when those appeals were heard. This Appellant's appeal was decided in May 2016.

20. Miss Evans also submitted that if the Judge had accepted the account of the individual risk which the Appellant claimed, the Judge's finding that he would not be at risk on that account would be inconsistent with the country guidance in AT and others. She accepted that since the Appellant was found not to be credible in that regard, this did not arise. She submitted that it was nonetheless relevant to the question whether the Judge should have considered the case on the evidence rather than simply applying AT and others.

21. In response, Mr Harrison relied on the Respondent's rule 24 response. He submitted that there was no material error. The Judge had directed herself appropriately and had considered the evidence before her. In relation to Article 15(c), the Appellant needed to show good reason for departing from what was at the time existing country guidance. There was no error in the Judge preferring the country guidance decision over the background evidence relied upon by the Appellant.

22. Both parties agreed that, if I found a material error of law, a further hearing would be required prior to re-making. It is possible that further limited oral evidence would be required and the background material would also need to be updated. Both parties agreed however that the appeal could remain in this Tribunal for re-making.

Discussion and conclusions

23. The headnote in AT and others reads as follows (so far as relevant):-

> "*Article 15(c)*
> *(2) There is not 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."*

24. The Judge dealt with this issue as follows:-

> "[23] During submissions my attention was drawn to various passages within the objective material. I have considered these. It is not disputed that there are militia groups operating in Libya and that there are many internally displaced people there and that detention centres are poor. It is also a fact that there is regular bombing in Libya. However, unless there is adduced very strong grounds supported by cogent evidence (**SG (Iraq) v SSHD [2012] EWCA Civ 940**), I am bound by the current country guidance, which in this case is **AT.** Sadly for the appellant, in the context of this case I have not seen evidence which would enable me to depart from the guidance issued in **AT.** As can be seen from my findings above, I do not accept the appellant's account of why he cannot return to Libya. In any event, if, which is not accepted, the appellant's account of his father and brothers' involvement in the regime were true, his position is a step removed and would not, on my assessment of the available evidence, place him at risk on return.
> .....
> [25] There are no substantial grounds for believing that any harm would come to him on return to Libya. His return will not breach Article 3 and it does not entitle him to humanitarian protection. I reject the appellant's refugee, humanitarian protection and article 3 claim because he has not established that there is any truth to his account. I have considered the case of **AT and Others (Article 15c; risk categories) Libya CG [2014] UKUT 318(IAC)** in which it was held that in the aftermath of the armed revolution that brought about the fall of the dictatorial and repressive regime of Colonel Gadhafi, the central government in Libya has relied on various militias to undertake security and policing functions. Those militias and the many others that operate within Libya often have their own interests, loyalties and priorities which may or may not coincide with the interests of the central government. That case sets out the risk categories associated with the former regime and considers internal relocation. It stresses that "a fact-specific enquiry is essential. An appellant's assertion that the individual or group that is feared has links to say, Tripoli or Benghazi, or another prospective place of relocation, will need to be assessed in the light of the findings in relation to overall credibility". I have found that the appellant did not have problems associated with his family connection or from the militia groups. Clearly he does not fall within one of the specific risk categories as such and he therefore is not at risk upon return to Libya."

25. As a starting point, the Judge was clearly entitled to have regard to the country guidance. Nor is there any error of law in relation to her

self-direction that she is bound by that country guidance unless there is strong evidence which suggests that it should no longer be followed. However, there was before her a substantial volume of material. I have read carefully that evidence which post-dates what was in existence at the time of AT and others, in particular that which relates to the period after the evidence which the Tribunal would have considered in that case. I have further narrowed my reading to that evidence which relates to the general country situation as opposed to that which refers to individualised risk. I have paid particular attention to the page references referred to in the Judge's notes of the Appellant's submissions since the Judge herself says that this is the material to which she had regard.

26. The material referred to in submissions includes an OHCHR report dated 25 February 2016 which refers to widespread human rights abuses, indiscriminate attacks on highly populated areas and unlawful killings/ arbitrary detention. A report from the UN support mission dated 1 March 2016 refers to the numbers of civilian casualties in early 2016, executions and evidence of torture. Another UN report also dated March 2016 reports on civilians being caught up in areas of fighting, in particular in Benghazi. A news article dated June 2015 reports on a "constant state of violence, veering close to full-on civil war and state collapse". Another UNHCR report deals with the substantial increase in displaced persons amounting to a doubling between September 2014 and the date of the article in June 2015. Other reports deal with the increase in violent attacks by Islamic State.

27. It is not necessarily the case that a full consideration of all the background evidence would lead to the conclusion that there is an Article 15(c) risk in all areas of Libya. However, on my reading of the evidence which was before the Judge, I am satisfied that there is an error of law by the Judge's failure to give reasons for finding that the evidence before her was not sufficiently strong to justify a departure from a country guidance case which was by that stage some three years old. Although there is a passing reference to what some of those reports show, at [23], that is insufficient to deal with the content of the evidence relied upon by the Appellant.

28. Based on my reading of the evidence, I am also satisfied that the error is a material one. The evidence requires more detailed consideration. Whilst I reach no conclusion as to whether an Article 15(c) risk is made out by that material, I cannot discount the possibility that such a conclusion could be reached. I am fortified in that conclusion by what is said by the Tribunal in FA (Libya) in particular at [11] of that decision.

29. There is an error of law in the Decision. I set it aside insofar only as far as it concerns the Article 15(c) risk. I have given directions below for further evidence to be served and for skeleton arguments to be exchanged.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge Lloyd-Smith promulgated on 3 May 2016 is set aside. I make the following directions for the resumed hearing:-

1. **The Appellant shall file with the Tribunal and serve on the Respondent no later than 28 days from the date when this decision is promulgated any further evidence on which he relies in relation to the Article 15(c) issue. He shall also by the same date file and serve a skeleton argument dealing with that issue in the context of his case.**
2. **The Respondent shall file with the Tribunal and serve on the Appellant no later than 28 days from the date of service of the evidence and skeleton argument at [1] above any further evidence on which she relies in relation to the Article 15(c) issue and a skeleton argument in reply to the Appellant's skeleton argument.**
3. **The resumed hearing of this appeal to deal with the Article 15(c) issue shall be listed for hearing in Manchester or Liverpool on the first available date after 56 days from the date when this decision is promulgated with a time estimate of 3 hours. If an interpreter is required, the Appellant's solicitors must inform the Tribunal no later than fourteen days before the date when the hearing is listed.**

Signed  Dated: 23 January 2017

Upper Tribunal Judge Smith