IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01744/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2015	**Judgment given orally on 22 October 2015**
	Sent out on 6 November 2015

Before

THE HON. MR JUSTICE HOLGATE
UPPER TRIBUNAL JUDGE MARTIN

Between

HAMZA ZEYADI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Wilkins, Counsel instructed by Wilsons
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Hamza Abdalla Zeyadi is a citizen of Libya. He was born in 1978 and so now he is 37 years old. He spent the first seventeen years of his life in Libya until 1995 and then he came to the United Kingdom. Before he left Libya his father had previously arrived in the UK on 24 September 1994.

He made an application for asylum which was successful. The circumstances which led to the grant of asylum are summarised in the judgment of the First-tier Tribunal at paragraph 42. There is no dispute that the reason why asylum was granted in the father's case was because of his membership of the Muslim Brotherhood combined with the persecution of members of that organisation by the Gaddafi regime.

2. The Appellant, his mother and siblings joined the father in the UK in June 1995. On 3 June 2000 the Appellant and his family were granted indefinite leave to remain in the United Kingdom as refugees. It is common ground that that was based upon the grant of refugee status to the father.

3. Since his arrival in the United Kingdom the Appellant has amassed some 36 convictions for 93 offences between 31 August 2001 and 7 March 2013. The catalogue of offending was summarised by the judge at paragraph 58 of his decision. The judge also carefully set out the seriousness of the criminality by referring to the sentencing remarks of several judges in the Crown Court between paragraphs 60 and 61. He placed considerable weight on the fact that the Appellant had continued to commit offences over the last few years despite the use of various sentencing options and involvement by both the Prison Service and the Probation Service. The Appellant had had significant opportunities to curtail his drug and crime problems. The judge concluded: "quite clearly the Appellant has become a criminal menace and appears to have done little to effectively address his continuing criminal offending". He went on in paragraph 63 to find that the nature and frequency of the offending are important considerations together with the need to protect the public. He judged the repeated breaches of this country's laws by a person subject to immigration control as being extremely serious and demonstrating that the Appellant has no regard for the laws of the United Kingdom.

4. Various attempts have been made to take deportation action against the Appellant. These were summarised by the judge in paragraphs 51 to 54 of his decision. Notwithstanding the formal steps taken to deport him the Appellant persisted in his criminal activities. Ultimately on 4 September 2014 the Respondent made the deportation order which resulted in the appeal before the First Tier Tribunal. A full explanation for the making of that order was set out in a 26 page decision notice dated 8 September 2014.

5. In addition on 25 March 2014 the Respondent gave notice to the Appellant of a proposed cessation of his refugee status under Article 1C(5) of the Refugee Convention of 1951. The decision letter on this matter was issued on 5 September 2014. In summary, it reminded the Appellant of the basis upon which refugee status had been granted and explained why there had been a fundamental change in those circumstances, in short they had ceased to exist.

6. In paragraph 3 of his decision the judge summarised the grounds of appeal relied upon by the Appellant. He challenged the deportation on the

basis that it would breach the Refugee Convention and Articles 3 and 8 of the ECHR. He said that he would be at risk of ill-treatment due to the current situation in Libya. He said that he had lived in the UK for over twenty years and had established family and private life and claimed that deportation would disproportionately interfere with his family and private life. He also argued that the decision was not in accordance with the Immigration Rules.

7. We have carefully reviewed the judgment. It is plain to us that it was a carefully structured and reasoned decision. At paragraph 18 the judge set out the four stage approach which he took in order to address the issues raised before the Tribunal. That approach has not been the subject of any criticism.

8. On behalf of the Appellant Ms Wilkins has sought to argue three grounds of appeal. The arguments were set out in her skeleton argument dated 15 October 2015 supplied to the Tribunal in advance of the hearing, for which we are grateful. We note that Ms Wilkins did not appear at the hearing in the First-tier Tribunal.

Scope of the appeal to the Upper Tribunal

9. An initial issue with which we have to deal is the scope of the permission to appeal from the First Tier Tribunal granted by the judge of the Upper Tribunal, permission having previously been refused by the First-tier Tribunal. Relying upon **Ferrer [2012] UKUT 304 (IAC),** it was submitted for the Appellant that paragraph 2 of the judge's reasons did not constitute a refusal to grant permission in respect of ground 1 (dealing with the article 1C(5) issue) and that, taking the order as a whole, we should not treat the grant of permission to appeal as being limited to grounds 2 and 3. We reject that submission. When the order is read as a whole, the judge made it plain that he was persuaded that only grounds 2 and 3 were arguable and that he considered ground 1 to be unarguable for the reasons clearly stated in paragraph 2.

10. The next issue was whether nonetheless this Tribunal should entertain the challenge under ground 1. This was not something which Ms Wilkins had anticipated dealing with and no authority was cited on the Tribunal's power to entertain a ground of appeal for which permission has not been granted. We have looked at the matter from first principles and also by reference to the Tribunal Procedure (Upper Tribunal) Rules 2008.

11. As a matter of first principle when an appeal court receives an appeal for which permission to appeal has been granted on certain grounds but not on others, the ambit of the appeal is limited to the matters for which permission to appeal has been granted. Whether or not that is strictly a jurisdictional matter, it certainly gives rise to an expectation on the part of other parties, as well as the appeal court itself, as to which matters they will have to address and which other matters in the decision appealed are not being challenged. In some jurisdictions it is possible to apply to the

appellate court to extend the ambit of an appeal, but where that is so it will generally be necessary for an application to be made, not only to ensure fairness for other parties, but also for the proper management of the appeal by the appellate court.

12. In this instance the Applicant made no attempt to make any application to the Tribunal to widen the scope of the appeal, assuming that such an application is possible, or even to notify the Respondent that such an application would be made. Ground 1 was covered in the skeleton for the Appellant, but in our judgment that was no substitute for making an application to broaden the scope of the permission to appeal which had been granted.

13. We have not been shown anything in the 2008 Rules which would enable us to entertain an application to pursue ground 1. The Appellant relied upon Rule 5 which is concerned with general case management powers. But rule 5 has to be read alongside Rule 22. Where the Upper Tribunal makes a decision "on the papers" to refuse permission to appeal or to grant permission on limited grounds, Rule 22(3) and (4) enable an Appellant to apply for the reconsideration of permission to appeal at a hearing before the Upper Tribunal. This provision only applies to appeals from the Tribunals listed in sub-paragraph (3), which do not include the Immigration and Asylum Chamber. The clear implication is that this Chamber in the Upper Tribunal does not have the power to reconsider a paper decision refusing or limiting permission to appeal made at that level.

Ground 1

14. Nonetheless, bearing in mind the importance to the Appellant of the decision taken under article 1C(5), we did in any event hear oral submissions on this ground and carefully considered the arguments advanced in the Appellant's skeleton argument. Even if ground 1 were to be treated as falling within the ambit of this appeal, or even if an application could be made to widen the permission to appeal, we would in any event have rejected the arguments and refused any such application. We are in firm agreement with the judges of the First-tier Tribunal and the Upper Tribunal who dealt with the application for permission to appeal, that ground 1 is unarguable.

15. Ground 1 as now put forward involves only two points. First, it was said that the judge failed to apply the correct legal test under Article 1C(5), namely whether a fundamental and durable change has taken place in the circumstances which formed the basis for the grant of refugee status. It is clear to us that this experienced member of the First-tier Tribunal did apply the correct test as is apparent, for example, from the careful attention he paid to the views of UNHCR (paragraphs 78 to 82 of the judgment) and the test he applied in paragraph 94 using the words "fundamental change in the country situation since the Appellant and his family left Libya".

16. The second part of ground 1 sought to attack the judge's application of Article 1C(5). We record that during the course of the Appellant's oral submissions this argument fell away because the Appellant does not dispute that the basis upon which refugee status was conferred was as set out in paragraphs 1 and 2 above and those circumstances have ceased to exist. There is therefore no scope for arguing that the judge's decision on Article 1C(5) was wrong in law. However, the Appellant sought to raise under Ground 1 additional points falling wholly outside the basis upon which refugee status had been granted. Counsel for the Appellant accepted that they should be dealt with instead under the second ground of challenge, which is concerned with Article 15(c) of the Qualification Directive.

Ground 2

17. The application of Article 15(c) to citizens of Libya was considered comprehensively by the Upper Tribunal in **AT & Others (Article 15(c); risk categories) Libya CG [2014] UKUT 318 (IAC)**. Following a five day hearing the Tribunal concluded that:

> "There is not such a high level of indiscriminate violence in Libya within the meaning of Article 15(c) of 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".

It is common ground that that formulation captures the legal test which the Tribunal was bound to apply in order for Article 15(c) to be engaged.

18. The main complaint under ground 2, as clarified in the oral submissions made by Ms Wilkins, is that a collection of materials postdating the evidence considered by the Tribunal in **AT** should lead to the conclusion that Article 15(c) does now apply in Libya. It needs to be said straightaway that this ground of attack on the judge's decision is not a challenge specific to this Appellant alone. Although this was not set out in terms in the skeleton, Ms Wilkins accepts that the effect would be to require the country guidance case to be re-determined and the argument, if accepted, would be applicable in general to Libyan citizens being returned to Libya. This argument goes much further than the challenge raised in relation to the specific profile of the Appellant, which we deal with first.

19. At paragraph 115 the judge recorded the submissions of Mr Ficklin, who then appeared on behalf of the Appellant, that his client would be at risk on return for two reasons: first, his ethnicity and second his imputed political opinion through family and tribal links. The judge said:

> "I find that the Appellant's evidence has not been sufficient to establish either alleged risk. I find on the evidence before me that the Appellant has not established that on his return to Libya that he would suffer persecution due to his tribal background."

The tribal background issue was carefully considered by the judge between paragraphs 107 and 114 and there has been no challenge to the legality of the conclusions which he reached in that respect.

20. As to the second matter, imputed political opinion the Appellant's oral submissions suggested, albeit faintly, that the Tribunal failed to grapple with material relevant to the Appellant's profile when applying AT. His profile is said to be a link with the Muslim Brotherhood and then in turn with militia groups connected with that organisation, in particular Libya Dawn. However, Ms Wilkins accepted that when the decision is read as a whole the Tribunal took into account the following circumstances:

- First, the Appellant has never been a member of the Muslim Brotherhood.
- Second, his father has been a member of the Muslim Brotherhood.
- Third, both the Appellant and his father have been outside Libya for some twenty years.
- Fourth, neither the father nor the Appellant have taken part in political activity during that twenty year period

Not surprisingly the judge concluded in paragraph 94 as follows:

> "Nor has he provided anything to suggest that his or any of his family activities whilst in the UK are such that he would likely to come to the adverse attention of the authorities on his return to Libya".

None of the material which we have been shown could possibly undermine that conclusion. Therefore we reject the suggestion that the Tribunal has erred in law in some way by failing to address material relevant to the Appellant's profile and hence the risk categories set out in the country guidance case. Accordingly, it follows that no legal criticism can be made of the judge's conclusion that this Appellant did not fall within any of the risk categories identified in the AT decision. The remaining part of the argument under ground 2 is confined to the application of Article 15(c). We should also record that Ms Wilkins accepted that ground 3 is only concerned with Article 15(1)(c) and the subject of indiscriminate violence.

21. The Appellant submitted that the judge was presented with material upon which he should have concluded that the situation in Libya has changed materially as regards the application of Article 15(c) so that there should have been a departure from the country guidance in this case and, moreover, that that guidance should be reconsidered.

22. Mr Whitwell on behalf of the Respondent referred us to paragraph 47 of the decision in **SG (Iraq) v Secretary of State for the Home Department [2012] EWCA Civ 940** in which it was held that makers and Tribunal judges are required to take country guidance determinations into account and to follow them unless very strong grounds supported by cogent evidence are adduced to justify their not doing so. Ms Wilkins agreed that the Tribunal should apply that test to the arguments being presented under grounds 2 and 3, not only as to whether the judge would

have been entitled to depart from the country guidance but also whether there is any justification for that guidance to be reconsidered.

23. In summary, the Appellant relied upon material of a relatively general nature which is said to show a deterioration of the circumstances in Libya such that Article 15(c) is now engaged. In relation to material of this kind, we consider that the Appellant in this case should at least have compared the relevant material put before the Tribunal dealing with the country guidance case and the new material post that decision in order to justify the drawing of different conclusions. We should record that there was no attempt in the grounds of appeal or in the skeleton argument or in oral submissions to carry out any such exercise. Instead we have been asked simply to examine at face value the material upon which the Appellant has relied. In order to present this submission Ms Wilkins focused on three pieces of evidence as being the best examples upon which the Appellant could rely.

24. She first relied upon advice from the Foreign Office on Tourism and Travel to Libya addressed to UK citizens which was updated on 17 December 2014. In particular she stresses the passage which appears at the foot of the first page as follows:

> "Since September 2014 there has been intense fighting and shelling between militias in the Warshafarna and surrounding areas south west of Tripoli. Intense fighting has also continued in Benghazi. There is a very high risk of being caught in indiscriminate gunfire or shelling in all those areas to which the fighting has spread. Violent clashes between armed groups are possible across the entire country including in Tripoli, particularly at night, fighting can break out in many places and at short notice. It can become serious quickly putting those in the area at risk".

It was the specific reference to indiscriminate gunfire or shelling that Counsel sought to rely upon.

25. Unfortunately the Appellant has not sought to show us whether this guidance departed materially in this respect from previous guidance from the Foreign Office, including material which would have been before the Tribunal in **AT**. Moreover, we note that this is guidance addressed to UK citizens. It is guidance on voluntary decisions to travel to a country. It is not directed at returns of citizens of Libya to that country and thirdly the guidance does not purport to apply and there is no reason to think that it had in mind the tests for the application of Article 15(c) of the Qualification Directive and the test to be applied.

26. The second item relied upon is a report by the UNHCR dated November 2014. As with the first source, the Appellant has not attempted to show to the Tribunal how the matters set out in this material differ significantly from those previously published by UNHCR or in any event the circumstances taken into account by the Tribunal in **AT** and reflected in its

judgment at paragraphs 104 to 128, together with the relevant sources upon which the Tribunal relied as set out in appendices to that judgment.

27. The third source relied upon is a single sheet from Human Rights Watch dated 5 December 2014. In this document the authors express their opinion that:

> "The armed conflicts and lawlessness in Libya are giving rise to indiscriminate violence and widespread human rights abuses. As a result anyone forcibly returned to any part of Libya would be exposed to a real risk of serious harm which would constitute what is known as refoulement under international law."

The authors also give their view that all countries should allow civilians fleeing Libya access to their territories and should suspend forcible returns of civilians to any location in Libya until the security and human rights situation has improved sufficiently to allow for a safe and dignified return.

28. One difficulty for an Appellant relying on material of this abbreviated nature in order to depart from a country guidance case where the issues have already been considered at great length, is that it provides little more than an opinion. Ms Wilkins accepted that what is of significance when looking at such a document is the material upon which the opinion has been based. The paper we have been shown says very little about the source material or the extent to which that material or the opinions to which it has given rise differ significantly from opinions expressed by the same organisation previously. One generalised indication of sources is set out as follows: "international organisations and most foreign diplomatic nations have suspended their activities in Libya, withdrew from the country at the onset of the armed conflicts in Tripoli in July 2014". No further detail on the sources or the content of the information is given. Ms Wilkins accepted that that statement is referring to the attitude taken by various governments with regard to their responsibility for their own diplomatic staff, their own nationals.

29. We are asked to have regard also to the other documents relied upon by the Appellant and we have read all of that material but we agree with Ms Wilkins that the three sources to which we have just referred put the Appellant's case at its highest. Having reviewed all of this material we do not consider that it called for any more explicit reasoning than the judge in fact gave.

30. In paragraph 102 he said this:

> "This is the current country guidance from the Upper Tribunal and although there continue to be reports of conflict between armed militias and by them with the forces loyal to the elected government I find that this Appellant has not established that substantial grounds exist for believing that he would, solely by being present there face a real risk that threatens his life and person."

31. In paragraph 123 the judge said:

> "I find that the Appellant has not established that the current security situation in Libya is such that he would be at risk merely by being present there. I find that he has failed to show that the current situation has deteriorated to such an extent as to challenge the findings of the Upper Tribunal in the case of **AT & Others (Libya) [2014]**."

32. We are satisfied that in the context of the material shown to the judge and his very full and carefully reasoned judgment on the wide range of issues raised before him, there is no basis for finding any error of law under ground 2.

Ground 3

33. Ground 3 criticises one part of the decision in the Tribunal alone, namely paragraph 122 where the judge said:

> "I accept that [at] the date of this hearing that there is some unrest in parts of Libya. The Respondent, as a cautionary measure, has temporarily suspended returns of failed asylum seekers to Libya. There may be therefore a delay in returning this Appellant to Libya due to practical and logistical problems."

34. This challenge is presented in the context of the decision of the Court of Appeal in **J1 v Secretary of State for the Home Department [2013] EWCA Civ 279**. Put shortly the principle there established is that it is improper for a Tribunal or a decision- maker to rely upon a suspension of returns to a country as determinative of risk. Instead the obligation of the decision maker or the Tribunal is to assess the risk relating to a return on the evidence and as at the date of the decision or hearing. It is plain from paragraphs 116 to 118 of the judgment and the judge's careful citation of authorities, that he was well aware of his obligation which, in our view he did discharge.

35. Paragraph 122 of the judgment refers back to paragraph 99 in which the Respondent's interim operational instructions stated, "all escorted returns to Libya should therefore be deferred at the present time". The judge's reference to practical and logistical problems simply related to the suspension of escorted returns and by necessary implication the view taken by the Home Office and the Foreign Office that it was inappropriate to deploy UK citizens for that purpose. This passage was not used by the judge in order to avoid his obligation to assess risk of return in relation to the Appellant as at the date of the hearing. The judge plainly did set out his conclusions on that risk in paragraphs 121 and 123, which were based upon preceding sections of the judgment. The error which was committed in **J1** simply did not arise in this case and ground 3 must be rejected.

Conclusion

36. For all those reasons the appeal is dismissed.

No anonymity direction is made.

Signed Date: 29 October 2015

Mr Justice Holgate

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Mr Justice Holgate