Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA112192014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 4th May 2016	**On 26th May 2016**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EMAD ABAS R GARRAFA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr J Filkin of Counsel instructed by Switalskis Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Robson made following a hearing at Bradford on 27th January 2015.

Background

2. The claimant is a citizen of Libya born on 22nd June 1995. He first arrived in the UK on 29th June 2013 in order to study. He came over again on 1st May 2014 for three weeks and returned for a third time on 12th June 2014 when he made a claim for asylum.

3. The judge rejected the appellant's account of the background to the claim, finding him not to be a credible witness. He said that the claimant had fabricated a story in order to remain in the UK and was not at risk of persecutory ill-treatment on return. There is no challenge to his conclusions on the asylum claim.

4. He took into account the current Foreign and Commonwealth Office advice which is against all travel to Libya due to "the ongoing fighting and great instability throughout the country". He was also referred to the UNHCR position on returns to Libya, which is that if the 1951 Convention criteria do not apply in the individual case it still might meet the criteria for complementary forms of protection. He noted that the situation had deteriorated in Libya and there were no enforced returns there at present and he concluded that the situation in Tripoli and indeed Libya generally was not safe. He allowed the appeal on humanitarian protection grounds.

The Grounds of Application

5. The Secretary of State sought permission to appeal on the grounds that the judge had erred by allowing the appeal on humanitarian protection grounds without stating what the individual risk to the claimant was. The basis for granting humanitarian protection was clearly because of the situation in Tripoli and Libya in general but the judge had misunderstood the advice of travelling to Libya. There was no suggestion that Libyan nationals could not voluntarily go there.

6. Permission to appeal was granted by Judge Fisher on 13th March 2015. Judge Fisher said that it was arguable that in departing from the country guidance (AT and Others (Article 15c – risk categories) Libya CG [2014] UKUT 318) the judge had attached excessive weight to the general situation in the country and insufficient weight to the individual risk to the claimant.

7. The claimant served a Rule 24 response, and made the following arguments.

8. There was clear evidence before the judge that the situation in Libya had materially changed since the promulgation of AT, not least that the proposed point of return in AT, Tripoli Airport, closed in July 2014 and was destroyed a month later in ongoing fighting. There was also further evidence of periodic air strikes on other airports in Libya and the FCO's assessment of generalised risk.

9. So far as the grant of humanitarian protection is concerned the risk need only appertain to those points that the Secretary of State proposes the returnee will pass through in an enforced return, and subsequently as he travels to a place of reasonable safety. If the returnee cannot reach the place of reasonable internal relocation without facing a real risk of serious harm he is entitled to a grant of humanitarian protection.

10. Furthermore the threshold of risk under Article 15(c) is slightly lower than that of other types of international protection due to the generalised nature of the risk as per AMM and Others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445.

11. Article 15(c) risk is assessed based on the situation of generalised violence and whilst personal characteristics may make one more or less vulnerable to living in a war zone, the personal characteristics of the claimant would not allow him to obviate or avoid the risk of violence along the route of return. Indeed the Secretary of State is unable to propose a safe point of return relying on making decisions in principle pending emergence of a safe route which is an unlawful approach.

12. Finally, the Presenting Officer at the hearing made it clear that returns were suspended due to "fighting and instability". On that basis the Tribunal asked itself the correct question which is whether, leaving technical obstacles aside, a hypothetical enforced return at the time of consideration would expose the returnee to a real risk of serious harm. If it would then the proposed returnee is entitled to humanitarian protection.

Consideration of whether there is a material error of law

13. Unfortunately there is a real lack of clarity in this determination.

14. First there was a very large bundle of background evidence before the judge in relation to the present situation in Libya which is not analysed.

15. Second, it is not clear whether the judge was allowing the appeal on humanitarian protection grounds because of the situation in Libya generally, and if so what the basis of the evidence for that conclusion was, given that there has been a relatively recent country guidance case which held that the situation in Libya does not presently require a grant of humanitarian protection. Alternatively, whether he was allowing the appeal on the basis that there was no safe method of return. Plainly it is highly significant that since the country guidance case was heard the main airport through which returns were being effected has been bombed and is not operational, but it is far from clear from the judge's reasoning whether that was the basis for his decision.

Resumed Hearing

16. The sole issue at the resumed hearing was whether the appellant is entitled to humanitarian protection under the Qualification Directive because either, the situation in Libya amounts to an armed conflict that

raises a risk of serious harm, the appellant arguing that the country guidance case of AT & Others (Article 15c; risk categories CG) [2014] UKUT 318 should be departed from, or alternatively he is entitled to humanitarian protection because there is real risk of serious harm at the point of return.

Submissions

17. Mr Diwnycz stated that, while he accepted that there were no direct flights between the UK and Tripoli, and that the FCO continues to advise against all travel to Libya, there were flights from Istanbul to the Tripoli Military Airport, and from Monastir and Kabul, but aside from that he could not advance any argument other than to rely on the reasons for refusal letter and the IDIs. He was hampered by the fact that he did not have a complete file but confirmed that he did not seek an adjournment at least in part because of the inordinate delay which it has taken in getting this matter back before the Tribunal.

Mr Filkin's Submissions

18. Mr Filkin acknowledged that the Tribunal in AT & Others, heard in November 2013 and promulgated in July 2014 concluded that the risk from indiscriminate violence was not so high as to engage Article 15(c). However that was on the basis that there were flights from the UK to Tripoli Airport and, on the evidence at that time, a finding that a returnee from the UK would be in need of protection on the grounds of risk at the airport was not warranted. He submitted that it should no longer be followed.

19. Because this has not been set as a country guidance case to reconsider that issue and, because I am satisfied that the appeal ought to be allowed on the grounds of risk along the route of return, I am not going to reach a decision as to whether the situation in Libya everywhere amounts to an armed conflict raising a risk of serious harm at the present time.

20. Mr Filkin, in reliance on JI v SSHD [2013] EWCA Civ 279 argued that the Secretary of State was not entitled to refuse to be drawn on the detail of how the appellant could be returned. She was not entitled to state that when the return was enforced it would be done safely and not entitled to refuse to engage with the issue of what an enforced return would look like.

21. At paragraph 113 of JI the Court of Appeal said:

    (i) "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. Accordingly, I uphold the appeal on this point."

In MS (Ivory Coast) v SSHD [2007] EWCA Civ 133 the Court held:

> "The appellant was entitled to have determined whether removal from the UK with an outstanding contact application would breach Section 6 of the Human Rights Act 1998. That question was capable of resolution one way or the other. What was not appropriate was to leave her in this country in limbo with temporary admission and the promise not to remove until her contact application had been concluded. Temporary admission is, as we have explained, a status given to someone liable to be detained pending removal. If the appellant had a valid human rights claim she is not liable to be detained pending removal. And if she has not, she ought to be removed. If she is entitled to discretionary leave to remain she ought to have it for the period the Secretary of State thinks appropriate, together with the advantages that it conveys; and if not she ought not to.
>
> On the point of principle the AIT should have decided whether the appellant's removal on the facts as they were when they heard the appeal i.e. with her outstanding application for contact with her children, would have violated Article 8 of the ECHR and thus put the Secretary of State in breach of Section 6 of the Human Rights Act 1998 if he removed her. It was not open to the AIT to rely on the Secretary of State's assurance or undertaking that the appellant would not be removed until her contact application had been resolved. Nor was it appropriate to speculate upon whether there might be a violation of Article 8 on different facts at some point in the future. Had the AIT decided the Article 8 point in the appellant's favour she should have been granted discretionary leave to remain as envisaged in the API of January 2006. This could have been for quite a short period, whatever was regarded as sufficient to cover the outstanding contact application. It would have been open to the appellant later to apply for the period to be extended should the circumstances so warrant. It was open to the AIT under Section 87(1) of the 2002 Act, if it allowed the appeal, itself to fix the period of discretionary leave to remain. Alternatively, it could have remitted that question to the Secretary of State."

22. He also relied on HH (Somalia) [2010] EWCA Civ 426 where at paragraph 58 the court rejected the Secretary of State's argument that the appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 was against the decision in principle to remove the appellant from the UK and it was only when actual removal directions were set that an issue could arise in law about the point or route of return because it was only then that it was known where the appellant was to be returned to.

23. The court held:

> "We do not accept Ms Laing's "strong argument." Dealing only with the arguments raised in this case and leaving aside those raised in

> the case of J, we consider that, 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. That conclusion is consistent with AG & GH; it is consistent with past established practice and, as we will later explain, it is consistent with the requirements of the Qualification and Procedures Directive.
>
> It appears to us that the intention of the Qualification and Procedures Directives is to require a member state to make a decision on entitlement within a reasonable time of the application and to allow the issues raised in it to be subject to an appeal. We do not consider that the fact that an appeal from removal directions is by way of judicial review rather then statutory appeal is of itself an insuperable objection. But we do think that in a case in which the appellant raises a cogent argument within his statutory appeal that there may not be a safe route of return, the Secretary of State must address that question and the issue must be considered as part of the decision on entitlement. Postponement of such consideration until the Secretary of State is in a position to set safe removal directions would effectively be to postpone the decision until the cessation provisions have come into play."

24. Mr Filkin accepted the distinction made in HH (Somalia) between circumstances where a returnee cannot be returned due to technical obstacles, where the risk does not arise, and where evidence indicates that a return could put the returnee at risk of serious harm. Where there is an identified issue of risk the appellant is entitled to international protection pending the emergence of a safe route.

25. Mr Filkin referred me to the background evidence. The appellant comes from Zwara which is in an area to the west of Tripoli controlled by the Libyan National Army. Tripoli itself was invaded by Libya Dawn in July 2014, an organisation itself called a terrorist group, for example by the Government of the USA, and has been associated with Islamists including Ansar al-Sharia. Fighting in and around Tripoli continues including air strikes by other Libya factions such as Libya Dignity and foreign powers such as the UAE and Egypt. The previous Government, the House of Representatives now governs in exile from Tobruk and intends to retake Tripoli.

26. So far as the proposal that the appellant should travel overland from Tunisia is concerned, the very recent evidence from February and March 2016 not only established how hazardous a journey this could be but also that the situation is deteriorating, not least with the expansion of Islamic State in that area. One of the most telling documents is the mapping of the security and armed groups associated with Operation Dignity and Libya Dawn as at 2014, which illustrates the huge complexity of the different armies, brigades and militias operating in the region. Benghazi, to the east, is partially controlled by Ansar Al-Sharia and contested both by

Libya Dignity and Islamic State which itself now controls significant territory in Libya. From there it carried out military operations against other factions and launches terrorist attacks against Libyans and foreigners in Libya and in neighbouring countries including Tunisia.

27. IS terrorises the civilians present in territory which it controls, territory which now includes Sabratha, west of Tripoli. Mr Filkin relied on a report from the UN Security Council dated 25th February 2016 reporting on the expansion of IS. It said that the group had managed to consolidate its grip on Sirte and its surroundings.

28. Approximately 10% of the current population of Libya is internally displaced due to the fighting and a further 1,000,000 Libyans live in Tunisia out of a pre-2011 population of approximately 6,000,000.

Findings and Conclusions

29. I accept Mr Filkin's argument that the Secretary of State is not entitled to refuse to engage with an assessment of the risk at the point of return, and indeed Mr Diwnycz did not seek to argue that matters relating to safety along the route of return were not a part of the decision on entitlement.

30. It is clear from the Qualification Directive that a grant of status is not required where there are "mere technical obstacles" to return. In HH the Court of Appeal said:

> "In our view these are probably confined to administrative difficulties such as documentation; they may include physical difficulties such as the lack of return flights; but the phrase does not readily signify a requirement to ignore risks to life or limb once the returnee is back in the country of origin, not only because it does not say so – it speaks only of return to the country of origin – but because to do so would be to permit the very thing that the Directive is designed to prevent, refoulement to a situation of real danger. Our view is that the mere fact that technical obstacles are excluded from consideration suggest that issues of safety during return are to be considered."

31. The fact that the border between Libya and Tunisia is closed from time to time, and that there are no flights from Europe to Libya in itself does not require a grant of humanitarian protection. However the fact that the border is closed due to security concerns is itself evidence that there are such security concerns and therefore evidence of risk.

32. The airports identified in AT & Others as possible points of return are destroyed or closed. The fact that no foreign carriers have flown into Libya since January 2015 is evidence of their assessment of the potential danger. Of course the fact that people return to Libya voluntarily is also evidence that the risk of return may not, in their assessment at least, be as significant as that assessed by the foreign carriers. Having said that, no evidence whatsoever was put before me at the hearing by the

respondent that people are returning to Libya voluntarily. It was simply said that a Libyan carrier is running commercial flights from non-European destinations. The suspension of escorted returns to Libya is therefore not conclusive evidence that the appellant should be entitled to a grant of humanitarian protection, but is certainly factual evidence in his favour.

33. The FCO advice is aimed at British citizens, who are arguably at greater risk of say kidnap by groups such as IS, but who are no more or less at risk of indiscriminate terrorist attack. It is therefore significant that the advice itself refers to "ongoing fighting and greater instability" and a suspension of escorted returns until the situation in Tripoli improves and the airport re-opens.

34. The unchallenged evidence is that, whether the appellant travels by air to Tripoli, or overland from Tunisia, he would be travelling through hostile areas controlled by groups other than those who are in charge of his home town of Zwara. The Secretary of State did not point to any information whatsoever to counter the evidence relied upon by Mr Filkin. Indeed, having heard his submissions Mr Diwnycz said that he had been very even-handed and that the Secretary of State could not advance anything to rebut it.

35. The appeal is allowed on the basis that the appellant has established to the required standard that indiscriminate violence exists along the putative routes of return and accordingly is entitled to humanitarian protection.

Notice of Decision

36. The original judge erred in law and his decision is set aside. It is re-made as follows. The appellant's appeal is dismissed on asylum grounds. His appeal is allowed on humanitarian protection grounds.

No anonymity direction is made.

Deborah Taylor

Signed Date 25 May 2016

Upper Tribunal Judge Taylor