Upper Tribunal
(Immigration and Asylum Chamber)

FA (Libya: art 15(c)) Libya CG [2016] UKUT 00413 (IAC)

THE IMMIGRATION ACTS

Heard at Bradford	**Promulgated on**
On 22 August 2016	
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Before

MR C M G OCKELTON, VICE PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE C ROBERTS

Between

F A

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Warren, instructed by Switalskis Solicitors.
For the Respondent: Mr R Petterson, Senior Home Office Presenting Officer.

1. *The question of whether a person is at art 15(c) risk in Libya should, until further Country Guidance, be determined on the basis of the individual evidence in the case.*

2. *This decision replaces AT and Others Libya CG [2014] UKUT 318 (IAC) in respect of assessment of the art 15(c) risk.*

DETERMINATION AND REASONS

1. The appellant is a national of Libya. She and other family members have made a number of journeys between Libya and the United Kingdom. She last entered the United Kingdom on 11 July 2014 with her husband and their young child. Another child has since been born. On 28 January 2015 the appellant claimed asylum, naming her husband and their child as making claims dependant on hers. On 28 July 2015 her claim was refused. She appealed; her appeal was heard by Judge Turnock in the

First-tier Tribunal and dismissed in a decision sent out on 20 June 2016. The appellant now appeals, with permission, to this Tribunal.

2. At the hearing we canvassed with the parties the preliminary view we had reached after reading the papers. The decision we make is made with the consent of the parties, including consent at a senior level in the Home Office following a consultation Ms Pettersen was able to make by telephone.

3. The appellant's claim as originally made was a complex one. As an asylum claim it was based on a claim of a fear of persecution on the grounds of race and political opinion actual and imputed. She also claimed humanitarian protection on the basis of art 15(c) of the Qualification Directive 2004/83/EC. Judge Turnock heard oral evidence from the appellant, her husband and another witness.

4. Judge Turnock accepted that the appellant and her husband are from Bani Waleed and are part of the Warfella tribe. He found that those characteristics did not expose them to any risk of ill-treatment. He rejected the appellant's claim that her apartment had been raided or that her husband was on a 'wanted' list. He therefore concluded that there was nothing in the history of the appellant or her family that would expose any of them to a risk of persecution or other ill-treatment directed at them. He then turned to the possibility of their being at risk of indiscriminate violence. He had before him the decision of this Tribunal in AT and others Libya CG [2014] UKUT 318 (IAC), which amongst other guidance concludes that a Libyan's mere presence in Libya would not expose him to risk of threatening his life or person (para (2) of the headnote). It was drawn to his attention that although the decision was not issued until some months later, the hearing in that case was in November 2013, and that developments since the latter date now needed to be taken into account. He noted a wealth of evidence but declined to depart from the guidance of AT. Thus he dismissed the appeal.

5. The grounds of appeal against his decision do not challenge the Judge's assessment of credibility or his conclusions about the history of the appellant and her family or the risk of their being persecuted. Those findings are therefore to be regarded as final for the purposes of this appeal. The grounds argue that the Judge gave too little weight to the evidence tending to show that the existing country guidance was no longer reliable in relation to the risk of art 15(c) harm, and that he failed to evaluate the risk to the appellant at the point of return.

6. The question of the weight to be attributed to each item of evidence is classically a question for the trial judge, and in an appeal on a point of law it would be quite wrong to allow any view we might have to undermine the decision of the judge. The problem here, however, is not precisely that of the weight he gave to the items of evidence in a fact-finding process, but the approach he took to considering whether the evidence before him was sufficient to require him to depart, in whole or in part, from the Tribunal's published guidance. He was essentially being asked to say that the present appeal would not be being determined on the basis of 'the same or

similar evidence' as was before the Tribunal in AT (the phrase in inverted commas is that in this Chamber's Guidance Note No 2 of 2011) and that he should therefore reach an appropriate conclusion on the new evidence insofar as it appeared to displace any conclusions reached in the Country Guidance.

7. The intention behind the Country Guidance System is that frequently-arising issues should be capable of being determined once only. The designation of a published judgment as Country Guidance therefore has the effect of removing the issues in question from the normal process of determination by evidence in an adversarial process. Consistency is assured, and time and resources are saved. Unless and until the guidance is set aside, the decision stands as the Tribunal's approach to that issue.

8. Of course there may always be supplementary evidence, either confirming or undermining the conclusion reached in the Country Guidance decision; and there will often be subsequent evidence that either in itself should not be treated as requiring the issue to be determined again (because it is similar to evidence considered in the Country Guidance decision) or that is met by other subsequent evidence to the opposite effect, rebalancing the issue as it were. But there is no intention that the guidance should be followed when the situation in the country concerned has changed substantially since the guidance was issued. Consistency is a virtue in a judicial system, but it does not displace the duty to determine cases correctly when the passage of time, and events since the evidence considered in the Guidance case, give real reason to say that the guidance either should not be followed or should be applied with caution. Whether that is the case must be a decision for a judge in an individual case, and may require individual assessment. No doubt in many circumstances the judge's view will be that he has been shown no reason to depart from the guidance; and the question whether any new evidence really is or was sufficient to displace the guidance has to be treated for the purposes of an appeal as an issue of law in the same way that the question whether a precedent of law was properly differentiated is an issue of law. But there is no good reason for imposing any other filter or legal hurdle before considering the evidence proffered.

9. In the present case the judge appears to have recognised that there had been many changes in the situation in Libya since November 2013. He sets out the material to that effect before him in three pages of small print. But he then says that the appellant has not produced a direct comparison with the material before the Tribunal in AT or an analysis of the differences from that material.

10. The judge's assertion may be right; and we readily endorse the process of his reasoning, which was evidently that without such a comparison and analysis he would not readily be persuaded that the new material was different from the old. But that does not mean that the production of a table of comparisons or analyses is a precondition to considering the evidence on its merits. If he needed help in determining what the real differences (if any) were, both parties were represented and the judge could have asked for help or required the appellant to produce such a table: a very short time-limit might well have been appropriate given that the submissions made on the appellant's behalf were precisely those that would be

merely reduced to writing in such a tabulation. But in the circumstances of this case deciding to follow the existing guidance in the face of a mass of new material simply because there was no comparison or analysis was in our judgment an error of law. It had the effect that the judge's decision was not – or more precisely cannot be shown to have been - based on all the relevant evidence before him. We shall set his decision aside for that reason.

11. 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, in a new decision that can be considered for marking as Country Guidance. In the mean time it is better that there be guidance in the form of instructions to determine each case on its own evidence than that there be out-of-date guidance liable to lead to incorrect conclusions. In our judgment AT should not stand as an authority on the art 15(c) risk in Libya. Instead, that risk should be determined on a case-by-case basis, on the evidence in each individual case, until general up-to-date guidance is again published. It may be that the Tribunal ought also to review the rest of the guidance given in AT: but that is not a matter that falls for decision in this appeal.

12. We therefore set aside the decision of Judge Turnock and remit the appeal to the First-tier Tribunal. The only extant ground of appeal is that the appellant's return to Libya, in the way and by the route in which it is envisaged it would take place, would expose her to a risk from which art 15(c) protects her. That issue needs to be determined on the evidence, by a judge other than Judge Turnock.

C. M. G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 31 August 2016