Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/04157/2015
AA/04169/2015
AA/04170/2015
AA/04171/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 1 December 2015	**on 15 December 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

AA
NA
MA
SA

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D McGlashan, of McGlashan MacKay, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are husband, wife, and two children, all citizens of Libya. They appeal against a determination by First-tier Tribunal Judge Doyle, promulgated on 17 July 2015, dismissing their appeals on Refugee Convention and all other available grounds.

2. The grounds of appeal to the Upper Tribunal are as follows:

'2. The FTT erred in law because:

2.1 **He left out of account evidence he should have take into account**. There were **2** items of evidence that the appellants would be persecuted if returned: first that a report identified the first appellant as a Gaddafi loyalist; and second that when the second appellant went to Libya, a militia group threatened to harm the first appellant if he returned (*see paragraph 12 in the first appellant's statement)*. Although the FTT does not believe the **first** item, he has not considered whether the **second** is made out. He has referred to the **second** *only* in the context of damage to the credibility of the first appellant *(see paragraph 15(s) in his decision)*, and not in terms of whether the events spoken to by the first appellant occurred. Since these events were a material part of the claim, findings in fact should have been made.

2.2 **He applied the wrong test in holding that the appellants were not entitled to humanitarian protection *(see paragraphs 19 and 20 in his decision)***. The test is not whether a person is a refugee, but whether there is a "… *serious threat … by reason of indiscriminate violence in situations of … internal armed conflict …" (Article 15(c)).* Even if the FTTIJ concluded that no "… *indiscriminate violence …"* was present in Libya on the basis of *AT and Others (Article 15(c)); risk categories) Libya CG [2014] UKUT 318)* he erred in law because he has not taken account of changed country circumstances. *AT* was decided on 14 July 2014 on the basis of evidence heard between 18 to 22 November 2013. Evidence before the FTTIJ indicated a serious deterioration in country conditions since the relevant dates in *AT. (see generally the items in the third Inventory of Productions for the first appellant and particularly Dr George's report between (i) paragraph 43 – 54 (dealing with the effects of militia rule and events later in 2014; and (ii) 74 (referring to USDoS report published 25 June 2015) and 75 (referring to The Foreign Office report 29 May 2015 which states inter alia (fourth paragraph) that terrorist attacks "could be indiscriminate …").* A decision maker is not bound by a CG case if there has been a material change in country conditions. The FTTJ erred in law in concluding notwithstanding evidence before him that there has not been such a change in Libya.

2.3 **He was not entitled to find that the first appellant was not a credible witness (*see paragraph 15(q) because*:**

- **Paragraph 15(l)**: the basis of the conclusion here is that there is no evidence that the report was sent to persons in Libya because the list of email addresses were limited to those with "yahoo" or "hotmail" accounts. Examination of the list will disclose that the report was also sent to persons with accounts suffixed by ".com". Accordingly it is possible it was sent to persons in Libya and the FTTJ has made a material error in fact amounting to an error in law.
- **Paragraph 15(r)**: Section 8 of the 2004 Act does no more than raise a rebuttable presumption that evidence is not credible in certain circumstances, one of which is if there is no valid reason for any delay in claiming asylum. The FTTIJ states that the expectation of the first appellant that matters in Libya would become resolved was "… *unrealistic …"*. Given the uncertainty in the country conditions, there is no basis for this conclusion.'

3. On 19 September 2015 Upper Tribunal Judge Taylor granted permission, observing as follows:

"1. The challenges to the judge's credibility findings are unlikely to be made out, save for the lack of a finding in relation to the threat from the militia group, which could be arguable (Ground 2.1). The judge was entitled to conclude that the production of the report did not establish that it had been sent to Libya. There is no misapplication of the law in relation to section 8 of the 2004 Act.

2. It is however arguable that the judge ought to have engaged with the evidence before him in relation to the deterioration of conditions in Libya since *AT and or* (Article 15c; risk categories) Libya CG [2014] UKUT 318."

4. The SSHD filed a Rule 24 response in these terms:

'3. Permission for leave to appeal was granted on the basis that it is arguable that the FTJ ought to have engaged with the evidence before him in relation to the deterioration of conditions in Libya since **AT and Others (Article 15c; risk categories) Libya CG [2014] UKUT 318**. The respondent will contend that this ground is not made out.

4. The FTJ made a reasonable and sustainable finding that "at its highest the appellants would simply be black Libyans without a noticeable profile … The case of AT indicates that is it only those with a significant profile in the Gaddafi regime who would be at risk. That profile is entirely lacking for any of these appellants. I there find that none of the appellants discharge the burden of proving that they have a well founded fear of persecution for a convention reason." [Paragraph 15(w) Determination]. This finding is entirely in keeping

with **AT and Ors** where the Upper Tribunal found that the majority of the population in Libya had either worked for or had some association with the Gaddafi regime, and that such employment or association alone would not be sufficient to establish persecution or ill-treatment on return to Libya. The grounds advanced by the appellant in this regard fail to establish a material arguable error of law.

5. Finally paragraph 2 of the head note in **AT** confirms that 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 (Qualification Directive) so as to mean that substantial grounds exist for believing that solely by being present in Libya that a person would face such a risk to his life or person. The grounds advanced by the appellant are opportunistic and in mere disagreement with the findings of the FTJ that he has failed to discharge the burden of proof to the requisite low standard to show that he would face a real risk of suffering serious harm or that he would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment.'

Submissions for Appellant

5. Mr McGlashan confined his submissions to paragraphs 2.1 and 2.2 of the grounds, as follows. The judge made no finding on the allegation that militias threatened family members at their home on 2 occasions. It might be said that this was covered by the general adverse credibility conclusions, or by the judge's finding that the appellant's wife and child would not have returned if there was a danger. However, the judge failed to address the significant issue of the "mindset" of the second appellant regarding her return to Libya. In his witness statement the first appellant said that his wife's brother had been missing, presumed dead. In his oral evidence the matter was put to him and he replied, "My wife wanted to go back, I could not stop her." The judge failed to deal with specific matters which had a significant bearing on the credibility of the claim.

6. I enquired whether there had been any written statement or oral evidence from the second appellant. Mr McGlashan advised that she had not provided a written statement or given oral evidence.

7. Mr McGlashan turned to ground 2.2. I enquired whether this had been a ground of appeal in the First-tier Tribunal. On reference, the grounds there turned out to be detailed and specific, set out under the headings "credibility", "plausibility", "internal relocation", "section 8 of the 2004 Act", "*sur place*", "humanitarian protection", "best interests of the child", and "discretionary leave: Article 3 ECHR". They do not contain any proposition that country guidance has become outdated.

8. Those grounds were prepared by previous agents. Mr McGlashan's firm was instructed after the appeal to the First-tier Tribunal was filed, but well before the date of the hearing. He confirmed that there had been no

application prior to or at the hearing to amend the grounds of appeal, but he said that the issue had been raised in the oral submissions.

9. An expert report by Dr George was in the respondent's bundle and also in the appellant's first bundle (item 2). It was obtained after the respondent's decision but prior to the hearing and after Mr McGlashan's firm was instructed. Mr McGlashan said this had been one of the main items relied upon for the submission that risk factors were no longer limited to those expounded in *AT*. He said that such factors extended to the activities of militias; discrimination against dark skinned Libyans; and suspicion of those who had been in the UK as students during the Libyan regime. He accepted that all these features were considered in *AT*. He said however that there had been considerable expert and background material to show that such risks had "intensified" since *AT*, and that dangers arising at road blocks manned by militias now present a risk to anyone returning to the appellant's home area.

Submissions for the Respondent

10. Mrs Saddiq submitted that the grounds disclose no error of law, and are only an attempt to have the case in effect reheard in the Upper Tribunal, elaborating on it in a way which was not formulated in the First-tier Tribunal. The determination showed that there had been no clear argument put to the judge that there was general risk to everyone in Libya. If the judge had been asked to distinguish *AT*, he would have dealt with that submission in his careful and thorough determination. Dr George had supplied a report, but it did not go so far as to disclose a protection need for all Libyans, for all dark skinned Libyans from the south of the country, or for all those who had been abroad as students during the Gaddafi period. The core of the case in the First-tier Tribunal was as reflected at paragraphs 15(l) to (q) of the determination: it was presented as a credibility case, turning on the allegation that information about the first appellant had been circulated to influential persons in Libya. His account in that respect had been found not credible, and no error of law was suggested in those findings. The judge gave thorough reasons for rejecting his evidence. It was significant that no evidence had been presented from his wife. There had been no analysis before the judge to identify any evidence substantially different from that which was considered in *AT*. Risks of the nature referred to in this case had all been considered in AT, and there had been no focus on how such risks had been shown to have materially increased. The judge had been correct to apply *AT*, there having been no structured submission on why he should go beyond it.

Reply for Appellant

11. Mr McGlashan in response said that the judge had not dealt with the explanation for the wife's return to Libya. Dr George's report had contained evidence of black Libyans being targeted since *AT* was decided.

The judge had "not engaged with any of the evidence" although he had been addressed on the changing situation since *AT*. There was no risk factor which was new, rather it was the intensity of all factors which had increased. Dr George's report was subsequent to *AT* and so such evidence had not been before the Tribunal at that time.

Discussion and Conclusions

12. The appellant's grounds and submissions disclose no error of law in the judge's generally adverse credibility finding. That finding was sufficient to encompass the alleged threats made during the period when the second appellant returned to Libya.

13. Any greater focus on that alleged episode discloses only that there was no good reason to accept that it occurred, especially once it is noted that there was no direct evidence from the second appellant. The allegation of a failure to consider the explanation for the return of the first appellant's wife to Libya reveals a weakness not a strength in the appellants' case.

14. Mr McGlashan submitted that the judge fell into the error of speculation when he thought it implausible that the first appellant would have permitted (or acquiesced in) his wife's return to their home area if this were a dangerous move, especially when she was accompanied by their 18 month old child (the third appellant) and while 5 months pregnant (she has since given birth to the fourth appellant). The allegation is that the second appellant was determined to return despite the risk and her husband's advice. If so, her story did not have to be related at second hand through the first appellant. Such a strong willed and decisive individual could readily have given evidence herself. I think the judge's view was not speculative but sensible.

15. Dr George's report was presented in the First-tier Tribunal as one which supported the first appellant's claim, conditioned upon his being found credible. It is dealt with accordingly in the determination at paragraph 15(o) and (p). There was no ground of appeal that the appeals might succeed on general risk, or on enhanced risks since *AT* was decided.

16. There were before the First-tier Tribunal Judge four inventories of productions. Inventory 2 comprises 15 items of background evidence running to 160 pages. There was also a schedule of 28 page references. No analysis of the evidence was presented to support the argument that the country guidance is outdated.

17. At paragraph 15(t) to (w) the determination takes over a page to apply *AT*. It does not record any submission that the case had become outdated, or deal with that possibility. That would be a startling error of approach if the appeal had expressly been taken on the basis that *AT* was no longer sound. I note that although ground 2.2 says that the judge erred by not

taking account of changed country circumstances, it does not specifically aver that the judge failed to deal with a submission made to him.

18. The First-tier Tribunal in terms of Practice Direction 12.2 is to treat a country guidance case as authoritative so far as the appeal before it relates to the country guidance issue in question, and depends upon the same or similar evidence. The First-tier Tribunal is of course entitled (indeed bound) to depart from such guidance if it is shown the evidence to displace it. Any such argument should be made clearly and openly. There was no ground of appeal before the First-tier Tribunal to lead it to consider whether the guidance should continue to be treated as authoritative. The determination is well focused and consciously applies the country guidance. It is inconceivable that if there had been any meaningful submission that the guidance was superseded that the judge would have ignored it.

19. No error of law has been shown. The determination shall stand.

20. No anonymity order has been requested or made

Upper Tribunal Judge Macleman

3 December 2015