Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10873/2014

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THE IMMIGRATION ACTS

Heard at: Columbus House, Newport
On: 10 August 2015

Decision & Reasons Promulgated
On: 14 August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EAAG
MJAA
(anonymity direction made)

Respondents

Representation

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr S Chelvan, Counsel instructed by South West Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the determination of First-tier Tribunal Judge Britton in which he allowed the appeals of EAAG and MJAA, citizens of Yemen, against the Secretary of State's decision to refuse asylum. I shall refer to EAAG and MJAA as the Applicants, although they were the Appellants in the proceedings below.

2. The application under appeal was made on 27 February 2014 and was refused by reference to paragraph 336 of the Immigration Rules (HC395) on 21 November 2014. The Applicants exercised their right of appeal to the First-tier Tribunal. This is the appeal which came before Judge Britton on 11 March 2015 and was dismissed on asylum grounds but allowed on humanitarian protection (Article 15(c) of the Refugee Qualification Directive) and human rights (Articles 3 and 8 ECHR) grounds. The Secretary of State applied for permission to appeal to the Upper Tribunal. The application was granted by First-tier Tribunal Judge Cheales on 15 April 2015 in the following terms

> In her grounds for onward appeal, the respondent asserts that the judge has not given adequate reasons for allowing the appeal under article 15(c) of the Qualification Directive and Article 3. Also, when he allowed the appeal under Article 8 did not refer to the immigration rules or the public interest.
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> It is arguable that the judge has not given adequate reasons for allowing the appeal under article 15(c), Article 3 and should have considered the public interest in his reasoning on Article 8.

3. At the hearing before me Mr Richards appeared to represent the Secretary of State and Mr Chelvan represented the Applicants. Mr Chelvan submitted a copy of the rule 24 response that had been filed on 12 May 2015 and a copy of the Court of Appeal decision in QD (Iraq) v SSHD [2009] EWCA Civ 620.

Background

4. The history of this appeal is detailed above. The facts, not challenged, are that the Applicants are mother and daughter born respectively on 3 February 1985 and 23 March 2012. They are the wife and child of JAMA who is a British citizen. The Applicants left Yemen with JAMA on 28 October 2013 arriving in the United Kingdom on the same day. They held valid visitor's visas. They applied for asylum on 27 February 2014 claiming fear of persecution in Yemen. Their application was refused and in dismissing their appeals on asylum grounds the Judge found that the core of the First Applicant's account of persecution lacked credibility and was a fabrication designed to gain access to the United Kingdom. The Judge went on to find nevertheless that the Applicants would be at risk if returned to Yemen because of the political situation and that the Yemeni government was not able to protect them from real risk of suffering serious harm on return. The Judge found further that if the Applicants were returned to Yemen there is a real risk that

they would suffer a breach of their rights protected by Articles 3 and 8 of the European Convention on Human Rights.

Submissions

5. On behalf of the Secretary of State Mr Richards said that it was conceded that there were exceptional circumstances and that there was no need to look at the Immigration Rules when considering Article 8, it was a matter of accepting proportionality. The Secretary of State concedes that there was no error of law in this respect. The Judge took into account the public interest; he properly took account of section 55 of the Borders, Citizenship and Immigration Act 2009 and came to a proper conclusion on proportionality. Although the Respondent concedes that the Judge did not err in law in allowing the appeal under Article 8 it was not conceded that the Judge was correct allow the appeal by virtue of Article 3 or by virtue of Article 15(c) of the Refugee Qualification Directive.

6. For the Applicants Mr Chelvan said that detailed evidence was provided by the Applicants on the day of the hearing pertaining to the situation in Yemen. It was this evidence that resulted in the concession made by the Presenting Officer at the hearing that the Secretary of State would not seek to return the Applicants to Yemen. There is some dispute as to the terms of that concession but it is of note that the Presenting Officer at that hearing has not filed a statement of evidence. In any event following the grant of permission to appeal to the Upper Tribunal the Applicants submitted a detailed rule 24 response that was served on the Secretary of State and the Tribunal. This response included details of the humanitarian situation in Yemen. The Secretary of State has had ample time to file evidence in reply but has not done so. When making his concession to the First-tier Tribunal the Presenting Officer referred to family life saying that the Secretary of State would not expect the Applicants to return to Yemen. In fact there was evidence before the First-tier Tribunal that the Foreign and Commonwealth Office (FCO) had advised against all travel to Yemen. The Secretary of State provided no evidence to the First-tier Tribunal and accepted that the situation in Yemen continued to deteriorate. So far as Article 15(c) is concerned the Secretary of State accepts that the situation in Yemen is so dangerous that there is a travel advisory. Referring to the Elgafagi [2009] 1 WLR 2100 sliding scale there is increased individual risk to the Applicants as a woman and an infant child. I was referred to paragraphs 35 and 36 of Elgafagi as quoted in QD (Iraq) and to paragraphs 35 and 36 of QD (Iraq). The

reliance placed by the Secretary of State on paragraph 26 of the recital to the Qualification Directive is wrong in law.

7. Mr Richards limited his response to relying on the grounds of appeal to the Upper Tribunal.

Error of law

8. In my judgement the decision of the First-tier Tribunal does not disclose a material error of law. The appeal was allowed under three headings, Articles 3 and 8 of the ECHR and Article 15(c) of the Refugee Qualification Directive. The Respondent concedes that the First-tier Tribunal did not err in allowing the appeal by virtue of Article 8 which leaves only the two headings to consider. Nevertheless it is in my judgement firstly appropriate to consider why the appeal was allowed under Article 8 because there is no doubt that this informed the Judge's decision in respect of the other two headings.

9. The facts of this appeal are unusual and individual. The Applicants are the wife and child of a naturalised British citizen and the family was living together as a family unit in Syria. The Second Applicant was born on 23 March 2012 and her father was not naturalised until November 2012 so she is not a British national by birth. The family left Yemen together at a time when there can be little doubt that the political stability and humanitarian situation in that country was rapidly deteriorating. Having entered the United Kingdom as visitors they delayed making a claim for asylum and the claim that they eventually made was refused and their appeal against that refusal dismissed as a fabrication. At their appeal they raised the issues of humanitarian and human rights protection and submitted an appeal bundle which included relatively limited information concerning the current situation in Yemen. This limited information did however include the Foreign and Commonwealth Office travel advice updated on 6 March 2015 the first two sentences of which read as follows

> "The Foreign and Commonwealth Office advise against all travel to Yemen. This includes the mainland and all islands. You are strongly urged to leave immediately".

10. The report is succinct but very clear indeed as to why the advice has been given

> "There is a high threat from terrorism throughout Yemen and specific methods of attack are evolving and increasing in sophistication. Terrorists

> continue to threaten further attacks … there is a very high threat of kidnap from armed tribes, criminals and terrorists …"

11. It is perhaps not surprising given this advice that the Presenting Officer, Mr Hibbs, agreed that there were exceptional circumstances. Whether he said that he would not seek the return of the Applicants to Yemen (as recorded at paragraph 38 of the decision) or simply that there were exceptional circumstances justifying consideration under Article 8 beyond the provisions of the Immigration Rules is, in my judgement, immaterial because the Secretary of State now accepts that she will not seek the return of the Applicants to Yemen. She will not do so because she accepts that it would be a disproportionate interference in the family life that the Applicants share with a British citizen who under British government advice should not travel to Yemen to require them to go there without him.

12. But the implications of the Secretary of State's concession go further than that. It is clear from the FCO advice that the reason why British nationals are *"strongly urged"* to leave Yemen is because there is considered to be a *"high threat from terrorism"* and a *"very high threat of kidnap"*. The advice was issued because, if it is not followed, there is a real danger of serious harm befalling those individuals who remain. The Refugee Qualification Directive provides

> Article 2(f)
> "Person eligible for subsidiary protection means" a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.
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> Article 15
> Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

13. Article 15(b) mirrors Article 3 ECHR. Violence through terrorism and kidnap easily fall within the definition of inhuman or degrading treatment. The fact that there is internal armed conflict in Yemen is beyond peradventure. The seriousness of the threat is highlighted by the FCO advice. The individual nature of that threat, to the extent given the Elgafagi sliding scale that such individual threat needs to be shown is clear from the fact the Applicants are a woman and infant child and

the wife and daughter of a naturalised British citizen and would be returning without him. In this respect Elgafagi holds as follows

> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.
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> 36. That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.
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> 37. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows by the use of the word 'normally' for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.
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> 38. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.
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> 39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

14. So far as the decision of the First-tier Tribunal is concerned there can in my judgement be no material error of law, given the above, in the decision made. Whereas the decision of the First-tier Tribunal falls far short of a detailed analysis that could set any precedent for other cases involving Yemen there was, in short, a concession that the Applicant's circumstances were exceptional. Further there was clear advice from the Foreign

and Commonwealth Office not only advising against travel to Yemen but strongly urging British nationals to leave. The reason for that advice was the threat of both targeted and indiscriminate violence. There was no challenge at the hearing to the evidence put forward on behalf of the Applicants as to the security situation in Yemen and there has been no answer filed to the rule 24 response in this respect.

15. My conclusion from all of the above is that the decision of the First-tier Tribunal contains no error of law material to the decision to allow the appeal by reference to Articles 3 and 8 ECHR and Article 15(c) of the Refugee Qualification Directive. The appeal of the Secretary of State is therefore dismissed.

Summary

16. The decision of the First-tier Tribunal did not involve the making of a material error of law. I dismiss the Secretary of State's appeal.

Signed: **Date:**

J F W Phillips
Deputy Judge of the Upper Tribunal