



IAC-AH-LEM-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11764/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 16 November 2015**

**Decision & Reasons Promulgated
On 9 March 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**ELSABIR OTHMAN MOHAMED EL ZAWI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Khan, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr Diwncyz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have written this decision following a resumed hearing before the Upper Tribunal at Bradford on 16 November 2015. By a decision which I promulgated on 10

September 2015 I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside and directed a resumed hearing before the Upper Tribunal on Article 15(c) grounds only. My error of law decision is set out below:

2. The appellant, Elsabir Othman Mohamed El Zawi, born on 2 February 1971 is a citizen of Libya. By a decision dated 15 December 2014, the appellant is refused asylum and leave to enter the United Kingdom. He appealed to the First-tier Tribunal (Judge Batiste) which, in a decision promulgated on 24 February 2015, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.
3. I find that the decision of the First-tier Tribunal should be set aside. I have reached that decision for the following reasons. The appeal to the Upper Tribunal concerns the decision of Judge Batiste only insofar as humanitarian protection is concerned. The appellant had sought to argue that the background information regarding Libya had altered since the promulgation (on 14 July 2014) of *AT and Others (Article 15c; risk categories) CG [2014] UKUT 318 (IAC)*. Material was put before Judge Batiste by Counsel for the appellant at that hearing (Miss S Khan) which, she argued, indicated that the appellant would be exposed to indiscriminate violence in a situation of internal armed conflict (Article 15(c)). Considering her submission, Judge Batiste wrote:
 40. I have gone on to consider the appellant's claim under 15(c) of the Qualification Directive and in *AT and Others* it was found there is not such a high level of indiscriminate violence in Libya 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 life or person. Given that this is a country guidance case I am bound to follow this case unless I am satisfied that the circumstances have materially changed since the time of the decision. Miss Khan argues on behalf of the appellant that there has been a material change in the situation.
 41. In support of this contention she places reliance on the bundle or background material of the appellant's bundle. [Ms Khan] directed me to a number of specific paragraphs within this material which I have carefully considered. I accept that these show that there has been a deterioration in the situation since the hearing of *AT and Others* in November 2013. In particular I accept there has been an increase in volatility caused by the rise of Islamic State in Libya. I also accept there has been evidence of fighting in specific towns, including Tripoli and Benghazi and a rising level of militia control of certain regions. There has also been considerable levels of internal displacement, particularly from Tripoli and some surrounding districts. I have also seen documentation confirming that Norway has temporarily suspended returns to Libya.
4. The parties do not dispute that the judge has, in the passage which I have quoted, set out accurately the issue which was before him. However, the judge's analysis and the reasons which he has given for his determination of the issue of humanitarian protection was as follows:
 42. However, having considered all the evidence before me I cannot be satisfied that the evidence enables me to be satisfied that the situation now is that there is serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of internal armed conflict. As a result I do not accept the current situation

engages Article 15(c) and I follow the guidance in the case of *AT and Others*. I therefore reject the appellant's claim for requiring international protection.

5. I find that that paragraph is inadequate and does not constitute a proper reasoned rejection of Miss Khan's submission. I have no doubt that Judge Batiste "considered all the evidence" before him but he has failed to explain exactly what it was in that evidence which has led him to his conclusion. Indeed, had he reached the converse conclusion "having considered all the evidence" before him but without giving any other more specific reasons, such a conclusion would have been equally unsustainable. The judge did not have to deal in detail with each and every item of the material put before him but he did need to explain what it was in the material which led him to reject the Article 15(c) claim. Further, he needed to explain why he chose to follow the guidance of *AT and Others* and that very guidance was being challenged by the appellant.
6. I do not say that the appellant will necessarily succeed in his Article 15(c) appeal but I do consider that the Upper Tribunal will need to examine in greater detail all the material (including any new material and expert evidence, should the appellant seek to rely on it) in order to determine whether this particular appellant should be granted protection. The resumed hearing will take place at Bradford before a panel of the Upper Tribunal. Both parties must ensure that they serve each other and file at the Tribunal copies of all evidence upon which they seek to rely no later than ten working days prior to the resumed hearing. The findings of fact of the First-tier Tribunal have not been challenged insofar as they relate to the asylum and Article 3, ECHR appeal and those findings shall stand. The resumed hearing will be concerned with the Article 15(c) appeal only.

Notice of Decision

7. The decision of the First-tier Tribunal which was promulgated on 24 February 2015 is set aside. The findings of fact of the First-tier Tribunal are preserved insofar as they concern the appeal on asylum and Article 3, ECHR grounds. The Upper Tribunal will remake the decision on Article 15(c) grounds only following a resumed hearing before a panel of the Upper Tribunal sitting at Bradford.
8. No anonymity direction is made.
9. Ms Khan, for the appellant, acknowledged that the starting point for the Upper Tribunal determination of this appeal is the country guidance case of *AT and Others (Article 15(c); risk categories) Libya CG [2014] UKUT 00318 (IAC)*. The Tribunal stated at head note (2):

Article 15(c)

- (2) *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 ("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.*

10. The appellant does not fall into any of the risk categories otherwise identified in *AT*. The question before the Upper Tribunal in this appeal is whether country circumstances in Libya have deteriorated to such a point that the appellant would now be at risk of indiscriminate violence upon return to that country. I have quoted above (see my error of law decision) at paragraphs [41] of Judge Batiste's decision promulgated on 10 September 2015. That paragraph provides a helpful summary of the changes which Ms Khan submits have led to levels of indiscriminate violence rising considerably within Libya since *AT* was promulgated. In particular, terrorist group commonly known as Islamic State was not present in Libya at the time of the promulgation of *AT*.
11. I also acknowledge that the political and security situation in Libya has clearly deteriorated as a direct consequence of the growing influence of the presence of Islamic State in that country, much of the background material which has been produced by the appellant's solicitors deals in fairly generalised terms with the threat to non-combatant civilians in Libya. There are Swiss and American news reports in the appellant's latest bundle of documents which give details of the ill-treatment and murder of civilians by groups purporting to represent the government of Libya whilst it is apparent that there is no centralised government now within the country rather a number of heavily armed antagonistic factions, including Islamic State. The news reports *per se* paint a distressing picture of the life of ordinary civilians within Libya but they do not, in my opinion, establish that this appellant will face the risk of indiscriminate violence upon return to the country. For that reason, I have considered the evidence specific to the appellant and which appears in the form of expert report of Dr Emil Joffe who is an affiliated lecturer at the Department of Politics and International Studies in the University of Cambridge. Dr Joffe is an acknowledged expert on Libya who produced expert evidence before the Tribunal in *AT*. I note that Professor Joffe was alone amongst the experts reporting to the Upper Tribunal in *AT* taking the view that "there was a risk of being affected by indiscriminate violence" in Libya [121]. However, his evidence was insufficient to persuade the Tribunal. Indeed, the Tribunal took the view [125] that whilst

it is undeniably the case that many civilians – men, women and children – have been injured or lost their lives in revolutionary and post-revolutionary Libya ... we are not satisfied the evidence demonstrates there is such a high level of indiscriminate violence that substantial grounds exist for believing that an individual would, solely by reason of being present there, face a real risk which threatens his life or person." [125]

The background material which I have been shown in the instant appeal falls into the same category of that examined by the Tribunal in *AT* but which, likewise, did not lead it to conclude that Article 15(c) would be engaged. It was also clear that Dr Joffe's conclusion that there would be a risk of indiscriminate violence in Libya was influenced by his opinion that that violence is essentially unpredictable, a view rejected by the Tribunal [127]:

Whilst we accept that there is some foundation for Professor Joffé's assessment of the violence as being unpredictable, with respect to him we do not agree that predictability (or lack of it) is a measure of indiscriminate violence. Unpredictability may often be a

feature of indiscriminate violence, but that does not assist in terms of an assessment of whether there is, in fact, indiscriminate violence of the necessary character which requires recognition in terms of international protection. To take two simple illustrations at opposite ends of the spectrum; it may be predictable that every day for several hours opposing factions in an internal armed conflict will bomb each other's positions which are in heavily built up civilian areas. That violence is predictable but would appear to have the character of indiscriminate violence necessary for Article 15(c). At the other extreme, there may be a bomb blast every few months in a market but the timing of it is unpredictable. We do not consider that that type of violence in a situation of internal armed conflict would amount to indiscriminate violence within Article 15(c).

12. Given that the appellant in the present appeal submits that the situation in Libya has now deteriorated to such a degree that he would be at risk of indiscriminate violence, it is perhaps surprising that Dr Joffe's report (which is dated 6 November 2015) does little to offer unequivocal support for that argument. At [115], Dr Joffe writes:

I understand from the decision of Upper Tribunal Judge Clive Lane that the resumed hearing in Mr El Zawi's appeal will be concerned with the issue of whether, under Article 15(c) of the Council Qualification Directive (2011/95/EU) (EASO 2015) the level of violence and insecurity in Libya today exceeds the threshold of indiscriminate violence, as laid down in the Directive, such as to represent a threat to civilians there. I am not in a position to make an authoritative evaluation as to whether or not the current state of insecurity exceeds this threshold as defined by Article 15(c) and as laid down in the latest country guidance on Libya (AT). However, from a layman's point of view, I will argue that violence in Libya is indeed "indiscriminate" and that the Libyan state cannot offer its citizens any protection against it. After all, today seven per cent (431,000 persons out of Libya's total population of 6,000,000) are internally-displaced, 24,400 of them in Awbari and Ghat alone, out of a total population there of 57,000 - 43 per cent! (UNHCR 2015b).

13. It is not clear to me why Dr Joffe backed away from making an "authoritative evaluation" as to whether the threshold of Article 15(c) violence has now been crossed in Libya; that evaluation was exactly what he has been instructed to undertake as an expert witness. It is possible that he is not required to make a judicial finding but that, with respect, is obvious. What is most puzzling is Dr Joffe's use of the expression "from a layman's point of view"; Dr Joffe's role in these proceedings is not that of a layman offering an uninformed view but rather of an expert who alone is able to offer an opinion as a witness rather than to relate facts. It is true that in subsequent paragraphs Dr Joffe goes on to discuss the macro-political situation in Libya (existence of "two governments" both illegitimate) but this analysis does not descend to the level of detail required to establish the existence of indiscriminate violence. Likewise, his pessimistic view of the future [121] and his somewhat generalised assessment that "Libya, in short, is not 'safe' in any ordinary sense of the word" does little to assist the appellant.
14. I am reminded that the burden of proof in the appeal continues to rest on the appellant. His evidence consists of background material which provides details of

incidents in which civilians have suffered or been killed and the report of Dr Joffe refrains from offering an expert opinion. I find that the appellant has failed to discharge the burden of proving the country situation in Libya has deteriorated to such an extent that the conclusions of *AT* are no longer valid and that he would face indiscriminate violence anywhere within that country. For that reason, I remake the decision dismissing his appeal on all grounds.

Notice of Decision

The appellant's appeal against the decision of the respondent dated 15 December 2014 is dismissed.

No anonymity direction is made.

Signed

Date 20 February 2016

Upper Tribunal Judge Clive Lane

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 20 February 2016

Upper Tribunal Judge Clive Lane