Neutral Citation Number: [2017] EWCA Civ 143

Case No: C5/2015/0404

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
DEPUTY UPPER TRIBUNAL JUDGE MAILER
AA/03013/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2017

Before:

LORD JUSTICE McFARLANE
LORD JUSTICE McCOMBE
and
LORD JUSTICE FLAUX

- -

Between:

NA (LIBYA)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Ranjiv Khubber and Althea Radford (instructed by **Turpin & Miller**) for the **Appellant**
Ben Lask (instructed by **Government Legal department**) for the **Respondent**

Hearing date: 9 March 2017

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellant is a Libyan national, born on 24 August 1986, who contends that he would be at risk of persecution on return to Libya, such that his removal would place the United Kingdom in breach of its obligations under the Refugee Convention 1951, or such that he is entitled to a grant of Humanitarian Protection under paragraph 339C of the Immigration Rules, or leave to remain under Appendix FM of the Immigration Rules or discretionary leave to remain on the basis of his rights under the ECHR. In essence, his case is that the Libyan authorities would perceive him as loyal to the Gaddafi regime, because (a) he previously lived in Khoms, a former Gaddafi stronghold, and (b) his mother is the second cousin of Colonel Gaddafi's second wife.

2. The Respondent refused his application for asylum by a decision dated 25 April 2014. The appellant appealed that decision to the First Tier Tribunal (First Tier Tribunal Judge Wellesley-Cole) which heard his appeal on 20 June 2014. The appellant gave evidence and was cross-examined. His wife also gave evidence, although there was no cross-examination of her. As the judge recorded in her determination, broadly speaking the Secretary of State accepted the appellant's factual account, with the exception of the assertion that his mother and Colonel Gaddafi's second wife were second cousins, which was said to be an attempt to bolster his asylum claim.

3. The judge was referred to the most recent Country of Origin Report on Libya then available to the Secretary of State, the Operational Guidance Note ("OGN") of May 2013. At the hearing both parties were aware that, in November 2013, the Upper Tribunal had heard what was intended to be a Country Guidance case in relation to Libya in *AT (Libya)* in which a decision was awaited. Neither party invited the First Tier Tribunal to adjourn the present case to await that Country Guidance.

The decision of the First Tier Tribunal

4. The judge prepared her Determination and Reasons which she signed on 30 June 2014. There was then an unexplained delay (which may have been an administrative one) before the determination was promulgated on 16 July 2014. In her determination, the judge relied in particular on the conclusion in the OGN that perceived Gaddafi loyalists are persecuted and do not in general have access to effective protection. She quoted this passage from the OGN:

> "Given the generalised attitude of resentment towards perceived Colonel Gaddafi supporters and fighters, and the force with which the Gaddafi regime sought to subdue the opposition, it is likely that applicants in this category will be able to show a need for international protection. Perceived supporters of Gaddafi are at risk of extra-judicial execution, arbitrary detention, torture, ill-treatment and death in detention […]. Communities perceived to be loyal to Gaddafi have also experienced forced displacements, indiscriminate shelling, looting and burning of homes."

5. The judge concluded that the appellant would be perceived as a Gaddafi loyalist, given the problems his brothers and cousins had experienced, together with the fact that Khoms generally was seen as a Gaddafi stronghold. His fears of persecution based on imputed political opinion were therefore genuine. She held that the Appellant would not be able to avail himself of the protection of the Libyan authorities, and would not be able to relocate internally. She summarised her findings at [27] of her Determination:

> "There is a reasonable degree of likelihood that the Appellant would be at risk of persecution because of his political opinion imputed because the people who are in charge of the country will treat him as pro-Gaddafi and might imprison and probably execute him. This is because when he live in Khoms, everybody worked in the army, it was one of Gaddafi's strongholds and people who lived there were all pro-Gaddafi. If returned to Libya, the border police at the airport would be able to tell where he was from because of his accent. The situation is not yet such in Libya that he could look to the authorities for protection."

6. On that basis, the appeal was allowed.

7. On 14 July 2014, the decision of the Upper Tribunal in the Country Guidance case of *AT and others (Art 15(c); risk categories) Libya CG* [2014] UKUT 318 (IAC) was promulgated, a fortnight after the judge signed her determination in the present case but two days before that determination was promulgated. Neither party drew the attention of the First Tier Tribunal to the decision in *AT* before the determination in the present case was promulgated. Indeed, despite the submission on behalf of the appellant that the Secretary of State should have done so because she was a party to both cases, that seems to me to be a counsel of perfection. I do not consider that the Secretary of State can be seriously criticised for having failed to bring the decision in *AT* to the attention of the judge, any more than she can be criticised for not being aware of it.

The decision in *AT*

8. As part of the Country Guidance, the Upper Tribunal in *AT* identified categories of people who would be at risk on return to Libya, and assessed the nature and extent of the risk they faced. In particular, they considered the position of former and/or suspected Gaddafi loyalists or supporters, as follows:

> "133 Former high-ranking officials within the intelligence services have been the subject of politically motivated murders […] Dr George emphasised that attitudes towards former members of Colonel Qadhafi's security agencies do not vary from one part of Libya to another. The OGN does not suggest that internal relocation to avoid risk is a possibility for a person in this category.
>
> 134 We do not interpret the evidence as limiting the potential for risk only to those who were formerly members of the

intelligence services. Others with a close association at a senior level with the former regime we consider equally to be at risk. It is not possible, nor indeed would it be appropriate, to suggest a list describing the type of work or association with the former regime that would potentially be in this risk category. The example most often given in the background and expert evidence is of high-ranking officials within the intelligence services, but other former high-ranking officials are also reasonably likely to be at risk.

135 Self-evidently, the closer an individual was to the centre of power within the Qadhafi regime, the more likely it is that that person would be at risk. Similarly, the further away from the centre of power the converse is true. During and in the immediate post-revolutionary period, those associated or suspected of being associated with the Qadhafi regime as fighters were subject to arbitrary arrest and ill-treatment. According to Dr George, there has been a shift in the pattern of detentions from 2011 onwards in that when there were a lot of ex-Qadhafi fighters at large, there were more people to arrest. Once all the obvious suspects were arrested the rate of arrests tapered off, with most individuals from the Qadhafi era having fled the country or having been detained, resulting in fewer arrests on grounds of sympathy for Qadhafi. Having said that, he also stated that there was still a fervour to hunt down Qadhafi loyalists.

136 We refer to this evidence from Dr George in this context because it indicates that in the revolutionary and the immediate post-revolutionary fever, the degree of association with the former regime which would attract adverse attention is likely to have been less than would now be the case, subject to our assessment in relation to specific groups.

137 We do not consider that the evidence leads to the conclusion that anyone who was associated with the former regime would be at risk of persecutory ill-treatment, serious harm or Article 3 ill-treatment on return. As Dr Porter states in his report dated 14 October 2013, seventy per cent of the Libyan labour force in the time of Qadhafi worked in the public sector so that the "gross majority" of Libyans were in some way associated with the regime, and that such association was especially high in Tripoli. He went on to state that it is not unusual for individuals to have worked for, or to have had family members who have had some relationship with, the previous government. Professor Joffé's oral evidence was that the effect of the Political Isolation Law would be that up to half the population would be excluded from holding office in the new regime.

> 138 All this serves to emphasise that an individual, fact-sensitive, assessment will be required in every case. That assessment will have to take into account the nature and extent of an individual's actual or suspected past association with the Qadhafi regime and taking into account that having worked for or been associated with the former regime is by no means exceptional in Libya. We consider it unlikely that simply having worked for or been associated with the regime in any capacity whatsoever will be sufficient to create a real risk of harm on return."

9. In relation to the risk to a person who has or has had a family member associated with the Gaddafi regime, the Upper Tribunal said this:

> "141 We have already referred to evidence that the majority of the population have had some association with the former regime and that it is not unusual for individuals to have worked for or to have had family members who have had some relationship with the previous government. The risk to a family member will again require a fact-specific assessment.
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> …
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> 145 It appears to us that there is limited support for a proposition that family members of those associated with the former regime, or those suspected of being such, are now, as a matter of course, at risk on return. The background evidence to that effect is limited and the expert evidence not entirely consistent. We had one example only cited to us. If there was such a risk to family members, we consider that there would be more evidence of it in the extensive background materials to which we were referred.
>
> 146 We do not rule out the possibility that an individual will be able to demonstrate such a risk but that would have to be demonstrated by a highly specific individual assessment of that person's circumstances. Mere assertion of risk by association as a family member would not be sufficient without fact-specific evidence of the risk to that particular family member. The clear evidence is that risk arises because of actual or perceived support for the previous regime. A family member may be able to establish risk on this basis, but the mere fact of being a family member would not in our judgement be sufficient."

10. In so far as the conclusions of the Upper Tribunal would have been relevant as Country Guidance to the case being made by the present appellant, they were as follows:

> "215 Drawing on all the expert and background evidence, and taking into account the submissions of the parties, we come to the following conclusions:

> ...
>
> (3) Having regard to the generally hostile attitude of society to the former regime, the following are, in general, at real risk of persecution or Article 3 ill-treatment on return to Libya: -
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> (a) former high ranking officials within the intelligence services of that regime;
>
> (b) others with an association at senior level with that regime.
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> (4) As a general matter, the closer an individual was to the centre of power within the former regime, the more likely that the individual will be able to establish a risk of persecution or Article 3 ill-treatment on return.
>
> (5) The majority of the population of Libya either worked for, had some association with, or has a member of the family who worked for or had an association with the Qadhafi regime. Such employment or association alone is not sufficient to establish a risk of persecution or Article 3 ill-treatment on return.
>
> (6) In general, family members of those described in (3) and (4) above are not at risk of persecution or a breach of their protected rights on return. It is possible, however, that an individual will be able to establish such a risk but this will need to be demonstrated by specific evidence relating to the individual's circumstances. Mere assertion of risk by association as a family member would not be sufficient without fact-specific evidence of the risk to that particular family member."

The appeal to the Upper Tribunal

11. The Secretary of State appealed to the Upper Tribunal on the sole ground that the First Tier Tribunal had erred in law in failing to apply *AT*, given that it had been published and promulgated before the determination of the First Tier Tribunal in the present case was promulgated. In his Decision and Reasons promulgated on 13 October 2014, the Deputy Upper Tribunal Judge accepted that the First Tier Tribunal remained seized of the matter until the decision was formally promulgated and communicated to the parties and the date of promulgation was thus key. In the present case, as at the date of promulgation, the Country Guidance in *AT* had been published and failure to have regard to or apply a Country Guidance authority constituted an error of law. Accordingly, the First Tier Tribunal had erred in law.

12. The Deputy Upper Tribunal Judge rejected the submission on behalf of the appellant that there was no inconsistency between the Determination in *AT* and the Determination of the First Tier Tribunal in the present case, so that any error of law was not material. He considered that it was by no means evident that the appellant would fit into one of the risk categories identified in *AT*. That was something that would require further assessment, including, if necessary, the production of further

evidence by the parties. The decision of the First Tier Tribunal was set aside. In those circumstances, it was agreed between the parties that the matter would have to be remitted to the First Tier Tribunal for reconsideration. This agreement was reflected in a further determination by the Deputy Upper Tribunal Judge, promulgated on 28 November 2014.

The grounds of appeal

13. The appellant now appeals to this Court with the permission of Laws LJ granted on 10 April 2015. The Upper Tribunal Judge had refused permission on the basis that, because the decision of the Upper Tribunal was not finally dispositive of the matter, any appeal was premature. Laws LJ indicated that he did not consider the appeal was premature. Thereafter, the matter has proceeded on the basis that the appellant has a right to appeal at this stage and the remission to the First Tier Tribunal has been stayed pending the present appeal to the Court of Appeal.

14. The grounds of appeal can be summarised as follows:

    (1) The Upper Tribunal erred in finding an error of law in the decision of the First Tier Tribunal. There is no duty on the First Tier Tribunal to apply a Country Guidance decision which was published after the determination has been produced and signed, but before promulgation, especially where the parties did not request that the un-promulgated decision be reconsidered in light of the guidance. Such a duty would be impractical and inconsistent with the nature of Country Guidance decisions.

    (2) Alternatively, the Upper Tribunal erred in finding that the error was material. The determination of the First Tier Tribunal was consistent with *AT*.

15. The Secretary of State by her Respondent's Notice sought to uphold the decision of the Upper Tribunal on the additional ground that the decision of the First Tier Tribunal was based on a misunderstanding or ignorance of an established and relevant fact, namely the existence of the Country Guidance in *AT*, applying the decision of the Court of Appeal in *E & R v SSHD* [2004] EWCA Civ 49; [2004] QB 1044.

The appellant's submissions

16. On behalf of the appellant, Mr Khubber emphasised that the parties and the First Tier Tribunal Judge had been aware that the Country Guidance case of *AT* had been heard and a decision was imminent and yet the Secretary of State had chosen not to ask for an adjournment or to put before the Tribunal the evidence which must have been available from *AT*, given that that case had been heard seven months previously in November 2013. In those circumstances and pursuant to the overriding objective in Rule 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the Rules"), the judge had decided to proceed with this case on the evidence before her, so that she could not be criticised and had not committed an error of law.

17. Mr Khubber relied upon the definition of "determination" in Rule 2 of the Rules: *"…a decision by the Tribunal in writing to allow or dismiss the appeal"* in support of his submission that the determination of the First Tier Tribunal was made when the judge signed her decision on 30 June 2014. What followed afterwards in terms of

promulgation was a purely administrative act over which the judge had no control. On that basis he submitted that the Country Guidance in *AT* post-dated the determination.

18. He also relied upon the reference in paragraph 12.2 of the Practice Directions: Immigration and Asylum Chambers of the First Tier Tribunal and Upper Tribunal ("the Practice Directions") to a Country Guidance case being *"authoritative in any subsequent appeal"*, in support of a submission that where, as here, the Country Guidance case was promulgated after the appeal had been heard, albeit before the determination of the appeal had been promulgated, the appeal was not a *"subsequent appeal"* of the kind the Practice Directions had in mind. In that context, he relied upon a passage of the judgment of Ouseley J as President of the IAT in the Country Guidance case of *NM and others (Lone Women-Ashraf) Somalia CG* [2005] UKIAT 00076 explaining the status of Country Guidance cases, in particular at [142], which Mr Khubber submitted demonstrated that the whole dynamic and purpose of Country Guidance cases was to assist the parties in determining how to present appeals which had not yet been heard:

> "142 The system enables the parties and the judiciary to know where to look for what the Tribunal sees as the relevant guidance, the parties to know what they have to deal with, and, if they wish to take issue with it, what it is that has to be the target of their evidence or argument. It enables parties to rely on the material which others have had accepted without reproducing or repeating it every time, or if it has been rejected, to know that there is no point in repeating it. Consistency and the justice which that brings can be provided for, even though differing and perhaps reasonable views can be taken of a wide variety of material. It also has the advantage of enabling the understanding of country conditions to be refined as successive decisions may lead to the identification of consequential issues to be grappled with which had hitherto been unrecognised […] There is recognised scope for improvement and parties can focus their evidence and arguments upon the aspect with which they take issue."

19. Mr Khubber also submitted that, even if there was an error of law by the First Tier Tribunal in not having regard to the Country Guidance in *AT*, it was not material, because there was no inconsistency between the determination in *AT* and the determination in the present case. The Upper Tribunal had declined to decide this issue by concluding that it was by no means evident that the appellant would fit into the risk categories or be part of a non-exhaustive risk group. The First Tier Tribunal had decided that the appellant would be at risk of persecution on the basis of perceived political support for the Gaddafi regime. Similarly, the Upper Tribunal in *AT* had identified persons associated with the Gaddafi regime as being at risk, with the risk increasing the closer they were to the centre of power. The populations of towns and cities known to have been loyal to the Gaddafi regime were noted to have been displaced and targeted by militia.

20. Mr Khubber relied on the fact that in relation to one of the issues considered in *AT*, whether there was serious harm within Article 15(c) of Council Directive 2004/83/EC ("the Qualification Directive"), the Country Guidance in *AT* had been superseded by

the more recent Country Guidance in *FA (Libya; Art 15(c)) Libya CG* [2016] UKUT 00413 (IAC). Article 15(c) defines serious harm as: *"serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"*. In *FA*, the Upper Tribunal decided that the numerous changes in Libya since November 2013 (when *AT* was heard) were sufficient to render the guidance on the Article 15(c) risk in that case unreliable. They stated that a new Country Guidance decision on the Article 15(c) risk was required, but that in the meantime, the Tribunal should decide each case on its own evidence rather than on the basis of outdated guidance on the Article 15(c) risk.

21. Mr Khubber recognised that this was not directly in point since the appellant had not relied upon an Article 15(c) risk in this case, but submitted that *FA* adds force to his case that fairness requires that the decision of the First Tier Tribunal in the present case on the basis of the evidence before the judge should not be undermined.

Submissions for the Secretary of State

22. Given that, at the end of Mr Khubber's oral submissions, we indicated that the appeal would be dismissed, we did not need to hear from Mr Lask on behalf of the Secretary of State. His submissions in his Skeleton Argument in opposition to the appeal can be summarised shortly as follows:

(1) As a general rule, a failure to apply or distinguish an applicable country guidance case will amount to an error of law.

(2) The relevant cut-off date until which the First Tier tribunal was seized of the case was the date that the determination was promulgated, not the date it was signed.

(3) There was no reason not to apply the general rule in this case, so that the decision of the Upper Tribunal that there was an error of law was correct and should be upheld.

(4) That error of law was material and the appellant's contention that the determination of the First Tier Tribunal was consistent with the Country Guidance in *AT* was unsustainable. The Upper Tribunal had been correct in setting aside the determination of the First Tier Tribunal and remitting the case for reconsideration in the light of *AT*.

(5) That course was fair, practical and consistent with the principles underlying the general rule in relation to country guidance cases, in that the appellant's claim will be the subject of a complete rehearing in the First Tier Tribunal at which the Tribunal can consider the impact of the country guidance in *AT* on the appellant's claim with the benefit of full submissions from both parties.

23. In the circumstances, we did not consider it necessary to hear any submissions on the alternative ground raised by the Respondent's Notice. We propose to say no more about that ground, which was not necessary for our decision, preferring to leave the point for argument as necessary in a case where it is germane to the determination of the appeal.

Analysis and conclusions

Was there an error of law?

24. It is quite clear that Country Guidance cases, whilst they do not amount to binding precedent, are authoritative in any subsequent appeal so far as that appeal relates to the Country Guidance issue in question and depends upon the same or similar evidence: see paragraph 12.2 of the Practice Directions. Paragraph 12.4 of the Practice Directions states:

> "Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

25. That paragraph reflects clear statements of the Upper Tribunal and the Court of Appeal to that effect. Thus, in the Country Guidance case of *NM and others*, Ouseley J explained the status of Country Guidance cases in these terms:

> "139 [Country Guidance decisions] were to be applied by the Tribunal itself and by Adjudicators unless there was good reason, explicitly stated, for not doing so. Failure to adopt that approach was an error of law in that a material consideration had been ignored or legally inadequate reasons for the decision had been given. The inconsistency itself with authoritative cases would be regarded by higher authority than the Tribunal as an error of law.
>
> 140 These decisions are now denoted as 'CG'. They are not starred decisions. Those latter are decisions which are binding on points of law. The requirement to apply CG cases is rather different: they should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can properly be held inapplicable for legally adequate reasons; there may be evidence that circumstances have changed in a material way which requires a different decision, again on the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any material change in circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged."

26. That analysis was approved by Brooke LJ, giving the judgment of the Court of Appeal in *R (Iran) v SSHD* [2005] EWCA Civ 982; [2005] INLR 633 at [27] referring to the predecessor of the present Practice Directions:

> "It will have been noticed that Ouseley J said that any failure to apply a CG decision unless there was good reason, explicitly stated, for not doing so would constitute an error of law in that a material consideration had been ignored or legally inadequate

> reasons for the decision had been given. This suggestion has now been repeated and adopted in para 18.4 of the AIT Practice Direction. We have no hesitation in endorsing that approach. It would represent a failure to take a material matter into account, which is the third of the generic errors of law we have identified in para 9 above."

27. It is no doubt because Country Guidance cases do not have the effect of establishing any principle of law, combined with the fact that a Tribunal cannot be criticised for failing to take into account material which has come into existence after the promulgation of its determination, that as a general rule the fact that a determination of the First Tier Tribunal is inconsistent with a Country Guidance case issued after the determination was promulgated, will not amount to an error of law: see, most recently, *SA (Sri Lanka) v SSHD* [2014] EWCA Civ 683 per Patten LJ at [12]-[13]:

> "Country guidance decisions, whilst determining the rights of the parties to the actual decision, are no more than a compilation and statement of evidence relevant to the position of asylum seekers from the country in question. They therefore provide a convenient guide to the likely treatment of asylum seekers in that jurisdiction but they are no more than a judicial assessment of the probative value of the evidence on which they are based and are not intended to exclude other relevant evidence which the parties in particular cases are able to adduce. For present purposes, it is important to emphasise that they are no more than factual summaries updated from time-to-time to record material changes in the position on the ground. A change in country guidance is in no sense a change in the law: see *NM and others (lone women – Ashraf) Somalia CG* [2005] UKIAT 00076 at [140].
>
> It is therefore difficult to see how the decision of the Upper Tribunal in this case which was based on a consideration of the then most recent country guidance contained in *TK*, coupled with the case-specific evidence produced by SA himself, can be said to contain an error of law by reason of it not having considered the then unpublished material now set out in the decision of *GJ*. A fact-finding tribunal may, of course, commit an error of law if it bases a particular finding on no evidence or makes an assessment of the issue it has to decide which is contrary to the only possible conclusion which could reasonably be reached on the admissible evidence: see *Edwards v Bairstow* [1955] 3 All ER 48. But the decision of the Upper Tribunal in this case was clearly open to it on the factual material that it had to consider and it is difficult to see how the Upper Tribunal can be said to have fallen into error by failing to consider material that was not before it and which may in part relate to a state of affairs that post-dates its decision. This is not a case where there has been a material but subsequent change in the law with the result that the decision of the lower

> tribunal can now be seen to have proceeded on the basis of a misdirection. I would therefore dismiss the appeal on the basis that there has been no error of law."

28. However, in my judgment, that analysis should not apply where a relevant Country Guidance case has been promulgated before the determination of the First Tier Tribunal has been promulgated. It is clear from the decision of this Court in *SSHD v RK (Algeria)* [2007] EWCA Civ 868 that the Tribunal remained seized of the case until such time as the determination was promulgated on 16 July 2014: see per Wilson LJ (as he then was) at [24]-[25]:

> "24 Miss Chan [counsel for the Secretary of State] also says -- and here now she speaks purely hypothetically -- that, if there is in the course of delay in the Tribunal's preparing or promulgating a decision a substantial change for the better in the relevant circumstances which obtain in the foreign country, it is highly undesirable that no cognisance can be taken of it. She relies on the decision of this court in *Ravichandran v Secretary of State for the Home Department* (1996) Imm AR 97 in which it was held that judicial determinations made within the immigration appellate structure were to be regarded as an extension of the decision-making process and so in principle should be based upon circumstances as they are at the time of those determinations rather than at any earlier stage. Of course she does not submit that this court is part of that structure; but she reaches for the principle behind that decision.
>
> 25 There has to come a time, however, at which the opportunity for judicial survey of up-to-date evidence stops. Under our system, and save in exceptional circumstances, it stops upon promulgation of the Tribunal's determination; and so it has stopped by the time when the case reaches this court."

29. The submission advanced by Mr Khubber that the determination was "made" when the First Tier Tribunal judge signed the determination on 30 June 2014, so that it was not an error of law for the Tribunal not to have considered the Country Guidance in *AT* promulgated after that date, is inconsistent with that decision. The First Tier Tribunal only ceased to be seized of the case when its determination was promulgated on 16 July 2014. Given that the Country Guidance in *AT* was promulgated before that date, albeit only two days before, the failure to follow the Country Guidance case or, at least, to consider it and give reasons why it does not apply, amounted to an error of law, albeit one for which the judge cannot be criticised personally. It is important that the applicable principles about following and applying Country Guidance cases do not become obscured by the happenstance of the timing in the present case and it should make no difference when, precisely, before promulgation of the case before the Tribunal, the Country Guidance case is published and promulgated.

30. I do not accept Mr Khubber's submission that, on the basis of paragraph 12.2 of the Practice Direction, a Country Guidance case can only be authoritative in relation to appeals which are *"subsequent"* in the sense of yet to be heard. No doubt those cases could be described as the paradigm example of a *"subsequent appeal"*, but the scope

of such cases cannot be limited in the way Mr Khubber suggests. Clearly, if the decision in *AT* had been available at the time of the hearing before the First Tier Tribunal on 20 June 2014, a failure on the part of the judge to have regard to it would have been an error of law. It does not seem to me that that clear conclusion should be different merely because the Country Guidance case was promulgated after the hearing, but before promulgation of the determination of the First Tier Tribunal. There is not some sliding scale of the significance to be attached to Country Guidance cases available before promulgation of the determination of a First Tier Tribunal depending upon how close to that promulgation the Country Guidance case becomes available.

31. Nor should the fact that the failure to have regard to a Country Guidance case will amount to an error of law depend upon whether the representatives of one or other of the parties has drawn the attention of the Tribunal to the Country Guidance case, as was suggested on behalf of the appellant. That there is still an error of law even though neither party has drawn the attention of the Tribunal to the relevant Country Guidance case is clear from the decision of the Court of Appeal in *Bokhurt v SSHD* [2006] EWCA Civ 289. In that case, there was a relevant Country Guidance case available at the time of the hearing and promulgation of the decision of the IAT, but neither party drew it to the attention of the IAT. As Laws LJ said at [10]:

> "The country guidance case of IK, replicating the risk factors in A, though apparently the Appellant's solicitor was unaware of it and the Home Office Presenting Officer failed to remind the IAT of it, was in my judgment clearly relevant to that question. It constituted country guidance which might assist the Appellant, to use the IAT's words at para 6, "in establishing his fear as being well-founded". But in that case, as it seems to me, the adjudicator's error of law cannot be said to have been immaterial. A different credibility finding might have produced a different result."

32. Furthermore, I do not consider that there is anything in the submission on behalf of the appellant that it would be impractical and only conducive to uncertainty to treat a Country Guidance case which was promulgated after the hearing but before promulgation of the particular case as binding on the First Tier Tribunal, because neither party will have focused evidence or submissions in the light of the guidance. To begin with, given the requirement in Rules 22 and 23 of the Rules, that the Tribunal send its determination to the parties not later than 10 days after the hearing finishes, it is unlikely that there will be a recurrence of the problem which occurred in the present case.

33. More importantly, it seems to me that the need to avoid uncertainty and to ensure finality to which Mr Khubber refers is outweighed by the principle that, in the interests of fairness and consistency, like cases should be treated in a like manner and, accordingly, applicable Country Guidance cases should be followed. This principle is reflected in paragraph 12.4 of the Practice Directions; see also per Lord Hope of Craighead in *Januzi v SSHD* [2006] UKHL 5; [2006] 2 AC 426 at [50]. Whilst I sympathise with Mr Khubber's submission that the setting aside of the decision of the First Tier Tribunal on the ground of error of law produces unfairness for the appellant, I have little doubt that, if the appellant had lost his appeal before the First Tier

Tribunal and the appellant's legal advisers considered that there was material in the Country Guidance in *AT* which improved his prospects of establishing his case that he would be at risk on return to Libya, they would be submitting that justice and fairness required that the original determination of the First Tier Tribunal should be set aside and the matter remitted to the Tribunal for reconsideration in the light of the Country Guidance in *AT*. The requirements of fairness and consistency do not differ depending upon which party invokes them.

34. It follows that, despite Mr Khubber's submissions to the contrary, there was an error of law here, although I would emphasise that the error cannot in any sense be said to be the fault of the First Tier Tribunal judge, who would have been unaware that there was any delay in promulgation of her decision and who did not have her attention drawn to the decision of the Upper Tribunal in *AT* before her decision was promulgated.

Was the error of law material?

35. I cannot accept the submission by Mr Khubber that the determination of the First Tier Tribunal is not inconsistent with the Country Guidance in *AT*. The Upper Tribunal in *AT* identified two relevant categories of people who were, in general, at risk of persecution as former or suspected supporters of the Gaddafi regime: (i) former high ranking officials of the intelligence services of the regime; and (ii) others with an association at senior level with the regime. The appellant does not appear to fall into either category.

36. The First Tier Tribunal essentially concluded at [27] that the appellant would be at risk of persecution if returned to Libya because, by virtue of having lived in Khoms, he would be treated as pro-Gaddafi. The judge also noted at [22] that his claim that his mother was Gaddafi's second wife's second cousin was an additional problem that he may face on return. However, the Upper Tribunal in *AT* did not find that a person would be at risk on return merely from having lived previously in Khoms or any other Gaddafi stronghold. Rather, in the passages of its decision at [137]-[138] and [215] which I quoted above, the Upper Tribunal concluded that employment by or association with the Gaddafi regime was not sufficient to establish a risk of persecution. Equally, the Upper Tribunal decided at [215] that: "mere assertion of risk by association as a family member would not be sufficient without fact-specific evidence of the risk to that particular family member".

37. Accordingly I consider that the decision of the First Tier Tribunal in the present case does appear to be inconsistent with the Country Guidance in *AT*. I should add that the submission in the Skeleton Argument for the appellant that the Upper Tribunal Judge had somehow declined to decide this issue in [24] of his Reasons is simply not correct. At the end of that paragraph, he says in terms: "I cannot presently accept Ms Radford's contention that the First Tier Tribunal Judge's findings are broadly consistent with the findings in *AT*".

38. Furthermore, I consider that the detailed analysis of the Upper Tribunal in *AT* in relation to the categories of people at risk would have been likely to influence the whole approach which the First Tier Tribunal took to the issue of risk of persecution. The conclusion I have reached that there was an error of law which was material is not affected by the subsequent country guidance in *FA (Libya; Art 15(c)) Libya CG*

[2016] UKUT 00413 (IAC). Quite apart from the fact that the appellant in this case was not running an Article 15(c) case, there is nothing in the ratio of *FA* which casts doubt upon the validity of the other aspects of the country guidance in *AT*.

39. In the circumstances, I consider that the Upper Tribunal was correct to find that there was an error of law and that the determination of the First Tier Tribunal should be set aside. Before this Court, Mr Khubber suggested various alternative courses which would provide a solution to the problem raised by this case and enable either party to rely on a change of circumstances: to re-apply for Refugee status in the case of the appellant by making fresh claim submissions under paragraph 353 of the Immigration Rules or to withdraw Refugee status in the case of the Secretary of State by relying on the cessation and exclusion provisions under the Refugee Convention. I do not regard any of these as satisfactory alternatives. They are only likely to increase uncertainty, delay and expenditure. The appropriate course was the one adopted by the Upper Tribunal, to set aside the determination by the First Tier Tribunal and remit the case to that Tribunal for reconsideration in the light of the country guidance in *AT*. As Mr Lask submitted, there will then be a full rehearing in the light of the Country Guidance with submissions from both parties, which is a fair and practical solution to the problem.

Conclusion

40. In the circumstances, the appeal is dismissed.

Lord Justice McCombe

41. I agree.

Lord Justice McFarlane

42. I also agree.