**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/02212/2016

**THE IMMIGRATION ACTS**

| **Heard at North Shields** | **Decision & Reasons Promulgated** |
|---|---|
| **On 22nd November 2017** | **On 29th November 2017** |

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**KA**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Anifowshe, Counsel instructed on behalf of the Appellant
For the Respondent: Mr Diwnycz , Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Libya.

**Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent.

Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant with permission, appeal against the decision of the First-tier Tribunal (Judge Manchester), who, in a determination promulgated on the 8th February 2017, dismissed KA's claim for protection.

3. The appellant's immigration history is set out within the determination and the decision letter of the 10th February 2016. He claims to have arrived in the United Kingdom in November 2001 on a student Visa and applied for further leave to remain which was granted but expired in May 2002. Further applications for leave to remain were made in 2002 and refused in a number of decisions including one made on and did so in the light of the public interest considerations set out in section 117B. The 28th of October 2003. In February 2010 he was encountered during an enforcement visit and was arrested and served with documentation as an over stayer. He claimed asylum on 21 December 2010 which was refused on 14 January 2011. He lodged an appeal against that decision but that was dismissed by the First-tier Tribunal on 28 January 2011. Permission to appeal the decision was refused by both the First-tier Tribunal and the Upper Tribunal and he became appeal rights exhausted by February 2011. Further submissions were lodged and which were subsequently refused a further application was made in 2011 on Article 8 grounds.

4. Further submissions were lodged in 2015. On the 5th of February 2016, further submissions were made on his behalf in support of an application for asylum and his protection claim was refused in a detailed reasons for refusal letter dated 10 February 2016. In that decision letter, the Secretary of State considered his protection claim in the light of the previous findings made by the First-tier Tribunal judge in 2011. The Secretary of State also considered the new evidence provided in support of his claim to be at risk on return to Libya including a documentary evidence in the form of arrest warrant and newspaper articles. The Secretary of State concluded that he had failed to provide any new substantial evidence to demonstrate that he would be at risk on return to Libya as a result of any outstanding arrest warrants relating to family relatives. The decision is also considered Article 15 C but for the reasons set out at paragraphs 21 onwards, the Secretary of State concluded that he was not entitled to a grant of humanitarian protection. Article 8 was also considered at paragraphs 36 – 53.

5. The appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal on the 13th December 2016. The judge had the opportunity of hearing the evidence of the Appellant and two witnesses and for that evidence to be the subject of cross-examination. His findings of fact relating to the protection claim are set out at paragraphs 49 and 71. In summary, the judge rejected his factual claim in its entirety. It is not necessary for me to set out those findings as there is no challenge to the judge's credibility findings in this regard in the written grounds of

appeal or challenge to his rejection of the asylum claim (see skeleton argument and grounds).

6. At paragraphs 67-71 he considered the issue of humanitarian protection. He made reference to the Country Guidance decision of AT and Others (Article 15c; risk categories) Libya CG [2014] UKUT 00318 within the determination at paragraph 67 and that the current country guidance case law of FA made it clear that the numerous changes in Libya since November 2013 were sufficient to render unreliable the previous guidance set out in AT and others (as cited). He also made reference to the current guidance that each case should be determined on its own evidence pending the publication of general up-to-date evidence.

7. In this context he considered the argument advanced on behalf of the Appellant that the indiscriminate violence in Libya constituted a risk which met the Article 15 (c) threshold. At paragraph 70, the judge made reference to the evidence at page 62 in the appellant's bundle but stated that he did not accept that the appellant would not have family support available to him in Libya. Thus the judge found that the appellant had not established that he would not be able to access the same support and protection from his brother's wife family. He also took into account the evidence from the first witness that he had been able to travel to and within Libya without any particular problems as recently as Christmas 2015. Therefore at paragraph 71 he reached the conclusion that the appellant had not demonstrated that he would be at risk of harm and that he was not entitled to humanitarian protection under the rules.

8. The Appellant sought permission to appeal that decision on the basis that the First-tier Tribunal Judge erred in law in his consideration of Article 15 (c) and his consideration of Article 8 of the ECHR. Those submissions stated that the judge erroneously considered whether the appellant had family support in Libya instead of considering whether the appellant would be at risk from "serious and individual threat to civilian life or person by reason of indiscriminate violence in situations of international or internal armed conflict." It was further submitted that the judge had wrongly devoted his findings to the appellant's immigration status rather than considering the risk which the appellant would face if returned to Libya.

9. On an unknown date, First-tier Tribunal Judge Norton – Taylor granted permission to the appellant for the following reasons:

> "The grounds assert that the judge erred in his assessment of Article 15 C of the Qualification Directive. The conclusions on Article 8 are also challenged.
>
> It is arguable that in assessing Article 15(c) at [70] the judge has focused on the presence of family members in Libya to the exclusion of other relevant matters. It is in turn arguable that he has not addressed the core issue of risk on return. To the extent that the judge applied AT and others, it is arguable that this was an error,

given that the country guidance had been replaced by the decision in FA (Libya: Article 15 C (Libya) CG [2016) UKUT 00413 (IAC).

Another issue now arises in respect of ZMM. By a letter dated 10 July 2017, the appellant's representatives have sought to amend the original grounds and rely on ZMM. Although he cannot of course be blamed for failing to consider ZMM, the issue of the judges risk assessment under Article 15 c is now arguably flawed.

The Article 8 challenge has little merit, but I do not limit the grant permission."

10. Following the grant permission, a Rule 24 response was provided by the respondent dated the 3rd October 2017. In that document it states that the respondent does not oppose the application for permission to appeal and invited the Tribunal to determine the appeal at a continuation hearing. The response also states that the consideration will be based upon the decision of ZMM and on the basis that the other findings of the First-tier Tribunal are retained.

11. The appellant's solicitors had sent by fax to the Tribunal a skeleton argument for the hearing. It made reference to the determination of the Upper Tribunal in ZMM and set out relevant parts of that decision. It submitted that the decision confirmed that the appellant as a national of Libya would be at risk of serious harm if returned contrary to Article 15 c of the Qualification Directive. Thus it was submitted in the light of that decision, the First-tier Tribunal judges risk assessment under Article 15 C of the Directive is now flawed. It goes on to state "the appellant would respectfully request that he be granted humanitarian protection as the respondent is not deemed him fit to qualify for refugee status. Also, he is not excluded from being granted humanitarian protection under paragraph 339 D of the Immigration Rules."

12. Under the heading "Article 8 ECHR" it is submitted that in finding that the removal of the appellant would not be disproportionate at paragraph 82, the appellant submits that the judge did not consider the positive obligation to consider the private life established having lived in the UK for over 17 years.. He has no criminal record and is unable or unwilling to return to Libya as it is an unsafe and stateless country. He relies on the guidance in Maslov v Austria [2008] ECHR 546 and the criteria established in the consideration paragraph 276 ADE the Immigration Rules."

13. Since the promulgation of the First-tier Tribunal's decision in February 2017, there has been a further Country Guidance decision issued by an Upper Tribunal presidential panel reported on 28 June 2017 as ZMM (Article 15 (c) Libya CG [2017] UKUT 00263 (IAC).

14. The head note to that decision reads as follows :

> "The violence in Libya has reached such high-level that substantial grounds are shown to believe that a returning civilian would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to a threat to his life or person."

15. At the hearing before me, there was agreement between the parties that there was a material error of law in the decision of the First-tier Tribunal and that the decision should be set aside and remade by this Tribunal by substituting a decision to allow the appeal on the basis of Article 15 (c) and allowing the appeal on that ground.

16. In the light of the submissions made by the parties in their written grounds and in the agreement reached before the Tribunal, that there was a material error of law in the determination of the First-tier Tribunal, it is the case that the decision reached cannot stand and must be set aside. I am satisfied that the judge did error in law as both parties have submitted. It is plain from reading the determination and the grounds from each of the parties that there is no challenge to the judge's finding that the Appellant had not demonstrated that he would be at risk of persecution for a Convention reason and thus had dismissed his claim for asylum based on the factual account given. However there was an alternative argument advanced on behalf of the Appellant which related to the issue of humanitarian protection and Article 15 (c). In this respect the judge appeared to find that the Appellant was not entitled to humanitarian protection.

17. In the light of the decision of the most recent country guidance as referred to in the preceding paragraphs, the Appellant's appeal will be remade. Both advocates submit that the correct course and outcome is that the appeal should be allowed on the basis of Article 15 (c).

18. Ms Anifoshe also relied on Article 8 of the ECHR. I have set out above the submissions that were set out in the skeleton argument. As set out in the decision of the First-tier Tribunal, the applicant had no basis for any claim in terms of the existence of any partner or child under Appendix FM. Under paragraph 276 ADE of the Rules, the appellant had lived in the United Kingdom for less than 20 years having lived in the United Kingdom for 15 years. The judge set out at paragraph 73 that the question to be decided is whether there would be "very significant obstacles to his integration into Libya." In this context it took into account that he had family remaining in Libya to whom we could turn to for support and lived in that country for over 28 years including his formative years before coming to the United Kingdom. The judge found that he had remaining ties in Libya and thus there would not be very significant obstacles to his integration into the country. As to Article 8 outside of the rules, the judge considered this at paragraphs 76 – 82. In terms of proportionality, he considered that he could keep in contact with friends that he had made and considered the issue in the light of the public interest considerations set out in section 117B. In particular he weighed in the balance that the maintenance of effective immigration control is in the public interest and that little weight

should be given to a private life that was established by a person at a time when he was in the United Kingdom unlawfully. He recorded the appellant had been in the United Kingdom unlawfully for very significant period of time or in the alternative, when his immigration status was precarious. He found that he had an ability to speak English but that he was not financially independent. Thus he found the balance to be in favour of removal.

19. In the light of the agreement reached between the parties that the appellant is entitled to a grant of humanitarian protection under Article 15 c, the reasoning must also apply to Article 8 of the ECHR on the same basis, namely, that there are very significant obstacles to the appellant's reintegration to Libya as it is accepted that he would face serious harm upon return for the reasons set out in the country guidance decision. Whilst any human rights claim is made on the basis of whether removal would be unlawful under section 6 of the Human Rights Act, the fact that the appellant can meet the rules under Paragraph 276 ADE(1)(vi) is a matter of significant weight in the proportionality balance against the public interest considerations identified by the judge. Consequently for those reasons the appellant succeeds in his appeal on human rights grounds.

Decision:

The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and remade as follows; I remake the decision in respect of Article 15 (c) by allowing the appeal on that ground and on Article 8 grounds.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed SM Reeds Date 22 /11/2017

Upper Tribunal Judge Reeds