Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21292/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2018	**On 6 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

MOHAMED MOHAMED ESELENI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bellara of Counsel instructed by Western Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a citizen of Libya born on 24 November 1982. As set out in the decision of the First-tier Tribunal the appellant has a lengthy immigration history which culminated in him applying for indefinite leave to remain in the UK having been in the UK for more than ten years. The respondent, in a decision dated 23 August 2016, refused that application. In a decision and reasons promulgated on 3 May 2017, Judge of the First-tier Tribunal Morris dismissed the appellant's appeal on human rights grounds.

2. The appellant appeals with permission on the following grounds:

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(1) Issue of discretion in relation to breaks in lawful residence – the judge erred in his approach given the Immigration Directorate Instructions as to breaks in lawful residence (for which a reason was provided) and this was relevant to the Article 8 proportionality assessment;

(2) In relation to insurmountable obstacles the judge erred in his approach given the evidence before the judge as to the circumstances in Libya;

(3) The judge should have considered Article 15(c) in light of the evidence before the judge including the FCO device.

Error of Law Discussion

3. Mr Avery submitted that there was no evidence that the respondent did not turn its mind to the discretion issue and this was a red herring. It was his submission that this did not make any difference to the ultimate decision and equally, in Mr Avery's submission, the Tribunal's findings on paragraph 276ADE(vi) were sustainable given that the appellant had been back to Libya multiple times and had family there and therefore regardless of the material before the judge this was in integration question. However, Mr Avery conceded that the appellant may have an Article 15(c) argument. I share that view.

4. Mr Avery submitted that there was potentially inadequate evidence before the judge in relation to Article 15(c) and it was conceded by Mr Bellara that **ZMM (Article 15(c)) Libya CG [2017] UKUT 263** had not been promulgated at the time of the First-tier Tribunal decision. The First-tier Tribunal decision was promulgated 3 May 2017, which was the date that **ZMM** was heard and the country guidance was only published on 29 June 2017.

5. I am of the view that the Tribunal erred in its approach. The judge in reaching his decision under Article 8 decided that, although there was no reason to doubt the appellant's evidence, the appellant had failed to satisfy the Tribunal that the respondent was wrong to refuse his application for indefinite leave to remain on the grounds of long residence under paragraph 276ADE of the Immigration Rules.

6. Neither the respondent nor the Tribunal turned its mind to the relevant guidance in relation to discretion for breaks in lawful residence in the IDIs which includes as follows:

> "You must always discuss the use of discretion with a senior caseworker. You must be satisfied that the applicant has acted lawfully throughout the whole 10 year period and has made every effort to obey the Immigration Rules. The decision to exercise discretion must not be taken without consent from a senior caseworker (SEO) or equivalent."

At paragraph 2.3.3:

> "Breaks in lawful residence and the use of discretion

> If an applicant has a single short gap of lawful residence through making one single previous application out of time by a few days (not usually more than ten calendar days out of time) the caseworker should use discretion granting ILR, so long as the application meets all the other requirements.
>
> It would not usually be appropriate to exercise discretion when an applicant has more than one gap in their lawful residence due to submitting more than one of their previous applications out of time, as they would not have shown the necessary commitment to ensuring that they have maintained lawful leave throughout their time in the UK
>
> It may be appropriate to use your judgement in cases where an applicant has submitted a single application more than ten days at a time if there are extenuating reasons for this (e.g. postal strike, hospitalisation, administrative error on our part etc.). This must be discussed with a Senior Caseworker."

7. Although the appellant's case did not fit into the examples given (above) the list was not exhaustive and the respondent ought to have considered whether to exercise discretion and therefore the Tribunal was incorrect in the reasons it gave for its decision that the appellant had failed to satisfy the Tribunal that the respondent was wrong to refuse the application for indefinite leave to remain on the basis of long residence. At the very least, the fact that there was no evidence that the respondent had exercised her discretion as to whether or not to refuse the application, given the explanation provided as to why the decision was out of time, ought to have been a factor in the Tribunal's consideration.

8. I do not accept Mr Avery's submission that paragraph 276ADE(1)(vi), with regards to the insurmountable obstacles for integration on return, cannot take into consideration the circumstances on return.

9. In addition, in **Agyarko v Secretary of State for the Home Department [2017] UKSC 11** it was acknowledged that leave can be granted outside the Rules where exceptional circumstances apply, i.e. "circumstances in which refusal would result in an unjustifiably harsh consequences for the individual so that the subsequent refusal of the application would not be proportionate. It is likely to be the case only very rarely".

10. Notwithstanding that **ZMM** had not been decided at the date of the decision, the Tribunal had before it the appellant's bundle which included a one page extract from the respondent's COI report and a further Foreign and Commonwealth Office document giving Libyan travel advice running from C2 to C9 of the appellant's bundle.

11. Mr Bellara conceded that the latter document was directed at British citizens. Nevertheless I accept his submission that the guidance, which was updated on 23 March 2017 and still current on 12 April 2017, contains stark warnings. These included that:

> "There is high risk of civilians, including journalists, humanitarian and medical workers, being caught in indiscriminate gunfire, shelling, including air strikes, in all areas where there is fighting, putting those in the area at risk."

12. Although the Tribunal, at [41], took into account what the Court of Appeal said in **Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813** including that integration is a broad concept, the fact that the Tribunal failed to engage with the background country evidence before it, and give adequate reasons (other than referring to the 'current turmoil' in the country) as to why this would not now affect someone in the appellant's circumstances, notwithstanding his many trips to Libya in the past and his remaining siblings there, amounts to an error in the Tribunal's reasoning and a material error of law.

13. In such circumstances I set aside the decision of the First-tier Tribunal Judge and proceed to remake the decision.

Remaking the Decision

14. The decision of the First-tier Tribunal contains an error of law. In remaking that decision I take into consideration the country guidance in **ZMM** which is authority for the proposition that:

> "... the violence in Libya has reached such a high level that substantial grounds are shown for believing 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. There was no objection to amending the appellant's grounds of appeal to include consideration of Article 15(c). In remaking the decision and assessing the circumstances today, I take into consideration what was said, in **ZMM** at paragraphs 83 to 94 and in particular, at paragraph 93, where the Upper Tribunal held that civilians would be severely affected and there is not a sufficiency of protection for the 'ordinary civilian'.

16. Mr Avery made no submissions in relation to the Article 15(c). I am satisfied that the appeal succeeds under Article 15(c) of the Refugee Qualification Directive 2004/83/C ECHR given the current situation in Libya. It is not necessary to make any detailed findings under the Article 8 provisions of the Immigration Rules or outside the Rules, given that the appeal succeeds on humanitarian protection grounds.

Decision

17. The decision of the First-tier Tribunal contains an error law such that it is set aside. I remake the decision allowing the appeal on humanitarian protection grounds.

No anonymity direction was sought or made.

Signed Dated: 2 March 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was sought or is made.

Signed Date: 2 March 2018

Deputy Upper Tribunal Judge Hutchinson