



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

Appeal Number: PA/08456/2016

THE IMMIGRATION ACTS

Heard at: Manchester

**Decision and Reasons
Promulgated**

On: 28 September 2017

On: 29 September 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AI

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the appellant: Mr McVeety, Senior Home Office Presenting Officer

For the respondent: None

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as AI.

1. I have made an anonymity order because this decision refers to the circumstances of the respondent's young child. The respondent, who I shall refer to as AI in this decision. AI is a citizen of Libya.
2. AI was not represented but Mr Medley-Daley, a consultant solicitor who had previously been instructed explained that difficulties had arisen as a result of the appellant's solicitors losing their legal aid contract. As it happened Mr McVeety conceded that AI's appeal should be allowed on humanitarian protection, and Article 3 and 8 of the ECHR grounds, for the reasons set out below. As such, Mr Medley-Daley acknowledged that the absence of formal representation for AI did not matter.

Background

3. The appellant ('the SSHD') has appealed against a decision of the First-tier Tribunal dated 17 March 2017 in which it dismissed the appeal on asylum and humanitarian protection grounds and allowed the appeal on Article 8 grounds. The First-tier Tribunal's decision on Article 8 turned upon a single issue, whether it would be unduly harsh for AI's son, L, to remain in the United Kingdom without his father – see section 117C(5) of the Nationality, Immigration and Asylum Act 2002. The findings of fact reached by the First-tier Tribunal have not been challenged. Rather the challenge focused upon the failure to take into account the wider considerations, such as AI's criminal offending, when addressed the issue of undue harshness.
4. The SSHD was granted permission to appeal against the decision of the First-tier Tribunal relevant to Article 8, by Upper Tribunal Judge Freeman in a decision dated 9 May 2017.

Hearing

5. At the beginning of the hearing I indicated the following provisional views to Mr McVeety, with which he entirely agreed:
 - (i) In assessing the issue of undue harshness for the purposes of Article 8, no regard was paid to AI's immigration history and criminal offending in breach of the guidance in MM (Uganda) v SSHD [2016] EWCA Civ 617, and as such the First-tier Tribunal decision should be set aside and remade by me in the Upper Tribunal. Although the First-tier Tribunal was aware of AI's criminal offending and referred to it at [36(f)], this was not taken into account when the applying section 117C at [39-41].
 - (ii) Given that it is not necessary to make any further detailed factual findings the decision can be remade by me.

- (iii) When remaking the decision I must do so by applying the factual matrix and relevant guidance as at the date of hearing. It follows that I must apply ZMM (Article 15(c)) Libya CG [2017] UKUT 263 (IAC). There is no updated evidence available that calls into question the conclusions reached in ZMM. For the reasons outlined in ZMM AI is entitled to humanitarian protection because the violence in Libya has reached such a high level that AI is at risk of being subject to a threat to his life or person.
 - (iv) It follows from this that it to remove AI to Libya would breach Article 3 of the ECHR.
 - (v) It also follows that as AI is at risk of treatment in contravention of Article 3 of the ECHR in Libya, it cannot be properly argued that his removal, even when section 117C is applied and the wider considerations are taken into account, would not constitute a disproportionate breach of Article 8 of the ECHR.
6. Mr McVeety made it very clear that if I found an error of law in the First-tier Tribunal decision that I should remake the decision myself and that the appeal fell to be allowed on humanitarian protection, Article 3 and 8 of the ECHR grounds. Given the concessions made it is not necessary for me to provide any additional reasoning save to indicate that for the reasons I have summarised above the appellant's appeal is allowed on humanitarian and human rights grounds.

Decision

- 7. The decision of the First-tier Tribunal contains an error of law and is set aside.
- 8. I remake the decision by allowing AI's appeal on humanitarian protection and human rights grounds.

Signed: Ms Melanie Plimmer
2017
Judge of the Upper Tribunal

Dated: 28 September