Upper Tribunal
(Immigration and Asylum Chamber)

Adam (Rule 45: authoritative decisions) [2017] UKUT 00370 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 August 2017	.....

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MEID OMAR ADAM

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr D McCormick, instructed by Halliday Reeves Law Firm

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

A decision with the status of “authoritative” within the meaning of s. 107 of the 2002 Act is to be regarded as “binding” within the meaning of r. 45 of the Upper Tribunal Rules.

DETERMINATION AND REASONS

1.
The Tribunal has before it an application for permission to appeal to the Court of Appeal against a decision of Deputy Upper Tribunal Judge Doyle, given on 23 June 2017. The appellant before Judge Doyle was a person who has always claimed to be of Sudanese nationality and at risk of persecution in Sudan. The Secretary of State has taken the view that he is not Sudanese but Libyan. Judge Doyle considered the material before him and dismissed the appeal, finding that the appellant was a Libyan who could be returned to Libya without risk. The appellant has sought permission to appeal to the Court of Appeal against that decision on a number of grounds.

2.
Since the issue of the decision the Upper Tribunal has, in a case reported as ZMM and given a CG Country Guidance designation ZMM (Article 15(c)) Libya CG [2017] UKUT 00263 (IAC), indicated that, in principle, Libyans are at risk of treatment contrary to article 15(c) of the Refugee Qualification Directive 2004/83/EC on return to Libya. It follows that the appellant, if covered by Country Guidance as now existing, would be entitled to humanitarian protection, that is to say to have his appeal allowed rather than dismissed.

3.
The difficulty for the appellant as it presents itself is that the failure to take into account Country Guidance not existing at the date of the Upper Tribunal's decision could not be an error of law. If that were the end of the matter we should have to refuse permission to appeal to the Court of Appeal, there being no error of law to that extent in the Tribunal's decision, unless other matters as raised in the grounds merited a grant.

4.
That is not, however, the end of the matter for the following reasons. Rule 45 of the Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2698/2008 (as amended) provides as follows:

"45.(1) On receiving an application for permission to appeal the Upper Tribunal may review the decision in accordance with rule 46 (review of a decision), but may only do so if –

(a)
when making the decision the Upper Tribunal overlooked a legislative provision or binding authority which could have had a material effect on the decision; or

(b)
since the Upper Tribunal's decision, a court has made a decision which is binding on the Upper Tribunal and which, had it been made before the Upper Tribunal's decision, could have had a material effect on the decision."

5.
The Country Guidance decision ZMM is not in any technical sense "binding". But in s 107 of the Nationality, Immigration & Asylum Act 2002 we find the following provision:

"107. Practice Directions

(3) In the case of proceedings under section 82… or by virtue of section 109, or proceedings in the Upper Tribunal arising out of such proceedings, practice directions under section 23 of the Tribunals, Courts and Enforcement Act 2007

(a) may require the Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter; and

(b)
may require the Upper Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter.

(3A) In subsection (3) the reference to a decision of the Tribunal includes –

(a)
a decision of the Asylum and Immigration Tribunal, and

(b)
a decision of the Immigration Appeal Tribunal."

(The reference to "the Tribunal" throughout is by virtue of s 81 a reference to the First-tier Tribunal).

6.
A practice direction to that effect has been issued. It is the Practice Direction of the Immigration & Asylum Chambers of the First-tier Tribunal and the Upper Tribunal. At para 12 of that direction there is the following:

"Starred and Country Guidance determinations

12.1 Reported determinations of the Tribunal, the AIT and the IAT which are "starred" shall be treated by the Tribunal as authoritative in respect of the matter to which the "starring" relates unless inconsistent with other authority which is binding on the Tribunal.

12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and

(b) depends upon the same or similar evidence.

12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.

12.4 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 an appeal on a point of law."

(In that Practice Direction "the Tribunal" is defined as the Immigration and Asylum Chamber of the First-tier Tribunal or of the Upper Tribunal, as the case may be.)

7.
A Country Guidance case is therefore "authoritative". The question is whether a case which is "authoritative" is to be treated as one which is "binding" within the meaning of rule 45 and 46. We adjourned this application into court in order to hear the submissions of the parties and neither of them has given us any substantive reason to alter the provisional view we had taken which is that for these purposes a case which is "authoritative" within the meaning of s 107 and Practice Direction issued in pursuant of that section should be treated as "binding" within the meaning of rules 45 and 46 of the Upper Tribunal Rules. It appears to us that for these purposes the notion of a case being authoritative has sufficient parallels with the binding nature of a decision binding as a point of law. The elevation to "authoritative" status by means of the CG designation has the effect that it is not open to a Tribunal affected by the decision simply to decide a case on its own motion, in a sense contrary to that indicated by the decision in question in the same way as if there were a binding decision.

8.
We emphasise, however, the restrictions which specifically appear within rule 45. What this decision does is to open the possibility of review to cases where the decision of the Upper Tribunal which is under challenge by an application for permission to appeal to the Court of Appeal is one which might have been affected by an authoritative decision within the terms of paragraph 12 of the Practice Direction. The power to review still only arises where the authority in question could have had a material effect on the decision. In terms of rule 45(1)(a) it may be that a complete failure to notice the existence of a relevant Country Guidance decision might constitute overlooking it, but nevertheless a question on review would have to be whether the Country Guidance decision in question could have had a material effect on the decision of the Upper Tribunal; and similar considerations relate to paragraph (b). Therefore this decision opens the door to review: it does not mean that in every case where there is a Country Guidance decision in existence or in issue the power to review would be exercised.

9.
Having reached that conclusion in principle, we conclude that the subsequent issue of the Country Guidance decision brought the present case within the terms of rule 45(1)(b). We therefore consider whether to review the Upper Tribunal's decision and set it aside under rule 46. It appears to us on the factual basis that we have indicated that the decision in ZMM clearly could have had a material effect on the decision. Indeed if the Country Guidance decision had been before Judge Doyle he would, as it appears to us, inevitably have taken a view on the outcome of the appeal which he did not take.

10.
We **review** and **set aside** his decision. The consequences of that conclusion are accepted by Mr Jarvis. They are that we should, there being an appeal to the Upper Tribunal before us following the setting aside of its earlier decision, we should substitute a decision **allowing** the appeal on humanitarian protection grounds, which we do.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 15 August 2017