Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/05513/2015
IA/05522/2015
IA/05511/2015
IA/05518/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 February 2016	**On 15 February 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

W M
P M
J M M
C M
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms L Delgado of Benchmark solicitors LLP

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. However, in the interests of protecting the identity of the two minor children in this case, I make an anonymity direction.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier Tribunal Judge Greasley promulgated on 10 August 2015 ("the Decision") allowing the Appellants' appeal against the Secretary of State's decisions dated 20 January 2015 refusing their application for indefinite leave to remain as a Tier 1 migrant and dependents and directing their removal to Zimbabwe. By the Decision, the Judge did not deal with the Tier 1 decision (it apparently being accepted that the Appellants could not succeed under the Rules in that regard) but allowed the appeals on the basis of Article 8 ECHR. Permission to appeal was granted on 26 November 2015 by First-Tier Tribunal Judge Grimmett. The matter comes before me to determine whether the First-Tier Tribunal Decision involved the making of an error of law.

2. The background facts so far as it is necessary to recite them are that the First Appellant who is a national of Zimbabwe arrived in the UK in May 2008 as a highly skilled migrant with leave valid until April 2010. The second Appellant is his wife and the third Appellant is his eldest child. They arrived in the UK as his dependents on 31 May 2008. The third Appellant was born in Zimbabwe on 15 March 2005. The fourth Appellant is the first and second Appellants' youngest child who was born in the UK on 21 January 2014.

3. The Appellants sought further leave to remain as a Tier 1 migrant and dependents in April 2010. Their application was refused initially and on reconsideration and appeal. However, a further application made in April 2011 although initially refused succeeded on appeal and the first to third Appellants were granted leave valid until 23 September 2014. In September 2014, the Appellants sought indefinite leave to remain as a Tier 1 migrant and dependents. That application was refused on the basis that the First Appellant could not show continuous lawful residence. There were other reasons given for the refusal but this was the main reason given (and it appears from the Decision that the Judge may have found that this was the only reason which was sustainable although the findings in relation to the Tier 1 decision are not clear). The second Appellant was also refused for failure to demonstrate sufficient knowledge of the English language. As noted above, the Judge did not find that the appeals should succeed in relation to the refusal of indefinite leave to remain and I need say little more about this decision save in so far as it impacts on the Article 8 claims.

4. The decision made by the Respondent was a section 47 decision which therefore also directed the removal of the Appellants to Zimbabwe. As such, the Appellants were entitled to raise human rights in their appeal and did so. It was on this basis that the appeals were allowed. The Judge appears to have concluded that the Article 8 claim could not

succeed under the Rules as he goes directly to consideration of whether there are exceptional circumstances. Indeed, this was the basis on which the Respondent has sought and obtained permission to appeal. The Judge considered whether there were exceptional circumstances at [26] to [30] of the Decision. Having considered section 117B Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), he concludes that removal of the Appellants would be disproportionate and that their appeals succeed under Article 8.

5. The Respondent accepted in her grounds of appeal that the Judge was entitled to consider Article 8 even though no formal application had been made. Having regard to section 85 and 86 of the 2002 Act, that is clearly correct. The Respondent pointed out that the Judge had not considered the Appellants' cases under the Rules and that the Appellants could not meet the Rules in relation to Article 8 (although that is a point to which I will need to return when I consider whether there is an error of law in the Decision). The Respondent submitted that there was no evidence to show that there are exceptional circumstances in this case. Permission to appeal was granted on the basis that the Judge had failed to consider whether there are exceptional circumstances outside the Rules.

6. This matter comes before me to determine whether there is an error of law in the Decision and, if so, to remit it to the First-Tier Tribunal to re-make the Decision or to re-make the Decision myself. I indicated at the hearing that I found there to be no material error of law and that I would provide my reasons in writing which I now turn to do.

Decision and reasons

7. At the start of his submissions, I pointed out to Mr Walker that the third Appellant arrived in the UK on 31 May 2008 and had therefore been in the UK for seven years as at the date of the hearing on 3 August 2015. There is accepted to have been no formal application under Article 8 in this case. I therefore discussed with Mr Walker what would be the relevant date for determination of the seven years that a child is required to be in the UK in order to come within paragraph 276ADE of the Rules. Mr Walker accepted that, where the Article 8 claim was not raised by way of an application, the Judge would be entitled to consider the seven years' requirement at the date of hearing. Even if that was wrong, he accepted that section 117 of the 2002 Act does not contain a similar restriction in relation to the date of application and the third Appellant would therefore be a qualifying child for the purposes of section 117B(6). The Judge had not considered this in the Decision. There was therefore an error of law in his analysis. That did not necessarily impact on whether there was an error of law in the overall Decision but I noted that this may impact on whether any error of law in the Judge's Decision in relation to exceptional circumstances was material when viewed against that background.

8. Mr Walker accepted that the Judge had reached a finding that it would not be reasonable to expect the third Appellant to return to Zimbabwe at [30] even if not expressed precisely in this way (which is unsurprising since the Judge did not consider the Article 8 claim within the Rules). Mr Walker therefore very fairly and correctly conceded that he was in some difficulty in submitting that there is a material error of law in the Decision.

9. The Judge has considered in the Decision whether there are exceptional circumstances. What appears to have impressed him in this case is not only the position of the two children but the reasons why the first Appellant was unable to succeed in his Tier 1 application, the fact that most if not all of the family's residence was lawful albeit precarious and the contribution which the first and second Appellants make to the UK. He also took into account their links with Zimbabwe which he found had effectively been broken. As the Judge notes, the evidence in this case was not challenged by the Respondent which is unsurprising since there was no Presenting Officer in attendance. The Judge was though entitled to have regard to the factors which he did as exceptional circumstances and to find that those were exceptional circumstances which justified allowing the appeal on Article 8 grounds even though the Appellants could not meet the Rules. I might not have reached the conclusion which the Judge did on the evidence but I am not satisfied that there is an error of law in the Decision. The Respondent's grounds are nothing more than a disagreement with the outcome.

10. Further, and in any event, even if I had found there to be an error of law in the Decision, I would not have found that error to be material for the reasons which I set out at [7] and [8] above and which Mr Walker accepted made it difficult to argue that the appeals should not succeed on Article 8 grounds. The third Appellant is a qualifying child for the purposes of section 117B(6) of the 2002 Act (and probably also meets paragraph 276ADE(1)(iv) save for the requirement that there be a valid application). Once that is accepted, and given the age of the third Appellant it would clearly be disproportionate to remove the other Appellants to Zimbabwe. Any error of law in the Judge's findings in relation to exceptional circumstances would therefore be immaterial.

11. For the above reasons, I am not satisfied that there is a material error of law in the Decision and the Decision is confirmed.

DECISION

The First-tier Tribunal Decision did not involve the making of an error on a point of law. The First-tier Tribunal Decision promulgated on 10 August 2015 is therefore confirmed with the consequence that the Appellants' appeals succeed under Article 8.

Signed  Date 10 February 2016

Upper Tribunal Judge Smith