IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04491/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 7 March 2016	**On 5 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

[T C]
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Moksud, Burton & Burton Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a national of Zimbabwe, appeals from the decision of the First-tier Tribunal (Judge McDade sitting at Bennett House on 17 November 2015) dismissing her appeal against the decision of the Secretary of State to remove her as a person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999, her asylum/human rights claim having been refused. The First-tier Tribunal

did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 7 January 2016 First-tier Tribunal Judge Osborne granted permission to appeal for the following reasons:

> "In an otherwise careful and certainly succinct decision and reasons it is nonetheless arguable that the judge erred in failing to consider the appellant's appeal in respect of E-LTRPT.2.3(b) of the Immigration Rules as that was a matter raised by the appellant and clearly set out in the skeleton argument. It is additionally arguable that the judge erred in failing to appropriately consider the appeal under Article 8 ECHR outside the Immigration Rules. The judge's finding that there is nothing exceptional and compelling in the appellant's case is arguably the wrong test to be applied."

Relevant Background

3. The appellant is a national of Zimbabwe, whose date of birth is [ ] 1966. She has five children, four of whom are in the United Kingdom. Their father came to the United Kingdom in 2005, and successfully claimed asylum. Subsequently he sponsored the reunification of his family in the UK, consisting of his wife, the appellant, and their five children. The entry clearance applications of three of the children, including the youngest child [J], were successful, and they arrived in the United Kingdom to join their father in 2009. The oldest child was unsuccessful in his application, as he was over the age of 18. The appellant's application was refused because the Entry Clearance Officer was not satisfied that her relationship to the sponsor was genuine and subsisting.

4. The appeals of the appellant and her daughter [TN] came before Judge Osborne sitting at Bennett House on 11 May 2010. The judge received oral evidence from the sponsor, who gave evidence that the relationship between him and the appellant was ongoing. The judge found his evidence credible, and he went on to allow the appellant's appeal and, for different reasons, the appeal of [TN].

5. Pursuant to Judge Osborne's decision, the appellant and [TN] were issued with family reunion visas in July 2010. However only [TN] joined her father and her siblings in the United Kingdom in 2010. The appellant did not arrive in the UK until 5 April 2013, a few months before her three year family reunion visa was due to expire.

6. On 27 February 2015 the Secretary of State gave her reasons for refusing to recognise the appellant as a refugee, and for refusing an alternative claim under Article 8 ECHR. She had been considered under the parent route and Appendix FM. From the information provided during her asylum interview, her children were cared for by her husband and he provided for them financially. In view of this fact, it was not accepted that she had sole responsibility for her children, and so she failed to meet the requirements of paragraph E-ELTRPT.2.3(a) of the Rules.

The Decision of the First-tier Tribunal

7. Both parties were legally represented before Judge McDade. Mr Ahmed of Counsel appeared on behalf of the appellant, and agreed with Judge McDade that there was no substance to the asylum claim. However, Mr Ahmed submitted that the appellant qualified for leave to remain on the basis of E-LTRPT.2.3(b) of Appendix FM.

8. The judge received oral evidence from the appellant and some of her children. In the light of this evidence, he accepted that after the children left Zimbabwe and came here, there was reasonably frequent contact between them and the appellant by means of phone calls and WhatsApp. Since coming to the UK, the appellant had taken on some responsibility for collecting one or two of the children at particular times from school; and the appellant went with her children to church on Sundays. There had been no issues raised in relation to any dependency between the appellant and her three children who were now adults in the United Kingdom. The younger child [J], aged 11, certainly had a face-to-face relationship now that he did not have when his mother was back in Zimbabwe. But it seemed to the judge that the relationship was nowhere near as significant to him as his relationship with his father with whom he had lived for the whole time he had been in the UK. The judge continued:

> "He is not a qualifying child under the Nationality, Immigration and Asylum Act 2002 because he is neither a British citizen nor has he been in the United Kingdom for the requisite period of seven years. As such Section 117(B) of that Act does not assist the appellant."

9. There were no exceptional and compelling in the appellant's case requiring him to look outside the Rules, as it was clear that the appellant had little private life in the United Kingdom of any significance and family life only to a limited extent. Family life that did exist in the UK could be pursued back in Zimbabwe just as it was throughout the years that she has remained in Zimbabwe after her children had left to the UK. The judge continued:

> "In respect of E-LTRPT.2.3(b) the appellant has never made any valid application for limited or indefinite leave to remain as a parent, having chosen instead to pursue the asylum route aforementioned. I hold that the appellant can therefore not succeed under those provisions."

Reasons for Finding an Error of Law

10. Although Tony Melvin of the Specialist Appeals Team settled a Rule 24 response opposing the appeal, Mr McVeety accepted at the outset of the hearing before me that the judge had been wrong to direct himself that a valid application under E-LTRPT.2.3(b) was a condition precedent of the Tribunal having jurisdiction to entertain an appeal based on the proposition that the appellant meets the requirements of this provision.

11. As pleaded in ground 2, GEN.1.9 of Appendix FM states at subparagraph (a) that the requirement to make a valid application will not apply when

the Article 8 claim is raised as part of an asylum claim, or as part of a further submission after an asylum claim has been refused; or in an appeal (subject to the consent of the Secretary of State where applicable).

12. Although the appellant had made a misconceived application for asylum, the Secretary of State in the refusal letter had rightly addressed an alternative claim under Article 8, and had given specific consideration to whether the appellant could qualify for leave to remain under the parent route in Appendix FM. However, having made the uncontroversial assessment that the appellant did not meet the eligibility requirement of 2.3(a), the Secretary of State had not considered whether the appellant met the alternative requirement contained in 2.3(b) that the parent or carer with whom the child normally lives must be a British citizen in the UK or settled in the UK.

13. It appears that by the date of decision, and certainly by the date of the hearing, the father was settled in the UK, having been granted ILR. So the judge should have gone on to consider whether the appellant met the requirements of E-LTRPT.2.4 on the basis that she had access rights to her 11 year old son [J], and she was taking, and intended to continue to take, an active role in [J]'s upbringing.

14. The appellant also needed to meet financial and language requirements. It was only after the judge had made findings on all the relevant requirements which the appellant needed to satisfy in order to qualify for leave to remain under the parent route of Appendix FM that (if not all the requirements were met) the judge could make an informed assessment of whether there were compelling circumstances not sufficiently recognised under the Rules which justified the appellant being granted Article 8 relief outside the Rules, having regard to Section 117(B)(6) of the 2002 Act.

15. For the above reasons, the decision of the First-tier Tribunal is vitiated by a material error of law such that it must be set aside and remade. It was agreed by the parties that the appeal should be remitted to the First-tier Tribunal for a *de novo* hearing of the Article 8 claim based on the appellant's contact with her 11 year old child, who has indefinite leave to remain in the UK.

Conclusion

The decision of the First-tier Tribunal dismissing the appellant's appeal on protection grounds did not contain an error of law, and accordingly that decision stands.

The decision of the First-tier Tribunal dismissing the appellant's claim on human rights (Article 8) grounds contained an error of law, and accordingly the decision is set aside.

Directions

The appellant's human rights (Article 8 ECHR) appeal is remitted to the First-tier Tribunal at Stoke for a *de novo* hearing (Judge McDade incompatible) with an agreed time estimate of two hours.

Signed Date

Deputy Upper Tribunal Judge Monson