Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: DA/00512/2014**
DA/00511/2014

THE IMMIGRATION ACTS

At	**Birmingham**	**Determination Promulgated**	
on	**08.12.2014**	**On 28.01.2015**	

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Gladys KUNAKA & another

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellants: *Arnela Imamović* (counsel instructed by Genesis Law Associates Ltd, Birmingham)
For the respondent: Mr Neville Smart

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Dorothy Thomas), sitting at Birmingham on 29 August, to allow on article 8 grounds an appeal against refusal to revoke a deportation order on 21 January 2014, by a citizen of Zimbabwe, born 12 June 1971. At the date of the decision, the Rules required no more of a person facing deportation for criminal offences in the circumstances of this case than that

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
(i) the child is a British Citizen; or

> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would not be reasonable to expect the child to leave the UK; and
> (b) there is no other family member who is able to care for the child in the UK

2. The (main) appellant has been in this country since 1999 and without any basis of stay since her student leave expired in 2000. On 10 July 2003 she gave birth to B, who was granted British citizenship on 8 May 2014; so, while he was included in the deportation order against her, and her appeal against that, his appeal no longer arises for consideration. The appellant herself was sentenced to 12 months' imprisonment on 29 April 2008 for working for about a year on a passport which did not belong to her. While she was away, her sister, now dead, looked after B.

3. The judge dealt with the case in the first place on the basis that the Rules applied as they stood at the date of the decision under appeal; however, she went on to find that, even if the latest Rules (see **4**) applied, the effect on B of the appellant's deportation would be unduly harsh. The findings of fact on which she based that are challenged in the grounds of appeal; but I shall deal with that if and when I need to.

4. The Home Office appealed the judge's decision on the basis that, by the date of the hearing before her, the new paragraph 399 (a) of the Rules (in force as from 28 July 2014) applied, so as to permit an appeal by the parent of a child who is either a British citizen, or has been here for at least seven years to be allowed on that basis, only if it would be unduly harsh for the child (a) to live in the country to which the [parent] is to be deported and (b) to remain in the UK without the person who is to be deported.

5. There is nothing in any part of the latest Rules to which Mr Smart was able to refer me, either in the unnumbered 'Implementation' section, or in the changes themselves set out in the body of the statement of changes, to suggest that they could possibly have gone further than what the House of Lords approved in *Odelola* [2009] UKHL 25. The nearest the latest Rules come to Mr Smart's submissions is at paragraph A362:

> Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

6. However, unless some contrary intention is shown, Rules operate as they stand at the time the immigration decision in question is made, and there is nothing in the statement (in the implementation section) that the changes "… take effect on 28 July 2014", or the words used in paragraph A362 to suggest otherwise. Rules may be changed from time to time, and there is nothing retrospective about requiring immigration decisions to be made on the basis of how they stand at the date of the decision.

7. On the other hand, if some change were to be made in the Rules to be applied, when dealing with them on appeal, as at the date of the decision,

that would in my view be a genuinely retrospective provision, for which, in accordance with general principle, nothing less than clear words in primary legislation would be required. So far as the Immigration Act 2014 is concerned, there is nothing in either the general transitional (s. 73) or commencement (s. 75) provisions which could possibly have been intended to carry the retrospective effect required in this case, or, so far as I can see from the table of contents, at any other point in the Act.

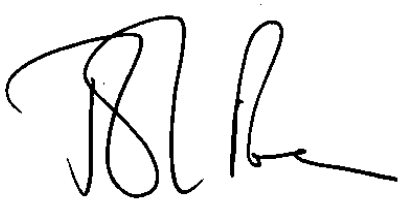
8. This general view of the legal position is confirmed by *YM* (Uganda) [2014] EWCA Civ 1292. Neither side referred me to it; but my attention was drawn to it after the hearing. The decision, given on 10 October 2014, involved a case where the Upper Tribunal re-heard the appellant's appeal after the 2012 Rules came into force; but before the 2014 Act did so. The only fully reasoned judgment, by Aikens LJ, is extremely learned and quite long: however, for present purposes, the only principles that need be extracted are these:

(paragraph 36) An error of law decision has to be made on the law as it stood at the date of the judicial decision under appeal (and the relevant Rules are those in force at the date of the immigration decision).

(paragraph 37) If on that basis the judicial decision has to be set aside and re-made, then the law in force at the date of the re-hearing applies, and the Rules in force at that time may also be relevant.

9. Mr Smart realistically agreed that, if I found against him on the question of what Rules the judge had to apply, there was no basis for interfering with her decision that there would be no other family member here to care for B, and it would not be reasonable to expect B to leave this country. I should go further, and say that the judge's decision was a model of its kind.

Home Office appeal dismissed



(a judge of the Upper Tribunal)