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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01117/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2016	**On 6 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H N M
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Willocks-Briscoe, Home Office Presenting Officer
For the Respondent: Mr Oshunrinade, of Samuel & Co, Solicitors

DECISION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the determination of First-tier Tribunal Judge I F Taylor ("the FTTJ") promulgated on 30 April 2015. The FTTJ dismissed the appeal of the respondent (hereinafter called "the claimant") against the refusal of his asylum claim and his human rights claim under the Immigration Rules; the FTTJ allowed his appeal on Article 8 grounds outside the Rules.

2. Given my references to the child of the claimant's partner and the family's personal circumstances, an anonymity order is appropriate.

Background

3. The claimant is a citizen of Zimbabwe born on [ ] 1969. He first entered the UK in January 2003 and claimed asylum at that time. This was refused and a subsequent appeal dismissed.

Various subsequent submissions were rejected and the claimant was removed from the UK to South Africa (from whence he had come) in April 2004. The claimant re-entered the UK on 22 May 2004 having been found by the South African authorities to be a Zimbabwean citizen. He claimed asylum the same day. That claim was refused and his appeal was unsuccessful. Further submissions were rejected but deemed to amount to a fresh claim and thus gave rise to a right of appeal. That appeal against the refusal of asylum by the Secretary of State was dismissed by the FTTJ on 30 April 2015. However, his appeal on human rights grounds was allowed outside the Immigration Rules.

4. The Secretary of state sought permission to appeal and this was granted in the following terms:

> "1. In a Decision promulgated on 30 April 2015 Judge Taylor allowed on human rights grounds the Appellant's appeal against the Respondent's decision to remove him to Zimbabwe having refused his most recent claim to asylum. The asylum appeal was dismissed. The human rights appeal was allowed apparently on the basis that the removal decision was not proportionate given the Article 8 rights of the Appellant, his partner, and his partner's child. The Appellant's partner and child are both citizens of Zimbabwe, who now enjoy ILR, despite her claim to asylum having been refused.
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> 2. The Respondent raises no concern about the decision to dismiss the asylum, humanitarian protection, and Article 3 appeals but challenges the decision to allow the Article 8 appeal. It is arguable on the findings of primary fact that were made by the Judge that his whole approach to the question of the best interests of the child, and to the Article 8 appeal was flawed. Arguably there was no proper consideration of the inability of the Appellant to meet the requirements of the Immigration Rules for settlement, the ability of the family to return to Zimbabwe together in safety, or, to the factors set out in ss117A-D. Indeed it would appear that the Judge failed to apply the guidance to be found in *EV (Philippines)*. The Judge was arguably not entitled to make a decision upon proportionality that appears to have rested in large part upon the speculation that the natural father of the child of the family might at some stage wish to resume contact with him, and that he might find it easier to do so if the boy remained in the UK, particularly given the long period since there had been any contact between the two and the absence of evidence to suggest that either knew where the other was now living."

Error of Law Submissions

5. There is no cross-appeal by the claimant with regard to the dismissal of his appeal on asylum and humanitarian protection grounds and under the Immigration Rules insofar as his Article 8 claim is concerned. Thus the sole issue is whether there is a material error of law in the FTTJ's decision outside the Immigration Rules on Article 8 grounds.

6. Ms Willocks-Briscoe, for the Secretary of State, notes the FTTJ found (paragraph 51) that it would not be disproportionate for the claimant and his partner to enjoy family life together in Zimbabwe but that it was not reasonable for the partner's son to follow the claimant and his partner to Zimbabwe. Having found that it was in the best interests of the child to remain in the UK the FTTJ proceeds to allow the appeal. He has failed to follow **ZH (Tanzania) v SSHD [2011] UKSC 4** to the effect that the best interests of the child are a primary consideration but not a "trump card" or determinative. The FTTJ had failed to consider the impact on the child of the claimant's removal to Zimbabwe (with the option of seeking entry

clearance), with the child remaining with his mother here (**R (Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**). The FTTJ had failed to take into account the wider public interest of maintaining effective immigration control as required by s117A of the 2002 Act. If the claimant were to have returned to Zimbabwe, the separation of the family members would have been temporary and a proportionate interference. The FTTJ had failed to take into account the claimant did not fulfil the criteria in the Immigration Rules for leave to remain and no reason was given for his preferential treatment. Those Rules reflected the public interest. Following **Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC),** the list of considerations in s117B and 117C was not exhaustive. The FTTJ acknowledged the claimant had no status at the time he entered into the relationship. The Secretary of State agreed the child was British at the date of hearing (contrary to the grant of permission to appeal which solely refers to the child and his mother as Zimbabwean). Finally it was not clear on what basis the FTTJ found that the child's father may with to renew contact; there was no reference to any evidence to that effect.

7. For the claimant, Mr Oshunrinade submitted that the FTTJ had accepted the claimant had a genuine relationship with his partner's child; this had not been challenged by the Secretary of State. It was accepted that the FTTJ had not made a finding as to whether the claimant could have returned to Zimbabwe to apply for entry clearance. Mr Oshunrinade initially submitted that it was not accepted that the FTTJ should have done so but then accepted the Secretary of State's position that the FTTJ should have "gone further and made an assessment on whether he should have gone back to Zimbabwe to make an entry clearance application" which would give rise to temporary separation from his partner and her child.

Discussion

8. The FTTJ found the claimant did not fulfil the criteria in Appendix FM. The FTTJ also found there are no very significant obstacles to the claimant's reintegration into Zimbabwean life (a fact which is not challenged by the claimant). Implicitly, therefore the FTTJ found the claimant did not fulfil the criteria in the Immigration Rules for the grant of leave to remain on the grounds of his private life. The FTTJ then goes on to say (paragraph 43) that "due to the limitations of Appendix FM with regard to the [claimant]'s claimed family life in the UK it is appropriate to deal with his case under Article 8 of the ECHR outside of the Immigration Rules. It is the [claimant]'s case that he has a genuine and subsisting relationship both with his partner … and her son… The respondent disputes that the [claimant] enjoys a genuine and subsisting relationship with either Ms … or her son." This does not explain why the FTTJ considered it necessary to decide the appeal outside the Immigration Rules (**R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 539 (IAC)**). However, this is not a ground of appeal to this tribunal and I do not therefore address it.

9. The FTTJ found (paragraph 51) that, if there were not a child involved in this case [he] would have little hesitation in reaching the conclusion that it would not be disproportionate in all the circumstances of the case for [the claimant's partner] to enjoy family life with the [claimant] in Zimbabwe. Both the [claimant] and [his partner] are very familiar with Zimbabwe, they have Zimbabwean citizenship, neither have refugee status and there is no real impediment to them enjoying family life in Zimbabwe." However, he then sets out the best interests of the child (findings which are not challenged by the Secretary of State) and concludes that it is in his best interests to remain in the UK with his mother and the claimant, her partner of five years' standing (paragraph 52). He finds it is not reasonable to expect the child to follow the

claimant and his mother to Zimbabwe.

10. Section 117B identifies the public interest considerations "applicable in all cases". Whilst there is passing reference in paragraph 50 to "Section 117" [sic] of the 2002 Act, there is no consideration of all the public interest considerations listed in s117B. In particular, there is no reference to the maintenance of effective immigration control as being in the public interest (s117B(1)). This is a material error of law, given s117A(2) which is mandatory. I also find the decision contains an error of law in the assessment of proportionality: the FTTJ has made the best interests of the child the primary consideration and a determinative factor, rather than a primary consideration, contrary to **ZH**.

11. I invited submissions from the parties' representatives on the way forward. They both agreed that it was appropriate for me to remake the decision on the facts as found by the FTTJ because these were not challenged by either party. I consider this to be appropriate and adopt the parties' reasoning for such an approach.

Submissions on Proportionality

12. Mr Oshunrinade submitted for the claimant that the claimant played a significant role in the child's life and had done since 2010. He accepted that the claimant could return to Zimbabwe to seek entry clearance as a spouse; he could do so with his partner and the child initially (for example during the school holidays) and, if the process took too long and his partner had to return to work or the child to school, the claimant would remain in Zimbabwe alone until entry clearance was granted. He accepted that whilst the couple had married traditionally they could marry formally in Zimbabwe to facilitate the grant of entry clearance; alternatively, the claimant could apply for entry clearance as a fiancé. He said this would bring hardship on the family as the partner was the breadwinner; she was able to work because the claimant looked after the child. It was accepted she could arrange childcare in the short term but she would not be able to attend parents' evenings at school because she worked nights as a carer. He submitted that the claimant and his partner "would have to reorganise a lot of things and it may not be easy; there would be an impact on the child's life". There was no evidence as to the waiting period for an entry clearance decision. He said the child had never left the UK; he was born here and had never lived elsewhere; he was British.

13. Ms Willocks-Briscoe for the Secretary of State submitted that, given the claimant's case that he would apply for entry clearance as a spouse, a temporary separation was reasonable. The claimant had not succeeded under the Immigration Rules. He had had no leave when the relationship started; he had no legitimate expectation to remain here indefinitely. There was no evidence to suggest an adverse impact on the child resulting from the claimant's absence (**Chen**). It was for the claimant to place such evidence before the tribunal. The claimant was not the breadwinner in the family. The child's mother would be able to make arrangements for alternative care in the absence of the claimant.

Findings

14. I adopt the FTTJ's findings with regard to the best interests of the claimant's partner's child: he lives in the family unit with his mother and the claimant. His best interests are for him to remain in the UK in that family unit. The claimant currently undertakes childcare, including taking the child to and from school. The child is aged 11 and about to conclude his primary education and to embark on secondary education. He sees the claimant as his father. He has no contact with his biological parent. Whilst it may be in the child's interests to regain contact

with his biological father, there is no evidence that either he or his biological father wish to do so or that there is any prospect of this taking place at any time in the future. I discount this possibility in the absence of any such evidence. The claimant, his partner and her son have genuine relationships and are a family unit.

15. According to paragraph 41 of the decision, the claimant cannot meet the Immigration Rules on the basis of being a partner because he does not meet the terms of GEN.1.2(iv): the claimant and his partner had not been cohabiting for a sufficient period. He cannot meet the rules as a parent either because his partner's child's father is not dead (paragraph 6 of the Immigration Rules). Nor does the claimant meet other substantive requirements of the Rules, for example with regard to sole responsibility for the child. However, I note the FTTJ found the claimant's partner to be a credible witness. Her evidence is that she earns sufficient income to be able to maintain and accommodate the claimant (paragraph 15). The claimant speaks English. The claimant and his partner intend to marry and it was submitted that they would be prepared to return to Zimbabwe to do so and for the claimant to make an application for entry clearance as a spouse. It was also submitted that they would be prepared to do this during the school holidays, taking the child with them. It was accepted that this would minimise disruption to his schooling. It was not suggested that the claimant's partner would have difficulties with her employment as a result of this arrangement. Whilst it would not be appropriate to predict the outcome of such an application in the absence of evidence as to whether the claimant can demonstrate he fulfils all the criteria for entry clearance as a spouse (including Appendix FM-SE), there is no evidence to suggest that such a course would impact negatively on the claimant's partner's child or indeed the claimant's partner in any way. The claimant and his partner are both very familiar with Zimbabwe; they are Zimbabwean nationals and have relatives living there.

16. I therefore find that, if the claimant were removed, his partner and child would travel to Zimbabwe for the purpose of arranging the claimant's and his partner's marriage and an application for entry clearance. Clearly, in such circumstances, the degree of interference with the family's protected rights under Article 8 would be minimal and therefore proportionate to the respondent's objective. However, the outcome of an application for entry clearance cannot be predicted (**SB (Bangladesh) v SSHD [2007] EWCA Civ 28**) and I therefore consider, irrespective of this finding, whether, if the claimant were removed, it would be reasonable for his partner's child to leave the UK permanently in order to keep the family unit together in Zimbabwe.

17. The FTTJ found that, were it not for the child, he would have little hesitation in reaching the conclusion that it would not be disproportionate for the claimant and his partner to enjoy family life in Zimbabwe. He noted they are very familiar with that country, that they are Zimbabwean citizens without refugee status and that they have family there. The claimant's partner is working in the UK and has acquired skills and experience which would assist her in finding work on return. The claimant too could find employment. They are capable of earning an income to sustain themselves and the child and to afford accommodation or live with their families.

18. I turn to the best interests of the child and make them a primary consideration. I consider whether it would be reasonable for him to leave the UK, given that the public interest does not require him to do so if that is not the case (section 117B(6) of the 2002 Act).

19. The child is an eleven year old British boy and entitled to all that his citizenship brings: an education, access to healthcare, a social life with his friends and so on. He has never lived

outside the UK. He undoubtedly has friends both in- and outside school, as well as within the family circle. His best interests lie in his remaining within the family unit in this country. In that way he can continue his education, moving on to secondary school in the UK. He would continue to have access to free healthcare.

20. I take into account the public interest considerations in s117A-117C of the 2002 Act. The maintenance of effective immigration control is in the public interest. He has a lengthy and precarious immigration history. He has no immigration status. The claimant speaks English but is not financially independent: he is dependent on his partner. He met his partner when he had no immigration status and little weight should be given to his private life or relationship with his partner because it was established at a time when the claimant was in the UK unlawfully. S117B(6) provides that, in the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

    (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

    (b) it would not be reasonable to expect the child to leave the United Kingdom.

21. S117D(1) provides that a "qualifying child" includes a person who is under the age of 18 and a British citizen. The claimant's partner's child is such a child. I therefore turn to the issue of whether it would be reasonable to expect the child to leave the United Kingdom. In doing so I bear in mind that it is in his best interests to remain in the UK within the family unit.

22. The child is on the point of completing his primary education and embarking on his secondary education; thus, to some extent, there will be a degree of interruption in his education in any event. If he were to move to Zimbabwe with his mother and the claimant, the family unit would remain intact. The child has no contact with his biological father and there is no evidence to suggest that this would occur if he were to remain in the UK. There is an education system in Zimbabwe and he could continue his education there. His mother is working in the UK and would be able to find work in Zimbabwe; she has transferable skills as a carer. The claimant is a Zimbabwean citizen and would be able to find work also. The couple have family in Bulawayo who could provide the claimant, his partner and the child with support and assistance at least in the short term until they find employment and can afford their own accommodation. The child would have access to healthcare, albeit not to the same standard as in the UK. The child is familiar with Zimbabwean custom and culture, living as he does in a Zimbabwean household in the UK. He undoubtedly has contact within the Zimbabwean diaspora in the UK. English is spoken in Zimbabwe and he could be educated in that language. There is no evidence to the effect that his best interests and/or welfare would be undermined by his living in Zimbabwe.

23. Whilst I recognise that the child would lose the opportunity to continue his education in the UK, his country of nationality, his citizenship is not a trump card (**ZH**). I also recognise he would lose direct contact with school and other friends but he is of an age when he could make new friends at his new school and indeed he would be starting at secondary school in the UK in any event: his education and social life will take a slightly different course even if he remains in the UK. In Zimbabwe, he would be able to retain contact with friends in the UK via the internet and other media and visits. Taking all the relevant factors into account and giving his best interests and welfare primary consideration, I am satisfied that it would be reasonable for him to leave the UK within the family unit, even if the family had to remain in Zimbabwe permanently as a result of the claimant being refused entry clearance. It follows

that any temporary or shorter stay in Zimbabwe (if entry clearance were granted) would similarly be reasonable.

24. Having considered the evidence in the round, I find that the degree of interference with the claimant's, his partner's and her child's protected Article 8 rights is justified and proportionate to the public interest in maintaining effective immigration control.

Decision

25. I do not set aside the decision of the First-tier Tribunal Judge to dismiss the appeal on asylum and humanitarian protection grounds or under the Immigration Rules. That decision stands.

26. The making of the decision of the First-tier Tribunal Judge on human rights grounds does involve a material error of law, as set out above.

27. I set aside the decision of the First-tier Tribunal to allow the appeal on human rights grounds and remake it, dismissing the appeal.

A M Black

Signed Date 19 March 2016
Deputy Upper Tribunal Judge A M Black

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the claimant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The FTTJ did not make a fee award and, the appeal having been dismissed there can be no fee award now.

A M Black

Signed Date 19 March 2016
Deputy Upper Tribunal Judge A M Black