Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/08469/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons**
On 6th June 2017	**Promulgated On 19th June 2017**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MISS CHLOE KUNASHE CHRISTABELLE MUTASA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

Representation:

For the Appellant: Mr J Acharya, instructed by Acharyas Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe born on 12 December 1998 and she appealed against the entry clearance officer's refusal made on 17 March 2015 to grant her entry clearance as a person seeking leave to enter or remain in the United Kingdom in order to join or remain with a parent who has been granted asylum in the United Kingdom under paragraph 352D of HC 395.

2. In a decision promulgated on 2 September 2016 by the First-tier Tribunal the appellant's appeal was dismissed both under the immigration rules and in relation to Article 8.

3. The appellant made an application for permission to appeal asserting the judge had not adequately considered the appellant's best interests and as a starting point the appellant's best interests were served by being with her father. It was submitted that the decision of the judge had not adequately considered whether it be the best interests of the appellant in being reunited with her father.

4. Permission to appeal was initially refused but then granted by upper Tribunal Judge Finch who stated as follows:-

"it is not arguable that the appellant was entitled to leave under the immigration rules but when considering her right outside the immigration rules, it was necessary to treat her best interests as a primary consideration and this exercise had simply not been undertaken. It is accepted that section 55 of the Borders, Citizenship and Immigration Act 2009 does not directly refer to a duty to safeguard and promote the welfare of a child who is not in the United Kingdom but guidance states that "UK border agency staff working overseas must adhere to the spirit of the duty". This approach was recently confirmed in ***R (on the application of MM (Lebanon) v the Secretary of State for the Home Department*** *[2017] UKSC10".*

5. At the hearing before me both representatives agreed that there was indeed an error of law in the decision which was material and that the judge had not considered the best interests of the child as she was when she made the application. There were no findings in relation to the best interests of the child and Mr Kotas and Mr Acharya also argued that the matter should be remitted to the first Tier Tribunal for findings in relation to the appellant's best interests.

6. It is clear that the judge in relation to Article 8 made no findings at all as to the child's best interests and although **T (s.55 BCIA 2009 – entry clearance) Jamaica** [2011] UKUT 00483(IAC) confirms that

(i) Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom.

There, however, remains reference to the 'spirit of statutory guidance'

(ii) Where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the "exclusion undesirable" provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken

into account by the ECO at first instance and the judge on appeal.

7. Thus although the section 55 duty does not apply to entry clearance applications, it is clear that the guidance gives explicit instruction that the best interests of the child must be considered. A similar approach was taken in ***R (on the application of MM (Lebanon).*** The judge did not address the issue of best interests and made no holistic findings thereon. As a result I find that there is a material error of law.

8. To that end I made enquiries of the representatives as to whether the transitional provisions attached to applications under Paragraph 352 D of the Immigration Rules in order to determine the relevant date for determination of the Article 8 assessment, the date of hearing or the date of decision.

9. The applicant was born on 12 December 1998. At the date of the decision by the entry clearance officer and at the date of the hearing before the first Tier Tribunal, the appellant was under the age of 18; by the date of the hearing before me and any further hearing she would indeed be an adult. I appreciate that there is no bright line but this will be relevant to the assessment and to the strength of the family ties between the appellant and her father. It would appear that the application and appeal falls within Article 9(1) (d) of the Commencement Order substituted by Article 8 (Part 3) of The Immigration Act 2014 (Commencement No 4 Transitional and Saving Provisions and Amendment) Order 2015. In effect the relevant date for consideration of the Article 8 claim is the date of decision.

10. The Judge erred materially for the reasons identified. I set aside the decision in respect of the Article 8 assessment only and pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed Helen Rimington Date 16th June 2017

Upper Tribunal Judge Rimington