Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11485/2016**

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 15 August 2017	**On 29 August 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR GEORGE MUCHAPIREI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Winter, instructed by Katani & Co Solicitors
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the respondent made on 5 October 2016 to refuse to revoke a deportation order and to refuse his asylum claim.

2. The applicant is a citizen of Zimbabwe who has lived in the United Kingdom since 1999. He is in a relationship with a partner who is settled here and they have two children both of whom are British citizens. The older, aged 13, has Down's Syndrome, significant learning disabilities and a hole in the heart; the younger child is aged 6. The appellant's partner's mother who is also a British citizen is recognised as a refugee and has a number of health problems and lives as part of a family.

3. The respondent refused the asylum claim considering that Section 72 of the UK Borders Act 2007 applies; that he was not at risk if returned to Zimbabwe; and, that he did not meet the requirements of the Immigration Rules specifically 398 and 399A, having applied paragraphs 362 and 390.

4. It is agreed between the parties that the First-tier Tribunal misdirected itself in its determination at [35] but the relevant test in this case was whether there were very compelling circumstances, the panel apparently believing that this was the relevant test in respect of paragraph 398B despite the fact that the appellant had not been sentenced to a term of imprisonment of greater than four years. It is also accepted this may not necessarily have been a material error had the Tribunal otherwise dealt with the issue set out in paragraph 399A.

5. Whilst the panel does appear to have addressed the issue of undue harshness the decision is not sustainable because the panel failed adequately to set out:-

   (i) what the effect of moving to Zimbabwe would have on the children with specific reference to the health needs and other support needs of the older child;

   (ii) failed to indicate what weight and been attached to the public interest in assessing undue harshness in this aspect;

   (iii) failed properly to assess the impact there would be on the children if the father were to be deported, again not least given the health and other needs of the elder child;

   (iv) to make findings as to what public interest had been attached in assessing undue harshness.

6. Further, whilst this appeal was specifically under Article 8, these considerations apply also in assessing whether removal would be proportionate. These considerations should have formed a part of the consideration, when considering amongst other matters the effect of Section 117C of the 2002 Act.

7. As Mr Matthews accepted, no proper findings of fact were made and accordingly the decision falls to be set aside.

8. I am satisfied for these reasons that the decision of the First-tier Tribunal did involve the making of an error of law and must be aside. In considering whether to remit the matter, both parties were in agreement that although the decision was relatively recent, a further extensive fact-finding exercise was required given that there had been no proper findings as to the impact of removal to Zimbabwe of the children or of the effect of deportation of their father on them were they to remain here. It was not, in particular, clear why the panel considered that social services or other support could or would be available to the family nor is it clear why this would be an adequate substitute for the presence of the father.

9. Accordingly, I remit the decision to the First-tier Tribunal for a fresh decision.

10. As Mr Winter acceded, the asylum issue is no longer live and was not pursued on appeal to the Upper Tribunal. He conceded that the matter would not be pursued even though the matter was being remitted. Accordingly, I direct that fresh consideration by the First-tier Tribunal shall be limited to considering whether removal would be in breach of Article 8 of the Human Rights Convention and on the basis that it is conceded that the applicant does not have a well-founded fear of persecution in Zimbabwe or that his return there would be in breach of Article 3.

Summary of Conclusions

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the decision to the First-tier Tribunal for a fresh consideration of the Article 8 issues it being conceded that the asylum claim is no longer in issue.

3. No anonymity direction is made.

Signed Date: 25 August 2017

Upper Tribunal Judge Rintoul