Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12025/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th September 2018	**26th September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

R D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Solanki of Counsel
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe. He was born on 4 May 1978.

2. He appealed against the respondent's decision dated 20 September 2017 to refuse him leave to remain in the United Kingdom.

3. Judge N Lodge (the judge) dismissed the appellant's appeal against the respondent's decision because he found that it was proportionate.

4. The grounds claim the judge erred because in concluding that paragraph EX.1 was not met, the judge applied the incorrect test. That was because having identified the correct test at [23] of the decision, he found at [26] that it would in all the circumstances be reasonable to expect the appellant to return to Zimbabwe.

5. Paragraph EX.1 provides:

> *"(a)*
>
> *(i) the applicant has a genuine and subsisting parental relationship with a child who-*
>
> *(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;*
>
> *(bb) is in the UK;*
>
> *(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of the application; and*
>
> *(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;"*

6. The question for the judge was whether it was reasonable to expect the children to leave the UK and he made no finding in that regard. Further, he failed to have regard to S.117B(6) of the 2002 Act which provides:

> *"(6) 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."*

7. In any event, the judge gave inadequate reasons for concluding that the appellant had a poor immigration history.

8. Judge Neville granted permission to appeal on 13 July 2018. He said inter alia:

> *"2. The issue before the judge was whether, pursuant to paragraph EX.1 of the Immigration Rules and then (although he does not refer to it) S.117B(6) NIAA 2002, it was reasonable for the appellant's qualifying child to leave the United Kingdom.*

3. *The grounds are arguably correct in their assertion that the judge solely measured reasonableness by reference to the impact of separation from the child's remaining parent, rather than having any regard to child's best interest as a primary consideration, the guidance in MA (Pakistan) [2016] EWCA Civ 705, and the significance placed by Parliament and the authorities on a child's British citizenship."*

9. Mr Melvin handed up his Rule 24 response dated 13 September 2018. The judge's finding regarding the appellant's poor immigration history was open to him on the evidence. Although not referring to the same, the judge had followed the guidance in **MA Pakistan EWCA Civ 705 [2016]**. See also **AM Pakistan EWCA Civ 180 [2017]** upholding **MA**. Whilst in the best interests of the qualifying children to remain in the UK, the poor immigration history of the parents and the wider public interest in immigration control, outweighed the children's best interests. The appellant's poor immigration history was capable of being a powerful reason in the "reasonableness" test.

Submissions on Error of Law

10. Ms Solanki relied upon the grounds. She sought to distinguish a *"poor"* immigration history from a *"very poor"* immigration history. The distinction arises from [7] of **SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 120 (IAC)** which refers to the guidance *"family life as a partner or parent and private life, ten year routes"*. It refers to guidance regarding whether it would be unreasonable to expect a British citizen child to leave the UK inter alia as follows:

> *"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice Judgment in **Zambrano**.*
>
> *Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.*
>
> *In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.*
>
> *It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay*

with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- *criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;*

- *a **very poor** (*my emphasis*) immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.*

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

11. Mr Melvin relied upon the Rule 24 response.

Conclusion on Error of Law

12. Having arrived lawfully, as of 2004 the appellant had no leave to remain. In 2010 he made an asylum claim which was refused and his appeal against the decision dismissed. He was appeal rights exhausted on 30 July 2010. On 23 October 2013 the appellant submitted another application which was refused with no right of appeal. He submitted his current application in July 2016.

13. The judge described the appellant's immigration history as *"poor"* at [25] of the decision. I do not accept there is any distinction in terms of the case law between a "poor" and a "very poor" immigration history which would give rise to an error of law on the part of the judge in describing the appellant's immigration history as "*poor*".

14. The judge found the appellant was in a genuine and subsisting relationship with his partner who has ILR. The judge took into account that the appellant had a genuine and subsisting parent relationship with two British children and correctly identified the issue as to whether it would be reasonable to expect them to leave the UK. See [23]. The judge took the Home Office guidance into account. See [24]. The children are aged 3 and 9 months. I accept that the judge failed to consider in terms S.117B(6) or **MA Pakistan**, however, he carried out an appropriate analysis nevertheless. He took into account that the appellant is the main point of contact for Elijah, age 3, who attends Grasshoppers Day Nursery. He correctly identified and considered whether it would be reasonable to expect the children to leave the UK. He found that there were no

insurmountable obstacles to family life continuing outside the UK. It was simply a matter of choice as to whether the family chose to relocate to Zimbabwe or whether the appellant's partner and children chose to remain here.

15. The appellant's circumstances and that of his children can be readily distinguished from those in **MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088 (IAC)**.

16. Although the judge did not engage with the best interests of the children in terms of return to Zimbabwe, I do not find he erred materially in that regard. The children are of such tender years that inevitably, their best interests must be to remain with both parents, whether that is here in the United Kingdom or Zimbabwe; there was no credible evidence before the judge to suggest otherwise. As the judge correctly identified, the decision of the appellant and his partner was their choice to make on behalf of the children.

Notice of Decision

17. The judge did not materially err in his decision which shall stand.

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

Unless and until a Tribunal or court directs otherwise, the appellant 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 appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Peart 14 September 2018