Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: IA/47477/2013**

IA/38691/2013

IA/47478/2013

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Determination Promulgated**
On 24 July 2014	**On 13 August 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

H A G

OG

AG

(ANONYMITY DIRECTION MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Charles of Leslie Charles Solicitors

For the Respondent: Ms C Johnstone Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. An anonymity direction was made previously in respect of this appeal. There was no application to amend the direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge De Haney, promulgated on 6 May 2014 which dismissed the appeal s under the Immigration Rules but allowed the Appellants appeals under Article 8 and held that it was disproportionate and unlawful to remove them to Zimbabwe.

Background

3. The Appellants are citizens of Zimbabwe, a mother and her two children. On 13 January 2009 the Appellants applied for leave to remain in the United Kingdom on discretionary grounds and under Article 8 and the application was refused. On 4 March 2013 the Respondent was asked to reconsider the Appellant's case and did so but the original decision to refuse the application was maintained in a letter dated 9 September 2013 and directions were made to remove the Appellant from the United Kingdom under s 47 of the Immigration, Asylum and nationality Act 2006.
4. The refusal letter considered the applications by reference to Appendix FM and paragraph 276 ADE. The Appellants did not meet the requirements of the Rules. The letter also took into account that the second and third Appellants were children who had been in the United Kingdom for over 10 years but did not find that sufficiently compelling to allow the Appellants leave to remain.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal and First-tier Tribunal Judge De Haney (hereinafter called "the Judge") found that as the applications made by the Appellants were made on 13 January 2009 they should have been dealt with under the law as it was on 8 July 2012 and the Respondent had considered the applications by reference to the wrong law; he considered the applications by reference to Article 8 and found the first Appellant to be a witness wholly without credit but identified the length of time that the two children had been in the United Kingdom, at the time of the hearing 10 years and 11 months, to be the real issue in the case given that they had been 4 and 1 year old when they arrived; he found that the children were integrated into United Kingdom society and there was no evidence that they had any ties in Nigeria; he cited authorities that suggested that in the absence of strong countervailing factors residence of 7/8

years was likely to make removal disproportionate; her dismissed the suggestion that the Appellants were in contact with the first Appellant's husband as speculation.

6. Grounds of appeal were lodged and on 5 June 2014 Judge of the First-tier Tribunal Ford gave permission to appeal stating it was arguable that the Judge erred in failing to consider the Immigration Rules relating to Article 8 claims and in treating the best interests of the children as an overriding interest.

7. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that :

   (a)The Judge had failed to consider Appendix FM. Prior to 9 July 2012 the Rules did not cover Article 8 and the Rules now set out where the balance was to be struck in such cases.

   (b) the Judge should have looked at EX.1 and engaged with the test of whether it was reasonable in this case for the children to return to Zimbabwe.

   (c)The Judge considered old case law.

   (d) There was no consideration of the public interest as part of the balancing exercise merely a focus on the length of residence in the United Kingdom as the decisive factor.

8. On behalf of the Appellants Mr Charles submitted that :

   (a) He relied on the case of Edgehill and another v Secretary of State for the Home Department [2014] EWCA Civ 402. The new Rules did not apply to an application made prior to 9 July 2012. The decision made in 2013 was not a fresh decision it was an upholding of the previous decision.

   (b) There had been delay in this case between the original application made in 2009 and the final decision in 2013 and the benefit of that delay should not be with the Respondent .

(c) He conceded that the Article 8 assessment was very brief. Given however his adverse credibility findings against the mother the central feature was the length of residence of the children.

(d) Even if it were accepted that there had been no balanced assessment this have still resulted in a decision in favour of the children.

(e) Even had a decision been made under the new Rules taking into account all of the factors the outcome would have been the same.

Finding on Material Error

9. Having heard those submissions I reached the conclusion that the Tribunal made errors of law but that the errors were not material to the outcome of the decision.

10. The first challenge in this case was that the Judge had applied the wrong law but should have looked at the application made for leave to remain on the basis of family and private life under Appendix FM and paragraph 276ADE.

11. HC 194, the Statement of Changes in Immigration Rules which sets out the provisions implementing appendix FM and paragraph 276ADE states:

"*if an application for entry clearance ,leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the rules in force on 8 July 2012.*

Appendix FM applies to applications made on or after 9 July 2012 as set out in paragraph 91 of this statement of changes."

12. The application in this case was made on 13 January 2009. On 4 March 2013 the Secretary of State was asked to review the decision and the refusal letter of 9 September 2013 states:

"We have reconsidered your application on behalf of the Secretary of State and the decision to refuse your application has been maintained."

13. I am therefore satisfied that the application in issue was made before 9 July 2012 and the application was refused on 13 August 2009 and that original decision

was upheld by the review therefore the Judge was correct to apply the law as it stood prior to the implementation of the new Rules.

14. The grounds argue that the Judge erred in his assessment of proportionality. The Article 8 assessment and findings are undoubtedly brief though it is clear from the evidence set out by the Judge in relation to the children's educational achievements and what he says at paragraph 7 that he took this all into account. The Judge did not adopt the structured approach to Article 8 claims as set out in Razgar [2004] UKHL 27 and this would perhaps have helped to focus and identify the public interest which it is suggested that the Judge failed to assess. I am satisfied however that in his analysis of the background the Judge refers to the refusal letter which identifies the need to maintain 'integrity of the immigration laws' and that no other factors relating to public interest were identified in the submissions of Mr Spence the Home Office Presenting Officer.

15. Ultimately even if the assessment under Article 8 was insufficiently detailed I am satisfied that this made no material difference to the outcome given what the Judge identified as the most significant feature in the case. I am satisfied that the Judge was entitled to highlight the fact that the having come to the United Kingdom at ages 4.25 and 1 and having been in the United Kingdom for nearly 11 years the child Appellants were extremely well integrated into United Kingdom society and it was disproportionate to remove them. He was entitled to conclude that on the evidence before him there was no reason to believe that the Appellants were still in contact with the first Appellant's husband in Nigeria.

16. I am therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and based on cogent reasoning and while not being sufficiently detailed this had no material effect on the outcome of the appeal.

CONCLUSION

17. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

18. **The appeal is dismissed.**

Signed Date 11.08.2014

Deputy Upper Tribunal Judge Birrell