**Upper Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Number: OA/10145/2013
OA/11266/2013
OA/11267/2013

**THE IMMIGRATION ACTS**

| **Heard at North Shields** | **Determination Promulgated** |
|---|---|
| **on 14th August 2014** | **On 15th August 2014** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**ENTRY CLEARANCE OFFICER - PRETORIA**

Appellant

**and**

**SM**
**TTM**
**NNM**
**(Anonymity order in force)**

Respondent

**Representation:**
For the Appellant: Mrs Rackstraw – Senior Home Office Presenting Officer.
For the Respondent: Mr Manachi – Sponsor.

**DETERMINATION AND REASONS**

1. This is an appeal by an Entry Clearance Officer (ECO) against a determination of First-tier Tribunal Judge Caskie promulgated on 27 February 2014 in which he allowed the appeals of the three above named Respondents.

2. Anonymity was granted because the Respondents are young children who at the date of decision, 22nd April 2013, were aged eight, six, and three. The sponsor is their father.

3. The chronology indicates that the sponsor came to the United Kingdom in 1999 as a student. His leave was extended as a work permit holder after which in September 2013 he was granted Indefinite Leave to Remain (ILR). He, like the Respondents, is a national of Zimbabwe.

4. The sponsor told the Judge that they had "tried to sort it out before they left the UK for the purposes of our holiday to Zimbabwe as the children had no status". Attempts made to secure status were not successful yet the family still chose to travel to Zimbabwe for the purposes of a holiday during the Easter period.

5. Applications were made by the Respondents for leave to enter the United Kingdom with their parents, indicating a wish to travel back to the United Kingdom on 13th April 2013. The applications appear to be in identical form, as the Respondents are siblings, and were refused for the same reason by the ECO; namely that they were seeking to join their father, that the Rules require them to show funds of £600 have been held for each of the three applicants for three months prior to the application, meaning there was a requirement to demonstrate £1800 being held for three months. No evidence of any funds held by the Respondent's parents was provided and that as their father's certificate of sponsorship did not include certification of maintenance it was necessary that he would have to show evidence of the required funds for the application of three months in his own bank account. As this did not happen the ECO was not able to accept such sponsorship in order to certify the maintenance requirement as a result of which he was not satisfied that the required funds were available. The applications were refused under paragraph 399H (g) of the Immigration Rules.

6. The Respondents' appealed. The Judge notes that the children were born in the United Kingdom and this was the first family trip to Zimbabwe that had taken place during the Easter holiday with the intention that the children would return at the end of the holiday. The Judge records that family savings had been exhausted in preparation for the family trip and that the children attended primary school in Stockton on Tees which they had missed as a result of the refusal of their applications [5].

7. The Judge also expresses surprise that the ECO failed to consider whether it was appropriate to grant leave in terms of Article 8 ECHR and specifically accepts that the children cannot meet the Immigration Rules or Appendix FM Rules but than makes a statement that, in his opinion, he is in no doubt whatsoever that the children are entitled succeed in a claim on Article 8 grounds [7].

8. The Judge finds the children have a family and private life in the United Kingdom that the decision interferes with. The issue was that of proportionality. The Judge disposes of this important element of the appeal in the following way:

9. That then simply leaves the question of proportionality. During by time as an Immigration Judge I have not seen a case in which the decision of an Entry Clearance Officer or the Secretary of State is more disproportionate than the decision in the present case. These young children have lived in the United Kingdom for the whole of their lives. Their father has now been granted indefinite leave to remain. The children were born in the United Kingdom. The children are entitled to each register as British citizens in terms of Section 1 (3) of the British Nationality Act 1981 and have been entitled to do so from September 2013. That of course is not a matter that I am entitled to take account of but I am entitled to take account of is the fact that in April 2013 (when the decision in the present case was taken) the parents of these children had resided in the United Kingdom for as long as they had, their father had all but completed the necessary qualifying period in order to obtain indefinite leave to remain and the children although not yet entitled to register as British citizens would be very likely indeed to be entitled to so register within a few months of the decision being taken .

10. At the date of decision the children were citizens of Zimbabwe however, it will be entirely unrealistic in a proper proportionality assessments to ignore completely their potential entitlement in early course to obtain British citizenship. However, even if that were not the case I am entirely satisfied that the decision in the present case would be a disproportionate interference in the family and private lives of these children. Without hesitation these appeals are allowed.

9. The ECO sought permission to appeal on the grounds that the Judge failed to provide adequate reasons for why the Respondents' circumstances are either compelling or exceptional by reference to the structure in which Article 8 applications need to be assessed in cases where an individual is unable to satisfy the requirements of the relevant immigration rule. Permission was granted on the basis it was arguable the Judge had not made adequate findings in respect of exceptionality.

**Error of law**

10. The Judge acknowledged in his determination, at paragraph 7, that "the children of course do not meet the Immigration Rules or Appendix FM rules for admission to the United Kingdom in terms of Article 8 ECHR but I am in no doubt whatsoever that the children are entitled to succeed in a claim on Article 8 grounds". Such a finding, on the face of it, appears to be contradictory indicating that the children fail in terms of Article 8 but thereafter are entitled to succeed under this head.

11. It is also of concern that the Judge spent some time referring to the fact the children may be entitled to register as British citizens at some point in the future when such observations are purely speculative, especially if there are insufficient funds available to this family unit. As an entry clearance decision it is also necessary to consider any Article 8 aspects at the date of decision. To put weight upon a potential entitlement does appear to be somewhat irrational when considering the proportionality of the decision.

12. The Judge is also criticised for a structural failing in his approach to the Article 8 assessment which is an argument that has merit. The appeal should have been considered in accordance with the approach set out by the Court of Appeal in MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. Such an approach was confirmed in broadly similar terms by Court of Appeal in MM & Ors [2014] EWCA Civ 985 @ para 134 and is consistent with the approach of the House of Lords, particularly in cases such as Huang [2007] UKHL 11 and Razgar [2004] UKHL 27.

13. Not only was this exercise not undertaken it is not clear from the determination whether the Judge found that unjustifiably harsh consequences arose from the decision and, if so, what they are. It is accepted that the impact of the decision is that the children remained in Zimbabwe with other family members whilst their mother and father returned to the United Kingdom, but the impact of that upon the children should have been adequately analysed to ascertain whether there was a need to undertake a freestanding Article 8 assessment.

14. If it was found necessary on the facts to undertake the Article 8 assessment outside the Rule the Judge was required to follow the guidance provided in the case of Razgar. This appears to have done, in part, as he concludes that the issue was one of proportionality. The Judge's findings regarding proportionality seem to focus upon the potential loss of benefit to the children being able to apply under the British Nationality Act 1981 but this is speculative, as there is no basis for claiming a legitimate expectation to be granted such status, and is not something the Judge should have considered as he records in the determination. The determination fails completely to engage with the ECO's arguments regarding why the decision was proportionate or to identify any other factors that support a sustainable finding that the decision is not proportionate, such as the actual physical and/or emotional impact upon the children.

15. I find that the ECO has established legal error in the determination. The question is whether that error is material.

16. The Upper Tribunal is grateful to the sponsor who attended and again confirmed the family history as set out in the determination; including the fact that when he and his wife applied for ILR they deliberately did not name the children on the application form, in 2011, which is a partial explanation for why the children are currently without status or permission to enter or remain in the United Kingdom with their parents. The family decided to have a holiday and so the sponsor, his wife and the three children travelled to Zimbabwe. Attempts to regularise the children's status prior to departure failed and so the mother and father were aware of the need to make a formal application for the children to re-enter. It was stated today that the requirements for such an application were checked before the family left for their holiday.

17. It appears to be part of the case that as a result of enquiries being made late in the day there was insufficient time to sort the children's status out before they went on holiday. It may also be that as a result of going on holiday and the costs of the same there were insufficient funds to meet the maintenance requirements. Whatever maybe the chronology of events, it is clear that when the children were taken out of the United Kingdom it was known that they had no lawful status permitting them to return unless that was granted to them as a result of a proper entry clearance application.

18. The visit was to the children's maternal aunt and family in Zimbabwe. When their application was rejected the children's mother and father returned to the United Kingdom leaving the children with relatives in Zimbabwe. The Tribunal has been advised that the children's mother has since returned to Zimbabwe where she is with the children, ensuring their physical and emotional needs are met.

19. The chronology shows this is a situation created by the children's parents as a result of their failure to regularise the children's status, failure to ensure that adequate funds were available to meet the requirements of the Rules, and taking the children out of the United Kingdom without any guarantee or legitimate expectation that they will be entitled to re-enter.

20. It is accepted that the requirements of the Rules cannot be met and so the only avenue at this stage is either to make a fresh application, as it is stated that funds are now available, or under Article 8 ECHR. It has been made clear in a number of authorities and decisions of the Senior Courts that Article 8 is not a 'golden ticket' which allows judges to depart from the requirements of the Rules and nor does it allow individuals to choose where they wish to live. All members of this family are Zimbabwean nationals and although the family wish to live in the United Kingdom it has not been shown that they cannot live together as a family unit in Zimbabwe. In relation to any ongoing effects; the children are now in

school in Zimbabwe, there is regular contact with their father in the United Kingdom, and although the children wish to return to their old schools, friends, and for family life to continue as before, the impact appears to be the effects of having to readjust rather than unjustifiably harsh consequences, even when the best interests of the children, as summarised in Zoumbas v SSHD [2013] UKSC 74, are considered.

21. The maintenance requirements are an important aspect of the Rules and are lawful as recently confirmed by the Court of Appeal in MM. It is now said that a fresh application can be made, as the required funds exists, and therefore any period of separation or continuing separation is only likely to be for the period of time it takes for such an application to be made and processed.

22. I find the Judge materially erred in failing to adopt the correct structural approach for the Article 8 assessment and in failing to make adequate findings in accordance with the law. I find that the consequences for the children have not been shown to be unjustifiably harsh such as to warrant Article 8 being considered outside the Rules although, in the alternative, if it was the decision will be found to be proportionate based upon the facts of this case and the opportunity to make a further application which according to the sponsor is likely to succeed, indicating any separation is not likely to be permanent or over a substantial period of time. In any event, in relation to a freestanding Article 8 assessment, the fact family life can continue in Zimbabwe is also a relevant factor.

**Decision**

23. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Fee Award.

Note: this is **not** part of the determination.
I make no fee award as the appeal has been dismissed.

Signed…….
Upper Tribunal Judge Hanson
Dated the 14th August 2014