Upper Tribunal
(Immigration and Asylum Chamber)

Appeals Numbers: IA/39527/2013
IA/39528/2013
IA/39529/2013

THE IMMIGRATION ACTS

Heard at Breems Buildings, London and decision given on 01 December 2015

Decision & Reasons promulgated 29 January 2016

Before

The President, The Hon. Mr Justice McCloskey
And Upper Tribunal Judge Smith

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BM
HYM
INM

Respondents

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Representation:

Appellant:	Mr P Deller, Senior Home Office Presenting Officer
Respondents:	Mr Corbeu, of counsel, instructed by/of Samuel Ross Solicitors

DECISION AND REASONS

FRAMEWORK OF APPEAL

1. The Respondents are a family unit constituted by the mother (aged 26 years) and two sons (aged 11 and 7 years), all nationals of Zambia. This appeal has its origins in a decision dated 16 September 2013 made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), the Appellants, refusing the Respondents' application for leave to remain in the United Kingdom under Article 8 ECHR.

2. The Appellant's decisions were challenged by appeal to the First-tier Tribunal (the "*FtT*") which, by its decision promulgated on 25 February 2015, allowed the appeals. The Tribunal's omnibus conclusion was framed in the following terms:

> "For the reasons I have given, I find that the decisions of the Respondent were not in accordance with the law and the relevant immigration rules and legislation."

This is followed by a passage embodying the twofold conclusion that the decisions in respect of the two children were not in accordance with the law, while the appeals of all three family members succeeded under the Immigration Rules.

3. The decision duly analysed, we consider that the FtT made the following key findings and conclusions:

   (a) The Appellant erred in law by determining the applications on the basis of the pre-July 2012 provisions of Appendix FM and paragraph 276 ADE of the Rules.

   (b) In the mother's case, the suitability requirements of paragraph S-LTR of Appendix 1 were satisfied.

   (c) *Ditto* the requirements of paragraph E-LTRET2.2, subject to paragraph EX.1.

   (d) Applying paragraph EX.1 and paragraph 276 ADE (1)(iv) of the Rules, in tandem with section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), it would not be reasonable to expect either child to leave the United Kingdom.

   (e) The Judge followed this by the statement:

   > "In the circumstances, it has not been necessary for me to consider Article 8 based upon wider considerations of proportionality, or with reference to Strasbourg jurisprudence, which wider considerations essentially become otiose."

   (f) The Judge then purported to address "*the issue of lawfulness*" of the decisions in the two childrens' cases, proceeding to conclude that the decisions were unlawful since, contrary to paragraphs 51.3 and 51.4 of the Appellant's "Enforcement Instructions and Guidance", the two children were wrongly served with completed Forms IS151A (Part 2) generating an out of country appeal only, whereas they should have been served with Forms IS151B which would have stimulated an in country appeal.

4. In a considered grant of permission to appeal, Upper Tribunal Judge Smith reasoned that the FtT had arguably erred in law in the following respects:

   (i) By measuring the children's periods of residence in the United Kingdom by reference to the date of the hearing, rather than the date of the Secretary of State's decision.

   (ii) In holding that the seven year residence periods specified in paragraph 276 ADE(1)(iv) of the Rules and paragraph EX.1 of Appendix FM to the Rules was satisfied by reference to the date of the hearing rather than the date of the applications to the Secretary of State.

   (iii) By failing to consider the Article 8 claims of the Respondents outwith the framework of the Rules.

5. Two observations about the grant of permission to appeal are apposite. The first, bearing in mind that this is the Secretary of State's appeal, is that the third of the issues of law summarised above did not form part of the grounds of appeal, albeit the Judge was entitled to identify this issue provided that her action accorded with the decision in Robinson – v – Secretary of State for the Home Department and Immigration Appeal Tribunal [1997] Imm Ar 568. The second is that the grant of permission is silent on the "appealable decision" issue to which we have referred in our synopsis of the FtT's decision in [3] above. I consider that this omission is attributable to the highly unsatisfactory manner in which the Secretary of State's completed application for permission, in Form IAUT-1, was formulated: see in particular Section F, the intervening page, section C and, on the next page, the final substantive paragraph of the completed form beginning with the words "Ground 2".

FACTUAL MATRIX

6. The salient facts invite the following summary:

   (a) During most of the period 2003 – July 2006, the mother was lawfully present in the United Kingdom.

   (b) Since 04 July 2006 the status of the mother has been that of unlawful overstayer.

   (c) The older son was born in 2004 and is now aged 11 years.

   (d) The younger son was born in January 2008 and is now aged almost 8 years.

   (e) In July 2010 the Respondents' leave to remain application was refused by the Secretary of State.

   (f) In August 2011 removal notices were served.

   (g) The two children have been reared by their mother without any assistance from their father, also a Zambian national, from around 2010.

   (h) Mother and father were divorced in January 2015.

   (i) In October 2011 the mother withdrew her appeal against the Secretary of State's July 2010 decision.

   (j) This was followed by the application generating the Secretary of State's further decision dated 16 September 2013 (*supra*).

CONSIDERATION AND CONCLUSIONS

7. We have reached a fairly clear conclusion in this case. The kernel of the application for permission to appeal and the ensuing grant of appeal resolves to the question of whether the FtT applied the correct date in allowing the Appellants' appeals. By virtue of paragraph 276 ADE(1) in force at the time the operative date was the date of the application made. In short the requirement enshrined in the rules had to be satisfied on that date. In equally brief terms the FtT erred in law by applying the date of the hearing as the operative date rather than the date of the application. That was a fundamental error and while we note the submission that the error was not material and the judge would have inevitably reached the same conclusion by a different route, we prefer to approach the matter in the following way given that this was an egregious error of law.

8. In our judgment the correct course is to accede to the Secretary of State's appeal and to set aside the decision of the FtT on the ground which I have outlined. That requires the decision of the FtT to be remade. The remaking will take place in this forum having regard to the Upper Tribunal Practice Directions and given that there is no sensible reason for delaying the final outcome by remittal to the FtT.

9. The alternative route for the Appellants at the time of FtT decision and taking into account the absence of any fresh application to the Secretary of State, also as of today before this Tribunal, is to succeed outside the Rules. This requires a consideration of all of the facts and factors highlighted in the determination of the FtT and in particular the unchallenged findings which are contained therein.

10. By virtue of the Rules in tandem with the relevant provisions of Part 5A of the 2002 Act and in particular Section 117B (6)(b) the question which arises as of today for the this Tribunal is whether it would be reasonable to expect the two children in question to leave the United Kingdom. It is common case that as of today they are qualifying children under the régime of Part 5a of the 2002 Act. Having regard to the factual matrix and the extant findings we, without hesitation, apply those provisions of the Act, which are a mirror image of what is contained in the Rules, in the Appellants favour. In short we re-make the decision of the FtT by allowing the appeals on a different basis.

DECISION

11. Accordingly, the Appellants succeed via the route which we have outlined.

Signed: Edward McCloskey

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 04 December 2015