Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/17283/2015**

IA/17287/2015

IA/17296/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Tuesday 30 August 2017	**On Friday 1 September 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS A O A
MS N O A
MASTER A A S A

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Oshunrinade, Counsel instructed by Samuel & Co solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Two of the Appellants in this case are minor children. Accordingly, it is appropriate that their details and those of their parents be protected. Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellants or any member of their family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

Background

1. This matter comes before me on a third occasion. The Appellants appeal against a decision of First-Tier Tribunal Judge Keith promulgated on 22 July 2016 ("the Decision") dismissing their appeals against the Secretary of State's decisions dated 21 April 2015 curtailing the First Appellant's leave to remain and directing their removal to Nigeria under section 47 Immigration, Asylum and Nationality Act 2006. The Second and Third Appellants are the children of the First Appellant born respectively on 28th January 2011 and 14th September 2007. As her dependents, the Secretary of State also sought to remove those children.

2. On the first occasion, I heard submissions whether the Decision disclosed any material error of law. Following the hearing, and by a decision promulgated on 10 January 2017, I identified two issues which were concerning me and which are set out in my decision which is annexed to this decision for ease of reference. I asked for written submissions on those issues. The Appellants complied with those directions and provided written submissions on 30 January 2017. The Respondent failed to comply.

3. However, the Appellants' written submissions did not appear to me to answer the concerns which I had about, in particular, the validity of the appeals. For that reason, I called for a further oral hearing for submissions on this point. That was listed on 30 June 2017. I adjourned the hearing on that day on the basis that Mr Melvin agreed that he would take instructions whether the Respondent would withdraw her decision under appeal and reconsider in light of the concerns which I expressed as summarised at [4] of my decision promulgated on 3 July 2017. That decision also is annexed to this decision.

4. The hearing was then relisted before me on 30 August 2017. On 29 August 2017, I received written submissions from the Respondent addressing the two issues raised by my decision in January 2017. The Appellants did not object to those submissions being admitted (very) late in the day and did not seek an adjournment of the hearing.

Decision and Reasons

5. As is evident from my decision promulgated on 10 January 2017, the main issue of concern in this case is whether the First-tier Tribunal had jurisdiction to consider and determine the appeals. For the reasons set out at [9] to [16] of that decision, it appeared to me that the decision under appeal in these appeals is not one which confers a right of appeal at all. Since my reasons are set out there by reference to the relevant legal provisions I do not repeat those provisions. In very short summary, the first issue is whether the appeal provisions which apply are those in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") prior to amendment by the Immigration Act 2014 ("pre-amendment provisions") or post amendment by that Act ("post-amendment provisions").

6. The jurisdiction issue was not a point raised by either party directly in the grounds of appeal or Rule 24 response. It was though raised obliquely by the Respondent who submitted that the "Zambrano issue" on which the Appellants sought to rely might potentially be a "new matter". That gave me cause to consider at the error of law hearing whether the appeals were under the pre-amendment provisions (in which case the issue of a "new matter" did not arise) or the post-amendment provisions. That led me to identify the concern which is expressed in my decision of 10 January 2017. As the Court of Appeal recognised in Virk v Secretary of State for the Home Department [2013] EWCA Civ 652, it is open to a Court or Tribunal to take a point on its jurisdiction of its own motion, provided the parties are given the opportunity to make submissions on the point ([23]). Similarly, the Court of Appeal accepted that this Tribunal's jurisdiction extends to whether there was a valid appeal before the First-tier Tribunal even if it is determined that there is in fact no right of appeal against the Respondent's decision ([10]).

7. The Appellants' written submissions were to the effect that the decision under appeal did confer jurisdiction because the Appellants' Article 8 family and private life rights were considered in the latter part of page one and first paragraph of page two of the decision dated 21 April 2015 ([1] of the submissions dated 30 January 2017). That position is however ambiguous as it is said at [7] of those submissions that the Respondent had considered private and family life "though not specifically mentioned in the curtailment of leave decision" [my emphasis].

8. It appears from those submissions that the Appellants rely on the post-amendment provisions. Save for the apparent contradiction which I identify in the preceding paragraph, the Appellants' submissions (at least in writing) appear to be that the Respondent's decision was a refusal of a human rights claim. They therefore say that they had a valid appeal on that basis.

9. The Respondent's position is also confused. At [14] of the submissions dated 29 August 2017, the Respondent submits that the caseworker who made the decision under appeal "granted a right of appeal as the previous grant was based on Private/Family life". It is then said that it is accepted that the decision would impact on private/family life and so it is accepted that it is a decision "relating to the refusal of a human rights claim and comes within the transitional provisions".

10. That submission raises the following difficulties. First, a caseworker cannot confer jurisdiction by intention. The Tribunal's jurisdiction is conferred by statute and cannot be extended by the parties (see [23] of judgment in Virk). Second, if it was accepted that the decision would impact on private/family life, it is unclear why the Respondent did not then go on deal with those matters. Had she done so, there would undoubtedly have been a right of appeal. Third, the Tribunal's jurisdiction, following the amendments made by the Immigration Act 2014 is limited (in the current context) to whether there is a refusal of a human rights claim not whether there is a decision "relating to" one. Fourth, although the submission appears to be that the transitional arrangements apply (and therefore presumably that the pre-Immigration Act 2014 provisions remain applicable), there is no indication on what provision the Respondent there relies. I note that the decision-maker (at least) appears to have thought that the pre-amendment provisions applied as is apparent from the fact that the decision refers to grounds of appeal in section 84 of the 2002 Act which are those contained in the pre-amendment provisions.

11. I canvassed the difficulties with the Respondent's submissions with Mr Melvin at the outset of the hearing. He accepted the following. First, there was no application made by these Appellants for any extension of their leave made prior to 6 April 2015. The decision is not therefore one refusing an application for a variation of leave made prior to the date when the new appeal provisions came into force (see transitional arrangements referred to at [14] of my decision promulgated on 10 January 2017). There was an application made by the Appellants' partner/father but the Appellants were not named as dependents in that application and he is not one of the Appellants in these appeals. I was told also that he has made a further application for leave to remain on human rights grounds which remains pending but, once again, these Appellants are not dependents in that application.

12. Second, Mr Melvin accepts that there was no human rights claim made by these Appellants, even in response to the one-stop notice contained in the decision under appeal. Had there been, that might have conferred jurisdiction on the Tribunal as being a human rights claim to which any response would have been a refusal (if it were rejected). Mr Oshunrinade similarly accepted that the Appellants had not submitted any statement of additional grounds or otherwise made a

human rights claim to the Respondent. The only mention by the Appellants of Article 8/family and private life is in the grounds of appeal. That cannot amount to a "human rights claim" (see [22] below) and there is no refusal of such by the Respondent.

13. When I asked Mr Melvin to explain why he said there was a right of appeal, he directed my attention to [15] of the submissions where it is said that there is a right of appeal because the decision under appeal included also a decision to remove the Appellants. However, that assumes that the pre-amendment provisions apply. When I asked Mr Melvin on what basis that was so given that the commencement orders provide that the post-amendment provisions apply to all decisions made after 6 April 2015, his response was only that, if there were no right of appeal, then the Appellants would be unable to appeal a curtailment decision or notice to remove them. That is correct. However, that arises because the appeal provisions in section 82 of the 2002 Act have been amended and now depend on a decision refusing a (human rights or protection) claim. They are no longer generated by particular "immigration decisions". Of course, a person aggrieved by a decision may still challenge that decision by way of judicial review.

14. Mr Melvin did not point me to any of the transitional arrangements which might apply in this case. Further, the raising by the Respondent in the Rule 24 notice of the question whether the "Zambrano issue" was a new matter suggests strongly that the drafter of that response considered that the post-amendment provisions apply.

15. Having listened to the discussions, Mr Oshunrinade accepted that there are no rights of appeal in these cases. He submitted however that the Respondent has acted unfairly in this case by not considering human rights as if there were an implied claim and the Respondent ought therefore to reconsider her decision. That is not a matter for me in these appeals. If the appeals are valid, I may go on to determine whether there is an error of law in the First-tier Tribunal's Decision and if so re-make the Decision. If there were no valid appeals, the most I can do is to set aside the First-tier's Decision on the basis of error of law on the jurisdiction issue and find that there were no valid appeals. The Appellants will then have to seek to persuade the Respondent to reconsider by other means (judicial review, a response to the one-stop notice or another application for further leave on human rights grounds). Although Mr Oshunrinade complained that the need to make a paid application would be unfair on the Appellants, as Mr Melvin pointed out in response, if their leave had not been curtailed, the Appellants would have had to make a paid application before now for further leave as their previous leave expired in July 2016.

16. At the end of the hearing, I ruled that there are no valid appeals in these cases. For that reason, I also indicated that I set aside the Decision of Judge Keith on the basis that it discloses an error of law and

substitute a decision finding that there were no valid appeals before the First-tier Tribunal. I indicated that I would provide reasons for that decision in writing which I now turn to do.

17. The decision under appeal is dated 21 April 2015. It is headed "Points Based System – Variation of Leave". It is neither. As the heading below that acknowledges it is a curtailment decision applying paragraphs 323(i) and 322(2) of the Immigration Rules ("the Rules") removing the Appellants' leave on the basis that it had been granted because the First Appellant was believed at the time to be the sole carer of the children whereas in fact she had reconciled with her partner. The decision also includes a passage recording a decision to remove under section 47 Immigration, Asylum and Nationality Act 2006 ("section 47"). The decision then goes on to make reference to section 55. There is a passing reference to family and private life in that context. What there is not though is any substantive consideration of the family's human rights or, more importantly, a refusal of a human rights claim.

18. There was no human rights claim made expressly at that point (although a one-stop notice was given as part of the decision and the Appellants could have made one). It may have been open to the Respondent to deal with the decision as involving an implied human rights claim (particularly given the basis of the earlier grant) and refusing that claim. If that were the Respondent's intention, one would expect consideration to be given to whether the Appellants met the Rules on the basis of their family and private lives and, if not, whether their circumstances outside the Rules justified the grant of leave; otherwise concluding that removal would not breach their Article 8 rights. That was not done. I do not read the paragraph at the end of page one as being a refusal of any implied human rights claim. That is only a section 55 consideration of the children's best interests.

19. In fact, what the decision-maker appears to have thought is that the pre-amendment provisions applied. A section 47 decision was an "immigration decision" which gave rise to a right of appeal under the pre-amendment provisions. That the decision-maker considered those to be the relevant provisions is apparent, as I indicated (at [10] above), from the grounds of appeal set out as being available to the Appellants.

20. The relevant commencement orders are set out at [14] of my earlier decision. In general, Article 8 of Commencement Order No 4 commences the post-amendment provisions for all decisions made after 6 April 2015. Those then apply to this decision unless one of the transitional provisions apply. I was not directed to any which do apply and I have reached the conclusion that the one which I initially thought might apply cannot apply (Article 9(1)(a) of Commencement Order No 4) because there was no application made prior to 6 April 2015. The

appeals could arise therefore only under the post-amendment provisions.

21. It is perhaps unsurprising that, so shortly after the coming into force of the final transitional arrangements and given the complexity of the transitional arrangements bringing the post-amendment provisions into force, that a caseworker might have made an error in relation to the appeal provisions which apply. I accept, however, that this error has had an unfortunate and potentially unfair consequence for these Appellants. Had the caseworker recognised that the post-amendment provisions applied, he/she would no doubt have treated the curtailment differently and substantively considered human rights in a way which would entitle the Appellants to appeal the decision to remove them. As it is, the Appellants are now left in the position of having to ask the Respondent to consider their human rights by a further decision, over two years after the decision curtailing their leave was initially made.

22. However, as a matter of law, since the post-amendment provisions apply, a right of appeal is generated only by the refusal of a human rights claim. Human rights claim is not defined by section 82 of the 2002 Act. The definition of "human rights claim" appears in section 113 of the 2002 Act and reads as follows:-

> "human rights claim" means <u>a claim made by a person to the Secretary of State</u> at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights"
>
> [my emphasis]

23. In this case, it is common ground that the Appellants have not made a human rights claim leading to the decision under challenge. They have not made one since in response to the one-stop notice. Whilst, as I observe, it may have been open to the Respondent to dispense with a claim and to deal with the Appellants' human rights on the basis of an implied claim, that is not what has been done in this case. There is in consequence no refusal of a human rights claim which could generate a right of appeal.

24. For those reasons, I conclude that there were no valid appeals before the First-tier Tribunal. The Decision contains a material error of law because Judge Keith had no jurisdiction to determine the appeals. Accordingly, I set aside the Decision. I substitute a decision that there were no valid appeals before the First-tier Tribunal.

<u>Decision</u>

The Decision discloses an error of law as the Judge had no jurisdiction to determine the appeals. I set aside the Decision of Judge Keith promulgated on 22 July 2016. I substitute a decision that there were no valid appeals before the First-tier Tribunal.

Signed

Upper Tribunal Judge Smith Dated: 1 September 2017

APPENDIX: PREVIOUS DECISIONS

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/17283/2015**
IA/17287/2015
IA/17296/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 21 December 2016	**On Tuesday 10 January 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MS A O A
MS N O A
MASTER A A S A

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Oshunrinade, Counsel instructed by Samuel & Co solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Two of the Appellants in this case are minor children. Accordingly, it is appropriate that their details and those of their parents be protected. Unless and until a tribunal or court directs otherwise, the Appellants are granted

anonymity. No report of these proceedings shall directly or indirectly identify the Appellants or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DIRECTIONS AND REASONS

DIRECTIONS

I make the following directions:-

1. **Within 28 days from the date of promulgation of this decision, the parties shall file with the Tribunal and serve on each other written submissions directed at the two issues set out at [9] to [16] and [17] and [23] below.**
2. **Within 14 days from service of their respective submissions, the parties may if they so wish file and serve written submission in reply to the other party's submissions.**
3. **If either party requires a further oral hearing as a result of this decision, they are to notify the Tribunal (copied to the other party) within 28 days from the date of promulgation of this decision. For the avoidance of doubt, the request for an oral hearing shall not dispense with the requirement for written submissions as above.**
4. **If neither party requests an oral hearing within the time limits stated above, the Tribunal will proceed to decide the case on the papers including the written submissions filed.**
5. **Either party may apply to the Tribunal on notice to the other party if they seek a variation of these directions or any additional directions.**

REASONS

Background

1. The Appellants appeal against a decision of First-Tier Tribunal Judge Keith promulgated on 22 July 2016 ("the Decision") dismissing their appeals against the Secretary of State's decisions dated 21 April 2015 curtailing the First Appellant's leave to remain and directing her removal to Nigeria under section 47 Immigration, Asylum and Nationality Act 2006. The Second and Third Appellants are the children of the First Appellant born respectively on 28th January 2011 and 14th September 2007. As her dependents, the Secretary of State also sought to remove those children.

2. The First Appellant has another older child born in the UK on 10th February 2006. He is no longer an appellant in these appeals although the Secretary of State also sought his removal at the outset. He is no

longer liable to removal as he is now registered as a British citizen. His situation is however highly pertinent to the position of these Appellants.

3. Finally, for completeness, I note that the First Appellant is in a relationship with another Nigerian national. He is in the UK without leave. He is the father of the minor Appellants. The First Appellant was previously granted leave as the sole carer of the children. It was as a result of that claim being found to be false that the Secretary of State curtailed her leave. However, the children's father is not an appellant in these appeals and the only relevance of his situation is that he remains in the UK without leave.

4. The First Appellant arrived in the UK as a visitor. She claims that this was in October 2004. That is disputed by the Respondent on the basis that an application was made for entry clearance using the First Appellant's passport in March 2005. Whatever the position, the First Appellant has been in the UK for over ten years since the Respondent has accepted, by registration of the eldest child as a British citizen, that he was born here in February 2006 and has lived here ever since.

5. On 19th April 2010, the First Appellant claimed asylum in the UK with her (then two) minor children as dependents. That claim was refused and her appeal dismissed. She was however granted leave to remain on 14th January 2014 until 14th July 2016 as the sole carer of her (three) children. As noted above, the Respondent subsequently asserted that the First Appellant's claim to no longer be in a relationship with the children's father was fabricated and she curtailed the Appellants' leave.

6. Permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy on 16 November 2016. The matter comes before me to determine whether the Decision contains a material error of law and if I so find, to either re-make the decision or remit the appeal for re-determination by the First-tier Tribunal.

7. I received oral submissions from the parties' representatives at a hearing on 21 December 2016. I reserved my decision and indicated that I would provide this with reasons in writing based on the papers before me. The Appellants' representatives indicated that I could re-make the Decision if I found there to be an error of law as the Appellants did not seek to put forward any further evidence. The parties accepted that it would not be necessary or appropriate to remit the appeal to the First-tier Tribunal.

8. In the course of considering my decision, it has become apparent to me that there are two issues on which I require clarification from the parties before I reach my decision whether there is an error of law in the First-tier Tribunal's Decision, as to the nature of any error and, if I find an error of law, as to the issues for me on re-making.

The Issues on which further submissions are required

Jurisdiction

9. As I indicated in the course of the hearing, the nature of the Respondent's decision dated 21 April 2015 and the grounds of appeal challenging it are relevant to my consideration. The decision letter is headed "Points Based System – Variation of Leave". Whatever else that decision is, it is not a decision made under the Points Based System. It is though clear from the remainder of the decision that it varies the Appellants' leave by curtailing it and it is accompanied by a decision headed "Notice of Immigration Decision" varying leave to remain accompanied by a decision to remove under section 47 Immigration, Asylum and Nationality Act 2006. That latter decision (also dated 21 April 2015) includes reference to the right of appeal against both the decision to vary leave and the decision to remove. The basis of the curtailment is under paragraphs 323(i) of the Immigration Rules with reference to paragraph 322(2). The decision letter also deals with section 55 Borders, Citizenship and Immigration Act 2009 and the best interests of the children. There is no consideration of Article 8 ECHR either within or outside the Immigration Rules. I note for completeness that there also appears to be an error in the Home Office's explanatory statement which refers to the decision under appeal being that which was challenged in the Appellants' earlier appeal namely the decision dated 18 November 2010 to refuse asylum.

10. The Respondent in her rule 24 statement at [4] has raised the question whether what is in essence a "Zambrano" issue raised by the Appellants before the First-tier Tribunal Judge could be considered by him as this was a "new matter" for which the Respondent's consent would be required. Consent was not sought.

11. The Respondent's submission appears to be founded on the proposition that this is an appeal which proceeds under the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") post amendment of those provisions by the Immigration Act 2014 ("the post amendment provisions"). I raised with Mr Tarlow during the hearing whether this is correct as it seemed to me at that stage that the appeal may fall within the transitional arrangements under the previous appeals provisions in the 2002 Act (the so-called "saved provisions") and is therefore an appeal which proceeds under the 2002 Act prior to amendment ("the pre-amendment provisions"). Mr Tarlow did not concede this point but accepted that, if I were persuaded that the appeal was under the pre-amendment provisions then the

Respondent's submission regarding the need for consent in order to raise a new matter would fail.

12. Having considered this issue further, however, I am concerned that this may not be an appeal which falls within the transitional arrangements and is therefore under the post amendment provisions. The consequence of that, though, is that there may not be a valid appeal before the Tribunal. If that is so, there was no valid right of appeal before the First-tier Tribunal in which case the Decision would have to be set aside for want of jurisdiction and the appeals dismissed.

13. In order to assist the parties to consider that issue, I set out below my own preliminary observations on what I consider to be the relevant provisions. I make clear however that these observations are only preliminary and are not intended to convey the impression that I have decided this issue one way or another. Nor do I intend by those observations to restrict the parties' consideration of the issue to the provisions to which I refer below. It may well be that there are other transitional arrangements which apply.

14. There have been a number of commencement orders in relation to the changes to the appeal provisions brought about by the Immigration Act 2014. Those were introduced in several stages. At each stage, the commencement orders relate to "the relevant provisions" as being the post amendment provisions and "the saved provisions" as being the pre-amendment provisions Those are defined in The Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014 (SI 2014 No. 2771) ("Commencement Order No 3"). The final stage of the changes was introduced by The Immigration Act 2014 (Commencement No. 4, Transitional and Saving Provisions and Amendment) Order 2015 (SI 2015 No. 371) ("Commencement Order No 4"). In general terms, Article 8 of Commencement Order No 4 commences the post amendment provisions for all decisions made after 6 April 2015. Article 8 however amends paragraph 9 of Commencement Order No 3 so as to apply the pre-amendment provisions to certain species of decision. The amended wording of Article 9 (so far as appears to be potentially relevant to this case) is as follows:-

i. "9(1) Notwithstanding the commencement of the relevant provisions, the saved provisions continue to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the Secretary of State –

ii. …..

a decision made on or after 6th April 2015 (so far as that is not a decision mentioned in sub-paragraph (a) or (b)) to refuse an application made before 6th April 2015, where that decision is –

(iv) to refuse to vary a person's leave to enter or remain and where the result of that decision is that the person has no leave to enter or remain;

unless that decision is also a refusal of an asylum, protection or human rights claim."

15. The Respondent's decision includes one varying leave (rather than refusing to vary leave). That may not be fatal since the effect may be thought to be the same. However, that was not a decision made in response to any application by the Appellants but rather on the Respondent's own initiative. Although the Respondent's decision itself refers to the grounds of appeal available to the Appellants by reference to the pre-amendment provisions of the 2002 Act that cannot be decisive of the question of jurisdiction. The Tribunal's jurisdiction arises by operation of statute and not by one party appearing to confer it. The reference to the pre-amendment provisions may suggest that the Respondent thought that those provisions applied but that cannot be determinative of the issue concerning the interpretation and application of the transitional provisions to the facts of these appeals.

16. The post-amendment provisions confine rights of appeal to refusals of protection and human rights claims (and revocation of protection status which does not arise here). The Respondent's decision is not a refusal of a human rights claim. If the post-amendment provisions apply therefore, it would appear that there was no right of appeal at all.

Error of law and scope of re-making: human rights grounds

17. Assuming that the parties submit and I accept that there is a right of appeal (on the basis that the pre-amendment provisions apply), there is a further issue regarding the errors asserted in the Decision and the scope of re-making.

18. The submissions before me and indeed some of the Appellants' grounds of appeal challenging the Decision are focussed on Article 8, including reliance on section 117B(6) of the 2002 Act. However, although the Respondent's decision refers to a right of appeal including on human rights grounds, Article 8 ECHR is referred to in the appeal form and the grounds of appeal raise the issue of whether the position of the eldest child (who was not at that time a British citizen) should entitle the family to leave to remain applying paragraph EX.1.1, the Appellants did not rely (for whatever reason) on human rights in their appeal before the First-tier Tribunal Judge.

19. It appears from [12] of the Decision that the only issue raised by the Appellants was whether the Respondent was entitled to curtail the Appellants' leave to remain as the First Appellant claimed that she had not exercised deception but had simply failed inadvertently to inform the Respondent that she and her husband had become reconciled. That paragraph expressly states that the Appellants' representative agreed that the Appellants were not appealing on human rights grounds. The focus of the First Appellant's witness statement is also

directed at the Respondent's finding that she had exercised deception. Although "Article 8 ECHR" is noted in the appeal form, there does not appear to be any reference to that in the evidence. It is also stated in the appeal form that a statement of additional grounds would follow but I can find none on file.

20. That leads me on therefore to the second issue. Assuming that the pre-amendment provisions of the 2002 Act apply, section 85 (in its un-amended form), reads so far as relevant as follows:-

> **i.** "**[85] Matters to be considered**
>
> An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).
>
> If an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against.
>
> Subsection (2) applies to a statement made under section 120 whether the statement was made before or after the appeal was commenced.
>
> On an appeal under section 82(1) … against a decision the Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.
>
> ……"

21. If as appears to be the case here, the Appellants have not put forward any statement of additional grounds raising Article 8 ECHR, that raises the question whether the First-tier Tribunal Judge had jurisdiction to deal with that issue and also whether he was obliged to do so, bearing in mind that the Appellants expressly indicated that they did not pursue human rights grounds (as to which see Court of Appeal's judgment in Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195). It also raises the issue, if I find an error of law, whether I have jurisdiction to deal with Article 8 at all in re-making the Decision and, if so, how that arises.

Signed

Upper Tribunal Judge Smith Dated: 10 January 2017

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(Immigration and Asylum Chamber) **Appeal Number: IA/17283/2015**
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ADJOURNMENT DECISION AND DIRECTIONS

DIRECTIONS

I make the following directions:-

1. **The hearing of this appeal is adjourned to be listed on first available date after 21 August 2017 with a time estimate of two hours.**
2. **By 4pm on Friday 28 July 2017 the Respondent shall file with the Tribunal and serve on each other written submissions directed at the two issues set out at [9] to [16] and [17] and [23] of my decision promulgated on 10 January 2017.**
3. **Within 14 days from service of the Respondent's written submissions, the Appellants shall, if so advise, provide written submission in reply.**

REASONS

1. In my decision promulgated on 10 January 2017, I gave directions for submissions in writing to be made on two issues identified in that decision.

2. By a letter dated 30 January 2017, the Appellant's solicitor provided written submissions which did not however adequately address the issues. In particular, it was unclear whether the Appellants contend that this is an appeal under the new provisions (ie post-Immigration Act 2014) or the former provisions. That is particularly relevant in this case since, if it is an appeal under the post-Immigration Act 2014, then the Appellants are unable to rely on the "Zambrano" issue as it would be a new matter requiring the Respondent's consent (as the Respondent identifies in her rule 24 notice).

3. Unfortunately, the Respondent did not produce any written submissions despite being given several opportunities to do so. As a result, the Respondent's position as to (a) whether there is a right of appeal at all and (b) the governing provisions and ambit of that appeal is unclear. Mr Melvin who appeared before me for the Respondent apologised for that oversight.

4. Mr Melvin had not seen the bundle at the outset of the hearing. Having seen it and having considered the provisional views expressed in my earlier decision, he indicated that he would like to discuss the cases with the relevant caseworker. He appreciated the concerns which I expressed whether the decision (dated 21 April 2015) correctly identified the relevant appeal provisions (if there were a right of appeal at all), whether that decision properly considered the Appellants' case (in particular, whether that decision should have considered Article 8 ECHR since the leave being curtailed had been granted on the basis of

private and family life) and the error in the explanatory statement as to the decision under appeal.

5. Mr Melvin indicated though that, in order to move matters forward, he would need some time to discuss the case. He undertook to inform the Tribunal of the Home Office's position (in particular, if the decisions under appeal should be withdrawn and reconsidered) within 28 days. I have made provision for written submissions within that period but, obviously, if the Respondent decides to withdraw the decisions, she should similarly inform the Tribunal and Appellants within that timescale. On that basis, he asked for an adjournment of 28 days.

6. Mr Oshunrinade did not object to the adjournment sought if that was expected to bring the matter to a conclusion.

7. I make the directions set out above in discussion with the representatives.

Signed

Upper Tribunal Judge Smith Dated: 30 June 2017