Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/29220/2014
IA/29227/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Friday 26 February 2016	**On 14 March 2016**

Before

UPPER TRIBUNAL JUDGE SMITH

Between
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and
MS DOREEN MTUTU
MR MUFUDZI WILL MTUTU
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr A Alexander, Counsel instructed by Barar & Associates

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. There is no good reason to make an anonymity direction in these cases.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference I refer hereafter to the parties as they were before the First-tier Tribunal. The Secretary of State appeals against the decision of First-tier Tribunal Judge M P W Harris who in a decision promulgated on 3 September 2015 ("the Decision") allowed the Appellants' appeal against a decision to remove them to Zimbabwe.

2. Permission to appeal the Decision was granted by First-tier Tribunal Judge Frankish on 14 January 2016 on the single basis that the Judge arguably

misinterpreted the facts of this case by assuming that the Second Appellant was a child when by the date of the hearing he was aged over eighteen years. That is said to arguably undermine the outcome of the Decision. This was the sole ground of appeal by the Secretary of State and is developed on the basis that because of the error of fact the Judge has failed to properly consider whether there exists a family life between the Second Appellant who was by the date of the hearing an adult and his mother, the First Appellant. The Judge also referred to Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("section 117B(6)"). The Secretary of State says that this could not apply either and the Judge's error therefore amounts to a material error of law.

3. In order to determine whether there is an error of law I do not need to dwell on the facts, save as to the Second Appellant's age. He was born on 25 May 1997 and the appeal hearing took place on 23 July 2015 although as Mr Alexander explained before me this morning that followed an adjournment of the hearing in March 2015. This very probably explains why the skeleton argument of the Appellants' Counsel before the First-tier Tribunal dealt in some depth with the Second Appellant's best interests. This may in turn explain to some extent why the Judge was misled into following the course which he did. It is common ground however that, when considering Article 8, the Judge was bound to consider the facts as they stood at the date of the hearing and as at the date of that hearing the Second Appellant was aged eighteen years. There can be no doubt therefore that the Judge has erred in his understanding of the facts of the case.

4. Section 276ADE(1)(iv) of the Rules reads as follows:-

> "(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> .....
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK"

5. In relation to whether the Judge's error is material, I accept that in finding that paragraph 276ADE(1)(iv) of the Rules could be met there is no error in relation to the first part because, as at the date of the application the Second Appellant had been in the UK for seven years and was aged under eighteen years. The Judge also therefore rightly directed himself to the issue being whether it was reasonable to expect the Second Appellant to leave the UK and return to Zimbabwe.

6. The Judge then went on to apply Section 55 of the Borders, Citizenship and Immigration Act 2009 which relates to the best interests of the child. That was of course by that stage not relevant to the Second Appellant's case as he was in fact no longer a child. The Judge expressly stated at [14] that,

as a result of the Second Appellant's best interests and the fact that the Second Appellant was aged sixteen years (which he was not), he found that the Second Appellant should remain with his mother. The Second Appellant's best interests were also the foundation for the finding in relation to the Second Appellant's private life that he should remain in the UK.

7. The Judge went on to consider the First Appellant's criminal conviction and rightly recognised that this needed to be weighed in the balance although not as he found against the Second Appellant's best interests (because those were no longer relevant).

8. The Judge then went on to have regard to Section 117B(6). That has no relevance to the case because it is common ground that the Second Appellant is now an adult. Unlike paragraph 276ADE(1)(iv), the relevant date for consideration of whether the Second Appellant is a child under section 117B(6) is date of hearing and not date of application.

9. The Judge concluded by allowing the First Appellant's appeal on the basis that the Second Appellant would have to accompany her to Zimbabwe if she were removed. That would be contrary to his best interests. However, on the basis that the Second Appellant is now an adult, even if his appeal does still fall to be allowed once best interests are removed from the equation, it does not necessarily follow that the First Appellant's appeal would also be allowed. It may be that the Second Appellant will be able to remain in the UK without the First Appellant. However, I make no finding to this effect because it is agreed before me and I accept that it is appropriate that these appeals are remitted to the First-tier Tribunal.

10. There are a number of factual issues which need to be determined in order for proportionality of the removal of both the First and Second Appellants to be properly assessed. These include, for example, whether there is family life between the Second Appellant and the First Appellant which may still exist notwithstanding the Second Appellant's majority. As I also pointed out to Ms Everett and she accepts, if the Second Appellant were now to make an application in his own right, it is likely that he would succeed under the Rules because of the impact of paragraph 276ADE(1)(v). That is a factor which may also need to be considered. As a result of the error of law in this case, there have been no findings based on the Second Appellant's private life absent consideration of his best interests or findings as to whether the First Appellant could return to Zimbabwe without the Second Appellant now that he is no longer a child. In those circumstances, in accordance with Tribunal guidance, it is appropriate for these appeals to be remitted to the First-tier Tribunal for findings to be made on the correct factual basis.

11. In summary I am satisfied that the decision contains a material error of law and I set it aside. I remit the appeals to the First-tier Tribunal for re-determination of the appeals on the correct factual basis that the Second Appellant is now aged over eighteen years and is therefore an adult.

Notice of Decision

The Decision of the First-tier Tribunal promulgated on 3 September 2015 contains a material error of law. I therefore set it aside. I remit these appeals to the First-tier Tribunal for re-hearing before a different Judge.

Signed  Dated 4 March 2016

Upper Tribunal Judge Smith