Upper Tribunal
(Immigration and Asylum Chamber)

SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC)

THE IMMIGRATION ACTS

Heard at : Sheldon Court Birmingham
On 14 December 2011

Determination Promulgated

……

Before

THE PRESIDENT, MR JUSTICE BLAKE
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SC

Respondent

Representation:

For the Appellant: Mr N Smart Senior Home Office Presenting Officer
For the Respondent: Bake and Co Solicitors

A decision to remove a claimant is in accordance with the law even if at the time of the decision there is a policy or practice not to enforce removals.

A decision to remove someone to Zimbabwe is not inconsistent with the statement of policy announced in October 2009.

:

A decision that was contrary to an established policy may be contrary to the law and thus incapable of justification under Article 8 ECHR.

In the absence of strong countervailing factors residence of 8 years in the United Kingdom with a child is likely to make removal at the end of that period not proportionate to the legitimate aims in this case.

DETERMINATION AND REASONS

Introduction

1. This is the Secretary of State's appeal from a decision of Judge C Bennett dated 30 June 2010 allowing the claimant's appeal on human rights grounds while dismissing it on asylum grounds. We will direct that the claimant be referred to as C in these proceedings.

2. C is a national of Zimbabwe who came to the United Kingdom in July 2003 with her child HC (then aged 5). They were both given leave to enter as visitors and subsequently had their leave extended to February 2006 as dependents of her husband Mr C who was here as a student. A further child SHC was born in the United Kingdom in September 2005 and a third child was born here in February 2009. In February 2008 C applied for asylum identifying her two children as dependants. The application was refused in June 2008 and an appeal was dismissed in August 2008.

3. In May 2009 C made further representations in support of an asylum claim for herself and her family based on the decision in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 promulgated in the autumn of 2008 after C's appeal had been dismissed. This application was refused and a decision was made to remove C and her family in April 2010. They appealed and the appeal came before the First-tier judge in June 2010.

The judge's decision

4. He concluded in summary as follows:-
   i) He did not accept C's claims that the first judge had erred in rejecting important aspects of her case and there was insufficient new material to persuade him to accept C's contentions of being at particular risk in Zimbabwe.
   ii) Nevertheless if he applied the guidance in RN (Zimbabwe) he would have allowed the appeal on asylum grounds as C and her family would be unable to demonstrate loyalty to ZANU-PF on return to Zimbabwe as she was a low level MDC supporter from Bulawayo.
   iii) However, he did not apply the guidance in RN (Zimbabwe) as he was satisfied that circumstances had changed there since that decision, largely because of the power sharing agreement that had come into force. The

risk of violence if C were to be returned to Zimbabwe was not such as to found an asylum or related protection claim.

iv) He concluded that there was private life established in the United Kingdom by reason of the seven years residence of C and her eldest child and Mr C in the United Kingdom and the residence of the other two children since their birth.

v) He further concluded that removal to Zimbabwe was an interference with that private life established here. However he decided that any interference was not in accordance with the law because at the date that he heard the appeal the Secretary of State had a policy not to remove failed asylum seekers to Zimbabwe and so the intended removal was not in accordance with policy and accordingly not in accordance with the law.

vi) He disagreed with and did not apply an unreported decision of the Asylum and Immigration Tribunal in CG v Secretary of State for the Home Department given on 12 February 2010 where Senior Immigration Judge Latter had reversed Judge Bennett on the same point. He concluded that the AIT had not referred to a decision of the Court of Appeal in CL (Vietnam) v SSHD [2009] 1 WLR 1873 that directed the judge's attention to the hypothetical removal and its consequences on the claimant even if there were no proposals to actually remove the claimant or do so in the near future.

vii) He allowed C's appeal on human rights grounds and indicated that the same would apply to her husband and children. He made no directions to give effect to his decision.

5. On 23 July 2010 the Secretary of State was granted permission to appeal against the judge's Article 8 decision.

6. It is not clear to us why it has taken such an inordinate length of time for this appeal to be listed for hearing. A period of delay of 17 months is not acceptable. On 8 December 2011 solicitors instructed for the claimant gave a rule 24 notice seeking to resurrect the asylum claim. That notice was given 16 months after the month provided for service of such notice in the Tribunal Procedure (Upper Tribunal) Rules 2008 rule 24 (2)(a).

7. In the meantime, there have been other developments relating to Zimbabwe and the application of Article 8 with respect to children who have lived in the United Kingdom for substantial periods. In March 2011 the Upper Tribunal delivered its Country Guidance case of EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC). The UT concluded that there had been a material change of circumstances in Zimbabwe since RN (Zimbabwe) that was no longer to be followed as Country Guidance.

8. The UT also gave some general guidance regarding long residence Article 8 claims involving the children of Zimbabwean nationals at [308] and concluded that where

children of asylum seekers had been in the UK for approximately eight years either with leave, pursuant to a moratorium on compulsory removals or pending the promulgation of relevant and up to date country guidance determination on the vexed issue of Zimbabwe, in the absence of a compelling public interest such as criminality or fraud by one of the family members, removal of the family containing such children was likely to be disproportionate. The guidance took into account the fact that the best interests of the children as a primary but not paramount or determinative consideration was emphasised in LD (Article 8 – best interests of the child) Zimbabwe [2010] UKUT 304 (IAC) and ZH (Tanzania) [2011] UKSC 4, [2011] Imm AR 395.

Error of Law

9. We agree with the contention that Judge Bennett made an error of law in concluding that the decision that the claimant and her family should be removed in principle was not in accordance with the law.

10. We recognise that there are cases where a decision to refuse an extension of stay or remove a person may be so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. In such a case the analysis does not move on to justification for Article 8 purposes and the decision must be re-made in accordance with the law, either by the Secretary of State or the judge. However, in our judgment this was not such a case.

11. As we understand it, the Secretary of State's policy or practice that removal directions should not be served on Zimbabwean nationals to effect a compulsory return of those with no claim to remain was not a policy that such persons should not be refused leave to remain, or that removal in principle was inconsistent with their rights. The matter is discussed at EM (Zimbabwe) at paragraphs 41, 130 and 131. In summary:-

    i) Forced removals were suspended in 2005 pending country guidance.
    ii) The suspension was re-imposed in July 2006 pending litigation in the Court of Appeal and the AIT.
    iii) On the 29 October 2009 the Minister of State made a statement in the House (Hansard col 25WS) to the effect:

> "Alongside these changes to our voluntary returns package we have also considered carefully our position on enforced returns to Zimbabwe. We have kept this issue under review since the Home Office first deferred enforced returns to Zimbabwe in September 2006 and the courts have found that not all Zimbabweans are in need of international protection. The UK Border Agency will therefore be starting work over the autumn on a process aimed at normalising our returns policy to Zimbabwe, moving towards resuming enforced returns progressively as and when the political situation develops."

iv) On the 14 October 2010 the Minister of State announced in the House that forced returns would be resumed once the case of EM (Zimbabwe) had been determined.

v) On the 18 October a letter from the FCO Zimbabwe Unit suggested that a relevant reason for the previous policy had been concerns about political stability rather than safety.

12. Accordingly, having regard to the 2009 Ministerial statement applicable at the time of the judge's decision, there was no inconsistency between such a practice and a decision to remove in principle that would engage the judge's jurisdiction to examine what the consequences of that (hypothetical) removal to be.

13. There are many reasons political or practical why a decision to remove in principle may not be implemented in practice, but that does not prevent the decision being made and the appeal being determined on the basis of the facts as they appear at the material date. In fact, four months after Judge Bennett's decision the moratorium on compulsory removal was lifted subject to the outcome of the Country Guidance case thus enabling those whose appeal rights were exhausted to be made the subject of removal directions.

14. There was nothing in the learning provided by the Court of Appeal in CL (Vietnam) v SSHD [2009] 1 WLR 1873 that is relevant to the issue in the present case, or suggests that Judge Latter was wrong in his determination in CG v Secretary of State. It was unfortunate that Judge Bennett persisted in this case with an approach that had correctly been held to be wrong previously. It is not necessary to explore further when a failure to apply a policy or practice to a claimant would make the decision not in accordance with the law for the purpose of Article 8.

15. We therefore set aside the Article 8 decision and re-make it. However, the passage of time and the legal developments since the judge decided this case have considerably strengthened it.

16. Eight and a half years have now passed since C and her child came here. HC has spent the formative years of his life (5 to 13 1/2) in education here and his siblings are now 6 and 2 respectively have spent all their lives here. There has been no criminality or fraudulent wrong doing by the parents or children and both C and her husband and child were given leave to enter and remain. If the guidance in EM (Zimbabwe) had been available to the first judge who decided the asylum claim in 2008 the claimant and her dependants would have been granted refugee status in the circumstances then pertaining in that unhappy country, despite the fact that the judge did not accept that she had worked as a teacher. For most of the period of their stay there was a moratorium by the UK government on enforced removals to Zimbabwe. The public interest in removing the claimant and her dependants in the interests of the economic order of society was consequently not a strong one. The children's claim to continuity of education and up-bringing in the United Kingdom was a weighty factor.

17. We raised these matters at the outset with the representatives for both parties. Mr Smart realistically conceded that he could not mount an opposition to the Article 8 claim or justify removal on the merits. We agree. Removal of this family would be disproportionate to the legitimate aim and accordingly not "necessary" within the meaning of Article 8.

18. As to the asylum claim, that was not pursued. In the light of the fact that the judges below were entitled to draw the distinction between being trained as a teacher and having practised professionally as one, and the guidance in RN (Zimbabwe) is no longer applicable, we would, in any event have refused permission to argue this claim out of time.

Decision

19. The judge made a material error of law in his decision in this appeal. We set it aside and re-make it.

20. We dismiss the Secretary of State's appeal on the merits of the human rights claim for the reasons given above. Although there is only one appeal reference number and one respondent identified in the proceedings before us, it is clear from the history of these proceedings that this family is treated as a unit and the judge intended to allow the appeals of the husband and children as well.

21. We will direct that the Secretary of State should grant the claimant and her family leave to remain on human rights grounds. The period of such a leave is a matter for her, but in the light of the unhappy history of this case and the considerations we have briefly set out above, she may well conclude that this is a case where indefinite leave to remain is appropriate.

22. We treat the asylum cross-appeal as abandoned and withdrawn.

Signed

Mr Justice Blake
President of the Upper Tribunal
Immigration and Asylum Chamber

Date: 17 January 2012