UK Asylum and Immigration: Rights of children and the withdrawal of the seven year policy- Court decides

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Previously the Home Office had a policy which helped families whose children had spent seven years in the UK to gain indefinite leave to remain. That policy recognised the need to help families and children who found themselves entangled with the ever changing immigration policies in the UK. That policy was withdrawn. Essentially it was an administrative way of giving effect to the principle of the welfare of the child as a primary consideration. The family as a whole ended up benefiting.

In a recent decision by the Upper Tribunal in the case of LD (article 8 best interests of child) Zimbabwe [2010] UKUT 278 (IAC), the court ruled that whilst the policy may have been withdrawn, substantial residence of a child in the UK is a strong indication that the judicial assessment of what the best interests of the child requires still deserve recognition. The court noted that the UN Convention on the Rights of the child 1989 Art. 3 makes such interests a primary consideration. In that case the court observed that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases. A failure to treat them as such will violate Article 8 (2) of the ECHR as incorporated directly into UK domestic law. To this extent removal of an immigrant from the UK regardless of the entrenched rights of the children would be a significant violation of the right to respect for the family life that an immigrant continues to enjoy with each member of his immediate family.

The brief facts in the case of LD Zimbabwe related to an appellant who came from Zimbabwe to join his family in the UK. The wife had pursued her immigration status in the UK from being a visitor, student, then becoming a nurse and subsequently got indefinite leave to remain together with their three children. The husband had been to Zimbabwe on a number of occasions. However, when he sought indefinite leave to remain in the UK he was refused because he had not disclosed a number of drink driving convictions. Paragraph 320 (7A) of the Immigration rules was applied against this appellant calling for a mandatory refusal of his visa application due to non disclosure of material issues. The appellant then claimed asylum in the UK. In his asylum claim he explained that his failure to disclose his drink driving conviction was because he thought that his convictions had been spent. The asylum claim was refused and he appealed to an Immigration Judge who in turn refused his appeal. It was the second appeal that the court in the Upper Tribunal on reconsideration had to grapple with.

The court ruled that it was inconceivable that the first Immigration Judge who heard the case had failed to take into account the fact that the appellant had an established family life in the UK being his wife and three children. The children had been in the UK for about 11 years living with both their mother and the appellant. The court noted that a number of positive higher courts decisions have been promulgated by the courts but some Judges tend to simply mention them in their determinations but when it comes to the actual decisions the determinations do not reflect the current position and jurisprudence. The President of the Upper Tribunal noted that the issue whether a removal of a family member interferes with the family life of the others lawfully settled in the UK for many years is judged by whether it is reasonable to expect the other family members to relocate. It is becoming a practice that some UK Border Agency case owners and some Immigration Judges simply mention such cases which support family life such as the cases of Huang [2007], AB Jamaica [2007] Beouku Betts (2008), EB (Kosovo) [2008]

Chikwamba and many other decisions of the higher courts; but without actually taking the core principle enunciated in the case law properly to protect family life. In the case of LD Zimbabwe, the court observed that it is improper for the courts to expect families to communicate by modern means or to maintain family life by visits without talking into account the difficulties which families may have to endure by separation.

The President of the Upper Tribunal emphasised that families normally live together. Family life consists of the interdependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of the minor children. The Judge noted that it is not normal for family life to be enjoyed by correspondence and occasional visits. The Judge also noted that failure to disclose a conviction on the belief that it was spent did not constitute a breach of rule 320 (7A). The court made reference to the case of A v SSHD which was promulgated on the 6th July 2010 which made it clear that mere non disclosure of driving convictions in the mistaken belief that they had been spent did not amount to a breach of Rule 320 (7A) as false representation within the meaning of that Rule is confined to deception and with it necessary element of deliberate dishonesty.

In the premises very weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life. The court concluded that it would not be reasonable to expect the wife and three children to give up their respective careers and prospects as a nurse, university student and school children doing well in school and relocate to Zimbabwe "where even in the absence of direct physical threat to them conditions are well known to be dire."