



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/06557/2016
HU/06558/2016
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THE IMMIGRATION ACTS

**Heard at Field House
On 18 June 2018**

**Decision & Reasons Promulgated
On 04 July 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MISS GN (FIRST APPELLANT)
MR ED (SECOND APPELLANT)
MISS AD (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Harding, Counsel
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants have been granted permission to appeal the decision of First-tier Tribunal Judge Roots dismissing their appeal against the decision of the respondent refusing them leave to remain on human rights grounds.
2. The appellants are a family comprising the parents and one child. The first and second appellants are the parents. The third appellant is their daughter. All appellants are nationals of Zimbabwe. The third appellant was born on 4 June 2008 and was therefore aged 9 at the date of hearing and had started year 5 at primary school.
3. The respondent refused their applications on 29 February 2016. The decision under various relevant Rules under Appendix FM for each appellant was no longer pursued by the appellants.
4. The respondent considered paragraph 276ADE(1)(iv) for the third appellant. It was accepted that she has lived in the UK for over seven years but it was considered that it was reasonable for her to leave the UK with both her parents. The respondent considered that there were no exceptional circumstances in this case. The respondent also considered Section 55 of the Borders, Citizenship and Immigration Act 2009. The respondent said no evidence had been provided that the parents could not provide for the safety and welfare of their daughter in Zimbabwe. They could return there and enjoy family life together in Zimbabwe. The first appellant's health conditions were referred to but it was concluded that suitable medical treatment was available in Zimbabwe.
5. The appellant's appealed the decision submitting that the respondent had not properly considered the best interests of the child. It was also submitted that it would be unfair to remove her as she had spent her formative years in the UK.
6. The judge stated that the right of appeal is purely on human rights grounds. As regards the child, the third appellant, paragraph 276ADE(1)(iv) of the Immigration Rules provides that leave to remain will be granted if the appellant is under the age of 18, has lived continuously in the UK for at least seven years, and it is not reasonable for her to leave the United Kingdom. As this represents the respondent formulation of private life considerations within the Rules, then leave should be granted if she meets the Rules. The judge said the Presenting Officer did not dissent from this analysis. The judge said case law also confirmed that if a child appellant meets this Rule then leave should be granted without any further proportionality consideration.
7. The judge said the parents applied on Article 8 grounds outside the Rules and relied on Section 117B(6) – that it would not be reasonable for the child to have to leave. This Section makes clear that no further proportionality consideration is required if

the Section is satisfied. The parents' relationship with their daughter is not in dispute.

8. The judge heard evidence from the first and second appellants who adopted their witness statements. The judge said the first appellant's statement set out the history of her stay in this country, how she had met her husband, her pregnancy, the HIV positive status. She confirmed that the application made on 12 June 2015 was made on the basis of her child's age. Her daughter had just turned 7 years old, on 4 June 2015. The judge noted that the application was made within eight days of this event. Her child only knows life in the United Kingdom. She would not understand Zimbabwean culture. She is British in the way she acts. She wishes to continue to go to school here and the family wishes to continue living in the way they have here.
9. The first appellant was asked about her daughter, the third appellant's health, and she said the daughter was thought to have TB. She is alright now and has no difficulty. She has not been back to see the doctors since 2014.
10. In Zimbabwe she has her mother. She has no siblings. In the UK she has her husband and daughter and has some family members whom she calls "aunties" and friends from church.
11. She said her partner has his mother and six sisters in Zimbabwe. He is also an overstayer. The third appellant sometimes speaks to her paternal grandmother who lives with her daughters. She rotates between them.
12. The first appellant said she has been working in the UK since 2004. Her husband does not work. They live off her income. She does not know if she could work in Zimbabwe as she has not been there since 2001.
13. The second appellant confirmed that his mother and six sisters live in Zimbabwe. He speaks occasionally to his mother in Shona. His mother visited the UK in about 2002 or 2003 and stayed a few months. She has never seen his daughter.
14. He said he came here as a visitor on a six months' visa which expired in early 2001. He did not intend to overstay initially but when his father's company failed, it was hard for him to go back and continue the lifestyle he had there.
15. At paragraph 48 the judge said that the public interest considerations applicable to all cases when considering Article 8 outside the Rules are in Section 117B of the Nationality, Immigration and Asylum Act 2002. He said Section 117B(6) is the key provision in this appeal as regards the parents. If it is not reasonable for the child to leave the United Kingdom, then essentially their appeals will succeed outside the Rules as the interference will not be proportionate.

16. From paragraphs 49 to 63 the judge identified the case law when considering Article 8 outside the Rules and Article 8 best interests of the child. They included **Razgar [2004] UKHL 27** and **MA (Pakistan) [2016] EWCA Civ 705**.
17. At paragraph 64 the judge said the key question in these appeals is whether it would be reasonable for the third appellant to have to leave the United Kingdom. Case law has confirmed that this issue of reasonableness in paragraph 276ADE(iv) as regards the child and in Section 117B(6) as regards the parents has the same meaning.
18. At paragraph 65 the judge said that in assessing the best interests of the child he has adopted the following principles. The best interests of the child are a primary consideration. He must not consider issues such as parental conduct or immigration history at this stage. The starting point is that it is in the best interests of the child to remain with their family. He should take into account in considering best interests that the length of residence in the UK is relevant to the nature and strength of the child's best interests. He has considered case law such as the seven principles set out in the case of **Zoumbas** in considering best interests.
19. The judge found that none of this family currently has any leave to remain in the UK. Considering the factors which he set out at paragraph 66, he found at paragraph 67 that the best interests of the third appellant are clearly to remain with her parents as a family unit. This is the primary interest of the child and it is a very strong best interest.
20. The judge said all things being equal it would be in the child's best interests to remain in the UK if possible, given her length of time here, the education system here and that she has never even visited Zimbabwe. However, the primary best interest in this case is for the child to remain with her parents. The appellants have produced virtually no evidence about the education system in Zimbabwe. The child's health is on their evidence no longer a significant consideration. It would be preferable, from the child's point of view, for them all to remain in the United Kingdom but the judge considered that this of itself is not a strong best interest and is one that is capable of being outweighed by other considerations which he went on to consider.
21. The judge took into account the parents' immigration history which he said was very poor. The first appellant has been here since 2001 and her husband since 2000. Both have had very long periods without any lawful leave to remain and without any applications being made from 2001/2002 up to 16 June 2015. Their current applications were made in 2015 shortly after the third appellant turned 7. The judge did not accept that there was any good explanation for the failure to make any applications until 2015, after their daughter had turned 7 years old. As regards the first appellant, even if it was accepted that she had difficulty for the first few years making applications as she claims because she was essentially under her aunt's control, this ceased in 2004 when she was able to move away from her aunt.

22. The first appellant was candid and admitted that she has been working unlawfully for a number of years in the UK without any right to do so. The second appellant was much less clear in his answers on this issue. The judge did not find his answers to be convincing. However, he admitted doing some work.
23. The judge found that the third appellant has lived in the UK for over seven years. She was born here. He accepted that she has never lived in Zimbabwe, or indeed even visited Zimbabwe in her nine years. He accepted that she has only known the education system in the United Kingdom.
24. The judge noted that the respondent's own guidance is that strong reasons are required to submit that it would be reasonable for a child to be forced to leave the United Kingdom after seven years. Case law suggests that a period of seven years from the age of 4 will be more significant than the first seven years of a child's life. He noted that the third appellant has lived here for all of her life and was aged 9 years and 4 months at the date of the hearing. The judge accepted that the length of residence was a weighty factor. He agreed however that this was not a "trump card" and that each case must be considered individually. The third appellant has entered year 5 in primary school. While she has lived over nine years here, they are the first nine years of her life, and case law suggests that of course the older a child is the more significant similar periods of residence would be.
25. The judge noted that both parents currently have family in Zimbabwe. He accepted that the third appellant has no, or very little links with Zimbabwe, a country which she has never visited. She speaks to her grandmother from time to time but there is a language barrier. The judge found however that the third appellant would adapt and settle down in Zimbabwe within a relatively short period of time given that she would be returning with her parents, as part of her close family unit.
26. The judge rejected the claim that the adult appellants would be destitute in Zimbabwe. They have produced no, or very little evidence, to support this assertion. They have family in Zimbabwe. He did not find that these family members would necessarily be able to accommodate or support them financially as there was no evidence of that, but the judge found no reason that they would not be able to give them emotional and moral support, guidance and assistance.
27. The judge noted that the first appellant is HIV positive. The letter from a consultant confirms that she has to take a more complex anti-retro-viral regime in order to achieve viral control. The letter states her consultant's understanding that patients such as her may not have access to the medication they need in Zimbabwe, although the situation in that country has improved recently. It refers to the potential problems of the supply of medication in that country. The judge however noted that the first appellant has had a significant improvement in her overall function.
28. The judge said the third appellant has a history of TB. Her parents' evidence was that she was currently well and has not had any hospital treatment for several years.

He noted the respondent's decision stated that appropriate healthcare is available in Zimbabwe. He said the appellants have not produced any other evidence to suggest that appropriate treatment is not available in Zimbabwe. Consequently, the judge found that the appellants have not shown that there would be any lack of appropriate healthcare for the first and third appellants in Zimbabwe.

29. The judge accepted the Presenting Officer's submission that this was still a relatively young child. She was still at primary school. There was little evidence that the appellants have made any enquiries about the education system in Zimbabwe. The judge took fully into account throughout that nine years' residence in the UK is significant but found there was nothing to suggest that the parents are not loving parents who will do their best to look after and protect their daughter, using their knowledge of the Zimbabwean country, its culture and education system.
30. The parents were consistent that their daughter could not speak Shona but understood a few words. They have not produced evidence about the education system in Zimbabwe and what language it is conducted in. Even if the education system is conducted entirely in a language which their daughter does not currently speak, or write or read, the judge saw no reason why at her age she would not quickly learn a new language with the support of her parents who speak that language once immersed in that culture.
31. In his conclusions on reasonableness the judge found that the seven year residence period has been satisfied by the third appellant who was in fact 9 years old at the date of the hearing. The judge considered the relevant sections of the guidance from the respondent - which are referred to in **MA (Pakistan)** at paragraph 46 etc - the judge said it was clear this guidance was intended to apply to cases under Rule 276ADE.
32. The judge found that the best interests of the child are firstly and primarily to remain with their parents and, very much secondary, to remain in the UK in principle. However, the best interests of the child are a primary consideration, not determinative. It was possible for other considerations to outweigh these best interests.
33. Having considered carefully the evidence in the appellants' bundle, he took into account that the first appellant has confirmed that she has been working unlawfully in the United Kingdom and there was evidence of that in the bundle.
34. There was evidence in the bundle concerning how the third appellant was doing well at school and photographs showing evidence of her life in the UK. This was entirely reflected in the case law and guidance that nine years is a significant period which he has fully taken into account.
35. In summary, although he gave due weight to the third appellant's nine year residence in the United Kingdom, and that it is in her interest to remain in the United

Kingdom. All things being equal, the judge found that the strong principle best interest is to remain with her parents. They have a very poor immigration history and after careful consideration he found that it was reasonable for her to move with her parents to Zimbabwe, principally due to their very poor immigration history. The appellants are Zimbabwean. They have no right to be in the UK and no right to education or healthcare in the United Kingdom and have had no leave to remain at all since 2000 or 2001. They should have had no expectation that they would be allowed to remain in the UK. Other factors which make it reasonable for the third appellant to move with her parents to Zimbabwe include the family networks which her parents still have in Zimbabwe.

36. Mr Harding relied on the grant of permission which stated that:-

“The Decision and Reasons is a thorough and detailed assessment of the evidence. However, it is arguable that in finding that the third Appellant who is aged 9 years, born in the UK and never been to Zimbabwe could reasonably be expected to leave the UK may have erred. It is clear from MA (Pakistan) [2017] EWCA Civ 705 (para 49) and MT and Eritrea [2018] UKUT 00088 (IAC) that powerful reasons are needed to remove a child who has been in the UK over 7 years and in this case the adverse factor relating to the parents was overstaying only .”

37. Mr Harding submitted that the judge at paragraph 61 correctly turned his mind to the **MA (Pakistan)** test; when a child hits 7 years recognition must be given because of the quality of ties the child has in the UK. The Secretary of State has to demonstrate strong reasons for refusing leave. The judge considered **Zoumbas** which said that the sins of the parents should not be visited on the child. He said however this is what the judge did by visiting the sins of the parents on the child. The judge did not consider if there were strong reasons put forward by the Secretary of State. This must be an error. He said the Secretary of State’s guidance at paragraph 11.4.6 reiterated the **MA** test which the judge failed to consider.

38. Mr Harding accepted that the judge considered a whole variety of factors and while at paragraph 82 the judge mentioned **MA (Pakistan)** paragraph 46, nowhere did the judge ask himself whether there are strong reasons for the family or the third appellant to be expected to leave. At paragraph 86 the judge said that the first and second appellants have a poor immigration history. He said we have seen far worse cases than simply overstaying. He submitted that the judge misdirected himself as to the legal tests. The judge did not correctly apply **MA (Pakistan)** or **Zoumbas**. His decision is fundamentally flawed.

39. Mr Harding submitted that the law as it is now is that a child who has been in the UK for ten years is entitled to British citizenship.

40. Mr Clarke said that there were no material errors in this decision. The judge adopted a textbook approach to the evidence and his reasoning. He gave powerful reasons at various points in his decision. The judge rightly invoked **MA (Pakistan)** at

paragraphs 61 and 62. His reasoning at paragraph 66 was consistent with paragraph 34 of **EV (Philippines)**. At 67 the judge considered the best interest of the child is to remain with the parents. At 68 he also considered that the best interest of the child is to be in the United Kingdom, but at 69 found that there were countervailing public interest factors such as their poor immigration history. They had been unlawfully here since 2001 and 2002 and had made no applications for leave to remain. The application made in 2015 was made only when the third appellant turned 7. In other words, the appellants had stayed under the radar only surfacing when the child had reached 7 and made the application in order to back the Home Office into a corner.

41. Mr Clarke submitted that the judge's proportionality assessment was fact-sensitive and was based on a balancing of all the evidence. The judge did not simply dismiss the appeal because the first and second appellants had a poor immigration history. As the judge stated in his summary, he gave due weight to the third appellant's nine years residence in the United Kingdom and found that it is in her interests to remain in the United Kingdom. He had also found that the strong principle best interest is to remain with her parents. The judge's findings throughout his decision said that he had considered the relevant sections of the guidance from the respondent which are referred to in **MA (Pakistan)** at paragraph 46. The judge also applied the principles in **EV (Philippines)** which said that a decision as to what is in the best interests of the child will depend on a number of wider factors such as their age, the length of time they have been here, how long they have been in education, what stage their education has reached and to what extent they have become distanced from the country to which it is proposed that they return. The other factors also included how renewable their connection with it may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights, if they have any, as British citizens. It is to be noted that in this case the first, second and third appellants are not British citizens. The third appellant whom the first and second appellants are relying on is not a British national.
42. When the judge was referring to the "very" poor immigration history, I concur with the submission made by Mr Clarke that the first and second appellants kept their heads under the radar only to surface soon after the third appellant turned 7. By their conduct they were seeking to back the Secretary of State into a corner into granting them leave to remain.
43. I find that the appellants' case is no different from cases of this type, where the parents have overstayed and have sought to regularise their stay by relying on a child who was born in the UK, has lived here for seven years and is a qualifying child and is being educated in the UK. The child is not a British national. She is still reliant upon her parents and as such her best interest is to remain with her parents as a family unit. She is young enough to adapt to life in Zimbabwe where she has family there and be educated there. The judge found that the third appellant would experience difficulties at the outset but as with any child moving to a new country, there is no reason why she would not overcome these difficulties relatively quickly.

44. The judge also found that the length of residence in the UK is not a “trump card”. Each case must be considered individually. I find that the judge did just that by considering all the evidence that was before him, including the child’s circumstances.
45. I agree entirely with the Mr. Clarke’s submissions. Throughout the decision, the judge considered the relevant sections of the respondent’s guidance which are referred to in paragraph 46 of **MA (Pakistan)**. In considering the best interests of the child, the judge considered the wider factors set out in **EV (Philippines)**. I find that the judge gave very strong reasons for his conclusion that it would not be unreasonable for the third appellant to move with her parents to Zimbabwe.

Notice of Decision

46. I find that the judge’s decision discloses no error of law.
47. I note that the grant of permission referred to the case of **MT and ET**. However, this case was not relied on by the parties.
48. The appellants’ appeals are dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 2 July 2018

Deputy Upper Tribunal Judge Eshun