



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)**  
IA/07804/2014

Appeal Numbers:

IA/07808/2014  
IA/07815/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 9 December 2014**

**Decision & Reasons  
Promulgated**

**On 11 December 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR**

**Between**

**BRIAN WAREMBA**

**DANAYI GAPARA**

**AND**

**TAPIWA STANSLOUS NEHEMIAH WAREMBA**

**(ANONYMITY DIRECTIONS NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr B Hoshi of Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are all citizens of Zimbabwe. The first and second appellants are husband and wife and the third appellant is their 11 year old son who was born in Zimbabwe but who entered the UK with his mother (as family dependants) in January 2007 at the age of 3. The first appellant originally entered the UK as a student in December 2004. A further child has been born to the family since their application was made in March 2012. Their application was for further leave to remain in the UK under Article 8 outside the Immigration Rules.
2. The application was refused by the respondent on 23 January 2014 both under paragraph 276ADE of the Immigration Rules and, separately, outside the Rules. The appellants' appeal to the First-tier Tribunal was heard by Judge E B Grant, who, in a determination promulgated on 29 September 2014, dismissed the appeals.
3. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Foudy on 4 November 2014 on the basis, as set out in the grounds, that the judge had failed to address Section 117B of the Nationality, Immigration and Asylum Act 2002 which, by virtue of the Immigration Act 2014, came into effect on 28 July 2014. In particular Section 117B(6) provides as follows:
  - “(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -
    - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
    - (b) it would not be reasonable to expect the child to leave the United Kingdom.”

Under Section 117D(1) a “qualifying child” is defined as a person under the age of 18 who is either a British citizen or who has lived in the United Kingdom for a continuous period of seven years or more. Thus the third appellant in this case is a qualifying child.

4. Mr Hoshi submitted that the judge erred in failing to make any reference at all in her determination to Section 117. Section 117A(2) makes it mandatory for the Tribunal to have regard “in all cases to the considerations listed in Section 117B”. It may be that the judge would have come to the same conclusion had she considered Section 117 in detail but the threshold is a high one and it is by no means clear that the judge would have come to the same conclusion.
5. The second point made by Mr Hoshi was that, throughout the judge's determination she considered, almost exclusively, the

education of the 11 year old third appellant without taking into account his private life, other than education. Reliance was placed on the presidential decision in **Azimi-Moayed [2013] UKUT 00197** (a case which was not referred to in the First-tier Tribunal) and to part of the headnote to that case which reads as follows:

- “iii) Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
- iv) Apart from the terms of published policies and Rules, the Tribunal notes that seven years from age 4 is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable.”

6. Mr Hoshi also relied on the fact that nowhere in her determination had the judge considered the private life of the first two appellants, the husband having been in the UK for 10 years and the wife for nearly 8 years. The judge concentrated on the education of the 11 year old in relation to Article 8 and on very little else. Mr Hoshi drew my attention to the fact that the appellants had appeared in person in the First-tier Tribunal and that the first appellant’s Grounds of Appeal as well as his witness statement of 18 March 2014 made reference to his private life generally in the UK. But those factors were not apparently considered in any part of the judge’s findings under Article 8.
7. Mr Avery, in reply, submitted that although the judge had not specifically addressed Section 117 the outcome was unlikely to be different and any error of law was not such that the determination should be set aside. It was clear from the tenor of the determination that the appellants’ main thrust in argument had been directed to the education of the 11 year old child.
8. I indicated at the end of the submissions that I was satisfied that the judge did err in failing to make any reference at all to Section 117 – she was statutorily bound to consider those provisions – and in apparently failing to consider and make findings concerning the private lives of the first and second appellants. Both representatives submitted (and I concurred) that that the appeal must be remitted to the First-tier Tribunal for rehearing with no part of the earlier determination being preserved.

## **Notice of Decision**

9. The First-tier Tribunal determination contains an error of law such that it must be set aside in its entirety with none of its findings being preserved.
10. The appellants' Article 8 claims will need to be reheard afresh and I therefore remit the appeal to the First-tier Tribunal at Hatton Cross for rehearing (by any judge other than Judge E B Grant).
- 11 No anonymity direction is made.

Deputy Upper Tribunal Judge David Taylor  
11 December 2014