



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

Appeal Numbers: IA/05326/2013  
IA/05332/2013  
IA/05334/2013  
IA/05335/2013  
IA/05337/2013

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 18<sup>th</sup> October 2013**

**Determination Promulgated  
On 6<sup>th</sup> November 2013**  
.....

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**ISAAC BINDURA  
ROSEMARY BINDURA  
ROPAFADZO BINDURA  
RUPONESO BINDURA  
IOANA BINDURA**

**Appellants**

**and**

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

**Respondent**

**Representation:**

For the Appellants: Mr Billie, instructed by I E I Solicitors  
For the Respondent: Mrs Brewer, Senior Home Office Presenting Officer

## DETERMINATION AND REASONS

1. These are the Appellants' appeals against the decision of Judge Southfield made following a hearing at Bradford on 22<sup>nd</sup> May 2013.

### Background

2. The Appellants are citizens of Zimbabwe, a husband, wife and their three children born on 31<sup>st</sup> March 1973, 9<sup>th</sup> July 1975, 31<sup>st</sup> July 2002, 28<sup>th</sup> November 2007 and 2 February 2011 respectively. The first Appellant arrived in the UK on 7 August 2003 as a student with leave initially until 2006, later extended until 2010. On 15<sup>th</sup> March 2004 the second and third Appellants joined him. The fourth and fifth Appellants were born here.
3. On 24<sup>th</sup> May 2008 the first Appellant was granted leave to remain on a Post-Study Work visa until 2009. His application for further leave was initially refused but later granted until 2<sup>nd</sup> February 2012.
4. On 23<sup>rd</sup> January 2012 the Appellants applied for further leave to remain on Article 8 grounds. They were refused on 30<sup>th</sup> January 2013 and it was this refusal which was the subject of the appeal before Mr Sarsfield.
5. The judge considered whether the third Appellant was in a position to meet the requirements of the new Rules which came into force in July 2012.
6. He wrote as follows:

"Under Rule 276ADE only the third Appellant meets any of the criteria. He is aged 10 and has been in the UK for over seven years at the date of application, so when considering his private life I find he meets that requirement. However, other factors have to be considered including the Immigration Rules and Article 8 issues under those Rules first."

7. He made a number of findings of fact and then wrote:

"Turning to the Rules alone it was not suggested at the hearing that the Appellants met the criteria under Appendix FM. I find they do not do so for the following reasons:

- (a) The adults do not qualify under E-LTRP as neither are British or settled in the UK nor have refugee or humanitarian protection.
- (b) They do not qualify under E-LTRPRT as each does not have sole responsibility for the children.

- (c) EX1 does not apply as it would be reasonable to expect any child to return with the family to Zimbabwe as one unit if the parents had to return, having regard to the case law and my other findings.”

8. The judge then considered Article 8 under the Razgar principles. He stated that under Section 55 of the Borders, Citizenship and Immigration Act 2009 the interests and welfare of the children are a primary consideration and referred to relevant case law. He concluded that the family could return as one unit and the children were young enough to adapt to life in Zimbabwe and the best interests of any child was to be with their parents, the adult applicants.

### **The Grounds of Application**

9. The Appellants sought permission to appeal on the grounds that the judge had failed to properly apply paragraph 276ADE of the Immigration Rules, failed to identify the best interests of the children, misapplied the country guidance in CM (Zimbabwe) and failed to properly consider Article 8 of the ECHR.
10. Permission to appeal was granted by Judge Plumptre on 19<sup>th</sup> June 2013 who stated that the grounds were arguable.
11. On 1<sup>st</sup> July 2013 the Respondent served a reply defending the determination.

### **Submissions**

12. Mr Billie relied on his grounds. He submitted that the third Appellant met the requirement of paragraph ADE both in its initial format which was operative between July and December 2012, and since its amendment in January 2013. He argued that the judge’s consideration of the best interests of the children was flawed; he had failed to engage with the lengthy skeleton argument which outlined why their removal could not be in the best interests of the children, namely the education system in Zimbabwe, the cultural and religious traditions there with which they were unfamiliar, the healthcare, the language and the first Appellant’s prospects of obtaining employment.
13. Mrs Brewer submitted that the determination was sustainable when read as a whole and that the judge had properly weighed up the evidence and come to a conclusion open to him.

### **Consideration of whether there is an Error of Law**

14. Under paragraph 276ADE(iv) as it was between July and December 2012, 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 is under the age of 18 years and has lived continuously in the UK for at least seven years.
15. From December 2012 an amendment was inserted to read:

“... and it would not be reasonable to expect the Appellant to leave the UK.”

16. It was not argued by either party at the hearing before Judge Sarsfield that the Rules had direct application because the family's application had been made before they came into effect. Clearly, however, it would be difficult for the Respondent to argue that there was a legitimate aim in removing the Appellants if, according to her own Rules, they satisfied the criteria. It was, therefore, essential for the judge to make a clear finding on whether 284ADE(iv) applied when reaching his decision in respect of Article 8.
17. It is difficult to know what the judge meant when he said that “other factors have to be considered, including the Immigration Rules and Article 8 issues under those Rules first”. The picture is muddled further by his reference in paragraph 20 of the determination to Appendix FM when he states that E-LTRP and E-LTRPT and EX1 do not apply without setting out what those requirements are.
18. Moreover, the judge stated that it was not suggested at the hearing that the Appellants met the criteria under Appendix FM when it is abundantly clear that that is exactly the submission which was being made.
19. Furthermore, the judge's consideration of the best interests of the children are limited to the assertion that it is in their best interests to be with their parents. However, clear submissions were made to him that the conditions in Zimbabwe which this particular family would face strongly militate against it being in the best interests of their children to remove them there. There is nothing in this determination to indicate that the submission and skeleton argument were considered.
20. Accordingly, the judge erred in failing to take into account relevant material when reaching his decision.
21. The decision is set aside.

### **Further Submissions**

22. Mrs Brewer submitted that the wording of the Rules as they were as at the date of decision were the relevant ones for the purpose of deciding the proportionality of removal. This application was made in January 2012, before the unamended Rules were implemented. She accepted that, had the application been made between July and December 2012, the old version was applicable, but since it predated them the correct approach would be to apply the Rules as they were in force as at the date of decision.
23. It was therefore for the Appellants to show that it would not be reasonable for the third Appellant to go to Zimbabwe. She accepted that as he arrived here when he was eighteen months old he would have no memory of Zimbabwe but he was a Zimbabwean national. His younger siblings had been born in the UK, and would have connections here in terms of friendships, their school and community and

church. However, Christianity was permitted in Zimbabwe. There were no medical conditions in the family which would argue against their removal there, and she said that at all times the first Appellant had had only temporary leave without any expectation of settlement.

24. Mrs Brewer accepted that the Appellant had no immediate family in Zimbabwe but submitted that, for the majority of the time the first Appellant was on student leave, and he would have maintained his links there. The children were of an adaptable age and could be expected to resettle in their country of nationality. The current situation there was improving and whilst there was high unemployment in Zimbabwe, the first Appellant was highly educated and could use his experience of work in the UK to his advantage on return.
25. Mr Billie relied on his skeleton argument. He asked me to apply the unamended Rule ADE(iv), but even if the amended Rule was to be applied it would not be reasonable to return the Appellants to Zimbabwe. The background evidence which he relied upon showed a collapse of the education system in Zimbabwe, a country where 81.6% failed their 2012 Zimbabwe School Examination Council ordinary level examinations. The education system there was on the verge of collapse with a shortage of teachers. The collapse of the infrastructure, particularly water, had led to an increase of waterborne diseases, and whilst the situation had improved since 2008, that did not mean that the situation for this family could in any sense be seen as acceptable. The test of reasonableness under the Rules was far less onerous than the Article 3 test.
26. Finally, this family were model migrants, having remained lawfully in the UK and the first Appellant contributing to the economy here. Both he and his wife had acquired qualifications in the UK which could be to the country's benefit and there would be no economic prejudice to their remaining here.

### **Findings and Conclusions**

27. The Appellants enjoy substantial private life in the UK as evidenced in their statements and not disputed by the Respondent.
28. Removal would interfere with their right to enjoyment of their private life, but would be lawful insofar as they have no basis of stay. The pursuit of a legitimate aim, namely the economic wellbeing of the country which encompasses the need to maintain immigration control is more complex. There is no economic benefit as such to this family being removed, since the first Appellant is working. He has remained in the UK with leave at all times, having come here as a student and renewed his leave on that basis until he gained work as a post-study work migrant.
29. Mrs Brewer confirmed that there was no issue under the Rules in respect of the third Appellant's ability to meet the suitability requirements as set out in LTR1.2-SLTR1.54.

30. The Rules have no direct application because they were not in force in January 2012. However, if the third Appellant did meet the requirements of the Rules then the argument as to the legitimate aim in the context of Article 8 would be severely undermined, although I agree with Mrs Brewer that there is little logic in applying a Rule which was only in force for some six months after the date of the Appellants' application but had been amended before the decision was made.
31. It is difficult to see how a decision could be reached that it would be reasonable for the third Appellant to return to Zimbabwe unless it was also found that it would not be disproportionate for his parents to return there.
32. In deciding whether it would be disproportionate for the first and second Appellant to be removed, the best interests of the children have to be considered first. The issue of reasonableness of return is clearly interlinked with the assessment of best interests.
33. The third Appellant is a national of Zimbabwe and that of course is a strong argument in favour of his return. Indeed, there would have to be strong evidence to establish that it would not be reasonable for a child to return to his country of birth and nationality. The fact that he has no memory of that country and has lived here all of his life and developed strong ties are relevant considerations as to whether it would be in his best interests to be allowed to remain here, but have less weight in the context of assessing the reasonableness of return.
34. He is 13 years old. He has always attended school in the UK. The school system which he would be entering into in Zimbabwe appears to be in a state of crisis. According to the Appellants' information, 20,000 teachers were lost in Zimbabwe between 2004 and 2009 and the education system there is a shadow of its former self. Teacher salaries are poor, and as a consequence corruption in the profession has increased. The affluent families send their children to private schools rather than risk State education.
35. It is not disputed by the Respondent that there are no immediate family members who could assist the family on return. The first Appellant says that he has no prospects of securing employment there since there is massive unemployment in Zimbabwe. It is very difficult to predict whether he will be able to find work but, without a support network, at least in the shorter term, it is hard to see how the third Appellant would be able to access education of any comparable standard to that which he has been accustomed to in the UK.
36. The strongest argument in the Respondent's favour so far as best interests are concerned, is the return of the children to their country of nationality. Beyond that, it is very difficult to see what those best interests could be, bearing in mind the present situation in Zimbabwe which, although improving, is still critical.
37. The difficulties in the infrastructure in Zimbabwe do not reach the level of Article 3 risk, but nevertheless the problems with the health service must be a matter of real concern to any family returning with children.

38. All of the children have effectively lived all of their lives in the UK and no other country. The youngest child will know little else than her family but the older two have developed social and cultural ties beyond their parents. I conclude that the best interests of the children are to remain in the UK.
39. In EM and Others (returnees Zimbabwe) CG [2011] UKUT the Tribunal held:
- “In the absence of countervailing factors, residence of over seven years with children well-integrated into the educational system in the UK is an indicator that the welfare of the child favours regularisation of the status of mother and children.”
40. So far as the first Appellant’s immigration history is concerned, there are no countervailing factors. Neither is there an economic drain on the UK’s resources since he is working and contributing to the economy.
41. The appeal succeeds for the following reasons. It would not be reasonable for the third Appellant to leave the UK and he meets the present requirements of Rule ADE(iv). There can therefore not be a legitimate aim in the Respondent seeking to remove him.
42. Second, removal would be disproportionate. There is a lack of weighty reasons needed to separate a child from a community in which he has grown up (LD (Article 8 best interests of child) Zimbabwe [2010] UKUT 278).

### **Decision**

The original judge erred in law. His decision is set aside. The Appellants’ appeals are allowed.

Signed

Date

Upper Tribunal Judge Taylor