



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

Appeal Numbers: IA/22495/2014  
IA/22484/2014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Oral decision given following hearing  
On 21 April 2015**

**Determination  
Promulgated  
On 11 May 2015**

**Before**

**UPPER TRIBUNAL JUDGE CRAIG**

**Between**

**ALEXANDRA EDWARD  
ROLAND EDWARD  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr T Aitken, Counsel instructed by Richmond Chambers LLP

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants in this case are siblings who were born respectively on 7 August 1984, that is the first appellant Miss Edward, and 30 April 1987 which is the second appellant, Mr Roland Edward. The circumstances in which they came to be in this country can be summarised briefly.

2. Their mother who is now Mrs Dunmore, and I will deal with her circumstances below, arrived in this country in or around 2001 intending to study. She came on her own and was given a visa to study for a brief period of time. Mrs Dunmore had three children. She had one child by a previous relationship prior to her marriage to Mr Edward and then she had two further children who are the two appellants in this case. She clearly, as I find, had no immediate intention to return to Zimbabwe because she brought each of her children here in turn having previously made arrangements in respect of each of them for their schooling in this country. All of them came on visitors' visas, and none of them left when their visas expired. The first appellant, Miss Edward, was 16 when she came and the second appellant, Mr Edward, was 14. Neither of them have returned to Zimbabwe since coming and have accordingly spent about half their lives in this country.
3. The appellants made a number of attempts to do what they now say was to "regularise" their position in this country which included applying for British nationality on grounds of ancestry on the basis that their father was a British citizen who had been born in Scotland. These applications were unsuccessful and their appeals against the respondent's refusal to grant them British nationality failed because the documents which were produced in support contained within them fairly basic and obvious mistakes. In the marriage certificate which I have seen Mr Edward is said to be 60 at a time when, if he was indeed born when he is claimed to have been in 1922, he would have been 59. Also a death certificate was produced which stated an incorrect age by several years. I should note that I have also been shown what is said to be a corrected death certificate (obtained much later) but that in itself as Ms Isherwood on behalf of the respondent pointed out in argument possibly raises more questions than it answers because it is stated on the face of this document that "this certificate is issued without amendment". Clearly if this was a certificate which had been corrected that cannot be true. Accordingly the position at least until 2010 was that Mrs Dunmore and the two appellants were and had been for most of their stay in this country without any lawful permission to be here.
4. It is probably common knowledge that the period in which the appellants and their mother were in this country was one in which, because of the circumstances and uncertainty which prevailed in Zimbabwe at the time, there were very few forced removals to Zimbabwe. It is probably because of that rather than any factors which are specific to this case that no attempts were made to remove the appellants or their mother and they were allowed to remain here, although the appellants were not permitted to work in consequence of which they enjoyed, if that is the right word, what might properly be regarded as a half life in this country. Not only were they not able to work, but they were also unable to pursue the sort of education that they might have pursued had they been in this country lawfully because without any valid permission to be here they could not access loan monies and in respect of Mr Edward, the second appellant,

although he did undertake a course in car mechanics he was not then able to go on to have an apprenticeship which he otherwise might have done.

5. In 2010 the appellant's mother married Mr Dunmore who is a British citizen and in consequence she but not the appellants was granted discretionary leave for three years which leave has been extended for a further three years. It is common ground between the parties that absent any bad behaviour on her part, it is likely that in due course she will be granted permanent leave to remain in this country.
6. The appellants' case is that Mr Dunmore is currently unwell. It is not entirely clear when he became ill and the medical evidence is not very satisfactory but he apparently has some anger management problems and it is said that he is stressed and suffers from anxiety. He has not given evidence to the Tribunal and it is difficult to be more specific about exactly what is wrong with him. However it is their case that the appellants have provided and continue to provide a substantial amount of assistance to their mother and stepfather. This is a matter which I will discuss in more detail below.
7. In 2014 the appellants made a further application to be allowed to remain on the basis that they had a family life within this country. This application was refused by the respondent who also made a removal decision in respect of each applicant. The appellants both appealed against this decision which had not been certified and their appeal was heard before First-tier Tribunal Judge Juss sitting at Sheldon Court, Birmingham on 17 October 2014.
8. In a determination promulgated on 30 October 2014 Judge Juss allowed the appeals under Article 8. The respondent appealed against this decision, with leave, and that appeal came before me on 9 February 2015 when I found that Judge Juss's decision had contained an error of law such that that decision had to be set aside and re-made. I do not propose to repeat fully in this determination the reasons I gave for so finding but I will summarise them briefly.
9. The judge found that notwithstanding the decision in *Kugathas* [2003] EWCA Civ 31 this was a case in which there were more than normal emotional ties between on the one hand the two appellants who are now aged 30 and 27 and their mother and stepfather such that family life properly could be said to exist between them. The judge went on to find that for this reason it would not be proportionate to remove them from this country. As I indicated in the decision I gave following that hearing what the judge did not do was to carry out any proper proportionality exercise which was necessary before he could consider whether or not removal was proportionate. He had no regard to the Immigration Rules as currently drafted and in particular to the effect of Section 117B of the Nationality, Immigration and Asylum Act 2002 which was inserted pursuant to Section 19 of the Immigration Act 2014 and which sets out the public interest considerations applicable in all cases with regard to Article 8 claims.

Accordingly, I gave directions that this case would be re-listed speedily before me when, after hearing evidence, I would re-make the decision.

10. Today's hearing has been for the purpose of my hearing such further evidence and submissions on behalf of both parties although I had indicated following the hearing in February that I would retain the finding made by Judge Juss that there was family life between the appellant and their mother and stepfather. What of course needed to be established was the strength of this family life and whether this was sufficiently strong that (when added to the other factors which were in the appellants' favour) these outweighed the factors which would otherwise make removal more or less inevitable. I should say at once that I am extremely grateful to both representatives in this case, that is Mr Aitken on behalf of the appellants and Ms Isherwood on behalf of the respondent for the concise yet thorough way in which they have advanced their clients' respective cases before the tribunal.
11. The appellants each gave evidence and were cross-examined thoroughly but fairly, as was their mother. The second appellant, Roland, has in the meantime commenced a relationship with a young lady, a Ms Wiggin who is currently nine weeks' pregnant and she also gave evidence briefly before the Tribunal. She was cross-examined sensitively by Ms Isherwood. I do not propose within this determination to set out in detail the evidence which I heard and which is contained also in large part within the witness statements which were adopted in evidence. I shall accordingly refer below only to such of this evidence as is necessary for the purposes of this determination. I also will not set out in full all the submissions which were made on behalf of the parties or were included in the skeleton argument produced on behalf of the appellants but again shall refer only to such of these submissions as is necessary. I have however taken into consideration before reaching my decision everything which was said to me both in evidence and submissions and all the material contained within the file whether or not the same is specifically referred to below.
12. I find that the appellants' mother when she came to this country and separately brought her children to join her did not at that stage have any intention that they should return notwithstanding that they had no lawful basis for remaining here. I am unable to reach any conclusive finding with regard to the applications which had been made on behalf of the appellants for British nationality on the grounds of ancestry save to say that there is no basis upon which, on the evidence currently before me, I could go behind the previous findings which have been made to the effect that they had not established their claim. I could not however make a finding that the appellants themselves had been party to the production of false documents in this regard because I simply do not know what the position is in that respect.
13. Having heard evidence from the appellants and their mother which was broadly consistent on the substantive points I consider it more likely than not that they are the children of a Mr Edward and that he died before their

mother came to this country. Quite what the circumstances are regarding his nationality I simply do not know but I am satisfied to the requisite standard of proof that he is no longer alive and that accordingly the appellants do not have a father either in this country or in Zimbabwe. The position therefore is that these appellants have currently been in this country for some thirteen or fourteen years, without leave, during which time they have continued to live with their mother and certainly since 2010 with their stepfather as well.

14. Regarding the stepfather, although it is argued on behalf of the appellants that their presence is vital to his wellbeing, I cannot accept that this is necessarily as vital as the appellants and their mother assert. As I have already indicated the medical evidence is scant and the appellants were not assisted by the presence of their stepfather. I was told that the family feared that he would react badly to giving evidence in the Tribunal and that might be the case but giving evidence is rarely a wholly pleasant experience and sometimes in order to support close family one really needs to do something (in this case come to court, give evidence and be available for cross-examination) which in the normal course of events one would prefer not to do. It is regrettable that he did not give evidence. It would have been a matter for the Tribunal to decide whether or not that evidence assisted and the fact that Mr Dunmore has chosen not to give evidence means that evidence which might have supported the appellants has not been before the Tribunal.
15. I also do not accept the submission made on behalf of the appellants albeit not ultimately pursued with any vigour on their behalf and by Mr Aitken who preferred to concentrate on his better points that were the appellants to be returned to Zimbabwe they would be destitute with nowhere to live and effectively no means of support. It is quite clear from the evidence which eventually surfaced during the hearing that they have some family in Zimbabwe, albeit not close, and that they also have some friends one of whom was responsible for obtaining some of the documents in this case. It would perhaps have been better if this had been put frankly before the court at the outset rather than essentially coming out in dribs and drabs while the evidence was being given. It is also quite clearly the case that insofar as the appellants' mother and stepfather have been providing financial support for the appellants while they have been in this country, they could continue to do so were they to return to Zimbabwe. So the fact is, if they went back to Zimbabwe they would be able to scrape some form of living and they would have some ties within that country. To that extent, insofar as it might originally have been argued on their behalf that they had no ties with Zimbabwe such that they would be entitled to remain under Article 8 under the Rules, in my judgment that argument is not sustainable and again, very sensibly, Mr Aitken in oral argument did not seek to pursue that argument before me.
16. An argument was advanced before me certainly in evidence that the effect on the appellants' mother and stepfather would be absolutely catastrophic if these appellants were to be made to return to Zimbabwe

because in those circumstances they on their own would not be capable of looking after themselves. Again in my judgment this puts their case too high. I do not accept that they would not be able to cope at all, albeit I do accept that their lives would be poorer as a result of the appellants returning.

17. Insofar as I have accepted that there is a family life between the appellants and their mother and stepfather I do not believe this to be by any means minimal family life. It was clear to me on the evidence I heard, albeit that I did not accept all the evidence which was given in particular by the appellants' mother who as I have already noted I believe never intended for her children to return after their leave expired, that their relationship with their mother is far greater than one might normally anticipate between adult children and their parents. Part of the reason for this is that due to circumstances which admittedly were of their own making they have continued living with their mother throughout the time they have been in this country, and consequently have done so throughout all their lives. Further, as they have remained here when they have been unable to work, I also accept that their stepfather, albeit not necessarily as ill as has been asserted, has nonetheless benefited from their support and the appellants do have strong and close family ties with their mother and stepfather. Also, although the appellants are not totally without ties in Zimbabwe, these are not close ties and their real family life is in this country. Although they are adults and adults usually are obliged to return to their country of nationality, these family ties must be considered.
18. There is of course one other factor in this case which I have to consider and that is that the second appellant now has a relationship with Ms Wiggin who is nine weeks' pregnant. I do however have to consider this against the background of Section 117B of the Nationality, Immigration and Asylum Act 2005 which was inserted by Section 19 of the Immigration Act 2014. This provides among other things that:
  - “(1) the maintenance of effective immigration controls is in the public interest” and
  - “(4) that little weight should be given to -
    - (a) a private life, or
    - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully”.

As I have already indicated the second appellant is in this country unlawfully and this relationship with Ms Wiggin was undoubtedly established while he was here unlawfully.

19. Insofar as the appellants have built up a private life beyond their family life in this country I have to have regard to 117B(5) which states that “little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious”. In this case this clearly applies because such private life as they have in this country was established at a time when their immigration status was precarious.
20. Interestingly, Section 117B(6) now provides as follows:
- “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”.
21. Were the situation to have been that Ms Wiggin had already given birth and the second appellant had a relationship with the child, this sub-Section might have come into play. However, it appears to be the case that I cannot give great weight to this sub-Section until such time as the child is born which he or she has not been yet. However, that does not mean that I have to disregard this factor totally when considering proportionality in general. In this regard I should make clear my finding, having heard Ms Wiggin give evidence, that I do accept to the requisite standard of proof, that the second appellant and Ms Wiggin do enjoy a real relationship and that it is a genuine one, that other things being equal, Ms Wiggin would wish, as would the second appellant, to continue this relationship and that the consequences of the second appellant being removed to Zimbabwe and not being allowed to come back, would be that she would quite literally be left holding the baby.
22. It is against the background of these findings that I now have to consider whether or not it would be proportionate for these appellants now to be removed, and I briefly summarise what I understand both parties agree is the law that has to be applied having regard to the Immigration Rules and to Section 117B of which I have set out the relevant parts and also current jurisprudence from *Nagre* onwards. I do not propose to set out a detailed treatise regarding the law but rather to summarise the position.
23. The Immigration Rules now set out in most cases the appropriate considerations to be applied where an application is made under Article 8. Absent factors outside the Immigration Rules it is very difficult to conceive of circumstances where an application to remain will be allowed where those factors which are taken into account within the Rules do not apply. It is not now argued that these applications could succeed within the Rules because it has to be accepted in light of the evidence which was given that the appellants do retain at least some ties with Zimbabwe. What is however argued is that there are factors in this case which are not

contemplated within the Rules and in my judgment that is clearly correct because although the Rules deal with relationships between children and parents where the children are minors there is no provision within the Rules as to the weight to be given or the manner in which consideration should be given to the unusual circumstances where a Tribunal or a decision maker finds that there is a relationship between adults such as to give rise to a family relationship (other than a relationship with a partner which is dealt with now under Section 117B). Clearly this is such a case because as Judge Juss found and I also find, the relationship between these appellants and their mother and stepfather does go beyond what in *Kugathas* was considered to be the normal emotional ties to be expected between a parent and his or her adult children.

24. In addition I do have to consider to what extent I should also have regard to the situation regarding the second appellant whose girlfriend with whom he has a genuine relationship is pregnant and whether and if so to what extent this is a factor which should be given any weight at all. It is not entirely clear within the Rules as to what weight should be given to the pregnancy. It is right that under the Rules little weight should be given to a relationship formed with a qualifying partner but it is also clear within the Rules that were the child to be born the public interest would not require removal were the father to have a genuine and subsisting parental relationship with the child and it would not be reasonable to expect that child to leave this country. (As the child would be a British national through his or her mother, it would arguably not be reasonable to expect that child to leave this country in order to live in Zimbabwe). Quite where that leaves the situation where the relationship formed with the partner is at the stage where a child is due to be born but has not yet been born is not entirely clear but I propose to deal with this case on the basis that although it is not a factor that I totally leave out of account I do not give any great weight to it at this stage.
25. Accordingly, I have now to consider the competing factors and I have in mind what the courts have consistently stated from *Nagre* onwards which is that where there are factors outside the Rules such that independent consideration has to be given to whether outside the Rules removal should not take place on Article 8 grounds, there have to be compelling reasons why, notwithstanding the public interest reasons why removal should normally take place, the consequences would be unduly harsh such as to make that removal disproportionate. I say at the outset that the weight to be given to the public interest in removing persons in circumstances such as apply here in light of the immigration history of the appellants and their mother is extremely high. Put simply, it is important in terms of immigration control that the public in this country and also those who might otherwise be tempted to come to this country without leave and then remain in the hope that they will somehow be allowed to remain understand that this will not be made easy for them. If the courts allow applicants such as these appellants other than in very rare circumstances to successfully challenge removal decisions in cases like this, it will be very difficult indeed to maintain effective immigration control which is



extremely important for this country. To their credit, the appellants I believe understood this. Even though they have remained without leave for a long period of time, the first appellant in particular did, I believe, appreciate that if she won her appeal this would be exceptional in the sense that few cases of her type could succeed. Again, very sensibly, Mr Aitken did not attempt to advance a contrary argument. Accordingly, what I have to consider is whether, considering all the factors in the round, the circumstances in this particular case are so compelling as to justify the Tribunal reaching a decision which would only be reached in very rare cases indeed and which can truly be said to be an exception to the general rule that people who remain in this country without leave will be required to return.

26. Having given very anxious scrutiny to this case indeed I am just persuaded in what I consider to be a very finely balanced case that the consequences to this family were the appellants to be removed would be unduly harsh such that removal would not be proportionate. I bear in mind that albeit they should individually have returned once they were adults, both appellants came here as children and cannot properly be blamed for the initial decision that they should remain here without leave, which was essentially a decision taken by their mother. I take into account also the fact that they have been here for a long period of time. Neither of these factors on their own would be sufficient to mean that their appeal should succeed because these are matters that are dealt with within the Rules. However, what does take this case beyond the normal case and make the circumstances rare is the extent of the relationship which they have with their family in this country, which is not a factor contemplated within the rules. Although the appellants would be able to subsist in Zimbabwe such that it could not properly be argued that they could not be returned there in any circumstances (and certainly were this a deportation case where different considerations would apply, their cases would be fairly hopeless) nonetheless, having heard all the evidence and even though I do not accept that they would on a practical level be unable to survive on their own or that their mother and stepfather would be unable to cope on their own either, I do accept that the relationship between the appellants and their mother and stepfather is an extremely strong one and that the family bonds are very strong indeed. I believe that it would not be wrong to say that were they to be removed the emotional effect on the family would be quite devastating and would cause a huge amount of grief and heartache. Regrettably that is what removal often does and, as I say, were this a deportation case that would be something that the appellants would have to live with; however, this is not a deportation case and it is after weighing all the factors together in the round, including giving great weight to the need, absent compelling reasons, to maintain effective immigration control, but also having in mind that the appellants have a substantial family life now in the UK, which could not realistically be carried on by modern methods of communication, that they did not come to the UK originally with any personal intention to remain without leave, that they have been here now for about 13 years

and that they are not in receipt of public funds and it is not anticipated that they will be (and it will be open to the respondent to make this a condition of such leave as they may be granted following this decision if she so chooses), that I consider that their removal would be unduly harsh in the circumstances.

27. As I have said I reach this decision without given any substantial weight to the position regarding Ms Wiggin and her pregnancy; had I given weight to this factor my decision would have been clearer and less finely balanced. In these circumstances the decision of this Tribunal, for the reasons which have been set out above, is that the appeals of the appellants will be allowed.
28. Since I gave my provisional judgement in this case, immediately following the hearing, the Court of Appeal has published its decision in *SS (Congo) and others v SSHD* [2015] EWCA Civ 387 (this decision was published on 23 April 2015). Having considered the judgement in *SS (Congo)* carefully, I am satisfied that my decision in this case is in accordance with the guidance so recently given by the Court of Appeal in that decision.

### **Decision**

**I set aside the determination of First-tier Tribunal Judge Juss as containing a material error of law and I substitute the following decision:**

**The appellants' appeal is allowed under Article 8, outside the Rules.**

No anonymity direction is made.

**Signed:**

A handwritten signature in black ink, appearing to read 'Ken Craig', written over a light blue grid background.

Upper Tribunal Judge Craig

27 April 2015