



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-000082

First-tier Number: PA/51306/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

**On 13<sup>th</sup> of September 2024**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**XOLILE MAZIBUKO**  
**(AKA LETHIWE NDLOVO)**  
**(no anonymity order made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Katani, Katani and Co Solicitors

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

**Heard in Edinburgh on the 5<sup>th</sup> September 2024**

**DECISION AND REASONS**

1. The Appellant claims to be a national of Zimbabwe, although her nationality is disputed. She appeals with permission against the decision of the First-tier Tribunal (Judge McLaren) to dismiss her appeal. Permission was granted on the 6<sup>th</sup> January 2023 by First-tier Tribunal Sills.
2. Before the First-tier Tribunal the Appellant advanced two grounds of appeal. She maintained that she is not a national of South Africa, as the Respondent believes, and that she is in fact a national of Zimbabwe. She avers that she has a well founded fear of persecution in Zimbabwe for reasons of her membership of a

particular social group (women). The Tribunal did not investigate this matter beyond finding as fact that the Appellant has not proven that she not a national of Zimbabwe. Since she did not raise any reason to fear living in South Africa the appeal was dismissed. The Appellant does not challenge the First-tier Tribunal's conclusions on this matter

3. The Appellant's second ground was that the refusal to grant her leave to remain amounted to a disproportionate interference with her Article 8 family and private life in the UK. In particular she relied on the fact that she has two children in the UK. Her son N, date of birth 30<sup>th</sup> May 2011, has lived in the United Kingdom since he arrived with her in 2017. Her son B was born here on the 24<sup>th</sup> April 2022.
4. It is this second limb of the Appellant's case which is the subject of the appeal before me today. The question raised in this appeal is whether the Tribunal erred in its approach to the family life that the Appellant shares with her children.

### **Discussion and Findings**

5. In any case involving Article 8 the Tribunal must have regard to the considerations set out in s117B of Nationality Immigration and Asylum Act 2002. This includes, at s117B(6), the following:
  - (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
6. The effect of this provision is that for those who are not subject to deportation orders, the public interest will not require the person's removal where three requirements are satisfied.
7. The first was that the person has a genuine and subsisting parental relationship with the child. It was not in issue that the Appellant has such a relationship with B; the First-tier Tribunal in fact accepts that she is his primary carer.
8. The second is that the child is 'qualifying', a term defined at s117D Nationality Immigration and Asylum Act 2002. A child is 'qualifying' if they are British, or if they have lived continuously in the UK for seven years or more. At its paragraph 52 the First-tier Tribunal finds that "neither child is a qualifying child within the meaning of Section 117D". At its paragraph 46 it states: "there is no evidence before me that B himself has a passport and therefore I make no findings about his nationality". Mr Katani takes issues with these findings of fact. He points out that it was not in issue that the child's father is a Mr David Ritchie. Mr Ritchie gave evidence in the appeal and his name appears on the child's birth certificate. Nor was it in issue that Mr Ritchie is British. It therefore follows that B himself is British, by operation of s1(1) of the British Nationality Act 1981:

### **Acquisition by birth or adoption.**

(1)A person born in the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother is—

- (a) a British citizen; or
- (b) settled in the United Kingdom

9. It is not the issuance of a passport which makes B British, it is this provision. He was therefore 'qualifying' and the First-tier Tribunal erred in fact in concluding otherwise.

10. The third question is whether it is reasonable to expect this child to leave the UK. The facts as found by the Tribunal are as follows:

46. As far as B is concerned, I have next to no information other than his age. Given his age his primary bond will be with his mother, his principal caregiver. His father Mr Ritchie works and therefore his time with B will be more limited. I have doubts as to whether Mr Ritchie is living in the same house as B and the Appellant. He has an older half-brother N. His mother and brother are nationals of South Africa and his father is a British Citizen. There is no evidence before me that B himself has a passport and therefore I make no findings about his nationality.

47. His cultural traditions are part British, part South African. He is not of an age where that will be particularly important. There is no indication of any health concerns, his language will only just be being formed and he may not yet have started even nursery education"

11. This was, by any measure, not a complete assessment of whether it would be 'reasonable' to expect B to leave the United Kingdom. The finding that the time spent with his father is "more limited" may have been correct, but obscures the uncontested fact that he has a meaningful relationship with his father that it would be in his best interests to maintain. The Tribunal states here that it has "doubts" about whether B's parents are living together but in fact elsewhere in its decision [at 39] it had rejected outright the contention that their relationship was even subsisting. That being the case this was the situation. Here is a British child facing removal with his non-British mother, the effect of which would be to effectively sever his relationship, at least in its present form, with his British father. B is only a toddler and cannot realistically be expected to derive any benefit from video or telephone calls that he would be left with should he leave the UK with his mother. This is the 'real world context' in which this family's situation had to be addressed. If Mr Ritchie and the Appellant are not in a genuine and subsisting relationship the prospect of him leaving the UK to maintain his relationship with his son is a distant one: that he already has another son here, and an elderly father to care for, reinforces that conclusion.

12. The First-tier Tribunal failed to consider any of this. It does not address itself to s1(1) BNA 1981, itself curious given that the provision was expressly highlighted in the pleadings. This error leads to the next, which is to overlook the impact of s117B(6) NIAA 2002. The Secretary of State had not disputed that Mr Ritchie is B's father, or that the two enjoy significant contact and a meaningful relationship.

On the facts the conclusion that it would not be reasonable to expect B to leave the UK seems to me to be unescapable. The consequence of that is that the public interest does not require his mother's removal from the UK.

### **Decisions**

13. The decision of the First-tier Tribunal is set aside to the extent identified above.
14. The decision in the appeal is remade as follows: the appeal is dismissed on protection grounds, the appeal is allowed on human rights grounds.
15. There is no order for anonymity.

Upper Tribunal Judge Bruce  
Immigration and Asylum Chamber  
5<sup>th</sup> September 2024