



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/26735/2016

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 13 July 2018

Decisions & Reasons Promulgated:  
On 13 September 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR LEWIS BOXTER

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr B Mutebuka (Solicitor)  
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

## **DECISION AND REASONS**

1. This is the claimant's appeal to the Upper Tribunal, with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 13 October 2017 following a hearing of 5 October 2017 and which was sent to the parties on 13 October 2017. The tribunal's decision was to dismiss the claimant's appeal against the Secretary of State's decision of 1 December 2016 refusing to grant him leave to remain in the United Kingdom on human rights grounds.

2. It is worth my spending some time setting out, in a little detail, the background circumstances which have ultimately led to this appeal to the Upper Tribunal.

3. The claimant is a national of Zimbabwe. He was born on 21 June 1987 in Zimbabwe. It appears that his parents entered the United Kingdom (UK) at some point shortly prior to March 2005. It seems likely, although this is not expressly stated, that when they came to the UK they were intending to stay here permanently. They entered on the basis of what has been referred to in the documentation before me as "the ancestry provisions". On 12 March 2005 the claimant entered the United Kingdom along with his sister. They came to join their parents. The claimant was given leave to enter until 4 November 2008. I assume that his sister was, at the same time, granted the same period of leave. Thereafter he was given a further period of leave, it is said as a dependent, until 28 October 2013. As I understand it (although the precise history is not as clear from the documentation as it might have been) the claimant's parents had, initially, only been granted limited leave themselves. However, in 2010 the claimant's parents and his sister applied for indefinite leave to remain. I have not been supplied with a copy of the relevant ancestry provisions then in force but it is obvious from what is said in the material before me, that one of the requirements for a grant of indefinite leave under those provisions was the passing of something called the Knowledge of Life and Language in the UK test (the test). The representatives were not able to tell me whether there was, in existence, an exemption under those provisions in relation to persons whose ability to pass such a test might be restricted by health difficulties. But be that as it may, the claimant's parents and his sister passed the test in 2010 and he did not. It appears that it was for that reason that, whilst his other family members applied for indefinite leave to remain in August 2010, he did not. The applications made by his parents and his sister were all granted.

4. The claimant continued to make attempts to pass that test. However, those attempts were unsuccessful. By 8 October 2013 he had failed on five successive occasions. That, of course, took him to within 20 days of the expiry of his leave. It is to be noted that, on 12 October 2013, a report was produced by one Jess Simmonite, a dyslexia specialist with an organisation known as the Whiterose Dyslexia Centre. In that report it was said that the claimant was "displaying a strong profile of strengths and weaknesses that is consistent with dyslexia". It was also said that the results of an assessment gave "a good indication as to why Lewis is finding passing the Life in the UK test so challenging". Ms Simmonite expressed the opinion that his lack of success was probably "a combination of ineffective study techniques, processing and comprehension difficulties, along with typical challenges that dyslexics face in relation to multiple choice questions and the subject of history itself".

5. On 23 October 2013 (and so in time but only just) the claimant applied for leave to remain under the ancestry provisions. His application was, however, rejected (as opposed to refused) on 7 November 2013. It is worth noting that whilst the application was made prior to his leave expiring it was rejected after expiry. Thus, he had become an overstayer. The reason the application was rejected, it was said, was that he had provided photographs in support of his application which were

in some way defective. I am not sure what was thought to be wrong with the photographs and nobody has been able to tell me. Very shortly after the rejection of his application he made another application which was sent on 12 November 2013. That application was also rejected (as opposed to refused) on 21 November 2015. This time, the rejection was because, as I understand it, he did not have sufficient funds in his bank account for the Home Office to be able to take from that account the amount required to cover the application fee. It has been said on his behalf that the fee he had paid in respect of the first rejected application had not been returned to him so that he was short of funds. He subsequently made further applications in November 2013 and September 2014 for leave to remain under the ancestry provisions but both were refused. Eventually, he applied on 6 February 2016, for leave to remain on human rights grounds. That application was refused on 17 July 2016 and it is that decision which led to the appeal to the tribunal and this appeal to the Upper Tribunal.

6. The claimant, it is worth pointing out, has entered into a romantic relationship with another Zimbabwean national who is resident in the United Kingdom. Indeed, the couple now have a child who is, I think, now either three or four years old. It was not in dispute before me that the claimant's partner and the child lack regularised UK immigration status.

7. All of the above information was before the Secretary of State when she made her decision to refuse the application on human rights grounds. Similarly, all of the above information was before the tribunal when it made its decision of 13 October 2017. It was not argued before the tribunal that the claimant was able to bring himself within the terms of any of the Immigration Rules, either the Article 8 related Rules or otherwise. His appeal was presented to the tribunal on the basis that he should succeed under Article 8 of the European Convention on Human Rights (ECHR) outside the Rules. The tribunal, in its written reasons, set out the evidence concerning the claimant's history and his family circumstances. Essentially, that evidence was to the effect that he had previously worked in the United Kingdom though not since his leave had expired, that his relationship had subsisted for seven years, that the couple have a child, that they have been living together as a family unit for the past seven years, that the claimant and his partner have some family who live in Zimbabwe, that the claimant's parents are now separated, that the claimant's father provides him with a degree of financial assistance and that the parents and the claimant's sister remain in the UK.

8. In explaining why it was dismissing the claimant's appeal the tribunal said this:

“ 22. I am dealing with an appeal on human rights grounds. I can only consider his appeal under article 8 ECHR although in assessing his appeal I must have regard to any compliance with the Rules and the factors set out in section 117B of the 2002 Act.

23. I have been assisted by both Mr Townsend and Mr Harron. The latter helpfully provided a chronology in statement form that explained what had happened in this case.

24. The appellant could not meet the mandatory requirements of Appendix FM of the Immigration Rules both as a partner or parent. He was entitled to have his application considered under paragraph 276ADE(1)(vi) HC 396 but in order to succeed he would have had to show 'very significant obstacles to his re-integration' to Zimbabwe. The fact the appellant and his partner both have family in Zimbabwe suggests this threshold would not be met.

25. The appellant's appeal fell to be determined outside the Immigration Rules under article 8 ECHR applying to the test set out in Razgar [2004] UKHL 00027. I accept this is a case to consider outside the Rules because of the history of the case.

26. The appellant and his partner are Zimbabwean nationals and they have a three-year old child who was born here. The child is not a qualifying child for the purposes of Appendix FM or Section 117B(6) of the 2002 Act but in considering the appellant's case I start from the position that the best interests of their child is a primary consideration and at paragraph [45] of MA the Court stated -

‘... In my judgment, if the court should have regard to the conduct of the applicant and any other matters relevant to the public interest when applying the ‘unduly harsh’ concept under section 117C(5), so should it when considering the question of reasonableness under section 117B(6). I recognise that the provisions in section 117C are directed towards the particular considerations which have to be borne in mind in the case of foreign criminals, and it is true that the court placed some weight on section 117(2) which states that the more serious the offence, the greater is the interest in deportation of the prisoner. But the critical point is that section 117C(5) is in substance a free-standing provision in the same way as section 117B(6), and even so the court in *MM (Uganda)* held that wider public interest considerations must be taken into account when applying the ‘unduly harsh’ criterion. It seems to me that it must be equally so with respect to the reasonableness criterion in section 117B(6). It would not be appropriate to distinguish that decision simply because I have reservations whether it is correct. Accordingly, in line with the approach in that case, I will analyse the appeals on the basis that the Secretary of State’s submission on this point is correct and that the only significance of section 117B(6) is that where the seven year rule is satisfied, it is a factor of some weight leaning in favour of leave to remain being granted.’

27. The child cannot meet the seven-year rule envisaged in *MA* and whilst I must consider social, cultural and educational links to the United Kingdom it is clear that these will be limited due to the age of the child. Any removal of the family would be disruptive but not as disruptive if the child had been here more than seven years because the child’s focus at this time would be on the family. The court in *EV (Philippines)* provided factors to be considered when considering the best interests of a child. These include (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens. I have had regard to these factors and note the child is young and has only been here for just over three years. The child has not started formal education and as the child has never visited Zimbabwe it is difficult to say he has become distanced from it.

28. Applying the Court of appeal decision in *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874 and the Supreme Court decision in *Zoumbas v SSHD* [2013] UKSC 74 it is trite law the appellant’s child is not entitled to expect to be educated at the public expense.

29. I find that the child’s best interest is to remain with his parents but that does not require either the child or his parents to remain in this country.

30. The appellant is an adult who has been leading an independent life for a number of years. He has lived with his girlfriend since he worked and continues to live with her with his family’s financial support. The family contribute around £700 a month.

31. The appellant suffers from dyslexia but this has not prevented him obtaining work or living an independent life. He lives away from his parents and sister and whilst I accept they are emotionally connected I do not find the dependency goes as far so as to engage family life under article 8 ECHA. The fact his family have indefinite leave does not mean he is entitled to leave. His family qualified for leave as they met the Immigration Rules.

32. He came here as a 17-year-old male and his leave was extended until October 2013. Since then he has been here unlawfully. His child has been born whilst he has been here unlawfully.

33. When assessing reasonableness under article 8 I must consider the factors in Section 117B of the 2002 Act. I have done so in this assessment. I accept the appellant speaks English and he previously demonstrated an ability to obtain work. The family life with his child has been created whilst here unlawfully.

34. Having balanced all the evidence I am satisfied it would be reasonable to require the appellant to return to Zimbabwe either with or without his partner and child. Neither his partner nor his wife have any status here.”

9. Pausing there, the reference to “his wife” is clearly an intended reference to his child.

10. The claimant asked for permission to appeal to the Upper Tribunal. The grounds, while relatively brief, were replete with references to caselaw not all of which seemed to me to be wholly relevant. But the central point being made in those grounds (I paraphrase) was that the tribunal in undertaking its Article 8 assessment had failed to take proper account or any account at all of the circumstances concerning the dyslexia and some alleged incompetence on the part of previous representatives, which had led to the claimant failing to obtain indefinite leave to remain which would otherwise have been given to him.

11. On 3 April 2018 permission to appeal was granted. The salient part of the grant reads as follows:

“ 2. The application for permission to appeal asserts: fairness and proportionality have not been applied as the appellant was the only one of his family to overstay his initial leave to enter because he erroneously attached the wrong photo to what would have been an intime application and his dyslexia meant he could not pass the English test, poor representation compounding the problem as demonstrated by a Non-Disclosure Agreement (NDA) and undertaking to pay costs from his previous solicitor.

3. The proportionality assessment does not include the fact (a) that the entire family converted their leave to remain on ancestry grounds into indefinite leave with the main difference (apart from the dyslexia induced failure of the English exam) in the appellant’s case being that he was late with his form; (b) the delay may have been attributable to bad representation as evidenced by the NDA and costs undertaking. An arguable error of law thereby arises.”

12. Permission having been granted the matter was listed before the Upper Tribunal (before me) for a hearing. Directions provided for that hearing to deal with the question of whether or not the tribunal had erred in law and also provided, if appropriate, for the decision to be re-made.

13. As to error of law, Mr Mutebuka relied upon the same sort of arguments as had been advanced when permission had been sought. Mrs Pettersen, who argued that there was no error of law, pointed out that the tribunal which had decided the appeal had had very detailed information before it and that the claimant’s partner and child did not have legitimate UK immigration status.

14. In my judgment the tribunal’s decision did involve the making of an error of law. I quite appreciate that the written reasons are very clear and thorough and demonstrate a careful assessment with respect to much of the evidence which had been presented. But there were particular factors of relevance here concerning the claimant’s inability to regularise his immigration status in the way that his close family members, in particular his sister who was in a similar position and had a similar immigration history to him, had been able to. There was the problem with dyslexia and the possible consequent impairment upon his ability to pass the relevant test as well as the administrative difficulties which had caused the rejection of his application. In my judgment those were matters which had to be considered by the tribunal when it was undertaking its Article 8 assessment outside of the rules. Had the claimant not had dyslexia he might have passed the test. Had he passed the test he would have, in all probability, been granted indefinite leave to remain had had his sister and his parents. Had he passed the test when they did he would have had plenty of time to ensure his application was in order and almost certainly would not have run out of time with the consequence that he became an overstayer. Such considerations were, in my judgment, clearly of potential relevance to an article 8 assessment outside the Rules but do not find mention in the otherwise careful analysis of the tribunal which I have set out above. I indicated to the parties that, on that basis, I would set aside the tribunal’s decision but that I would, nevertheless, preserve its factual findings none of which appeared to be in dispute.

15. It was then decided to move on, without me being required to hear any evidence, to remaking.

16. As to remaking, Mr Mutebuka asserted that there was a “windrush dimension” to this case. There was evidence to show that the claimant had not been able to meet the requirements of the Immigration Rules simply because he suffers from dyslexia. That is not his fault. It had not even been known at the time he had attempted to take the test that he has dyslexia. Since coming to the UK he had been able to work and support himself. He had not wished to breach the Immigration Rules and become an overstayer. He has only limited family in Zimbabwe. It would be unduly harsh to expect him to return there. Mrs Pettersen pointed out that two immigration applications had been rejected. The first due to the photographs and the second due to the claimant having insufficient funds. The requirements of the Immigration Rules had not been met. If the claimant had thought there was a particular problem as to his ability to pass the test he could have sought and obtained his diagnosis regarding dyslexia at an earlier stage and could have then put that difficulty to the Home Office.

17. In remaking the decision I have decided to allow the claimant’s appeal against the Secretary of State’s decision of 1 December 2016. I have done so under Article 8 of the ECHR outside the Immigration Rules.

18. I am satisfied, first of all, that this is an appropriate case to consider outside of the Rules and that the consideration that there has been under the rules has not encompassed an assessment of all relevant matters.

19. There are a number of factors which weigh against the claimant. The key one, of course, is his accepted failure to meet the requirements of the Immigration Rules. He has family in the United Kingdom who have been able to regularise their status. But they are all adults and the evidence before me does not demonstrate any unusual depth or substance to the relationship which he has with them. As to his own relationship with his partner and as to the couple’s child, none of those persons are British or, at least currently, have the right to remain here under the Immigration Rules.

20. But the claimant has been in the United Kingdom since he was aged 17 years. His parents and his sister have all been granted indefinite leave to remain and, in order to obtain that grant, it was necessary for them to pass the test. There is evidence (see above) to suggest that the claimant’s attempts to pass that test himself may have been unsuccessful because of his being dyslexic, a condition previously undiagnosed. On the material before me I consider it likely that he does have dyslexia, that he did have undiagnosed dyslexia at the times he attempted to take the test, and that had he not been suffering from that then undiagnosed condition he would probably (of course I cannot be certain) have passed that test. That would have removed what appears to have been the only significant barrier to his meeting the substantive requirements for the obtaining of indefinite leave to remain. That seems to me then to be a powerful consideration with respect to his situation under Article 8 outside the Rules.

21. There is then, of course, the matter of the rejected applications. Of course, a person making such an application has to take responsibility for ensuring that formalities are complied with. But as I have already said, the claimant, had he passed his test when his family members had passed, would have had ample time to have submitted a properly compliant application. So, his failure to achieve that is, itself, linked to his dyslexia. The substantive requirements would have been met, or at least probably, but for the dyslexia and the claimant was, I find, unable to take any steps to alert the Home Office of the difficulty at that time because he had not been diagnosed and was unaware of his condition. In short it is likely that had he not been dyslexic he would now be enjoying the same

immigration status as his family members. The only obvious thing that distinguishes him from them is his disability. In my judgment those matters are of such significance not properly catered for within the article 8 related Immigration Rules which tip the balance in his favour with respect to any Article 8 proportionality assessment.

22. So, in remaking the decision, I allow the claimant's appeal.

**Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

In remaking the decision, I allow the claimant's appeal from the Secretary of State's decision of 1 December 2016.

I make no anonymity direction.

None was sought.

Signed: Date: 3 August 2018

Upper Tribunal Judge Hemingway

**TO THE RESPONDENT  
FEE AWARD**

I make no fee award.

Signed: Date: 3 August 2018

Upper Tribunal Judge Hemingway