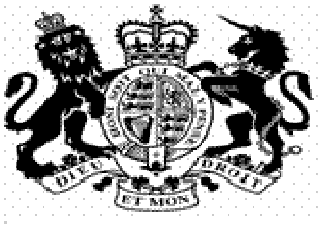

Upper Tribunal
(Immigration and Asylum Chamber)

LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 15 July 2010

Before

MR JUSTICE BLAKE, PRESIDENT
SENIOR IMMIGRATION JUDGE WARD

Between

LD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: G Ward, instructed by Howe & Co.
For the Respondent: Mr J Gulvin, Home Office Presenting Officer

1. *Consistent application of the Immigration Rules to promote the economic and social policy of the UK is a relevant factor in carrying out the balancing exercise under Article 8(2) but the weight attached to it depends on the*

context of the case, whether there was ever any claim under the rules for indefinite leave to remain, and why such claim was not accepted.

2. *In the particular circumstances of this case the weight to be attached to enforcement of immigration control was small in the light of the misdirection as to Paragraph 320 (7A), and the fact that the paragraph applies to all cases whether there is family life deserving respect or not.*

3. *The interests of minor children and their welfare are a primary consideration. A failure to treat them as such will violate Article 8(2).*

4. *Weighty reasons would be required to justify separating a parent from a lawfully settled minor child or child from a community in which he or she had grown up and lived for most of his or her life. The general situation in the relevant home country is also relevant, especially if it is known that the conditions there are dire (as they are, for example, in Zimbabwe at present).*

5. *In this particular case, no useful purpose would have been served if the appellant is required to depart the UK in order to make an entry clearance from abroad. All the issues are to be determined in this appeal rather than in the course of an investigation abroad where there would in any event be an interference.*

DETERMINATION AND REASONS

Introduction

1. This is an appeal against a decision of the Secretary of State taken on 17 December 2009 refusing the appellant refugee status and rejecting his human rights claim based upon Article 8 of the ECHR. The appellant appealed to the Asylum and Immigration Tribunal but by the time the Immigration Judge had written his determination dismissing his appeal on 28 February 2010 the AIT had disappeared and this is an appeal from the First-tier Tribunal Immigration and Asylum Chamber to the Upper Tribunal Immigration and Asylum Chamber.

2. Although the grounds of appeal took issue with the refugee aspect of the claim, asylum has not been pursued as an issue before us. SIJ Jordan granted permission to appeal on the Article 8 issue as he considered that the IJ had not made a rounded assessment of the family life claim on 1 March 2010.

3. The appellant is a national of Zimbabwe, born in 1965. He first came to the United Kingdom in October 1999 to visit his wife who arrived

here in March of that same year. His wife has been ordinarily resident with leave to remain ever since first as a student and then as a nurse and was given indefinite leave to remain in June 2009. There are three children of the marriage: Bessie, born April 1990 now aged 20; Tatenda born March 1996 and now 14 years of age, and Michelle born December 1998 now 11. They also obtained ILR at the same time as their mother.

4. The appellant has made a number of visits back to Zimbabwe since he first came to the UK. However, it appears that for the substance of the period from his arrival in the UK to date he has lived with his wife and children with immigration leave to remain to do so.

5. The appellant also applied for indefinite leave to remain but his application was refused on 17 June 2008 because he failed to disclose the existence of a number of drink driving convictions. As a consequence it was considered that his claim to remain was to be refused mandatorily applying paragraph 320 (7A) of the Immigration Rules: making use of a false representation whether or not material to the application or whether or not to the applicant's knowledge.

6. He made representations against that refusal but it was maintained on 11 September 2008 and a human rights claim to remain was rejected at the same time. That prompted his application for asylum that in turn led to the human rights appeal in the case. In the asylum interview and at the appeal the appellant explained that his failure to disclose his convictions for driving with excess alcohol was because he had thought those convictions were spent.

7. The Home Office explained its Article 8 decision in December 2009 in the following terms:

> "[59] While it is accepted that you currently have a family life in the UK, it is not accepted that your removal to Zimbabwe would interfere with your family life as it is considered that there are no insurmountable obstacles to your family returning to Zimbabwe to live with you. It is well established in the jurisprudence of the AIT and the ECtHR that Article 8 ECHR does not impose on a State any general obligation to respect the choice of residence of a married couple. In the case of Mahmood R (on Application of) v SSHD [2000] EWCA Civ 315, (8 December 2000), the Court of Appeal held that removal or exclusion of one family member form (sic) a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin and the family members excluded, even where this involves a degree of hardship…

There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience.

[60]… Furthermore in SS (Sri Lanka) [2004] UKIAT 00126 the Tribunal held that a grant of indefinite leave to remain to the partner of a claimant did not amount to an automatic insurmountable hurdle to the partner's return to the country of origin.

[61] In conclusion, for the reasons given above, it is not accepted that your family life would be interfered with by removing you to Zimbabwe. Therefore, it is not accepted that your removal would lead to a breach of Article 8 ECHR."

8. The Immigration Judge first dealt with the asylum appeal then turned to the Article 8 claim. He reminded himself of the five stages for consideration under Lord Bingham's guidance in Razgar [2004] UKHL 27 [2004] 2 AC 368 and then at paragraph [48] said this:

> "In considering this appeal I have taken account of Beoku-Betts v SSHD [2008] UKHL 39 and I accept that removal would interfere with the appellant's private and family life and the life of his family. I have little or no evidence to suggest that the appellant had any significant mental or physical health problems. Similarly I have no evidence to suggest that members of the appellant's family have any significant health problems. Whilst I have no doubt that the appellant would rather remain in the UK, I have little reason to doubt that he maintains contact with his family in the normal manner. Arrangements can be made for visits. Some members of the appellant's wife's family still live in Zimbabwe. They can no doubt assist the appellant on his return. On the evidence before me I find that the interference complained of is proportionate to the legitimate aim which is sought to be achieved. The appellant was well aware that he had no right to remain permanently in the UK but in spite of this he made no efforts to claim asylum in spite of claiming to have been in fear of returning to Zimbabwe."

9. Article 8 ECHR provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, of the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Did the IJ make an error of law?

10. Mr Gulvin helpfully and realistically conceded that both the consideration by the Home Office of the claim and the Immigration Judge were flawed and inadequate. We entirely agree. We did not need to call on Ms Ward to argue this appeal for the appellant, although we are grateful for her skeleton argument exposing the weaknesses of the IJ's assessment.

11. We turn first to the Home Office decision. It will be seen from the passages quoted above that it is entirely based upon the proposition that removal will not amount to an interference with family life. No justification for interference was attempted, although there is no doubt that it intended to remove the appellant to Zimbabwe. The Home Office concluded that this did not amount to interference of the family life he enjoyed with his wife and children in the UK because there were no 'insurmountable obstacles' to them returning to Zimbabwe.

12. This was a plain misdirection. It is somewhat unfortunate to find such a glaring error being made in a decision dating from December 2009 by which time there had been an abundance of jurisprudence making it plain that the issue whether a removal of a family member interferes with the family life of others lawfully settled here for many years is judged by whether it is reasonable to expect the other family members to relocate: see Huang [2007] UKHL 11 [2007] 2 AC 167 at [35]; AB (Jamaica) [2007] EWCA Civ 1302 at [33]; Beoku-Betts [2008] UKHL 39 at [48]; EB (Kosovo) [2008] UKHL at [41]; LM (DRC) [2008] EWCA Civ 325; AF (Jamaica) [2009] EWCA Civ [2009] 240 at [20] and [42] and many other decisions of the higher courts.

13. Whilst it is perfectly true that the ECtHR refers in Uner to the 'degree of difficulty' the spouse would face in the other country, and has in other cases made reference to 'insurmountable obstacles' those are observations generally made in the context of the overall assessment of proportionality having regard to the strength of the public interest in removal, including cases of serious offending. It is clearly established that 'insurmountable obstacles', if it has any continued relevance to the application of the Human Rights Act in immigration cases, is not a minimum requirement that has to be met before any removal becomes disproportionate; it is certainly not the test for whether a proposed removal of a spouse and father interferes with the family life of the family unit as a whole.

14. Here if the Home Office decision maker had addressed the sequential questions posed by Lord Bingham in Razgar he or she would have been bound to conclude: (i) there was an actually existing family life in the UK that deserved respect having regard to the lawful entry of the Appellant and the settled status of wife and children and (ii) removal would amount to a serious interference with that family life as it would be destroyed if the family was separated and it was not reasonable to expect the wife and children to abandon their jobs, lives, education and residence here.

15. At this point in the analysis the Tribunal must be satisfied that:

> (iii) the interference was in accordance with the law
> (iv) it was in support of a reason recognised by Article 8
> (v) it was necessary having regard to that reason and was justified as proportionate and a fair balance between the competing considerations.

The third and fourth will often not present a difficulty where a person is an over-stayer or subject to a deportation order made pursuant to s.32 of the UK Borders Act 2007. Nevertheless the Tribunal must be satisfied of these matters.

16. Usually the question is whether the respondent can justify an interference with the right to respect for family life as necessary and proportionate either to prevent crime and protect the public from harm or to maintain economic order and the rights of others by applying a consistent immigration control.

17. We now turn to the decision of the Immigration Judge on the question. He did not comment on any of the failures of the decision maker but he did accept that removal was an interference with family life. He had been given no assistance in the decision letter as to what the legitimate aim was to be served by a removal. He failed to identify the aim before going on to consider proportionality. There is a distinction between interferences designed to protect the public from harm, disorder or crime and those directed at economic well being of the country and the rights and freedoms of others, see JO (Uganda) and JT (Ivory Coast) v SSHD [2010] EWCA Civ 10. Immigration control is not a legitimate end in itself, though it is a well established means of protecting the economic well being of the country and rights of others by regulating borders in such manner as the general immigration policy of the country approved by Parliament considers fit.

18. We are grateful to Mr Gulvin who identified the aim in this case as being economic well being through the maintenance of immigration control because the Appellant did not fulfil the conditions of the Immigration Rules to entitle him to indefinite leave to remain. No argument was developed before us that by reason of a sequence of drink-driving convictions the Appellant was a danger to the community that required his removal. This is not a deportation case.

19. We pointed out to Mr Gulvin that even this part of the case would now call for re-examination in the light of the decision by the Court of Appeal in the case of A v SSHD [2010] EWCA Civ 773 delivered on 6 July 2010 where in very similar circumstances to the present the Court held that mere non-disclosure of driving convictions in the mistaken belief that they were spent did not amount to a breach of Rule 320(7A) as false representation within the meaning of that Rule is confined to deception and with it the necessary element of deliberate dishonesty. The Appellant's consistent claim, that he failed to declare his drink-drive convictions because he thought they were spent and spent convictions do not have to be declared in the form, has never been challenged by the Home Office or anyone else in the decision making process to date. The decision to refuse indefinite leave to remain did not therefore appear to be in compliance with the immigration rules and accordingly was probably not in compliance with the law regulating the justification of interferences within the meaning of Article 8(2).

20. We accept, of course, that neither the SSHD nor the Immigration Judge could have expected to have anticipated the decision of the Court of Appeal, but in legal theory the law is always speaking and the Court has merely served to declare what the rules always meant.

21. We therefore turn to consider the Immigration Judge's reasoning on the question of proportionality. We confess we find it is wholly absent. This is not a case about physical or mental illness of anybody, but whether the family life that had been enjoyed over eleven years with authority afforded to each member of the family should now be interfered with. The Immigration Judge has wholly failed to grapple with this. We find his reference to maintain contact with his family 'in the normal manner' is extraordinary. Families normally live together. Family life consists of the inter-dependent bonds between spouses or stable partners and between parents and children with particular strength being placed upon the interests and welfare of minor children. It is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision). Although the Immigration Judge has cited the case as Beoku-Betts he

appears singularly to have misunderstood the core principles to be applied in this area of the law, as exemplified by the other important House of Lords cases Huang, EB (Kosovo) and numerous decisions in the Court of Appeal noted above as well as the decision in Chikwamba [2008] UKHL 40.

22. We therefore agree with both the SIJ in granting permission to appeal and Mr Gulvin in conceding there was an error in law that the Immigration Judge's decision on this issue cannot stand. We set it aside and remake the decision for ourselves.

The relevant context

23. We observe that the context of this assessment is lawful admission to the UK by every member of the family, indefinite leave to remain having been granted to the wife and children, an expectation of such indefinite leave being granted to the Appellant in the absence of countervailing factors, and the absence of any conduct relied upon as justifying removal in the public good.

24. As Miss Ward identified in her skeleton Lord Bingham's observations in EB (Kosovo) v SSHD [2008] UKHL 41 at [12]:

> "… it will rarely be proportionate to uphold an order for removal of the spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removal spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."

25. The guidance from the European Count of Human Rights is to the same effect. In Uner v Netherlands [2006] ECHR 873 the Grand Chamber has identified the following issues (in the context of criminal offending):

> "(a) the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
> (b) whether the spouse knew about the offence at the time when he or she entered into the family relationship;
> (c) whether there are children of the marriage, and if so, their age; and
> (d) the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled."

and continued:

" The Court would wish to make explicit two criteria which may already be explicit in those identified in the Boultif judgment:

(e) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

(f) the solidity of social, cultural and family ties with the host country and with the country of destination."

26. Very weighty reasons are needed to justify separating a parent from a minor child or a child from a community in which he or she had grown up and lived for most of her life. Both principles are engaged in this case.

27. The two younger children of the appellant have lived in the UK continuously for eleven years and for most of their lives. Previously Home Office policy tended to identify seven years of residence of a child as one that would presumptively require regularisation of immigration status of child and parents in the absence of compelling countervailing factors. That was really an administrative way of giving effect to the principle of the welfare of the child as a primary consideration in such cases and when it was considered that those interests normally required regularisation of the immigration position of the family as a whole. The policy may have been withdrawn but substantial residence as a child is a strong indication the judicial assessment of what the best interests of the child requires. The UN Convention on the Rights of the Child 1989 Art 3 makes such interests a primary consideration.

28. Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases. A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law.

29. It is regrettable that neither the Home Office reasons for the Article 8 decision nor the IJ's reasons for dismissing the appeal begin to recognise any of the above. We have no doubt that removal would represent a significant violation of the Article 8(2) right of respect for the family life that the appellant continues to enjoy with each member of his immediate family.

30. In summary our conclusions are as follows:

(i) The appellant was admitted to the UK lawfully to be with his wife and children and had the reasonable expectation of being allowed to remain for this purpose while the remainder of the family was.

(ii) He applied in time for ILR for which he presumptively qualified but his failure to achieve ILR was entirely due to the application to him of a mandatory ground for refusal based on non-disclosure of a matter which might not have led to refusal on discretionary grounds if it had been disclosed.

(iv) His conduct in incurring those criminal convictions was not identified as a ground that makes his removal conducive to the public good, and it was not so relied on in the hearing before us.

(v) It would not be reasonable to expect the wife and three children to give up their respective careers and prospects as a nurse, university student and school children doing well in secondary education and relocate to Zimbabwe where even in the absence of direct physical threat to them conditions are well known to be dire.

(vi) The interests of the minor children and their welfare are a primary consideration in the balance of competing considerations in this case and their educational welfare as part of the UK education system point strongly to their continued residence here as necessary to promote those interests.

(vii) Weighty reasons would be required to justify separating a father from his spouse and children, and no strong reasons for doing so have ever been identified.

(viii) Consistent application of the immigration rules to promote the economic and social policy of the UK is a relevant factor but the weight attached to it depends on the context of the case, whether there was ever any claim under the rules for indefinite leave to remain, and why such claim was not accepted.

(viii) In the particular circumstances of this case the weight to be attached to enforcement of immigration control is small in the light of the misdirection as to Paragraph 320

(7A), and the fact that the paragraph applies to all cases whether there is family life deserving respect or not .

(ix) No useful purpose would have been served if the SSHD had required the Appellant to depart the UK in order to make an entry clearance from abroad. All the issues are to be determined in this appeal rather than in the course of an investigation abroad where there would in any event be an interference.

31. This appeal is allowed.

Signed

Mr Justice Blake,
President of the Upper Tribunal,
Immigration and Asylum Chamber