



the Appellant applied for leave to remain on the basis of his relationship with his partner, Y M, and his children, twins born on [ ] 2015. That application was refused for the reasons given in the Respondent's Refusal Letter dated 30<sup>th</sup> December 2015. The Appellant appealed, and his appeal was heard by Judge of the First-tier Tribunal Parkes (the Judge) sitting at Birmingham on 27<sup>th</sup> January 2017. The Judge dismissed the appeal for the reasons given in his Decision dated 15<sup>th</sup> February 2017. The Appellant sought leave to appeal that decision, and on 29<sup>th</sup> August 2017 such permission was granted.

2. The Judge dismissed the appeal under the provisions of Appendix FM of HC 395 and Article 8 ECHR because although he found the marriage between the Appellant and his wife to be genuine and subsisting, the decision of the Respondent was proportionate even taking into account the best interests of the children because the Appellant could return to Zimbabwe and make an application for entry clearance from there which would probably be successful and therefore would not lead to a lengthy separation between the Appellant and his family.
3. At the hearing before me, Mr Mitchell argued that the Judge had erred in law in coming to this conclusion. He referred to his Skeleton Argument and argued inter alia that the Judge had failed to take account of the decision in **Chikwamba [2008] UKHL 40** as explained in **Hayat [2011] UKUT 444**. It appeared from the Decision that preventing the Appellant from circumventing the Immigration Rules by requiring him to seek entry clearance as a spouse from Zimbabwe was the main, if not sole, reason given by the Judge for finding the Respondent's decision proportionate.
4. In response, Mrs Aboni referred to the Rule 24 response and submitted that there was no such error of law. The Judge directed himself appropriately and gave sufficient reasons for his decision. He considered all the relevant issues and made findings open to him on the evidence before him. He found that the Appellant had deliberately chosen to circumvent the Immigration Rules and that therefore the Respondent's decision was proportionate because, as the Judge found at paragraph 16 of the Decision, any application made by the Appellant for entry clearance in Zimbabwe would take no more than 30 days to resolve.
5. I find a material error of law in the decision of the Judge which I therefore set aside. The decision in **Hayat** reads as follows:
 

“23. The significance of **Chikwamba**, however, is to make plain that where the only matter weighing on the Respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance”.
6. In his Decision, the Judge made no reference to the decisions in **Chikwamba** and **Hayat**, and evidently did not take them into account

when reaching his conclusion. This amounts to a material error of law because, as Mr Mitchell argued, the Judge's main reason for dismissing the appeal and finding the decision of the Respondent proportionate was that there would only be a brief separation between the Appellant and his family whilst the Appellant sought entry clearance in Zimbabwe. There were factors in favour of the Appellant identified by the Judge in his Decision such as the best interests of the twins and if the Judge had taken into account the principle set out in **Chikwamba** he may well have come to a different decision.

7. For these reasons I find a material error of law in the decision of the Judge which I therefore set aside. I did not proceed to re-make the decision in the appeal but instead remitted the appeal to the First-tier Tribunal for that decision to be re-made there. This is in accordance with paragraph 7.2(b) of the Practice Statements as further judicial fact-finding is necessary for a full consideration of proportionality.

### **Notice of Decision**

8. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside that decision.

The decision in the appeal will be re-made in the First-tier Tribunal.

### **Anonymity**

9. The First-tier Tribunal made an order for anonymity which I continue for the same reasons as given by the First-tier Tribunal.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 24th November 2017

Deputy Upper Tribunal Judge Renton