



IAC-FH-CK-V1

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

Appeal Numbers: VA/00259/2014
VA/00254/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28 July 2015**

**Decision & Reasons Promulgated
On 3 August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MRS ELIZABETH MUCHABAIWA - FIRST CLAIMANT
MR ELIAS MUCHABAIWA - SECOND CLAIMANT
(ANONYMITY DIRECTION NOT MADE)**

Claimants

Representation:

For the Appellant: Mr L Tarlow (Home Office Presenting Officer)

For the Respondents: Ms T Kyakwita (Legal Representative, Immigration
Advice Service (Hounslow))

DECISION AND REASONS

1. This matter comes before me as an error of law hearing. The first Claimant, whose date of birth is 26 April 1947, is a citizen of Zimbabwe. The second Claimant, whose date of birth is 1 December 1943, is also a citizen of Zimbabwe.
2. The Claimants appealed the refusal made by the Entry Clearance Officer (Pretoria) of their application for entry clearance as family members to

visit their adult children in the UK. The First-tier Tribunal (Judge Beach) allowed the appeals on human rights grounds in a Decision and Reasons promulgated on 24 February 2015.

First-tier Tribunal Decision

3. The Tribunal considered the restricted grounds limited to human rights in accordance with Section 84(1)(b) & (c) Nationality, Immigration and Asylum Act [17]. The Tribunal found no family life as between the Claimants and their sponsors all of who were adults [19]. The Tribunal found that there was an interference with private life as the decision effectively denied the Claimants the opportunity to see each other face to face and further concluded that the decision was not proportionate given that the cost of travel to a third country was prohibitive and that two family members residing in the UK were unable to visit Zimbabwe because they were refugees [21].

Grounds of Application

4. The Secretary of State contended that the First-tier Tribunal failed to apply Section 84(1)(b) and (c) of the Nationality, Immigration and Asylum Act 2002.
5. Ground 2 argued that the First-tier Tribunal erred by finding there was private life and further that there was an interference with private life. The Tribunal failed to take into account relevant law (**EM (Lebanon) v SSHD [2008] UKHL 64**), that consideration is to be given to existing as opposed to future private life.
6. Ground 3 argued that the First-tier Tribunal's assessment of proportionality was inadequate; it failed to explain why refusal of the visa was a disproportionate interference.

Permission to Appeal

7. Permission was granted by First-tier Tribunal Judge Simpson on 28 April 2015 on the grounds that the FtT failed to explain why there would be an interference with private life and failed to consider that contact could be maintained in a third country.

Error of Law Hearing

8. At the hearing I heard submissions from both representatives. Mr Tarlow submitted that the private life finding was incorrect in light of **EM (Lebanon)** (cited above). Members of the family could make contact using modern methods of communication such as Skype. The Tribunal had used private life as an alternative basis to family life which was an incorrect approach in law.
9. Ms Kyakwita submitted that the Tribunal considered all of the evidence including oral evidence from the sponsors and placed weight on the fact that two of the UK family members were refugees who could not travel to Zimbabwe. Costs were a relevant consideration as it would be prohibitive

to pay for the air tickets for all family members to travel to South Africa. The Tribunal had taken into account the extent to which the Claimants failed to meet the Immigration Rules and found evidence to show that they were genuine visitors.

10. At the end of the hearing I reserved my decision, which I now give with my reasons.

Discussion and Decision

11. I can find no basis for the criticism that the Tribunal failed to deal with the appeal with reference to the restricted right of appeal under Section 84. Although the statutory provision was not set out in the decision, reference is made to the scope of the appeal at [17]. The Tribunal then went on to consider whether or not there was family life and concluded that given that there was no dependency above and beyond the normal family ties as between adults, there was no family life. However, the Tribunal went on to consider private life which was found to exist in the context that contact between family members existed and the decision denied all family members the opportunity to see each other face to face.
12. I am satisfied that there was no error by the Tribunal in terms of the consideration of private and family life. In **NN (South Africa) & Anor v SSHD [2013] EWCA Civ 653** the Court of Appeal considered whether or not family life is established is a question of fact in each case and whether or not it is appropriate to focus on family life rather than private life, but in practice the factors to be examined in order to assess the proportionality of the removal are the same regardless of whether private or family life is engaged. This is also consistent with the Tribunal's approach in **Shamin Box [2002] UKIAT 02212** in which it was considered that Article 8 also required the Secretary of State to focus on the positive obligations on the UK to facilitate family reunion, and in conducting the balancing exercise the need to consider other ways or possibilities to enjoy family life elsewhere. The decisive issue was whether it could reasonably be enjoyed elsewhere. Furthermore the Tribunal considered that part of private life was not simply to look at the existing circumstances but also not to inhibit family life in future.
13. I now consider ground 3 as regards the assessment of proportionality and the contention that the Tribunal failed to explain why the refusal of the visa was disproportionate. I am satisfied that the Tribunal did not adequately explain why, given that the Claimants and their sponsors maintained contact on a regular basis via WhatsApp and telephone, the decision amounted to an interference with their private lives. Furthermore in considering proportionality the Tribunal considered alternative ways of maintaining family and private life the Tribunal and placed weight on the costs of flights and travel to a third country. Whilst accepting that two of the family members are unable to travel to Zimbabwe because they are refugees, nevertheless there was no other reason given aside for cost to prevent them from travelling to a third country in order to visit the Claimants there. This is an error of law.

14. Furthermore I am satisfied that the Tribunal erred at [21] in concluding that the decision made by the respondent was not in accordance with the law. The Tribunal focused on decision taken under the Immigration Rules and concluded that that decision was wrong in law having made findings to the contrary. It is beyond the scope of the hearing of a restricted right of appeal for the Tribunal to reconsider the substantive decision, but the Tribunal can consider the extent to which the application is refused as relevant to the proportionality assessment.

Decision re error of law

15. The decision discloses material errors of law. I set aside the decision and remake the decision with reference to the evidence that was before the First-tier Tribunal.

Remaking the decision

16. There was no evidence before the First-tier Tribunal to show that there was dependency above and beyond the normal family ties between the Claimants and the sponsors who are adults. The issues incorporate both family and private life matters and in the context of family visits Article 8 rights must be viewed in that context. I am satisfied that private and family life can constitute an obligation not to inhibit family life in the future. This must be relevant to the appeal where the Claimants have been separated for some twelve years because of the politically unstable situation in Zimbabwe. However, whilst accepting that communication by modern means such as Skype and telephone is an unrealistic and limited form of communication, I am nevertheless satisfied that there are other possibilities for family members to meet each other, for example in a third country. There are no insurmountable obstacles to family/private life reasonably being enjoyed elsewhere notwithstanding the high cost. Whilst therefore concluding that family/private life is engaged I am not satisfied that the decision amounts to an interference with the Article 8 right as contact can be continued and members of the family in the UK can visit the parties in Zimbabwe and those who have refugee status are able to visit the family in another country.

Notice of Decision

17. I dismiss the appeal on human rights grounds.

No anonymity direction is made.

Signed

Date 30.7.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 30.7.2015

Deputy Upper Tribunal Judge G A Black