



IAC-FH-NL-V1

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

Appeal Numbers: IA/17895/2013  
IA/17896/2013  
IA/17897/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 22<sup>nd</sup> October 2014**

**Determination**

**Promulgated**

**On 30<sup>th</sup> October 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE J G MACDONALD**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**KENNETH BOWAZI  
TIONE DORA BOWAZI  
TADALA CHISOMO BOWAZI**

Respondents

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondents: Mr P Corben, Counsel instructed by Kolia Solicitors

**DECISION AND REASONS**

1. The Appellants (noted above as the Respondents) are citizens of Malawi whose appeal under the Immigration Rules was allowed by First-tier Tribunal Judge Flynn in a determination promulgated on 15<sup>th</sup> July 2014. The Secretary of State lodged grounds of application stating that the judge

had been wrong to rely on the Upper Tribunal decision of **Ejifugha (Tier 4 - funds - credit) Nigeria [2011] UKUT 00244** as this referred to whether or not funds were “available” whereas the test under Tier 2 was whether the funds were under “his own control”. In terms of the previous determination that was merely a starting point and the judge was therefore wrong to rely on **Chomanga (binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)**. Furthermore the judge had erred in accepting original documents. Finally the funds available fell below the required limits.

2. For the Secretary of State, Mr Whitwell relied on the grounds. There was a marked difference on whether funds were available or under one’s own control. The judge was not bound by a factual finding of Judge Flynn that the potential money under the Master Card could be taken into account as this was a matter of law.
3. For the Appellants the fundamental submission from Mr Corben was that Judge Finch had dealt with all the material issues (except Article 8). Those findings were binding on the Secretary of State unless she had elected to appeal that decision which she had not done. Accordingly, it mattered little what Judge Flynn said since he was also bound by the previous findings and he had been correct to allow the appeal of each Appellant under the Immigration Rules. For that proposition reliance was placed on **Chomanga** and with reference to what was said in the Court of Appeal in **SSH D v TB (Jamaica) [2008] EWCA 977**. In that case Stanley Burnton LJ had summarised issues of principle by saying “*it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decisions. If she could do so, the statutory appeal system would be undermined.*”
4. Judge Finch had dealt with all the material issues by concluding that the Respondent’s decisions were not in accordance with the law. She had allowed the appeal on that basis and presumed that the Respondent would now reconsider the application and grant further leave to remain.
5. The Secretary of State had not appealed that decision. Far from following what Judge Finch had said the Secretary of State had issued a fresh decision dated 23<sup>rd</sup> April 2013. Judge Flynn had been correct to say that because the Respondent had failed to appeal the judge’s decision she was not entitled to differ from one of the findings made by the judge (paragraph 32). In the event that I was against him in his primary submission Mr Corben made further detailed observations based mainly on the proposition that having funds “available” is essentially the same as having funds under one’s “control”. I do not record the submissions here as it is not necessary to do so.
6. I reserved my decision.

## **Conclusions**

7. I have come to the view that Mr Corben's primary submission is correct. Judge Finch made a number of findings in her determination which, if the Secretary of State was unhappy with, she could then have lodged grounds of application contending that the decision was wrong.
8. The Secretary of State did not do that. Rather she issued a fresh decision refusing the application on various grounds which the Appellant then appealed to Judge Flynn who, essentially, reverted to the decision made by Judge Finch.
9. The question before me is whether the Secretary of State is entitled to go behind the findings of Judge Finch in the manner she has, namely by not appealing that decision but by making a fresh decision.
10. The answer to that question seems quite clearly to me to be no - the approach of the Secretary of State is impermissible in law. The reasons are obvious enough and as set out in **Chomanga**. As was said in **TB (Jamaica)** the principle that the decision of the Tribunal is binding on the parties and in particular on the Home Secretary, has been "*consistently upheld by the courts*". It was said there that the Secretary of State cannot deliberately delay giving effect to the ruling in that hope that something might turn up to justify not implementing it.
11. There might be exceptions to this Rule but it was not suggested they apply in this case.
12. Accordingly, what we have is a clear decision of Judge Finch who decided that the Secretary of State had not followed her own policy and allowed the appeal on the basis that the Respondent would reconsider the application and "grant further leave to remain in accordance with the Immigration Rules".
13. Unless the Secretary of State appealed that decision that was what she was bound to do. She did not appeal the decision and is now barred from opening up arguments which might well have arisen had she elected to appeal Judge Finch's determination.
14. In essence Judge Flynn did no more than make similar findings to Judge Finch which in law he was bound to do. There is therefore no error of law in his determination which must stand.

### **Decision**

15. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
16. I do not set aside the decision.

Signed

Date: **22<sup>nd</sup> October 2014**

Deputy Upper Tribunal Judge J G Macdonald