



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

Appeal Numbers: OA/07071/2013  
OA/07072/2013

**THE IMMIGRATION ACTS**

**Heard at Manchester**

**On 14<sup>th</sup> May 2014**

**Determination**

**Promulgated**

**On 1<sup>st</sup> August 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS**

**Between**

**MISS MELANIA SHINGA MURENGA (FIRST APPELLANT)  
MR ADRIAN TAPUWA MURENGA (SECOND APPELLANT)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Schwenk, Counsel

For the Respondent: Mr A McVeety, Home Office Presenting Officer

**DECISION AND DIRECTIONS**

1. The Appellants are nationals of Zimbabwe, the first Appellant having been born on 12<sup>th</sup> April 1990 and the second Appellant, who is the younger brother of the first Appellant being born on 15<sup>th</sup> December 1994. The first

Appellant had applied for entry clearance as an adult dependant relative under Appendix FM of the Immigration Rules. The second Appellant had applied under paragraph 352D of the Immigration Rules. Entry clearance was refused for both Appellants and they appealed. The appeals came before First-tier Tribunal Judge Devlin sitting in Manchester on 13<sup>th</sup> November 2013. In a determination promulgated on 17<sup>th</sup> December 2013 both appeals were dismissed under the Immigration Rules and on human rights grounds.

2. Grounds of Appeal were lodged on 4<sup>th</sup> February 2014. On 20<sup>th</sup> February 2014 First-tier Tribunal Judge Bird granted permission to appeal. Judge Bird noted that the ground alleged that the judge made an arguable error of law in finding that at the date of decision the second Appellant was over 17. And that the judge wrongly decided that the second Appellant did not meet the requirement of paragraph 352D(ii) as at the date of decision and cannot be heard to argue that he would have done so had his application been decided before 15<sup>th</sup> December 2015. The Appellants allege that the judge in considering the second Appellant's age at the date of decision had made an arguable error of law in that he had failed to take into account the fact that what was relevant was the Appellant's age at the date of application. This was in accordance with the Respondent's own policy and directions given to Entry Clearance Officers in the IDIs published in July 2011 in particular Section 5A in Chapter 8. In granting permission the judge therefore found that it was arguable that in considering the second Appellant's age as at the date of decision the judge made an arguable error of law in the assessment of the Appellants' appeal as the second Appellant's age had to be assessed as at the date of application and the relevant Rule was paragraph 352D(ii).
3. Further the Appellants alleged the judge's approach in relation to Article 8 under the Human Rights Convention failed to properly take into account family life that existed between the Appellants and the Sponsor. Reference was made to the decision of the Upper Tribunal in *Ghising [2012] UKUT 160*. The judge in considering Article 8 quite clearly considered Article 8 in relation to adult dependant children as the judge had misled himself in relation to the applicable age of the second Appellant consequently an arguable error of law arose in the overall assessment of Article 8.
4. I am greatly assisted in this matter by Mr McVeety conceding there is a material error of law in the decision of the First-tier Tribunal Judge. Both Mr McVeety and Mr Schwenk acknowledge that the judge got the dates wrong and that the date of application of the second Appellant was under 18 and this affects the Article 8 consideration. Both legal representatives are of the view that the matter will have to be reheard afresh and that the correct approach is to remit it to the First-tier Tribunal. Having heard their submissions on this I agree. Directions are attached.

## **The Law**

5. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
6. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

### **Decision and Directions**

7. The decision of the First-tier Tribunal contains a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be heard afresh before any First-tier Tribunal Judge other than Immigration Judge Devlin on the first available date 28 days hence. None of the findings of fact stand. E.L.H. 3 hours.
8. If an interpreter is required the Appellant's solicitors must notify the Tribunal at least seven days pre-hearing.

Signed

Date

Deputy Upper Tribunal Judge D N Harris