IAC-FH-AR

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/47236/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
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| **On 4 June 2015** | **On 6 August 2015** |
| **Prepared 6 June 2015** | |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**
**DEPUTY UPPER TRIBUNAL JUDGE PROFESSOR N M HILL QC**

**Between**

**ADAM HASSAM LEHER**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**
For the Appellant: Mr S Leher
For the Respondent: Mr T Melvin, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Zimbabwe, date of birth 14 September 1944, appealed a decision of the Respondent, dated 25 October 2014, to refuse to vary leave to remain and to make removal directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. On 6 March 2015 I found that the judge who dealt with this matter previously had made errors of law so that the Original Tribunal decision

could not stand. Accordingly I decided that the decision would have to be remade in relation to the considerations of Article 8 of the ECHR. The balance of the Original Tribunal's decision stands in relation to the Appellant's appeal being dismissed under the Immigration Rules. The judge made no specific finding in relation to the removal directions but it was to be inferred that he had decided that the removal directions should stand.

3. We have therefore considered this matter both as to Article 8 ECHR and in connection with the removal directions.

## Background

4. The Appellant with his wife first entered the United Kingdom in May 2008, as the dependent spouse of his wife, having being granted leave to enter the United Kingdom on ancestry grounds. The Appellant was granted leave to remain until 29 April 2013. In advance of their arrival in the United Kingdom the Appellant's son, Seth Karl Leher, had entered the United Kingdom in December 2002 under ancestry provisions from his mother. Eventually after extensions of his residence permit he was granted indefinite leave to remain, and a British passport was issued to him in December 2012.

5. The Appellant's daughter, Lain Daria Leher, came to the United Kingdom in 2007, and qualified for entry on the basis of her being the daughter of a British citizen (her mother) under an ancestry visa.

6. The Appellant's wife fell ill and died of cancer in May 2011. The Appellant was unaware of the potential consequences of that matter until his application for further leave to remain was refused on the basis that the Appellant did not meet the requirements of the Immigration Rules paragraph 287 because he had been granted an initial period exceeding 27 months. The application was considered under Appendix FM of the Immigration Rules which could not be met because the Appellant's spouse was deceased and because the Appellant's children Seth and Lain were both over the age of 18 years. It was said that the Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules HC 395 as amended. No exercise of discretion was carried out outside of the Rules.

7. The evidence of the Appellant, his son and daughter were contained in witness statements previously before the original judge. Further reasons were added by Mr Seth Leher in the grounds of appeal which he settled. In short he indicated that he did not think that the Appellant, over 70 years of age, would be in a position to find reasonable and remunerative employment, he and his sister did not have extra income to support their father in Zimbabwe were he to return nor did the Appellant have savings or a home to return to, all those matters having been resolved when he and his wife left in 2009 to settle in the UK.

8. It was unchallenged that the Appellant's relatives were in the United Kingdom and that there was no one in Zimbabwe for the Appellant to return to. It was claimed the Appellant would be unable to care for himself or survive in Zimbabwe on his own. Mr Melvin did accept his return would be hard for the Appellant. It was also clear that the Appellant's sister-in-law and husband along with close friends all lived in the UK. The Appellant's nieces and nephews all live in the United Kingdom and the rest of his family is here. Reliance was placed upon the fact that the Appellant's children had occasionally sent money to their father in Zimbabwe but that they would not be able to send meaningful quantities of funds to support the Appellant to survive there. It was also identified that communication, email contact and the like is very poor and while phone costs are high, communications because of the lack of consistent electricity supply are very difficult. It was argued that the Appellant would not survive on his own with no friends and family to provide the physical and emotional support he needed. Reliance was placed upon the fact that the Appellant's health would inevitably with the passage of time decline and at the hearing the Appellant alluded to previously undisclosed health conditions which he had avoided speaking of in order to avoid upset to his son and daughter.

9. There were made, but it seemed to us of no particular moment, general comments upon the poverty to be found in Zimbabwe, the uncertain economy, the nature of the government and the conduct of people within it. Essentially what was said was that the Appellant, over 70, has no real prospect of finding work, has nowhere to live, no money, no support in Zimbabwe and with no entitlement to any state support or benefits network.

10. The evidence given at the hearing by the Appellant and Seth Leher was to similar effect, but simply highlighting the impoverished state of the Zimbabwean economy and the circumstances to which he would return. In addition the Appellant spoke movingly of the impact on his life of the loss of his wife in the United Kingdom and the important part both his son and daughter had played in enabling him to get back on his feet and keeping him there.

11. The Appellant currently lived in Redditch and his son a few miles away in Bromsgrove while his daughter lived in London. She visited her father on a regular basis, as well as did his son on a weekly basis.

12. It was clear to us that the Appellant lived for the contact with his children. Seth Leher is married: He and his wife plan to start a family in the United Kingdom and he wished his father to be a part of that life. Similarly his daughter had made her home in the UK and planned to remain here.

13. As Mr Melvin pointed out, the Appellant, as a matter of fact, lived in separate accommodation from his son and daughter. We find that they do have regular contact and if the Appellant needed help his son was close by. If he cannot manage any longer on his own he would be

accommodated by his son. Whatever the green fee charges are at Redditch Golf Club it is not suggested that either the Appellant or his son has such wealth and means to be full members of that particular golf club or that the green fees saved would enable the Appellant to live in Zimbabwe.

14. Whilst the Respondent, by Mr Melvin's submissions, did not accept that the Appellant has lost all contact with other family members or friends "given that he spent the first 63 years of his life living in Zimbabwe" it was not put to the Appellant that there are such persons who would take on, accommodate or maintain the Appellant there. If there were any material friends who could assist they would certainly be of the similar age to the Appellant but the cross-examination by Mr Melvin did not establish the same. Ultimately Mr Melvin's submission was that the evidence did not show ties going beyond normal emotional ties between an adult and his children.

15. We take into account that the leave to remain granted until 29 April 2013 could not be renewed because of the death of his wife. In the circumstance, on the expiry of leave to remain, his status in the UK necessarily became precarious. We apply the case of AM (S.117B) [2015] UKUT 260 (IAC). In this case the provisions in the Immigration Rules which the Appellant could not meet because of the death of his wife, the age of his children bears on whether or not the Article 8 objectives are being addressed. In this case there is no clue as to why discretion was not exercised outside of the Rules or if any balance had been struck between the relevant considerations, the public interest and the consequences of non compliance with the Rules. Such an assessment is extremely difficult to make when the Secretary of State gives no insight into that matter.

16. In assessing this matter we fully consider the provisions of Sections 117A, 117B and 117C of the Immigration Act 2014 amending the NIAA 2002. Thus, as we have indicated, we accept that the Appellant's status was precarious but it was not precarious when the Appellant came with his wife to the United Kingdom and, had she not died, leave to remain would likely have been granted and he would have remained here with his family.

17. Before us there was no challenge to the role the children play in supporting the Appellant. The significance of that role has been highlighted by the circumstances surrounding the death of the Appellant's wife and its consequences for the Appellant in terms of his mental health and ability to manage his life: In which the children played a significant part rebuilding. Significantly there was no challenge to the Appellant's description of the importance of the part his children still play in what might be described as the Appellant's will to live. We find that it was a fact specific consideration as to whether the ties between the Appellant and his children were anything more than the normal parental and emotional ties. We look for exceptional or compelling circumstances which are not significantly recognised under the Immigration Rules to consideration of Article 8 ECHR issues.

18. We have considered the case of SS (Congo) [2015] EWCA Civ 387. It was clear that not every case requires exceptional circumstances to prevent removal. SS (Congo) identified the differences between leave to enter and the grant of leave to remain [41]. At [44] the Court of Appeal stated

> "The proper approach should always be to identify, first, the substantive content of the relevant Immigration Rules, both to see if an applicant for LTR ... satisfies the conditions laid down in those Rules (so as to be entitled to LTR ... within the Rules) and to assess the force of the public interest given expression in those Rules (which will be relevant to the balancing exercise under Article 8, in deciding whether LTR ... which should be granted outside the substantive provisions set out in the Rules). Secondly, if an applicant does not satisfy the requirements in the substantive part of the Rules, they may seek to maintain a claim or grant of LTR ... outside the substantive provisions of the Rules pursuant to Article 8, then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment of whether refusal or grant LTR, as the case may be, is disproportionate and hence unlawful by virtue of Section 6(1) of the HRA read with Article 8."

At [D51 – 53] the Court of Appeal also considered circumstances where compelling circumstances may be required.

19. We find that the circumstances in which the Appellant found himself were not only completely unexpected in terms of the death of his wife but also set in the context that there was every expectation they would live out their years in the United Kingdom. We did not think the rules make sufficient provision to deal with the Appellant's circumstances and the effect of the unexpected death of his wife. It was clear that they sold up and left Zimbabwe behind to join their children in the United Kingdom where it was plainly planned a new life would be made. Given the status of the Appellant's children and his wife in immigration terms, this was not the kind of case under Article 8 where the presence of the Appellant in the United Kingdom was initially unlawful and, as Mr Melvin argued, it may be that with the death of the Appellant's wife, leave to remain "effectively expired on her death". We accept the Appellant and his son's evidence that they simply did not realise that effect or consequence of her death.

20. We give full and significant weight to the public interest in maintaining immigration controls in the assessment of Article 8 claims and the assessment of proportionality. We find that matter is tempered by the weight to be given to both the impact of removal upon the Appellant and the evident upset it would cause to his children combined with the personal hardship and circumstances that he would face on his own and on return to Zimbabwe. We note that there is no state support, no comprehensive social security system to which the Appellant would have recourse, nor is it suggested that he could have recourse to such on a

return to Zimbabwe. We understand there was some public assistance programme which required evidence that claimants are unable to find family support or due to the market economy. We accept the unchallenged evidence that the Appellant's son and daughter could not financially support him in Zimbabwe. We find it was material to the public interest that it was undesirable for close relations of British nationals or those with indefinite leave to remain to be expected to tolerate their only parent being required to return and live in what, we find, in all likelihood would be destitution in Zimbabwe. We conclude that a relevant element of the public interest included matters of common humanity in how a person is treated.

21. In these circumstances we find that this was one of those very few cases where the public interest was outweighed by the personal circumstances of the Appellant and his children. We readily appreciate that the Secretary of State wishes to maintain a high threshold so as to prevent proportionality and Article 8 being misused. However, for the reasons given, we also take into account his good English language skills and his will to occupy himself so far as he can, for as long as he can, in work. We take into account that the Appellant's children are in work with prospects of it and being good, well paid employment, have their homes and roots in the United Kingdom now. They are able to accommodate the Appellant in the UK if need be. Accordingly, we find the Respondent's decision was disproportionate.

**NOTICE OF DECISION**

22. The appeal is allowed on Article 8 ECHR grounds.

23. It follows the appeal against removal directions is allowed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Davey

**TO THE RESPONDENT**
**FEE AWARD**

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award but decided to make no fee award for the following reason. It was later evidence which showed removal was disproportionate.

Signed Date

Deputy Upper Tribunal Judge Davey