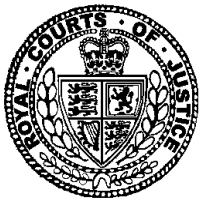

Neutral Citation Number: [2018] EWCA Civ 2848
Case No: C5/2016/4013/AITRF, 4013(D)/FCS, 4013(B)/FC3, 4013(C)/FC3

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Hanson
DA/01738/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2018

Before:

LORD JUSTICE IRWIN
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE HADDON-CAVE

- -

Between:

VALENTINE HARVERYE	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Stephanie Harrison QC and Lucy Mair (instructed by **Paragon Law**) for the **Appellant**
Julie Anderson (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 27 November 2018

- -

Judgment Approved

Lord Justice Irwin:

Introduction

1. In this case the Appellant challenges the decision of UTJ Hanson given on 26 August 2016, allowing the appeal of the Secretary of State from the decision of the First-tier Tribunal of 3 March 2015, with the effect of upholding the Order for the Appellant's deportation to Zimbabwe made on 21 August 2014. The background and procedural history are important for the substance of this appeal.

2. The essential point in issue is whether, on the facts of this case, a second decision to deport might properly be made; where the Appellant was a foreign criminal as defined by section 32(1) of the UK Borders Act 2007 ("the 2007 Act") in respect of whom the Respondent had an obligation to make a deportation under section 32(5) of the 2007 Act, but where an exception under section 33 of the 2007 Act had been established in an earlier appeal. In such circumstances, is there a requirement for a material change in circumstances before a second decision may be taken? Was there such a material change here?

Background Facts

3. The facts of this case were well summarised by UTJ Hanson in his first determination of 17 July 2013, recited once more in his second determination of 26 August 2016:

> "5. Mr Harverye is a citizen of Zimbabwe who was born on the 22nd April 1991. He is of mixed race as are his mother and father. He arrived in the United Kingdom on the 18th November 1998 as the dependant of his mother who had married a British citizen. He was granted Indefinite Leave to Remain on 29th January 2001 although an application for naturalisation was refused on the 31st May 2007 as a result of his personal conduct.
>
> 6. Mr Harverye has a criminal record which shows two offences against the person between 2008-2009, three theft and kindred offences between 2005 and 2008, one offence relating to the police/courts/prisons in 2009 and six miscellaneous offences between 2008-2009. He received his first reprimand/caution in 2004 for common assault. Details of those convictions are as follows:
>
> …
>
> 8th June 2009 — Nottingham Crown Court – Causing grievous bodily harm. Offence committed on bail. Sixty-six months detention in a Young Offenders Institution.
>
> 7. It is as a result of the last offence, for which he received a five and a half year prison sentence that Mr Harverye was made

the subject of a deportation order pursuant to UK Borders Act 2007. It was his appeal against the making of the automatic deportation order which was considered by the First-tier Tribunal.

8. The sentencing judge, HHJ Bennett, sitting at the Nottingham Crown Court noted that Mr Harverye was not of good character and his guilty plea but in relation to the offence stated:

> "What you actually did, if you analyse it, in her own home, is you attacked [the victim]; you abused her, you mutilated her, you intimidated her and you humiliated her. All that over a long period of time. So although I am quite satisfied, as I have said to your counsel, you did not go there with the intention of carrying out this kind of attack, the fact is when you saw the opportunity after opportunity after opportunity you took it.
>
> Twice you poured boiling water over her. One has only to look at the photographs to realise the extent of that and the consequence is she is scarred for life and had to undergo surgery. She will never get back what she had before you did that to her, so far as her body is concerned never mind the psychological damage. You used a melted plastic bottle and stuck it in her neck. That is absolutely awful. Then as if that was not bad enough, you humiliated her by trying to her to strip and dance in front of the group when she was injured in this terrible way and warned her not to go to the police and threatened her.
>
> That is a list, I am afraid, of extremely aggravating factors.
>
> The result is that if you had been convicted for doing that at the hands of a jury I would undoubtedly have given you 9 years in a Young Offenders Institute. As it is, with mitigation, I shall give you 5 ½. So you get your full discount and six months off the balance of the mitigating features….. I can pass no less for something as horrific as this."

9. Mr Harverye has admitted he was a drug dealer.

10. As a result of his conviction Mr Harverye was excluded from the protection of the Refugee Convention and it was found he had failed to rebut the presumption that he constituted a danger to the community. The finding of the First-tier Tribunal in this regard was not challenged on appeal." (Determination 2013)

4. The first decision to deport was served on 5 October 2011. The Appellant successfully appealed this decision to the First-tier Tribunal, who upheld his claim under Article 3 of the European Court of Human Rights, in a determination of 22 February 2012 ["F-tT1"]. This was appealed by the Respondent to the Upper Tribunal (Immigration Appeals Chamber), resulting in the First Determination of UTJ Hanson ["UT1"].

5. In that decision, the Upper Tribunal rejected many of the arguments advanced by the Appellant. There was no issue that the Appellant was a "foreign criminal" and therefore no issue that the obligation to deport arose, unless a statutory exception precluded deportation. Then and thereafter, the case has concerned the application of an exception, based on the existence or otherwise of an Article 3 risk to the Appellant. The Upper Tribunal relied on the Country Guidance given in *EM and Others (Returnees) Zimbabwe* CG [2011] UKUT 98 (IAC), as refined by the Supreme Court decision in *RT (Zimbabwe)* [2012] UKSC 38, and on the guidance in *CM Zimbabwe CG* [2013] UKUT 59. UTJ Hanson rejected the claim that the Appellant would face an Article 3 risk on return at the airport, rejected the claim that the Appellant would be returned to Zimbabwe destitute, rejected any Article 8 claim based on either family life or private life, and rejected a claim that the Appellant would be stateless. However, he concluded that, because of the particular situation prevalent at the time, the Appellant would have to remain in Harare, and therefore concluded that an Article 3 risk was established.

6. The express basis of that decision is of importance. Judge Hanson emphasised that the Appellant had no political profile. However, he concluded that the Appellant would, at that time, likely be unable to move to Bulawayo, or to Matabeleland, where there were such family connections as he had. He would likely be constrained to remain in Harare and, although he would not be destitute, his limited means would be likely to require him to live in a cheaper "high density" area of Harare. Judge Hanson analysed the consequences of this as follows:

> "55. It is likely that his limited resources will require him to seek lodgings in a high density area where housing is cheaper but such areas in Harare were considered in *CM* the findings in *EM* (sic) where it was found that whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF. Mr Harverye has no such significant profile but his case must be considered at the date of hearing, when the elections are said to be imminent in Zimbabwe. In this regards Dr Kibble refers to the constitutional changes and since the hearing the Constitutional Court in Zimbabwe has rejected a joint application by the President and Prime Minister in Zimbabwe to delay the

elections. They must therefore occur before the end of July 2013.

…

56. If Mr Harverye was to be challenged in other than English he is unlikely to understand what he is being asked and if this is a challenge to demonstrate loyalty, which he will not be able to do, he is at risk of beatings and ill-treatment. The fact he has no ZANU-PF party card and is unlikely to know the slogans and constantly repeated radio jingles means it will be difficult if not impossible for him to prove loyalty. Dr Jeater refers to the unemployed joining the ZANU-PF militia but she also states that orders are given in the vernacular languages and such groups have a reputation for beating and torturing their own members as well as other citizens [para 3.3, page 57 A's bundle].

57. The Tribunal in *CM* also refers to the Chipangano. This group has been described as 'a brutal band of thugs formed by Zanu (PF) in the 1980s and now running a brazen murder, violence and extortion racket that started as a hit squad for the party but which has become a lucrative business'. An article broadcast on SW Africa Radio on 13th April 2012 reported that the violent ZANU PF youth gang that has terrorised residents of Mbare suburb in Harare has reportedly started campaigning for the party, forcing innocent civilians to reveal their personal details and ordering them to vote for Robert Mugabe in the next election. The Chipangano gang, who operate with impunity and with the support of top ZANU PF officials, have been regularly forcing local residents, vendors and passersby to attend ZANU PF rallies held on open grounds in the area.

58. As it appears likely Mr Harverye will have to remain in Harare he will have to seek accommodation in a high density area such as Mbare as he will not have the economic resources to live elsewhere. He will have to seek entry into the informal economy which is controlled by Chipangano. He is therefore likely to be identified as a newcomer and challenged in relation to his political leanings by members of this group. If he is unable to demonstrate loyalty there is a real risk of ill-treatment sufficient to breach the high threshold of Article 3 in light of the imminent elections.

59. ... I do not find the evidence he seeks to rely upon is sufficient to allow me to depart from any of the existing country guidance case law. I therefore would not find Mr Harverye has proved that the United Kingdom will be in breach of its obligations under Article 3 ECHR should he be deported from the United Kingdom and returned to Zimbabwe with the exception of the real risk of such a breach as a result of the

> heightened levels of violence and associated risks at this election time, recognised in case law, and the unique factors relating to Mr Harvey (*sic*) such as his lack of language skills. If the elections period passes and violence abates and the position is as per *CM* the Secretary of State will be able to reconsider her position. It is the timing and as Miss Mair submitted, the combination of Mr Harvey's (*sic*) characteristics, that create the real risk at this time."

The Second Deportation Order

7. A year or so following that decision of July 2013, the Secretary of State made the Second Deportation Order of August 2014[1].

8. The Notice of Decision adds somewhat to the history of the case, as follows:

> "12. You appealed against the deportation decision on 19 October 2011, which was allowed by the First-tier Tribunal on 23 February 2012, under Articles 2 and 3 of the ECHR due to the country situation in Zimbabwe. The Home Office was granted permission to appeal against the allowed appeal on 5 April 2014. However, the Upper-tier Tribunal upheld the First-tier Tribunal's determination on 17 July 2013 and gave recommendation that: "*If the elections period passes and violence abates and the position is as per CM the Secretary of State will be able to reconsider her position*".
>
> 13. You were granted bail on 27 January 2012; but recalled on licence to serve the remainder of your custodial sentence on 27 July 2012, because you breached your licence condition in contacting the victim of your offence.
>
> 14. In light of the Upper-tier Tribunal's determination and your conduct which resulted in you being recalled to prison whilst on licence, your case was reviewed and a decision was made on 1 July 2014, to resume deportation action against you. A new Notice of liability to deportation action was served to you on 1 July 2014. You were served with the Liability Notice on 30 July 2014 and your legal representatives responded by submitting the completed questionnaire along with submissions on 6 August 2014."

9. The Notice of Decision proceeds to a summary of the history, a review of whether "very compelling circumstances" exist so as to prevent deportation, and a review of the Article 8 claim. The Secretary of State reviewed the means which would be available to the Appellant by way of financial support, concluding that he would be in receipt of a higher income than 9.75m of the population of Zimbabwe. The Notice contains quotations from the appeal determination of July 2013, including the relevant

[1] The Court has been informed that the Deportation Order of 3 October 2011 was in fact revoked on 2 July 2014.

passage from the final paragraph 59, set out above, in which UTJ Hanson addressed reconsideration by the Respondent "if the elections period passes and violence abates".

10. The Notice continued, suggesting that the Tribunal (meaning the decision in UT1) had concluded against the Appellant on Article 3. That was an error.

11. The Notice then proceeded to a review of the Appellant's circumstances and "claims to be vulnerable on return", again rejecting destitution, and any claim under Article 8. The Notice recited a summary of the Facilitated Returns Scheme now available to the Appellant. This meant that, if he made a successful application, he "could be eligible for up to £750 … [which] could be used to relocate to Zimbabwe to secure housing".

12. The Notice of Decision does not add any reasoning in relation to Article 3.

The Second Appeals: 2015/2016

13. The Appellant succeeded before the First-tier Tribunal, for the reasons set down in the determination of Judge Place of 3 March 2015 ["F-tT2"]. Judge Place summarised concisely the submissions made to her by Ms Mair for the Appellant. The first was that the second decision to deport "was not in accordance with the law as there has been no new conviction to trigger a further decision" (paragraph 11). The second was that, "by analogy with Refugee Convention cases, … the burden of showing that there has been a relevant change of circumstances is on the Respondent" (paragraph 12). Thirdly, it was submitted to Judge Place that "on *Devaseelan* principles" (*Devaseelan v SSHD* [2002] UKIAT 702; [2003] Imm AR 1), the decision of UTJ Hanson (meaning "UT1") –

> "13. …is the starting point for me … Though Judge Hanson found that the Appellant was born in Bulawayo, he also found that he had no established roots there and would be likely to have to live in a high density area of Harare. She argued that Judge Hanson had decided that the Appellant was at risk both because of the elections and because of the ascendancy of the group called Chipangano.
>
> 14. She argued that the Respondent has not adduced any evidence that the conditions in Zimbabwe have improved and argued from the CIG Report that much remains the same: the Mugabe regime is still in power, there is still violence and the security forces continue to act with impunity."

14. Comparison of the index of documents for the first hearing before UTJ Hanson ("UT1") and the hearing before Judge Place ("F-tT2") demonstrates that there was no new evidence before F-tT2. The only additional item, produced at the hearing, was the CIG report of October 2014 (see below). Ms Mair relies on this to demonstrate that no new evidence or Country Guidance was placed before Judge Place in F-tT2.

15. Judge Place accepted the first submission that, without a fresh conviction, the Second Decision was unlawful. She also commented that:

> "Despite being given every opportunity to do so, the Respondent has not explained on what basis she has issued a further Deportation Order in respect of the same offence."

16. Judge Place went on to consider the remaining submissions "in case I am wrong" on the first point. She concluded that "the burden was on the Respondent to show a change of circumstances in Zimbabwe sufficient to justify departing from the Upper Tribunal's decision of July 2013". Acknowledging that there had been a number of findings adverse to the Appellant in that hearing, the judge went on:

> "19. Judge Hanson found (paragraph 58) that the Appellant would have to seek entry into the informal economy which is controlled by Chipangano. The Respondent has adduced no evidence that that situation has changed. I find that the Appellant would still face the same risks of being identified as a newcomer. Judge Hanson found that, because of the imminent elections, the Appellant would be at risk if, as was probable, he could not demonstrate loyalty to Zanu-PF.
>
> 20. Although Judge Hanson's findings were closely linked to the situation in Zimbabwe in the pre-election period, I find that it does not follow that, simply because the elections are over, the Appellant would not be at the same risk. He would be living in the same area, controlled by the same group, Chipangano. The Respondent has not brought any evidence to my attention to show that Chipangano have changed their ways. The CIG Report shows that Zanu-PF violence continues in Zimbabwe and that, if anything, the activities of Chipangano are increasing (see, for example, section 2.3.11 to section 2.3.13).
>
> 21. Judge Hanson drew attention to the fact that there were heightened levels of violence and associated risks at the time of the elections. The Respondent has not shown, on a balance of probabilities, that those heightened levels have since reduced. I find that the Respondent has not shown that there are new circumstances which now alter Judge Hanson's findings that the Appellant would be at risk of a breach of his Article 3 rights if he were returned to Zimbabwe. Judge Hanson's comment at paragraph 59 of his decision had 3 limbs: if the election period passes *and* (my emphasis) violence abates *and* the position is as per CM. The Respondent has only shown the first limb to be satisfied. I therefore find that the Respondent's decision was incorrect and I allow the appeal."

17. The Respondent appealed once more to the Upper Tribunal. Ms Mair places emphasis on what she says are the limited grounds advanced. The first ground was that Judge Place erred in law by failing "to identify any specific defect in the terms of the deportation order". The second ground was that the F-tT had failed properly to consider the Country Information and Guidance *Zimbabwe: Political Opposition to Zanu-PF*, of October 2014 ["the CIG report"], which echoed the guidance laid down

by the Upper Tribunal in *CM*. The central point here is a passage in *CM* (and the CIG report) indicating that "a returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF". Hence it was submitted the F-tT had failed to revisit the question of the Appellant's potential return to Bulawayo.

18. Ms Mair argues that neither of these grounds on which the Respondent appealed to the UT for the second time addressed the alternative basis for the decision in F-tT2, and therefore that decision must stand, as a decision of a properly constituted tribunal not the subject of a ground of appeal. I will return to this below.

19. The Respondent was given permission to appeal by UTJ Kekic on 27 July 2015, in respect of both grounds.

20. In this appeal (UT2), counsel for the Appellant conceded that he fulfilled all the requirements of section 32 of the 2007 Act, and was a "foreign criminal". The principal argument was that there was a breach of common law fairness, amounting to an abuse of process, because the new deportation decision was based on the same criminal conviction which had founded the previous successfully-appealed decision. In that earlier appeal, the Appellant had shown he was the subject of an exception. Since then there had been no new conviction. His recall from release on licence was not a conviction, and could not properly found a fresh decision under the 2007 Act.

21. UTJ Hanson rejected this argument. He firstly cited section 33(7) of the 2007 Act, which reads:

> "(7) The application of an exception—
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;"

22. Judge Hanson noted that this provision had been the subject of comment by the Court of Appeal in *SS (Nigeria) v SSHD* [2013] EWCA Civ, in which Laws LJ (at paragraph 54) observed that the application of an exception preventing deportation does not abolish the public interest in the deportation. Judge Hanson further noted that it was established in *Greenwood (Automatic Deportation: Order of Events)* [2014] UKUT 00342 that "in an appeal against automatic deportation there is no appeal against a decision to deport or against the order to deport, but only against the decision that section 32(5) applies" (paragraph 20).

23. This was congruent with the statute. Section 33(1)(a) of the 2007 Act was expressly subject to section 33(7). Even though the deportation decision can be made (arguably must be made), the foreign criminal concerned cannot be removed "if an exception still applies" (paragraph 21). As he emphasised, the exception in section 33(2) states:

> "(2) Exception 1 is where *removal* (my emphasis) of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) a person's Convention rights, or

> (b) the United Kingdom's obligations under the Refugee Convention"

24. It was an error on the facts to conclude that this Deportation Order was founded on the recall on licence. It was founded on the 2009 conviction, and on the subsisting decision to deport.

25. Judge Hanson went on to conclude that a change in the circumstances on which an exception preventing removal was founded must entitle the Secretary of State to seek to deport. It cannot be the case that a lawful decision to deport, where removal was precluded by circumstances which establish an exception, cannot be renewed when those circumstances fall away, but must await a fresh conviction (if and when such arises): see paragraph 23.

26. The judge observed that the original October 2011 Deportation Order "was a lawful order". The appeal was "to the effect that section 32(5) did not apply on the basis of the circumstances that prevailed at that time" (paragraph 24). The finding of an exception did not extinguish the Deportation Order, which remained valid (paragraph 24). That order was not revoked[2] and there were therefore "two valid Deportation Orders in force", notwithstanding the power under section 34(4) of the 2007 Act, which provides:

> "(4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5), for the purpose of—
>
> (a) taking action under the Immigration Acts or rules made under section 3 of the Immigration Act 1971 (c.77) (immigration rules), and
>
> (b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5)."

27. Judge Hanson rejected the proposition that the principle of finality in litigation bit on these circumstances. It followed from the wording of the statute that:

> "(30) If a valid deportation order has been made pursuant to the 2007 Act but it is found an exception applies, section 33(7) still provides that section 32(4) applies i.e. that the deportation of a foreign criminal is conducive to the public good. If the situation changes such that the exception relied upon in the original appeal no longer exists, it is arguable the structure of the statutory scheme permits the Secretary of State to issue a further decision. A finding that an exception exists is not a finding in perpetuity but based upon the situation appertaining at the date of the decision. What is of vital importance is recognition of the fact the fresh decision is a further

[2] See footnote to paragraph 7 above.

> immigration decision that gives rise to a further right of appeal, unless certified."

28. On that basis, Judge Hanson found an error of law in the approach of the First-tier Tribunal.

29. As to the facts, UTJ Hanson noted that the 2013 elections had come and gone, and that there had been a reduced level of violence and human rights abuses (paragraphs 44/45). There had been no incidents of violence recorded in or around Bulawayo.

30. He then concluded:

> "47. It was accepted in the earlier determination that Mr Harverye originates from Bulawayo although he has not lived there for a considerable number of years. It was accepted, and is still the case, that returnees to Bulawayo will in general not suffer the adverse attention of the Zanu-PF, including from the security forces even if they have a significant MDC profile. Mr Harverye has no adverse political profile.
>
> 48. The key finding in the original decision was that as a result of the timing of the appeal, and the heightened tensions at the time of an election, Mr Harverye could not be expected to travel to Bulawayo for if he was challenged and could not show loyalty he was likely to be ill-treated. As a result he would be forced to remain in Harare where the risks identified in the decision would manifest themselves.
>
> 49. The current evidence made available does not show that the situation in Zimbabwe is the same as that which prevailed when the original decision was written. As such there was an obligation upon the Judge to do more than follow the previous findings. I find that in failing to analyse the evidence made available with the required degree of anxious scrutiny the Judge has materially erred in law.
>
> 50. The only issue that led to the previous Tribunal finding there was a real risk to Mr Harverye on return is set out above.
>
> 51. Roadblocks are a way of life in Zimbabwe and numerous complaints have been made by those in the tourist industry in 2015 – 2016 of corrupt police officers setting up frequent barriers and stopping traveller solely to secure a bribe. As stated this was not found to be sufficient to breach Article 3 previously. It has not been made out that Mr Harverye will be unable to leave the airport on return or that he will be destitute. It has not been shown that the level of political violence or intimidation remains as it was previously at this time or that he will be required to demonstrate loyalty to Zanu-PF on arrival. It has not been made out that he will be without funds on return which should enable him to meet the costs of travel to

> Bulawayo from Harare. It has not been made out that only speaking English will prevent Mr Harverye from being able to negotiate his way around, as English is spoken throughout Zimbabwe. It has not been made out that he will not be able to travel to Bulawayo without suffering a breach of his Article 3 rights and once there his situation is as considered in the earlier determination and country information.
>
> 52. Accordingly the evidence available to the First-tier Judge did not establish a real risk of serious harm sufficient to show Article 3 would be engaged. The evidence before the First-tier tribunal did not establish very compelling circumstances over and above those described in paragraph 399 and 399A of the Immigration Rules."

31. For those reasons, the Respondent's appeal succeeded.

Submissions

32. With one exception, the submissions in this case have been broadly consistent with those made below. The exception arises from the decision of this Court in *SSHD v R (Antonio)* [2017] 1 WLR 3431 [2017] EWCA Civ 48. In that case, it was decided that where a decision to deport has been revoked, there is no requirement for a fresh conviction as a foundation for a subsequent decision to deport. That principle is now accepted by both parties.

33. The written submissions from both parties in this appeal are over-long, diffuse and over-complicated. Unfortunately, leading counsel for the Appellant was unwell on the first day of listing, and we adjourned to the following day to permit junior counsel Ms Mair to finalise oral submissions. I do not intend to rehearse the submissions from either side, save as they appear to me to bear on the key points in the case.

Analysis

34. The first ground of appeal from F-tT2 to UTJ Hanson was correctly sustained by him. As already indicated, the decision in *Antonio* establishes there is no requirement in every case for a fresh conviction before a second (or theoretically subsequent) decision to deport can be taken. UTJ Hanson was correct to allow the appeal on that ground.

35. However, it should be emphasised that the instant case was very different from the situation in *Antonio*. In that case an order had been revoked[3]. There had been no adjudication by a properly constituted tribunal allowing an appeal. It is not a proper implication from *Antonio* that, where an appeal has been allowed, the Secretary of State can simply take a fresh decision to deport, or indeed a fresh decision, based on the proposition that a relevant exception preventing the deportation of a foreign criminal no longer applies, absent a material change of circumstances. That would indeed undermine the finality of judgments. Absent a successful further appeal, and absent a material change in circumstances, such a judgment stands.

[3] See the footnotes to paragraph 7 and 26. The Revocation does not alter the analysis in this case.

36. The approach of UTJ Hanson on Ground 1 was not only correct in its outcome, but correct in its analysis. The status of the Appellant as a foreign criminal, and the public interest in his deportation were not in issue. The only question was the application of the exception based on the risk of breach of Article 3. Necessarily, as emphasised in *Antonio* at paragraph 84, if the Secretary of State wishes to re-consider deportation following a revocation or successful appeal, there must be a fresh decision, so as to give rise to a right of appeal. However, if there has been a material change of circumstances following a successful appeal, such a process may be perfectly proper.

37. I turn to the question raised by Ms Mair as to the ambit of the appeal from F-tT2 to UTJ Hanson. I have set out the basis of this in paragraph 18 above. In my view, this submission fails for at least two reasons. The first is that, strictly speaking, the secondary basis on which Judge Place reached her conclusion ("If I am wrong about that…") represented *obiter dicta*. The second is that, in my view, the Grounds advanced by the Secretary of State were broad enough to capture the alternative basis for her decision expressed by Judge Place. The Second Ground of appeal is expressed discursively, but in essence attacks the alternative or fall-back position of Judge Place: the heart of this ground is that the circumstances which underpinned UTJ Hanson's earlier decision had fallen away. This was erroneously expressed as arising from "recent country information", meaning the CIG report. That was misleading, since the decision of *CM Zimbabwe CG* had been before UTJ Hanson at the time of UT1 and the CIG simply incorporated and reflected that decision. The change was not fresh country guidance, but a change (or potential change) in its application to this Appellant, arising from changed circumstances: a reversion to the norm, as expressed in *CM Zimbabwe CG*.

38. I have said that the Respondent's Second Ground was discursive and complex, although just sufficient to permit the substance to be addressed. However, it also presents a good opportunity to re-state the obligations of clarity and accuracy in drafting grounds of appeal. They are – or should be – a tight formulation of the propositions advanced, and not a discursive draft of submissions.

39. The real point in this case is straightforward. Was there a material change of circumstances in this case so as to render lawful a reconsideration by the Secretary of State as to whether the relevant exception preventing deportation subsisted?

40. To answer that question one must focus on what was material to the first decision of UTJ Hanson. Again, in my view the essentials of that decision can be expressed shortly. As his judgment in UT1 made clear, the Article 3 risk arose from the Appellant's anticipated residence in the "high density" suburbs of Harare, and from his consequential exposure to the activities of the Chipangano. It is clear that if the Appellant would not remain in Harare (or move to live in a rural area where ZANU-PF were dominant) the Article 3 risk would not arise. The opening of paragraph 58 is explicit: "As it appears likely Mr Harverye will have to remain in Harare …".

41. Why was it that he would have to do so? In my view there were two ingredients to this. The heightened tension associated with the election campaign was clearly important, as was emphasised throughout the judgment, and in the important passage in paragraph 59 quoted in paragraph 6 above: "If the election period passes and

violence abates and the position is as per *CM* the Secretary of State will be able to reconsider her position".

42. The other key ingredient was the Appellant's impecuniosity. Again, this relates to the election period, since the number of roadblocks and the difficulty, rapacity and cost of traversing the roadblocks were accentuated by the elections. It was this combination of circumstances which led UTJ Hanson to conclude in UT1 that the Appellant would be constrained to remain in Harare. It is clear from the other findings in UT1 that, although the Appellant could not be said to have an established "home area" in Bulawayo or Matabeleland, such connections as he had were with that city. The guidance in *CM* was clear that if he went there, no Article 3 risk would arise.

43. Two factors may properly be said to have established a material change of circumstances from those underpinning this first judgment in the Upper Tribunal: the elections were over, and the Appellant had likely access to more funds from the Resettlement Scheme.

44. It would surely have been both straightforward and sensible on the part of the Secretary of State to spell out in the Notice of Decision what were said to be the material changes of circumstance which justified and founded the fresh decision and deportation order. This should be regarded, in future, as an obligation of good practice on the part of the Secretary of State. The problem is not best addressed by the rather sterile technical debate as to competing burdens of proof: whether it is the Appellant who must establish that a relevant risk exists under Article 3, or the Secretary of State who must displace the exception under the statute. Again, the problem is simpler.

45. Where there has been a valid adjudication on such an issue, but where the Secretary of State considers there has been a material change of circumstances, then he must say so and spell out what he says they are. That necessary preliminary to a fresh decision must be capable of challenge in any ensuing appeal. Although such a challenge is not by way of judicial review, and the decision will not be overset by reference to inadequate reasons being given in the Decision Notice, the communication of reasons will inevitably feature large in any ensuing appeal. Moreover, as Ms Mair properly pointed out to us in her oral argument, there are very good practical reasons for a clear account of what is said to have changed. In many cases there will be factual and evidential shifts which are said to be important, perhaps involving or calling into question expert opinion or publicly available material. Unless an Appellant has timely warning of the issues, he or she may be unable to obtain legal aid funding to address what is necessary, or at least to do so in time. Delay is a likely consequence, and injustice may possibly arise.

46. The unusual feature of this case is that the relevant change in circumstances was not a new development, but rather a reversion to the norm, anticipated by UTJ Hanson in his conclusions in UT1:

> "If the elections period passes and violence abates and the position is as per *CM*…"

47. It is clear from the terms of his later judgment this is precisely how UTJ Hanson himself read his earlier judgment. Of course that is not decisive, since the matter

must be determined by an objective reading of the earlier judgment. However, in my view, taking the earlier judgment as a whole, the elections were at the heart of the decision. The exception preventing deportation arose from particular circumstances which were transient, *i.e.* time limited, sufficiently so as to justify a fresh decision when the case was altered.

48. That threshold passed, the approach of UTJ Hanson falls to be examined on its own terms: there can be no further valid argument that the later judgment conflicts with the finality of the earlier ruling.

49. I have some concern with one aspect of the approach by UTJ Hanson in UT2. He appears to have had regard to evidence that was not only after-coming but not in fact presented to him:

> "43. *It is argued by Ms Mair that the influence of the Chipangano is increasing and that they are becoming more violent* (emphasis added) although news reports from Zimbabwe from 2015 speak of the internal purges within Zanu-PF substantially weakening the group and the weakening of its influence in the area of Harare where it operates."

It will be apparent from the italicised passage that the Appellant was asking UTJ Hanson to consider the up-to-date position but apparently without fresh evidence. His consideration of news reports from 2015 seems to have arisen in that context. It is of course inappropriate for a judge to conduct, and then rely upon, his own research – at least without giving the parties an opportunity to comment upon it. However, in this case, I am unconvinced that this represents a material error on Judge Hanson's part, such that it might found the basis for an appeal.

50. The crux of the second decision of UTJ Hanson was that the specific combination of circumstances which had led to the exception from deportation in the summer of 2013 had passed. The background country guidance remained valid. The basis of the earlier finding had fallen away, and so also the Article 3 risk. I see no basis on which that conclusion can properly be overturned.

51. For those reasons, I would dismiss this appeal.

Lord Justice Hickinbottom:

52. For the reasons given by Irwin LJ, I too would dismiss this appeal. I add some observations of my own only to reinforce his comments as to the unsatisfactory way in which the issues in this case were identified and then dealt with before us.

53. In this case, the issue for the Secretary of State, and in their turn the tribunals, was straightforward and narrow: had there been a material change of circumstances which justified a fresh decision to deport the Appellant? As Irwin LJ has described, this issue was all but lost in the plethora of paper.

54. I respectfully agree with Irwin LJ (at [44] above) that it would have been simple for the Secretary of State to have set out in the Notice of Decision what he considered the material change of circumstance to have been. That he did not do so led to

considerable time and effort being expended on issues that were not, and were never going to be, determinative of the Appellant's claim and appeal.

55. However, in my view, the legal representatives cannot avoid all blame. The grounds of appeal, skeleton arguments and oral submissions lacked the required and expected focus.

56. As I emphasised recently in *Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851, especially at [73] and [74(iv)], it is incumbent upon the Appellant to set out in his grounds of appeal, clearly and "as concisely as practicable", the relevant part of the decision and the way(s) in which it is said to be wrong or unjust (paragraph 5(1) of CPR PD 52C). No more is required of grounds of appeal. Indeed, no more may be incorporated in them.

57. The grounds of appeal are the well from which the argument must flow. The reasons *why* it is said the decision is wrong or unjust must not be included in the grounds, and must be confined to the skeleton argument (paragraph 5(2) of CPR PD 52C). The skeleton argument must comply with paragraph 5(1) and (2) of CPR PD 52A, which provides:

> "(1) The purpose of a skeleton argument is to assist the court by setting out as concisely as practicable the arguments upon which a party intends to rely.
>
> (2) A skeleton argument must–
>
> - be concise;
> - both define and confine the areas of controversy;
> - be set out in numbered paragraphs;
> - be cross-referenced to any relevant document in the bundle;
> - be self-contained and not incorporate by reference material from previous skeleton arguments;
> - not include extensive quotations from documents or authorities

The requirement for conciseness is reinforced so far as this court is concerned by paragraph 31(1)(a) of CPR PD 52C, which requires any skeleton argument to comply with the requirements of paragraph 5(1) "and in particular must be concise".

58. Where a skeleton argument does not comply with these requirements then it may be returned to its author by the Civil Appeals Office (paragraph 31(2)(a)(i)); and the costs of preparing a skeleton argument which does not comply with these requirements, or which was not filed within the time limits provided by the Practice Direction or order of the court, will not be allowed on the assessment of costs except as directed by the court (see paragraph 5.1(5) of CPR PD 52A, and paragraph 31(5) of CPR PD 52C). Subject to the intervention and guidance of the court, oral submissions should fall within the scope of, and elucidate, the skeleton argument.

59. This appeal provides a timely opportunity to remind advocates of their obligations in this regard. As I indicated in *Hickey* (at [75]), compliance with the Rules will ensure

that appeal hearings are properly focused, as they must be: insofar as additional time and resources of this court are expended in dealing with less than optimally prepared and focused cases, then other appeals, that are properly advanced and prepared, may not have the resources devoted to them as they deserve, at all or at least in as timely a fashion as they should. Where there is a failure to comply with such important mandatory procedural rules, the courts have a variety of sanctions (including costs orders) at their command.

Lord Justice Haddon-Cave:

60. I agree with the judgment of Irwin LJ and with the additional comments of Hickinbottom LJ.