



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02576/2012

THE IMMIGRATION ACTS

Heard at Field House
On 20 June 2013

Date Sent
On 10 September 2013
.....

Before

**LORD BURNS
UPPER TRIBUNAL JUDGE GILL**

Between

**LV
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person
For the Respondent: Mr. D Hayes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal from First-tier Tribunal Judge Herbert OBE dismissing an appeal against a decision of the respondent made on 26 February 2012 to remove the appellant from the United Kingdom to Zimbabwe following the refusal of her asylum and human rights claims.

Background

2. In about June 2004 the appellant travelled from Zimbabwe to South Africa illegally and claimed asylum there. After a number of unsuccessful applications, her application for asylum was granted in 2010. On 13 September 2010 she applied for a visitor's visa to the UK which was refused on the same day. She successfully appealed that decision and a visa was issued on 26 May 2011 valid until 26 November 2011. In June 2011, she left South Africa and travelled to Zimbabwe. She left Zimbabwe on 21 June 2011 and arrived in the UK on 22 June 2011. She attended for asylum screening interview on 5 October and lodged an asylum claim on 18 November 2011. She was served with an IS151A form alleging that she had unlawfully entered the United Kingdom by deception on 24 November 2011.
3. She claimed refugee status under the 1951 Geneva Convention arguing that she had a legitimate fear of persecution if returned to Zimbabwe. She applied for a grant of humanitarian protection in accordance with paragraph 339C of the Immigration Rules. Further, she claimed that the United Kingdom would be placed in breach of its international obligations under articles 2, 3 and 8 of the European Convention of Human Rights (ECHR). Those claims were refused and reasons were given in the decision letter dated 27 February 2012. The appellant had maintained before the respondent that she had fled Zimbabwe as a result of her husband having been killed by supporters of ZANU-PF in an attack at their home in June of 2004. During that attack the appellant herself had been injured. The reason for that attack was said to be the fact that her husband was a supporter of the local Movement for Democratic Change party (MDC) or a chairman of the local MDC party (see paragraph 20 of the decision letter of 27 February 2012 where attention was drawn to the differing accounts of this matter given by the appellant). She feared that she would be the subject of the attentions of ZANU-PF if she was returned to Zimbabwe.
4. The respondent did not accept that the appellant's husband was a member of the MDC nor that he or the appellant had been attacked by ZANU-PF members. It was not considered that she had an adverse profile in Zimbabwe as a supporter or member of the MDC. The respondent therefore refused the appellant's claim for asylum on the basis that she had not established any fear of persecution on return to Zimbabwe. The appellant's claim for humanitarian protection under rule 339C of the Immigration Rules was also refused and it was not considered that removing her from the UK to Zimbabwe was contrary to the United Kingdom's obligations under articles 2, 3 or 8 ECHR.
5. The appellant appealed that decision to the First-tier Tribunal. The appeal was first heard on 11 April 2012 before First-tier Tribunal judge Beg. That appeal was refused but the appellant successfully appealed to the Upper Tribunal who, on 3 September 2012, found that Judge Beg had made an error on a point of law, set aside that decision and remitted the matter to the First-tier Tribunal for the decision on the appeal to be remade.

Proceedings before the First-tier Tribunal

6. The appeal was reheard before Judge Herbert on 4 October 2012. The appellant gave evidence and confirmed that her written statements and her asylum interview were correct. She rehearsed the account given on prior occasions that she had lived in the town of Kadoma with her husband and children. Her husband, unbeknown to her, had joined the MDC and was active within that party in the town of Kadoma and in Chegutu. He had held meetings at their house from the end of 2003 until 2004. On 16 June 2004 ZANU-PF youths came to her house and beat her husband. They returned the next day, broke down the door to their house and dragged her and her husband from bed and beat them both. She lost consciousness but when she came to, she discovered her husband was dead. She then fled to a friend's house some five miles away and subsequently was treated in a hospital for injuries which she sustained. She then went to her sister in Masvingo where she stayed for two weeks. She received a letter from her mother while staying with her sister which stated that her mother had been attacked by ZANU-PF supporters and that they were looking for the appellant. As a consequence of that, she fled to South Africa. She left three of her children behind who were young. She claimed that it would be "very difficult for her" to return to Zimbabwe as she would be regarded as a person with imputed political beliefs because of her husband's support of the MDC (see paragraph 18 of the Tribunal judge's determination).
7. The First-tier Tribunal, having considered the appellant's evidence, rejected her account as not being credible. There was no independent corroboration of her husband's death at the hands of ZANU-PF and no death certificate or newspaper reports covering the matter were produced. The details given by the appellant were vague as were her account of the whereabouts of her children at the time. The judge found it implausible that she would leave her three children in Zimbabwe in the area where the attack had occurred. Furthermore, on arrival in South Africa, she had claimed asylum on the basis of "economic hardship". In addition, having left South Africa, she voluntarily returned to Zimbabwe in 2011 and used her own passport to travel from Zimbabwe to the UK.
8. The Tribunal judge had regard to the country guidance set out in *EM and Others (Returnees) Zimbabwe* CG [2011] UKUT 98 (IAC). The judge considered that there had been a significant improvement in the circumstances on the ground in Zimbabwe since 2008. In paragraph 38 he stated as follows:

"I find that there has been an improvement as set out in the case of *EM* in the generalised risk that MDC supporters and members would face and although it has not disappeared entirely it is certainly only applicable to people who have a profile and persons who have faced persecution in the past."
9. He did not accept on the evidence before him that the appellant had faced persecution imputed or otherwise via her husband's membership or chairmanship of the MDC in her local area. He therefore dismissed the appeal on all grounds. He considered the appellant's claim under article 8 of ECHR at paragraph 40. That claim

was based on one of her children being in the United Kingdom and upon the appellant's own ill-health. However, he found that the extended family of the appellant would assist her if she returned to Zimbabwe and that she could provide maintenance and accommodation for herself through her extended family.

10. The appellant appealed to the Upper Tribunal and on 11 December 2012 an Upper Tribunal judge granted permission to appeal on the basis that it was arguable that the First-tier judge failed to appreciate that the Court of Appeal had quashed the determination of the Tribunal in *EM and Others* (cited above) so that the appellant's appeal had to be determined in the light of the previous determination of the Tribunal in *RN (Returnees) Zimbabwe* CG [2008] UKUT 00083 (IAC). Having considered representations from the respondent, the same Upper Tribunal judge issued a direction dated 31 January 2013 to the effect that it was anticipated that the Upper Tribunal would be able to remake the decision on the basis of the evidence before the First-tier Tribunal judge.

Proceedings before the Upper Tribunal

11. We heard this appeal on 20 June 2013. The appellant was unrepresented. She addressed us through an interpreter. Mr Hayes, for the respondent, submitted that the findings of the First-tier Tribunal in relation to the credibility of the appellant and in particular in respect of her account of the circumstances under which she left Zimbabwe should stand. We were able to accept that submission because of the limited basis upon which permission to appeal was granted in this case. Permission was granted on the basis that the First-tier Tribunal judge had proceeded to follow the country guidance in *EM and Others* although the Court of Appeal was said to have "quashed the determination" of the Tribunal in that case. Accordingly, the only issue was whether, within the context of the findings made by the First Tribunal, the applicable country guidance dictated that the appellant's claims ought to be upheld.
12. It is necessary at this point to examine what happened in the proceedings before the Court of Appeal in *EM*. The principal issue before the court was the impact on the appeals and the Country Guidance issued in them of data relating to assessment of risk in Zimbabwe available in January 2011 that had not been disclosed to the Tribunal or to the claimants. Before the appeal had proceeded to a hearing, parties agreed that the respondent had failed in duties of disclosure and a consent order was drawn up to the effect that the appeals be allowed and remitted to the Upper Tribunal for re-determination in the light of certain identified issues of law.
13. When the Upper Tribunal came to make its determination on the matters remitted to it, it found that the country guidance given in *EM* was not vitiated by any non-disclosure and did not require to be amended save in a relatively minor respect set out in paragraph 5 of the modified guidance (see *CM (EM country guidance; disclosure) Zimbabwe* CG [2013] UKUT 00059 (IAC)).
14. We therefore have to consider whether, within the factual context found by the First-tier Tribunal, the appellant should be granted refugee status on the ground that she has a legitimate fear of persecution on the grounds of political opinion, whether she

was entitled to humanitarian protection under rule 339C of the Immigration Rules or whether her return to Zimbabwe would place the UK in breach of articles 2, 3 and 8 of ECHR.

15. The appellant was unrepresented at the hearing. She explained that this was because she could not afford to pay for representation. Accordingly, there was no reason to think that she would be able to secure representation if the hearing was adjourned. We therefore proceeded with the hearing, having explained to her that we would assist her, if necessary. In order to ascertain the appellant's circumstances on the issue of future risk, we put a number of questions to her. Mr Hayes, for the respondent, had declined the invitation to ask any questions prior to us doing so.
16. The appellant told us that she had lived in Kadoma with her family but was unable to describe where that town was or how far it was from Harare. She stated that Kadoma was controlled by the MDC. Her three children remain there in the care of a lady who attended the same church as the appellant. They had recently been ill because of typhoid and lack of food. She spoke to them about once every one or two months by telephone. She claimed that they had been forced to go to ZANU-PF youth meetings but was unable to say how often that had occurred despite speaking to them on the phone about four times this year. She accepted that she had a sister in Masvingo but she was mentally ill. At this point, she said she became aware of her sister's mental illness in 2011. She would not be able to go and live in Harare or anywhere else in Zimbabwe because she would not be safe there due to her husband's history. She would be killed as her husband had been. She claimed that ZANU-PF would always be able to find her. She had never lived in Harare and it would be a new area for her. In response to subsequent questions by Mr Hayes, she said that her mother died in May 2011 but that she did not go to her mother's funeral nor had she visited her grave. She knew the town of Masvingo well since her sister and her mother had lived there. She had visited Harare on a number of occasions and had stayed sometimes for about three days while on church outings. She denied however that she could return to Zimbabwe and live there since she did not know that city. At this point, she said that she first learned of her sister's mental illness in December 2004 when she was in South Africa. It was her sister who had told the appellant that Masvingo was not safe for her but that was before she became mentally ill.
17. At the conclusion of that evidence, Mr Hayes submitted that there was no evidence to support the view that the appellant would be subject to any persecution by ZANU-PF. Her account of she and her husband being attacked by ZANU-PF had been rejected by the First-tier Tribunal on the basis of her lack of credibility. He submitted that we should reject her account that her sister suffers from mental illness and therefore could not assist the appellant in establishing herself in Masvingo. The appellant could also go back to Kadoma where she had connections with members of her church. They would be able to give her temporary support while she established herself there. It was also an option that she could relocate to Harare. In those circumstances Mr Hayes invited us to refuse this appeal.

Discussion

18. Having considered the appellant's evidence we have reached the view that she has not established (to the lower standard for proof as set out in *Sivakumaran* 1998 AC 958) a real likelihood that she would suffer persecution for a Convention reason or that there is a real risk that she would face serious harm in Zimbabwe. Her account of the violence against her and her husband was rejected before the First-tier Tribunal. We therefore do not consider that, by reason of her husband's connections with the MDC, she is at real risk from persecution or serious harm. Such a conclusion is supported by the fact that she voluntarily returned to Zimbabwe from South Africa before travelling to the UK. At the border and at Harare airport, her passport was examined and she was required to engage with a number of institutions both at the border and at the airport. At no time did she come to the adverse attention of the authorities.

19. The restated Country Guidance in CM states that there is no evidence to show, in general, that the return of a failed asylum seeker from the UK, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to ZANU-PF. Given the adverse credibility assessment by Judge Herbert, we find that the appellant has no such profile. CM goes on to state that the position is likely to be otherwise in the case of a person without ZANU-PF connections, returning from the UK after a significant absence to a rural area of Zimbabwe. Such a person may well find it difficult to avoid adverse attention, amounting to serious ill treatment. That situation was not uniform across the relevant rural areas and in some areas the position may be different where ZANU-PF power structures are weak. At paragraph 204, the Tribunal pointed out that it was in certain rural areas that this risk arose but it was not a "widespread or generic" one. The evidence from the appellant was that the MDC controlled the Kadoma area. Standing the rejection of her account of the activities of the ZANU-PF in that town, we are unable to conclude that she would be at any real risk there. Her children are there and she has social connections from her membership of the church. We were unable to accept her evidence that her children had been forced to go to ZANU-PF meetings. This matter has not been raised by her in the past and there was no apparent reason why this feature should have arisen only in the past year, despite her claim that ZANU-PF was so active in this area in 2004. She was unable to say how often this had occurred. In any event, the appellant has family in Masvingo. We did not find her evidence that her sister in Masvingo was unable to help her on account of her mental illness credible, given the discrepancy in her evidence as to when she first learned of her sister's alleged mental illness (initially saying 2011 and later 2004), that she gave no detail about her sister's alleged mental illness and whether for that reason she would be unable to assist the appellant. Despite her alleged illness, her sister was, according to the appellant, able to warn her that she was not safe in Masvingo. In addition, there appeared to us that she could go to Harare which she had visited several times in the past.

20. If returned, the appellant would have to pass through immigration control at Harare airport. The guidance in *HS (returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094 was reviewed in CM. At paragraph 203 of CM it is stated that "the evidence as

a whole reveals no case of scrutiny for loyalty at the airport”. *HS* itself at paragraph 264 recognises that any adverse attention at the airport would focus on those which are perceived to be politically active in support of the opposition or perceived to be a threat to or a critic of the regime. Applying the low standard of proof, we do not consider that the appellant falls into either category. Accordingly, we find that the appellant has not established her claim for refugee status under the UN Convention 1951 or under rule 339C of the Immigration Rules.

21. For the same reasons, we do not consider that returning the appellant to Zimbabwe would involve a violation of her rights under Article 2 or 3 of the EHCR. We do not require to re-make the decision of the First-tier Tribunal under Article 8.

Decision

The asylum appeal is dismissed.

The humanitarian protection appeal is dismissed.

The human rights appeal under Articles 2 and 3 is dismissed.

Anonymity

We make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the applicant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
Lord Burns

Date