



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

Appeal Number: IA/39880/2013

THE IMMIGRATION ACTS

**Heard at Birmingham
on 1st October 2014**

**Determination
Promulgated
On 17th December 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**JANNET MUDAVANHU
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chapwanya of Genesis Law

For the Respondent: Mr Smart - Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 30th May 2014 Deputy Upper Tribunal Judge M Hall found an error of law in the determination of First-tier Tribunal Judge K Henderson and set that decision aside. On the 11th August 2014 the substantive hearing was adjourned as an issue as to the true identity of the person before the Upper Tribunal arose although at the commencement of this hearing Mr Smart confirmed there were no further concerns.

Background

2. The appellant is a citizen of Zimbabwe, born on 26 October 1967, who appeals the refusal by the Secretary of State to grant her indefinite leave to remain in the United Kingdom on the basis of 10 years lawful residence. The application was refused under paragraph 276B of the Immigration Rules as the appellant is said to have spent periods of time in the United Kingdom without lawful leave, totalling 284 days. The appellant had therefore remained in the United Kingdom in breach of immigration laws in excess of 28 days and therefore her ten-year period was not a continuous period of lawful residence.
3. The application was also considered under paragraph 276ADE but it found the appellant did not have 20 years residence in the United Kingdom and had not severed all ties, including social, culture, and family ties to Zimbabwe. The Secretary of State noted that the appellant still had a brother living in Zimbabwe and that she had returned to her home state in 2003/2004 and 2012.
4. Consideration was given to whether it was appropriate to grant leave outside the Immigration Rules but it was not found that family life existed. The respondent noted ties to her local church and as a volunteer visitor with the City Hospital in Birmingham and her work as a Tenant Support Worker, but found such did not entitle her to remain on a permanent basis, that her skills were transferable, and that there were insufficient grounds to warrant a grant of leave outside the Rules.
5. Before the First-tier Tribunal the appellant claimed in her grounds of appeal that she suffered difficulties with her health of a gynaecological nature and that there had been a need for corrective surgery. There is also a reference to the sickness of her mother who has since passed away, confiding with a Methodist preacher and a Methodist minister regarding health difficulties, and her belief she will experience difficulties as a result of her published views in support of gay/lesbian rights. The appellant claimed that as an advocate she fears for her life and also refers to suffering sexual trauma, and the reasons that she remained single. There is also a reference to sexual abuse occurring to her in her village between 1982 and 1990.
6. In a witness statement provided for the purposes of the appeal before the Upper Tribunal the appellant relies upon similar grounds claiming that she fears for her life on return to Zimbabwe based upon gay and lesbian advocacy in Zimbabwe, which she claims the authorities will crush with impunity. The appellant states she has conducted research in the field in Zimbabwe as part of her Ph.D. research project during which time she and her research assistants experienced difficulties with the authorities. The appellant claims the views expressed in her Ph.D. thesis are opposed to the official views of the president of Zimbabwe.

7. In relation to the brother who lived in Zimbabwe, the appellant states that he has since left the country and relocated to South Africa and that she will therefore be returned alone without support, resources, or employment prospects.

Discussion

8. The appellant's nationality, date of birth, educational qualifications as a person holding both a Masters degree and PhD, together with the presence of family members in the United Kingdom, are not contested.
9. The appellant has provided evidence of medical issues that have impacted upon her life in the United Kingdom but this material does not indicate that the appellant requires ongoing medical treatment, although it is submitted on her behalf, that her experiences during the course of medical investigations and procedures and ability to cope with the same have far reaching psychological consequences particularly if she must return to Zimbabwe. The medical aspects are specifically referred to in support of the claim for leave to remain on Article 3 grounds within the appellant's skeleton argument.
10. The latest information the appellant seeks to rely upon in relation to her medical issues is to be found on pages 25 to 35 of her appeal bundle although many of the documents are dated 2002, 2006, and 2008 and refer to previous gynaecological issues. On page 25 is a letter from her GP dated the 18 July 2014 addressed to the appellant's solicitors responding to specific questions although a copy those questions has not been provided. The GP states:
 - The appellant has been diagnosed with abdominal pain.
 - The appellant is currently on no medication.
 - The appellant has been registered with the surgery since July 2008.
 - The appellant was seen by Dr Lateef on the 8th July with abdominal discomfort and was referred for an ultrasound scan and maybe an endoscopy later on if symptoms persist.
 - The appellant was prescribed Lansoprazole on 23 May 2014 but we are unsure if she responded to treatment as she did not request any more.
11. In N v UK Application ECHR 26565/05 and the Grand Chamber upheld the decision of the House of Lords and said that in medical cases Article 3 only applied in very exceptional circumstances particularly as the suffering was not the result of an intentional act or omission of a State or non State body. The threshold was not reached in the present case which could be distinguished from D v UK (1997) 24 ECHR. The legal test was set out at paragraph 42 as follows "A decision to remove an alien who is suffering from a serious physical or mental illness to a country where the facilities for treatment of that illness are inferior to

those available in the Contracting State may raise an issue under Article 3 but only in a very exceptional case where the humanitarian grounds against the removal are compelling. In the D case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food shelter or social support". The EctHR said that Article 3 could not be relied on to address the disparity in medical care between Contracting States and the applicant's state of origin. The fact that the person's circumstances, including his or her life expectancy, would be significantly reduced was not sufficient in itself to give rise to a breach of Article 3. Those same principles had to apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which might cause suffering pain or reduced life expectancy and required specialist medical treatment that might not be readily available or which might only be available at considerable cost. No separate issues arose under article 8(2) and it was not therefore necessary to consider the Claimant's submission that removal would engage her right to respect for private life.

12. In relation to physical ailments; I find it has not been established that the appellant suffers any ongoing issues requiring medical treatment/intervention at this time. It has not been established that if there was to be a diagnosis that medical treatment would not be available for the same or accessible within Zimbabwe. It has not been established that the appellant is able to satisfy the required test to engage Article 3 on the grounds of her physical medical condition/presentation.
13. The skeleton argument also refers to psychological aspects of her previous treatment. I accept that having to undergo a number of procedures, including what appears to be a repair procedure, can have a psychological effect on any individual. In relation to the psychological aspects of an Article 3 claim the threshold is very high - see N v UK (Application 26565/05) above.
14. In J v Secretary of State for the Home Department [2005] EWCA Civ 629 the Court of Appeal said that in a foreign case the Article 3 threshold would be particularly high and even higher where the alleged inhuman treatment was not the direct or indirect responsibility of the public authorities in the receiving state and resulted from some naturally occurring illness whether physical or mental.
15. There is no evidence of a persuasive nature from a psychiatrist or psychologist indicating that any recognised condition exists of the nature suggested in the skeleton argument or, if it does, that treatment would not be available for the same in Zimbabwe within the mental health services. The appellant has failed to discharge the burden of

proof upon her to the required standard to show that she is able to succeed on this basis.

16. In relation to the physical and mental health issues, so far as they form part of the Article 8 assessment, it has not been established that there is any engagement with her private life beyond the use of GP services and the NHS within the United Kingdom. As stated, it has not been shown that facilities will not be available in her home state or that there is a bond of dependency upon the providers of health services within the United Kingdom that would lead to Article 8 being engaged on this basis or, if it was, that would make the decision disproportionate.
17. In relation to the appellant's claim to be entitled to be recognised as a refugee on the basis of her perceived membership of a particular social group; this group was defined by her representative in submissions as being a member/sympathiser of GALZ or her perception as such. It was accepted in submissions that the appellant was unable to bring forward any evidence to prove that she would be perceived in such an adverse way although it was submitted it was plausible that those in Zanu PF may take such an adverse view in light of the expressed opposition to members of this group by the President.
18. It is accepted the appellant has been out of Zimbabwe for some time but it was submitted that she would be seen as an advocate of this group as she is seen by the world at large as such as a result of her Ph.D. thesis. One of the reasons for the delay in producing this determination, from the date of the hearing, has been to allow me to read the thesis which was kindly provided by the appellant and which is stated to be available on the University of Birmingham internet. The title of the thesis is "The Attitude of the Methodist Church in Zimbabwe to Homosexuality: Towards a Socio-sexological Theological Investigation". The date of the document is 2010 and it highlights a number of aspects of Zimbabwe society including the traditional views of members of the Shona community and the Methodist Church within Zimbabwe to aspects of sexuality, containing comment upon the political aspects but also biblical and other teachings and publications in relation to these issues.
19. Although I accept the thesis has been produced and it deals with a subject which, at times, has been shown to be one that is particularly sensitive within Zimbabwe the assertion that the appellant has acquired a profile as a result of the publication of this document such that she would be viewed as a worldwide advocate for members of the gay and lesbian community is not substantiated.
20. The appellant was granted permission to undertake this work within Zimbabwe and refers in her finished text to potential difficulties and problems that she and her research assistants were fully aware of in undertaking the research. However, it appears that the Church and

others approved her undertaking the research, completed and returned questionnaires, permitted the appellant to arrange and attend public meetings where discussions occurred, which is recorded within the text of the thesis. The conclusion of the thesis at paragraph 7.4 contains the following observations:

It is uncertain how the social life of homosexual men and women is likely to develop in Zimbabwe. Until now they have experienced only a few years public history but are thoroughly frustrated in all their attempts and the approach of the Church can at best be described as nostalgic, evocative and wistful. Homosexuality as we know it today is challenging the church in Zimbabwe to rethink its theological approaches to sexuality. As Paul puts it, our knowledge at best is imperfect (1Cor13:9), it is hypocrisy then for a Church to claim a monopoly of the truth, there must always be openness to insights within every generation. It provides a good reason for the Church to

Be willing to step outside the bounds of our comfort and into the realm of God's creation. We must be willing to follow Christ into the places that make us uncomfortable, places that we never imagined going.

The challenge for the Church is to participate in actions that will break especially the cycle of gay and lesbian abuse, to walk with the victims and to confront what we would rather avoid. This carries with it the pastoral duty to be active in protecting those who are victimised, since it is sadly true that members of the gay and lesbian community are often verbally abused and made the targets of humiliation. The Church is challenged to critically analyse its socio-theological approaches to sexuality. The Church needs to engage some serious thought into the effects her approach has to on all concerned, more so, where human beings are concerned. The debate on homosexuality is about God and human rights, it is about God and the marginalised. Jesus' ministry was concerned with breaking barriers humans put up against each other. There is a need for the Church to facilitate a discourse on sexuality in which gays and lesbians should be part. The idea of participation by quantification honestly needs to be revised before a meaningful discourse can take place. Any disclosure on sexuality in which the voice of gays and lesbians is not heard is an unequalled discourse because it portrays an assumed superiority of knowledge by the Church. Nevertheless, it is important to note that it is other people's lives being tossed left, right and centre. Why not let the individuals concerned that lead the debates that concern them and determine their own destiny? For a well balanced approach to the issue of homosexuality the Church needs the contribution of gays and lesbians in Zimbabwe, because in reality at this stage everyone else has been speaking for them. There is need for an open contribution from gays and lesbians in Zimbabwe for which the Church can provide the appropriate context to facilitate such discourse. This contribution may operate as a corrective of the misconceptions surrounding homosexuality in this context, and develop awareness as well as open up new avenues for exploring African sexuality at large. To continue propagating a theology of sexual silence where homosexuality is concerned does not seem to hold much water now that there is a known organised group of gays and lesbians in the country. Today the Church is faced with a modest task: to recognise and acknowledge the emergence

of a new situation that should lead to a broad ecclesial awareness of sexuality.

It is certain that attitudes towards change in any society fall within a broad spectrum. While one extreme of the spectrum may oppose all transformation under any circumstances and cherishes a return to the past, insisting that the achievements of the past are better than any possible future proposals, the other opposite extreme may support and advocate immediate change at any cost. These extremes are imminent once the debate kicks off. Whatever direction the debate may fall, the bottom line is that, it is a human right to be accorded the opportunity to openly debate all share an opinion on issues that are pertinent to one's life.

What the Church also needs is more comprehensive academic work to broaden knowledge on human sexuality. In doing so the Church needs to work with a broad prospective that subjects what is regarded as the norm to a critical evaluation as an attempt to present a more progressive alternative in the face of new evidence from other related scientific studies as well as social changes. It is a reality now that one need to think twice before making claims such as "this is not part of Shona culture", because the interaction of cultures is increasing by the day, and as a result claiming or denying the monopoly of anything has too many limitations, and seems to be an over simplistic approach. It is a reality that traditional villages are fast disappearing, and with city life becoming more fashionable there are some elements of traditional lifestyles that are no longer practical. Of late the country have seen lots of people emigrating to different countries; such an upheaval and cultural overhaul is bound to give people a new face. However, it is also a reality that there are some elements of the culture's sexual concepts that to this day have survived the storms, of which the concept of Shona marriage coupled with its primary purpose of procreation is a typical example, hence the phallocentric model elaborated above.

In conclusion I would like to quote Wogaman's remarks in his book *A Christian Method to Moral Judgement*, "We live at an awkward but exciting juncture of human history. None of us should claim too much for our own wisdom. All of us should confront our sensibilities humbly and diligently, hoping that by our faithfulness the next generation will have more to work with and a better society to live in." The understanding of homosexuality among the Shona is going to be a long drawn out process which requires the corporation of not only the Church but the whole community of which the Church is a member. Because the reality is that gays and lesbians may not wish to be what they are, but they have to be because that is what they are, and therefore they are. In this respect then, the Church must get real and get used to it because this is real contemporary challenge that can no longer remain behind social or ecclesiastical doors. The challenge for the Church is to boldly face up to the related socio-theological challenges if it does not want to live in an imaginary world. The phenomenon of homosexuality, complex as it is, and with its many consequences for social, cultural and ecclesial life requires the Church's attentive study, active concern and honest, theological well-informed discourse. Advocating for a secrecy model does not seem to hold water any more. There is every indication that the

coming years will provide us with very different exciting and challenging ways of viewing sexuality as well as the Church, in ways that are quite different from those that we have been accustomed to in the past or today. The same should apply to our theological approaches if they are to remain relevant for every generation; in doing so the Church of God marches on.

21. The appellant is an ordained Minister herself and refers in the thesis to the fact that a substantial part of the work she did by way of research was in an area in which she had held a ministry and was therefore known to her congregation and trusted.
22. I accept that the reaction to the appellant's suggestions and the discussion generally may depend upon the standpoint of the individual reader. There is clearly a challenge to the view of the Methodist church within Zimbabwe which may produce an adverse reaction from officials within that Church who do not share what they may perceive as a radical view of this particular area of socio-theological thinking. There is no suggestion however that the appellant will face a real risk of serious harm from those within the Church although she claims that her position as a Minister has been lost to her as a result of her recommendations; this suggestion is not supported by sufficient material originating from the Church itself to create a real risk for the appellant on return, sufficient to engage the United Kingdom's international protection obligations, or to show she will be unable to continue her work within the Church.
23. The appellant refers in the thesis to the existence of gay and lesbian members of the community together with organised groups providing representation for them, albeit not as openly as the appellant may prefer to avoid the risk of adverse reactions/persecution. Such groups, including GALZ, are the subject of adverse rhetoric from the President although this group in Zimbabwe recently succeeded in actions brought against the police for what they considered to be unjustified harassment. The relevant country guidance case is that of LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC) in which the Tribunal held that (i) There has been much public expression of extreme homophobia at the highest levels in recent years in Zimbabwe (ii) Male homosexual behaviour is criminalised, but prosecutions are very rare. Lesbianism is not criminalised. (iii) Some homosexuals suffer discrimination, harassment and blackmail from the general public and the police. Attempted extortion, false complaints and unjustified detentions are not so prevalent as to pose a general risk. There are no records of any murders with a homophobic element. "Corrective rape" is rare, and does not represent a general risk. (iv) There is a "gay scene," within limitations. (v) Lesbians, living on their own or together, may face greater difficulties than gay men. (vi) GALZ (Gays and Lesbians of Zimbabwe) takes a realistic view: Zimbabwe is "not the worst place in the world to be gay or lesbian even though the President, government officials and church leaders have whipped up a climate of

hysterical homophobia.” (vii) Applying **HJ & HT [2010] UKSC 31, [2010] Imm AR 729**, there is no general risk to gays or lesbians. Personal circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk. (viii) The police and other state agents do not provide protection. (ix) A homosexual at risk in his or her community can move elsewhere, either in the same city or to another part of the country. He or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances present risk throughout the country

24. The appellant has not establish she has an adverse profile that will place her at risk on return as demonstrated by her own admission that she returned to Zimbabwe for the purposes of research in 2003/2004 and thereafter returned for the purposes of a holiday in 2012. There is no evidence the appellant came to the adverse interests of the authorities at the airport on return or suffered ill-treatment sufficient to indicate that she is likely to be targeted on return in any part of Zimbabwe in 2014. The 2012 visit substantially postdate publication of the thesis in 2010. In HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094 the Tribunal found that the process of screening returning passengers is an intelligence led process and the CIO will generally have identified from the passenger manifest in advance, based upon such intelligence, those passengers in whom there is any possible interest. The fact of having made an asylum claim abroad is not something that in itself will give rise to adverse interest on return. In paragraphs 264 and 266 the tribunal said: “The CIO has taken over responsibility for the operation of immigration control at Harare airport and immigration officers are being replaced by CIO officers. We accept also that one of the purposes of the CIO in monitoring arrivals at the airport is to identify those who are thought to be, for whatever reason, enemies of the regime. The aim is to detect those of interest because of an adverse military or criminal profile. The main focus of the operation to identify those who may be of adverse interest remains those who are perceived to be politically active in support of the opposition. But anyone perceived to be a threat to or a critic of the regime will attract interest also ... We have set out the evidence that indicates in whom the CIO has an interest. This will be those in respect of whom there is any reason to suspect an adverse political, criminal or military profile of the type identified in AA(2). In addition, those perceived to be associated with what have come to be identified as civil society organisations may attract adverse interest as critics of the regime” (and see paragraph 282). At paragraph 102 the tribunal had said: “The evidence concerning the CIO establishes clearly that anyone who comes to the attention of the CIO and is perceived to be an enemy of the regime faces a very real risk of being subjected to physical ill-treatment”.

25. In CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC) the Tribunal held that the fresh evidence regarding the position at the point of return does not indicate any increase in risk since the Country Guidance was given in **HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094**. On the contrary, the available evidence as to the treatment of those who have been returned to Harare Airport since 2007 and the absence of any reliable evidence of risk there means that there is no justification for extending the scope of who might be regarded by the CIO as an MDC activist.
26. It is not suggested that on return the appellant is likely to engage in activities that will bring her to the adverse attention of the authorities. Her previous employment in Zimbabwe was as a Minister of the Methodist Church not as a vocal activist supporting members of the gay and lesbian community. It is not claimed she is a lesbian and the basis of the claim is that the real risk rises from an adverse perception following the publication of the thesis not as a result of her desire to undertake activities reflecting a fundamentally held belief that forms part of her personal identity, which it would not be permissible to expect her to act discreetly to hide in order to avoid persecution.
27. I have taken into account the letter of purportedly from the office of the Secretary of the MDC for Chitungwiza Province dated 24 July 2014 confirming the appellant was granted permission to undertake research on homosexuality in 2003 and the fact it was emphasised that she needed to be extremely cautious due to potential risk. The letter states that her work was noticed by government officials and people were severely beaten and a few jailed, threats made, and people tortured by the government authorities and a lot of families have suffered the consequences. It is also stated that since publication of the thesis in 2010 the author of the letter has noticed people who assisted her suffering "atrocious punishments from government officials" and that the authorities will not hesitate to punish the appellant herself as the author. The letter was criticised by Mr Smart in his submissions on the basis it is in general terms, there was no indication of the identity of the person who signed the letter or who created it, no specific information relating to the number who suffered, and that the content did not established that the appellant herself faced a real risk on return.
28. The signatory of the letter is stated to be the Secretary of the province for the MDC, although is not named. There is a lack of detail in the letter although there is no mandatory requirement for all evidence to be in a particularly detailed form. If the work undertaken by the appellant has created a real risk such that physical harm has resulted specific detail may not be required. The difficulty with the letter however is it that it does not specify who was ill treated other than in generalised terms and appears to be the only source of information relating to this allegation. The claim the appellant faces a real risk from government officials as a result of the publication of the thesis in 2010 is also undermined by the

fact she was able to enter Zimbabwe for purposes of a holiday in 2012 when there was no adverse interest shown in her at the airport or within Zimbabwe generally sufficient to engage the need for international protection.

29. In relation to this issue; I find the appellant has failed to substantiate her claim to face of real risk of ill treatment on return sufficient to engage the United Kingdom's obligation under the Refugee Convention, in relation to the Qualification Directive, or under the Human Rights Convention.
30. The appellant also seeks to rely upon Article 8 family life which she states is with her sister, brother-in-law and their children, and her brother in the United Kingdom. It was accepted in submissions that the appellant is unable to succeed in relation to Article 8 under the Immigration Rules and so it is necessary to consider this matter outside the Rules under Article 8 ECHR.
31. The Article 8 claim is based upon a relationship with family members in the United Kingdom but these are adults, bar her nephews and/or nieces. Any relationship with the junior members of the family has not been shown to be anything other than the normal relationship of an aunt. Even if the appellant does maintain close contact with family members in the United Kingdom the best interests of the children have not been shown to be other than to remain with their own parents who are their primary carers. It has not been shown that the appellant's removal and change of contact with her sister's children to indirect contact will result in consequences that will be unjustifiably unduly harsh such as to make the decision disproportionate.
32. Any relationship with her brother, sister, and other adult family members in the United Kingdom may be strengthened by the appellant's own circumstances although it was noted that she has not only studied to a very high level of academic achievement but also undertakes voluntary work and paid employment in the United Kingdom; indicating a willingness and ability to undertake activities outside the home environment and a degree of independence. The appellant's own evidence undermines the submission made by her representative that if returned to Zimbabwe all she will know is her previous life as a Minister which may be lost to her as result of the thesis. The appellant has worked in the United Kingdom in a role not related to her profession as a Minister indicating that she is an adaptable as well as a very competent individual. It has not been shown that the consequences of removal from the United Kingdom in relation to her relationships with any adult member of the family, or in relation to her private life in the United Kingdom, will result in unjustifiably harsh consequences such as to make the decision disproportionate. The appellant may wish to stay with family in the United Kingdom but Article 8 does not given an individual the choice of where they wish to reside

and, as the appellant has never had a grant of settled status in the United Kingdom, the family and private life she seeks to rely upon has all been created at a time when her immigration status was precarious. As a result little weight should be accorded to it by virtue of the provisions of section 117B of the 2002 Act and the Strasbourg jurisprudence.

33. The appellant also raised in her written and oral evidence the fact that she had been the subject of sexual abuse. The appellant claimed a single act of abuse in 1982 in her oral evidence to the Upper Tribunal but in other parts of her evidence refers to a longer period between 1982 and 1990. The appellant, however, did not flee Zimbabwe and there is no evidence of ongoing acts of abuse or of any adverse experiences of this nature between 1982 and September 2001 when she came to the United Kingdom as a student. Although it was indicated in submissions made on her behalf that the appellant would have to return to her home village, which may have been the venue of the abuse, she states in the earlier part of the thesis that she not only lived in her home village but would also travelled with her father and live in a local town/city with him while she was growing up, indicating experience of living in other parts of Zimbabwe. It has also not been established on the facts that it would be unreasonable for her to relocate to another area in Zimbabwe if she did not wish to return to her home village in any event. Employment prospects are probably greater within the conurbations too. Insufficient evidence has been established to show that she would be required to return to the site of any previous abuse or that she could not establish herself elsewhere.
34. I accept that the psychological impact of abuse can be extremely deep but there is no indication that the appellant has sought assistance from the professional authorities in the United Kingdom trained and equipped to deal with any residual emotional or psychological issues. If such issues exist they would fall within consideration of the mental health aspects of the claim which, for the reasons set out above, it has not been established that treatment, if required, or assistance would not be available in Zimbabwe to which the applicant will be able to seek access. In summary in relation to this issue; the appellant claimed she was abused in the village at the age of 15 but no police action was taken. The abuser was not a relative. In 2010, however, she returned to her home village as her mother was ill with no evidence of any adverse reaction. The appellant has chosen not to seek assistance for the consequences of abuse and to keep events in her mind and deals with the same internally, as a result of which no expert evidence is available. If returned to Zimbabwe there is no evidence of an impact sufficient to engage Articles 3 or 8, the latter on a physical and moral integrity basis, treatment has not been shown not to be available or assistance from women's groups in Zimbabwe, although the appellant has to-date chosen not to make use of the same in the United Kingdom. If there is an ongoing consequence as a result of the appellant's choice not to

obtain help available to her that is not a matter arising as a result of the consequence of any action of the state but rather as a result of the appellant's own choices.

35. Comment was also made in submissions regarding the fact that following medical intervention and the hysterectomy the appellant cannot have children. This issue was however combined with a submission that she would have to return to her village where cultural thinking is that women marry and have children and that it was inhumane to expect the appellant to return due to the resulting emotional consequences. The medical evidence supports the fact the appellant is unlikely to be able to conceive a child following a hysterectomy and her own thesis discusses at length the traditional view of the role of women within Shona society. As stated above, however, it has not been established that the appellant will be required to return to her home village or that it is unreasonable for her to relocate to or within the conurbations where the appellant recognises herself, in her thesis, that society within Zimbabwe is changing. It has also not been established that the fact she may be a single woman who, even if married, is a person unable to have children will result in any form of persecution or treatment sufficient to engage the United Kingdom's obligations in the field of international protection. Misunderstanding can lead to harassment/abuse/marginalisation in some cases but it has not been established that there is a real risk to the appellant or that the appropriate threshold will be crossed in all Zimbabwe.
36. It is accepted that the appellant on return to Zimbabwe may experience a period of disruption to her lifestyle, hardship, and uncertainty, while she readjusts and re-establishes her life. She returns however as a highly educated individual albeit in a more specialist field, with contacts within Zimbabwe and family in the United Kingdom who have provided her with support to date with no suggestion that they will abandon her even if she is returning home. It is claimed her brother has left Zimbabwe and moved to South Africa but that is a neighbouring state indicating that a family member remains in the region.
37. The burden is on the Secretary of State to prove that any decision under Article 8 is proportionate. For the reasons set out in the reasons for refusal letter, Mr Smart's submissions, and set out above, I find the Secretary of State has discharged this burden in relation to family life, private life, and medical issues. The burden is upon the appellant to prove she is entitled to be recognised as a refugee, and, if not, a person entitled to a grant of humanitarian protection and a person entitled to leave to remain as a result of a real risk of a breach of rights under Article 3 in relation to both protection and medical issues. I find the appellant has not substantiate her claim in relation to any of the above heads and has failed to discharge the burden upon her to show that she is entitled to any form of international protection or leave to remain.

38. The appellant is no more than a failed asylum seeker and as such at no risk on risk on return to Zimbabwe per se. Her appeal is therefore dismissed.

Decision

39. **The First-tier Tribunal Judge has been found to have materially erred in law and her decision set aside. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

40. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 16th December 2014