



IAC-AH-DP-V1

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

Appeal Numbers: AA/06181/2014
AA/06643/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27th November 2015**

**Decision & Reasons Promulgated
On 16 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) S M

(2) J M

{ANONYMITY DIRECTION NOT MADE}

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms R Manning (Counsel)

For the Respondent: Ms A Everett (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Birk, promulgated on 25th March 2015, following the hearing at Birmingham Sheldon Court on 5th March 2015. In the determination, the Judge dismissed the appeals of the first and the second Appellants herewith, whereupon they both applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are sibling sister and brother. The first Appellant, the sister, was born on 21st January 1994. The second Appellant, the brother, was born on 6th August 1990. Both are nationals of Zimbabwe. Both come from Harare, and arrived in the UK in April 2009 on a multi visit visa. Their mother and sister already reside in the UK. Their mother had made a claim for asylum which was rejected by an Immigration Judge on 25th January 2010. Following this, on 30th April 2012, both the Appellants made an application for leave to remain outside of the Immigration Rules, and when that was refused on 25th May 2012, they claimed asylum on 4th June 2014, and the Respondent issued her refusal letter on 6th August 2014.

The Appellants' Claim

3. The Appellants' claim is that they have each been physically assaulted and threatened by ZANU-PF groups on a number of occasions due to their mother being a member of the MDC, and because she was a teacher, so that both the Appellant children were seen as traitors and spies because they had travelled to the UK (see paragraph 5 of the determination). The Appellants' case, however, is that they themselves were not members of the MDC. They were also not themselves involved in politics. They had each attended meetings in the UK by going to Zimbabwe vigils. They claimed that they would have now been viewed as spies and traitors since they could not demonstrate loyalty to the ZANU-PF regime.

The Judge's Findings

4. By the time of the hearing before Judge Birk, there was additional evidence provided to her in the form of photographic evidence that a former solicitor had sent the Appellant's mother pictures of himself with a prominent ZANU-PF member. The Judge accepted this as a credible proposition. She held that,

"I find that the Appellants' passports are held by the solicitor as they would have been handed to him to advance their claim and that this means that the solicitor has their details and is aware of the family background and that he has connections to the ZANU-PF. I find that there is a risk that the ZANU-PF could be alerted about the Appellants on return" (paragraph 23).

5. The Judge also then went on to look at the Appellants' own political involvement with the MDC and held that they were not members themselves and also had not been politically active. Such support that they showed for the MDC was "only very low level support in the UK" (paragraph 24).
6. The Judge went on to apply the country guidance case of **CM (EM CG; disclosure) Zimbabwe CG [2013] UKUT 00059** and observed once again that the Appellants do not have a significant MDC profile. They both live in Harare. Neither Appellant has demonstrated that they are featured on any of the lists for being targeted for harassment. She observed that

the case guidance indicated that a failed asylum seeker without a significant MDC profile would not face a real risk of having to demonstrate loyalty to ZANU-PF (paragraph 25).

7. What the Judge did, however, also additionally add was that, “there has been persecution in the past and there is a risk that their former solicitor may have connections with the ZANU-PF and there is a risk that this could cause them some difficulties on return” (paragraph 25). The Judge did, in considering this particular aspect of the claim, go on to then hold that,
“... however, the Appellants have not established that facing adverse attention would cause them to face treatment amounting to persecution on return as it does not raise their profiles to be one that of having a significant MDC profile. I find that they could return to Harare. Alternatively looking at return to Bulawayo they could relocate and I do not find it unduly harsh or unreasonable for them to do so” (paragraph 25).

The appeal was thereafter dismissed both on asylum grounds, on humanitarian grounds, as well as on human rights grounds.

Grounds of Application

8. The grounds of application argue that the Judge failed to consider paragraph 339K of HC 395 and **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059**. This is because the Appellants would be at risk of persecution during the second stage of interrogation on arrival at the airport. Further, it would be unduly harsh for them to relocate to Bulawayo. Accordingly, the Judge failed to consider that the Appellants were in a heightened risk category. This was given the Judge’s own findings that they had suffered past persecution. In these circumstances, internal relocation to Bulawayo would be unduly harsh for the Appellants who were of Shona ethnicity.
9. On 27th June 2015, permission to appeal was granted.
10. On 19th August 2015, a Rule 24 response was entered, this was to the effect that the Judge had specifically considered the country guidance case and had concluded that on return the Appellants would not reach the level of persecution required as their profiles would not be significant MDC profiles. The finding was entirely open to the Judge. Even if the Appellants are of Shona ethnicity this does not cross the threshold of persecution required under the law.

The Hearing

11. At the hearing before me on 27th November 2015, Ms Manning submitted that the facts here were that the Appellants had suffered serious assault because their mother was a teacher and a member of the MDC. The Appellants were targeted for that reason. Secondly, the solicitor was a ZANU-PF member with prominent connections and would have passed on information to the authorities thus placing the Appellants at risk. The Judge had found the Appellants to be credible in every other respect. The

only issue was whether these facts would point to persecution at the lower standard. The Judge was wrong to conclude that it would not point to persecution. This was because at paragraphs 23 and 25 the Judge had already found there to be past persecution, and it was reasonable to assume that this persecution will continue in the future.

12. For her part, Ms Everett submitted that the Judge had looked at the country guidance case. He had found that the Appellants themselves did not have an MDC profile of any significance. They were not politically active. Therefore, they themselves would not be at risk of persecution. Whilst it was accepted that internal relocation to Bulawayo might well be difficult, it could still occur within Harare itself.
13. In reply, Ms Manning submitted the persecution here had been by non-state agents and the state had been unable to prevent such persecution by ZANU-PF members. It was likely to continue now. The family background here was such that persecution would follow.

Error of Law

14. I am satisfied that the making of the decision by the Judge involved the making of an error of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the Judge has made a clear finding that, “on account of the Appellants’ former solicitor being seen with a prominent ZANU-PF member and passing on information, that, I find that there is a risk that the ZANU-PF could be alerted about the Appellants on return” (paragraph 23). In addition, the Judge has gone on to say that, “there has been persecution in the past and there is a risk that their former solicitor may have connections with the ZANU-PF and that there is a risk that this could cause them some difficulties on return” (paragraph 25).
15. Second, the Judge had clearly concluded that,

“... the Appellants have been consistent in their oral and written evidence as to the assaults that they each suffered from the ZANU-PF. I find that there is no reason to find that these assaults did not take place bearing in mind the power and actions that were taken by the ZANU-PF at that time in Zimbabwe ...” (paragraph 21).
16. In the light of these two different sources of risk that the Judge adverted to, paragraph 339K of HC 395 was plainly relevant.
17. This reads that,

“... the fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or harm, will be regarded as a serious indication of the person’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated”.

18. The existing country guidance decisions had to be applied in the context of this background. That being so, it was clear that, if the Appellants had suffered persecution in the past, as a result of their mother being a teacher, then this would have placed the Appellants in an enhanced or heightened risk category by association, and this is clear from paragraph 10 of **CM (EM CG; disclosure) Zimbabwe CG [2013] UKUT 00059**. These were not matters that the Judge gave proper consideration to. Accordingly, given that “anxious scrutiny” has to be applied, I find that the Judge fell into error.

Re-Making the Decision

19. I have remade the decision on the basis of the findings of the original Judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal to the extent that it is remitted back to the First-tier Tribunal, to be heard by a Judge other than Judge Birk, under Practice Statement 7.2(b) in that the nature or extent of the judicial fact-finding, which is necessary in order for the decision and the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. I am particularly concerned in that there has been no proper evaluation made of the role of the Appellants’ previous solicitor in exposing these Appellants to further risk given that he has been seen with a prominent member of the ZANU-PF. These are matters, however, that must be explored upon evidence being heard before the First-tier Tribunal again.

21. So also, must the situation with respect to internal relocation, be properly explored given that the Appellants are of Shona ethnicity.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original Judge. This appeal is remitted back to the First-tier Tribunal in Birmingham to be determined by a Judge other than Judge Birk.

~~No anonymity order is made.~~

Signed

Date

Deputy Upper Tribunal Judge Juss

4th December 2015