



**Upper Tribunal IA/29770/2014
(Immigration and Asylum Chamber)**

Appeal Number: PA/00309/2017

THE IMMIGRATION ACTS

Heard at Field House

**Decision &
Promulgated
on 26th June 2017**

Reasons

**Heard on 8th June 2017
Prepared on 16th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

[Z S]

~~-(Anonymity order not made)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Billie, legal representative

For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Zimbabwe born on [] 1970. She appealed against a decision of the Respondent dated 23rd of December 2016 to refuse to grant her asylum. Her appeal was allowed at first instance by Judge of the First-tier Tribunal Hillis sitting at Bradford on 10th of February 2017. The Respondent appealed against that decision and the matter

came before me to determine whether there was a material error of law in the First-tier Tribunal's decision. For the reasons which I set out in more detail below I found that there was an error such that the decision was set aside and I re-heard the matter. Thus, although the appeal initially came before me as an appeal by the Respondent, for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant arrived in the United Kingdom in December 2001 with leave as a student valid until 2004. She was diagnosed as HIV positive in 2003. She applied for further leave to remain on 25th September 2004 (five days before her leave was due to expire). This application was rejected by the Respondent on 14th April 2005 (the refusal letter appears to contain a misprint stating 2004 which would be an impossible date). She claims she did not receive that decision from the Respondent. In January 2011, she met her partner, [M] and they began living together in December 2012. On 5th of March 2015 she applied for leave to remain on private and family life grounds but this was refused by the Respondent on 28th of May 2015. The Appellant appealed that decision but subsequently withdrew her appeal. On 26th of June 2016 she applied for asylum which resulted in the Respondent's decision dated 23rd of December 2016 which led to these proceedings.

The Appellant's Case

3. The Appellant's case was summarised by Judge Hillis at paragraphs 18 to 22 of his determination. The Appellant had fled Zimbabwe in fear for her life in 2001 as the Mugabe regime was killing people. She fled to South Africa where she obtained a genuine Zimbabwean passport in her own name and with her own details. She travelled to the United Kingdom in 2001 using this passport. From about 2009 onwards the Appellant began attending the vigils on a weekly basis outside the Zimbabwean embassy in London demonstrating against the Mugabe regime. The Appellant's fear was that she would have been identified at the vigils by the Zimbabwean authorities as a result of which they would have an adverse interest in her due to her political opinion should she be returned to Zimbabwe.
4. She further argued that whether or not she was credible she would nonetheless be at risk of persecution on arrival in Zimbabwe due to the two-stage test of questioning at the airport. According to information contained in **HS [2007] UKAIT 94** the purpose of the initial interview (the first of the two stages) is to establish whether the deportee is of any interest to the CIO or the security services. If such a political or relevant military profile is suspected, or if there are outstanding criminal matters to be resolved, the deportee will be taken away by the relevant branch of the CIO for interrogation. This second stage interrogation carries with it a real risk of serious mistreatment sufficient to constitute a breach of Article 3. The Appellant would be singled out for that second stage

interrogation because of her prolonged absence from Zimbabwe (which is now some 16 years). She would be required to demonstrate her support for the regime and Zanu-PF which she would be unable to do.

5. Her partner [M] had refugee status in the United Kingdom and would be unable to accompany her to Zimbabwe which would breach her Article 8 right to family life with him. Further she would be at risk as a single female returning without male support to Zimbabwe. The lack of adequate medication in Zimbabwe to treat her medical condition also engaged Article 8 on the basis of a private and/or family life claim outside the Immigration Rules. The Appellant produced photographs showing her attendance at the demonstrations which she submitted added significant evidential weight in support of her claim.
6. The Respondent did not accept that the Appellant was credible arguing that her activities in the United Kingdom were purely self-serving and it was not likely she would be identified by the Zimbabwean authorities attending the vigils. She was not in a genuine and subsisting relationship with [M] as if she was he would be supporting her application. He did not attend the hearing at first instance before Judge Hillis (and he did not attend the hearing before me). The Appellant had withdrawn her previous appeal but had given no good reason why.

The Decision at First Instance

7. At paragraphs 38 to 54 the Judge set out his reasons why he allowed the appeal on asylum grounds. The Judge did not accept it was credible that the Appellant had left Zimbabwe illegally since she had gone to the Zimbabwean authorities in South Africa and obtained a Zimbabwean passport from them. She must have been asked for identification to obtain a passport and must have therefore proved to the Zimbabwean authorities that she was one of their nationals. If she had been of adverse interest to the authorities at that time she would not have been issued with a passport. In short, the Appellant had no political profile when she left Zimbabwe, her political activities only began once she had arrived in the United Kingdom when she began to attend the vigils from 2009 onwards.
8. The Judge accepted that a photograph of a building marked "Embassy of the Republic" was indeed the Zimbabwean embassy. A letter from the Zimbabwe vigil coordinator provided significant support to the Appellant's account that that photograph was taken outside the embassy and thus that the Appellant had attended vigils as a regular and active participant since 2009. The Judge acknowledged that the evidence of the coordinator, Ms Benton, was not tested because she had not attended the hearing. However, the Judge noted from the background evidence that the Zimbabwean authorities actively monitored the demonstrations outside their embassy in London and had undercover officers mingling with those in attendance in support of the vigil. The vigil was of a

particularly high profile taking place at the same time every Saturday. It was therefore extremely easy for the Zimbabwean authorities to photograph and record those who attended the vigil who were protesting against the Mugabe regime and thus were not supporters of Zanu-PF.

9. The Judge then went on to consider these facts against the country guidance authorities. Unfortunately, it was at this stage that the Judge fell into an error of law. At paragraphs 48 and 50 he referred to a relatively old country guidance case **RN [2008] UKAIT 83**. On the basis of this case he concluded that the Appellant would come to the attention of the Zimbabwean authorities on removal to Harare airport due to her attendance at the vigils and the period of time she had been outside Zimbabwe. She would be unable to demonstrate support for the regime during the two-stage questioning she would face whilst in detention at the airport. She therefore came within one of the risk category set out in **RN**. The risks were throughout the country in both urban and rural areas and it was not reasonable or viable for the Appellant to internally relocate. Article 3 stood or fell with the refugee claim.
10. In relation to Article 8 the Judge noted the absence from the hearing of the Appellant's claimed partner [M] but found no evidence that [M] was in fact a recognised refugee. He had been granted indefinite leave to remain on the basis of settlement. No weight was placed on [M]'s statement as he had not been questioned on it and the Appellant had failed to show that she was in a relationship akin to marriage with him. Her presence in the UK had been as an over-stayer and her relationship with [M] had taken place during that time. She could not meet the Immigration Rules. Compelling circumstances would be required before she could succeed under Article 8 outside the rules. In this case the compelling reasons were the basis for the Appellant's asylum claim. The Judge allowed the appeal under both the Refugee Convention and the Human Rights Convention.

The Onward Appeal

11. The Respondent appealed against this decision arguing that the Judge should have adjourned the matter for [M] to attend court so that he could be cross examined. The Appellant's representative had made such an application although one presumes that that application had been made to strengthen the Appellant's claim under Article 8. This rather weak onward appeal resulted in a refusal of permission by Judge of the First-tier Tribunal Pedro on 27 March 2017. He rightly observed that the Respondent's grounds were misconceived since the Appellant had attended and gave oral evidence and had been cross examined. The Judge had given an adequate explanation why he had refused to adjourn the matter for the attendance of the Appellant's partner.
12. The Respondent renewed her application for permission to appeal but this time on different grounds. The first bullet point of the renewed

application accepted that the grounds before Judge Pedro did not identify an arguable error of law. The grounds now submitted that the First-tier had allowed the appeal without applying the existing country guidance on returns to Zimbabwe. **RN** was several years out of date. The Judge had failed to apply the current country guidance case of **CM [2013] UKUT 59**. This failure led to incorrect findings in respect of risk on return and the ability to relocate internally. The Judge's findings applied out of date and incorrect risk categories and this had materially affected the outcome of the appeal.

- 13.** The renewed grounds of onward appeal came before Upper Tribunal Judge Kebede on the papers on 25th of April 2017. In granting permission to appeal she wrote that there was arguable merit in the assertion that the Judge's assessment of risk on return was based upon arguably incorrect risk categories and thus arguably flawed owing to his application of outdated country guidance. Following that grant of permission directions were sent to the parties that they should be prepared that if the decision at the First-tier Tribunal was set aside as erroneous in law the remaking of the decision would take place at the same hearing. The fresh decision would normally be based on the evidence before the First-tier Tribunal and any further evidence admitted together with the parties' arguments. The parties must be prepared accordingly in every case.
- 14.** The Appellant filed a reply under rule 24 of the Procedural Rules responding to the grant of permission to appeal. The rule 24 submission noted those parts of the Appellant's case which had been accepted by the Judge and submitted that his decision was in accordance with a Court of Appeal decision in **EM [2009] EWCA Civ 1294** even if it had not been cited. There was active scrutiny by the Zimbabwean authorities of MDC activities in the UK. In **EM**, the Appellant had been taking part in vigils. In the instant case the Appellant's profile had not been challenged by the Respondent and no other conclusion could be reached except that the Appellant would be persecuted on arrival at Harare airport. The grounds argued that risk of persecution had been maintained in cases after **RN** and the Judge was aware of the two-stage interrogation process. There was a reasonable possibility that the Appellant would be stopped at the airport on account of her prolonged absence from Zimbabwe. The Judge's decision was neither perverse nor so lacking in reasons as to be unintelligible. No error of law was disclosed.
- 15.** The Appellant could not safely return to her home town of Zvishavane which it was claimed, was located in the Midlands province of Zimbabwe (but see below paragraph 30). In the case of **EM** serious concerns were expressed about the position of Zimbabwean citizens returning from the United Kingdom after a significant absence to live in the Midlands province. In any event once the Judge determined that the Appellant would be stopped, interrogated and persecuted at the airport the issue of internal relocation was no longer relevant. The Respondent's grounds were no more than a disagreement with the result.

The Error of Law Stage

- 16.** The first issue I had to determine was whether there was a material error of law such that the decision of the First-tier Tribunal should be set aside. I heard submissions from both representatives before giving my decision that there was a material error of law because the Judge had followed out of date country guidance. I now give full reasons in this section of my determination.
- 17.** The Respondent argued that there had been significant changes in Zimbabwe since **RN** was decided. The Appellant was from the area of Gwanda as could be seen from her birth certificate. If the Judge had considered the up to date country guidance of **CM** and considered where the Appellant came from in Zimbabwe, he would have seen that there was no risk on return to the Appellant in her home area. In reply the Appellant's representative argued that whether or not the Appellant came from Matabeleland that was not the correct position. It was said to be common ground that she came from the Midlands area. She was born in Gwanda but the issue of a person's home area was a question of fact. **HS Zimbabwe** was still good law and all the subsequent cases had maintained that guidance regarding interrogation at the airport. The Appellant's sur place activism was not challenged under cross examination.
- 18.** I considered the submissions both written and oral that I had received. The position in Zimbabwe at the time that **RN** was decided was significantly different to the position in that country by the time the Upper Tribunal came to give fresh country guidance on Zimbabwe in 2013 in the case of **CM**. Indeed, had there not been any change in country conditions since **RN** was decided there would have been little point in the Upper Tribunal giving country guidance in **CM**. The head note referred specifically to the Tribunal being entitled to find that there had been a durable change since **RN**. Certain risk categories such as teachers remained at risk in 2013 but that is not suggested to be relevant in this case.
- 19.** The issue to be determined was whether in applying **RN** to the facts which he had found the Judge had fallen into error. When **RN** was decided the economy in Zimbabwe was in a very poor state with rampant hyperinflation. The position now was that a returnee to Matabeleland was highly unlikely to face significant difficulties from the regime even if they were an MDC member or supporter. There had been no increase in risk at the point of return since **HS**. On the contrary, the available evidence as to the treatment of those who had been returned to Harare airport since 2007 and the absence of any reliable evidence of risk they might have faced meant that there was no justification for extending the scope of who might be regarded by the authorities as an MDC activist.

- 20.** It was clear that by applying out of date country guidance given at a time when the position in Zimbabwe was very different to what it is now the Judge fell into error. Quite why more up to date country guidance was not presented to the Judge was not at all clear. The Appellant's representative who appeared before me had appeared at first instance but neither representative at the hearing before the First-tier had seen fit to provide the Judge with up-to-date country guidance. In those circumstances, there was always going to be the danger that the assessment of risk upon return for the Appellant (whose claim was essentially a sur place claim) would fall into error. I found that it did and announced that I was setting aside the decision of the First-tier.

The Substantive Rehearing

- 21.** I invited Mr Billie for the Appellant to call his client in the event that he wanted her to give further evidence and also for her to be available for cross examination. It was put to the Appellant by the Presenting Officer that when interviewed she had said she was born in Zvishavane and later went to Gwanda (contradicted by what was said on her birth certificate) but also said that the two places were the same. She believed that there had been a mistake in the interpretation and did not remember saying that Zvishavane and Gwanda were the same (but see her answer recorded at question 106). The Appellant was also invited to comment on paragraph 205 of CM which stated that there was no evidence to show that the authorities were likely to detain and ill treat a person at the airport merely for having attended a MDC branch meeting in the United Kingdom. The Appellant replied that people were being arrested almost every day in Harare on arrival. The Appellant denied that she was from Matabeleland. It was a mistake to say she was born in Gwanda in Matabeleland.

Closing Submissions

- 22.** For the Respondent, it was argued that the Appellant had said she lived in Zvishavane but she had told the Home Office she was born in Gwanda. She was seeking to hide the fact that she was from Matabeleland. Even someone with an anti-government profile was far less likely to be at risk there. Her excuse that it was a translation error did not explain the very clear answers she had given in interview. When she said in interview that Zvishavane and Gwanda were the same that was her opportunity to point out if there had been an error but she had not done so. The evidence strongly suggested it was most unlikely she would be of any interest to the authorities at the point of return. Matabeleland would be the correct place for her to relocate and she would be highly unlikely to face difficulties there from the authorities including the security forces. That was the case even if the returnee was an MDC member or supporter. Taking the Appellant's case at its highest that she attended vigils it still meant her claim could not succeed. She would not be at risk in

Matabeleland and it was not unduly harsh for her to relocate there. The claim must fail in the light of the correct country guidance.

- 23.** In closing for the Appellant reference was made to the guidance in **CM**. The risk on return had to be assessed in accordance with the guidance of **HS**. A returnee who had a political profile or had been involved in sur place activities would be persecuted on arrival. Decision-makers had to take into account the activities of the Zimbabwean police in the United Kingdom. For the 2nd time there had been no challenge to the Appellant's sur place activism. Evidence about her profile was in the public domain, anyone who googled her name could find her. That distinguished her profile from someone who had attended one or two MDC meetings. If one looked at the length of her activism she was a genuine member of the MDC. It was safe to conclude that her profile had come to the attention of the authorities.
- 24.** There would be no record of her exit from Zimbabwe at all. It was an offence to travel on a foreign passport outside Zimbabwe. She would be questioned about that. She would be asked whether she had ever claimed asylum or criticised the regime and she would not be able to lie about that. She grew up in Zvishivane which she called home. Lengthy submissions were made at first instance in support of her claim under paragraph 276 ADE of the Immigration Rules. There were very significant obstacles to her return. These included her medical condition which had to be looked at in the light of the general collapse of the health system in Zimbabwe with a shortage of drugs and the ostracism of those suffering from that type of health condition. In relation to the claim under the Immigration Rules (which appeared not to have been dealt with substantively by the Judge) the Respondent relied on the refusal letter. Finally, in conclusion the Appellant's representative said the Appellant would be at risk on the airport and there was a risk in her home area.

Findings

- 25.** The Appellants claim is essentially a sur place claim. The authorities had no interest in her when she left Zimbabwe and there is little beyond her own assertion that she left illegally. The First-tier Judge rejected that claim and I can see no basis for the claim made by her representative that the Appellant had ever travelled abroad on a false or a non-Zimbabwean passport. The First-tier Judge did not accept any such argument and I too find it has no merit. I deal with the issue of the two-stage interrogation below but I do not accept that the Appellant would face any such interrogation because of an allegation she travelled on a non-Zimbabwean passport.
- 26.** The Respondent rejected the genuine nature of the Appellant's claim indicating that she had made the claim in bad faith in order to bolster an otherwise weak asylum claim. The authorities make clear that the issue in assessing a sur place claim is not the state of mind of the person

putting forward the claim (whether she is genuine or otherwise) but whether the authorities would become aware of the Appellant's activities and if so would act adversely upon them. The Respondent doubts that the authorities would be aware of the Appellant's activities but as was submitted to me by the Appellants representative, the Appellant was not cross examined about her activities. The Judge at first instance found that the activities did take place.

- 27.** The question therefore is if the Appellant were to be returned to Zimbabwe and her opposition activities in the United Kingdom were known to the authorities (albeit that they are limited to attendance at Saturday afternoon vigils) would that put her at risk upon return? The Appellant's argument is that the country guidance in **HS** still applies and that anyone subjected to the two-stage interrogation process would succeed in a claim for international protection. At paragraph 202 of **CM** the Upper Tribunal indicated that the country guidance remained as given in **HS** but the duty to follow country guidance under the practice direction was only to the extent that the evidence was the same or similar to that which had been before the Tribunal in **HS**. To say therefore that the Appellant must succeed because of **HS** assumes that the authorities would have an adverse interest in a low ranking MDC supporter as the Appellant is.
- 28.** I say low ranking because when one looks at the Appellant's own description of what she has done for the opposition in this country, selling T-shirts, dancing, giving out flyers and travelling alone to the vigils, it is difficult to find that the Appellant's participation in the vigils is anything other than low level. Significantly Ms Benton on whom the Appellant relied in support of the claim to participate in the vigil has never made herself available for cross-examination for example on her knowledge of the scope of the Appellant's activities. The Judge accepted Ms Benton's evidence in generic terms, that vigils existed and were monitored but I do not accept that any weight can be placed on untested evidence about the Appellant's claimed profile in the opposition. The evidence received by the Upper Tribunal in **CM** (see paragraph 205 thereof) was that there was no justification for regarding low level MDC supporters as the sort of activists who would be likely to fall foul of the authorities as set out in **HS**. There was no evidence to show that the authorities would detain and torture a person for attending an MDC branch meeting in the United Kingdom. In my view that extends to low level activities around vigils.
- 29.** In the light of the Judge's findings of fact at first instance, I accept that this case has to be looked at taking the Appellant's case at its highest but even at its highest in the light of the changed situation in Zimbabwe and the changed country guidance it is not possible to come to the same conclusion on the need for international protection that the Judge at first instance came to. At paragraph 203 of **CM** it was said that the evidence as a whole revealed no case of scrutiny for loyalty at the airport. Nor

were there any roadblocks en route from the airport to Harare or Bulawayo where checks might be made on sympathies to the peril of those who could not honestly proclaim support for ZANU-PF. An expert who gave evidence to the Upper Tribunal when pressed could not give any example of such a thing happening since 2009. I do not accept therefore that the Appellant would be at any risk upon return at Harare airport.

- 30.** The Appellant's evidence on where she was born and grew up was muddled. The Respondent's submission was that the Appellant was altering her evidence as she went along to shore it up by saying she was from the Midlands province a risk area according to the country guidance. She was born in Gwanda in South Matabeleland which is not a risk area and in interview she was ambiguous as to where she had grown up. When I asked her to identify where in Zimbabwe was the town of Zvishavane she hesitated for a very long time and appeared quite uncertain eventually venturing that it was in the north of the country. In fact, Zvishavane is also in South Matabeleland. This explains the appellant's answer in interview that both towns were the same. They are two different towns but crucially they are both in the same safe area. I see no reason why the Appellant could not travel to Matabeleland where she grew up, upon return.
- 31.** I do not find that the Appellant has been truthful either to the Respondent or to me in relation to where she has grown up in Zimbabwe and I cannot therefore accept her argument that she would be destitute upon return without any form of support. The Appellant is not from Harare and there would be no risk from the point of view of someone engaging in anti-regime activities in Harare since the Appellant could reasonably be expected to return to her home area upon return. As the Appellant cannot demonstrate that she would be at risk upon return I dismiss her appeal under the Refugee Convention. Her appeal under Article 3 falls with that decision. It cannot be said that country conditions in Zimbabwe are so bad that the Appellant could succeed under Article 15 C of the qualification directive or in respect of a claim for humanitarian protection.
- 32.** That leaves the Appellant's claim under the Immigration Rules paragraph 276 ADE and outside the Rules under Article 8. The Appellant puts her claim under paragraph 276 ADE on two bases. She says that there will be very significant obstacles to her reintegration into Zimbabwe because of the risk to her upon return. I have already dismissed that and therefore reject that as a very significant obstacle. The other basis is that she has been out of the country a long time and has a serious medical condition for which she is receiving treatment in the United Kingdom which would not otherwise be available to her in Zimbabwe.
- 33.** There is no evidence that the position is still as it was under **RN** that someone who has been out of the country for a long time would face significant difficulties where for example they went to Matabeleland.

Persons going to other areas might find a requirement to demonstrate loyalty but this would not apply to the Appellant for the reasons which I have set out at some length above. The return of a failed asylum seeker from the United Kingdom having no significant MDC profile would not lead to that person facing a real risk of having to demonstrate loyalty to ZANU-PF. As I have indicated, the low-level activities of the Appellant mean that she does not have a significant MDC profile even on her own case.

- 34.** The length of time that she has been out of the country is of little relevance, the Appellant would be returned as a failed asylum seeker and all the case law indicates that that of itself does not bring risk. Similarly, difficulties in obtaining medication are also of marginal significance. As I have indicated the position in Zimbabwe has changed since **RN** was decided. Whilst medication may be difficult at times to obtain it is not completely unobtainable as the background evidence shows. Whilst the standard of healthcare in that country might be lower than that of the United Kingdom that does not of itself mean that the Appellant can succeed. I do not consider the Appellant's medical condition amounts to a very significant obstacle to her reintegration. The Appellant gave her evidence to me in Shona as she gave her evidence at first instance. She speaks the local language and has clearly not lost all ties to her home country. I therefore dismiss her claim that there would be very significant obstacles to her reintegration and I dismiss her claim under the Immigration Rules.
- 35.** In relation to her claim outside the rules under Article 8, the Appellant does not make any claim concerning her relationship with [M]. That must be right. He did not attend at first instance and he did not attend before me. Her claim in relation to [M] was rejected by the Judge at first instance and I have seen nothing to indicate that that was wrong. Whilst the Appellant has established a private life of sorts in this country during the time she has been here, for much of that time she has been here without leave. Her private life would be interfered with by requiring her to return to Zimbabwe but that interference would be in accordance with the legitimate aim of immigration control because the Appellant has overstayed her student visa. I find that the interference would be proportionate to the legitimate aim pursued because of the unlawful nature of her stay and the little weight to be given to a private life built up while she was here unlawfully since the rejection of her 2004 application. That is to be contrasted with the very significant weight to be afforded on the Respondent's side. The Appellant's private life has been somewhat limited in its scope. She can resume her private life upon return to her country of origin. I therefore dismiss the appeal under the Human Rights Convention and make no anonymity order as there is no public policy reason for so doing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal against the Respondent's decision to refuse to grant asylum.

Appellant's appeal dismissed

Signed this 22nd day of June 2017

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and the appeal was dismissed. There can be no fee award.

Signed this 22nd day of June 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge