



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: PA/07050/2019  
PA/07428/2019

**THE IMMIGRATION ACTS**

Heard at Field House (via Skype)  
On 22 March 2021

Decision & Reasons Promulgated  
On 13 April 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ER (ZIMBABWE)  
EIR (ZIMBABWE)  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the First Appellant: In person  
For the Second Appellant: Mr S Winter, instructed by Katani & Co  
For the Respondent: Ms S Cunha, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellants are Zimbabwean nationals who were born on 17 August 1973 and 16 October 1999. The first appellant is the father of the second appellant. They appeal against a decision which was issued by First-tier Tribunal Judge Farrelly on 9 December 2019, dismissing their appeals against the respondent's refusal of their claims for international protection.

## **Background**

2. There is a full account of both appellants' claims at [9]-[15] and [21]-[23] of the decision under appeal. It suffices for present purposes to give a rather shorter precis.
3. The appellants are from Harare. The first appellant states that he has been fairly prominent in the Movement for Democratic Change ("MDC") since its formation in 1999. He claims to have suffered violence and harassment at the hands of the ruling Zanu PF Party for more than a decade. Two incidents in 2012 finally persuaded him to leave the country. The first, in June 2012, involved a burglary at the family home during which the family dog was killed and blood smeared on his son's pillow. In the second, in October 2012, the home was entered by armed men who beat and humiliated the whole family but particularly the first appellant.
4. These incidents caused the first appellant to arrange a placement at a university in South Africa and the whole family left for that country in 2012. In January 2014, the first appellant was able to secure a post-graduate placement in the UK and he and his wife came here with their two younger children. The second appellant remained in South Africa to complete the school year but he joined the remainder of the family in July 2014. The first appellant held entry clearance as a Tier 4 student. The remainder of the family, including the second appellant, held entry clearance as his dependents. The entry clearance conferred leave to enter until 30 April 2018.
5. The first appellant was refused further leave to remain in January 2019. It appears that the second appellant was named as a dependent upon that claim. On 6 March 2019, they both claimed asylum. They underwent screening interviews and submitted outlines of their asylum claims and then, on 3 June 2019, each appellant underwent a substantive asylum interview. Each gave a detailed account of the events in Zimbabwe. Each appellant also detailed the sur place activities which they had undertaken in the UK.
6. The respondent did not accept that the appellants would be at risk on return to Zimbabwe and refused their applications. I need not set out the basis upon which she reached those conclusions. The appellants appealed against her decisions to the First-tier Tribunal.

## **The Appeals to the First-tier Tribunal**

7. The appellants were both initially represented by Katani & Co of Glasgow. As the judge noted, that firm completed most of the preparation for the hearing for both appellants. A conflict of interest arose in the first appellant's case, however, and Katani & Co ceased to act for him. At the hearing before the judge, he was content to proceed as a self-representing litigant and the judge was satisfied that it was appropriate to proceed in that way. The judge heard oral evidence from the two appellants and submissions from the advocates before reserving his decision.
8. The judge set out the history of the claims and the evidence before him in admirable detail. Having done so, he turned to his assessment of the claims at [34]. At [39]-[42], the judge noted that there were two possible reasons for the timing of the first

appellant's protection claim: either it was a fabrication designed to secure the family's continuing stay in the UK or it was a claim brought by a man who had previously been in receipt of leave as a student and had been studying the situation in Zimbabwe, assessing whether to claim international protection.

9. At [43], the judge turned to consider the point which had understandably been at the forefront of the Presenting Officer's submissions, which was that the first appellant's passport bore a number of stamps to show that he had returned to Zimbabwe after 2012. The first appellant had denied that but the judge did not accept his explanation for the stamps, which he considered to be 'rambling and evasive': [46]. There were some documents adduced in support of the claim, including a letter from the MDC, which the judge accepted to be genuine, but he concluded that they did not 'significantly enhance the first appellant's appeal because of the lack of detail about what he did.': [49].
10. At [52]-[54], the judge expressed various concerns about the sur place activity. There was little evidence of the first appellant's early involvement; the second appellant's photographs outside the Embassy appeared to be staged; the second appellant was unable to be specific about the influence of his website.
11. The judge noted that there was an expert report from a Dr Cameron, who the judge considered to be an expert on Zimbabwe: [55]. She was unaware of the stamps in the first appellant's passport: [56]. The judge accepted her opinion that the supporting evidence from the MDC was genuine. The judge set out other conclusions reached by the expert at [59]-[62], at the end of which he accepted her view that the claim was 'plausible and consistent with country conditions': [62]. At [63], he noted that a claim which was plausible was not necessarily true. At [64], the judge considered what the expert said about the sur place claim but he considered it likely that the intelligence services would be 'seeking out the most prominent activists and not the occasional attendee at routine events.' At [66], however, he noted the expert's view that 'someone with a low political profile is at risk of persecution'.
12. From [68] of his decision, the judge expressed the conclusions he had reached on the evidence as a whole. He considered that there was a possibility that the first appellant was a member of the MDC but it was not established that he was 'active in any way' because his focus was upon his 'education, career and his family': [69]. His account was inconsistent with the absence of difficulties 'save for two claimed occasions highlighted', as Harare is a Zanu PF stronghold: [70]. In reaching that conclusion, the judge was 'influenced' by his concerns over the appellant returning to Zimbabwe, as evidenced by the stamps in his passport. He did not accept his account of the two incidents in 2012: [71].
13. The judge did not accept that the first appellant was in any way prominent in the MDC, noting that there was no evidence of his involvement in the movement in South Africa or in the early part of his stay in the UK: [72]. His involvement in the UK was more consistent with an attempt to create a claim: [73]. The authorities would not consider the first appellant to be of interest and the family could relocate to Bulawayo: [73] and [75]. The appellants did not have 'such strong views that they would require concealment': [74]. In respect of the second appellant, the judge concluded as follows:

[76] Regarding the second appellant, in line with my views about his father's claim I reject his suggestion he encountered difficulties in 2012. I am of the view that he sought to create a profile for himself by occasionally attending demonstrations and by establishing a website in support of the MDC aims. If this is opportunistic, I am still required to consider whether this will nevertheless place him at risk. It is my conclusion that it would not. This is because there has been an absence of evidence that his website has such a following that he would be seen by the authorities as a source of threat.

14. The remainder of the judge's decision concerns the non-protection limbs of the appeal and need not be further described.

### **The Appeal to the Upper Tribunal**

15. Permission to appeal was initially refused by Judge Loke. The renewed grounds presented by the first appellant are lengthy and well-written but, as might be expected of a non-lawyer, do not seek to identify legal errors in the judge's decision. For the second appellant, Ms Winter advances four grounds which might be summarised in the following way:
  - (i) In rejecting the events in 2012, the judge had reached inconsistent and inadequately reasoned findings;
  - (ii) In concluding that the second appellant's sur place activity would not give rise to risk, the judge had reached unclear findings, particularly as regards whether the appellants' activity was opportunistic or not;
  - (iii) In concluding that the appellants did not have such strong views that they would require concealment, the judge misdirected himself in law and overlooked material evidence; and
  - (iv) The judge had given insufficient reasons for finding that he should not depart from the country guidance as regards the ability of the appellants to relocate to Bulawayo.
16. Judge Rintoul granted permission as he considered the second ground arguable, although he did not refuse permission on the remaining grounds. On 17 November 2021, Judge Rintoul clarified that his grant of permission referred to both appellants, and that he considered it just about arguable that the judge had erred in his consideration of the expert report.
17. The respondent responded to the notice of appeal, opposing the appeal and submitting that the judge had given a comprehensive and sustainable decision.

### **Submissions**

18. Mr Winter adopted the grounds of appeal and submitted that [74] and [76] were the key paragraphs in the judge's decision. The judge's reasoning at [76] contradicted his findings earlier in the decision as regards the plausibility of the appellants' account. The judge had given inadequate reasons for rejecting the credibility of the account

when it was recalled that he had previously accepted that it was plausible when set against the background material.

19. By his second ground, Mr Winter submitted that no real reasons had been given for finding that the appellants' attendance at anti-regime events in the UK was opportunistic. It was not even clear whether the judge had decided that they had acted opportunistically. Nor were there any reasons given for the apparent finding that the photographs were staged. If that observation had been properly made, the photographs to which it applied had not been properly identified. In any event, there was a paucity of reasons for rejecting this limb of the second appellant's claim.
20. As regards the judge's evaluation of risk to the appellant, he had failed to consider the expert evidence properly or at all. The real question in relation to the sur place activities was whether the authorities in Zimbabwe would draw any distinction between those whose activities were opportunistic and those who were committed to the cause. The judge had failed to consider that point, and had failed to consider it in light of the expert report. Equally, in relation to the fourth ground and internal relocation, the judge had given insufficient reasons for concluding that the appellants could relocate to Bulawayo.
21. The first appellant did not wish to add much to what had been said by Mr Winter on his son's behalf. They had left the country due to their opposition activity but their sur place activity stood alone. They had been involved with the groups known as Zimbos Arise and Zimvigil, which would add to their risk profile on return.
22. Ms Cunha relied on the response to the grounds of appeal drafted by her colleague, Mr Melvin. In her submission, the judge had reached sustainable conclusions in relation to the appellants' credibility and the risk to them on return. It had been open to the judge to conclude that the photos of the second appellant were staged. The findings in relation to the sur place activity as a whole were staged and could not properly be said to be contradictory. The judge had considered the expert report at [33]-[35] and had clearly borne it in mind. It was open to the judge to conclude that he should continue to follow the country guidance notwithstanding that expert evidence, however.
23. Ms Cunha accepted that there was no express finding as to whether the first appellant's brother had been killed. The respondent did not accept that there was any contradiction in the judge's findings, however. The fact that the appellants account was plausible did not mean that it was true, or any more likely to be so. The judge had scrutinised the sur place activity with some care and had reached findings which were open to him on the evidence. The judge had been entitled to attach significance to the fact that the evidence from the MDC (etc) was silent on the actual activities of the first appellant in the UK. The expert had based her assessment of the risk to the appellants on a wholesale acceptance of their accounts but that was not the judge's conclusion.
24. Mr Winter responded, submitting that the absence of a finding about the first appellant's brother's death was important. The significance of the expert report was that the expert had assessed the plausibility of the appellants' claim, which should be borne in mind in deciding whether the claim was credible. The judge had failed entirely to weigh the expert evidence in assessing the truthfulness of the claim. Ms

Cunha had concentrated her submissions on the first appellant but there were major difficulties with the judge's assessment in relation to the second.

25. The first appellant also responded, noting that he would not have manufactured the death of his brother. He did not presently have access to the death certificate. The stamps in his passport did not involve any physical movement across the border and had just been placed there to confuse the authorities. He had not visited Zimbabwe since 2012. Zanu PF was in the middle of an extermination campaign.
26. I reserved my decision at the end of the submissions.

### Analysis

27. CM (Zimbabwe) (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 59 (IAC) is the extant country guidance decision on Zimbabwe. Whilst the decision was issued on 1 February 2013, it was heard at the start of October 2012 and was necessarily based on evidence which focused on the position at that time. Given that the appellant is not a teacher and that he originates from Harare, the relevant paragraphs in the headnote to CM (Zimbabwe) were the following:

(1) As a general matter, there is significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in RN. In particular, the evidence does not show that, as a general matter, the return of a failed asylum seeker from the United Kingdom, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.

(...)

(5) A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF.

(6) A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF, including the security forces, even if he or she has a significant MDC profile.

28. The judge did not cite these paragraphs in his decision. He was not required to do so. It is clear from [66] of his decision and his subsequent focus on the level of the first appellant's profile that he was aware of the country guidance and that he sought to apply it.

29. The first obvious difficulty with the judge's decision is his treatment of the suggestion in the expert report that he should depart from the country guidance and should hold, in the words of the expert, that 'paragraph 3(1) of the country guidance case law of CM is no longer reflective of the current political and social situation within Zimbabwe': [123] of Dr Cameron's report refers. She expressed the same opinion in respect of paragraphs 3(5) and 3(6) of the country guidance at [124] and [125] of her report.
30. The judge was provided with a copy of the Court of Appeal's decision in SG (Iraq) [2012] EWCA Civ 940; [2013] 1 WLR 41. It was plainly the appellants' submission, based upon Dr Cameron's report, that there were what Stanley Burnton LJ described at [47] of that decision as "very strong grounds supported by cogent evidence" for departing from the country guidance which had been issued some six and a half years before the judge came to consider these appeals.
31. The appellants' expert is Dr Hazel Cameron, who has since 2011 been a full time lecturer in International Relations at the University of St Andrews. She was formerly a director of the Centre of Peace and Conflict Studies. She has worked in Africa in the past. She has regularly been instructed to provide expert evidence in Rwandan and Zimbabwean cases. She was previously instructed by the Home Office in a Rwandan extradition case. Her work on Zimbabwe has been published in journals including *Genocide Studies International*. She is eminently well qualified to provide expert evidence on Zimbabwe. In fairness to the judge, he did not suggest otherwise and concluded, at [55], that she 'can be considered as an expert on Zimbabwe'.
32. Dr Cameron's report is lengthy and carefully reasoned, running to a total of 39 pages, excluding her CV. The length of the report is reflected in the judge's consideration of it, which covers [55]-[67] of his decision. Oddly, despite the detailed summary of Dr Cameron's report, the judge made no reference to her opinion that paragraphs 3(1) and 3(5) of EM (Zimbabwe) should no longer be followed because they are no longer reflective of the situation on the ground in Zimbabwe. At [66] of his decision, the judge noted Dr Cameron's opinion that 'someone with a low political profile is at risk of persecution' but he did not register the invitation to depart from the country guidance in that respect.
33. At [75], there is a reference to the expert's suggestion that the country guidance should not be followed. The terms of that paragraph show that the judge was confining his analysis to paragraph 3(6) of the guidance, which relates to the possibility of return to Bulawayo:

Whilst country conditions have changed following the emergence of the army as a political force and the death of President Mugabe I am not prepared to hold that the country guidance decision no longer applies in his situation. Consequently, there continues the option of relocation to Bulawayo.
34. I accept the submission that this conclusion was inadequately reasoned when set against the expert evidence produced by the appellants, which provided detailed reasons for concluding that EM (Zimbabwe) should no longer be followed insofar as it concluded that Bulawayo was likely to be a safe haven, even for those with a significant MDC profile.

35. More fundamentally, however, the judge also erred in failing to engage with the expert's opinion that he should depart from EM (Zimbabwe) as regards the level of opposition activity (or the absence of loyalty to Zanu PF) which was necessary to expose an individual to a risk of persecution on return to Zimbabwe. That was a submission which was supported by relevant authority and by a detailed expert report. The judge erred in failing to come to grips with that submission. As contended in grounds three and four, therefore, I find that the judge erred in his assessment of the risk to the appellants upon return to Zimbabwe. That assessment was inadequate as a matter of law because the judge failed to consider whether Dr Cameron's report and the other material before him justified departure from the country guidance decision.
36. My analysis of the grounds began with the third and fourth because I consider many of the points made in the first two grounds to be misconceived. On any proper analysis of the judge's decision, there is no inconsistency in his findings, nor is there any opacity in his rejection of the events which are said to have taken place in Zimbabwe in 2012.
37. The judge was plainly aware of Dr Cameron's opinion that the events were plausible but he felt able, on the lower standard, to reject the appellants' account of those events for a host of reasons, uppermost of which was the first appellant's ability to return to Zimbabwe after the events of 2012. Nothing more was required of the judge and I specifically reject Mr Winter's submission that the judge was required to weigh the expert's opinion on the plausibility of the appellants' account as a factor which militated positively in favour of accepting the account. To borrow from what was said by Underhill LJ at [103] of MN [2020] EWCA Civ 1746, the expert's opinion did not positively support the appellant's claim in this regard; it was essentially neutral in the analysis required of the appellants' credibility. Nor is there any lack of clarity in the judge's findings about the events in 2012; that he was unable to accept that those events took place is clear from [71] of his decision and the reasoning which precedes the conclusion expressed at the end of that paragraph.
38. Were it just for those criticisms of the judge's decision, therefore, I would have found that he erred in law in failing to consider the SG (Iraq) submission properly or at all, and would have remade the decision, without a further hearing and on the basis of the FtT's findings of fact.
39. I am not able to proceed in that way because of one of the other points made in ground two. It is said in that paragraph that the judge reached unclear findings in relation to the appellants' political activity. The particular target of the ground is the judge's [76], in which he evaluated the risk to the second appellant 'if' his activities in the UK were opportunistic.
40. On analysis, however, there is an overall absence of clarity or particularity in the judge's findings in relation to the first appellant's political activity in Zimbabwe and the UK. The first appellant had given a detailed account of his involvement with the MDC over the years. He stated in his witness statement that he had supported the party financially; that he had attended meetings and rallies; and that he had also taken others to rallies in his large vehicle. The judge described these aspects of his claim at [11]-[13] of his decision.



41. In his findings, at [68] et seq, the judge clearly accepted that the first appellant had some role in the MDC. Although the finding at [69] ("There is the possibility he was a member of the MDC") is opaque at best, it seems that the judge accepted that the appellant obtained an MDC card in Zimbabwe - [47]-[50] - and that he was a member of the party. (I interpose that it is not particularly easy to see why someone would obtain an MDC membership card in Zimbabwe, years before claiming asylum in the UK, unless it was out of loyalty to the party.) The judge dismissed the appeal not because he rejected everything the first appellant had said about his relationship with the MDC in Zimbabwe, therefore, but because he considered the first appellant not to have been 'active' or 'very active' and that there was an 'absence of a profile'.
42. By making these findings, the judge was of course evaluating the risk to the first appellant in light of the country guidance, which shows that only those of greater prominence would be at risk on return. What the judge failed to do, however, was to set out with any degree of clarity or particularity what it was he accepted that the first appellant had done for the MDC in Zimbabwe. If he was merely someone who, for whatever reason, decided to obtain an MDC card whilst he was living in Harare, and all else he said was a falsehood, the conclusion that he would not be at risk on return is readily comprehensible. If, on the other hand, he obtained that card and participated in some activity for the MDC in the past, it would have required an analysis of that activity in order to decide that the appellants would not be at risk on return as a result of the first appellant's activity. Other than the labels that the appellant was not 'active' or 'very active', however, the judge gave no clear indication of what it was he accepted about the first appellant's MDC activity in Zimbabwe. It would be wrong to assume - given that lack of clarity - that the judge simply rejected all of the first appellant's account with the exception of his MDC membership, since it was for the judge to state with particularity what evidence he accepted and what he rejected. Even reading the judge's decision as a whole I am unable to discern any such finding.
43. I do not consider the judge's decision to be sustainable for these reasons. He failed to engage with the submission that he should depart substantially from the country guidance and he failed to set out with clarity what he accepted and rejected in relation to the first appellant's activity in Zimbabwe. These errors infect the entirety of the judge's analysis of both appeals and it would not be appropriate (in light of AB (Iraq) [2020] UKUT 268 (IAC)) to attempt to preserve only certain aspects of the judge's analysis. There must be a fresh analysis of the claims made by both appellants, with fresh findings of fact and a proper consideration of whether there is a proper basis for departing from the extant country guidance. Given the scope of that enquiry, it should take place in the FtT.
44. At the remitted hearing, the first appellant will have a further opportunity to address what is, on any view, a pressing difficulty with his credibility. The presence of stamps in his passport which seem to show that he returned to Zimbabwe after 2012 does tend to suggest that he was not in fear of return to that country. Since the second appellant's claim rests on his father's profile as well as his own sur place activities, this is a point which potentially has a clear impact in both appeals. The second appellant's representatives may therefore consider it appropriate to have Dr Cameron express an opinion on the first appellant's explanation for those stamps or, at the very least, to

produce some background material about it. The absence of any such material might legitimately lead the next judge to draw an adverse inference.

45. The remitted hearing will also provide the respondent with an opportunity to clarify a point which caused me some concern, although it played no material part in the decision I have reached. These are two protection claims, brought by two separate adults, and it was necessary and appropriate for there to be two separate refusal letters. It is an unusual feature of these refusal letters, however, that the authors reached inconsistent findings on a central issue. The author of the first appellant's letter rejected his account of MDC activity. The author of the second appellant's letter, however, "accepted that you have a fear of the Zanu-PF party in Zimbabwe because of your father's involvement with the MDC party." Unless that concession has been withdrawn (and I can see no indication that it has been), it might well be thought to be of significance at the next hearing. It will be for the respondent to consider what steps, if any, she wishes to take in light of what I have said in this paragraph. Obviously any alteration of her position should be notified to the second appellant in good time.

### **Notice of Decision**

The decision of the FtT involved the making of errors on points of law. The decision of the FtT is hereby set aside and the appeals are remitted to the FtT to be heard afresh by a judge other than Judge Farrelly.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I continue this direction in force due to the protection issues in these appeals.

*M.J. Blundell*

Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
Date 29 March 2021