



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00871/2012
DA/00872/2012
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DA/00874/2012
DA/00875/2012

THE IMMIGRATION ACTS

Heard at Bradford
on 19th August 2013

Determination Promulgated
On 22nd August 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

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DGTM

SMM

DTM

(Anonymity order in force)

Respondents

Representation:

For the Appellant: Mr Spence - Home Office Presenting Officer.

For the Respondents: Mr Selway of Halliday Reeves Law Firm.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal Judge Kelly and Mr M L James (hereinafter referred to as 'the Panel') who allowed the appeals of the first and second

respondents under the Refugee Convention and the third, fourth, and fifth respondent's, their children, under Article 8 ECHR in line.

2. The Secretary of State alleges the Panel legally erred in attaching weight to documents that had not been fully translated into English, misunderstanding the relevant country guidance case regarding the risk at the point of return to Zimbabwe, and in failing to determine the appeal by reference to the correct country guidance case, CM (Zimbabwe), which was published the day the determination was promulgated.
3. As advised in court, I accept the Panel erred in law in that the correct country guidance case applicable to assessing the risk of return to Zimbabwe is CM [2013] UKUT 00059. In relation to any suggestion that because it was only published on the day the determination was promulgated there is no legal error, I refer to the case of OM (AA(1) wrong in law) Zimbabwe CG [2006] UKAIT 00077 in which the Tribunal said that country guidance stands until it is replaced or found to be wrong in law. Where a country guidance case is replaced because of changed country conditions or because further evidence has emerged, that will not mean that it was an error of law for an immigration judge to have followed it up to that point. Where, however, a country guidance case is found to be legally flawed the reasons for so finding will have existed both before and after its notification. It is a determination inconsistent with other authority that is binding on the Tribunal. In those circumstances, which will be encountered only rarely, any determination of an appeal decided substantially on the basis of that country guidance will be legally flawed also and cannot stand.
4. I find the reliance by the Panel upon the previous country guidance case of RN [2008] UKAIT 00083 [44] was therefore an error of law.
5. I also advised the parties that, notwithstanding the above, any error is not material. Mr Selway indicated that this was also his position as the respondents' home area was one under the control of Zanu-PF which created a recognised risk as per CM, although the question of internal flight would have to be examined before any findings were made on this particular submission, which is not necessary for the reasons set out below.
6. The application for permission to appeal challenges the weight placed upon a document by the Panel and mentions paragraphs 36 to 40 of the determination. The Panel in paragraph 36 recognise they were handicapped in the assessment of the reliability of the document as a result of an incomplete translation into English, but it is clear from reading the determination that the matters the Secretary of State relies upon as the basis for claiming the Panel should not have attached the weight they did to this document were properly considered by them. The Panel recognised the limitations and problems the document created for them as a result of their approaching the evidence with the degree of care

required in an appeal of this nature. They gave adequate reasons for why they consider they were able to attach the degree of weight to this document they did [41]. They found the document was likely to be genuine notwithstanding the evidential problems. The weight to be attached to this evidence was a matter for the Panel and it has not been proved that they made any legal error by approaching the matter in the way they did.

7. The reason the reliance on RN is not material is because of the Panel's findings in paragraph 47 of the determination. They found there was a real risk that the authorities would consider the purpose of the return of the second respondent to Zimbabwe was to continue enquiries referred to in the determination, which it was found could lead to her facing consequences no less severe than those which were likely to have followed her brother's disappearance in mysterious circumstances in 2008; which will also place the first appellant at risk by association with her.
8. The Panel identified a real risk of serious harm at the point of return at the airport. 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". In CM 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.
9. The Panel found that as a result of the matters referred to in the above quoted paragraphs the second respondent has a profile which would lead to her being

perceived as a threat to, or a critic of, the regime and a person against whom there was reason to suspect an adverse political role. The finding therefore that the second respondent would come to the attention of the CIO and face a very real risk of being subjected to physical ill-treatment is a finding that was available to the Panel as being within the range of permissible findings on the evidence. Such treatment would be as a result of a perceived/imputed adverse political opinion. As such it has not been shown that the decision set out in paragraph 49 of the determination is legally wrong.

Decision

10. **There is no material error of law in the First-tier Tribunal Judge’s decision. The determination shall stand.**

Anonymity.

11. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed.....
Upper Tribunal Judge Hanson

Dated the 19th August 2013