



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

Appeal Numbers: AA/02888/2013

THE IMMIGRATION ACTS

**Heard at Laganside Courts Centre, Belfast
On 13 January 2014**

**Determination Sent
On 24 January 2014**

Before

The Hon. Mr Justice McCloskey, President

Between

LOYD NCUBE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brennan (Solicitor)
For the Respondent: Ms O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter "*the Secretary of State*") dated 11th March 2013, whereby the application of Loyd Ncube ("*the Appellant*") for refugee status was refused. In the ensuing appeal, the First-Tier Tribunal ("*the FTT*") upheld this

decision and dismissed the Appellant's other claims under Article 15 of the Qualification Directive and Articles 2 and 3 of the Human Rights Convention. The Appellant is a national of Zimbabwe.

2. Duly analysed, the refusal decision of the Secretary of State had the following central elements:
 - (a) The Appellant's story was considered unworthy of belief in several material respects, rehearsed in paragraphs 25 – 35 of the decision.
 - (b) It was considered that the Appellant, having the status of an unsuccessful applicant for asylum, would not be at risk of persecution in the event of returning to Zimbabwe: paragraphs 38 – 41.
 - (c) Based on the same assessment, his claim for humanitarian protection and his claims under Articles 2 and 3 ECHR failed.
 - (d) Furthermore, he had no sustainable claim under Article 8 ECHR.
 - (e) He would not be granted discretionary leave to remain in the United Kingdom.
3. The grant of permission to appeal to this Tribunal focuses on paragraphs 19 and 20 of the determination of the FTT. These passages are preceded by two clearly articulated findings, in paragraphs 16 and 18, which were that the Appellant was not seized by army members on 20th January 2013 and (one might add *ipso facto*), he did not then desert. In making these findings, the Judge, in common with the Secretary of State, found the Appellant's account of escaping from army custody and returning to his home, remaining there for a period, unworthy of belief.
4. The Judge then turned to consider the Appellant's account of his escape from Zimbabwe to South Africa, in paragraphs 19 and 20. She highlighted, in particular, his assertions that there had been a queue at the border causing a delay of around 30 minutes, during which the driver of his vehicle entered an office. This occurred at a bridge border crossing at Beitbridge and he saw no sign of flooding. In his asylum interview (per the Judge) he claimed that this occurred on 21st January 2013, while in his written statement he claimed that this occurred on 22nd January 2013.

The decision also referred to a newspaper report dated 7th January 2013, which stated:

"The South African Government's Immigration Department has received criticism for its handling of immigration processing at the Beitbridge border which is causing people to take up to three days to go through either from or to Zimbabwe."

It is appropriate to observe at this juncture that the media report of 7 January 2013 did not feature in the Judge's decision.

5. In her determination, the Judge recorded that the Secretary of State "submitted evidence" about the flooding at Beitbridge and the closure of the bridge on 20th/21st January 2013. The parties were agreed that this evidence consisted of a single newspaper report, published on 21 January 2013. The details of this report are of some significance:
 - (a) 21 January 2013 was a Monday.
 - (b) The report states that the relevant border crossing was closed "yesterday" because the bridge "*was flooded on Sunday night*" i.e. the previous evening (Sunday).
 - (c) Continuing, the report states "*the border was only open to travellers after 3.00am when the waters subsided*": a clear reference to 3.00am on Monday 21 January 2013.
 - (d) In a later passage, the report repeats "*the bridge was temporarily closed for 3 hours at midnight on Sunday. It was only re-opened at around 3.00am when the water had subsided*".
 - (e) It is further stated that the heavy rains were confined to "Saturday and Sunday" i.e. 19 and 20 January 2013.

Referring specifically to the evidence about flooding and temporary closure of the Beitbridge crossing, the Judge stated:

"This undermines the Appellant's overall account."

At this juncture, the relevant passages from the Appellant's asylum interviews are pertinent. In the screening interview, he stated:

"Left Zimbabwe on 21/01/13 (Monday) by motor vehicle. Got to S. Africa on 22/01/1 (Tuesday)".

[Words in bold inserted]

In the substance of interview, he stated that he travelled from his home place during the "*early morning*" of 21 January 2013 to Gwandu, a distance of some 120kms. He then reiterated that he left Zimbabwe on 21 January 2013. He described a second car journey, with a distance of some 280 kms, from Gwandu to Beitsbridge. In another answer, he suggested that this journey was "*overnight*".

6. The Appellant made a written statement for the purpose of the hearing at first instance. This contains the following material passages:

"The following day, Monday 21 January 2013, in the morning, me and my family left Filabusi by car. We drove to Gwanda, which is approximately 120kms from Filabusi. We went there because my mother knew a man who could keep me safe"

That same day we left Gwanda by car

We went to Beitbridge, on the border between Zimbabwe and South Africa, which was 280kms from Gwanda and travelled over night into South Africa".

In total, the Appellant has given three accounts: in his asylum screening interview, in his substantive asylum interview and in his witness statement. Duly analysed, each is consistent with the other as regards the issue of his movements and journey following the alleged escape from custody and the weather conditions prevailing at the relevant border crossing. Careful analysis demonstrates that the Judge's rehearsal of certain evidence, in tandem with the assessment thereof, any findings made, explicit or implicit, and the conclusion that the Appellant's credibility was undermined, all contained in paragraph 119 of the Determination, cannot be sustained.

7. I now turn to consider the second main issue. In the next paragraph of the Determination paragraph [20], the Judge considered the Appellant's statement in interview that he did not claim asylum in South Africa because the "CIO" could easily find him there. The Judge continued, in paragraph 20:

"However, they failed to guard the camp or to try to find him in the days after he claimed to have escaped. I do not accept that the CIO had any interest in the Appellant. His failure to claim asylum in South Africa further undermines his credibility."

In this context, it is necessary to rehearse what the Appellant said about the "CIO" when interviewed.

8. The relevant passages in the asylum screening interview begin with question number 113. The Appellant recounted that he had been seized and brought to an army camp on a Sunday, affecting his escape on the evening of the same day by jumping over an unguarded fence with a height of 1 - 2 metres. He could not explain why the fence was unguarded and was not of greater dimensions. This occurred on 20 January 2013 (Sunday). He then stated that he left Zimbabwe on 21st January, driving directly, with his escort/agent, to the Beitbridge border crossing, an "*overnight*" journey entailing a distance of some 280 kilometres. Having then described the border crossing and onward travel, he was asked [question 184] why he did not stay in South Africa, replying:

"The reason being – it is very close to Zimbabwe and the CIO's can easily find me."

At this juncture, it is appropriate to recall some pertinent questions and answers belonging to an earlier stage of the interview:

[21] Who are looking for you? People from the army

[24] Who or what do you fear in Zimbabwe? I fear CIOs because when I left I ran away from a camp which I was put in to join the army

[25] CIO – who or what are they? They are Central Intelligence Organisation working for the Government."

9. In his written statement, the Appellant claimed that following his departure from Zimbabwe his mother informed him that the CIOs had come looking for him. He further stated:

"I fear the Central Intelligence Organisation (CIO). I did not stay in South Africa because it is very close to Zimbabwe and borders it. It would be very easy for the CIOs to track me down".

There are two particular features of the Judge's assessment, which was critical of the Appellant's credibility, in paragraph 20. The first is the statement that the CIOs failed to guard the camp where he claims to have been forcibly detained. This invites the observation that, considering all relevant aspects of the evidence, there is no apparent basis for believing that the CIOs would be expected to guard the relevant camp. Secondly, the Judge adverted to "*the days after he claimed to have escaped*". This does not accurately reflect the Appellant's story, which was that he had succeeded in crossing the Zimbabwe/South Africa border less than one and a half days following his escape from the military camp. Continuing, the Judge found that the CIO had no interest in the Appellant and made a related finding that his failure to claim asylum in South Africa was adverse to his credibility.

10. Duly analysed, the Judge's assessment of and finding relating to the "CIOs issue" are unsustainable. They cannot be justified by reference to the evidence.
11. The problematic nature of the Judge's findings on the two main issues, analysed and outlined above, must be considered in a somewhat fuller context. The credibility findings adverse to the Appellant were clearly cumulative in nature, having regard to certain surrounding passages in the Determination, specifically those relating to (i) the voluntariness or otherwise of the Appellant's submission to the soldiers and (ii) the onward travel from England to Northern Ireland and the failure to claim asylum in the former location. Thus the findings made by the Judge which I consider unsustainable do not have some remote, isolated existence: rather,

they are intimately linked to the overall negative credibility assessment of the Appellant.

12. Mrs O'Brien, on behalf of the Secretary of State, realistically acknowledged that, when juxtaposed with the underlying evidence, the Judge's assessments and findings in two key paragraphs of the Determination, 119 and 120, are unsustainable. Following, and in the light of, certain exchanges which I initiated with both representatives, the analysis of the FtT decision set out above was, properly, not contested on behalf of the Secretary of State. The conclusion that the Determination of the FtT must be set aside follows inexorably.

DECISION

13. I decide as follows:

- (a) The decision of the FtT is hereby set aside.
- (b) Having considered the parties submissions on this discrete issue, on which they were *ad idem*, I order remittal to a differently constituted FtT for the purpose of making a fresh decision.



THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 21 January 2014