



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

Appeal Number: AA/10497/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 27 September 2017**

**Decision & Reasons
Promulgated
On 6 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

**DHM
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss N Braganza, Counsel
For the Respondent: Mr S Staunton, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Zimbabwe born on [] 1967. He appealed against the decision of the Secretary of State dated 13 July 2015 to remove him from the UK following a refusal to grant him asylum, humanitarian protection and protection under the European Convention on Human Rights (ECHR).

2. The appeal was heard before First-tier Tribunal Judge Widdup (hereafter “FtTJ”) on 18 March 2016 and he dismissed the appeal on 5 April 2016 on all grounds. The Appellant now appeals that decision with permission granted on 7 August 2017 by Deputy Upper Tribunal Judge Mailer on all grounds.

Background

3. The Appellant has been in the UK since his entry in 2001. His leave to remain as a Highly Skilled Migrant ended on 19 January 2006 and subsequent applications for an extension in the same capacity were refused. On 29 April 2008 he was arrested for criminal damage and was cautioned. He was served with a Notice informing him of his liability to be removed. He absconded and claimed asylum on 20 January 2015.
4. The Appellant’s claim is that he is at risk of persecution on return to Zimbabwe because of his involvement in opposition politics and his work as a teacher in Zimbabwe. The Appellant’s claim is set out by the FtTJ in his decision at [12] and can be summarised as follows.
5. The Appellant is highly educated. He obtained a degree in Physics in Cuba and a Masters degree in Material Sciences in Australia. He claimed that his academic career had been thwarted because he was not an active member of Zanu PF. He came to the UK as a teacher in 2001 and became a vocal critic of the regime. He had written to the African Union about the regime and circulated this letter to the Prime Minister in the UK. He set up the Zimbabwe External Communications Secretariat (ZECS) to co-ordinate the struggle against corruption and human rights abuses in Zimbabwe. Since 2007 he had attended monthly vigils at Zimbabwe House. In 2010 he was assaulted by Zanu PF thugs at Zimbabwe House and was active in leaving anti Zanu PF messages on Facebook and social media. He was a member of Zimbabwe United for Democracy (ZUNDE) and claimed that teachers in Zimbabwe were persecuted.
6. The FtTJ heard evidence from the Appellant and a witness and had before him documentation personal to the Appellant filed in support the claim. Having considered all the evidence, the FtTJ noted various inconsistencies and omissions in the Appellant’s account. The FtTJ rejected the Appellant’s account of being assaulted in Zimbabwe House but, nevertheless, reached the following positive findings of fact:
 - (i) It is possible that the Appellant may have attracted adverse attention in Zimbabwe by his online activities [40].
 - (ii) The Appellant was a teacher in Zimbabwe [42].
 - (iii) The Appellant has used social media to publish anti Zanu PF material online [53] & [71].
 - (iv) The Appellant had written a letter to the Prime Minister in 2007 [66] (this is the Appellant’s letter written to the African Union that was circulated to the Prime Minister [49]).
 - (v) The Appellant set up ZECS [71].

7. In light of these findings, the FtTJ concluded that the Appellant's membership of ZUNDE and ZECS did not place him at risk. The FtTJ observed that the latter organisation had not been registered and his activities were minimal. The FtTJ further observed that the Appellant's social media postings were infrequent and the Appellant had not received threats online.
8. The FtTJ proceeded to apply these facts to extant country guidance, namely, CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059 (IAC). The FtTJ noted the Appellant did not have any connections to the MDC and who was on his account an inactive political member of the Zanu PF in Zimbabwe. The FtTJ noted the Appellant did not experience any ill-treatment because of his occupation as a teacher [77] and found that his allegations of unfair treatment did not relate to his work as a teacher, but to his work as a research scientist.
9. In his omnibus conclusion the FtTJ stated thus at [80]:

"In these circumstances I find that his activities as a teacher and his somewhat limited role online as a critic of the regime are not of such significance as to give rise to any perception on the part of the CIO that he has any profile of the sort which would attract their attention. "
10. Accordingly, the FtTJ rejected the Appellant's claim that he was in need of international protection.

Discussion

11. At the hearing, on behalf of the Appellant, Miss Braganza relied on the grounds of appeal and elaborated upon them. She submitted that in view of the findings made by the FtTJ and, the acceptance of the Appellant's sur place political activity and social media activity, taken with the country guidance and the Respondent's Country Information Guidance (CIG), the FtTJ plainly erred. Miss Braganza submitted that the FtTJ had failed to consider what would happen to the Appellant at the airport, which was specifically referred to in counsel's skeleton argument and the submissions at the hearing [35]. Miss Braganza referred to several passages of the FtTJ's decision which I have summarised above. She submitted that the FtTJ recognised that it was possible that the Appellant may have attracted the adverse attention of the authorities in Zimbabwe by his online activities and thus the level of activity was irrelevant. She submitted that the FtTJ accepted the Appellant was a critic of the regime and, as such, would be subject to airport checks during which he would be asked about his absence and identity. She submitted that his online presence and criticism of the regime would immediately be seen thereby placing the Appellant at risk. Miss Braganza submitted that at [80] the FtTJ did not address what he was required to do.
12. Miss Braganza referred to the CIG report that was before the FtTJ and, in particular, to the following paragraphs which provide as follows:

“1.3.7 As was the case before the July 2013 elections, the security apparatus is controlled by Zanu-PF, the enactment of a new constitution has not improved the human rights environment, and there continue to be reports, albeit declining numbers, of ill-treatment of MDC supporters, their families, political activists, student leaders and perceived government critics, particularly in Mashonaland West, Mashonaland Central, Mashonaland East, Manicaland, Masvingo and Midlands provinces and high density areas of Harare.

1.3.8 In those places opponents, or perceived opponents, of Zanu-PF may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from Zanu-PF authority figures and those they control. They would also face a real risk of ill-treatment because of a continuing risk of being required to demonstrate loyalty to Zanu-PF. There are few incidents of similar difficulties being faced by perceived MDC supporters or activists in Matabeleland North, Matabeleland South, low density areas of Harare or in Bulawayo.

1.3.9 Assessing who may be at real risk from politically motivated violence is not simply a matter of the level of political activity in which the individual has engaged. Violence tends to be targeted at those with a perceived political profile, not necessarily of a high level, and those perceived to be active in MDC politics.

1.3.10 Following an assessment of the risk on return to Harare airport (see country guidance caselaw of HS read with AA and SM and others), the assessment of risk on return to a home area will also very much depend on the place in Zimbabwe to which the particular individual would return. There are differences between urban and rural areas (and the situation is not uniform across the rural areas).

.....

1.3.16 Those who have been or who are human rights defenders, members of civil society organisations and journalists are similarly at a heightened risk of ill-treatment on account of their actual or imputed political opinion. The heightened risks should be considered alongside the individual circumstances of each case, including their previous employment, any activity which might be perceived as being critical of ZANU-PF, any adverse interest by the authorities and an assessment of the risk to them on return to Zimbabwe whether or not they seek to resume their previous profession.

1.3.17 Where the person’s fear of ill-treatment is by the state authorities, they would be unable to apply to these authorities for protection.

1.3.18 As regards fear of ill treatment by non-state actors, victims of political violence are rarely able to rely on the police to pursue justice on their behalf. Police are often unwilling or unable to protect those targeted. It is reported that the police remain partisan on behalf of Zanu-PF, committed serious abuses against perceived supporters of the MDC and government critics with impunity, and in numerous cases fail to intervene or investigate reports that Zanu-PF-aligned individuals engaged in political violence. It is also reported that policed sometimes arrest the victims of violence rather than the perpetrators. Court cases in Zimbabwe take a long time to proceed

and are regularly postponed. Selective application and interpretation by law enforcement officials and the Attorney General's Office limit access to justice and the freedoms of political actors opposed to Zanu-PF. Zanu-PF sympathisers use threats and intimidation to force magistrates, who hear the vast majority of cases, particularly rural magistrates, to rule in the government's favour."

13. On behalf of the Respondent, Mr Staunton, submitted that paragraph 1.3.9 of the CIG placed the Respondent in difficulties and he thus conceded that the FtTJ materially erred in law.
14. I consider that that concession was rightly made and I announced my decision at the hearing setting aside the decision of the FtTJ.
15. It is plain on the facts found by the FtTJ that he accepted that the Appellant is a low-key opponent of Zanu-PF through his online criticism of the regime and the letter that he sent to the African Union subsequently circulated to the British Prime Minister. The FtTJ concluded that the Appellant's limited role was not sufficient to place him at risk on return. That conclusion as Mr Staunton rightly recognised does not sit comfortably with the Respondent's own guidance which does not limit the question of risk to the level or degree of activity of the individual concerned. It is further plain that the FtTJ failed to address risk at the point of return and failed to consider that the Appellant could not be expected to hide his political opinion in order to keep safe when interviewed by the CIO at Harare airport - (see HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094 and RT (Zimbabwe) & Ors v Secretary of State for the Home Department [2010] EWCA Civ 1285).
16. Having found that the FtTJ materially erred in law the parties were invited to address the Tribunal as to their respective position on disposal. Miss Braganza invited me to remake decision on the FtTJ's primary findings of fact and she relied on her earlier submissions. Mr Staunton did not wish to make further submissions and he was content for the Tribunal to remake the decision on the evidence. I thus proceed to remake the Decision.

Re-making the Decision

17. I have borne in mind that the burden is on the Appellant to show that there is a real risk of persecution and/or serious harm in the event of a return. I also bear in mind the preserved findings in relation to the Appellant's asylum claim (see para. 6 (i)-(v) above) and case law of HS, CM and RT (as previously cited).
18. The FtTJ's findings identify the Appellant as a teacher and a critic of the Zanu PF on line, that corresponded with the African Union and the British Government, and who was involved with civil society organisations. While the Appellant's activities have taken place in the UK, it is of significance that the FtTJ found that it is possible that the Appellant may have attracted adverse attention in Zimbabwe by his online activities.
19. In HS the Tribunal stated as follows:

“264. 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.

265. The fact that the CIO has taken over responsibility for monitoring all returning passengers at Harare airport is not something that effects the level of risk. The evidence before AA(2) was that all deportees were handed over to the CIO for questioning in any event. Then, as now, those deportees will have been identified in advance from the passenger manifest and the CIO will have formed a preliminary view as to which, if any, are of further interest.

.....

282. For all these reasons we adopt and reaffirm the guidance given in AA(2), set out above at paragraph 34 of this determination. We identify one further risk category. The evidence indicates that those associated with the civil society organisations that have attracted adverse interest from the Zimbabwean authorities will face the same level of risk as those perceived to be political opponents of the Zimbabwean regime.”

20. Further, the headnote to the decision of the Upper Tribunal in CM summarises the position. For present purposes, it is sufficient to set out paragraphs 3(1) and 3(2) which refreshes and updates the relevant Country Guidance.

(3) The only change to the EM Country Guidance that it is necessary to make as regards the position as at the end of January 2011 arises from the judgments in RT (Zimbabwe) [2012] UKSC 38. The EM Country Guidance is, accordingly, re-stated as follows (with the change underlined in paragraph (5) below):

(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.

(2) The position is, however, likely to be otherwise in the case of a person without ZANU-PF connections, returning from the United Kingdom after a significant absence to a rural area of Zimbabwe, other than Matabeleland North or Matabeleland South. Such a person may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control. The adverse attention may well involve a requirement to demonstrate loyalty to ZANU-PF, with the prospect of serious harm in the event of failure. Persons who have shown themselves not to be favourably disposed to ZANU-PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (RT (Zimbabwe)).

21. In view of the Appellant's accepted profile and, in particular, as a publicised critic of the regime through social media along with the unchallenged finding that the Appellant's activities, however minimal, may have received adverse attention in Zimbabwe, I find that in light of the background evidence which suggests that the level and degree of the adverse activity engaged in does not determine who is targeted, and the country guidance, that the Appellant is likely to be identified at the point of return as an opponent to the regime and is thus at risk of being subjected to ill-treatment at Harare airport.
22. No questions were put to the Appellant concerning his willingness or otherwise to declare his loyalty to Zanu-PF, nor was enquiry made as to where in Zimbabwe the Appellant might choose to live were he to be returned. In my assessment, the Appellant's case comes squarely within paragraph 3(2) above. The Appellant is within a category of persons recognised in CM as likely to suffer ill-treatment. I find that there is a real risk of persecution or serious harm to the Appellant both on arrival at the airport in Harare and, in the event that he was to pass through the airport unchallenged, when residing in his home area in Zimbabwe.
23. Accordingly, the Appellant has established a well-founded fear that he would be persecuted for a reason that is recognised by the Refugee Convention and that there is a real risk that he would be subject to various forms of ill-treatment such as to infringe Article 3 of the European Convention on Human Rights.

Notice of Decision

I set aside the decision of the First-tier Tribunal to be re-made. I substitute a decision allowing the Appellant's appeal on asylum and human rights grounds.

Signed

Date 15 November 2017

Deputy Upper Tribunal Judge Bagral

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Bagral

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Bagral