



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/00100/2019**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 31 May 2019

On 25 June 2019

Before

**UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

B C

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer

For the Respondent: Mr W Bhebhe, Legal Representative from Njomane Law

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant (referred to as the Claimant in this decision). This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. For ease of reference, we refer to the Appellant in these proceedings before the Upper Tribunal as the Secretary of State and the Respondent as the Claimant.
2. This is a challenge by the Secretary of State against the decision of First-tier Tribunal Judge O'Rourke ("the judge"), promulgated on 29 March 2019, in which he allowed the Claimant's appeal against the Secretary of State's decision of 23 November 2018, refusing his protection and human rights claims.
3. These claims had been made by way of further representations submitted to the Secretary of State on 26 September 2018, following the Claimant's previous unsuccessful appeal before the First-tier Tribunal, which had been dismissed by a decision promulgated on 26 April 2010 (AA/03597/2010). In essence, the Claimant's "new" case was that she had been a prominent activist for the MDC in the United Kingdom over the course of time and that her profile would place her at risk on return to Zimbabwe.

The judge's decision

4. The core aspects of the judge's decision can be summarised as follows. On the basis of what he clearly regarded as credible oral and documentary evidence, the judge accepted at [22] that the Claimant was an active member of the MDC in the United Kingdom. Indeed, at [23(iii)(b)], he found her to be a "committed MDC political activist" who would, significantly for the purposes of this appeal, engage in such activities in Zimbabwe.
5. The judge made specific reference to the country guidance case of CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) ("CM"), which had formed the basis of the Secretary of State's assessment of risk in the reasons for refusal letter. At [23(i)(a)-(n)] the judge proceeded to set out a number of passages from the Secretary of State's most recent Country Policy and Information Note ("CPIN") entitled "Zimbabwe: opposition to the government", published in February 2019. A number of these passages are in fact taken from the section of the CPIN representing the Secretary of State's own assessment of the country situation, although those set out at [23(i)(f)-(n)] relate to the primary sources of country information themselves.
6. On the basis of the country information referred to (and the Secretary of State's assessment thereof), at [23(iii)] the judge concluded that he was able to depart from the guidance set out in CM. In support of this, the judge notes the age of CM (it having been heard in October 2012) and what he describes as the "general tone" of the assessment and

information contained in the CPIN. At [23(iii)(b)] the judge quotes from para. 2.4.13 of that document:

“... There is a lack of clear and cogent evidence that the government has, in practice, fundamentally changed the political environment or how it treats those opposed to the state.”

7. From this, the judge draws the following conclusion:

“I take from this that the situation at the moment is too fluid and too uncertain to decide that a person who, I have found, is a committed MDC political activist and who would engage in such activities in Zimbabwe, would not face the kind of persecution outlined in the background evidence above (regardless of whether or not the Zimbabwean authorities were aware of her surplus activities - which seems inherently unlikely).”

8. At [23(iii)(d)] the judge concludes that the Claimant would be unable to relocate “in the countryside” on the basis that she had no connections to rural areas.

9. Article 8 is dealt with briefly at [24]. The Claimant’s precarious and then unlawful status in the United Kingdom is noted. There is reference to the delay by the Secretary of State in considering previous further representations submitted in 2012, together with the Claimant’s total period of 14 years’ residence in the United Kingdom.

10. The Claimant’s appeal was duly allowed on “asylum grounds”, “humanitarian protection grounds”, and “human rights grounds”.

The grounds of appeal and grant of permission

11. The Secretary of State’s grounds of appeal do not challenge the judge’s findings of fact as regards the Claimant’s political activities in the United Kingdom, their motivation, and her intention to undertake such activities on return to Zimbabwe.

12. Instead, they seek to attack the judge’s conclusion that he was able to depart from the guidance in CM with reference to the “test” set out by the Court of Appeal in SG (Iraq) [2012] EWCA Civ 940 (that being the need to show “very strong grounds supported by cogent evidence” – see para. 47). It is said that the judge failed to refer to any “cogent evidence” or provide reasons underpinning any “very strong grounds”.

13. On the issue of internal relocation, the Secretary of State asserts that the judge failed to consider the possibility of the Claimant going to live in Bulawayo, an option, so it is said, that CM provides for.

14. Finally, the judge is taken to task for failing to identify which specific Article of the ECHR is relied upon when allowing the appeal on “human rights grounds”.

15. Permission to appeal was granted by First-tier Tribunal Judge Pooler on 30 April 2019.

The hearing before us

16. Mr Melvin relied on the grounds of appeal. At one point in his submissions there was an intimation that the Secretary of State was seeking to argue that the country situation in Zimbabwe had improved to the extent that CM should be departed from in his favour. When it was pointed out that this had never formed part of the Secretary of State's case against the Claimant and that, on the contrary, the Secretary of State had expressly relied on the country guidance to reject the claimed risk on return, Mr Melvin accepted that CM remained applicable in the context of this appeal. He also quite rightly accepted that none of the judge's findings of fact had been challenged.
17. It was submitted that the Claimant possessed a "low" political profile and, if CM had been applied by the judge, it would have been concluded that there was no risk in her home area, or alternatively, that she could have internally relocated.
18. Mr Bhebhe relied on his rule 24 response. In addition, he submitted that if CM had been applied, on the facts as found, the Claimant would have succeeded in her appeal in any event.

Decision on error of law

19. As we announced to the parties at the hearing, we conclude that there are no material errors of law in the judge's decision.
20. Our reasons for this conclusion are as follows.
21. It is the case that the judge purported to depart from the country guidance in CM. It is also true that he did not specifically refer to the relatively stringent approach required when undertaking this particular course of action, as set out in SG (Iraq).
22. However, having regard to the passages from the CPIN cited in his decision and the conclusions drawn therefrom, it is apparent to us that the judge was not in truth making any material departure from CM, but was instead taking the view that the situation in Zimbabwe had not improved over the course of time. On the basis of the Secretary of State's own assessment of the country information contained in the CPIN (and the primary sources on which that assessment was based), such a view was open to him.
23. Alternatively, we could adopt the position that the judge was concluding that the country situation had materially deteriorated since CM. This being the case, we might then conclude that the judge heard in failing to identify

“very strong grounds supported by cogent reasons” when purporting to depart from the country guidance.

24. On either analysis and for the reasons set out below, the Secretary of State’s primary challenge to the judge’s decision must fail.
25. It is quite clear that the guidance set out in CM has formed the bedrock of the Secretary of State’s case against the Claimant from the very beginning and throughout the appellate process. Indeed, although the grounds of appeal refer to an “improvement” in the political situation in Zimbabwe, it is manifestly the case that the challenge being mounted was predicated on the guidance in CM remaining valid. It was primarily on the basis of that assertion that permission to appeal was granted. Before us, Mr Melvin quite rightly accepted the obvious and insurmountable difficulties facing any attempt on the part of the Secretary of State to now suggest that the judge should have concluded that the situation in Zimbabwe had significantly improved to the extent that CM should be departed from in his favour.
26. At para. 215 of CM, the Upper Tribunal set out the previous guidance in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC), modified to a very limited extent as result of the Supreme Court’s judgment in RT (Zimbabwe) [2012] 3 WLR 345. Sub-para. (i)(5) of the modified guidance states:

“(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.”

27. Applying this aspect of the guidance to the present case, there are unchallenged findings by the judge to the effect that the Claimant was a committed political activist for the MDC in the United Kingdom who would engage in such activities if returned to Zimbabwe. It is also the case that the Claimant’s home area in Harare has been accepted by the Secretary of State as constituting a high-density location in the capital (see for example, para. 14 of the reasons for refusal letter). Further, and importantly, the risk to an individual returning to such a location in Harare is not solely dependent upon them having a “significant MDC profile” which is likely to place them on a list of any sort. The “or” stated in the passage from the guidance quoted above clearly shows that an individual who is reasonably likely to engage in genuine MDC activities likely to attract the adverse attention of ZANU-PF, or would so engage but for a

fear of persecution and/or Article 3-treatment, is also reasonably likely to be at risk.

28. In light of the judge's findings of fact, it is sufficiently clear to us that the Claimant would have succeeded in showing a risk in her home area on the basis of CM and the activities she would carry out on behalf of the MDC.
29. Therefore, the errors averred in the grounds as having been made by the judge is, to this extent, immaterial.
30. As to the issue of internal relocation, it is right that the judge failed to expressly consider the possibility of the Claimant moving to Bulawayo. However, on the basis that this omission amounts to an error, once again, in light of CM we conclude that it is immaterial to the outcome for the reasons set out below.
31. The Claimant's assertion that she is of Shona ethnicity has never, as far as we can see, been challenged or found to be untrue. Para. 215(i)(7) of CM states:

“(7) The issue of what is a person's home for the purposes of internal relocation is to be decided as a matter of fact and is not necessarily to be determined by reference to the place a person from Zimbabwe regards as his or her rural homeland. As a general matter, it is unlikely that a person with a well-founded fear of persecution in a major urban centre such as Harare will have a viable internal relocation alternative to a rural area in the Eastern provinces. Relocation to Matabeleland (including Bulawayo) may be negated by discrimination, where the returnee is Shona.”

32. We also bear in mind the judge's finding that the Claimant had been away from Zimbabwe for a total of 14 years and had no connections with any rural area in that country.
33. In our view, even if the judge had directed himself with greater precision to CM and the issue of internal relocation, it is extremely likely that his conclusion on the issue would have remained unchanged. Indeed, not only would that conclusion have been clearly open to him; on the basis of the findings of fact, he would have been inevitably driven to it.
34. Finally, we turn to the judge's conclusion that the appeal was to be allowed on “human rights grounds”. It is unclear as to what particular Article of the ECHR he was relying upon. If he was simply saying that the risk to the Claimant of persecution meant that she would also be exposed to Article 3-treatment, this would be wholly unobjectionable. If, however, the judge was purporting to allow the appeal on Article 8 grounds, we would accept that his analysis and reasons are deficient. On the second of the two possibilities, our conclusion on the primary issue of the protection claim renders any error in respect of Article 8 entirely immaterial.

Anonymity

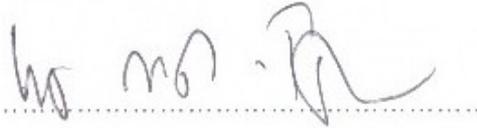
35. We have maintained the anonymity order made by the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal shall stand.

The Secretary of State's appeal to the Upper Tribunal is dismissed.

A handwritten signature in black ink, appearing to read 'H. Norton-Taylor', is written over a horizontal dotted line.

Signed
Upper Tribunal Judge Norton-Taylor

Date: 5 June 2019