Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10941/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 3rd June 2013	**on 6th June 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

CAROLINE NETSAI CHINGONO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is against a determination dated 17th January 2013 by First-tier Tribunal Judge Agnew, dismissing the Appellant's appeal against refusal of her fresh claim to recognition as a refugee from Zimbabwe.

2. Judge Agnew rejected the Appellant's account that she would be unable to show loyalty to ZANU-PF, seeing no reason to depart from findings in a previous determination. Permission to appeal to the UT was granted on 8th February 2013. It was thought arguable that the judge's finding at

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paragraph 26 that the Appellant had not provided evidence that she would not be able to demonstrate loyalty was a misdirection in light of RT (Zimbabwe) [2012] 3 WLR 345**,** in which the Supreme Court held that an individual could not be compelled to lie about her beliefs, and that the judge's findings "…did not examine with sufficient depth the potential that the Appellant might be interviewed and required to declare loyalty".

3. In a Rule 24 reply to the grant of permission, dated 22 February 2013, the Respondent submitted that it was clear that the judge considered the case law in light of the background evidence. The Respondent further says that CM (Zimbabwe) CG [2013] UKUT 59, "… promulgated soon after promulgation of the Appellant's determination, confirms that the Appellant with her specific factual matrix will not be required to show loyalty to ZANU-PF".

4. The Appellant's response to that, dated 19th March 2013, is that the judge did not consider risk on return " … in line with the relevant case law at the time of the hearing of RT ... and RN (returnees) Zimbabwe CG [2008] UKAIT 00083 ... the decision should be remade, albeit on the basis of ... CM ..."

5. Mr Caskie submitted that the grant of permission correctly identified error of law, and the judge's finding that the Appellant would be able to demonstrate loyalty was a "leap in the dark". Mr Caskie had only recently been instructed in the case. He considered that detailed witness statements should be made available, going to whether the requirements of CM could be met. There were, as matters stood, insufficient findings to reach a conclusion on the "CM matrix". The appeal to the Upper Tribunal should be allowed and a re-hearing fixed, possibly by way of a Case Management Review hearing, for the purposes of which the Appellant might be directed to file a skeleton argument explaining how she might meet the criteria of CM.

6. Mr Matthews submitted that while the determination might have been better expressed on the approach to be taken in the light of RT, the only reasonable reading was that the Appellant would be in a position to demonstrate loyalty, given her personal background, her relationship to a senior person in ZANU-PF, and the established negative conclusions on her credibility. Even if there were any error, there was no need for a further hearing. On the findings reached firstly by Judge Wood and later by Judge Agnew the claim was not established by reference to the criteria in CM. The Appellant has family in Zimbabwe, and has at times lived in Bulawayo. There was no reason for the CIO to have any interest in her on her return through Harare Airport. If necessary, there was no reason why the Appellant could not live in Bulawayo. There was no reason for a different outcome.

7. Mr Caskie in reply submitted that the calculation whether the Appellant could succeed within the requirements of CM was a complex one, on which she should have the opportunity to make further submissions. She might

not in the end be able to make out a tenable case, but she should have further opportunity to explore that possibility, with the onus placed upon her in respect of further evidence and submissions. The disposal of the case had to be seen to be fair, and at no judicial stage so far had submissions been made on whether the Appellant could succeed within the terms of CM.

8. I reserved my determination.

9. At paragraph 26 of the determination Judge Agnew says, "The Appellant has not produced evidence which can be relied upon that she would not be able to demonstrate loyalty, which Judge Wood found in his determination ... that she could". Whether or not that is best put, the finding of Judge Wood stands. Judge Agnew went on in her next paragraph to find that the Appellant was no more credible than previously, a finding not capable of any legal challenge. She then found that the Appellant has not established that she or any member of her family has MDC connections, but that on the contrary she would be able to establish connections with and loyalty to ZANU-PF.

10. CM is head noted as follows:

(1) There is no general duty of disclosure on the Secretary of State in asylum appeals generally or Country Guidance cases in particular. The extent of the Secretary of State's obligation is set out in R v SSHD ex p Kerrouche No 1 [1997] Imm AR 610, as explained in R (ota Cindo) v IAT [2002] EWHC 246 (Admin); namely, that she must not knowingly mislead a court or tribunal by omission of material that was known or ought to have been known to her.

(2) The Country Guidance given by the Tribunal in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) on the position in Zimbabwe ***as at the end of January 2011*** *was not vitiated in any respect by the use made of anonymous evidence from certain sources in the Secretary of State's Fact Finding Mission report of 2010. The Tribunal was entitled to find that there had been a durable change since RN (Returnees) Zimbabwe CG [2008] UKAIT 00083. The Country Guidance in EM does not require to be amended, as regards the position at that time, in the light of-*

> *(a) the disclosure by the Secretary of State of any of the materials subsequently disclosed in response to the orders of the Court of Appeal and related directions of the Tribunal in the current proceedings; or*
>
> *(b) any fresh material adduced by the parties in those proceedings that might have a bearing on the position at that time.*

(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)).

(3) The situation is not uniform across the relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described in the preceding paragraph, in reality does not do so. For example, the evidence might disclose that, in the home village, ZANU-PF power structures or other means of coercion are weak or absent.

(4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee is a MDC member or supporter. A person may, however, be able to show that his or her village or area is one that, unusually, is under the sway of a ZANU-PF chief, or the like.

(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.

(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.

(8) Internal relocation from a rural area to Harare or (subject to what we have just said) Bulawayo is, in general, more realistic; but the socio-economic circumstances in which persons are reasonably likely to find themselves will need to be considered, in order to determine whether it would be unreasonable or unduly harsh to expect them to relocate.

(9) The economy of Zimbabwe has markedly improved since the period considered in RN. The replacement of the Zimbabwean currency by the US dollar and the South African rand has ended the recent hyperinflation. The availability of food and other goods in shops has likewise improved, as has the availability of utilities in Harare. Although these improvements are not being felt by everyone, with 15% of the population still requiring food aid, there has not been any deterioration in the humanitarian situation since late 2008. Zimbabwe has a large informal economy, ranging from street traders to home-based enterprises, which (depending on the circumstances) returnees may be expected to enter.

(10) As was the position in RN, those who are or have been teachers require to have their cases determined on the basis that this fact places them in an enhanced or heightened risk category, the significance of which will need to be assessed on an individual basis.

(11) In certain cases, persons found to be seriously lacking in credibility may properly be found as a result to have failed to show a reasonable likelihood (a) that they would not, in fact, be regarded, on return, as aligned with ZANU-PF and/or (b)

that they would be returning to a socio-economic milieu in which problems with ZANU-PF will arise. This important point was identified in RN … and remains valid.

(4) In the course of deciding CM's appeal, the present Tribunal has made an assessment of certain general matters regarding Zimbabwe ***as at October 2012****. As a result, the following country information may be of assistance to decision-makers and judges. It is, however,* ***not*** *Country Guidance within the scope of Practice Direction 12 and is based on evidence which neither party claimed to be comprehensive:*

(a) *The picture presented by the fresh evidence as to the general position of politically motivated violence in Zimbabwe as at October 2012 does not differ in any material respect from the Country Guidance in EM.*

(b) Elections are due to be held in 2013; but it is unclear when.

(c) In the light of the evidence regarding the activities of Chipangano, judicial-fact finders may need to pay particular regard to whether a person, who is reasonably likely to go to Mbare or a neighbouring high density area of Harare, will come to the adverse attention of that group; in particular, if he or she is reasonably likely to have to find employment of a kind that Chipangano seeks to control or otherwise exploit for economic, rather than political, reasons.

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 (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094. On the contrary, the available evidence as to the treatment of those who have been returned to Harare Airport since 2007 and the absence of any reliable evidence of risk there means that there is no justification for extending the scope of who might be regarded by the CIO as an MDC activist.

11. CM was added to the country guidance list on 1 February 2013. The Zimbabwean refugee recognition issues with which it deals were well known before then. The Appellant has had ample opportunity to advance her claim to recognition as a refugee. There is no new element in the factual matrix established in CM which she has not had a fair opportunity to address. Her proof has fallen well short of establishing any entitlement to recognition. She has tried to establish an MDC profile, and has been found to have none. There is no reason why she should attract adverse attention, involving a requirement to demonstrate loyalty to ZANU-PF. There is nothing within the matrix of CM to suggest that she should have another opportunity to reformulate her case, or that there is any prospect of her doing so successfully.

12. The determination of the First-tier Tribunal does not err in any point of law, such as to require it to be set aside. Alternatively, if the decision were to

be remade, then on the basis of the findings made in the First-tier Tribunal, and in light of CM, the appeal would again be dismissed.

13. The determination of the First-tier Tribunal shall stand.

14. No order for anonymity has been requested or made.

4 June 2013
Upper Tribunal Judge Macleman