



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

Appeal Number: AA/10644/2012

THE IMMIGRATION ACTS

**Heard at Glasgow
on 5th June 2013**

**Determination Sent
on 12th June 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

AGNES MAKWEMBERE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J Bryce, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mrs M O'Brien, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant identifies herself as a citizen of Zimbabwe, born on 1st February 1974. The First-tier Tribunal Judge discontinued an anonymity direction. No request was made for such an order in the Upper Tribunal.
2. The Respondent refused the Appellant's fresh claim to recognition as a refugee for reasons explained in a letter dated 13th November 2012.
3. First-tier Tribunal Judge McGavin dismissed the Appellant's appeal for reasons explained in her determination dated 15th January 2013.

4. These are the relevant parts of the Grounds of Appeal to the Upper Tribunal:

2.1 [The judge] failed to apply the *ratio* of RT (Zimbabwe) and Others v SSHD [2012] UKSC 38 ... The judge concluded that the applicant will be returned to a *milieu* where her loyalty to ZANU-PF will be assumed because of the previous findings referred to in paragraph 27 in their decision. Following ... RT, two factors are crucial:

- (a) whether the person has a political opinion or one will be imputed to her and
- (b) whether this opinion may be challenged.

The principal focus in both (a) and (b) is now the authorities in Zimbabwe, not the claimant. There may have been evidence as noted by the judge at paragraph 27, but what is now more important than the claimant herself is the approach and attitude of the authorities. The judge erred in holding that the same approach applied as before RT and per the decision of the first judge ...

2.2 [The judge] erred in holding that ‘... it is difficult to conclude that [the Appellant] was not ... in a *milieu* where her loyalty to ZANU-PF was assumed’ (paragraph 27). This is clearly based on paragraph 59 in RT. The word “*milieu*” can be said to mean the circumstances of the area to where a person will be returned. Each case will be different. The judge erred by defining this word (i) by reference only to the personal circumstances of the claimant; without (ii) any reference to the *milieu* to where she will be returning. In particular, the IJ erred in not considering in detail the objective evidence ... discussing problems in various areas, including Mudzi, to where the [Appellant] would be returned.

5. First-tier Tribunal Judge Kamara granted permission to appeal on 8th February 2013, observing:

In an otherwise well reasoned determination the judge arguably erred ... in concluding that the Appellant would be returning to a *milieu* where her loyalty to ZANU-PF would be assumed; making reference to the fact that she had not been persecuted during her visits to Zimbabwe in 2006. The background evidence ... included a significant number of examples of persecution of MDC members and those suspected of being so, specifically in Mudzi, the Appellant’s town. That evidence postdated the determination of the previous judge ... in 2008. Additionally, the judge may have erred in finding that the decision in RT was relevant because the Appellant was an MDC member as opposed to politically neutral.

6. In a response to the grant of permission, dated 8th March 2013, the Respondent submitted thus:

The judge was entitled to base [her] findings on the previous determination as a starting point ... the Appellant has returned to Zimbabwe to her home area where her family are known to support the MDC despite attending some ZANU-PF meetings. On her previous visits the Appellant was not required to demonstrate any loyalty to ZANU-PF. The judge was entitled to apply the Appellant’s previous history to [her] evaluation of whether she would be at risk on return now. The ultimate finding in this determination and the previous one is that the Appellant will not be perceived to be anti-ZANU-PF. She will be returning to a ZANU-PF area where she has never had any requirements to declare loyalty or any difficulties despite her family background.

7. It is convenient to refer here to CM (Zimbabwe) CG [2013] UKUT 59, which was added to the country guidance list on 1 February 2013, after the decision of the FtT. The headnote reads:

(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.

(d) 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.

8. Mr Bryce provided a clear and detailed written submission of ten pages, which should be read herewith. The culmination of his argument is as follows. The judge erred in her consideration of the previous determination; by misapplication of HJ [2010] UKSC 31 and of RT; and by misapplication of country guidance. Her decision ought to be set aside and remade in the light of paragraphs **(2)** and **(8)** [as numbered within headnote (3)] of the head note of CM, which was to be read along with EM on internal relocation. The Appellant is at risk in her home area; for reasons related mainly to her ethnicity, she cannot relocate to Bulawayo; due to unemployment and harsh economic conditions, she cannot relocate to Harare; and her appeal should therefore be allowed on Refugee Convention grounds.
9. Mrs O'Brien adopted the Rule 24 response. She argued that the determination did not fall to be set aside, but even if the decision were to be remade, the appeal would fail in light of CM. The Appellant on return would have no greater political profile than that of a failed asylum seeker with no significant connection to the MDC. The judge was correct to find no real likelihood that she would come to the attention of the authorities in such a way as to be required to demonstrate her loyalty. Alternatively, although the Appellant's origins are in a rural area, there is nothing forcing her to go there. The Secretary of State did not accept that she would at risk in that rural area, but in any case she could relocate to Harare (which would be the point of return). Her objection to that was mainly economic, and was not well-founded. From 1995 until 2000 she worked in Zimbabwe at two banks as a teller. From 2001 until September 2004 she studied at the London School of Management, obtaining a diploma in hospitality and tourism management. From September 2004 for one year she studied hospitality and tourism management at Queen Margaret University College, Edinburgh, graduating BA (Hons). She has also worked in the UK. She has a work history and worthwhile qualifications. Her history pointed to resourcefulness, ability to maintain herself, adaptability and

worthwhile skills. The Respondent provides return packages which would help her to re-establish herself in Zimbabwe. There was economic difficulty, but not such as to render it unduly harsh to return an individual such as the Appellant. She had the advantage of family support. There was no need to pursue the alternative of relocation to Bulawayo, given that the Appellant had no family there and was not of the predominant ethnic background.

10. Mr Bryce argued that there was ample recent background information regarding the Appellant's home area of Mudzi, in Mashonaland East, to demonstrate continuing anti-MDC violence. The Appellant said from the outset that she has a ZANU-PF connection, but the link is to a now disgraced former bodyguard of Mugabe, and likely to be of little use to her now. The true issue in the case became internal relocation: whether the Appellant could be expected to relocate to Harare, where she has two sisters and a brother.
11. Mr Bryce sought to lead further oral evidence from the Appellant on internal relocation, on the grounds that it had not so far been focused as the live issue. Mrs O'Brien did not object, and I agreed to hear the evidence, under reservation of whether error in law might be found.
12. In evidence-in-chief the Appellant said that her family in Harare comprises her sister Redemption, her sister Rodwicker, and her brother Alois. Each sibling has two children. The children of her sisters are under 18, while the children of her brothers are now over 18. Her brother has a horticultural business, growing and selling seedlings. He has no employees. Her sisters are both unemployed. Redemption's husband runs a butchery, also a one person business. Rodwicker's husband is a telecommunications officer in a private company. It would be difficult for the appellant to live with her siblings because they are all struggling and finding it difficult to meet expenses such as school fees. They would not throw her out onto the street, but it would impose great pressure on them if they had to support her also. She would be wary of putting their lives in danger, having been away from Zimbabwe for a considerable time and having sought asylum. She has another sister in the UK, working as a mental health nurse. The Appellant lives with her and receives support from her. This sister has no immediate family of her own. She sends support to her other siblings and to their parents in Mudzi. While studying in the UK, the Appellant worked as a support worker with people with learning disabilities, and in the Hilton Hotel. She believes it would be extremely difficult to find a job in Harare. Unemployment is high and she would not be favoured as an asylum seeker absent from the country over the last thirteen years. People would rather help somebody else. Bulawayo would be worse, because she has never been there, does not speak Ndebele and has no relatives or other contacts.
13. In cross-examination the Appellant said that her sister Redemption last worked as a teacher in 1999 or 2000. She stopped work not because she had a family but because there was no further work. Her sister Rodwicker

was also a teacher, until about 2003. Both sisters are supported by their husbands. Her brother's children are working in South Africa. Her brother supports his wife and himself and helps to support her parents. Both parents are retired. Her father was a teacher and her mother a housewife. Her father has a pension, but it is very small, and they now rely on their children. Her brother and her sister Redemption own their own properties. Rodwicker rents her home, and her children are still at school. She and her husband are paying the school fees. She is aware that she could obtain assistance to help her on her return, but that would not continue in the long term, and she does not have the contacts required to establish a business.

14. There was no re-examination.
15. In further submissions on the internal relocation issue, Mr Bryce referred to the Respondent's Country of Origin Information Report dated 13th July 2012 at paragraphs 2.07 or 2.08. 2.07 notes a 90% unemployment rate, whereas 2.08 quotes a 2008 paper by the International Labour Organisation stating that despite a sharp fall in formal sector employment, the unemployment rate has remained below 10%. Mr Bryce acknowledged that the stark difference between the two figures must reflect different treatment of the formal and informal employment sectors. He argued that the Appellant's bleak view of her likely employment prospects was realistic. It was a greater hardship to impose unemployment through relocation on a person who had qualifications and experience but was unable to find a use for them. Although the Respondent would provide assistance which might help to start a business, the Appellant was on her own with no partner to assist, and possibly not "streetwise" so as to accommodate herself to the intense competition of the marketplace. Enormous changes had taken place over the thirteen years since she left Zimbabwe, and she would have a huge problem with adjustment. The case should not fail on the internal relocation alternative.
16. Mrs O'Brien pointed out that in the suggested and most likely area of relocation the Appellant would have substantial family connections. Her siblings all had their own accommodation, two of them owning their properties. No doubt they were not in affluent circumstances but they had small businesses, they could pay school fees, and they managed to get by. The circumstances the Appellant would face in Harare were not comparable to those she enjoyed here, but that was not the test, and the circumstances she faced were far from the worst. As to ability to adjust, she had come to the UK to study and her personal history did not suggest that she lacked ambition or positive abilities. The evidence showed that her extended family members constitute a network of mutual support. Against that background and the support available from Refugee Action, funded principally by the Secretary of State, the Appellant's situation did not amount to undue hardship on return.
17. I reserved my determination.

18. The relevant comparison is firstly between the Appellant's circumstances in her home area and in her proposed place of relocation, i.e. between Mudzi and Harare, not between conditions in the UK and in Harare.
19. There is nothing to establish that the Appellant would be worse off in Harare than in Mudzi (absent fear of persecution). The reverse might well be true. Her economic prospects in either area are not as good as in the UK, but no worse than most of the population in Zimbabwe; and given her personal background and family circumstances, and a relocation package, her prospects are better than many others.
20. The expectation that the Appellant might relocate to Harare is not unreasonable or unduly harsh. (There is no need to test whether there might be other less attractive but still viable alternatives in Bulawayo or elsewhere.)
21. I resolve the other issues as follows.
22. The judge erred by considering the HJ Iran principle and the decision in RT to be irrelevant. The Appellant's position as someone who would say that she did support ZANU-PF was stronger not weaker than that of a person of no political belief. That was an error of legal approach.
23. It was possible to find, notwithstanding that error, that the Appellant was not at risk of being called upon to demonstrate loyalty, but the error was a significant one, connected to the vital issues. I do not think it would be satisfactory for the determination to stand.
24. The Appellant might well go unchallenged in Mudzi, but the background evidence to which Mr Bryce referred and the country guidance mentioned at headnote **(2)** is sufficient to show a real risk.
25. The decisive issue is as identified at headnote **(8)** and as discussed above. The Appellant has a realistic option of internal relocation to Harare. Although the case on her behalf was mounted with skill and care, that point is ultimately decisive against her.
26. The determination of the First-tier Tribunal is **set aside**. The following decision is substituted: the appeal, as brought to the First-tier Tribunal, is **dismissed**.



11 June 2013
Upper Tribunal Judge Macleman