Upper Tribunal
(Immigration and Asylum Chamber)

CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2, 3, 4, and 5 October 2012	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE PETER LANE
DEPUTY UPPER TRIBUNAL JUDGE CAMPBELL

Between

CM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mark Henderson, Phil Haywood and Catherine Meredith, instructed by Turpin and Miller

For the Respondent: Colin Thomann instructed by Treasury Solicitor

Public Interest Immunity Advocate: Kate Olley, appointed by the Attorney General

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(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.*

DETERMINATION AND REASONS

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APPENDIX A: EXTRACTS FROM RN (RETURNEES ZIMBABWE CG [2008] UKAIT 00083 AND EM AND OTHERS (RETURNEES) ZIMBABWE CG [2011] UKUT 00098 (IAC)

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Introduction

1. Once more, the Upper Tribunal Immigration and Asylum Chamber (following on from its predecessor the Asylum and Immigration Tribunal), is called on to decide an asylum claim by a national of Zimbabwe with reference to a general assessment of risk on return of those who are not supporters of the ZANU-PF party of President Mugabe.

2. This appeal returns to the Chamber after an unfortunate procedural history. Between the 18 October 2010 and the 14 January 2011 this panel heard the appeals of four Zimbabweans known as EM, COM, CLM (hereafter CM) and JG. The subsequent decision in those appeals was promulgated in March 2011 and reported as EM and others (Returnees) Zimbabwe CG [2011] 98 (IAC) hereafter EM. The appeals had been identified as suitable ones for the issue of Country Guidance because of conflicting approaches by immigration judges and others as to whether the assessment of general risk given in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 (hereafter RN) remained authoritative or had become displaced by fresh evidence.

3. In EM we reviewed at [36] to [70] the sequence of Country Guidance cases relating to Zimbabwe from 2005 to 2010. We noted the circumstances in the months preceding the decision of RN. We were satisfied that the evidence relating to events and consequent risk from 2009 through to January 2011 was not the same or similar to that under consideration by the Asylum and Immigration Tribunal in RN. Having evaluated the evidence before us at [74] to [231] we concluded that the guidance in RN was no longer applicable.

4. At [267] we replaced it by fresh guidance in the following terms:

> *(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.

(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, (see paragraphs 62 and 64 above) and remains valid.

5. In doing so, we were conscious that fresh elections in Zimbabwe might generate a further change of circumstances and pose fresh risks to certain classes of Zimbabwean asylum-seekers, but we concluded that the uncertainties as to when such fresh elections would be called, how they would be conducted, and what the influence of the international community would be in restraining a repetition of the violence encountered in 2008 were too speculative and uncertain as to constitute a present real risk of harm: see [263] to [265]. We noted at [50] that the AIT

in RN had also recognised the possibility that events in Zimbabwe could change swiftly for better or worse.

6. In the event, applying the new guidance to the individual appeals, the appeal of COM on asylum grounds was allowed while those of the other appellants on similar grounds were dismissed. The appeal of JG on Article 8 grounds would have been allowed had not the respondent already decided to grant her leave to remain as a result of reconsideration during the hearing of the evidence relating to her personal circumstances. EM himself had disappeared without leaving his solicitors with instructions and played no role in the appeal. CM and JG sought permission to appeal to the Court of Appeal, having apparently been granted legal aid to do so despite the fact that JG was not going to be removed to Zimbabwe.

7. The principal issue of concern before the Court of Appeal was the impact on the individual appeals and the Country Guidance issued in the appeals of data relating to assessment of risk in Zimbabwe available in January 2011 that had not been disclosed to the Tribunal or the claimants. This data had come to light in another case. Once permission to appeal had been granted, the Court of Appeal in January 2012 issued directions for further disclosure of material in the control of the respondent or the Foreign and Commonwealth Office dating from 1 January 2010 until 10 March 2011 but were informed that compliance with these directions would give rise to Public Interest Immunity (PII) certificates issued by or on behalf of the Secretary of State for Foreign Affairs.

8. On 13 June 2012, before the appeal had either proceeded to a substantive hearing or the process of further disclosure had been completed, the parties agreed that the respondent had failed to comply with its disclosure obligations. A consent order was drawn up with an agreed statement of reasons that the appeals be allowed and remitted to the Upper Tribunal for re-determination in the light of a number of issues of law identified in the schedule to the order. For present purposes we summarise these issues as follows:-

(i) What is the impact on the Country Guidance of the material not before the Tribunal at the date of EM that has now been provided to the appellant and/or may be provided following the conclusion of the disclosure process and the claim to public interest immunity made in respect of a volume of material by or on behalf of the Foreign Secretary?

(ii) Was there a durable change of circumstances between the factual assessment in RN and EM?

(iii) Was the Tribunal wrong to give any weight to information supplied to the Fact Finding Mission (FFM) by certain organisations that did not consent to their identity being supplied to the appellant, having regard to the observations of the European Court of Human Rights in Sufi and Elmi v United Kingdom [2011] ECHR 1045, [2012] 54 EHRR 9 ?

(iv) What is the impact of any of the above and or any fresh evidence adduced on the individual appeals?

9. As the appeals had been allowed, the Tribunal's decision in EM could no longer stand as Country Guidance. The position was therefore that the last Country Guidance issued about generic risk to those not loyal to Zanu-PF was RN in 2008. This consequence was noted by the Supreme Court when it considered the appeal on a point of law in the case of RT (Zimbabwe) [2012] UKSC 38 at [2] and [3] but that point of law itself arose out of the requirement to show loyalty to Zanu-PF by returnees to Zimbabwe which requirement was based on the evidential assessment in RN that we concluded in EM was no longer generally applicable.

10. Judges of both immigration chambers were left to determine future Zimbabwe appeals from the starting point of RN despite the fact that we had considered that the evidential assessment in that case was no longer valid. The Tribunal's decision in EM has remained on the UT website as a reported case albeit with the warning that the Court of Appeal had remitted the case for re-determination.

11. Although they were not required to treat the assessment in EM as authoritative it was open to judges deciding Zimbabwe cases to have regard to the evidence set out therein, the appendices containing the oral and documentary evidence that was before us, and our analysis of that evidence, albeit subject to the proviso that the consideration of the matters remitted to us might result in a different conclusion.

Preliminary Issues for the management of this appeal

12. Once this Tribunal received the judgment and order of the Court of Appeal we directed a preliminary hearing where we hoped to map out a procedure and timetable for remaking of these appeals. There were at least four preliminary issues for us to consider:-

(i) The first issue was how the process of disclosure and further disclosure and evaluation of the PII claim should be undertaken**.** The parties were at odds as to whether the Tribunal should undertake the exercise for itself in private, appoint a specially appointed advocate to assist them or adopt some other course.

(ii) The second issue was whether further directions for disclosure should be issued. Mr Henderson for the appellant submitted that further disclosure should be ordered of relevant data up to a date shortly before the date set for substantive determination of this appeal.

(iii) The third issue was whether the re-determined appeal should be case managed as a Country Guidance case. Mr Henderson contended that as the Country Guidance in EM had been set aside, directions should be given

for the appeal to be listed as new Zimbabwean Country Guidance. Mr Thomann for the Secretary of State opposed that course and indicated that all that was required was that CM's appeal be re-determined in accordance with the Court of Appeal's order.

(iv) The fourth matter concerned JG's future participation in the appeal. We were informed that although JG had been party to the appeal to the Court of Appeal, the legal aid authorities had concluded that she was no longer eligible for legal aid to pursue the asylum appeal before us. She was unrepresented at the direction hearing as her existing representatives could not continue to act for her.

13. There were links between each of these issues. We asked for written submissions on the scope of the appeal, the scope of the disclosure duty and related matters. We concluded that we needed to set directions and a timetable to determine the appeal on the information before us at the end of July 2012.

14. That information did not include any fresh evidence by either the appellant or the respondent indicative of a significant change of circumstances since we delivered the decision in EM in March 2011, although we recognised this may turn out to be the case. The issues that had been remitted to us for determination concerned whether the decision in EM was flawed by reason of non-disclosure or error of approach as opposed to whether it had been overtaken by subsequent events and fresh evidence.

15. We intimated at an early stage in the proceedings our view that the appeal should be listed for re-determination as soon as was reasonably practical having regard to the issues to be resolved. Each of these appeals had originally been determined or ordered on reconsideration to be re-determined in 2009. The process of case management, directions, oral hearing, supplementary submissions and promulgation meant that nearly two years had elapsed before we gave our decision in EM in March 2011 and it was only after a further period of 15 months that the Court of Appeal returned two of the appeals to us in June 2012. It was important in the public interest as well as the interests of both parties, that these proceedings reached a final conclusion.

16. Any Country Guidance case involves general considerations broader than the precise basis for determining an individual appeal. Depending on the country and issue in question such cases potentially affect large numbers of claimants. We were informed at the end of the proceedings that several hundred Zimbabwean cases were likely to be affected by the outcome in this case.

17. If, despite our conclusions in EM on the evidence then available, we were now to conclude that the claimant and many, most or all of those in a similar position to him should be recognised as refugees it was important that we reached this conclusion promptly, so the years of uncertainty

could be brought to an end. As the Tribunal noted in RN, establishing stable Country Guidance in respect of Zimbabwe has been a particularly challenging task in the light of the history of appeals, re-determinations, and changes in evidence since the case of SM and others (MDC-internal flight-risk categories) Zimbabwe CG [2005] UKIAT 00100 in 2005.

18. By contrast, if we concluded that our analysis in EM remained sound and other claimants in a broadly similar position to those whose appeals had been dismissed were not entitled to refugee status or complementary protection and had no other basis of stay, it was equally inappropriate that they should continue to remain here if there were no human rights reasons to prevent removal.

19. We were also concerned at the state of uncertainty resulting from the agreed order setting aside our determination in EM would have on judges of the First-tier Tribunal: should they adjourn all Zimbabwean asylum appeals or proceed to determine them and if so from what Country Guidance starting point and on what post- RN evidence as to risk?

20. Unlike a case such as PO (Nigeria) [2011] EWCA Civ 132 [2011] Imm AR 466 where the Court of Appeal had set aside a decision of the Upper Tribunal for identifiable error set out in the judgment but had preserved those parts of the Country Guidance not affected by the error of approach, the whole guidance had been set aside in EM and no final conclusions had been reached on the impact on the original decision and the Country Guidance given in it of the various grounds of appeal.

21. We were conscious that in EM much argument had been deployed on the question of when the next round of Parliamentary and Presidential elections would take place. From the perspective of the claimants in autumn 2010 the worst case scenario was that elections would be called unilaterally by the President in early 2011 before the programme of reform agreed by the coalition government and urged by influential members of the international community had been completed. In the event that worst case scenario had not come about, and it seemed in July 2012 that elections were now unlikely to be called until the spring or summer of 2013 when they were required under the Constitution of Zimbabwe. Given the potential impact of violent elections on risk for non Zanu-PF supporters there was a risk that any conclusion about categories of general risk in 2011 or 2012 would need revisiting by mid 2013.

22. For these reasons we indicated that we intended to hear the appeals in October 2012 and would issue the directions we considered appropriate in order to meet that time-table.

The procedure for determining disclosure issues

23. We first consider Mr Henderson's submission that as a matter of principle, we should ask for a special advocate to be appointed to represent the interest of the appellant before determining the outstanding issues of disclosure. He relied on the observations of the Master of Rolls given in AH v SSHD [2009] EWCA Civ 287 [2009] 1 WLR 2049 at [20], [35], [37] and [38].

24. AH was a case where the claimants sought judicial review of decisions by the Secretary of State to refuse naturalisation on the grounds that he was not satisfied that each was of good character. That conclusion was substantially based on material that the Secretary of State was unwilling to disclose for reasons of national security. A preliminary issue arose in the judicial review proceedings as to whether a special advocate should be appointed. One reason to do so was to assist the Tribunal on whether a gist or an expanded gist of the undisclosed reasons could be given. There was a close relation between the preliminary issue, the question of whether a gist of closed information could be given and the substantive issue whether the Secretary of State was entitled to reach the conclusions he did.

25. The present case concerns an adjudication on a claim to public interest immunity made by the Foreign Secretary and his Permanent Under-Secretary in respect of material relating to an evaluation of political circumstances in Zimbabwe of potential relevance to the assessment of risk on return for those claiming asylum in the United Kingdom. The material in dispute does not relate to the appellant personally at all. It is not relied on by the Home Secretary as the reason to refuse his protection claim. Its potential relevance to this asylum appeal relates to the background assessment of the stability of political change or improvements or deterioration in the security situation in Zimbabwe.

26. This is a conventional public interest immunity problem that arises from time to time in civil litigation where either the trial judge or an applications judge can decide the issue in private and without extraneous assistance (see AH at [20]). We were not persuaded the discussion of principle and the guidance issued in that case made it necessary in the interests of justice to request the appointment of a special advocate to represent the interests of the appellant.

27. Nevertheless, we were conscious of both the scale of the outstanding disclosure issues, the limited time to complete it, the intervention of the long vacation and the possibility that the process of determining the public interest immunity issue would require an oral hearing when we would hear submissions from the Secretary of State in the absence of the appellant and his legal team.

28. We further recognised the risk that had such a hearing been convened we might have been party to disclosure of information that went to the merits of the appeal or otherwise conclude that fairness required us to recuse

ourselves. We were anxious to adopt a procedure that could avoid such risk and the possibility of further delay in reaching a final determination.

29. We accordingly adopted the exceptional measure of inviting the Attorney General to appoint an advocate to assist the Tribunal with respect to the resolution of the public interest immunity process. This material now extended to four volumes of material that in our view needed to be assessed for the following purposes:-

    (i) to determine if it was relevant to the issues in the appeal, having regard to what was already known to the Tribunal and the appellant; and, if so:-

    (ii) to decide whether the claim for public interest immunity was made out;

    (iii) if PII applied, to assess whether the material was of such significance to the appeal that fairness required us to direct that the material in whole or in part should be disclosed to the appellant.

    This task included completing the process of reviewing the redactions already made during the Court of Appeal proceedings. It was necessary to review the redactions made on relevance grounds, and if we considered the material to be relevant ascertain whether a PII claim arose in respect of it.

30. We have already explained our view that expedition was desirable in this appeal. As a matter of practical reality the prospects of progressing disclosure during the long vacation when holiday and other commitments prevented the panel from meeting regularly or at all until late September would de-rail any reasonable prospect of starting these appeals in the first week of October as we had indicated was otherwise appropriate.

31. The procedure that we were able to adopt with the assistance of the Attorney General addressed all potential obstacles to our satisfaction. Ms Kate Olley was appointed a PII advocate by the Attorney. She has acted at our direction and has been able to review all the material timeously; make her own independent assessment of the three questions we posed for her to consider; discuss her conclusions with members of the panel; engage in discussion with the counsel for the Secretary of State about issues that remained unresolved including the extent to which any gist of the material to which PII did apply could be provided to the appellant.

32. We are most grateful to her for the assistance provided over the period of the long vacation. The outcome of the process meant further information was supplied to the appellants shortly before the start date for these appeals without the need for a PII hearing. Although there have been subsequent slippages in the timetable set for determining this appeal and consequently the time available for the panel to be able to promulgate its

determination, the hearing days assigned were productively deployed in hearing the evidence and core submissions.

Extension of the disclosure application

33. Second, we declined Mr Henderson's invitation to extend the disclosure process beyond the period that had been directed by the Court of Appeal.

34. As we have already noted, we regarded the issues that had been remitted to us for determination to be essentially historic ones. The task of determining them did not itself require further disclosure beyond 10 March 2011. We infer that this date was chosen by the Court of Appeal in January 2012 because this was the date of promulgation of the decision in EM. The Court was looking back to what we should have had then rather than forward to what may have come to light since.

35. We did not rule out the possibility that an evaluation of the information already supplied to us or indeed any further fresh evidence that was submitted might lead to further questions arising about information within the knowledge of the Foreign and Commonwealth Office after March 2011. However that was not the nature of the application before us; the appellant's request was general rather than specific.

36. As a starting point and in contrast to ordinary civil litigation, we recognise that there is no general requirement for disclosure of all relevant data held by the Home Secretary or indeed the Foreign Secretary in asylum appeals. These are appeals to a Tribunal governed by a statutory regime and the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended. Neither these Rules nor the AIT (Procedure) Rules 2005 made provision for general disclosure.

37. In principle, the starting point was similar to that considered by the House of Lords in Abdi and Gawe [1996] 1 WLR 298 [1996] ImmAR 288 where Lord Lloyd concluded that neither the express provisions of the rules then applicable nor the interests of justice required the Secretary of State to give discovery in asylum appeals. The case was concerned with return to a safe third country, and it is clear from the speech of Lord Lloyd and the partly concurring speech of Lord Mustill that the circumscribed timetable of third country appeals was a material factor in determining what the interests of justice required.

38. R v SSHD ex p Kerrouche No 1 [1997] Imm AR 610 was another third country case; Lord Woolf said:

> "While Lord Lloyd's approach must be the starting point for the consideration of this issue, there are limits to the approach he indicated in that case. The decision would not justify the Secretary of State knowingly misleading the Special Adjudicator. The obligation of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must know or

ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied."

39. This observation was applied in R (ota Cindo) v IAT [2002] EWHC 246 Admin. This was a judicial review of a substantive asylum appeal on the grounds of non-disclosure. Maurice Kay J (as he then was) quoted the passage in Kerrouche and emphasised the words "ought to have known" and said:

> "10. The words I have emphasised point to the inclusion of constructive knowledge. This was taken up by Simon Brown L.J. in Konan v SSHD (CA, 20 March 2000), who also observed that (para 24):
>
> > "…..the Secretary of State's obligation in a full asylum appeal like this may well be higher than in cases like Kerrouche and …. Abdi and Gawe, cases concerned with safe third country appeals".
>
> 11. Taking a broad view of the authorities, they appear to illuminate these principles: (1) there is a duty on the part of the Secretary of State not knowingly to mislead in the material he places before the Adjudicator or the IAT; (2) "knowingly" embraces that which he ought to have known; (3) a breach of that duty may found judicial review on the basis that either (a) the decision was reached on a "wrong factual basis" (see Wade & Forsyth, Administrative Law, 8th Ed. Pp.283-284); or (b) the proceedings were tainted with unfairness."

40. The AIT concluded in MS and others (risk on return) Kosovo [2003] UKIAT 00031 (reported as FZ and others [2003] Imm AR 633) applying the dictum in Abdi and Gawe) that:

> "There was no duty on the Secretary of State to embark upon an investigation to identify evidence not in his hands for the preparation of country reports, in order to assist these appellants in making their cases".

41. We conclude that this observation is subject to the requirements of fairness as noted by Maurice Kay J. We are not aware of any authority on the point that advances the obligation beyond the duty not to mislead by omission of material that was known or ought to have been known to the Secretary of State.

42. Mr Henderson's submission was founded on two different lines of authorities. The first was the principle that in judicial review proceedings once permission is granted, a respondent should disclose all relevant data about the decision and the process by which it was made (cf R v Lancashire CC ex p Huddleston [1986] 2 All ER 941, cited in the commentary in the White Book to CPR 54.14). There is an obligation on a public authority whose decision is challenged by judicial review, to set out the relevant facts and reasoning behind the decision making process: see also Tweed v Parades Commission for Northern Ireland [2007] I AC 650 at [31] and [54]. The second was the developing line of authorities identifying the respondent's duty to search for and disclose to a special

advocate exculpatory material in the context of proceedings before the Special Immigration Appeals Commission (SIAC) or other closed proceedings.

43. We find neither strand supportive of a contention for a general duty to search for and disclose data relevant to risk in an asylum appeal or a Country Guidance case. In judicial review, the obligation on the respondent is to explain the decision and make relevant disclosure of the materials on which the decision was actually based. It is not suggested in these proceedings that the respondent actually had possession or sight of the subsequently disclosed FCO materials at the time of the decision to refuse asylum or resist this appeal[1].

44. In SIAC or other closed proceedings the appellant is excluded from the closed parts of the hearing and is unable to present his own evidence in rebuttal of any closed data against his interests. The special advocate is unable to take the appellant's instructions on any potentially exculpatory material and will generally be precluded from making inquiries of his or her own in open material as, by one means or another, this would generate a risk of disclosure of the substance of closed material. In that special context, the general principles of common law fairness required that the respondent did not pick and choose between the closed data under her control and there was a duty to search for and provide to the special advocate material that may be considered exculpatory.

45. In our judgment, in asylum appeals and Country Guidance cases, the duty not to mislead provides a sound basis for evaluation of country material. Where the respondent relies on absence of material risk by reference to Country of Origin Information Service (COIS) reports, UKBA Operational Guidance Notes (OGN), or responses to the evidence of others, she cannot make assertions that she knows or ought to know are qualified by other material under her control or in the possession of another government department.

46. We anticipate that UKBA assessments of risk in foreign countries will frequently be informed by information emanating from the UK diplomatic mission in the region or other data in the possession of the Foreign and Commonwealth Office. In the case of Zimbabwe we know that this has been substantially the case for some time. The UKBA relied substantially on the expertise of the British High Commission in preparing the fact-finding mission and the evaluation of political circumstances. We would expect the UKBA to ask for and be informed about any reliable material that might qualify a published assessment. We would expect COIS reports to be updated regularly and kept under review. Where new material comes to light an OGN can be issued promptly, even if it is not itself a source of independent evidence. We observe that it was on the basis of an

[1] The respondent has clarified that some of the documents discovered in the course of the unlawful detention litigation were copied to officers of UKBA (although she says there was no suggestion that her case workers or legal team had possession or sight of the subsequently disclosed FCO materials at the time of the decision to refuse asylum or resist this appeal).

OGN as to enhanced risk of non-Arab Darfuris in Khartoum that the AIT was able to promptly vary previous Country Guidance in AA (Non-Arab Darfuris- relocation) (Sudan) CG [2009] UKAIT 0056.

47. Nevertheless, the respondent's duty to act fairly and not mislead is supplemented by the power of the Tribunal to issue specific directions. The Upper Tribunal's powers are set out in rule 5:

> …
>
> (2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may—
>
> …
>
> (n) require any person, body or other tribunal whose decision is the subject of proceedings before the Upper Tribunal to provide reasons for the decision, or other information or documents …

48. The reasons why the Tribunal had exercised its case management powers in the autumn of 2010 and directed disclosure of documents over a specific period, was because the appellant had disputed the accuracy of a public statement made by Ministers in the context of the resumption of enforced returns of failed asylum seekers to Zimbabwe (see further paragraph 65 below). It seemed to us appropriate in the light of the public statements made and the nexus to the Country Guidance appeal we were then embarked on to see if material existed to support or undermine the contention that the previous suspension of removals was for political rather than safety reasons.

49. Before the Court of Appeal the respondent accepted that previous disclosure was incomplete and that there was a failure of the duty of disclosure in the light of the issue identified above that had caused the Upper Tribunal to exercise its case management powers.

50. This again was a historic rather than current issue. It went to an issue as to why the respondent had decided to resume removals to Zimbabwe. In the absence of a general duty to place before the Tribunal all contemporary data relating to an assessment on Zimbabwe, we saw no reason to exercise our case management powers to achieve the same result.

51. There was further a risk of a never ending cycle of disclosure requests, PII applications and so on. Disclosure by the Secretary of State of material held by the Foreign Office did involve PII issues, and the process for manual search, evaluation, submission for a certificate, judicial scrutiny of the merits of the certificate and the assessment whether there was a compelling case for disclosure in the interests of fairness was a laborious and time-consuming process. The volume of material in issue far exceeded the slender bundle we were able to assess for ourselves in December

2010. The whole process was bound to be measured in months rather than weeks or days. By the time one application was determined the passage of time might lead to a further application and so on. We consider that the issue of directions requiring either the respondent or *a fortiori* a third party, to provide material in an asylum appeal is an unusual and exceptional course. If it were regularly and routinely undertaken, it would be likely to significantly delay the listing and determination of any appeal.

52. We recognised that, if there was recent material that was known or ought to be known to the Home Secretary suggesting that, whatever the position in the past, it would now be unsafe to return the appellant to Zimbabwe, her legal representatives had accepted that a duty of disclosure would arise, in the event that it was decided still to oppose the appeal. The discharge of such a duty did not depend on directions from this Tribunal.

53. We accept Mr Henderson's submission that asylum appeals in general are decided on up to date assessment of risk and the Tribunal will frequently need to consider post-decision evidence of country conditions applying the principles set out in the leading case of Sandralingam and Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 at p112-113 per Simon Brown LJ, hereafter Ravichandran.

54. Such material in asylum appeals is usually provided by the parties rather than by direction of the Tribunal. As already noted no such information had been provided to us by the appellant at the time of the case management directions.

Whether the present appeal should be listed as a Country Guidance case on the position in Zimbabwe in 2012

55. A decision whether a case is reported at all or is reported as a Country Guidance case is one for the Tribunal alone that it performs through the function of the reporting committee. The process is set out in Presidential Guidance Note 2011 No 2 (available at http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/upper/guidance-note-no2-reporting-decisions-of-the-utiac.pdf.) It is not a decision in which the parties have an interest: see Senior President's Practice Statement at 11 (revised September 2012). It is only at the end of the process that the Tribunal can be assured that the investigation has been sufficiently well-informed and comprehensive as to be able to constitute authoritative guidance on the conclusions to be drawn from a given body of material. However, best practice is to case manage a potential Country Guidance case with this possibility in mind; normally by combining the appeals of several different appellants, and identifying the topic on which guidance is likely to be given in advance and thereby enabling the appellant and the respondent to identify the relevant evidence to be adduced.

56. Country Guidance is intended both to be an instrument for the fair and effective use of resources in Tribunal asylum determination, and a means of avoiding inconsistent approaches to the same material thereby generating uncertainty and duplication of appeals. It is usually deployed where there are a large number of appeals from the same country of origin raising the same or similar claims, and where an exhaustive examination of the material evidence is considered desirable in the interest of efficiency and consistency. The principle is that like cases should be decided alike. The material evidence is all relevant information that the parties choose to place before the Tribunal or the Tribunal is able to deploy during the appeal from its own resources and expertise.

57. The status of a Country Guidance determination once reported as such is established by the Senior President's Practice Direction 12:-

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the Country Guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a Country Guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the Country Guidance issue in question; and
> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current "CG" determinations relating to that country.
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable Country Guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

58. It is of importance to note that a Country Guidance case is only authoritative in so far as the evidence in any subsequent appeal is the same or similar. It is thus not a binding precedent that can only be varied by the Upper Tribunal or the higher courts. Where the evidence is materially different it is the duty of the judge of the First -tier Tribunal to evaluate it and reach his or her own conclusion, but in doing so he or she will start from the last extant Country Guidance case and see what if anything has changed.

59. Where the nature of the appeal or the rapidity of change in the country of origin is such that the Tribunal concludes it does not have a fully informed or durable picture, the relevant assessment may still be reported as a country information case, without the status of a Country Guidance case.

Given the inability of the existing technology to permit subject matter searches of unreported decisions of the Upper Tribunal the Reporting Committee is conscious of the need from time to time to bring cases containing relevant country information to public attention.

60. With these principles in mind, we were not persuaded in July 2012 that we should case manage this appeal as a new Country Guidance case on the up-to-date position in Zimbabwe, for the following reasons:-

    (i) The principal issue was whether the assessment in EM was flawed for the reasons of concern to the Court of Appeal. If it was not then its status as Country Guidance when it was issued could be restored pending any change of circumstances. Until these issues were determined it was premature to conclude that the decision no longer had any value as guidance.

    (ii) Whereas the EM group of cases involved four appellants from different locations and with different personal histories, the reheard appeal on which we were embarked seemed likely to involve only one appellant from a low or medium density suburb of Harare. This was not a satisfactory basis to make the general appraisal that the Upper Tribunal had delivered in EM.

    (iii) Although EM had been under appeal from the Upper Tribunal since March 2011, no fresh evidence suggesting a significant change of circumstances had been presented to us by July 2012 that would have enabled us to explore with particularity what fresh issue was being considered for guidance.

    (iv) We had a duty to determine CM's individual appeal in the light of updated information and would receive any fresh information presented to us. If it were materially different from the previous Country Guidance case we were required by the principle in Ravichandran to reach the appropriate conclusions to be drawn from the material as a whole.

    (v) It was probable given the importance of the issues remitted to us for adjudication that our final determination would be reported in due course, but whether any fresh evidence was such to make it suitable for reporting as a Country Guidance case was a matter to be considered in the light of what was presented at the appeal and conclusions on it.

61. Again, this decision did not preclude a later conclusion that the fresh evidence did, after all, make it appropriate to issue up-to-date Country Guidance on Zimbabwe, in the context of CM's remitted appeal. However, at the time of the case-management directions, we had neither such evidence before us nor the expectation that it would come before us and offer a materially different picture. The reason the appeal was before us at

all was not because there were conflicting First-tier assessments of post-EM material, but because the assessment in EM might prove to be flawed by the three arguable errors identified in the Court of Appeal proceedings.

The appeal of JG

62. As a result of the legal aid problems noted above, JG did not participate in the directions hearing and make detailed submissions on the preliminary issues. In the event we were informed that she had secured representation by solicitors and would participate in the appeal set down for the autumn.

63. However, when her skeleton argument was received shortly before the hearing it was apparent that she wished to develop a wholly new point never previously canvassed, namely that her child was at risk of social group persecution if (hypothetically) returned to Zimbabwe as a result of medical needs. The Secretary of State objected to this late change of case without an opportunity to consider and investigate it and in those circumstances, we concluded that it was necessary in the interests of justice to separate her appeal from that of CM and adjourn it for separate consideration on its own individual facts.

Issue 1: The effect on the Country Guidance in EM of the materials subsequently disclosed by the respondent

Introduction

64. Paragraph 3(a)(i) of the Tribunal's directions of 14th September 2012 made plain that one of the purposes of the present proceedings is as follows:-

> "(a) to determine whether the Country Guidance in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) regarding the position in Zimbabwe as at March 2011 should be amended as regards the position at that time by reference to:
>
> (i) any material subsequently disclosed by the respondent in response to the orders of the Court of Appeal and any related further directions of the Tribunal."

65. The background to the matter is set out at [130] and [131] of EM:-

> "130. Prior to the hearing in October 2010, appellants JG, EM and CLM requested disclosure of all documents within the control of the Secretary of State for the Home Department or other government departments relating to assessments of the political situation in Zimbabwe for the purpose of determining whether to commence enforced returns, pursuant to the ministerial statement of 29 October 2009. That ministerial statement had indicated that the UKBA would begin work on a process aimed at normalising the returns policy to Zimbabwe, moving towards resuming enforced returns as and when the political situation developed. The appellants' purpose was, in essence, to ascertain what lay behind the ministerial statement in

October 2010, that the situation was now such that (subject to what might be said by this Tribunal in the present proceedings by way of Country Guidance) enforced returns to Zimbabwe could recommence.

131. In a letter of 18 October 2010 from the FCO Zimbabwe Unit to Mr Walker, it was said that the FCO had always been clear that enforced returns were related to foreign policy considerations, in particular the stability of the inclusive government in Zimbabwe, and were not related to security or safety of returnees. On 20 October the Tribunal directed the disclosure of "any material emanating from the FCO regarding its assessment of the political situation in Zimbabwe from 1 August 2010". On 22 December 2010 certain egrams were supplied to the appellants and the Tribunal, subject to certain redactions and gists. This followed an analysis of FCO material, in which Junior Counsel for the respondent was involved, to identify material potentially falling within the scope of the Tribunal's direction, including (of course) material that might be said to undermine the respondent's case and/or support the cases of the appellants. Ten egrams were identified."

66. In the course of litigation involving another Zimbabwe citizen who wished to resist lawfulness of detention, material had come to light which cast doubt on the accuracy of what the FCO was recorded at [131] as having told Mr Walker. This material led to the appellants formulating ground 1 of their grounds of application to the Court of Appeal, as follows:-

> "Whether the respondent failed to comply with its disclosure obligations and whether the respondent's statement of the Foreign Office 'had always been clear that its concerns on enforced returns were related to foreign policy considerations … and were not related to the security or safety of returnees' had been misleading."

67. It is common ground that the documentation not seen by the Tribunal in EM disclosed an interest on behalf of the United Kingdom government in implementing enforced returns to Zimbabwe, before future elections and the violence considered to be associated with them. The significance of future elections in Zimbabwe was discussed at [232] to [265] of EM. At [264] the Tribunal said this:-

> "264. Drawing all these threads together, we do not conclude that our evaluation of who is or is not presently at risk if returned to Zimbabwe is undermined, by the possibility of a return to violence at 2008 levels in the event of elections being called in the foreseeable future. The combined effect of the evidential uncertainty of when elections may be called and what might happen when they are produces a picture that is too equivocal or obscure to amount to a real risk of future ill treatment."

68. In granting permission to appeal on 20th December 2011, the Court of Appeal (per Sullivan LJ) was recorded as stating as follows:-

> "It seems to me that it is at least arguable on the material that we have now seen that there was a failure to make proper disclosure to the Tribunal – for whatever reason, it matters not – and, in very brief summary, that it is arguable that the material which related to the Foreign Office concerns that there was a limited window of opportunity in which Zimbabweans might be returned to Zimbabwe and that window of opportunity was limited because elections were anticipated within a relatively short period (various periods are given, including the period of twelve to eighteen months) and that there was a real likelihood of violence at those elections … was arguably relevant and might arguably have had an impact upon the critical conclusion of the Tribunal: namely, that the combined effect of the evidential uncertainty of when elections may be called and what might happen when they are, produced a picture that was too equivocal or obscure to amount to a real risk. It is arguable that the additional material might have persuaded the Tribunal that the picture of when elections will be called and what was likely to happen when they were called, was not too equivocal or obscure. I express no conclusion as to whether that is the case since this is simply a permission application."

69. In the light of the emergence of this previously undisclosed material the Court of Appeal on 24th January 2012 decided to make its own orders for disclosure, as follows:-

    (a) No later than March 16th 2012 the respondent was ordered to disclose those documents in the respondent's or the FCO's control, dating from 1st January 2010 to 10th March 2011, touching on the timing of elections in Zimbabwe and the risk of a return to violence in connection with those elections. The obligation extended to a manual search by the respondent and a manual and electronic search by the FCO.

    (b) No redactions were to be made on public interest immunity grounds (and previously served redacted documents to be re-served in unredacted form) unless a public interest immunity exercise had been carried out and public interest immunity certificates pertaining to the appeal served by the respondent, no later than 16th March.

    (c) In the event that the respondent invoked PII for those documents already served on 25th October 2011, the gist was to be provided for the redacted passages [listed in an annex] … no later than 4pm on 16th March.

70. On 18th May 2012 the appellants issued an application seeking the Court of Appeal's review of the respondent's claim to withhold documents, or parts thereof, on grounds of relevance or a claim for public interest immunity. The hearing of that application was, in the event, overtaken by the parties' agreement as to the grounds on which the appeals would be remitted to the Upper Tribunal. The respondent accepted there had been a procedural irregularity affecting the Tribunal's determination, amounting to a material error of law, by reason of her failure to provide at least some part of the disclosure now made in the Court of Appeal. It was therefore considered, by consent, that all of the material disclosed to the appellants, and thus before the Court of Appeal, should be considered by the Tribunal. The

parties also agreed that the outstanding review of the respondent's claim to withhold disclosure should be addressed by the Tribunal.

71. We have explained in the first section of this determination the approach taken by the Tribunal to these outstanding tasks.

The previously undisclosed materials

72. Having explained the background, we turn now to assess the previously undisclosed materials ("the new materials"), in order to decide, pursuant to the directions of September 2012, whether the Country Guidance given in EM requires amendment as regards the position at that time. In their submissions, the parties have chosen to deal with this matter by reference to separate headings, which appear to the Tribunal to be sensible, and which we describe as follows:-

(a) Views as to risks arising from future elections (the so-called "window of opportunity");

(b) The potential influence of the Zimbabwean Electoral Commission (ZEC), Southern African Development Community (SADC) and South Africa on arrangements for and the holding of elections;

(c) Risk of serious harm in urban areas.

(a) Views as to risks arising from future elections (the so-called "window of opportunity")

73. We have had regard to all the new materials; in particular, those specifically relied on by the parties. The following paragraphs, although selective, give a sufficient indication of their nature.

74. At vol. 2, tab 23, there is a lightly redacted copy of a report, compiled by Dominique Hardy, on a visit by United Kingdom government officials to Zimbabwe of 15th-18th February 2010. The visit was a joint FCO/UKBA exercise. The team spoke with officials in the British Embassy and the Government of Zimbabwe, as well as with the Zimbabwe Lawyers for Human Rights, the Counselling Services Unit and the Institute of Migration (who put the team in touch with three voluntary returnees from the United Kingdom).

75. The report noted that political tensions were ""apparent" and that "human rights concerns remain. Subject to the conditions on the ground at the time, we are likely to have a small window in later summer, ahead of fresh elections, to seek HMG agreement to resume returns and return a few people". However, "we need to be alert to the real risk of violent elections likely to be in early 2011 and a potential repeat spike in intake." Footnote 10 recorded that the expected "AIT (sic) decision on Zimbabwe Country Guidance [was] expected in July 2010." Ms Hardy wrote that "violence

and human rights abuses are not as bad as they were in 2008, but there is evidence violence is on the increase and the machinery to unleash more remains." There is then this comment, particularly relied on by the appellant: "Without exception, all observers we met predict a violent next election, perhaps even more so than 2008". The hoped for period of enforced returns was suspected by Ms Hardy to be followed "by a further suspension of returns (and a real risk intake will spike once again due to the size of the Diaspora in the UK) if elections are as violent as expected".

76. At vol.1, tab 6 an email opined that "we have a small window of opportunity in which to enforce returns – between the forthcoming Country Guidance case and the inevitable escalation of political violence ahead of the Zimbabwe elections whenever in 2011 they are". At vol. 3, tab 15 an email from the British Embassy Harare sent in June 2010 said "until the political situation in this country is resolved there will never be the ideal window but one of sorts – with the situation now more stable and elections, and the violence they will bring, probably still 12-18 months away – is now in view". That view found its way into a draft response from the FCO Migration Directorate to the Home Secretary (1st July 2010: vol. 3, tab 19), which included a comment that "the situation is now more stable than in 2008 and elections, and the risk of violence they may entail, are probably at least a year or more away. While we cannot be certain, the window of opportunity may extend through 2011." Likewise, a letter from the Foreign Secretary to the Home Secretary of 14th July 2010 describes the situation as "more stable in 2008 and elections, and the risk of violence they may entail, are probably still at least a year or more away". At vol. 3, tab 43 the FCO commented in September 2010 that "the opportunity actually to resume enforced returns that the [CG] case will create, will be of limited duration. As elections approach in Zimbabwe, renewed political violence may well drive a further change in the ground rules".

77. Elsewhere, the new materials underscore the FCO's concerns regarding the effect of a resumption of enforced returns on the position in Zimbabwe. Thus, at vol. 2, tab 5 Margaret Belof of the Zimbabwe Unit noted on 24th July 2009 that "the enforced return of failed asylum seekers would be a difficult handling issue for the MDC" and that it was "crucial that the resumption of enforced returns does not destabilise the political situation in Zimbabwe" (gist). At vol. 2, tab 12 the Foreign Secretary told the Home Secretary in September 2009 that "sporadic incidents of violence and intimidation and evidence that ZANU-PF is not only maintaining but increasing the capacity of its latent terror machine" were testament to the fact that political progress "to date is far from irreversible". In June 2010 (vol. 3, tab 7) the UKBA's head of immigration suggested to the Home Secretary that enforced returns should start "with a very small number of carefully selected cases where their asylum claim is without any merit and the individual is not even protected by the very low threshold set out in the existing RN case law".

78. An email of 2nd March 2010 (vol. 2, tab 21) described a seminar on future elections and conflict prevention held in Nyanga in February 2010, under the auspices of the Centre for Peace Initiatives in Africa (CPIA). Participants included political parties, civil society church group ministers, the army, CIO, tribal chiefs, war veterans and diplomats. Although "debate was polarised" dialogue "was surprisingly open". "It was agreed that from the time that Zimbabwe was colonised, each transfer of power and/or elections had come with violence. CIO and military presence said nothing to suggest that the next elections would be any different. It was agreed that communities had a role to play in building peace and resisting violence". An FCO egram of 8th March 2010 (vol. 2, tab 24) noted the United Kingdom was raising concerns "about the next elections repeating the violence and intimidation of the previous election and it was important that that be avoided". Two days later, an FCO email chain (vol. 2, tab 26) stated that "concerns over a repeat of the violence seen in June 2008 were well-founded but that was not inevitable". In April 2010 an FCO briefing (vol. 2, tab 32) noted that "an election, without the necessary ground work, will result in a great deal of violence and intimidation and another stolen poll".

79. The gist of an FCO email of 25th August 2010 (vol. 3, tab 39) stated that there were "many variables bearing upon/affecting any road map/timeline, including the electoral act, the constitutional process and any referendum". Matters which needed to be addressed in order to avoid a repeat of 2008 were (1) the climate of fear needed to be tackled (there was some evidence that ZANU-PF was deploying similar tactics via its constitutional outreach program albeit at a lower key); (2) vote rigging needed to be addressed and a reliable way of recording, collating and announcing the results needed to be found; and (3) the security sector had prevented President Mugabe from stepping down in 2008, reform of that sector would be necessary. A submission from the Africa Directorate to the Foreign Secretary in October 2010 included the view that "in the absence of sustained engagement by the international community, Zimbabwe would fall back to the violence and chaos". Henry Bellingham, Minister for Africa, the UN, Overseas Territories and Conflict Issues states in November 2010 (vol. 1, tab 21) that "effective election monitoring at an early stage will be critical if there is to be no repeat of the 2008 elections". On 7th February 2011 a briefing for Henry Bellingham stated that it was "widely accepted that a premature election without completion of the constitutional process would be like the last election – violent and stolen".

Discussion

80. Although we have chosen to address the relevance of the new materials by reference to the above-mentioned headings, we would stress that our conclusions have not been reached by treating those headings as "watertight" compartments. Rather, we have taken a holistic view of the new materials; as well as examining them by reference to the very large body of material that was presented in EM.

81. The case for the appellant under this heading is, in essence, that the new material, particularly the report by Dominique Hardy on the February 2010 visit and the draft and final responses from the Foreign Secretary to the Home Secretary of July 2010, meant that the Country Guidance issued in March 2011 should have maintained the wide risk categories identified in RN. To quote from paragraph 7(a) of the appellant's response to the respondent's "reply to appellant's closing submissions":-

> "The limited window reflects the FCO's assessment that the election, whether early or later, will *not* be properly supervised and will bring risk to returnees, whether or not identical to 2008."

82. As is clear from RN and from the evidence before us now and which was before the Tribunal in EM, the extent of the violence and general persecutory activity associated with the elections in Zimbabwe in 2008, was unprecedented in its scope and intensity. But, as an analysis of the previous Country Guidance and relevant background materials makes plain, election violence has been a regular feature of post-independence Zimbabwe.

83. Thus, at [37] of SM and Others (MDC – internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100, it was recorded that:

> "elections were held in June 2000 and there was a systematic campaign of violence towards supporters of potential opposition politicians. Many acts of violence were perpetrated by ZANU-PF militants and war veterans. Politically motivated violence mostly perpetrated by government supporters against the MDC and commercial farmers continued throughout 2001 after the parliamentary elections and in 2002 in the run up to the presidential election of March 2002".

At [44] the Immigration Appeal Tribunal found that there was "a heightened risk during election periods and their immediate aftermath. This reflects the pattern which has been followed since 2000. Before an election there is intimidation of opposition supporters and those perceived to be encouraging support for the opposition, in particular teachers and civil servants". As we have already noted, the report of the March 2010 CPIA seminar recorded agreement that "each transfer of power and/or elections had come with violence".

84. What was exceptional about the election violence in June 2008 is well-described at [212] to [220] of RN. Instead of merely targeting MDC activists, members and supporters, ZANU-PF, through its use of militias deployed in urban areas, and militias, road blocks and no-go areas in certain rural provinces, unleashed a wave of persecution that brought a real risk of serious harm to those who could not demonstrate loyalty to the regime.

85. It is in this important context that the views expressed in the new material regarding the likelihood of violence at further elections needs to be viewed. With one possible exception, there is no indication that the comments in the new material, regarding election violence, ought to be read as considered assessments that any future elections would, in substance, lead to a repetition of what was seen in 2008. This went beyond anything seen before and drew the finding in RN, regarding risk on return, not just to those with a MDC profile, but to anyone who could not demonstrate loyalty to the regime. The possible exception, in Dominique Hardy's report, that "all observers we met predict a violent next election, perhaps even more so than 2008" is (understandably, in its context) imprecise and cannot be regarded as an indication that the observers in question were agreed that the nature of any future violence would take the same form as that deployed in 2008.

86. This is particularly so, given that one of those observers, the Counselling Services Unit, was interviewed by the FFM team in August 2010, and said this:-

> "The Source considers that both ZANU-PF and the military are desperate for political legitimacy. They are also very aware of the intense regional pressures to form a civilian government and are keen to rebuild their reputation in the region and with the West, not least because they feel that the relationship with China is not going to be a comfortable one …
>
> They will therefore seek to rely as far as possible on measures short of large-scale political violence in the election campaign and believe that they can achieve a clear majority without needing to resort to large-scale violence. Instead they will seek to exploit the deep divisions in the MDC, which is close to fracturing into two distinct factions, led by Makoni and Biti, with the former keeping Tsvangirai as a front."

87. Although at [116] of EM the Tribunal explained that it had given only limited weight to the views of the Counselling Services Unit, in the light of the significance now sought to be placed by the appellant on the Dominique Hardy report and the "observers" that she and her team met, we consider that what the Counselling Services Unit saw fit to say only a few months later is worthy of note.

88. The new materials themselves contain indications that the 2008 election violence was exceptional. In a FCO paper of 4 March 2011 (vol. 4, tab 148), it was observed that:

> "The explosion of violence in the run-up to the June 2008 election was probably a one-off. ZANU paid a high price for Mugabe's victory, since SADC observers declared the election did not reflect the will of the people. The preferred model will be the 2005 election, which ZANU won convincingly (recovering the ground they had lost in 2002) and which was not questioned by SADC."

89. Reliance was placed by the appellant on a comment in an Embassy egram of February 2011, at vol. 4, tab 126, that:

> "This is unlikely to be the 'bloodiest election in Zimbabwe's history' (as some commentators say) unless ZANU panics (as well they might)" (our emphasis).

This comment was, however, addressing the "early election scenario" discussed in EM, which the Tribunal in that case considered would not materialise and which we know did not materialise. The comment has no material bearing on the more distant scenario, addressed in that determination.

90. It appears to be part of the appellant's case under this heading that the respondent's view of the likelihood that it would be necessary to suspend removals when an election was called meant that the picture was not "too equivocal or obscure" to amount to a real risk of future ill-treatment (cf [264] of EM). However, the fact that the respondent must, quite properly, keep under review the continued appropriateness of any policy of enforced returns to a particular country, does not automatically have any bearing on the validity of any Country Guidance issued by the Upper Tribunal in respect of that country. This relationship was made plain by the Tribunal at [265] of EM. Having explained why the Tribunal did not consider that the prospect of future elections, viewed from March 2011, demonstrated a real risk of future ill-treatment to the entire category of those covered by RN, the Tribunal said this:-

> "… There is also the following important point. If, after promulgation of this determination, evidence emerges that elections will be held at a particular time, without any of the safeguards and other countervailing features we have described, then the structures underpinning the Country Guidance system ensure that judicial fact-finders will be required to have regard to the new state of affairs, in reaching determinations on Zimbabwe cases. The effect of Practice Direction 12.2 is such that a Country Guidance case is authoritative in a subsequent appeal, only so far as that appeal relates to the Country Guidance issue in question and depends upon the same or similar evidence (our emphasis). By the same token, we would expect the respondent to take account of that situation, both in reaching decisions on asylum claims involving Zimbabwe (including fresh claims under paragraph 353 of the Immigration Rules) and in deciding whether to give directions for a person's removal to Zimbabwe."

91. Mr Henderson submits that the respondent's view of the likely need to suspend returns whenever an election would be called means that the respondent envisaged there would be a generalised real risk to all returnees in any election period, whether or not the violence was as grave as in 2008. We do not accept this submission. It was not the respondent's case that this was how the views expressed in 2010/2011 should be interpreted. Looked at together with all the other evidence, such an interpretation is simply not possible. The fact that the respondent must keep any policy she has regarding enforced returns under review (whether

or not formed in the light of existing Country Guidance from the Tribunal) does not mean that the country in question is presently unsafe, or even that every utterance of the respondent regarding the possible future operation of her policy must be of decisive or even material relevance to her current view of risk; still less to the view of the Tribunal. We further conclude for reasons we will set out shortly that it is not a correct approach to view an earlier determination giving Country Guidance as laying down fact-specific conditions that are automatically binding on a Tribunal giving subsequent Country Guidance.

92. Mr Henderson also sought to rely on a comment from the Head of the Zimbabwe Unit, in the context of considering in 2010 the resumption of forced returns, that Zanu PF "might oppose the return of large numbers of probably MDC supporters". There is nothing to suggest the respondent had a considered view that Zanu-PF would oppose such returns or ill-treat such returnees. In any event, the comment does not advance the appellant's case for amending the Country Guidance as given in EM. That case did not give Country Guidance as to risk at the point of return (Harare Airport) and thus recognised and applied the previous Country Guidance on that issue (HS (Returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094), that those known to the security services to be MDC activists and targeted as such might still be at risk of ill-treatment by the Central Intelligence Organisation (CIO) at that airport. The Country Guidance in EM concerned the position after a returnee had left the airport.

93. In conclusion on this heading, we do not consider that the disclosure material relied on by the appellant undermines our assessment or makes it appropriate to revise the Country Guidance given in EM or to qualify the finding at [264] of that determination.

(b) The potential influence of the Zimbabwe Electoral Commission (ZEC), the Southern African Development Commission (SADC) and South Africa on the arrangements for and holding of elections

94. We have examined the new materials for what light they might shed on these issues. (What we say at paragraph 80 above applies here also.) The appellant contends that in EM the Tribunal placed weight on the role of the ZEC. At [47] of the appellant's closing submissions on disclosure, it is asserted that the Tribunal in EM "was prepared on the evidence placed before it to place weight on the role of ZEC in light of the new Chair". The new material, however, (vol. 1, tab 1) indicates that it was thought essential for the Chair of the ZEC to be "full time and located in Zimbabwe". There was FCO concern that this Chair (a respected legal academic resident in Angola) might not be able to entirely commit himself to the work of the commission and whose presence may be little more than symbolic given commitments out of the country.

95. In EM the Tribunal considered that "more important" than the ZEC:

> "will be the attitude of the SADC and, in particular, the government of South Africa. Again, the earlier evidence in this regard to which we have been referred paints a somewhat uncertain picture. However, the later evidence indicates a greater degree of commitment to ensuring that any future elections in Zimbabwe are not characterised by the sort of violence seen in 2008" [236].

96. At vol. 3, tab 62 a gisted Embassy egram of October 2010 recorded that "President Zuma had become distracted by domestic political developments and wider regional trouble. Sources were reporting reduced engagement with the Zimbabwe portfolio" (as at October 2010). A further egram of 9th December 2010 opined that

> "if there were elections, it would still be the military forces that had the upper hand … SADC and South Africa had reacted weakly which reflected the strong position of President Mugabe" (vol. 4, tab 88). At vol. 4, tab 140 an interlocutor was noted as making the "interesting observation that although SADC wants change in the leadership of ZANU-PF, they do not want any other party other than ZANU-PF to run the country. Their ideal choreography would be a ZANU-PF victory, followed by an orderly succession".

Discussion

97. We do not consider that the new materials bearing on the ZEC has any effect on the Country Guidance findings in EM. At [236] the Tribunal found that

> "whilst we do not overestimate the power of the Zimbabwe Electoral Commission, we note the evidence that its Chair is an internationally respected jurist, who has already indicated a reluctance to be rushed into elections, before proper preparations have been made; in particular, reform of the electoral roll."

This finding was made in the context of the Tribunal's analysis of when elections in Zimbabwe would be called; in particular, whether they would occur in 2011 (see [235] and [236]). The only other finding in EM relating to the ZEC is at [263], where it was concluded that

> "the scenario of elections being held in mid-2011, or slightly later, in defiance of international (especially regional) opinion and the Electoral Commission, and in circumstances where, despite his indications to the contrary, Morgan Tsvangirai decides to expose the MDC to danger by contesting the elections, is an unlikely one, on the balance of probabilities, albeit that there is a chance it might happen".

Those findings proved correct: as at the beginning of 2013, the elections have not been held.

98. None of these new materials detracts from the overall thrust of the evidence as a whole, including that before the Tribunal in EM, that both

SADC and South Africa were anxious to ensure, not only that there would be no repeat of the 2008 election violence in Zimbabwe, but also that future elections would be regarded internationally as legitimate. As is pointed out at [32] of the respondent's reply, the British Ambassador in an egram of 1st December 2010 (that was before us in 2011) commented that, despite his many other distractions, President Zuma remained both engaged on Zimbabwe and concerned "that elections proceed without violence". The fact that, like any other major leader, President Zuma has many pressing demands on his attention seems to us axiomatic and does not mean that he is thereby incapable of dealing with them. As for the interlocutor's observation regarding SADC's preference for ZANU-PF to run the country, such a desire does not, in our view, run counter to the aims of SADC, as just described. The same report (at 22nd February 2011) went on to state that "Zuma wants credible elections and should exert pressure on ZANU-PF".

99. Overall, the new materials regarding the SADC and South Africa fit the pattern of the material disclosed to the Tribunal in EM. It does not suggest that the United Kingdom government or other similar observers regard the efforts being made by SADC and South Africa as having no realistic prospect of avoiding a repeat of 2008. On the contrary, the degree of interest and encouragement points in the opposite direction.

(c) Risk of serious harm in urban areas

100. At [198] to [218] of EM, the Tribunal examined the political and socio-economic positions in Harare and Bulawayo, the main urban centres in Zimbabwe. So far as Harare was concerned, the Tribunal's analysis was as follows:-

> "199. The Tribunal in RN noted a difference between the position in, respectively, high and low-density areas of Harare. A person living in a low-density area would, in summary, not be reasonably likely to face a "loyalty" challenge from militia or war veterans. In relation to the period under consideration in RN, however, it was found that the situation would be otherwise in high-density areas.
>
> 200. The evidence before us demonstrates that there are difficulties faced by those living in high density areas not faced by those living in other urban areas: there is a greater prevalence of criminal disorder and reduced personal security; where it is available at all accommodation will be very crowded and a lower standard; street traders working in the informal economy may be the subject of harassment from state officials; persons perceived to be active in MDC politics may face the risk of targeted reprisals. The Zimbabwe Lawyers for Human Rights described high-density areas as experiencing "occasional arrests and beatings". The evidence taken as a whole does not present a picture of such intensity or regularity as to suggest that any resident of a high density area having no active involvement in MDC politics would be at risk of harm. The picture of ZANU-PF activity in these areas is significantly different from rural areas: the system of control through

ZANU-PF chiefs and village headmen and the ability to monitor the identity of new arrivals in rural communities have no proper counterparts in Harare. We are accordingly unable to accept the evidence of those witnesses who suggested that the risk level was the same in the rural and high density urban areas.

201. It is common ground that the MDC tend to dominate high-density areas. In his response to the FFM team, W80 of the Zimbabwe Human Rights NGO Forum said that it would be difficult for ZANU-PF to harm MDC supporters in MDC dominated areas "because the MDC tend to be quite well-organised in those areas and can protect those who might otherwise be at risk of political violence by the threat of retribution". In his statement on behalf of the appellants, W80 sought to qualify those remarks. He said that what he was referring to were isolated pockets of resistance that had appeared on occasions and he did not mean that there were areas of the country that the MDC controlled or that the MDC could generally protect its supporters. The infrastructure of violence was still intact and ZANU-PF remained in total control of the coercive arms of the state.

202. We accept W80's point that, since ZANU-PF does indeed remain in de facto control of the army, police and similar services, it is wrong to speak of any particular area of Zimbabwe as being "controlled" by the MDC. Nevertheless, it is apparent that in his response to the FFM team, W80 was describing the present position, where in practice it is indeed "difficult for ZANU-PF supporters to harm MDC supporters in MDC-dominated areas". The position might, of course, be different if, immediately prior to an election, Mugabe and ZANU-PF were to launch a significant campaign of violence in Harare, such as in 2008. That is not, however, the position at present.

203. We say this, having particular regard to the latest evidence, from January 2011, concerning various disturbances in Harare, which are said to have been instigated by ZANU-PF elements. The alleged establishment in high-density areas of campaign bases in the homes of ZANU-PF leaders falls significantly short of the kind of militia bases described in the evidence in relation to certain rural areas. There continues to be an absence of reliable evidence that militia bases have been established in Harare. The setting up of campaign bases in peoples' homes is, if anything, an indication of the relative weakness of ZANU-PF in the capital. The report of 26 January 2011 that carried the story of these bases referred to ZANU-PF and MDC youths being engaged in clashes, which, again, differs from the descriptions of what is going on in rural areas, where the picture is often one of villagers being coerced into silent submission by a ZANU-PF gang. Overall, we find that this and the other most recent evidence underscores the position that emerges from the earlier evidence, which is that the focus of such current ZANU-PF activity as there is in the high-density areas of Harare is on MDC activists, as opposed to the general population.

204. We accordingly conclude that, at the present time, although a person having no significant MDC profile, returning to a high-density area of Harare, is likely to face more difficulties than someone returning to a low-density area, he or she would not at present face a real risk of

having to prove loyalty to ZANU-PF in order to avoid serious ill-treatment. So far as living conditions in high-density areas are concerned, the only witness to assert that the housing in such areas was unfit for human habitation was the person we have described as W79 of the Zimbabwe Human Rights Association. We do not conclude from this that anyone having to live in such a high density area would be exposed to inhuman or degrading treatment contrary to Article 3. Mr Henderson did not attempt to submit to us that this was the case. Whether any individual having to live rough in shanty accommodation or other grossly overcrowded and insecure arrangements would be exposed to treatment of this level of severity would depend on an individual assessment of circumstances including age, gender, health, earning capacity, social assistance arrangements, the presence of young children and the like.

205. We have spoken so far of high and low-density areas in Harare. Professor Ranger, however, told us that there were three kinds of zone in Harare. The low-density areas comprised the white community, the coloured community and Africans "who were not so poor. The low-density areas had more Africans than in the past." Then there were areas of intermediate-density. Here, although there were problems with dereliction, there were not problems with gangs. These he categorised as "medium-density areas". Finally, there were the high-density areas, which, although they had problems, nevertheless "had some services". The Tribunal also notes that appellant JG described her home area of Queensdale as "kind of medium-density". She said that it was not far from Epworth "where many rowdy gangs" existed; and Queensdale might therefore be "a vulnerable location". Many cities in the world, including ones in the United Kingdom, have areas of affluence adjacent or close to areas of relative deprivation. This fact would generally not give rise to a claim for international protection or furnish evidential support for a contention that it would be unduly harsh to expect a person to relocate to accommodation there. Particularly given what we have had to say about the present position of the high-density areas in Harare, we do not consider that the distribution of high, medium and low-density areas has significance, as regards the matters with which we are concerned."

101. At [239] the Tribunal considered the appellant's submissions of 28th January 2011 regarding a report that 80,000 youth militia etc would be mobilised across the country to cow the population in the run-up to elections "and that this process may already be beginning". At [240] the Tribunal gave some weight to these "alleged plans" but considered that the article in which they were described might itself be part of a plan to pre-empt such a mobilisation by exciting international interest, "in particular, SADC and President Zuma". It was also, the Tribunal considered, at present speculative as to whether hard line elements in ZANU-PF and the military had the upper hand in what appeared to be a power struggle within that party and whether they would in the event be prepared to resist international pressure "particularly given the reported concern of at least some of them of being brought before the international criminal court".

102. At [241] to [243] the Tribunal considered the position in Harare, in the event of elections being held early in defiance of international opinion. So far as Harare was concerned, the Tribunal found that:-

> "… whilst it may be reasonably likely that ZANU-PF militias etc would be bussed in to that city in order to cause problems during an election campaign, the present evidence is such that it would be merely speculative to conclude this would have a material impact upon those living in low-density areas. In addition, even in this scenario, we do not consider the present evidence suggests that ZANU-PF would be able to engage in the kind of systematic intimidation, which it would deploy in rural areas of the eastern provinces. In this regard, we note the absence of reliable evidence regarding militia bases. The report of 26 January 2011, regarding the alleged use of ZANU-PF leaders' homes in Harare as campaign bases, is said to be confined to high-density areas and, in any case, appears to be of a different and lesser order to the sort of camps and bases established in rural areas in 2008. Whilst we accept the evidence of the appellants, that even in high-density areas in which it dominates, the MDC would be unable to resist a military or quasi-military assault, it is questionable whether ZANU-PF would, in 2011, choose to launch such an assault, given the high-profile nature of Harare and the international condemnation which would ensue. The evidence of January 2011 regarding disturbances in Harare instigated by ZANU-PF elements does not begin to amount to such a state of affairs, notwithstanding the report of Tsvangirai's having raised the disturbances with President Zuma. Those involved in the disturbances were MDC members and supporters (voanews.com article of 24 January) and the evidence of non-political residents suffering in this regard is sparse."

103. At [267(5)] the Tribunal gave its Country Guidance in respect of Harare, viewed as at March 2011, as follows:-

> "(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."

104. The new materials contain further references to the unrest in Harare in late January 2011, described in the EM determination. (What we said at paragraph 80 above again applies.) At vol. 4, tab 102 an email to the British Ambassador of Harare described "violence in Harare high-density suburbs over the weekend" and that "ZANU youths were brought in to cause trouble". The email considered that the unrest "suggests that ZANU are still looking at a vote in 2011". At vol. 4, tab 103 an egram from HM Embassy Harare of 24th January 2011 referred to:

> "a worrying increase in tension" and that ZANU-PF youths were bussed in "to intimidate and assault MDC supporters in three of Harare's high density

> outlying areas. ZANU youths attacked two MDC-T officials in Budiriro, along with their families, and destroyed and looted their homes. One party official is in hospital with a gunshot wound, a ward chairman is believed to have been abducted and another supporter is in hiding after being assaulted. The militia also attacked people at a bar on Saturday night and smashed TV sets and windows before closing the place down. In Mbare, a Harare suburb, a large group of ZANU youths attacked the MDC office on Saturday, assaulting 24 MDC youths who were guarding the office." In Chitungwiza, "ZANU youth assaulted an MDC official and his family and destroyed his home. Another MDC activist sustained serious head injuries after being assaulted with bottles".

The email concluded that it was "unclear, however, to what extent the violence was planned centrally or reflects lawlessness at local level."

105. An MDC MP was described as regarding "the violence this weekend [as] the worst she had seen since 2008". A House of Lords briefing paper of 25th January 2011 said that:

> "Mugabe, supported by some of the military, has officially called for elections in June 2011. However, the MDC and a significant part of ZANU-MDC were opposed to elections before further economic consolidation and, on MDC's part, before important electoral, media and security reforms are carried out and a credible long-term monitoring mission established. Constitutionally elections do not have to be held until 2013. A recent increase in ZANU intimidatory tactics (thuggery in Harare, setting up of militia camps) suggests that securocrats are positioning themselves for an early election, but there is no certainty yet."

106. At vol. 1, tab 37, an email of 28th January referred to "Budiriro ZPF youths … using a house belonging to Gladys Hokoyo, losing candidate in the last election, as a mobilising centre to carry out violence in the suburb". This and other activities were considered to be "all-in bid to provoke MDC to retaliate and of course it is the MDC youths who always end up in police cells". The email was in response to an FCO email posing the question "is this true – the setting up of campaign bases in Harare?".

107. At vol. 4, tab 113, an FCO email of 31st January 2011 referred to the incidents as "violence against MDC supporters". The British Ambassador in an egram of 4th February 2011 (vol. 4, tab 117) referred to "intensified harassment of MDC members" in late January 2011. Questioning whether the violence was a pre-election attempt to "soften up the opposition", the Ambassador considered that "in practice Mugabe would face extreme difficulty – both because of opposition within his own party and from the region – in engineering a precipitate election". The violence was "being targeted at MDC support structures in high-density areas, and rural constituencies crucial to ZANU-PF fortunes". An Embassy egram of 8th February 2011 (vol. 4, tab 121), apparently based on a conversation with an interlocutor, described MDC-T as condemning "rising instances of state-orchestrated violence against its structures and supporters". The recent violence was considered to be "an attempt by a small clique at the top"

but that "MDC-T was playing its part by restraining its youths from fighting back. Retaliation was exactly what those instigating the violence wanted". Vol. 1, tab 45, an email from the British Ambassador of 8th February, referred to political violence as being targeted "at rural areas crucial to the ZPF and at MDC support structures in the high density suburbs". Although the point of this might be to instigate "precipitate elections", the Ambassador considered that Mugabe "will want to steer a careful course – ramping things up, but not to the extent that they too obviously put themselves on the wrong side of regional opinion". Although there were risks of starting something that could not be stopped, Zimbabwe was "going to be back on radar screens with a vengeance at some point in the next twelve months".

108. At vol. 4, tab 148, a gisted FCO paper of March 2011, in an apparent reference to this violence, said that

> "Although in general ZANU had lost the major urban areas, there were signs it was mounting a counter attack in Harare. It was possible it wanted to tighten its grip on the city in advance of any demonstrations provoked by a stolen election".

There followed some discussion of militia bases; it seems in the context of Zimbabwe as a whole. The paper contains no reference to any then existing militia bases in Harare.

Discussion

109. We have carefully considered the new materials but do not conclude that they come near to undermining the EM Country Guidance or requiring it to be amended. On the contrary, we consider that the new materials underscore the appropriateness of that guidance.

110. It is clear that the violence in late January/February 2011 in Harare was directed against MDC elements. That is a constant theme of the emails and egrams. The evidence that the violence might have had any wider ambit is sparse and equivocal: e.g. the description of an attack on a bar. Overall, the Harare violence, as described in the totality of the evidence now available, is very far indeed from disclosing a state of affairs such as was described in RN, where the general population in high density urban areas risked being subjected to loyalty challenges, backed up by an immediate threat of serious ill-treatment.

111. The new materials do not suggest that the Tribunal in EM was wrong to conclude, that there was no evidence to indicate militia bases had been or were being established in Harare urban areas, so as to inflict on the population the kind of problems that arose during the 2008 elections. On the contrary, the evidence at vol. 1, tab 37 regarding use of a private house and an office reinforces what the Tribunal had to say in EM.

112. The House of Lords briefing at vol. 4, tab 105 contrasts "thuggery in Harare" with the "setting up of militia camps" and does not refer to the setting up of such camps in the capital. The comment at vol. 4, tab 103 from the MDC MP about the late January weekend violence being "the worst she had seen since 2008" cannot properly be read as a view that the violence was as bad as in 2008; in any event, such a view is not borne out by the new materials.

113. The new materials underscore the view that ZANU-PF was factionalised; that the violence in Harare in early 2011 was probably orchestrated by the small clique of hardliners referred to in the emails and egrams; and that, as the Tribunal in EM concluded, the pressures (including international) against holding early elections proved the more powerful. As part of Issue 4 below, we examine what light the fresh evidence covering the period up to 2012 might shed on the Harare disturbances (paragraphs 210-213 below).

Issue 2: Was the Tribunal in EM entitled to find a "well-established evidentially and durable change" had arisen since the time under consideration in RN?

Introduction

114. We have already noted that permission to appeal to the Court of Appeal was granted on this ground (ground 4) but the appeal was remitted to the Upper Tribunal without any view being expressed by that Court.

115. In RS and Others (Zimbabwe) (AIDS) CG [2010] UKUT 363 (IAC) the Upper Tribunal was concerned with the giving of Country Guidance in respect of the position of those in Zimbabwe suffering from HIV/AIDS. At the hearing the respondent (Secretary of State) argued that the panel in RS should revisit the general Country Guidance set out in RN.

116. In the course of rejecting that proposal, the Tribunal in RS said this:

> "199. We do not propose to dwell on this issue. The status of RN as the relevant Country Guidance is not a substantive issue before us, and we understand that it is likely that later this year RN will be revisited. In any event such evidence as we have before us to the extent that we have considered it appropriate to give consideration to it, indicates sufficiently clearly to our view, that bearing in mind that it is limited evidence only, that there is no reason to depart from RN as the Country Guidance that should lie behind our decision insofar as it is relevant to do so. Matters such as the State Department Report of 11 March 2010, and the report of Professor Ranger, indicate to us sufficiently clearly, that bearing in mind the terms of Practice Statement 12, we have not been provided with the kind of clear and cogent reasons which seem to us to be required in cases involving issues relating to aspects of country conditions as a whole for

departing from RN as Country Guidance. It remains therefore very much of significance in this case as background (and in some cases as foreground) to the issues that we must consider."

117. The effect of previous Country Guidance cases upon subsequent such cases was addressed in detail by the Tribunal in EM:-

"69. For the appellants in the present case, Mr Henderson, relying upon paragraph 199 of RS, submitted that, not only should extant Country Guidance provide the starting point, but also that it could be departed from only if there were "clear and cogent reasons" for doing so. In support of that submission, Mr Henderson relied upon what the Tribunal (Carnwath LJ, Deputy President Ockelton and Senior Immigration Judge Storey) had said in paragraph 13(ii) of TK (Tamils – LP updated) Sri Lanka CG [2009] UKAIT 00049:-

'(ii) …all parties should understand that when a case is set down to review existing Country Guidance, the latter is to be taken as a starting-point. The Tribunal has not ruled out that in some cases there could be a challenge to the historic validity of Tribunal Country Guidance (although such would require the production of evidence pointing both towards and against the accuracy of that guidance at the relevant time: see AM & AM (Armed conflict; risk categories) CG Somalia [2008] UKAIT 00091); but that will be rare. Ordinarily (as here), the process is incremental: the parties do not seek to dispute that the Tribunal's Country Guidance was valid at the time, but only to argue that it now needs alteration in the light of fresh evidence (see AIT Practice Direction 18.2). That being the case, there is no place for the wholesale reiteration of background country evidence that was before the previous Tribunal. Expert reports should not trawl over old ground…'

… (paragraph 70 recites the Practice direction noted at paragraph **[57]** above).

71. The proposition that a Country Guidance case should provide the "starting point" for a subsequent case that relates to the Country Guidance issue is inherent in the Practice Direction (and its AIT predecessor). Whether the subsequent case is being "set down to review existing Country Guidance" or not, the effect of Practice Direction 12 and section 107(3) of the Nationality, Immigration and Asylum Act 2002 is to require the existing Country Guidance case to be authoritative, to the extent that the requirements in Practice Direction 12.2(a) and (b) are met. This is fully in accord with what the House of Lords (per Lord Brown) held in R (Hoxha) v Special Adjudicator [2005] UKHL 19. If the existing Country Guidance is such as to favour appellants (to a greater or lesser extent), it will in practice be for the respondent to adduce before a subsequent Tribunal "sufficient material to satisfy them" that the position has changed" (Paragraph 66).

72. We do not find that the Upper Tribunal's conclusion in RS at paragraph 199 is of assistance to our task in the present case. There the Upper Tribunal was expressing a view about the need for cogent evidence to depart from an extant Country Guidance case in a case that was not

itself intended to be a Country Guidance case on the issue before us. The present cases have long been designated Country Guidance on the issue of a change in circumstances since RN, and we are re-examining all material data to inform ourselves what the present evidential position is. We recognise that the Country Guidance system has limitations if extant decisions become out of date and not based on relevant assessments as close as reasonably practicable to the date of the decision. The solution is two fold. First, in individual appeals where there is fresh material not available at the time of the Country Guidance the Immigration Judge will be entitled to depart from the Country Guidance in the particular case on the basis that the guidance was either not directed to the particular issue in the subsequent appeals, or the factual assessment in the guidance case has now to be updated in the light of relevant cogent fresh information. Second, it is for the Tribunal to identify appeals as suitable for fresh Country Guidance where a fundamental review of all relevant material should be undertaken to see whether the situation has changed. The observations in TK were directed to the first class, rather than setting a test for departure from Country Guidance in all circumstances. We nevertheless recognise that where a previous assessment has resulted in the conclusion that the population generally or certain sections of it may be at risk, any assessment that the material circumstances have changed would need to demonstrate that such changes are well established evidentially and durable. That is the test that we will apply in our consideration of the material but not as a preliminary reason to decide whether we should revisit RN at all.

73. Mr Henderson's related submission regarding RS was that, with the exception of the FFM report, the evidence submitted by the respondent to the panel in RS was in substance no different from that submitted to us; and that, on any reasonable view, developments in Zimbabwe since March 2010 had been a deterioration rather than an improvement. In considering this submission, it is important to bear in mind that, as the RS Tribunal said in paragraph 199, the status of RN as the relevant Country Guidance was not "a substantive issue before us". The focus in RS was the availability in Zimbabwe of medication for the treatment for HIV/AIDS and whether such availability was influenced by political factors. A Country Guidance case provides guidance on the issue that the case is considering rather than generally. Some of the expert material relied on before us was included in the material before the Tribunal in RS where comments of a more general nature were made by the witnesses but that is no reason for us not to evaluate all the material now available to decide the issue at stake in the present case. In short we reject the contention that we should not embark on the enquiry that follows."

118. What the Tribunal said at [72] of EM is not to be construed as imposing some sort of legal "gloss" on Practice Direction 12, so as to place greater restrictions on a Tribunal making a "later 'CG' determination" than, say, a First-tier Tribunal Judge hearing "any subsequent appeal". It is clear that the Tribunal was not seeking to set a test to be satisfied before Country Guidance could be varied, but merely a means of approaching and evaluating the nature of the changes in the evidence. Where a regime has

engaged in persecutory conduct of a particular type even for a limited period, the judge undertaking a subsequent analysis will need to be satisfied that the cessation of the conduct was durable before concluding that either Country Guidance should not be followed or (if engaged in a Country Guidance exercise) that the Guidance itself needed to be amended. There is no rule of law here but simply an application of the precautionary principle relating to the assessment of reasonable likelihood of harm, where the previous assessment of risk was itself based on an unusually virulent and widespread outburst of persecutory activity dating from June 2008, the nature and duration of which needed to be assessed with care.

The rival submissions

119. In essence, Mr Henderson's present approach is the same that he adopted in EM. This is that the Country Guidance in RN – which held that risk on return was "no longer restricted to those who were perceived to be members of the MDC but includes anyone who is unable to demonstrate support for or loyalty to the regime or ZANU-PF" – ought to have remained Country Guidance in early 2011 because: (a) the RN guidance took into account the decrease in violence in the autumn of 2008, compared with the election period that year; and (b) ZANU-PF remained in control of the State and non-State instruments of power, both of which had been used to terrorise the population during the elections.

120. The fact that these submissions involved both parties engaging in a highly detailed exegetic analysis of the determination in RN underscores the general observations we have just made; nevertheless, we shall address those submissions. For ease of reference, in Part 1 of Appendix A to this determination, we set out paragraphs from RN, drawn from (but not confined to) references made in those respective submissions.

(a) Decrease in violence since elections

121. We accept that the Tribunal in RN arrived at its Country Guidance regarding the risk of a "loyalty test" in the light of the diminished levels of violence in Zimbabwe in the autumn of 2008, following the presidential elections in June. This does not, however, mean, as the appellant in effect contends, that those lower, autumn figures form some sort of binding benchmark, restricting the ability of the EM Tribunal to find that there was not, in 2011, any current nationwide real risk of facing such a loyalty test.

122. As is apparent from various passages in RN, the Tribunal considered that, even after the elections, the problems from ill-disciplined militias, that had been unleashed in both urban and rural areas during the election period, and the problem of roadblocks and no-go areas in rural

parts, established during that period, continued to be present risks. Thus, at [122] the Tribunal stated that

> "it is no longer the professional security staff at Harare Airport who are the main concern for returnees, it is the ill-disciplined, irrational and unpredictably violent militias to be confronted upon return to the home area" (our emphasis).

At [123] it was found that it was "not hard to see how anyone returning from the United Kingdom would be associated with the hysterical propaganda that continues to be peddled to these various groups or militias who appear to be acting with impunity"(our emphasis).

123. At [198] the Tribunal considered that the power sharing agreement had not yet resulted in any significant change and that the regime appeared to be intent on recovering control of Parliament and retaining the presidency "by keeping in place and by continuing to exercise militias and party machinery that were deployed following the March elections". We shall deal in due course with the issue relating to control of state and party machinery. So far as militia activities were concerned, however, the Tribunal in EM at [141] to [158] set out cogent reasons why, as of early 2011, the population of Zimbabwe was not, as a general matter, facing a real risk of loyalty challenges from militias and/or at roadblocks.

124. At [218] of RN the Tribunal found that the violence set in motion in 2008 was not limited to delivering victory to Mugabe in the runoff vote but also to ensuring:

> "that the MDC support base was sufficiently dismantled as to ensure that it ceased to exist in a meaningful way as to remain a threat to ZANU-PF's hold on power. That explains why, notwithstanding the talks taking place following the memorandum of understanding and the fact that the elections are, for now at least, concluded, the violence continues".

125. The appellant relies on the sentence which follows:

> "Although this violence is not at the level seen during the summer of this year, everything remains in place for it to be repeated, should the regime deem this necessary".

126. The RN Tribunal continued as follows:-

> "219. We are satisfied that the militias have established no go areas and road blocks to ensure that abuses that continue in rural areas where the MDC had made inroads into the Zanu-PF vote go unreported wherever possible and so that displaced people are not allowed to return to their home areas.
>
> 220. For these reasons we do not see that there can be said to be an end in sight to the real risk of violence being perpetrated on those identified

as disloyal to the regime and therefore as potential supporters of the MDC.

221. As we have seen, by the time the hearing was reconvened on 30th October such a power sharing agreement had been reached but, for the reasons given above, that has not led us to a different conclusion from that we reached at the conclusion of the first part of the hearing when we initially reserved our decision.

222. Even though a form of agreement has now been reached in these talks, it remains to be seen whether that will bring about any reduction in the level of risk to those not able to demonstrate loyalty to Zanu-PF. After all, the Memorandum of Understanding that was signed by Mr Mugabe on behalf of his party and the regime contained assurances about the cessation of politically related violence but that has not been delivered. It is not readily apparent how the militias and War Veterans who have been meting out violence would be disbanded without genuine commitment by Mr Mugabe and his senior supporters to the sharing of power. It is evident from the failure to implement the power sharing agreement that no such intention presently exists.

223. For these reasons we are not satisfied that the power sharing agreement has given rise in itself to any significant change on the ground in Zimbabwe, so far as international protection issues are concerned. There is, moreover, no evidence to show that, in the absence of more effective foreign political or other political pressure, the position is likely to change spontaneously."

127. Taking these passages as a whole, the clear picture that emerges is that it was too early to conclude in the autumn of 2008 that the risks that had arisen in June 2008 had disappeared, particularly where there were instances of the survival of the same kind of harm being perpetrated by or otherwise involving the very instruments of harm (viz. militias; war veterans; road blocks) that had delivered the violence that summer.

128. At [227] the Tribunal in RN considered the nature of the loyalty test. Production of a ZANU-PF card was likely to suffice where an individual was confronted with such a demand, for example at a roadblock. At [228] it was found that people living "in high density urban areas will face the same risk from marauding gangs of militias or war veterans as do those living in the rural areas, save that the latter are possibly at greater risk if their area has been designated as a no-go area by the militias".

129. Accordingly, we consider that the Tribunal in RN made its assessment of a real risk of facing a loyalty test or challenge on the basis that, notwithstanding the falling off of violence since the summer of 2008, roadblocks, marauding gangs and militias were still, in effect, "on the ground" in Zimbabwe. So far as urban areas are concerned, that assessment is graphically borne out at [190] and [192], where the Tribunal cited evidence from late September 2008 that "ZANU-PF torture bases are still operational in Mbare (a high density suburb of Harare)" (our emphasis).

130. As can be seen, one of the factors underpinning the Country Guidance in RN was the perception that, in late 2008, in the immediate aftermath of the power-sharing agreement, Mugabe and ZANU-PF were intent on using the oppressive agents brought to bear during the election campaign, in order to eradicate the power of the MDC. By early 2011, by contrast, it was manifest that any such aim had long since failed: see [149] of EM. There was also highly compelling evidence, including from the appellants, that roadblocks were no longer a real risk: [152] and [153]. So far as Harare was concerned, the Tribunal in EM likewise had cogent evidence before it to indicate that, even during problematic periods such as the COPAC (Constitution Parliamentary Committee) campaign and the unrest in early 2011, the position in high density areas remained materially different from the period under consideration in RN. This can be seen by reading [159] to [173], [176], [201] to [205] and [243] of the EM determination (set out, for ease of reference, in Part 2 of Appendix A to this determination). So far as the unrest in early 2011 is concerned, see also paragraphs 102 to 106 above.

(b) ZANU-PF control of relevant instruments of power

131. As we have already seen, Mr Henderson placed considerable reliance upon this sentence in [218] of RN: quoted at paragraph 125 above. In short, the appellant's submissions are that since ZANU-PF still effectively controls the CIO, army, police, so-called war veterans and various youth groups, the Tribunal in EM was not entitled to find there had been a "durable change" since the period considered in RN.

132. We do not agree. There is a danger of an inappropriate and mechanistic imposition of a date beyond which the evidence must have significantly changed. It is an illustration of the dangers of treating every utterance by a Tribunal in a Country Guidance determination as constituting some kind of *ratio decidendi* that is binding on another Tribunal giving later Country Guidance in respect of the same country. In fact, [218] of RN is not even part of the Country Guidance issued by that Tribunal; the Country Guidance conclusions are at [258] to [264].

133. The future assessment of risk in the guidance given in RN was as follows:-

> "263. Although a power sharing agreement has been signed between Mr Mugabe on behalf of Zanu-PF and Mr Tsvangirai on behalf of the MDC, it is too early to say that will remove the real risk of serious harm we have identified for anyone now returned to Zimbabwe who is not able to demonstrate allegiance to or association with the Zimbabwean regime.
>
> 264. Further international intervention or some unforeseen upheaval inside Zimbabwe itself may change the position, for example, by giving the MDC real control of the police. In such an eventuality it will be for

judicial fact finders to determine the extent to which the evidence before them differs from that which is before us, pending fresh Country Guidance: see Practice Direction 18.2."

134. Two matters are noteworthy. First, at [263] the RN Tribunal adopted, in effect, the approach described at [72] of EM; namely, to ask whether the then recent making of the power-sharing agreement between Messrs Mugabe and Tsvangirai constituted a well-established and durable change, such as to remove the real risk of serious harm. In the autumn of 2008, only a matter of weeks after the unprecedented and internationally-condemned violence of the elections period, it was plainly appropriate to adopt the "precautionary" approach set out at [263]. In assessing the durability of a state of affairs, it is obviously relevant to take account of how long that state of affairs has, so far, endured. It would clearly not have been right for the Tribunal in RN to have decided that the state of affairs in Zimbabwe had materially changed, on the basis of a recent and unprecedented arrangement between hostile parties, that was yet to be implemented and when many informed observers were sceptical as to its ability to deliver any tangible results.

135. A similar precautionary approach by the Tribunal can be seen in the Country Guidance given in AMM and Others (Conflicts; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC), where the Tribunal decided in the autumn of 2011, that it was, in effect, too soon to say that the withdrawal of conventional Al-Shabab fighting forces from Mogadishu in early August 2011 meant there was no longer in that city any real risk to civilians, of the kind described in Article 15(c) of the Qualification Directive.

136. By contrast, the Tribunal in EM was assessing the position over two years after the end of the period considered in RN. The position on the ground in Zimbabwe had, for some significant time, been different. The power-sharing agreement had given rise to the transitional government, with several ministries being occupied by MDC members. The feared eradication of the MDC as a political force had not happened. International (especially regional) pressure was being brought to bear on Mugabe and Zanu-PF. As [157] of EM noted, the British Ambassador could say in September 2010: "Had we in the chaos and violence of 2008 been offered a glimpse of the Zimbabwe of today, there is little doubt we would have seized it. Tsvangirai, harshly criticised for going into the coalition, has been proved right."

137. Accordingly, even though the instruments of relevant State and non-State control remained in Zanu-PF's hands (a point reiterated in the new materials: eg vol. 4, tab 148), the Tribunal in EM was properly able to conclude that the previous finding regarding a nationwide risk of a loyalty test for those who were opposed or indifferent to Zanu-PF required to be amended. The amendments were, essentially, in respect of the risk in certain urban areas, and in Matabeleland. In the rural Eastern provinces, Zanu-PF's control (as a general matter) meant that the real risk of serious

adverse attention (and, thus, harm) remained in the case of a person without Zanu-PF connections, albeit that the immediate means for delivering such harm (in particular, roadblocks) might not be the same, compared with the time of RN.

138. The second matter concerns the guidance at [264] of RN. Here, the Tribunal gave an indication of what, from its vantage point in 2008, it considered might cause the generalised real risk of a loyalty test or challenge to change. In no sense can [264] be regarded as an attempt by the RN Tribunal to circumscribe the ambit of any future Country Guidance analysis on Zimbabwe. The appellant appears to point to the fact that there has been no assumption of control over the police by the MDC as necessarily demonstrating that there has not been a "durable change" since RN. We do not accept that submission. If the comment regarding the police has the force for which Mr Henderson contends, then the logic of his position would be that, if the MDC were to gain control of the police, a subsequent Country Guidance Tribunal would be required to find there had been a durable change in generalised risk, even though other factors might have dictated otherwise. In any event, read as a whole, [264] makes it plain that the Tribunal was there distinguishing between the approach to be taken by, on the one hand, judicial fact-finders operating under Practice Direction 12.2 and, on the other, a future Country Guidance Tribunal, which would be assessing in-depth the wide-ranging background evidence that is a feature of most Country Guidance cases.

139. For these reasons, we are fully satisfied that the Tribunal in EM asked itself the right question, considered the relevant evidence comparing the position in 2008 and 2011 and made no error in reaching the conclusions it did. It was entitled to reach the findings it made, applying the approach it described at [72] of its determination. We have already decided that the disclosure material as a whole did not undermine that conclusion and we will consider whether anything in the fresh evidence submitted to us has that effect under Issue 4 below.

Issue 3: Did the use of anonymous evidence in EM render the decision unfair or unreliable?

140. At the hearing in 2010 the Tribunal received in evidence the report of a Fact Finding Mission (FFM) made by UKBA officials to Zimbabwe with FCO support. Various problems were identified with aspects of the information recorded but by the end of the hearing we were satisfied that the information contained in Appendix D represented a fair summary of the exchanges between the investigators and the informants.

141. The FFM interviewed members of the following organisations/individuals:

1. Zim Rights 5 Aug 2010.
2. An anonymous organisation 3 August 2010.

3. Research and Advocacy Unit 17 August 2010.
4. Gays and Lesbians of Zimbabwe 17 August 2010.
5. Zimbabwe Association Doctors for Human Rights 12 August 2010.
6. Zimbabwe Lawyers for Human Rights 12 August 2010
7. Counselling Services Unit 12 August 2010
8. An organisation referred to in the report as an international organisation but whose identity and stature was known to the appellants 12 August 2010.
9. An organisation in Zimbabwe 11 August 2010.
10. A major NGO 11 August 2010.
11. Zimbabwe Human Rights Forum 13 August 2010.
12. Catholic Commission for Peace and Justice Zimbabwe 11 August 2010.
13. Anastasia Moyo, human rights activist 16 August 2010.
14. Bulawayo Progressive Residents Association 16 August 2010.
15. An organisation referred to as a faith based organisation but whose identity and stature was known to the appellants 16 August 2010.
16. Major international humanitarian organisation 17 August 2010.
17. Commercial Farmers Union 12 August 2010.
18. Radio Dialogue 16 August 2010.

142. The Tribunal was informed that the six un-named organisations had indicated a wish to remain anonymous because any publicity given to their comments on events inside the country might be prejudicial to their ability to work in Zimbabwe and the best interests of people working with and for them. By the time of the hearing only four of the six remained unknown to the appellants. The details of the "major international humanitarian organisation" became known to the appellant's witness W 66. In summary, the FFM recorded information from 18 organisations or individuals who worked for NGOs active in Zimbabwe, of which 15 were known to the appellants or their witness and were acknowledged to be appropriate interlocutors for the purpose of the FFM inquiry. In substance, therefore, three such organisations were anonymous in the sense that their identities were known to the FFM and the respondent but not to the appellants or the Tribunal.

143. In addition the FFM interviewed seven people who had returned to Zimbabwe voluntarily with the assistance of the International Organisation for Migration.

144. During the hearing in EM the appellants questioned the weight to be adduced to the evidence of anonymous organisations. We noted at [96]

> "Four of the interviewees in the FFM report asked to remain anonymous. Mr Henderson questioned the weight that could be placed upon these, particularly in the light of his submissions regarding Practice Direction 10."

145. The reference to Practice Direction 10 was an attempt by the appellants to submit that country information could only be introduced into the hearing when it complied with the conditions for the admission of an expert's report. We rejected that submission and there was no appeal from that conclusion. No other legal principles were cited.

146. The Tribunal addressed the issue of weight at [97] to [102]. Following the promulgation of this decision the European Court of Human Rights published its judgment in the case of Sufi and Elmi v United Kingdom [2011] ECHR 1045 28 June 2011. Reliance was placed on this authority by those appellants who appealed to the Court of Appeal.

147. This case was concerned with country conditions in Somalia with a view to assessing Article 3 risk to individuals liable to be returned to Mogadishu. A material part of the information before the Court was information derived in Kenya from anonymous organisations apparently operating in Somalia. This lead to a submission by the applicants and an adjudication on the issue in the following terms:

> *"3. The weight to be attached to the report of the fact-finding mission to Nairobi (see paragraph 80, above)*
>
> **(a) The parties' submissions**
>
> 227. The applicants submitted that following *NA. v. the United Kingdom*, no. 25904/07, §§ 118 – 122, 17 July 2008, BAILII: [2008] ECHR 616, little or no weight should be attached to the report of the fact-finding mission as it did not visit Somalia, did not appear to contact anyone in Somalia, and the majority of "sources" were anonymous, identified only as "an international NGO", "a diplomatic source", or "security advisors". No information was provided about the extent of the sources' presence in Somalia, their roles within their respective organisations, or the type of work (if any) that they carried out in Somalia. This was of particular concern on account of the fact that so few international NGOs and diplomatic missions had any presence in Somalia.
>
> 228. In response, the Government submitted that such criticisms were misplaced and unjustified. Although they acknowledged that the mission did not travel to Somalia, they claimed that this was pursuant to advice provided by the Foreign and Commonwealth Office which warned British nationals against travel to Somalia. The Mission went instead to Nairobi, which was the location of the African Headquarters of the United Nations, the location of the highest concentration of inter-governmental and non-governmental organisations operating in and with daily contact to the situation in Somalia. In Nairobi, the Mission was able to interview a number of contacts who had recently returned to Nairobi from Somalia, some of whom had been in Somalia for a number of weeks in the period immediately preceding the mission.
>
> 229. The Government further acknowledged that the majority of sources were not named in the report. However, they submitted that anonymity had been granted at

the sources' request as they were concerned about the risk to their operations and staff and they asked the Court to take notice of the fact that the sources cited in the report by the Norwegian Directorate of Immigration were also anonymous.

(b) The Court's assessment

230. In assessing the weight to be attributed to country material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations (*Saadi v. Italy* [GC], no. 37201/06, § 143, ECHR 2008 .., BAILII: [2008] ECHR 179. and *NA. v. the United Kingdom*, cited above, § 120).

231. The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do.

232. The Court appreciates the many difficulties faced by governments and NGOs gathering information in dangerous and volatile situations. It accepts that it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and, in such cases, information provided by sources with first-hand knowledge of the situation may have to be relied on. The Court will not, therefore, disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources.

234. That being said, where a report is wholly reliant on information provided by sources, the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the Court in assessing the weight to be attributed to their evidence. The Court recognises that where there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information. Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it.

235. In the present case the Court observes that the description of the sources relied on by the fact-finding mission is vague. As indicated by the applicants, the majority

> of sources have simply been described either as "an international NGO", "a diplomatic source", or "a security advisor". Such descriptions give no indication of the authority or reputation of the sources or of the extent of their presence in southern and central Somalia. This is of particular concern in the present case, where it is accepted that the presence of international NGOs and diplomatic missions in southern and central Somalia is limited. It is therefore impossible for the Court to carry out any assessment of the sources' reliability and, as a consequence, where their information is unsupported or contradictory, the Court is unable to attach substantial weight to it."

148. Paragraphs [230] and [231] of Sufi above are in substantially the same terms as paragraphs 120 and 121 of NA v United Kingdom [2008] ECHR 616 that were adopted as relevant guidance by the AIT in TK (Tamils-LP updated-Sri Lanka CG [2009] UKAIT 49. In so far as the Court in Sufi and Elmi was applying its own guidelines in NA v United Kingdom, its decision was not a new development. As we have noted the Tribunal in EM explained why in each case the anonymous source was capable of carrying weight albeit that the weight actually applied to each piece of information provided varied.

149. In his submissions, the appellant relies on the decision in Sufi and Elmi to attack the Tribunal's observations in EM at [145] and [198]. These passages are concerned with assessment of a partial improvement in police performance.

150. At [145] the Tribunal was summarising the evidence on the issue:

> "The anonymous organisation interviewed by the FFM team on 11 August 2010 *(No 9 above)* spoke of people in Zimbabwe being "tentative about the current peace and … aware that it is fragile". Again, however, there was concern about the "potential for violence in many rural communities". There was a "general opinion that [the police] are less tolerant of political violence" than in the past; although the evidence overall means that that last remark must be treated with considerable caution. There is, however, support for it in the view of the major NGO interviewed on 11 August *(No 10 above)* , which considered that in urban areas "the police are more likely to intervene to stop political violence, whoever the perpetrator". The Zimbabwe Human Rights NGO Forum considered that there were problems regarding the constitutional outreach process (about which we shall have more to say); but that otherwise "levels of political violence are currently low, with more emphasis on threats along the lines of stay in line or expect to face worse violence than in 2008". The Catholic Commission for Justice and Peace Zimbabwe considered that there was "little actual political violence at the moment", although this was said to be because the population had been "so cowed by previous violence that they are afraid to do the sort of things that would provoke further actual violence". Whilst we have tempered the weight to be placed on the views of Bulawayo Agenda, so far as more general issues are concerned, it is nevertheless noteworthy that they considered that threats and physical violence within Matabeleland North and South, Bulawayo, Midlands, Masvingo and Manicaland had declined since the formation of the GNU. By the same token, the Bulawayo Progressive Residents Association considered the current situation to be

> "peaceful – for the moment, at least. Violence is much less widespread and the violence is less open."

151. At [198] it reached its conclusions on comparative political violence between 2008 and 2010:

> "Harare and Bulawayo are, by some margin, the main urban centres in Zimbabwe, each having the status of a Province. Our general assessment of the evidence before us is that, in both of these cities, ZANU-PF's inclination and ability to control and coerce the population is significantly less than in the rural areas of, for example, Mashonaland and Manicaland, where the party has not lost hope of securing electoral success. We have already described the events regarding the COPAC outreach meetings in Harare. Although there was some violence involving the September meetings, the outreach process was quickly postponed when violence flared. *This lends support to the view of those, such as the anonymous organisation in Zimbabwe quoted in the FFM report, that the police are generally better disciplined and less tolerant of political violence, in the main urban areas.* We have also noted the evidence in the "A Place in the Sun" report, concerning the greater independence of magistrates in those areas, which found support in the evidence of Professor Ranger. The October meetings in Harare went off without any significant violence, albeit that they fell far short of COPAC's wish to engender full and frank discussions between the rival political parties" (our emphasis).

152. Thus what the Tribunal was doing at [145] was noting a range of views on police response to politically motivated violence and recording that the views of organisation 9 were supported by those of organisation 10. In its conclusions at [198] it was identifying open uncontested information about the response to violence at a COPAC outreach meeting as supportive of a view expressed by an informant from organisation 9. That informant's views were not unique or eccentric but directly supported by organisation 10 who drew attention to the extensive monitoring by civil society and its institutions of politically motivated violence in Zimbabwe as a restraining factor on Zanu-PF.

153. Further it should be noted that this was part of the assessment of the general background to personal security in Zimbabwe and did not form a specific part of the guidance issued. The issue in question was not a free standing assessment of the current state of police discipline and independence but whether the incidence of politically motivated violence had reduced in the urban centres, for which there was near unanimity of view between informants.

154. The Tribunal was not, therefore, giving decisive or undue weight to a single unsupported source. Moreover the interview process elicited details of the extent to which the two organisations referred to were able to operate in Zimbabwe. Organisation 9 was able to operate freely throughout Zimbabwe and the environment had improved over the last 18 months but mostly within a year of the political agreement. Where there were directives from local officials to stop working in limited cases, the

problem could be overcome through negotiation. There were a few districts where access was not granted but these were small geographical areas. Organisation 10 said it was 'able to operate freely in respect of some aspects of its operations but in relation to work with IDPs (*internally displaced persons*) there are some constraints on physical aspects to some areas. They are often overcome through local explanation and negotiations but concerns remain and the situation is expected to get worse as the next elections approach'. There is thus nothing inconsistent between the use the Tribunal made of the two organisations in question and the guidance in NA v United Kingdom repeated in Sufi and Elmi v United Kingdom.

155. At [44] of the appellant's skeleton argument he appears to go further than the Strasbourg Court and submit that a fair hearing compatible with the standards of Article 47 of the EU Charter on Fundamental Rights precludes any reliance on anonymous evidence in asylum appeals. This cannot be right. Neither the ECHR nor the EU Charter amount to a detailed code for the admissibility of evidence in asylum appeals, such matters are largely for national law to determine and the United Kingdom's Procedure Rules enable the Tribunal to receive any information whether admissible in civil proceedings or not. Flexibility in receiving relevant information where the subject matter concerns people and places outside of the United Kingdom is an important aspect of Tribunal justice. With the exception of evidence demonstrated to have been obtained by torture, human rights norms do not mandate exclusion of evidence in proceedings that are not criminal in character. The analogy with proceedings by or against the security services is again misconceived, as the Secretary of State was not seeking to make out a case against or defend a claim by the appellant by use of secret evidence.

156. For the reasons given by the European Court of Human Rights in NA and the passages repeated in Sufi and Elmi, in asylum determination, there are sound reasons why sources who may have valuable information to give to diplomatic missions, international organisations like UNHCR or non-governmental organisations like Amnesty International would wish to do so under conditions of anonymity. In some cases an order prohibiting the publication of the sources may suffice to give re-assurance in others it may not. Where they do not, potential sources of concern may not always be confined to government agents and their supporters. Providing information to an appellant or his legal team on a confidential basis may thus provide the source with satisfactory protection.

157. Anonymous material is not infrequently relied on by appellants as indicative of deteriorating conditions or general risk. The Tribunal should be free to accept such material but will do its best to evaluate by reference to what if anything is known about the source, the circumstances in which information was given and the overall context of the issues it relates to and the rest of the evidence available.

158. The problem is not one of admissibility of such material as forming part of the background data from which risk assessments are made, but the weight to be attached to such data. It is common sense and common justice that the less that is known about a source and its means of acquiring information, the more hesitant should a Tribunal judge be to afford anonymous unsupported assessment substantial weight, particularly where it conflicts with assessment from sources known to be reliable. In our judgment it is neither possible nor desirable to be more prescriptive than this, and the task of evaluation of weight is a matter for the judgment of an expert Tribunal that is regularly asked to take into account un-sourced data whether submitted by claimants or respondents. Provided a judge is alert to the problems caused by anonymous evidence and the principles we have summarised above, we do not consider that an issue of law arises.

159. The report of the FFM under consideration in EM was not a model of best practice in a number of respects, many of which were exposed at the hearing. We were, however, satisfied that the informants with whom contact was made were selected in good faith by the mission with the assistance of locally based diplomats. We were also satisfied that ultimately the interlocutors (whether they wished to be quoted in an individual or representative capacity) were content with the final version of the summaries of their information and knew the context in which it was being gathered (cf [106] to [107] in EM).

160. By contrast with the position pertaining in Sufi and Elmi, each of the four anonymous organisations had a presence in Zimbabwe and brief descriptions had been supplied of their status and ability to gather information. The informants in the report were not predominantly anonymous. The known sources were all reputable and independent and had the capacity to supply relevant data within the area or field of their operation. We had no reason to suspect that unknown sources were different in kind to known, and in respect of organisation 16 this seems to have been accepted by W66. To reject anything said by informants from the unknown group on the basis that it was possible that they alone were not independent, objective, or had the capacity to acquire the information they were passing on, would be very close to questioning the good faith of the respondent in submitting this data for our assessment.

161. In summary, we are satisfied that the use we made of Organisations 9 and 10 on the passages under challenge was not unlawful, unfair, an irrational exercise of judgment or in breach of the general principles set out in NA v United Kingdom and approved by the AIT and the higher courts in the United Kingdom.

162. There is no need for this panel to be drawn into a consideration of whether the application of those principles by the European Court of Human Rights in Sufi and Elmi is something that should generally apply in UK Country Guidance cases. In our judgment the issues in the case, the degree of

reliance on the reports from anonymous organisations contacted outside Somalia and the lack of any information about how those organisations acquired information in Somalia are all materially different from the present issues of evaluation, as is the comparison between the activities of civil society in urban Zimbabwe and Somalia.

163. Our legal duty is to take account of Strasbourg decisions rather than invariably apply every last conclusion, and this is particularly so where the subject matter of the decision is weight to assigned to evidence rather than the formulation of general principles of approach. We note the concerns expressed by another constitution of this Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC) and recognise that an over-prescriptive approach may undermine developing state practice in the European Union, where cooperation with informants in places of potential danger is likely to require assurances of anonymity.

164. We accept that where reliance is placed on informants from anonymous organisations and an undertaking of confidentiality is not sufficient to give assurance to the informant to cooperate with the investigation, the respondent should normally give all reasonable assistance to the appellant and the Tribunal in evaluating the nature, size, capacity and independence of the source in question, and the extent to which its opinions are supported or contradicted by others.

165. Where there is a breach of recognised guidelines and best practice it is open to the judge deciding an asylum appeal to afford no weight to unsupported anonymous material because no realistic assessment can be made of its reliability. However, this is a fact sensitive case by case assessment and not the application of a general exclusionary rule: see by analogy the observations of Elias LJ with respect to the admissibility of a child's asylum interview in AN and FA v SSHD [2012] EWCA Civ 1636 at [160] to [173], with which Maurice Kay and Black LJJ agreed at [184] and [124] respectively.

166. Accordingly, this ground of appeal fails as a reason to set aside either the conclusions on individual risk or the general guidance given in EM and quoted at the beginning of this determination.

Issue 4: What is the impact of any of the above and/or any fresh evidence adduced in the individual appeal of CM?

Introduction

167. As formulated in the Tribunal's directions of September 2012, the fourth issue in these proceedings is to determine CM's international protection case in the light of (a) the conclusions we reach about the current status of EM and the Country Guidance as assessed at March 2011; and (b) any fresh evidence adduced as to the position in Zimbabwe

as at October 2012. Those directions also specifically envisaged that the fresh evidence would be analysed by the Tribunal in order to see whether it has any effect on the position in Zimbabwe as at March 2011: ie whether the Country Guidance in EM requires amendment in that respect. Finally, the directions made it clear that the Tribunal was not minded to give any Country Guidance regarding the position as at October 2012. Both parties have assembled their fresh evidence on that basis. To have attempted to give up to date Country Guidance would have led to an unacceptable delay in resolving the important issue of the status of EM and its Country Guidance.

168. That said, we recognise that any analysis of the fresh evidence may have a bearing, not merely on the fate of CM's appeal, but more generally; and, because this determination will be reported, that decision makers, claimants and judicial fact-finders may have regard to it, for what we say about various issues, such as the present state of Harare. As a result, we set out at the end of this section of the determination what we describe as country information on Zimbabwe, as at October 2012 (paragraph 214 below). We emphasise that this information is not to be treated as statutorily authoritative. It is not Country Guidance within the terms of Practice Direction 12. It is, however, both a source of evidence and a statement of the findings of a Presidential panel on that evidence; no more, no less.

Nature of the fresh evidence

169. Both sides adduced oral and documentary evidence. The documentary evidence included witness statements

from the appellant:

i. Mr Mavhinga *
ii. Witness 77*
iii. Witness 66
iv. Mr Reeler
v. Professor Ranger
vi. Witness 83 *
vii. Ms Mukoko
viii. Appellant CM *

from the respondent:

viii. Mr Ives *
ix. Ms Scruton (Mr Griffiths *)
x. Ms Goodier

170. Besides these witness statements, the documentary evidence also included press reports and NGO reports. A summary of both the witness

statements and the other documentary evidence is contained in Appendix B to this determination. The names of those who also gave oral evidence are marked above with an asterisk. Mr Griffiths spoke to Ms Scruton's statement, in her absence. A transcript of the oral evidence is contained in Appendix C. That transcript, which the parties were shown in draft, and which takes account of their agreed corrections, records instances where what was said was inaudible to the transcribers. In making our assessment of the evidence, we have had regard both to the transcript and to the panel's own records. We nevertheless consider that it is helpful on this occasion to append the transcript. Where the transcript states [SSHD unable to confirm] this refers to corrections filed by the appellant which have been taken into account by the Tribunal but which the respondent indicated she was unable to confirm or dispute from her notes.

171. What follows is a synopsis of the major themes in the written and oral evidence. We stress that we have considered that evidence overall, in reaching our conclusions.

(a) The outlook for constitutional reform, elections and the conditions in which they might be contested

172. Mr Mavhinga of the "Crisis in Zimbabwe Coalition" was sceptical of reports that indicated a degree of consensus between the MDC and ZPF, going into the then awaited second stakeholders' conference organised by COPAC in respect of a new Constitution for Zimbabwe (Appendix C, 2 October) but opined that, in any event, ZPF did not regard a new Constitution as "the big game in town".

173. W77, an informed observer on Zimbabwe from the civil society viewpoint, whilst noting delays and obstacles apparently occasioned by ZANU-PF in the Constitutional process, accepted that there had been positive developments. Historically, ZANU-PF had always wanted to have early elections, as opposed to the MDC, who wished them to be delayed so that safeguards could be in place (Appendix C, 3 October). According to W77, holding elections in 2013 under the existing Constitution would have a greater capacity for violence, compared with the position if there were Constitutional reforms (Appendix B, paragraph 8). W77 did not, however, consider it likely that ZPF would in any event use the same form of violence or apply the same intensity of violence during elections as had been the case in 2008 (Appendix C, 3 October). This view was echoed by Mr Ives of the FCO (Appendix B, paragraph 54). Mr Reeler regarded the COPAC process as inadequate and flawed, and not a major advance on the Lancaster House Constitution (Appendix B, paragraph 14).

174. As an indicator of an improved political atmosphere, the respondent pointed to the recent completion of the census project, undertaken according to UN principles and SADC guidelines (Appendix B, paragraph 86). W77 was asked about this in oral evidence (Appendix C, 3 October).

175. Regarding SADC/regional involvement, Mr Mavhinga described his personal involvement with SADC ambassadors in September 2012 (Appendix B, paragraph 31). Certain proposals put by him and his colleagues, such as confining soldiers to barracks during elections, had been dismissed as "interference". President Zuma was, however, more critical of ZPF than had been his predecessor. Mr. Ives regarded SADC and, in particular, South Africa, as having important roles to play (Appendix B paragraph 54). The evidence in general was that SADC and South Africa remained engaged on the issue of Zimbabwe and its political future, although the case for the appellant was that, as submitted to the EM Tribunal, this had not shown itself to be such as to eliminate a real risk of harm during a future election period.

(b) Levels of politically motivated human rights violations in Zimbabwe

176. The respondent placed considerable emphasis on the Monthly Monitoring reports of the ZPP (Zimbabwe Peace Project) (Appendix B paragraphs 80-85). These showed what the respondent submitted was a significant fall, across the intervening years, in reported politically motivated human rights violations, compared with 2008. For instance, in the report for June 2012, figure 1 shows trends for politically motivated violations. There were 3758 such incidents in June 2008, 1558 in June 2009, 913 in June 2010, 1014 in June 2011 and 42 in June 2012. Harassment and intimidation were said to be the most common type of violations being recorded. The report stated that

> "An analysis of the violations trends during the month of June over the past five years reveals that the month has always had high figures of politically motivated human rights violations compared to the other months".

177. A description of salient elements of the ZPP reports for July and August 2012 are to be found at paragraphs 82-84 of Appendix B. The main sources of conflict nationally were inter and intra-party conflict between ZPF and the MDC-T. Although MDC supporters remained the major victims of politically motivated human rights violations, the number of ZPF victims had increased substantially, to 20% of all victims recorded for July 2012. As with June, a similar downward trend was recorded for the months of August 2008 to 2012.

178. W77 was asked about these ZPP reports (Appendix C, 3 October); in particular, as to overall trends. W77 agreed that the downward trend shown by the ZPP reports was "indisputable" and that other organisations, such as Amnesty International, who reported higher figures "are often accused of double counting".

179. Justina Mukoko, executive director of the ZPP, provided a statement on behalf of the appellant (Appendix B paragraphs 39-40), in which she referred to a "really worrying rise in militia activity in Harare and other urban areas since the beginning of 2012". Having described the

methodology employed by the ZPP and its monitors, she said it was more difficult "to individually verify and record a large proportion of the current violations by militia in Harare because of the high density of people living there and the numbers affected".

(c) Problems in Harare

180. The Tribunal was referred to a considerable amount of evidence regarding the activities of a group, sometimes described as a militia, known as Chipangano (eg Appendix B paragraphs 9-11, 19, 33, 63, 69, 71, 73, 75, 83, 85, 89, 97 ; Appendix C, 2 October). The group is said to have links with ZPF and to operate mainly but not exclusively in the high density area of Mbare, Harare, where it has sought to impose financial demands on transport operations, by means of touts (or Mandimbandiba), as well as market operations carried on by those in the informal employment sector. It appears on one occasion to have been responsible for disrupting Parliament. Evidence describes Chipangano hostility towards MDC supporters. There is some evidence of Chipangano activity outside Harare (eg Mutare). In September 2012 there appears to have been an army operation against these touts. It was said that Chipangano was no longer controlled by ZPF, having become financially independent.

(d) Returnees to Zimbabwe

181. A summary of Ms Scruton's evidence on this subject is at paragraphs 55-58 of Appendix B (see also Mr Griffiths at Appendix C, 3 October). 23 enforced returns to Zimbabwe have taken place since publication of EM. The criteria adopted in 2011 for selection of returnees appear to have included only those who failed (or would have failed) in their claims to international protection under the Country Guidance in RN. Returnees are observed "airside" at Harare Airport by a Migrations Delivery Officer (MDO), who makes contact with the leader of the escort group once the returnees have disembarked but who then withdraws whilst the returnees go through immigration control. Usually, the MDO is able to observe the returnee through the open door of the immigration interview room. Once "landside" the MDO observes the progress of the returnees from interview room to immigration desk and then on to baggage reclaim. The MDO then observes the returnee leave the airport terminal building. The whole process takes about 40 to 60 minutes.

(e) Bulawayo and the Matabeleland provinces

182. Professor Ranger's statement opined that the security and humanitarian situation in Bulawayo had seriously deteriorated since he last gave evidence (Appendix B paragraph 26). W77's statement referred to violence including areas of Matabeleland. Mr Mavhinga would not describe Bulawayo as a safe place (Appendix B paragraph 37), whilst W83 was aware of a communiqué that MDC members had been attacked by war

veterans whilst travelling to Bulawayo on the occasion of the party's thirteenth anniversary (Appendix B paragraph 43).

The parties' submissions on the fresh evidence

(1) Appellant's initial submissions

183. The written submissions on the appellant's behalf were that the updated country evidence showed that intimidation and violence from militias in urban areas is on the increase. This was the view taken by W77, Professor Ranger, Mr Reeler, Ms Mukoko and Mr Mavhinga.

184. Militias and gangs had been responsible not only for the infliction of physical violence but also in taking on quasi-state functions in urban areas. Many of the press reports in the public domain showed the activities of gangs, militia and ZANU-PF youth including Chipangano.

185. The updated evidence also showed that the military, police and security forces remain under the control of ZANU-PF and that the military and police were involved in intimidation and violence. There were substantial prospects of violence in the 2013 elections.

(2) Respondent's submissions

186. Mr Thomann's written submissions in summary are that:-

(i) The updated country evidence, and the evidence particularly regarding Harare, does not cast doubt upon the observations made by the Tribunal in EM regarding the comparative security positions in low, medium or high density areas.

(ii) The evidence of Chipangano activities outside its Mbare base and immediate vicinity is scant and does not found a general risk of persecution in respect of dwellers of high density suburbs of Harare. Still less does it indicate that a returnee to a low or medium suburb of Harare would be placed at real risk of persecution or serious harm on return.

(iii) Further elections will be held at some point in 2013 and that the implementation of the GPA and the adoption of a new Constitution remain incomplete. Nonetheless, the Government of National Unity endures and plans for general elections in 2012 have been finally abandoned. Regional interlocutors remain engaged.

(iv) The COPAC process has not reached an impasse and there remain a number of countervailing safeguards undermining the contention that there is a real risk to a returnee to Harare of persecution or serious harm, let alone a putative returnee to low and medium density suburbs.

(v) Witness 77's evidence largely consisted of broad statements regarding the position in Harare but these were not founded upon specific incidents or reports. His evidence of a deteriorating human rights position in Harare was not reflected in the generally authoritative, albeit inevitably incomplete, monitoring of the ZPP. Some of his evidence, tested in examination, was more nuanced than initially appeared in his written report.

(vi) Mr Mavhinga's evidence was rather general and suffered from an absence of specifics. He accepted that he was not aware of specific incidents of politically motivated violation in Harare's low and medium density suburbs. He appeared to suffer from a lack of awareness or unwillingness to accept a widely reported recent development in the COPAC process, namely ZANU-PF's acceptance that the previously agreed draft of the Constitution, rather than its tabled amendments, would be presented.

(vii) Professor Ranger and W66 were only able to provide evidence indicating broad agreement with Witness 77's report.

(viii) Mr Reeler and Ms Mukoko were not available for cross-examination.

(ix) By contrast with some of the hypothetical answers given by Mr Mahvinga and witness 77 as to what a returnee would be likely to experience on return to Zimbabwe, the evidence adduced by the respondent in the witness statement of Anne Scruton and the UKBA's returns team described the uneventful return of the first 23 enforced returnees.

(x) The monitoring reports from ZPP covering the period from June to August 2012 do not purport to be exhaustive but, significantly, they fail to indicate a rising trend in politically motivated violations over 2012 and the number of incidents reported in Harare is strikingly constant and low. The overall trend for Zimbabwe shows a significant reduction from 2011 levels.

(xi) So far as the activities of the group Chipangano is concerned, the Tribunal has been provided with a number of reports in the public domain regarding its operations. Whilst the appellant submits that its activities are steered by ZANU-PF, the evidence provides at best an ambivalent picture. There is some evidence of a link but more recently, Chipangano has been described as linked to rogue elements within ZANU-PF or as having become financially independent and therefore beyond the party's control.

(xii) Recent evidence suggests a crackdown on the activities of extortion groups linked to Chipangano. Overall, the evidence does not show that Chipangano's activities are a recent phenomenon or that its

activities have made a significant difference to the security situation in Harare. There is some evidence of incursions beyond Mbare, linked to recent events and of Chipangano's activities spreading to neighbouring high density areas but, in the round, the most that can be said is that its activities have intensified in Mbare, albeit not to a degree which has led to a significant rise in the overall number of human rights violations in Harare.

(xiii) The date most often referred to in relation to the holding of elections is June 2013. Witness 77 suggests that there has not been sufficient progress towards security reforms to prevent the violence of the 2008 elections being repeated. He accepted in oral evidence that future progress could not be ruled out. Reforms and further progress in the implementation of the GPA are, however, one facet of the potential safeguards in place which militate against a repeat of the indiscriminate violence of 2008. Monitoring and the role of the Electoral Commission have repeatedly been cited as important to free and fair elections and the role of South Africa and SADC remains capable of bringing pressure to bear.

(xiv) So far as the imminence of elections is concerned, the current timeframe is not significantly different from that considered by the Tribunal in EM in March 2011, when most observers predicted elections in late 2011 or 2012.

(xv) The recent country evidence does not show that the COPAC process has stalled, the Second Stakeholder Conference being scheduled to take place in late October. The countervailing factors in the assessment include the prospect of monitoring by SADC and the AU, the prospect of further legislative changes, including the implementation of a new Constitution and a new Electoral Amendment Act, the ongoing engagement of SADC and South Africa, the lack of likelihood that ZANU-PF would seek to engage in a campaign of violence resembling 2008 as such a campaign would not result in legitimisation, doubts that the MDC would willingly partake in a poll resembling that of 2008, evidence of disunity within ZANU-PF and a disconnect between pronouncements by security chiefs and their actions in private and the views held by the rank and file.

(xvi) These factors are particularly pertinent in relation to Harare, where ZANU-PF has little prospect of significant electoral success and where the eyes of the international community and civic society are firmly directed. The election would be supervised by an Electoral Commission, the Honourable Justice Simpson Mutambanengwe remaining at its head and with likely scrutiny by the international community.

(xvii) The respondent accepts that there is a credible risk of violence instigated at local levels and a risk that violence would be deployed

following a disputed election but the prospect of such violence rendering a returnee to a low or medium density suburb of Harare at risk remains a matter of speculation and does not amount to a real risk.

187. In his oral submissions, Mr Thomann emphasised these points and noted:-

(i) Both the disclosed material and the updated material showing circumstances since March 2011 reveal a reduction in violence since the 2008 peak.

(ii) In her statement, Ms Mukoko referred to a worrying rise in militia activity in Harare in the informal economy sector but what was not clear was the geographical location or whether the incidents had spread beyond Mbare.

(iii) The ZPP reports did pick up on violations by Chipangano, which also featured in the press reports before the Tribunal. The high point of claims that Chipangano had links with ZANU-PF appeared to be the article in The Zimbabwean published on 2nd August 2011 (A's singular bundle at page 167) and a Voice of America article (page 162).

(iv) There was, however, no evidence of specific incidents outside Mbare or in low or medium density areas. September 2012 saw a crackdown on the incidents related to the Mbare Bus Station, where mention was made of Chipangano's influence in Mbare and surrounding suburbs. All of this formed the background to the recent backlash against the gang. Overall, the evidence showed that Chipangano was not engaged in a political campaign.

(v) They were engaged in criminal activities, carried out under claims of political cover, with the addition of incidents where people were asked for ZANU-PF cards or shepherded into meetings. A gang member appeared to have confessed that there were links with ZANU-PF. Evidence from the Harare Residents' Trust, in the South West Radio report at tab 33 of the respondent's rebuttal evidence bundle suggested that ZANU-PF no longer had control of the gang.

(vi) Evidence before the Tribunal in EM included a news article published on 16th August 2010, regarding the eviction from markets by the gang of MDC-T youths in Mbare. The updating evidence did not show any substantial change since then.

(vii) Although Ms Mukoko, Mr Mavhinga and Witness 77 opined that there had been an intensification of activity, these claims were not borne out by the trends shown in the ZPP reports and the evidence of a recent backlash against Chipangano from army members, the police and perhaps even within ZANU-PF.

(viii) Beyond Mr Mavhinga's evidence there was scant evidence of specific incidents involving Chipangano. At its highest, the evidence perhaps suggested some intensification in Mbare, consisting of the attempts by touts and rank marshals to intimidate drivers.

(3) Appellant's reply

188. In his reply, Mr Henderson said that:-

(i) The increased militia activity in Harare is relevant to the RN loyalty test risk. There was a risk that violence would increase again through the forthcoming elections and the apparatus of oppression remains in place.

(ii) Elections would be called by June 2013 at the latest.

(iii) The recent police activity, which included beating up touts and innocent people, did not amount to a crackdown on Chipangano, still less a block on the power or influence of ZANU-PF.

(iv) The Tribunal should prefer the direct evidence given by the appellant's witnesses and the senior figures in Zimbabwe who have provided statements to the evidence from the newspaper articles relied upon by the Secretary of State. There is, in any event, no inconsistency between the two. The suggestion that there has been a reduction in violence and intimidation is a misconceived spin on the ZPP monthly reports.

(v) The evidence shows that Chipangano and the gangs are linked to ZANU-PF and that their activities are not limited to Mbare, which is simply the focus of their Harare activities. Everything is in place for violence to resume should the regime deem this necessary.

(vi) The position is arguably more acute than was the case at the time of RN as elections would be underway by June 2013.

(vii) Chipangano's activities were recorded as having extended beyond Mbare, and in any event Mbare and surrounding areas covered a large part of Harare. The evidence showed that most Harare public transporters suffered problems at the hands of the militia.

(viii) The evidence also showed consistently that the security apparatus remains solidly behind ZANU-PF.

(ix) The appellant's experts all agreed that there had been little progress in reforms. A new Constitution might be in development but it would have limited impact without real reforms to the security apparatus. The COPAC process showed that ZANU-PF might be happy to be

flexible on presentation but would not be willing to compromise on the retention of power.

(x) Witness 77's and Ms McGregor's work was of great importance, there being new and compelling evidence of the position in periurban areas, for example. Witness 77 had access to a variety of good sources.

(xi) Mr Reeler's report considered the ZPP monthly summaries and he concluded that they were not a true reflection of the position. There were two monitors per constituency and they were able to report only what came to them. They might pick up matters arising as a result of the COPAC process but there was significant underreporting of violations and abuses.

(xii) The monthly reports did not show the extent to which the poor in high density areas have to buy ZANU-PF cards or are required to show loyalty to the party. The reports give no clear indication of what constitutes a violation. Violations are only recorded if they arise as a result of the political process. If events in the political process did not occur, the numbers of violations would drop but it did not follow that violence and intimidation by Chipangano dropped.

(xiii) Witness 77's evidence was also supported by Professor Ranger. Mr Mavhinga had been prominent in Zimbabwe civil society for some time and was able to attend and give evidence before the Tribunal. His evidence had significant weight. His view was that SADC would not intervene in any meaningful way.

(xiv) All the witnesses called by the appellant took the view that militia activity in urban areas is increasing. Mr Mavhinga said that there was no crackdown on Chipangano; action has been taken against the touts, which some say are linked to ZANU-PF. The evidence does not show real police action, in his view.

(xv) In relation to the countervailing factors identified by the Secretary of State, there was no substantial sign that SADC or the AU would be in place to monitor the elections.

(xvi) The prominent judge chairing the ZEC was a titular head only.

(xvii) All the commentators agreed that real reform of the security forces was missing and any disunity in ZANU-PF did not amount to a substantial safeguard. There were isolated news reports, including the article entitled "security chiefs panic" but this fell far short of showing a durable change.

(xviii) Overall, the evidence showed that militias allied to ZANU-PF were now active, a few months before the elections. The evidence of the enforced returns was of limited weight as the particular returnees

would have failed under RN and so would be able to demonstrate loyalty to ZANU-PF. The ILPA correspondence exhibited to Ms Scruton's witness statement was of importance here.

The Tribunal's findings on the fresh evidence regarding the situation in Zimbabwe as at October 2012

(a) The outlook for constitutional reform, elections and the conditions in which they might be contested

189. Whilst we accept the point made by the appellant that constitutional reform is no guarantee of what may happen on the ground, particularly during an election period, we consider it significant that the COPAC process remains in being, albeit that progress has not always been smooth. The agreement reached between Mugabe, Tsvangirai and Deputy PM Mutambara that the COPAC draft would be the document used in the second stakeholders' conference is a sign of progress. So too is the successful census exercise. There remains the realistic prospect of monitoring of the elections by SADC and of oversight by the ZEC, despite the apparent difficulties faced by its Chair. We take account of the appellant's submissions that the instruments of state power remain in the hands of ZANU-PF; but the evidence of a plurality of views within that party has grown since the period under consideration in EM.

190. There is no evidence to compel the conclusion that ZANU-PF are reasonably likely to defy regional opinion as to the conduct of elections, whether from SADC or South Africa itself. We accept the views of the FCO that the roles of both are of great significance in this regard. The evidence does not suggest that there is a reasonable likelihood of either having become disengaged since EM, albeit that there may be a regional reluctance to agree with all the demands of Zimbabwean civil society, such as requiring troops to be confined to barracks during the elections. We accept the FCO's assessment that there may well, nonetheless, be violence when elections are called (which could be as late as November 2013). But, as the analysis at Issue 1 above makes plain, violence has been a feature of elections generally in Zimbabwe since independence. The 2008 violence was far greater than any seen before. Both the FCO and W77 consider that such violence is unlikely to be repeated in 2013.

191. Overall, whilst we recognise that reasonable commentators are entitled to pessimistic views about the future prospects of stable political settlement and the risk of a return to much higher rates of political violence, that is not the picture that is presented to us in the present proceedings, and has not been the picture for four years now. The assessment of real risk has to be based on an evaluation of what is happening on the ground where that proves to be durable, rather than possibilities of future breakdown where that is necessarily speculative. This leads us to the second general issue.

(b) Levels of politically motivated human rights violations in Zimbabwe

192. This panel recognises, as have previous constitutions of the Upper Tribunal and the AIT, that Zimbabwe remains a society where great brutality and human rights abuses have taken place, and both the political instigators of those abuses and the personnel who inflicted them remain in existence. We recognise as the appellant's experts have reminded us that there has been no abiding political and constitutional solution of the divisions that led to the intense violence around the second round of Presidential elections of June 2008. Nevertheless, as we read the documentary material presented to us and follow the trend of reporting in the ZPP monthly reports, we are struck by two general observations.

193. First, there remains in Zimbabwe an active and vocal civil society prepared to criticise the government in general and ZANU-PF and its leaders in particular and, despite the threats of violence and the disturbances that have arisen from time to time, the appetite for change in civil society remains.

194. Second, whatever failings ZPP reports may have in not being able to record every single act of politically motivated human rights violations (PMV) in Zimbabwe, they plainly and powerfully demonstrate the general downwards trend since the summer of 2008. W77 acknowledged that the downward trend was "undisputable". Since we were not provided with any evidence to show that the ZPP's methodology had changed, the trend is significant. We reject the suggestion from Mr Reeler that the ZPP summaries are, in this respect, not an accurate summary of the position. We do so, having regard to Ms Mukoko's statement that violations by militias in Harare are difficult to verify individually and to record because of the high density of people living there and the numbers affected. We are not aware of the reports, which are otherwise highly detailed and evidently carefully prepared, issuing such specific caveats. We note the comments in 14.44 of the July 2012 COIS, that recommends:

> "officials exercise caution in considering and assessing ZPP's data. While the ZPP may go to reasonable lengths to confirm the veracity of reported cases of politically motivated human rights violations, it does not set out how exactly the events and motivations of the perpetrators are verified. Conversely, ZPP (or indeed other sources referred) does not claim to have documented all incidents of human rights violations; not all will come to the attention of and be documented by ZPP monitors for a variety of reasons including, for example, victims' fear of reprisal. The quantitative data should therefore not be considered comprehensive or exhaustive but an indication of the levels, nature and distribution of politically motivated human rights violations in Zimbabwe in the period concerned".

We endorse and apply that observation. We also agree with Mr Thomann's submission, that the ZPP reports did pick up on violations by Chipangano in Harare (as to Harare, see further paragraphs 196-201 and

211-213 below). The overall evidence as to the downward trend of politically motivated human rights violations in Zimbabwe is, in short, cogent.

195. Since the ZPP reports specifically address instances of political intimidation, within the ambit of PMV, the Tribunal in EM was entitled to rely on them in reaching its conclusion as to risks at road blocks or of loyalty challenges and there is no new category of information that requires this assessment to be revisited, as at October 2012 when we completed the task of receiving evidence. Overall, there is no evidence to suggest that the nation-wide findings of RN as regards the risk of having to show loyalty to ZANU-PF have any bearing on the present position in Zimbabwe.

(c) Problems in Harare

196. As can be seen from the above and from Appendices B and C, there was much discussion by the witnesses and submissions by the representatives about the origin, nature and activities of Chipangano. Although the respondent pointed out that there was a piece of evidence before the Tribunal in EM, to the effect that "ZANU-PF, Mbare youths popularly known as Chipangano are closing down all markets belonging to opposition supporters in the area" (16 August 2010), it is quite evident that it is only relatively recently that the group's activities have attracted widespread publicity and condemnation. It is evidently with Chipangano in mind that Ms Mukoko referred in her statement to a rise in militia activity in Harare "since the beginning of 2012", although we note that the disturbances in Parliament organised by Chipangano occurred in October 2011. We do not accept W77's evidence that militia bases comparable to those in 2008 have been re-established around Mbare. If this were so, there would be much more about it in the media and other reports in the fresh evidence. Mr Reeler's reference to "regular alerts" of militia bases being re-opened was unspecific. By contrast, the ZPP report of July 2012 described a trend for the re-emergence of "terror bases" in Mashonaland West, Central and East and Masvingo (Appendix B paragraph 82).

197. The press reports show that it was Chipangano's criminal activities and their extortion at cab ranks in particular that led to a backlash in September 2012. Kombi operators and drivers complained that those demanding money claimed to be ZANU-PF youths who were free to act with impunity as the party was in power. The police were reported in early September as having engaged all stakeholders in the dispute. In the second week of September, two uniformed members of the army were assaulted by members of a gang believed to be Mandimbandiba, an offshoot of Chipangano, and this led to the revenge attack reported by South West Radio Africa on 11th September 2012. Soldiers attacked touts, rank marshals and innocent bystanders and then stationed themselves, in civilian clothes, at strategic points on omnibus ranks in Harare. The soldiers were reported as saying that they wanted to get rid of all

extortion business as it had brought anarchy to the streets of Harare. The disturbances took place close to Harare Central Police Station but the police did not intervene. Military police were deployed to stop the violence escalating. ZANU-PF was reported as having tried to distance itself from the gang's activities.

198. Weighing the evidence, we find that Chipangano has been responsible for acts of violence and intimidation outside Mbare on limited occasions and largely in neighbouring suburbs such as Epworth and Highfields. The backlash in September 2012 shows that professed allegiance to ZANU-PF was not sufficient to insulate Chipangano from a crackdown on their activities. There is scant evidence that Chipangano has any significant range or influence in low or medium density suburbs of Harare, and their forays into the centre of the city are infrequent. Notwithstanding the consistent claims of direction or control by ZANU-PF, we find that the evidence falls short of showing that Chipangano is an arm of the party, capable of being deployed at will to further ZANU-PF's ends. The evidence of the press and media reports suggests, rather, that the threats and extortion at the commuter omnibus ranks are signs of autonomy. Mr Mavhinga's evidence, including his rather general mention of reports of Chipangano activities in neighbouring suburbs, is consistent, we find, with what emerges from the press and media reports. Overall, Chipangano's criminal activities, no doubt a cause of considerable anxiety in high density suburbs in Harare, have not, on the evidence, led to a significant rise in the overall number of human rights violations in the city.

199. We find that the recent crackdown in Chipangano has, as its target, the gang's organised attempts to intimidate and extort and the action taken by the police may not simply be characterised, as suggested by Mr Mavhinga, as an unfocused action against touts and innocent people.

200. Whatever may have been Chipangano's origins, we consider that the evidence shows it has become an organisation that is intent on self-enrichment (at least of its leaders), at the expense of those working in transport and in the informal economy (such as stallholders), primarily in the high density area of Harare known as Mbare. Despite the crackdown by the army on its activities, we accept that Chipangano may be a cause of difficulty for a person returning or otherwise going to Mbare from the United Kingdom, who is reasonably likely to have to seek employment of such a kind as to encounter Chipangano "touts", or the like. However, we do not consider that any such difficulties can be said as a general matter to have any actual or imputed political element, in the sense that Chipangano will be hostile to the person in question because he or she is viewed as having a particular political affiliation. In particular, there is no credible evidence to show a reasonable likelihood that Chipangano will impose on the person a political loyalty test or challenge.

201. These are our findings, based on the evidence before us, which the parties did not suggest was comprehensive. Pending any new Zimbabwe Country

Guidance case, judges may wish to have regard to these findings and the evidence underpinning them, but will need to make fact-sensitive findings of their own. So, for instance, if it is being asserted that a person could relocate to Mbare or other areas where the evidence established high levels of Chipangano activity, it will be necessary to consider whether any difficulties posed by Chipangano would, on their own or cumulatively, make such relocation unreasonable in Januzi terms.

(d) Returnees to Zimbabwe

202. As we have already made clear, we are not purporting in this determination to give any new Country Guidance regarding risk at the point of return in Zimbabwe; namely, Harare Airport. The Country Guidance on that topic remains HS. Nevertheless, like any other fact-finding Tribunal we have a duty under Practice Direction 12 to follow that Country Guidance only to the extent that (inter alia) the evidence before us is the same or similar to that which was before the Tribunal in HS.

203. In this regard, the Tribunal now has the significant advantage of Ms Scruton's evidence of what has been happening since EM was promulgated. Mr Henderson cautions us that the criteria selected for return were generally those who could be removed applying the RN guidance, rather than despite it. But, even if it were the case that none of the returnees had any pro-MDC sympathies, which we rather doubt, the point is that the evidence as a whole reveals no case of scrutiny for loyalty at the airport. Ms Scruton's evidence ends where the returnee leaves the airport terminal; but nowhere in any of the evidence before us is there any indication that there are roadblocks en route from the airport to Harare or Bulawayo, where checks are made on sympathies, to the peril of those who cannot honestly proclaim support for ZANU-PF. We note that Mr Mavhinga said he thought returnees would be subject to such checks but, when pressed, he could not give any example known to him of it happening at the present time or since 2009. His video evidence was the high point of people being invited to apply for ZANU-PF cards, but this was an assembly, not a road block and, from what we heard and saw, there was no menace of threats of violence.

204. As the guidance in EM states, and as aspects of the evidence confirm, the position in certain rural areas may be different, albeit that the test of loyalty may arise otherwise than at a roadblock, following curiosity about the returnee, but we are primarily concerned with whether there is a widespread and generic risk, as there was assessed to be in RN. In 2012 as in 2011, we are completely satisfied that this is not the position and durably not the position.

205. To return to the position at the point of return of the airport, we are fully satisfied that the fresh evidence completely fails to disclose any change in

the position as described in HS, as tending to suggest any heightened scrutiny of returnees. On the contrary, the evidence of Ms Scruton, together with that of the 7 returnees who featured in the 2010 FFM Report, clearly shows no justification for regarding low level MDC supporters as the sort of activists, who the HS Tribunal thought likely to fall foul of the CIO. We will address this issue later, when considering the facts of the appellant's case. But it would be wrong not to observe here that there is no evidence to show the CIO are, for example, likely to detain at the airport and torture a person for having attended a MDC branch meeting in the United Kingdom.

(e) Bulawayo and the Matabeleland provinces

206. Appellant CM is not from Matabeleland and no one is suggesting that he could or should go there, following any return to Zimbabwe. Nevertheless, the position of Bulawayo and Matabeleland was touched in the evidence and it is therefore convenient to say something about them, by way of country information.

207. In EM, the Tribunal found that, in general, a returnee from the United Kingdom to rural Matabeleland North or South was highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee was a member or supporter of the MDC. The position was, accordingly, different from the rural Eastern provinces, where certain returnees were still reasonably likely to face a loyalty challenge from ZANU-PF elements. A returnee to Bulawayo would in general not suffer the adverse attention of ZANU-PF etc, even if he or she had a significant MDC profile. By contrast, such a profile could put a person at risk in Harare. That was the Country Guidance as at January 2011 and, as we have held, that Guidance was sound, as at that time.

208. Professor Ranger's view that the security and humanitarian situation in Bulawayo has seriously deteriorated since he gave evidence in EM is lacking in detail and, in any event, is not supported by other evidence. (W77's view that current violence "includes areas of Matabeleland" was sourced by only one news report of January 2012.) Professor Ranger refers to greater police presence and tensions in the townships, neither of which are necessarily indicative of ZANU-PF politically motivated human rights violations. Indeed, the ZPP reports show extremely low numbers of such violations in Matabeleland and in Bulawayo. For instance, no aid related violations were recorded in Bulawayo or Matabeleland South in June 2012 and only one in Matabeleland North. Overall PMVs in September 2012 totalled 2 in Bulawayo, 0 in Matabeleland North and 5 in Matabeleland South. W77's evidence was, likewise, unpersuasive on this subject. Mr Mavhinga's statement that he would not describe Bulawayo as a "safe place" was vague. His view that Shona facing problems elsewhere would not relocate to Bulawayo is in line with the Country Guidance in EM, which

held that such relocation "may be negated by discrimination" on the part of the Ndebele towards the Shona.

209. In conclusion, on the fresh evidence before us, there is no justification for regarding the position in Matabeleland North and South and Bulawayo as being any different in late 2012 than it was in January 2011.

Effect of fresh evidence on Country Guidance in EM, regarding the position in January 2011

210. At the beginning of this section (paragraph 167 above), we indicated that it would be necessary to analyse the fresh evidence in order to see whether it has any effect on the position in Zimbabwe as at January 2011: ie whether the Country Guidance in EM requires amendment in that respect. Having done so, we do not consider that it does.

211. In every respect save one, it is quite evident that, if anything, the fresh evidence underscores the soundness of that Country Guidance, so far as the evidence can be said to bear on circumstances in early 2011. The one issue that does require more comment is in relation to the position in high density areas of Harare. As we have seen, in EM the Tribunal found that, despite the disturbances that had taken place in January 2011, it was in general not the case that significant problems would be faced by those without a significant MDC profile, or who would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF.

212. We have already concluded that there is nothing in the newly disclosed FCO materials that causes this aspect of the EM Country Guidance to be amended. The evidence described in Schedule B, regarding incidents in Harare in February and March 2011, might have a degree of relationship with the events in late January 2011; but, even so, we do not find that the material calls for any revision of the overall findings regarding Harare in EM, including the high density areas. Looking at the position nationally (and so including the rural Eastern provinces, where EM found a continuing generalised real risk), the FCO Human Rights report 2011 concluded that

> "Following a worrying rise in political violence and intimidation at the start of the year, Zimbabwe's human rights situation by the end of 2011 had returned to the relative stability experienced in 2011 (COIS, July 2012, 14.69)."

The report described the early spate of politically motivated human rights abuses as targeting "political and civil society groups". No mention is made of loyalty challenges or the like being applied to the general population. In its March 2012 report, the ZPP, whilst noting the rise in PMVs that month, said that "compared to the same period [January to March in 2008, 2009, 2010 and 2011] the levels seen so far are still lower than in previous periods" (14.56). It is also noteworthy that Ms Mukoko of the ZPP refers to a rise in what she describes as militia activity in Harare since the beginning of 2012 (Appendix B paragraph 39). Insofar as she

may have been referring to the activities of Chipangano, we refer to what we have found at paragraphs 196-201 above.

213. Having regard to all the material and, in particular, taking a holistic view of the relevant evidence both in the new (disclosure) materials and the fresh evidence, we do not consider that the EM Country Guidance regarding the position in Harare requires to be amended.

214. The position we have therefore reached is that there is nothing in either the materials belatedly disclosed by the respondent (Issue 1 above) or in the fresh evidence (Issue 4) that requires the Country Guidance in EM to be modified. There is, however, a modification which we consider it appropriate to make, which does not flow from either of these strands of evidence. Rather, it arises in the light of the judgments of the Supreme Court in RT (Zimbabwe) [2012] UKSC 38. The guidance in EM was given in the light of the Court of Appeal judgments in RT (see [267(2) of EM), which were upheld in the Supreme Court. However, for the avoidance of doubt, at [267(5)] the reference to a person facing significant problems in Harare if he or she "would … engage in political activities likely to attract the adverse attention of ZANU-PF" needs to be read as encompassing a reference to a person who would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF.

215. It is therefore convenient at this point to set out (i) the Country Guidance in EM, as so modified; and (ii) a summary of the country information on Zimbabwe as at October 2012.

(i) Country Guidance in EM, as modified

(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.

(ii) Summary of the country information on Zimbabwe as at October 2012

216. We reiterate that what we have to say in this regard is not Country Guidance. The picture presented by the fresh evidence as to the general position of Zimbabwe as at October 2012 does not differ in any material respect from the Country Guidance in EM. Elections are due to be held in 2013; but it is unclear when. 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. On the contrary, the absence of reliable evidence of risk at Harare Airport means that there is no justification for extending the scope of who might be regarded by the CIO as an MDC activist.

Deciding CM's appeal

217. Having made findings as to the status of EM and as to the current general position in Zimbabwe, it is necessary to consider whether CM is entitled to international protection. A summary of his evidence begins at paragraph 209 of Appendix 2 and the transcript which begins at page 41 of Appendix C sets out what he said at the hearing.

The respondent's submissions

218. Mr Thomann's submissions can be summarised as follows:-

(i) It remains the position that CM has accommodation available in what his own evidence indicates is a sought-after suburb of Hatfield.

(ii) As a returnee to, at worst, a medium density suburb of Harare, he would not be at risk of persecution or serious harm. Mr Mavhinga conceded that he is not aware of a single incident in low or medium density parts of the city and this picture is consistent with Professor Ranger's evidence in October 2011, summarised at paragraph 128 of EM (and see also paragraph 100 of EM, the evidence of Witness 77). There is no reported evidence suggesting that areas such as Hatfield can be compared to townships, let alone Mbare, in respect of security.

(iii) CM has not provided updating evidence casting doubt on the EM Tribunal's finding that health issues he has mentioned do not preclude him from working, if need be in the informal sector. The updated evidence regarding the security position in Harare does not show that CM will be at risk on return.

(iv) The assessment of risk to CM proceeded on the basis of a preserved finding that any political profile he had in Zimbabwe was "of the lowest level", as found by the Tribunal in EM. He claimed to be politically active in the UK but waited some two years before joining the MDC here and the minutes provided at meetings at his local branch showed that his record of attendance was irregular and characterised by a conspicuous lack of activity.

(v) The Tribunal had previously noted that his return would be to a low or medium density suburb and that even in the unlikely event of his returning to a high density suburb, there was no real risk of his being subjected to a loyalty test ([295-296] of EM). CM's case in October 2012 is that he would be at risk on return as he intends to relocate to join his brother in Karoi, Mashonaland West. He claims he would

there be at risk of having to demonstrate loyalty to ZANU-PF or attend ZANU-PF meetings. In fact he would not have to relocate to Karoi, Mashonaland West.

(vi) He claims that he needed to move to Karoi by reason of his fear of persecution, linked to his profile in Hatfield as an MDC activist and his claim that even in a low or medium density area he would be randomly at risk, even absent profile, of subjection to a requirement to demonstrate loyalty.

(vii) He states he would be without means in Hatfield and his house there was dilapidated. He also relies upon his medical condition as well as his age and the state of the economy. He had been previously economically active in Harare and his reason for the failure of a business set up with his son, D, of the business premises being destroyed by politically motivated persons, was not accepted by the Tribunal.

(viii) CM claims also to be at risk of targeted at the airport as a known MDC activist of interest to the security services. There is no real prospect that any CIO agent infiltrating CM's local branch would report him as someone worthy of intensive interest. The letter of support from W83 of 20th September 2012 does not detract from this assessment; nor does the oral evidence of CM and W83. CM would not be at risk on arrival at the airport or en route to Hatfield and would face no real risk that he would have to demonstrate his loyalty to ZANU-PF.

(ix) The updated evidence does not show that his medical condition would put him at risk, drugs being available in Harare to treat his ill-health. CM remains capable of economic activity, and has previously held well paid employment. He might have to resort to the informal sector. He has a house available in a low or medium density suburb and the updated evidence does not cast doubt on the Tribunal's earlier assessment that he would not be at risk by reason of his claimed former role as an MDC organising secretary at local level.

(x) CM had changed his evidence regarding the enquiries he made of his aunt, in the light of the respondent's case that CM could rely on the prospect of support from this relative. CM had failed to show a real risk in Hatfield.

The appellant's submissions

219. Mr Henderson submitted that, prior to leaving Zimbabwe, CM had lived in Hatfield, Harare. When he left Zimbabwe his adult children from his first marriage and his second wife and youngest child were all living in Harare. CM has a son living in the United Kingdom. His four oldest children were living in Hatfield, Southerton and Westgate suburbs in Harare. He claimed to be organising secretary in his local MDC branch in Hatfield, a claim

rejected by the Designated Immigration Judge who heard his appeal in October 2009. The preserved findings made by the first judge included his acceptance that CM had been involved in his local branch of the MDC, albeit not to the extent claimed. CM therefore had a connection with the MDC whilst in Zimbabwe and had been involved with the MDC in this country, through his connection with the local branch.

220. When the appeal returned to the Upper Tribunal, CM adduced further evidence including local party minutes and screen prints of photographs of MDC meetings posted on Flickr, in which he could be seen. That evidence was clearly material and important. A letter from the MDC, attached to CM's witness statement and dated 20th September 2012, further confirmed his connection with the party. CM's further witness statement provided the Tribunal with current evidence of his family's circumstances in Zimbabwe.

221. The house where CM had been living in Hatfield lies empty and dilapidated and his second wife and one of his sons have gone to live in Malawi. His four children in Zimbabwe live away from Harare and in difficult circumstances so that they would be unable to support him. CM fears return to Hatfield, where he had been known as a long-term resident, as he was opposed to ZANU-PF, had been a member of the MDC there and in view of the location of Hatfield, close to Epworth. The evidence shows that Hatfield is a medium density area, as the article attached to the appellant's witness statement confirms ("Shanty Town Menace Haunts Harare").

222. According to Mr Henderson, the risk to CM on return arises in two ways: first, because of the risk of adverse identification at Harare Airport. CM has been involved with the MDC via involvement at his local UK party branch and that connection, at the very least, is a matter of public record and a source of possible adverse identification. W83 had given evidence of CM's MDC activities. A photograph showing CM appeared on the MDC website. Secondly, and on the accepted evidence, CM is not only non-aligned with ZANU-PF and opposed to it, but a supporter and member of the MDC. He was a local activist in Zimbabwe, engaged in fundraising activities and likely to be of interest to ZANU-PF and the CIO, particularly with the elections being imminent. There was a real risk of intrusive questioning at the airport in Harare. Even if he were able to pass through the airport, he would be at risk in Hatfield.

223. CM cannot be expected to dissemble and to falsely profess a political alignment that he does not hold: RT [2012] UKSC 38. In this regard, CM's evidence is that he would go to live with his brother in a high density area of the town of Karoi in Mashonaland West, where there was a real risk that he would have to attend ZANU-PF meetings, although he did not wish to do so.

224. If CM were to remain in Harare, his home area of Hatfield is a medium density suburb. CM would be returning as a man in his sixties and in all likelihood would have to rely on the informal economy. His house was not habitable and he might be forced to seek shelter in a shack.

225. In summary, CM was a refugee in the light of HS and RT.

The appellant's further oral submissions

226. At the hearing on 5 October, Mr Henderson additionally submitted as follows:

(i) CM's risk arose in consequence of his low profile in the MDC in Zimbabwe and his activities at his local branch here in the United Kingdom. W83 had given evidence of CM's activities. A photograph showing CM appeared on the MDC website.

(ii) CM was a local activist engaged in fundraising activities and likely to be of interest to ZANU-PF and the CIO, particularly with the elections being imminent. There was a real risk of intrusive questioning at the airport in Harare. Even if he were able to pass through the airport, he would be at risk in Hatfield.

(iii) There was an existing finding regarding his MDC activities there. Hatfield is a medium density suburb. The problems regarding CM's house were reiterated.

(iv) The Secretary of State speculated that CM might receive help from his aunt. In the light of all of this, CM would relocate to be with his brother but he would face problems in Karoi, where there was a real risk that he would have to attend ZANU-PF meetings although he did not wish to do so. CM's brother lived in a high density area in Mashonaland West.

(v) In summary, CM was a refugee in the light of HS and RT.

The Tribunal's findings on CM

227. We will start with CM's own evidence, although we stress that we have taken into account the background country evidence in assessing his credibility.

228. We found CM to be a very unimpressive witness in the evidence he gave to us. He was evasive, lacking in telling detail and inconsistent about such details as he did provide. We were left with a strong impression that he was inventing aspects of his evidence as he went along to support the case he was endeavouring to make.

229. We were equally unimpressed by his attempts to present himself as an MDC activist in his local United Kingdom branch, despite the previous findings of the AIT judge and the assessment in EM (as to which no arguable error of law has been identified). The materials show that he does continue to participate in branch activities but, having regard to our assessment of his oral evidence as a whole, we conclude that this reliance is part of a deliberate attempt to redress previous negative findings and induce us to change our assessment of his personal status. It does nothing to show a real risk that he would be regarded as worthy of hostile interest on or after return.

230. We consider it improbable in the extreme that, if CM was the MDC activist he claimed to be, that he would contemplate moving to a ZANU-PF stronghold to be with his son. This significant shift in his likely place of residence on return to Zimbabwe appears to be an attempt to fit into the class of risk identified in the Supreme Court decision of RT (Zimbabwe).

231. His attempt to use the opportunity presented by the remittal of this appeal to make out a serious Article 8 case for the first time is equally unconvincing. Whilst we recognise that he has been in the UK for a number of years, as this protracted appeal has gone through the various levels of decision making, he has never had any claim to remain here other than for alleged reasons of international protection and, by contrast with JG in the EM group of appellants, CM has not been responsible for small children growing up in the United Kingdom, as the years pass by. Whatever his state of health, future employment prospects or the state of disrepair of his house, they do not amount to reason to remain in the United Kingdom. We would be reluctant to take at face value anything CM tells us about his personal circumstances that is unsupported by reliable independent evidence.

232. Despite the evidence of W83, we were wholly un-persuaded that CM is now or would be on return of interest to the Zimbabwe CIO or other State security services. There is no reliable reason to believe that he would be interrogated about MDC activities at the airport and fall within one of the risk categories in HS. If the web-based information regarding CM had come to anyone's attention at all, which we doubt, it would not lead to a risk of ill-treatment for that reason alone. In the light of the preserved assessment of absence of any significant MDC activities in Zimbabwe, we do not consider that there is any real risk that he would be assessed as an activist on return or would genuinely wish to engage in such activism. We do not find any reason to change the previous findings regarding CM's assertion of activism whilst in Zimbabwe (EM [290]).

233. Accordingly, his case for international protection depends on the generic risk to any low level MDC supporter who is returned to Harare at the time of the promulgation of this decision. Applying the conclusions we have set out earlier regarding the status of EM and having regard to the fresh

evidence concerning the general position as at October 2012 (which is the latest we have) and our findings thereon at paragraph 216 above, it is manifest that CM's claim fails.

234. Whether Hatfield is regarded as a low or as a medium density suburb of Harare, it is certainly not a high density one and it is not a place where there is any reliable evidence of significant Chipangano activity or any other malign presence that could properly be said to give rise to a real risk of CM's facing a RN-style loyalty challenge. There is no credible evidence that CM would be forced through economic necessity to seek work outside Hatfield, so as to come into contact with Chipangano. His true economic position is unclear, as a result of his propensity to say whatever he thinks might best serve his aim of staying in the United Kingdom, come what may; but he cannot properly use that lack of clarity to his advantage. Even if he in truth lacks means, he has a property in Zimbabwe, which he has not shown to be uninhabitable. He has a means of support from his aunt, as well as the prospect of financial help from the United Kingdom government's returns programme. He has worked as a small businessman (EM [295]). Neither his age nor his health suggests that he would lack means of support.

235. In conclusion, CM has failed to show a reasonable likelihood that, if returned to Zimbabwe, he would suffer persecution or other serious ill-treatment. His Article 8 case is hopeless. He has no protected family life here. Whilst he has a protected private life, this remains exiguous (EM [297]). He has the usual medical conditions to be expected with late middle age. No case has been advanced that it would, in the circumstances, be disproportionate to remove him, given the United Kingdom's interests in maintaining immigration controls.

General conclusions

236. As can be seen, the appeal of CM is a simple one that by itself would not merit the degree of analysis that preceded our conclusions: he has no profile making him of interest to the authorities on arrival at Harare Airport. There is no reason to believe that he will be stopped and interrogated on his journey from the airport to Harare. He has lived and retains premises in a low or medium density suburb of Harare where gang activity is not endemic. The house may be in need of some repair but CM has family who are potentially able to help him and asylum or subsidiary protection is not extended according to the degree of repair work needed on leaky roofs.

237. We have addressed each of the issues left undecided by the Court of Appeal in this case and have concluded that none alone or together undermines the guidance we reached on a more extensive examination of risk in Zimbabwe that we undertook in 2010-11 than we have in 2012. Although the fresh evidence that we have received demonstrates that there is a need for caution in respect of gang related

activity with respect to some at least of the high density areas of Harare, and no one can rule out a resumption of some politically motivated violence when elections are called, there is no inevitability or even probability that elections will see a complete repetition of the actions taken in 2008.

238. A Country Guidance case is designed to be a fair and efficient way of assessing evidence relating to country conditions, so the exhaustive process is not unnecessarily repeated at different hearing centres throughout the country, and so that the inferences to be drawn from the available data are consistent and legal having regard to the anxious scrutiny given to cases where there is a reasonable possibility of risk. A Country Guidance case is not a straitjacket and if conditions deteriorate in a manner that affects the previous assessment a First-tier judge is able to act on the fresh evidence and we would expect an OGN or COIS report to speedily note developments. In such circumstances the Tribunal can convene a fresh Country Guidance case to alert judges and other stakeholders of the changes in position as soon as practicable.

239. The present appeal has been outstanding for some years. The process of disclosure and evaluation of PII claims has been laborious and costly in terms of resources for both the government departments concerned and the workload of the Tribunal. In the event we have concluded that the disputed material did not paint a materially different picture from the material that we had received. We accept that the material should have been before us in 2010 and early 2011 given the particular history of this case, but in general the duty to act fairly by not misleading and its concomitant duty not to maintain an uncritical assessment of the absence of risk where there is material known to the respondent or ought to have been known to her that requires a different assessment to be made, ensures that appeals are conducted fairly.

240. Where exceptionally, further material is needed the judge can assess that claim in the exercise of case management powers. This will be a departure from the normal run of cases, and neither the directions we made in 2010 nor the appointment of the PII advocate that we sought in 2012 should be seen as the norm for asylum appeals or Country Guidance appeals. Indeed we doubt whether the overriding objective of dealing with a case fairly and justly set out in rule 2 of the Upper Tribunal Rules has been advanced by what has occurred in this case, with the consequent considerable cost to public funds of the disclosure exercise and the associated delay in finally determining this appeal.[2]

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[2] 2)Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Upper Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

241. We have all contributed to this determination.

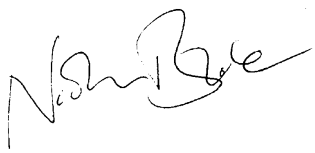
Decision

We re-make the decision in the case of CM by dismissing his appeal on asylum and human rights grounds. He is not entitled to the grant of humanitarian protection.

Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008), we continue the anonymity order in respect of CM.

Signed



The Hon Mr Justice Blake

Chamber President

Date 31 January 2013

APPENDIX A

EXTRACTS FROM RN (RETURNEES) ZIMBABWE CG [2008] UKAIT 00083 AND EM AND OTHERS (RETURNEES) ZIMBABWE CG [2011] UKUT 00098 (IAC)

PART 1

EXTRACTS FROM RN (RETURNEES) ZIMBAWE CG [2008] UKAIT 00083

121. The argument that those returned to Zimbabwe after having made an unsuccessful claim for asylum in the United Kingdom would be regarded as spies or saboteurs sent to destabilise the country, often called "Blair's spies", was considered by the Tribunal in HS and rejected as being unfounded. The CIO, being the organisation who would assess returnees, was described as a sophisticated organisation of professional intelligence officers. They acted on the basis of intelligence obtained not least from the extensive investment the regime had made in infiltrating the MDC in the United Kingdom. Such professional intelligence officers would not believe that the United Kingdom, if minded to send spies to Zimbabwe, would do so in a category of those returning who were bound to attract attention, unlike ordinary travellers who would pass through the airport unhindered.

122. But the answer to that reasoning is now found in the final paragraph of the extract from the evidence of W2 set out above. It is no longer the professional security staff at Harare airport who are the main concern for returnees. It is the ill-disciplined, irrational and unpredictably violent militias to be confronted upon return to the home area.

123. In our view, the evidence indicates that those groups act with unprecedented brutality towards a broad range of people on the basis of suspicions of disloyalty and that they have been indoctrinated to believe that the United Kingdom, and those associated with it, are the source of Zimbabwe's problems today. It is plainly the case that the Zimbabwean community in the United Kingdom is an area of solid support for the MDC. It would, in our view, be naive to assume that those tasked with eliminating potential support for the MDC in Zimbabwe would not be aware of that. There is a large body of evidence that membership of a community perceived to support the MDC is sufficient to mark a person out for violent harassment or worse treatment. It is not hard to see how anyone returning from the United Kingdom would be associated with the hysterical propaganda that continues to be peddled to these various groups or militias who appear to be acting with impunity.

...

166. We do not find surprising that the presence of Zanu-PF youth groups has declined in the more wealthy suburbs of Harare. Those are unlikely to be areas within which much support would be found for the MDC. We have seen evidence of the "high walls" behind which people live in these suburbs, an expression which, as we understand it, extends beyond the protection of bricks and mortar so as to involve also security measures that are not available outside such areas. On the other hand, it is difficult to see how a confident view can be expressed concerning declining levels of violence within areas to which access has been restricted by those who are said to be responsible for that violence.

…

183. Despite the doubts and reservations expressed after the signing of the Memorandum of Understanding, the talks that took place between Mr Mugabe and the opposition did result in what has been described as a power sharing agreement. Understandably, this was met with high expectations for resolution of the problems that have beset Zimbabwe. After all, if that agreement eventually leads to the establishment of a government of national unity, with the MDC playing a full role as an equal partner in the government of Zimbabwe, it would be difficult to see how its supporters could be at any continuation of risk. Further, the establishment of such a government, with Mr Tsvangirai as Prime Minister, would unlock access to huge monetary and other aid that is needed to start the process of rebuilding Zimbabwe's shattered economy and so improving living conditions for ordinary citizens.

184. As we have mentioned, at the resumed hearing on 30th October there were two further sources of evidence upon which both representatives made submissions. There was a collection of news reports about the power sharing agreement and a number of reports of interviews conducted by Embassy staff in Harare with organisations said to be able to comment upon the situation "on the ground" consequent to the signing of that agreement on 15th September 2008. We deal first with the news reports.

…

190. On 24th September a Voice of America news item reported that:

> "Political violence is on the rise again in Zimbabwe despite the signature less than two weeks ago of an agreement to establish a unity government in which power would be shared by the long ruling ZANU-PF party of President Robert Mugabe and the Movement for Democratic Change, now in majority in Parliament, MDC officials said.
>
> …
>
> Some of that violence has been taking place in Mbare, a populous Harare suburb where according to MDC sources some 61 families were attacked by ZANU-PF militia members in full view of police at the Matapi station, who took no action.
>
> …
>
> Witnesses said two truckloads of ZANU-PF militia including the notorious Chipango gang associated with ZANU-PF invaded the police station singing

songs denouncing the MDC and beating party members while the police passively looked on."

And in an Independent on line report of 25th September a spokesperson for the National Constitutional Assembly, a forum for trades unions, NGOs and church organisations, said that he feared that the power sharing agreement was designed simply to absorb the MDC rather than to share power with it:

"We will be happy if it fails. The people were running Mugabe's torture camps in the June election are now the same ones who are explaining the agreement to people in the rural areas.

"They are saying it gobbles the MDC up into Zanu-PF," he added.

…

MDC spokesperson Nelson Chamisa said on Wednesday night political violence was continuing in some parts of the country. He gave details of three separate incidents, and added that no arrests had been made despite reports to the police. "Zanu-PF torture bases are still operational in Mbare and other parts of the country, but the police are not doing anything to dismantle them."

…

195. It can be seen from this material that Mr Mugabe and his supporters appear determined to retain control of the instruments used previously to deliver the "right" result at any future elections. And the recent news reports indicate that such elections may well be in contemplation. This is for two reasons. First there are now six vacant seats in Parliament. There is said to be provision in the power sharing agreement for continuity in that where a by-election is necessary only the party holding the seat that becomes vacant would put up a candidate. But even if that provision were honoured, it would apply to only three of the six seats and, in view of the very slim majority that is presently held by the combined MDC factions when voting together it is not hard to see the importance of any such elections.

196. Secondly, as it has become increasingly clear that the power sharing agreement is unable on its own to produce a national unity government acceptable to all concerned there have been calls for fresh elections generally. We refer to a BBC report headed "MDC seeks new election" published on 21st October:

"New polls are "the only way forward", Movement for Democratic change spokesman Nelson Chamisa told the BBC.

Neighbouring Botswana has also called for new elections, after a regional summit on Zimbabwe was postponed.

…

At a summit in Swaziland to discuss the deadlocked power-sharing agreement was postponed for a week after the MDC insisted that its leader Morgan Tsvangirai be granted a passport."

197. Drawing all this together, considered in the context of the evidence as a whole, we conclude that the agreement signed on 15th September in Harare has not resulted in the Mugabe regime ceding any real power to the MDC.

198. Of course it always remains possible that the worsening chaos of the Zimbabwean economy and the pressure from the international community, which stands ready to pump massive aid into the country but not until there is real change, will bring about just that. But we have to reach our conclusions upon the basis of the evidence that is available to us. That evidence leads us to find that the power sharing agreement signed on 15th September has not resulted in any significant change in the political situation in Zimbabwe and that the real intention of the regime appears to be to claw back control of parliament and to retain the presidency by keeping in place and by continuing to exercise the militias and party machinery that were deployed following the March elections.

…

202. It is correct to say that the level of reported human rights violations has reduced since the height of the violence during the period leading up to and immediately after the run off vote. But the militias and Zanu–PF groups, encouraged by state agents, have sealed off the areas in which the have focused their attentions and we are satisfied that has been done specifically to prevent access by those who would report such events. It is also correct to say that the absolute ban upon NGOs' food relief programs has been lifted but it is clear also that these organisations do not in general have anything approaching the freedom they need to carry out these aid operations as they would wish. There is evidence before us that one reason for limiting the scope of these aid operations is to restrict access to areas in which abuses continue to be perpetrated by those seeking to maintain the current regime in power.

203. Turning to the interview summaries themselves, we find there further evidence to support, rather than to diminish, the concerns we have expressed above. Some of the interview summaries express more positive assessments than others but they include the following:

The European Commission:

> "Currently there are very few (if any) gross violations of human rights in terms of assaults, murders etc but the threat of repetition of this violence remains. Perpetrators are still deployed to rural areas and there is an atmosphere of fear, intimidation and mistrust."
>
> "The police …. Have not generally taken steps to protect victims… In some cases the police have been perpetrators themselves."
>
> "… It is likely to be very difficult for [voluntary returnees from the United Kingdom] to return to their communities, particularly in the rural areas. The environment remains quite tense, and there is likely to be suspicion about returnees' political affiliation. It is likely that they would find it harder than others to get access to food and services."

Zimbabwe Human Rights NGO Forum:

"the police are not doing anything to protect the victims and have even been perpetrators themselves.

We have regular reports of discrimination on the part of the government in distributing aid.

Returnees would come back to a situation of uncertainty, economic disaster, hunger and poverty. They would not be able to rely on social or health or education services, unless they could afford to go privately. The local authorities are likely to be suspicious of them, just by the fact of having been to the UK. They might well be labelled sell-outs or MDC supporters. They would be disadvantaged if they tried to get access to GMB food, land or BACOSSI distributions. In certain areas, depending on the profile/activism of the returnee and the local presence of Zanu-PF supporters/youth militia, they might be at risk of physical harm. Returning to urban areas is probably safer than to rural areas. It is hard to predict how the central authorities would react - some returnees might be welcomed back to prove that the government is reformed and ready to welcome back its citizens. Others might be arrested."

Zimbabwe Lawyers for Human Rights:

"Overtly, there has been a reduction in the level of violence compared to the electoral period, but this might give a false picture because many of the internally displaced people have not yet returned home. In addition, the structures of state control remain in place. After the signing of the deal there was an easing of the situation but in the last couple of weeks, we have seen authorities returning to their usual attitudes and behaviour."

Witness 4 of Source D:

"There are signs of hate speech starting again e.g. over sanctions and MDC being puppets of the West. And in rural areas things are still tense. The deal has not changed realities on the ground. Some of the celebrations over the signing of the power-sharing agreement were broken up. People are still fearful and suspicious, and afraid of retribution if they show support for MDC. An MDC event in Makoni to explain what was happening was disrupted by soldiers, who wanted to make people attend a rival ZANU-PF meeting."

Source R:

"[Source R] continues to get reports of beatings and torture of MDC supporters around the country e.g. 15 people were treated in Buhera, Manicaland on 1 October. Structures of control and intimidation are still in place (made up of army, war vets, CIO and rogue elements of the police) but the bases/structures are more active in some places than others. In some areas, the ZANU PF activists are telling the MDC to forget the agreement, as it will not be implemented. In addition there is a purge exercise going on among ZANU PF local structures to ensure only Mugabe loyalists attend the Congress in December."

...

216. This campaign has been rolled out across the country not by disciplined state forces but by the loose collection of undisciplined militias who have delivered a quite astonishingly brutal wave of violence to whole communities thought to bear responsibility for the "wrong" outcome of the March 2008 poll. It is precisely because of that that any attempt to target specifically those who have chosen to involve themselves with the MDC has been abandoned. In our view there can be no doubt at all from the evidence now before the Tribunal that those at risk are not simply those who are seen to be supporters of the MDC but anyone who cannot demonstrate positive support for Zanu-PF or alignment with the regime.

217. We are reinforced in that conclusion by the reports that even some Zanu-PF supporters have suffered beatings when confronted by the militias and when they have been unable to demonstrate their loyalty.

218. The evidence demonstrates also, in our view clearly and without ambiguity, that the aim of the violence was not limited to delivering for Mr Mugabe victory in the run-off vote, but to ensure that the MDC support base was sufficiently dismantled as to ensure that it ceased to exist in any meaningful way as to remain a threat to Zanu-PF's hold on power. That explains why, notwithstanding the talks taking place following the Memorandum of Understanding and the fact that the elections are, for now at least, concluded, the violence continues. Although this violence is not at the levels seen during the summer of this year, everything remains in place for it to be repeated, should the regime deem this necessary.

219. We are satisfied also that the militias have established no go areas and road blocks to ensure that abuses that continue in rural areas where the MDC had made inroads into the Zanu-PF vote go unreported wherever possible and so that displaced people are not allowed to return to their home areas.

220. For these reasons we do not see that there can be said to be an end in sight to the real risk of violence being perpetrated on those identified as disloyal to the regime and therefore as potential supporters of the MDC.

221. As we have seen, by the time the hearing was reconvened on 30th October such a power sharing agreement had been reached but, for the reasons given above, that has not led us to a different conclusion from that we reached at the conclusion of the first part of the hearing when we initially reserved our decision.

222. Even though a form of agreement has now been reached in these talks, it remains to be seen whether that will bring about any reduction in the level of risk to those not able to demonstrate loyalty to Zanu-PF. After all, the Memorandum of Understanding that was signed by Mr Mugabe on behalf of his party and the regime contained assurances about the cessation of politically related violence but that has not been delivered. It is not readily apparent how the militias and War Veterans who have been meting out violence would be disbanded without genuine commitment by Mr Mugabe and his senior supporters to the sharing of power. It is evident from the failure to implement the power sharing agreement that no such intention presently exists.

223. For these reasons we are not satisfied that the power sharing agreement has given rise in itself to any significant change on the ground in Zimbabwe, so far as international protection issues are concerned. There is, moreover, no evidence to show that, in the absence of more effective foreign political or other political pressure, the position is likely to change spontaneously.

…

226. That risk arises throughout the country, in both urban and rural areas. A person may be faced with the need to demonstrate such loyalty to the ruling party in varying circumstances. The youth militias, "War Veterans" and other groups put together under the direction of the state authorities have established camps or bases throughout the country from which they operate. Although the evidence suggests that some of those camps or bases have closed down after the run off vote in July of this year it is plain that many remain and that they are to be found throughout the country in both rural and urban areas. Ordinary Zimbabwean citizens may encounter these groups at road blocks set up to establish no go areas or simply when at home as the militias move into areas thought to harbour MDC support.

227. The means by which loyalty to the regime may be demonstrated will vary depending upon who is demanding it. Production of a Zanu-PF card is likely to suffice where an individual is confronted with such a demand, for example at a road block. But even that may not protect the holder from serious harm in rural areas where the adverse interest is in the community as a whole because the area is one in which the MDC made inroads in the Zanu-PF vote at the March 2008 elections.

228. People living in high density urban areas will face the same risk from marauding gangs of militias or War Veterans as do those living in the rural areas, save that the latter are possibly at greater risk if their area has been designated as a no go area by the militias.

229. The evidence suggests that those living in the more affluent low density urban areas or suburbs are likely to avoid such difficulties, the relative security of their homes and their personal security arrangements being sufficient to keep out speculative visits. Many of those with the means to occupy such residences are in general likely to be associated with the regime and so not a target on the basis of doubted loyalty. Others may enjoy such a lifestyle as a result of a more circumspect relationship with the regime falling short of actual association, but which is, nevertheless, such as to give the appearance of loyalty.

…

258. The evidence establishes clearly that those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the Country Guidance in HS is no longer to be followed.

259. The fact of having lived in the United Kingdom for a significant period of time and of having made an unsuccessful asylum claim are both matters capable of giving rise to an enhanced risk because, subject to what we have said at paragraph 242 to 246 above, such a person is in general reasonably likely to be assumed to be a supporter of the MDC and so, therefore, someone who is unlikely to vote for or support the ruling party, unless he is able to demonstrate the loyalty to Zanu-PF or other alignment with the regime that would negate such an assumption.

260. The attempt by the regime to identify and suppress its opponents has moved from the individual to the collective. Thus, a person who returns to a home in an area where the MDC made inroads into the Zanu-PF vote at this year's elections faces an enhanced risk as whole communities are being punished for the outcome in an attempt to change the political landscape for the future and to eliminate the MDC support base.

261. There is clear evidence also that teachers in Zimbabwe have, once again, become targets for persecution in Zimbabwe. This is confirmed by the evidence of Professor Ranger considered at paragraph 96 of this determination and reinforced by the news reports, examples of which are given at paragraphs 130 and 148. As many teachers have fled to avoid retribution, the fact of being a teacher or having been a teacher in the past again is capable of raising an enhanced risk, whether or not a person was a polling officer, because when encountered it will not be known what a particular teacher did or did not do in another area.

262. It is the CIO, and not the undisciplined militias, that remain responsible for monitoring returns to Harare airport. In respect of those returning to the airport there is no evidence that the state authorities have abandoned any attempt to distinguish between those actively involved in support of the MDC or otherwise of adverse interest and those who simply have not demonstrated positive support for or loyalty to Zanu-PF. There is no reason to depart from the assessment made in HS of those who would be identified at the airport of being of sufficient interest to merit further interrogation and so to be at real risk of harm such as to infringe either Convention.

263. Although a power sharing agreement has been signed between Mr Mugabe on behalf of Zanu-PF and Mr Tsvangirai on behalf of the MDC, it is too early to say that will remove the real risk of serious harm we have identified for anyone now returned to Zimbabwe who is not able to demonstrate allegiance to or association with the Zimbabwean regime.

264. Further international intervention or some unforeseen upheaval inside Zimbabwe itself may change the position, for example, by giving the MDC real control of the police. In such an eventuality it will be for judicial fact finders to determine the extent to which the evidence before them differs from that which is before us, pending fresh Country Guidance: see Practice Direction 18.2.

PART 2

EXTRACTS FROM EM AND OTHERS (RETURNEES) ZIMBABWE CG [2011] UKUT 00098 (IAC)

159. In making our findings, we have had particular regard to the activities of the Constitutional Parliamentary Committee (COPAC), which in the summer of 2010 undertook a large number of “outreach” meetings across Zimbabwe, with the aim of gathering the public’s views on the proposed new constitution for that country. It is noteworthy that these meetings were well underway at the time that the civil society interviewees gave their views to the FFM team in August

2010. W66 said in oral evidence that he was sure that those who attended COPAC outreach meetings and had a political profile were at higher risk than those whose profile was low. W77 placed on the debit side of his "balance sheet" the continuing use of youth militia to attack suspected opposition figures and supporters, as well as those speaking out at constitutional outreach meetings (or even attending them). The present violence tended to be focused on the COPAC process. Professor Ranger referred to the violence when COPAC reached Harare, in September 2010, leading to the postponement of the outreach meetings in that city. This had overshadowed the COPAC process in Bulawayo, where the meetings were "violently noisy, if not subject to violence by means of sticks and stones".

160. Professor Ranger agreed that the COPAC process served as the focus for such intimidation and violence as there was at the present time. This chimed with the Peace Project report in appellants' bundle B, dealing with the position in August 2010. The MDC had provided a number of chairmen in the COPAC process, who had initially spoken about it highly. Professor Ranger considered that an ordinary villager would conclude from the activities of ZANU-PF at COPAC outreach meetings, that it was "too dangerous to support the MDC".

161. Anthony Reeler, in his statement, considered that people attending outreach meetings had to say the right things "otherwise they might be assaulted by militia". When COPAC reached Harare, ZANU-PF people had been bussed into the city in order to commit violence. Dewa Mavhinga of Crisis Zimbabwe Coalition, whilst noting that levels of organised violence were lower than during the election period, observed that the COPAC process had brought a wave of violence. The problems in Harare, which had left a person dead, had, he considered, "put to rest the idea that urban areas were safe". For the same reason, W78 had changed his earlier view that urban areas were still relatively safe from organised violence. W79 of the Zimbabwe Human Rights Association thought that, since being interviewed by the FFM team in August, the situation had deteriorated, owing to the COPAC process, with violence inflicted by people bussed in by "certain anti-democratic political parties". W80 of the Zimbabwe Human Rights NGO Forum likewise thought that ZANU-PF had imposed its authority on Harare through organised violence related to the COPAC process.

162. In its July 2010 summary on politically motivated human rights and food-related violations, the Zimbabwe Peace Project considered that villagers suspected of belonging to the MDC-T were being told to "shut up during COPAC processes and also selected ZANU-PF supporters were allowed to speak during the outreach meetings in most rural constituencies across the country". In its August 2010 summary, ZPP noted an upsurge "in the number of intimidation and harassment cases related to the COPAC outreach programme. The highest numbers of violations were recorded in the Manicaland province", which remained "a hotspot of violations". On the other hand, Matabeleland North and South recorded only "minimal cases of violations despite the enthusiasm that has been associated with the constitution making process". In Bulawayo, most cases reported were those of harassment and intimidation. A press report in September 2010 recorded that up to sixteen outreach meetings had been cancelled in Manicaland province because of violence from ZANU-PF supporters.

163. The Radio Africa correspondent in Harare thought that Mugabe and ZANU-PF were using the outreach exercise "not only to test the waters but to remind people just how violent his thugs could be and how far they were willing to go to

get their way". On 7 November, there was a report that at least fifteen resettled farmers near Masvingo had been "severely tortured by ZANU-PF youths … for failure to attend a rally held in Manwenge area". The farmers were "too afraid to go to hospital". On the other hand, a report of 10 November, also from Masvingo, noted that villagers were refusing to pay a levy of two goats per family or a $70 fine for refusing to support ZANU-PF-imposed village heads and that attempts by ZANU-PF to reorganise their party's leadership at grassroots level was facing resistance from villagers who "vowed to challenge the goat levy in the courts". A report of 11 November describes something called "Operation Headless Chicken", described by an anonymous ZANU-PF official as identifying youths and party leaders "who will be trained in beheading people".

164. In the FFM report, ZimRights, whilst noting that the COPAC process had been used by ZANU-PF to trigger violence, was encouraged by the fact that, contrary to expectations, people were happy to speak direct to a video camera, as part of a ZimRights project, and that "they were clearly not afraid". In the rural areas people had not been turning up to COPAC meetings "simply because they don't want to hear from or about ZANU-PF anymore". It would be difficult for ZANU-PF to regain control in areas such as Manicaland. The fact that, in rural areas, villagers were not, as a general matter, coerced into attending COPAC meetings is also borne out by the article of 12 July in the Zimbabwean, concerning the touring play "Waiting for the constitution". The article described people saying that COPAC asked them to gather at certain venues "where they could not go because they were being watched". The people knew they "have power for a "NO" vote if they are prevented from speaking out during the constitutional process". The Research and Advocacy Unit (Anthony Reeler) told the FFM team that now that the constitution making process had begun, political space was closing down dramatically and there were increasing reports of political violence and intimidation. Zimbabwe Lawyers for Human Rights told the team that with the advent of COPAC, violence had surfaced again in a number of provinces and COPAC outreach meetings had had to be cancelled in some areas due to intimidation, disruptions and monitoring.

165. The Counselling Services Unit considered that, although there would still be intimidation as seen in the COPAC process, ZANU-PF would try to suppress large-scale pre and post-election political violence, out of a fear of being indicted by the International Criminal Court. The international organisation interviewed on 12 August, whilst noting that violence was occurring in the outreach process, considered that ZANU-PF "has taken an active decision not to unleash the full force of political violence in relation to the constitutional referendum, not least because to have done so would have infuriated the South Africans during the soccer World Cup". The Zimbabwe Human Rights NGO Forum told the team that the violence linked to the outreach process was "not systematic but such as there is tends to be perpetrated by war vets". Although ordinary people "who say the wrong things at meetings" might be threatened, or worse, higher profile figures were liable to be arrested and, if so, tortured. Otherwise, levels of political violence were low with more emphasis on threats.

166. Although physical violence undoubtedly occurred from time to time during outreach meetings (as to which we have noted the MDC's list of some incidents it said had then occurred, mainly in Mashonaland and Masvingo), it is evident from the evidence as a whole, including the Zimbabwe Peace Project reports, that most of the violations did not involve physical violence. For example the Harare/Bulawayo report – shadowing the outreach process – recorded only 3% of

violations as involving violence, with the majority relating to coaching, political interference and harassment. There were, however, disturbances that were said to have rocked outreach meetings in Mbare, Harare. It was, in our view, significant that the decision was very quickly taken to suspend the outreach meetings in Harare, rather than let the difficulties continue. A further report of the Peace Project described the resumed consultations in Harare on 30 and 31 October 2010, following the September suspensions. The report identified the reason for the suspension as "inter-party violence between supporters of the two main rival parties, ZANU-PF and the MDC-T". The MDC list, to which we have referred, describes a small number of physical assaults, involving MDC members and supporters, at outreach meetings.

167. At the resumed October meetings, COPAC was applauded for deploying police to all outreach venues, albeit that this created "a somewhat intimidating, subdued, sombre and agitated atmosphere". The political mood in October was described as "brittle, temperamental and visibly polarised along party lines". It appears that ZANU-PF, no doubt through the bussing in of supporters, were able to turn many outreach meetings into political rallies. In Harare North there were no reported incidents of political skirmishes or violence, although "hate language" was said to have haunted the proceedings.

168. Despite the problems experienced in Harare during the COPAC activities, it is plain that they were on nowhere near the scale of the 2008 election violence. Unlike reports in respect of certain rural areas, where there is suggestion that villagers may have been threatened or otherwise cajoled to attend meetings, the evidence in respect of Harare does not indicate that (leaving aside ZANU-PF supporters who were bussed there), attendees at meetings were there otherwise than of their own free will.

169. It would also be wrong to categorise the COPAC outreach meetings as entirely negative. In a press report of 5 November, it was said that the deliberations exhibited "a general consensus that the new constitution shall have a bill of rights and that people should be guaranteed their freedom of expression and association". This supports positive statements made in respect of the process by Morgan Tsvangirai and an MDC spokesman, who indicated that it would be wrong to think that the MDC would campaign for a "No" vote in any future referendum on the constitution. It also fits with the evidence regarding the separate "transitional justice" process, commented on by Professor Ranger, who acknowledged there had been relatively open discussions in connection with that process. Likewise, the British Embassy in Harare reported to the FCO on 29 October that, despite ZANU-PF's mobilising to dominate many outreach meetings, "the outreach process has educated and empowered many Zimbabweans" and that despite the serious flaws "it has been remarkable to see an exercise of this scale unfold in the way it has".

170. The Zimbabwe Peace Project reports in respect of COPAC activities in Bulawayo indicate that these "generally went well though with a few isolated chaotic incidents". This reflects the general position in that city, which we shall describe in more detail in due course.

171. Instances of significant problems, including intimidation backed by threats designed to instil serious fear, are, however, much more evident in reports relating to rural areas (other than Matabeleland), although these were not always overt. The Zimbabwe Peace Project report entitled "Shadowing the Outreach

Process" spoke of outreach violations in rural communities as being "craftily committed through an array of hard to detect strategies that include ferrying of party supporters from one venue to another, posting party youths/supporters at outreach venues, grouping communities under their head men and conducting of roll calls after meetings" etc. According to the same report, cases of harassment remained "disturbingly visible".

172. The suggestion that all outreach meetings were dominated by ZANU-PF is, however, to some extent contradicted by a passage in the Zimbabwe Peace Project weekly report of 19 to 25 July, which describes responses at meetings as being along political lines with ZANU-PF and MDC-T "actively involved in selling their constitutional positions by way of distributing flyers before the arrival of COPAC teams". Contributions either reflected MDC-T or ZANU-PF positions "depending which political party was dominating at the outreach meeting". Compatibly with what we have earlier noted, the reports said that areas that were less politically sensitive appeared to result in "consensus after serious debates", at least in the case of meetings in Midlands province.

173. Overall, we do not consider that the problems emanating from the COPAC exercise in the period June-October 2010 justify the view that there has been a significant deterioration in general country conditions, as seems to have been asserted by some of the appellants' witnesses. The COPAC exercise has, however, served to underscore the difference in circumstances between those living in urban and rural areas respectively. In particular, in some instances at least, the combination of coercion to attend meetings and the nature of the threats made, appear to us to be capable of being persecutory, within the ambit of the Refugee Convention. We do not, however, consider as a general matter that everyone living in rural areas is currently suffering persecution. But the evidence regarding COPAC points to differences between urban and rural areas, and between rural areas themselves, which have relevance to the position of a person returning from the United Kingdom, and which require a detailed appraisal. It is to this that we now turn.

...

176. ZimRights stated that urban areas were politically more open than rural ones and that violence was more common in "Mashonaland, Midlands, Manicaland and Masvingo. These are all ex-ZANU-PF strongholds that ZANU-PF wants to win back from the MDC. They are doing this by cracking down on the people that they think made them lose." A little later, the same organisation stated that the "remotest parts of the rural areas are the most affected by violence". So far as Manicaland was concerned, however, the interviewee thought that it would be very difficult for ZANU-PF to regain control, as the Zimbabwean people "have lost their patience". The first now anonymous interviewee (paragraph 97 above) told the FFM team that Harare was "more politically open than the rural areas. Areas that were strongly contested during the last election and where majorities are slim are still battlegrounds in political terms." In this regard the interviewee referred to Bindura (in Mashonaland Central) and Buhera (in Manicaland).

...

201. It is common ground that the MDC tend to dominate high-density areas. In his response to the FFM team, W80 of the Zimbabwe Human Rights NGO Forum said that it would be difficult for ZANU-PF to harm MDC supporters in MDC

dominated areas "because the MDC tend to be quite well-organised in those areas and can protect those who might otherwise be at risk of political violence by the threat of retribution". In his statement on behalf of the appellants, W80 sought to qualify those remarks. He said that what he was referring to were isolated pockets of resistance that had appeared on occasions and he did not mean that there were areas of the country that the MDC controlled or that the MDC could generally protect its supporters. The infrastructure of violence was still intact and ZANU-PF remained in total control of the coercive arms of the state.

202. We accept W80's point that, since ZANU-PF does indeed remain in de facto control of the army, police and similar services, it is wrong to speak of any particular area of Zimbabwe as being "controlled" by the MDC. Nevertheless, it is apparent that in his response to the FFM team, W80 was describing the present position, where in practice it is indeed "difficult for ZANU-PF supporters to harm MDC supporters in MDC-dominated areas". The position might, of course, be different if, immediately prior to an election, Mugabe and ZANU-PF were to launch a significant campaign of violence in Harare, such as in 2008. That is not, however, the position at present.

203. We say this, having particular regard to the latest evidence, from January 2011, concerning various disturbances in Harare, which are said to have been instigated by ZANU-PF elements. The alleged establishment in high-density areas of campaign bases in the homes of ZANU-PF leaders falls significantly short of the kind of militia bases described in the evidence in relation to certain rural areas. There continues to be an absence of reliable evidence that militia bases have been established in Harare. The setting up of campaign bases in peoples' homes is, if anything, an indication of the relative weakness of ZANU-PF in the capital. The report of 26 January 2011 that carried the story of these bases referred to ZANU-PF and MDC youths being engaged in clashes, which, again, differs from the descriptions of what is going on in rural areas, where the picture is often one of villagers being coerced into silent submission by a ZANU-PF gang. Overall, we find that this and the other most recent evidence underscores the position that emerges from the earlier evidence, which is that the focus of such current ZANU-PF activity as there is in the high-density areas of Harare is on MDC activists, as opposed to the general population.

204. We accordingly conclude that, at the present time, although a person having no significant MDC profile, returning to a high-density area of Harare, is likely to face more difficulties than someone returning to a low-density area, he or she would not at present face a real risk of having to prove loyalty to ZANU-PF in order to avoid serious ill-treatment. So far as living conditions in high-density areas are concerned, the only witness to assert that the housing in such areas was unfit for human habitation was the person we have described as W79 of the Zimbabwe Human Rights Association. We do not conclude from this that anyone having to live in such a high density area would be exposed to inhuman or degrading treatment contrary to Article 3. Mr Henderson did not attempt to submit to us that this was the case. Whether any individual having to live rough in shanty accommodation or other grossly overcrowded and insecure arrangements would be exposed to treatment of this level of severity would depend on an individual assessment of circumstances including age, gender, health, earning capacity, social assistance arrangements, the presence of young children and the like.

205. We have spoken so far of high and low-density areas in Harare. Professor Ranger, however, told us that there were three kinds of zone in Harare. The low-density areas comprised the white community, the coloured community and Africans "who were not so poor. The low-density areas had more Africans than in the past." Then there were areas of intermediate-density. Here, although there were problems with dereliction, there were not problems with gangs. These he categorised as "medium-density areas". Finally, there were the high-density areas, which, although they had problems, nevertheless "had some services". The Tribunal also notes that appellant JG described her home area of Queensdale as "kind of medium-density". She said that it was not far from Epworth "where many rowdy gangs" existed; and Queensdale might therefore be "a vulnerable location". Many cities in the world, including, ones in the United Kingdom, have areas of affluence adjacent or close to areas of relative deprivation. This fact would generally not give rise to a claim for international protection or furnish evidential support for a contention that it would be unduly harsh to expect a person to relocate to accommodation there. Particularly given what we have had to say about the present position of the high-density areas in Harare, we do not consider that the distribution of high, medium and low-density areas has significance, as regards the matters with which we are concerned.

…

243. What we have just said about Matabeleland applies to Bulawayo, even in the early election scenario. As for Harare, whilst it may be reasonably likely that ZANU-PF militias etc would be bussed in to that city in order to cause problems during an election campaign, the present evidence is such that it would be merely speculative to conclude this would have a material impact upon those living in low-density areas. In addition, even in this scenario, we do not consider the present evidence suggests that ZANU-PF would be able to engage in the kind of systematic intimidation, which it would deploy in rural areas of the eastern provinces. In this regard, we note the absence of reliable evidence regarding militia bases. The report of 26 January 2011, regarding the alleged use of ZANU-PF leaders' homes in Harare as campaign bases, is said to be confined to high-density areas and, in any case, appears to be of a different and lesser order to the sort of camps and bases established in rural areas in 2008. Whilst we accept the evidence of the appellants, that even in high-density areas in which it dominates, the MDC would be unable to resist a military or quasi-military assault, it is questionable whether ZANU-PF would, in 2011, choose to launch such an assault, given the high-profile nature of Harare and the international condemnation which would ensue. The evidence of January 2011 regarding disturbances in Harare instigated by ZANU-PF elements does not begin to amount to such a state of affairs, notwithstanding the report of Tsvangirai's having raised the disturbances with President Zuma. Those involved in the disturbances were MDC members and supporters (voanews.com article of 24 January) and the evidence of non-political residents suffering in this regard is sparse."

APPENDIX B

DOCUMENTARY EVIDENCE

PART 1

WITNESS STATEMENTS

(1) Appellant

Witness 77

1. W77 is a member of several networks of NGOs and faith-based organisations and has provided information at meetings with the Foreign and Commonwealth Office, Zimbabwe Unit. He has continued to exchange information with his office in Zimbabwe and members of the diaspora and has made yearly visits to Zimbabwe, including in 2011 and March 2012. He provided a written report dated 24th September 2012.

2. In summary, he considers that there has been no significant progress towards security reforms to prevent the violence of the 2008 elections being repeated or other reforms to ensure free and fair elections. The GPA requires a referendum on a new Constitution before elections but a recent impasse has occurred with the ZANU-PF politburo rejecting a previously agreed draft. If there are no reforms to the Constitution, the elections required to be called by June 2013 will have to be held under the current constitutional arrangements which W77 believes will lead to a greater capacity for violence. Neither the MDC nor SADC is able to overcome ZANU-PF's political and military control. W77 referred to recent reports suggesting that levels of fear and mobilisation necessary to ensure ZANU-PF's continuation in power will be maintained.

3. A recent Zimbabwe Election Support Network ("ZESN") update contains information on reduced levels of violence in certain constituencies but points to issues of political intimidation over songs, reading of certain newspapers, the wearing of party regalia and an intolerance of opposing views. W 77 states that most in Zimbabwe believe that ZANU-PF is gearing up for elections using "favoured tactics" of repression, denial of political space, intimidation and misinformation.

4. The COPAC process to agree a new Constitution hit an impasse in August 2012, with a draft intended to go to the second stakeholders' conference. This draft was believed by some in civil society to contain some progressive elements but recurring delays caused the proposed referendum date of 30th September 2012 to be lost. In the event, ZANU-PF demanded many changes to the document.

5. W77 is of the view that the MDC is unable to force changes through the Interim Government ("IG") and that Mugabe retains control of the military and intelligence ministries and the system of governance from the Joint Operations Command ("JOC") downwards to ZANU-PF supporting civil servants and the security forces. All major civil service posts and officials at local level continue to be occupied by ZANU-PF appointees. Alongside this, there exists a parallel state

with militia and gangs taking on quasi-state functions such as controlling the ability to work in the informal economy by demanding ZANU-PF cards and money to operate in markets.

6. W77 states that the police remain partisan in terms of who is arrested, with government supporting perpetrators enjoying almost total immunity and others, especially opposition supporters and civil society, still being subject to arbitrary arrest. There is a strong likelihood that violence will increase with the elections, especially now that ZANU-PF has rejected the COPAC draft. In the opinion of W77, consistent with views held by local partners, there has been a lack of real change since late 2008 and those unable to demonstrate loyalty to ZANU-PF would run the risk of ill-treatment. After the election period, the position in late 2008 was described by W77 as being not significantly different from subsequent years.

7. This year, there has been increasing ZANU-PF gang activity in urban areas. There has been factional fighting inside ZANU-PF, regarding the succession to Mugabe and ensuring continued access to legal and illegal resources. This has increased since the suspicious death in August 2011 of General Solomon Mujuru, husband of Vice President Joyce Mujuru, and head of one of the ZANU-PF factions. The December 2011 ZANU conference saw new appointments to the Politburo to strengthen Mugabe's hand. W77 opined that ZANU-PF might be in more turmoil than the MDC, not so much over political differences as between those more disposed towards political violence to solve problems and those who see the dangers. There are many reports of ZANU-PF gearing up for intimidation in electoral terms, with the expectation that violence will be directed at those areas that abandoned ZANU-PF in 2008. Although ZANU-PF's capacity and willingness to use violence did not appear to have abated, intimidation and some violence rather than systemic violence are described by witness 77 as current characteristics, a footnote to paragraph 19 of his statement drawing attention to the ZPP Monthly Monitor for June 2012. Zimbabwean civil society sees the role of SADC, as GPA guarantor, as being crucial to ensure that democratic elections comply with SADC principles and guidelines. Although SADC has made clear that it wants free and fair elections, in the opinion of W77, they are unable to provide the means needed to enforce their will.

8. Urban violence in townships in Harare has increased, including the activities of the Chipangano gang in the Mbare township in Harare. W77 refers to a description of Chipangano as essentially an authorised ZANU-PF thug association, the source being a conversation in Brussels with a group of activists in October 2011. Townships like Mbare are volatile areas, ZANU-PF intensifying its strategies for controlling or re-imposing power over urban areas. Although most of the residents, along with most townships in the greater Harare region, support the MDC-T, there is a strong and threatening ZANU-PF presence.

9. In preparing this part of his report, W77 spoke to Dr Joann McGregor, reader in human geography at UCL, who gave him access to the research she is currently working on, regarding violence in urban areas, with a focus on Harare. Dr McGregor has read and approved this part of W77's report. ZANU-PF's aims in intensifying its efforts to control urban areas appears to be to win selected urban constituencies, to control urban economic opportunities and resources and distribute them in a partisan manner and to undermine and discredit MDC-run municipal councils. Violence and economic incitements have been used to achieve these ends, including the deployment of militias such as Chipangano.

10. According to a Crisis Coalition briefing paper, Chipangano is "growing its tentacles in all urban areas of Zimbabwe", the same organisation pointing to links between ZANU-PF and the militia group. The same briefing paper refers to Chipangano being in Mutare, Zimbabwe's fourth biggest urban centre, in February 2012 during Mugabe's birthday celebrations. Many residents were force marched to Sakubva Stadium for the festivities. Dr McGregor believes, as do witness 77's local partners, that Chipangano is hijacking local state roles in Harare's main markets, being particularly active in the high density suburb of Mbare. This reflects the area's importance as a hub for the informal economy, with its extensive markets and the main bus station. Chipangano has exercised control and surveillance and has regularly closed the markets and forced all traders to attend ZANU-PF rallies and events, monitoring attendance by maintaining registers.

11. W77 states that militia bases comparable to those in 2008 have been re-established around Mbare and surveillance reinforced so that the area has become "no go" for MDC councillors and its MP. Transport hubs, bus and "kombi" ranks throughout the city have come under comparable ZANU-PF control. In some areas, the MDC and local traders have been able to put forward some temporary resistance to these. Violence has escalated recently in relation to protection fees demanded by ZANU-PF linked militia from minibus operators in the capital, W77 giving as a source a report published on 29th May 2012 by CHRA. Taking into account the acute shortage of housing in Harare and other urban areas and the lack of capacity available to the MDC councils to provide housing, those without independent means returning or moving to urban areas, including removed asylum seekers, would now find it even more difficult in the high density areas to which they would have to go. Without existing housing or relatives to live with, they would be liable to end up in high density overspill areas where loyalty to ZANU-PF is most likely to be demanded. Without support mechanisms, the people in high density areas will be forced into the informal sector to earn their living where groups such as Chipangano charge protection fees and demand displays of loyalty or ZANU-PF cards.

12. So far as the humanitarian situation in Zimbabwe is concerned, W77 described this as precarious. Food distribution is still liable to politicisation in distribution and there are acute water shortages in certain areas. Cholera, which had been halted, now seems to be on the point of returning and malaria and measles have been endemic since 2010. The economy appears to be losing momentum, with donor funding and investment problems due to coalition disagreements and indigenisation worries. A footnote to this part of W77's statement includes a news item reporting that the growth forecast in Zimbabwe had been cut to 5.6%, in mid July 2012. Although there has been an improvement in livelihoods in urban areas, W77 described this as very partial and largely restricted to those with access to dollars or rands. Those who previously worked in the informal sector have seen their position worsen and the small rise in employment will not necessarily last. The rural poor are more or less out of the mainstream economy and are dependent on harvesting, trading and survival.

Anthony Reeler

13. Antony Reeler, director of the Research and Advocacy Unit ("RAU"), provided a statement dated 25th September 2012. He and his organisation have been involved in comprehensive monitoring of the political situation in Zimbabwe. The

RAU has a wide range of partnerships with other Zimbabwean non-governmental organisations working in Zimbabwe in urban and rural communities. Mr Reeler states that the present government may continue in office only until June 2013. If elections are called at the last possible moment, the electoral process itself could theoretically take until the start of November 2013 to conclude but the rainy season in Zimbabwe makes it difficult to hold elections after September due to poor conditions in rural areas.

14. The COPAC process to agree a new Constitution has been badly delayed, ZANU-PF rejecting a compromise draft which had earlier been agreed. The two MDC factions have rejected ZANU-PF's list of amendments. The next stage will be the second stakeholders' conference. This might be held "in house" with all representatives of civil society excluded, the political parties seeing this as a means to increase the chances of a compromise draft being agreed. So far as a referendum on a new Constitution is concerned, this is dependent on the resolution of disagreements between the parties over the content of the draft. Mr Reeler states that it is possible that disagreements over the Constitution may be so severe that the COPAC process will fail. There will then remain a legal necessity for general elections. In the absence of a new Constitution, these will be held under the existing Lancaster House Constitution. Even if the COPAC draft previously negotiated were to remain in place, this would represent a compromise text that a substantial part of civil society has already rejected as inadequate and flawed. Mr Reeler states that in his view, the COPAC draft is not a major advance on the Lancaster House Constitution.

15. In any event, even if the draft were passed and came into effect before the elections, it would have little impact in terms of preventing the tactics used by ZANU-PF in the 2008 elections as there have been no significant reforms to the institutions which Mr Reeler describes as key to whether the 2008 violence will be repeated. He states that there has been no real change to the operation of JOC, the police, the partisanship of the attorney-general or the traditional leadership. There is no evidence that there has been any real reform of the formal state organisations, including the army, the police and the CIO that have been regularly reported as involved in political violence and intimidation. No reliable commentator has identified a change for the better in the independence, reliability and professionalism of the police as compared to late 2008. The security chiefs also retain their explicit political affiliations, the most senior officers in the army publicly expressing their support for ZANU-PF and denigrating opposition political parties. Notwithstanding legislation requiring the police to be non-partisan, the Police Act expressly forbidding policemen from belonging to a political party, the Commissioner General of the Zimbabwe Republic Police, Augustine Chihuri, has publicly expressed his support for ZANU-PF and recent weeks have seen attacks by the police on gays, lesbians and women.

16. There are also frequent statements by ZANU-PF supporters and members of the government denigrating and threatening NGOs. Abel Chikomo of the Human Rights Forum has been arrested repeatedly in 2011 and 2012. Mr Reeler states that there is little evidence that there has been any attempt to control or bring to justice any of the War Veterans, traditional leaders, youth militia, local government officials or political party supporters. There has been a number of prosecutions for murder and rape but there remain outstanding several hundred murders that are not receiving any "plausible attention". The work of the RAU does not indicate that the propensity for political violence and intimidation has

declined. In the statement he made to the Upper Tribunal in EM in 2010, Mr Reeler observed that violence was not currently as high as during the 2008 election period. The worst violence occurred between the March and June elections in that year and in the days immediately after the June election. The situation in October and November 2008 is described by Mr Reeler as "basically similar to the current situation: a polarised situation with a reduced level of violence compared to the 2008 election period but … no movement on reforms that would mitigate against that level of violence being unleashed again." The apparatus to unleash such violence has been maintained in place and there are currently regular alerts about militia bases being reopened.

17. Mr Reeler states that although SADC has made some strong statements about the need for reform in the last two years, the strength of its statements has had no effect in terms of its ability to achieve change on the ground. Although SADC has placed two persons in the JOMIC secretariat, the machinery for conducting and supervising the elections is mostly under the control of ZANU-PF, which has a majority in the Zimbabwe Electoral Commission and is in charge of the Ministry of Justice, which in turn controls the Registrar General's office and the maintenance of the voters roll. ZANU-PF also controls the machinery by which ordinary citizens can be influenced or compelled to vote, such as state institutions and proxy forces, including youth militia, War Veterans and ZANU-PF supporters.

18. Mr Reeler states that intensive monitoring might make a difference to vote-rigging and violence and intimidation, of the kind implemented for the 1994 South African elections. This would include high level police officers from other countries placed within the police and monitors on the ground in communities. All of this would need to be in place six months ahead of the actual elections. This has never been achieved in Zimbabwe. Most of the monitors in 2008 arrived only a couple of weeks immediately prior to the polls and were powerless to prevent violence. If elections are to take place in June 2013, monitors and observers would need to be in place in Zimbabwe in January in state institutions such as the ZEC, the Registrar General's office, the police and the army as well as on the ground. There have been no steps since June 2010 to put that sort of monitoring in place. The reality is that the security forces, the police and ZANU-PF are absolutely opposed to this sort of monitoring and are determined to prevent it.

19. Mr Reeler states that there are reports that "the heat is rising in both rural and urban areas, so it looks as if there is mobilising going on." There are more ZANU-PF groups operating in urban areas, including Chipangano in Harare and Al Shabaab in Midlands.

20. Although the monthly totals of violations produced by the ZPP are less this year than in previous years, in his view this does not give a true reflection of the extent of intimidation and violence happening on the ground, especially in urban areas. It can be seen from numerous recent news reports that what is going on in Harare is not reflected in the ZPP numbers for the city. ZPP has a couple of hundred monitors covering the whole country and it is more difficult for them to monitor and report on individual incidents in high density urban settings, especially for Harare and Chitungwiza. The ZPP reporting process is only intended to present those incidents that its monitors can personally either observe or establish after the event, through reports to them. Unlike reports produced by the Human Rights Forum, which aimed to collate all credible reports based on all news reports and on information from all NGOs, as well as first hand

testimony, the ZPP only collates reports from its own monitors. It is easier for ZPP monitors to observe and establish individual violations connected with political processes on the ground and monitors living in communities can only do their work by remaining anonymous. The monitors may have advance notice of political processes where violations are likely and may be able to observe and record violations connected with them.

21. Local political structures may also have established confidential lines of communication with monitors through which reports can be channelled after the event. On the other hand, ZANU-PF militia and gang intimidation and violence directed against ordinary citizens are more random and unpredictable and so an observer is unlikely to be present by chance to observe an incident. Unless the ordinary citizen is willing and able to make a report to a monitor, the monitor will not be able to report an incident and it will not be recorded in a report. Mr Reeler states that only a fraction of incidents are recorded individually by NGOs and individual incidents that are reported cannot be assumed to be representative of what is happening on the ground. Another issue is what constitutes a violation for the purposes of the ZPP statistics. Does a single violation have one victim or 100 victims? Are different types of violations counted in the same way? The nature of the reports of violations means that they are a sample rather than a national picture and it is necessary to refer to wider commentary, including news reports.

22. Mr Reeler states that one of the most significant recent developments is an appreciable rise in ZANU-PF militia activity in urban areas over the last nine months. Chipangano, which he describes as a ZANU-PF affiliated gang, has been active throughout Harare and the neighbouring town of Chitungwiza and has carried out violence, extortion and intimidation with complete impunity. The gang has displaced non-ZANU-PF persons from employment, arrested persons selling from informal markets or the roadside and even threatened a businessman trying to develop a petrol station. There has even been adverse comment from ZANU-PF officials about the gang's activities but Mr Reeler described denials of affiliation as not credible.

23. So far as roadblocks are concerned, Mr Reeler states that militia roadblocks have always been more a rural feature and are most used during elections. The militia in urban areas did not generally use roadblocks but moved around inflicting violence on the urban population. However, there are currently dozens of roadblocks in rural and urban areas throughout the country set up by the police, used primarily to extract bribes and providing a continuous reminder of the power of ZANU-PF, as the police owe public affiliation to the party. There is little evidence that the MDC can provide effective protection from ZANU-PF, even as part of the Inclusive Government. What efforts the party can make to help people will, stated Mr Reeler, be concentrated on their own activists rather than non-aligned people.

24. Mr Reeler describes the humanitarian situation as having deteriorated this year, with severe outbreaks of typhoid in several urban areas and growing food insecurity. He refers to Mr Dewa Mavhinga as a good and well-informed observer and as having written eruditely on Zimbabwe. Mr Reeler has seen W77's report for the appeal and considers it accurate and up-to-date.

Professor Ranger

25. Professor Terrance Ranger provided a short undated statement. He has suffered from ill health recently and has been unable to travel outside Oxford in 2012. He has kept in touch with events in Zimbabwe by reading international and local human rights reports, maintaining correspondence with friends and students in Zimbabwe and through the Zimbabwe association and the British Zimbabwe Society.

26. He states that he is familiar with the research of Dr McGregor on Harare and in addition receives regular reports from researchers including former students in Bulawayo. He has read W77's report and wishes to endorse the points made in it. He adds that the security and humanitarian situation in Bulawayo has seriously deteriorated since he last gave evidence, in EM. The humanitarian situation is pretty desperate and unemployment high. Professor Ranger states that Zimbabwe is in a complex situation. By selective quotation one can cite Morgan Tsvangirai for the opinion that Mugabe and even the generals will accept electoral defeat like gentlemen. This is said in the hope that it might put some constraint on ZANU-PF. The real situation and its dangers are as in W77's report.

Witness 66

27. A similar short statement was provided by W66. He has previously given written and oral evidence in appeals concerning Zimbabwe before the Upper Tribunal. He has read the report prepared by W77 and agrees with his analysis.

Mr Mavhinga

28. Mr Dewa Mavhinga made a statement on 26 September 2012. Until August 2012, he was regional coordinator for the Crisis in Zimbabwe Coalition and has worked in Zimbabwe in civil society since 2003, for different organisations. Mr Mavhinga states that the current term of office for President Mugabe and the parliament expires in June 2013 and elections must be called by then. The first round of elections is traditionally held in March. He states that violence similar to 2008 or even worse is expected in the forthcoming elections.

29. There are tensions within ZANU-PF regarding the succession to Mugabe which make the outlook even more unstable. Although the military were of course closely involved in the 2008 violence, the security forces in Zimbabwe are not simply an instrument of Mugabe. They have their own interests to protect, including economic interests. These include interests in mines in the Democratic Republic of Congo and the Marange diamond fields. Mr Mavhinga states that the security forces have an interest in preventing any risk of prosecution domestically or internationally.

30. In his view this concern will not prevent the violence of the 2008 elections being repeated. Although the MDC have said that they would consider some form of amnesty, in Mr Mavhinga's view this was a worthless guarantee. There was previously a willingness by the group led by the late General Solomon Mujuru to negotiate. There is a strong suspicion in Zimbabwe that he was murdered in consequence of his connection with this group. A condition of the GPA was the establishment of the National Security Council to replace the Joint Operations Command (JOC). Although the council was set up, it does not function and has met no more than four or five times, without discussing substantial policy issues. The JOC, however, has continued to meet outside the framework of government,

making key national security decisions and reporting directly to Mugabe outside the GPA.

31. Mr Mavhinga states that he expects the JOC to play a role in the violence in the forthcoming elections. The draft constitution is currently subject to political negotiation. The COPAC draft requires free and fair elections but the legislative framework in 2008 was, states Mr Mavhinga, already reasonable in terms of electoral laws. What matters for ZANU-PF is their ability to inflict violence, intimidation and fear on the population to control the electorate. The proposed new Constitution will not change that. Mr Mavhinga expected in October 2010 that elections would be held in 2011. That elections were not held was due to some extent to the influence from ZANU-PF MPs who did not want to expose themselves to early elections. Mr Mavhinga believes that Mugabe and ZANU-PF have treated the GPA as if it were a ceasefire agreement, allowing them to regroup. ZANU-PF and the security forces have benefitted economically, through access to diamond revenues controlled by the military and the implementation of the indigenisation policy, requiring companies worth more than US$500,000 to cede 51% of their shares.

32. Mr Mavhinga states that free and fair elections will depend on reform of the security sector and effective monitoring. Civil society has demanded early deployment of effective monitors with unfettered access, six months before elections. However, ZANU-PF will reject this sort of monitoring and the SADC guidelines only require deployment two weeks before the elections are held. Mr Mavhinga and his colleagues met with the executive director of SADC in August 2011 and with SADC ambassadors in September 2012, to advocate reform of the security sector and long-term, effective monitoring. They propose that SADC should call for soldiers to be confined to barracks during the elections, to limit the intimidation of citizens. SADC replied that this would amount to an interference. Responsibility for facilitating the GPA rests primarily with South Africa. Although President Zuma has been more critical than Mbeki, there remains a base of sympathy and solidarity in the ANC for ZANU-PF.

33. Mr Mavhinga states that in urban areas in recent months, there has been increased ZANU-PF militia and gang activity, compared to 2010 and 2011. Chipangano is based in Mbare, a high density suburb of Harare. It operates across the city, forcing people in different ways to profess loyalty to ZANU-PF through intimidation, threats and violence. There is no clear distinction between Chipangano and the youth militia. Mbare has a large population and is the main commercial and transport hub, with the largest markets in Harare. Many from outside the suburb go there to work in the informal economy. Unemployed youth in Mbare form a critical mass and can be easily recruited as instruments of intimidation and violence. Residents have to show ZANU-PF cards and attend meetings. There has been no reform of the police, who provide no real protection to citizens from the militia.

34. The Crisis in Zimbabwe Coalition obtained a secret video of a forced meeting in Harare in 2012. This is evidence that would not be reflected in reports such as the ZPP's monthly statistics. Mr Mavhinga describes reports of ZANU-PF denying an association with Chipangano as not credible as there are eyewitness reports where senior ZANU-PF officials have been seen acting together with these groups to create terror and intimidation. The leader of Chipangano is the Harare province ZANU-PF youth leader. Militia operations have also been happening in other towns and cities although it can be unclear whether the militia are based

there or travel in. The MDC has no real capacity to protect ordinary citizens and can only make public statements and ask for support.

35. Mr Mavhinga states that a person returning to Zimbabwe with no family to support him would end up in a high density or periurban area, the only chance of employment being in the informal economy. Such a person would come into contact with the militia or gangs and have to profess support for ZANU-PF. Such a person would face being required to present a ZANU-PF card to work in the markets and to show loyalty by attending meetings and buying membership of ZANU-PF. If a person travelled from the airport with no funds or family to go to, he would arrive at Mbare. Epworth high density suburb is another possible destination, where it is easier to build a shack. ZANU-PF is particularly prevalent in these areas and in order to be permitted to build a shack loyalty would have to be professed to the party. People without resources are now forced into the overspill in the periurban areas where they depend on local ZANU-PF gangs to make and keep their shacks.

36. Such people would be intimidated and required to take part in night vigils and even to participate in intimidation and violence. Everyone in the locality is required to attend re-education campaigns for the whole night. These activities will become more prevalent as the elections approach. The militia and gangs will become increasingly active around the city, as will the army. Mr Mavhinga comments on medium density areas. He describes them as relics from town planning before independence. These areas have more in common with high density areas than low density ones.

37. So far as Bulawayo is concerned, Mr Mavhinga would not describe this as a safe place. Shona people facing serious problems in Harare would not travel to Bulawayo by bus to try to establish themselves there if they had no ties or family in the city. Bulawayo also has high density and periurban areas but simply turning up there without any ties would attract attention, especially if such a person could communicate only in English. Throughout Zimbabwe, people want to know where you are from and why you are present and information travels through communities quickly. This makes it easy for local militia to check out newcomers and test their political allegiance.

38. Urban areas do not have traditional chiefs but they do have local ZANU-PF and militia instead. The position regarding the supply of food is worse than for the past couple of years, meaning that people in high density and periurban areas as well as rural areas will be dependent on food aid as the elections approach. This increases the risk of ZANU-PF interference.

Justina Mukoko

39. Ms Justina Mukoko, executive director of the Zimbabwe Peace Project ("ZPP") made a statement on 25th September 2012. She describes herself as a human rights activist and former journalist and as a recipient in March 2010 of the US State Department's International Women of Courage Award. She describes as really worrying a rise in militia activity in Harare and other urban areas since the beginning of 2012. Residents have been obstructed from earning their living in the informal economy if they cannot show allegiance to ZANU-PF. The Chipangano militia have required market stalls to be closed in order to force people to attend ZANU-PF meetings. Stalls are only permitted to reopen once the meeting is over.

40. Ms Mukoko states that ZPP has two monitors in each parliamentary constituency. They remain anonymous so as to minimise risk to them. ZANU-PF, the security forces and the militia do not like human rights violations being publicised by ZPP. In 2008, the organisation was targeted as it was in a position to publicise victims and perpetrators in the election violence. ZPP's monthly reports are summaries compiled at the national office, based on reports from constituency monitors. Verification is an important component and the organisation vests a lot in this. Violations are only recorded once verified. Monitors on the ground do the initial verification and information is then passed to provincial coordinators. National officers also have a role. Where a single violation is recorded, this might involve a single victim or many victims, depending on the nature of the violation. The organisation is working on providing definitions of the categories used to identify violations. The violations given in the monthly summary reports are those that have been individually verified and recorded. Ms Mukoko states that it is more difficult to individually verify and record a large proportion of the current violations by militia in Harare because of the high density of people living there and the numbers affected.

Witness 83

41. W83 is an MDC representative in the United Kingdom and Ireland with authority to speak on their behalf. W83 has known CM since early 2007 and wrote letters in support in February 2009 and September 2012. He gave evidence before the judge at the original hearing of CM's appeal. He is able to confirm that CM regularly attended meetings during W83's time as branch chair. W83 maintains contact with the local branch and its members and is able to confirm that CM has continued to attend meetings. The activities of the local branch were not well-known or publicised when CM joined and the branch was not really active prior to 2007, when it was properly constituted. W83 would describe the local branch as important in the overall structure of the MDC in the United Kingdom. It is the branch where a number of important campaigns were initiated, to involve local community groups and organisations in the town. The branch also had prominence because of its links with the national leadership, W83 and another member of the branch, Adella Chiminya being well-known and having leadership roles in the MDC in the United Kingdom. W83 states that CM has been involved with fundraising activities at the branch and has helped with fundraising activities organised by other branches. W83 recalls travelling to events in Peterborough and Portsmouth in 2008 with CM. CM has attended demonstrations organised by the MDC and travelled to Leeds with the local branch to attend the Congress in April 2011, where W83 was elected to his current post.

42. The MDC in Zimbabwe draws on financial support from branches abroad, including the UK and Ireland branch. Contributions from this branch stand at around ten times higher than contributions made by other branches in other countries. In 2008, the MDC in the UK and Ireland was vital in funding campaigns in 30 to 40 key constituencies in Zimbabwe, by providing funds directly to them, the balances being sent to the MDC central organisation in Zimbabwe. At present, the south west district in the United Kingdom is twinned with constituencies in Mashonaland East, where some of the worst violence in 2008 occurred. The UK and Ireland branch also has a good website and a calendar of fundraising and branch level activities. W83 states that the party is concerned about potential infiltration by the CIO and ZANU-PF.

43. It is difficult to control or vet access to branch activities such as meetings and party events are regularly photographed, not least because members want to keep a record of their activities. It is difficult for the MDC to check the background of people joining. In W83's opinion, the political temperature in Zimbabwe is rising. The weekend before he made his statement in early October 2012, he received a communiqué from the MDC in Zimbabwe concerning attacks by War Veterans on MDC members travelling to Bulawayo on the occasion of the party's thirteenth anniversary. Some required hospital treatment. In his opinion, being involved in activities in the MDC here would place an individual at risk on return to Zimbabwe. In W83's view, the security forces and ZANU-PF are increasingly paranoid about the possibility of regime change following the forthcoming elections. The CIO is present at the airport and questions passengers forcibly returned to Zimbabwe from the United Kingdom. Someone returned would in all likelihood be stopped and asked what they had been doing in the United Kingdom and whether they had connections with the MDC. This would not be dependent on whether the CIO had an intelligence based record on the returnee. If CM answered truthfully about his MDC involvement, he would be questioned in greater detail and that would be linked with a risk of ill-treatment. After arrival in Zimbabwe, a person outside of the country for a long period would be in great difficulty as they would lack the ability to repeat the current slogans and were likely to be suspected of being not supporters of ZANU-PF if the current slogans were not known. Newcomers to a particular locality would be likely to be questioned by the militia, including questions regarding a person's politics.

The appellant

44. CM's immigration history, the circumstances in which he left Zimbabwe and his account of events since his arrival in the United Kingdom are summarised in EM at paragraphs 20 to 23 and 284 to 298 of the determination. The findings of fact made by a Designated Immigration Judge, in dismissing CM's appeal in October 2009, have been preserved. These included adverse credibility findings, the judge did not accept CM's evidence about what he had done for the MDC in Zimbabwe and what had happened to him as a result and concluding that any political profile CM had with the MDC in Zimbabwe was at the lowest level.

45. The panel found in EM that there was no reason to believe that CM's vestigial connections with the MDC would put him at risk in Harare of adverse interest, including having to demonstrate loyalty. This was especially true if he resides in the low or medium density suburbs with which he has been historically connected, including Hatfield, his last place of residence.

46. Even in the unlikely event of his living in high density suburbs, the Tribunal concluded that there was no real risk of his being subjected to a loyalty test or serious harm, applying the Country Guidance at paragraph 276(5) of the determination. No Article 8 case was advanced on behalf of appellant CM and the Tribunal saw nothing in the evidence to suggest why one might have been. His 20 year old son lived in Oldham but his other children remained in Harare. CM was separated from his wife.

47. CM has since provided two witness statements, dated 26th September and 3rd October 2012. His last permanent address in Zimbabwe was in Hatfield Harare. At the time he left Zimbabwe, his second wife, Mary was living in the house. At the end of 2010, she left Zimbabwe and returned to Malawi with the couple's youngest son, D. CM states that his wife and D have remained in Blantyre in

Malawi ever since and that he has not had contact with them since they went to live there. Their older son, S, came to the United Kingdom in 2007. In his statement, CM describes Hatfield as a medium density suburb. In his asylum interview, he erred in describing Hatfield and the suburbs of Southerton and Westgate, where his children were living, as low density areas. All three areas are medium density. The suburb of Hatcliffe, where he lived in the period before he left Zimbabwe, is a high density area.

48. Since his second wife left for Malawi, the house in Hatfield has remained empty. A friend who visited Zimbabwe in May and June 2012 went to look at it and told CM that it is in a dilapidated state. The bathroom and bedroom windows are broken, the back door to the kitchen is damaged and tiles on the top of the lounge have been removed, causing leaking and damage to the floors.

49. CM states that he has no family remaining in Harare. His first wife divorced him in 1982 and relations between them are not good. His four adult children from his first marriage were living in Harare at the time of his asylum interview but all have left since then. They remain in Zimbabwe but CM is not in regular contact with any of them. They live in different parts of the country, struggling to make ends meet. CM's son, DN, lived in Southerton for a while but went to Masvingo towards the end of 2010, seeking work. CM last spoke to him about six months ago. He lives in Mucheke Township, a high density area, with a friend. DN has not found work and does not have his own accommodation. CM's son, C Junior, lived in Hatcliffe for a while before leaving for Kariba in Mashonaland West, where he was offered a job with the fisheries. He met his wife in Kariba and they have two children. CM states that his son does not earn very much and the family struggles to make ends meet. He last spoke to C Junior five or six months ago, when they were living in two rooms with the children. His older daughter P went to live with her mother in Wedza towards the end of 2010. P has four children, two of whom live with her. She is separated from the father of the children. Wedza is a rural area and, so far as CM is aware, the family survives by growing food and selling some of their produce. CM has had little contact with P as there is no mobile telephone reception and has not spoken to her for many months. His younger daughter, R, lives with her aunt in Chinoyi in Mashonaland West. Contrary to what appears in the Asylum Interview Record, R has never married. She lived with DN in Southerton for a while before leaving for Masvingo. CM does not know R's aunt as he separated from his first wife a long time ago. R is not working and neither is her aunt. CM has little contact with them.

50. CM states that he still fears return to Hatfield as he is opposed to ZANU-PF. He had lived in Hatfield since 1988 and fears that he would be known if he returned there, even after a few years of absence. Hatfield is about one and a half miles from Epworth, which also causes him concern. He believes that none of his children would be able to support him as they are all in difficulties economically. It would be difficult for CM to move to a new place, particularly in the light of his age, to find any form of work or accommodation. The only place he believes he would be able to return to in Zimbabwe is his brother's place in Karoi. CM has kept in touch with WM, his younger brother. He lives with his family in Chikangwe, a high density area of Karoi, a town in Mashonaland West, not far from Kariba. CM believes that he could stay there initially although probably not on a long-term basis. CM states that he continues to attend MDC meetings in the town where he lives in the United Kingdom and has participated in fundraising with the local branch and attended demonstrations.

51. Attached to his first statement is a letter from W83, a representative of the MDC United Kingdom and Ireland with authority to speak on their behalf, in which CM is described as a longstanding and fully paid-up member of the local branch who is involved in branch activities. Also attached to his statement is a newspaper article from an "in-depth reporter" regarding occupation of land between Hatfield and Harare International Airport. A settlement cleared away in Operation Murambatsvina has established itself there, although the government supports a drive by the local authority to clear illegal structures. In the article, a prominent figure in the settlement claimed that the authorities envied the occupied land because of its proximity to the airport "and the nearby medium density suburb of Hatfield".

52. CM added more detail regarding his health in his second statement. He has been taking medicines to control hypertension and high blood pressure since about 1982. Without his medicines, his legs swell and it becomes difficult for him to walk. He also suffers from an irregular heartbeat. CM states that his 60th birthday falls in November 2012. He has been absent from Zimbabwe for seven and a half years and will be unable to compete with younger men to find work. He would have no way of earning money in Harare and would have no choice but to return to his brother, WM, who would be able to house and feed CM for at least a while. His brother's job involves driving lorries on a route from Johannesburg to the DRC, via Zambia and Zimbabwe. His brother can be absent for months at a time. CM states that over the last couple of years, WM has told him in their telephone conversations about ZANU-PF meetings that have been held in Chikangwe, ZANU-PF supporters regularly going from house to house asking people to attend the meetings. He spoke to his brother the day before making his statement and was told that these events are still happening. ZANU-PF supporters knock on WM's door. CM's brother and his wife are MDC sympathisers. When asked by ZANU-PF to attend a meeting he and his wife will do so through fear. It is harder for CM's brother's wife, who is always there, and so she ends up attending more meetings. CM's brother and his wife have not told him of any specific problems that they have had with ZANU-PF, beyond having to attend meetings. If CM stayed with them in Chikangwe, he would not want to attend those meetings as he does not support ZANU-PF.

(2) Respondent

Debbie Goodier

53. Ms Goodier is a Senior Country Researcher for Somalia and Zimbabwe in the Country of Origin Information Service, UKBA. Her short statement introduced the respondent's bundle of recent country information (described further below) "covering a number of the key issues raised in the witness statements" of [W77} and Mr Mavhinga. She said that in the very limited time available it had not been possible for her to provide a comprehensive survey of the available country information arising over recent months, but she considered the materials provided a "fair reflection of the presently available country information".

Wayne Ives

54. Wayne Ives is a member of HM Diplomatic Service. He is currently the head of the Zimbabwe Unit within the FCO, a position he has held since January 2011. The FCO anticipates that elections will take place in Zimbabwe in 2013. There had been "some important steps forward under the Inclusive Government, although the pace of political reform continues to be slow. Some degree of

violence is expected [in respect of the elections], although we do not expect it to reach the levels seen in June 2008". The role of the SADC was regarded as "particularly important" and South Africa had a "key role to play, "in particular in persuading ZANU-PF and the Zimbabwean security chiefs not to disrupt the next election".

Anne Scruton

55. Ms Scruton is Country Manager Africa 1 in the Country returns Operations and Strategy Team of UKBA, which facilitates travel documentation for returnees from the United Kingdom and coordinates "focussed returns strategies". After the suspension of forced returns from the United Kingdom to Zimbabwe in September 2006, those found not to be in need of international protection were still expected to leave the United Kingdom voluntarily. Furthermore, between September 2006 and 1 September 2010 the respondent enforced the removal of 81 Zimbabweans who were refused leave to enter and who did not claim asylum.

56. After promulgation of EM, enforced returns resumed, with the fist such return taking place on 6 April 2011. There have so far been 187 removals of Zimbabweans, of whom 150 departed voluntarily and 5 were third country removals. Ms Scruton is personally aware of 23 enforced returns of failed asylum seekers to Zimbabwe since April 2011. There have also been at least 11 returns under the Facilitated Returns Scheme for foreign national offenders.

57. Exhibited to Ms Scruton's statement are copy letters to the Immigration Law Practitioners' association from UKBA of 9 May and 20 April 2011. In the former, it was stated that UKBA carefully monitored developments in Zimbabwe, pot EM. Although it was not accepted that only those not in RN risk categories should be forcibly returned, in practice those selected for initial returns had had their asylum claims rejected and their appeals dismissed "during the period that the *RN* caselaw was extant". Criteria for selection also included having been in the United Kingdom for a relatively short period, coming from urban areas of Zimbabwe and being found either to lack credibility or to have connections with ZANU-PF. The letter of 20 April stated that the criteria mentioned in the earlier letter were factors that currently helped UKBA to prioritise cases. It was not "a necessary precondition of removal that one, all or any of the factors are present".

58. On 3 October 2012, the respondent served a copy email in which Ms Scruton described in more detail the procedure of observation of returnees by the respondent's Migration Delivery Officer at Harare Airport.

59. Mr Griffiths spoke to Ms Scruton's statement at the hearing (Appendix C, page 2 (day 2)).

PART 2

OTHER DOCUMENTARY EVIDENCE ADDUCED BY THE APPELLANT

60. A substantial number of reports appeared in Part A of the Appellant's bundle. The reports relied upon are drawn from a variety of sources, including newspapers published in Zimbabwe and abroad, international human rights organisations, including Amnesty International, radio broadcasters in Zimbabwe, South Africa and further afield and date from mid February 2011 to the end of the

first week in October 2012. A helpful schedule of essential paragraphs appeared in the Appellant's bundle of supplementary materials.

61. Many of the articles and reports concerned calls from abroad for an end to ZANU-PF sponsored violence and for reforms to the security services, police in order to implement key reforms in readiness for the forthcoming elections. The Zimbabwean, for example, reported on 11th February 2011 that ZANU-PF youths looted shops and destroyed property in Harare's central business district and that ZANU-PF thugs attacked MDC officers and the home of an MDC councillor in Mbare. There were calls from the United States and the United Kingdom for action to be taken in the light of the violence, the embassy of the United States stating that those responsible were youths and opportunists affiliated with elements of ZANU-PF.

62. In a public statement from Amnesty International in mid February 2011, SADC and the African Union were said to have missed opportunities to end human rights violations in Zimbabwe. On 7th February that year, vendors from the NewsDay, an independent newspaper, were beaten up in Harare's central business district by alleged ZANU-PF supporters. Amnesty reported that the Crisis in Zimbabwe Coalition strongly condemned the escalation of politically motivated violence perpetrated by suspected ZANU-PF supporters, as reported by kubatana.net, the NGO Network Alliance Project in Zimbabwe.

63. The Standard, a prominent Sunday newspaper in Zimbabwe, reported that villagers were forced to sign a ZANU-PF petition or face death, in Mashonaland East, West and Central as well as Mazvingo and Guto. In Harare, such activities were restricted to high density areas such as Mbare, Epworth, Kmbuzuma and Warren Park, where residents were forced to attend ZANU-PF meetings, ZANU-PF youth militia moving from house to house. In the same month, The Zimbabwean reported that MDC supporters were being uprooted from market stalls in Mbare, ZANU-PF being backed with "passion and sycophancy" by the Chipangano militia. Although no deaths were reported in Mbare, scores had been beaten and some ZANU-PF supporters suffered revenge attacks. The local MDC-T MP, Pinel Denga was reported as having a good chance of retaining his constituency and was optimistic that MDC supporters would not be cowed.

64. The same newspaper contained a report published on the same day that ZANU-PF youths rounded up market traders and other residents and force-marched them to a rally, singing songs and carrying a pro ZANU-PF banner. On 2nd March 2011, The Zimbabwean carried a report that newspaper vendors in Harare city centre had been forced to flee for safety following an attack by ZANU-PF terror gangs, instructing them to attend the ZANU-PF's anti-restrictive measures campaign. One of the vendors was said to have been assaulted and could be seen bleeding profusely and another sought refuge at the NewsDay newspaper offices. On the same day, the newspaper reported that most Harare public transporters were diverted from their normal routes by ZANU-PF thugs who blocked roads with the help of police to direct people towards the same campaign meeting. Harare businessmen were summoned to a meeting at ZANU-PF's provincial headquarters at which they were ordered to support a petition calling for the removal of western visa restrictions and an end to the asset freeze imposed on Mugabe and his lieutenants.

65. Voice of America reported on 7th March 2011 that human rights activists were warning that an upsurge of political violence in Zimbabwe was threatening

reconciliation and might make it impossible to hold free and fair elections which were due in the next year. The author of a Human Rights Watch report said that there had been no human rights reforms on the ground in Zimbabwe and no accountability for the killings and other acts of violence that occurred in 2008. ZANU-PF youth militia were reported in The Zimbabwean on 10th March 2011 to have mounted a 24 hour illegal roadblock in Chimanimani, forcing motorists and their passengers to sign an anti-sanction petition. The same newspaper reported that "desperate" anti-sanctions campaigners from ZANU-PF invaded schools countrywide, forcing teachers and young children to sign up or face death.

66. SADC leaders were urged by Human Rights Watch in late March 2011 to publicly press President Mugabe and ZANU-PF to end their harassment and arbitrary arrests of civil society activists and political opponents.

67. The New York Times reported on 18th April 2011 that more than a quarter of Mugabe's opponents in parliament had been arrested since the power-sharing arrangement was made, part of an intensifying campaign of harassment, the source being "officials from both sides". Morgan Tsvangirai insisted that he would not leave the government, notwithstanding arrests, a police beating, assassination attempts and a treason trial over the past decade. The Zimbabwean reported on the same day that "rights lawyers" in Zimbabwe had said that they were appalled that police brutality, abuse of rights laws by the police and politically motivated violence in Zimbabwe was increasing. The Civil Society Monitoring Mechanism Report published on 9th May 2011 (for February and March of that year) found that state-sponsored violence and repression increased markedly in the period under review, mainly attributable to the organs associated with and operated by ZANU-PF. Voice of America reported on 25th May 2011 that many of Zimbabwe's top lawyers had said that the 2008 political agreement, the foundation of the Inclusive Government, would not achieve its goal of producing undisputed elections unless the present attorney general was replaced by a professional legal officer. The report noted that many analysts blamed partisan police for the arrests of opponents to Robert Mugabe.

68. The New York Times reported on 23rd June 2011 that Brigadier General Douglas Nyikayaramba, a high-ranking general in the Zimbabwean Army, described Morgan Tsvangirai as a national security threat who took instructions from foreigners.

69. The extent of Chipangano activities was considered in several articles published in the summer and autumn of 2011 and in early 2012. The Zimbabwean reported on 2nd August 2011 that the Chipangano gangs are led by Tendai Savanhu and Amos Midzi, the Harare ZANU-PF chairmen, in a carefully coordinated campaign of political violence. A young Chipangano militia member interviewed by the newspaper candidly admitted that he does not support Mugabe or ZANU-PF and became involved for purely financial motives. When asked how he would vote in a presidential poll, he said that he was an MDC supporter. Voice of America reported on 21st September 2011 that Chipangano, based in Mbare, had been stepping up criminal activities in recent days with extortion at bus terminals and seizing control of market stalls. The co-minister of home affairs had said that Harare was overrun by the gang, alleged to have ties to ZANU-PF. Commuter omnibus operators were assaulted at the bus terminus opposite Harare Central Police Station and police officers who came to investigate were beaten up. ZANU-PF officials denied that Chipangano was tied to the party. Chipangano used to operate mainly in high density suburbs or

townships but the deputy mayor of Harare said in the same article that there was now anarchy throughout the city as the organisation seized control of every open space. A press release from the embassy of the United States on September 28th 2011 made mention of an unrestrained show of violence and extortion along political lines around Harare by Chipangano, described as a ZANU-PF allied gang. The Standard reported on 6th November 2011 that Chipangano had unleashed a reign of terror in Harare, threatening to take over businesses and land. Legislators and journalists were attacked inside parliament. A media scholar, Brilliant Mhlanga was reported as saying that ZANU-PF hoped that the threat of violence would continue to loom over the heads of people so that in the event of elections the party would be in the ascendency.

70. On 22nd January 2012, The Standard reported that political analysts had warned that recent running battles between police and vendors in Harare, the arrests and torture of MDC-T activists across the country and ZANU-PF's continued reluctance to implement the roadmap to free and fair elections were telltale signs of imminent political chaos. Chipangano was reported on 28th January 2012, by The Standard, to be disrupting construction work in Mbare, as part of a protest by local residents who claim that they were not consulted by the local authority in relation to the project. Construction workers were attacked by Chipangano members and were only able to resume work when the coast was clear. Across the road, the group was parcelling out stalls to ZANU-PF supporters. Chipangano was reported as having disrupted a housing scheme the previous year, established under the auspices of the Bill and Melinda Gates Foundation.

71. The following month, on 18th February, the same newspaper reported that Chipangano had managed to instil fear into the hearts of residents of Mbare, rowdy young men and women moving from house to house ordering residents to attend ZANU-PF meetings. Those who tried to resist were dragged to the militia's bases dotted around the suburb, where they were tortured. Attempts by the city council to evict them have been met with violent resistance. MDC-T said that the group was sponsored by known senior ZANU-PF officials, some of whom were aspiring for political office in the constituency. Chipangano's influence was described as not limited to politics as it determined who would get a stall at informal markets. The Harare Residents' Trust coordinator, Precious Shumba, was reported as saying that if a person lived in Mbare, he or she would rarely be protected by the police. Residents reported cases such as theft to ZANU-PF structures as in most cases, police officers were openly defied by the militia. Chipangano received further attention from the media in Zimbabwe in March and April 2012. Nehandaradio.com reported on March 26th that the acts of Chipangano, described as a notorious shadowy militant ZANU-PF group from Mbare, could be described by one word: terrorism. Zimbabwe Briefing, a publication from the Crisis in Zimbabwe Coalition, in its 28th March to 3rd April 2012 edition, stated that Chipangano was growing its tentacles in all urban areas in Zimbabwe.

72. The group was described as having been reported to be behind a spate of violence in many parts of Harare beyond Mbare. An MDC-T rally in Sunningdale was disrupted in mid March 2012 and the same group was behind a spate of violence in Chitungwiza in late 2011. The author of the briefing report, a Zimbabwean journalist and human rights activist, was in no doubt that Chipangano was in Mutare during Mugabe's birthday celebrations in February 2012. He described Chipangano as the beginning of the spread of structures of violence by non-state actors supported by ZANU-PF and given logistical support

by state security agents. He called for the disbanding and arresting of members of Chipangano and a need to put pressure on the police through publicity so that they take action against the gang.

73. South West Radio Africa reported on 12th September 2012 that a gang of ZANU-PF thugs known as "Top Six" had been "reactivated" in the town of Chinhoyi, Mashonaland West. The secretary general of the MDC-T Youth Assembly described the gang as "a replica of the Chipangano gang that has terrorised Harare" and said that MDC-T wants to ensure that all perpetrators are arrested. The Zimbabwean described Chipangano as the ZANU-PF youth gang that has terrorised residents of Mbare, in an article published on 15th April 2012, which had reportedly started campaigning for the party. The gang were described as operating with impunity and with the support of ZANU-PF officials and as having regularly forced local residents, vendors and passersby to attend ZANU-PF rallies on open ground in the area. In a recent incident, people with no identity documents were told to reveal their details to the group on the promise that Chipangano would approach the Registrar General for help in registering them to vote. There was an element of fear because anyone who refused to reveal their identity was accused of being a supporter of the MDC formations. According to a source from a community radio station, Chipangano had gained so much power that even the police were afraid to intervene. South West Radio Africa reported MDC-T Bulawayo provincial chairperson, Gordon Moyo and the policy coordinator of the MDC Ncube faction, Qhubani Moyo as agreeing that a few people in government had monopolised wealth and political space in Zimbabwe, resulting in social, economic and political conflict. Despite the formation of the Inclusive Government, Zimbabwe continued to witness politically motivated violence, with Chipangano terrorising residents in Mbare, Highfields and other surrounding suburbs in Harare. Amnesty International's Annual Report on Zimbabwe for 2012 also made mention of Chipangano, described as a gang linked to ZANU-PF and as having committed human rights abuses with impunity in their base in Mbare and in other parts of Harare. On 23rd July 2012, they invaded the parliament building and disrupted a public hearing on the Zimbabwe Human Rights Commission bill, beating several people including an MP and a journalist.

74. Morgan Tsvangirai was reported as saying that the police commanders were forcing their subordinates to support ZANU-PF, in a report published on 21st June 2012 by Radio Vop Zimbabwe. On 1st July 2012, the same source reported that the mines and mining development minister had pledged to give gold, platinum and diamond mines to the military and police, apparently to safeguard the country's minerals. The outgoing US ambassador was reported on 24th July 2012, by Voice of America, to fear that Zimbabwe's next elections could be violent, judging by recent trends. There were disturbing signs of potential violence that could be problematic in an election environment, he stated at his last media briefing in Harare.

75. Morgan Tsvangirai vowed to take the fight between Harare City Council and Chipangano, as reported by Zimbabwe News Online on 22nd June 2012, having been briefed by mayors who told him of the failure by the police to protect their council properties from invasions by ZANU-PF aligned groups. The Zimbabwean reported a statement issued by the MDC Harare provincial spokesperson in which Chipangano was said to have made Mbare and surrounding suburbs no-go areas for MDC activists and other peace loving people. Chipangano was described by the spokesperson as being owned and financed by some politicians in ZANU-PF.

76. The disruption of training for enumerators, as part of the census process supposed to take place from 17th August 2012, was reported by S W Radio Africa on 8th August 2012. For the second day running, armed riot police descended on Harare Girls High School and ordered all enumerators undergoing training there to disperse. There were similar reports from all over Zimbabwe. The radio station reported that this was a clear attempt to derail the census.

77. In mid August 2012, Freedom House urged SADC leaders during their summit in Mozambique to demonstrate strong commitment to free and fair elections in Zimbabwe by demanding that elections not be held until the Global Political Agreement was fully implemented. A senior programme officer for Africa at Freedom House was reported as saying that without significant reform, Zimbabwe had little hope for free and fair elections and was on a path to see a repeat of the electoral violence seen in 2008. As a guarantor of the GPA, SADC had a responsibility to the people of Zimbabwe to ensure that the GPA is fully implemented. On 17th August 2012, Voice of America reported that Zimbabwe's political impasse was high on the SADC agenda. At the end of that month, The Zimbabwe Independent, a business weekly newspaper, similarly reported Freedom House as urging SADC leaders to be firm on resolving Zimbabwe's political crisis by ensuring full implementation of the GPA before elections.

78. More recently, on 7th October 2012, The Standard reported Morgan Tsvangirai as saying that he would soon convene an emergency council meeting to decide whether or not to stay in the Inclusive Government. He said it would be morally wrong for him to end up as President at the expense of the people and called Mugabe a hypocrite, who denied violence by day and promoted it by night.

PART 3

OTHER DOCUMENTARY EVIDENCE ADDUCED BY THE RESPONDENT

79. The respondent's bundle of evidence consisted of several witness statements and country evidence largely dating from June to August 2012. This included the COI Report published on 14th July that year, a summary of events in July and August 2012 in bulletins from the COIS and an Operational Guidance Note published on 10th August 2012. The bundle also included reports from the Zimbabwe Peace Project ("ZPP"), published in June, July and August 2012, monitoring human rights violations in Zimbabwe, compiled from reports from ZPP community based human rights monitors who observe, monitor and record cases of human rights violations in the constituencies in which they reside. ZPP deploys a total of 420 community based peace monitors, two for each of the 210 electoral constituencies in Zimbabwe. The monitors reside in the constituencies they monitor, compile reports which are handed over to ZPP provincial coordinators, based in the ten administrative provinces of the country. Upon receipt and verification of the reports, the provincial coordinators compile reports which are then consolidated at ZPP's national office.

80. The ZPP Monthly Monitor reports contained an assessment of politically motivated human rights violations in Zimbabwe, for each of the months of June, July and August, 2012, including a bar chart showing violations in each of these months in the years 2008 to 2012 inclusive.

81. For June 2012, politically motivated human rights violations were described as having continued on a downward trend. An analysis of the violations trends during the month of June over the past five years revealed that the month has always had high numbers of such violations, compared to other months. It was in June 2008 that the country witnessed horrific politically motivated human rights abuses, during the presidential run-off election campaign. In June that year, 3,758 violations were recorded. The number remained high in June 2009 when 1,558 cases were recorded. In June 2010, the number had fallen to 913 cases, only to increase in June 2011 to 1,114, the author of the report noting that this coincided with the ZANU-PF anti-sanctions petition campaign moving across the country. The cases recorded in June 2012 fell substantially to 42 but cases of politically motivated violence remained high and the atmosphere volatile in Midlands, Manicaland and Masvingo provinces, with a significant rise in Mashonaland West. Incidents of the politicisation of food aid remained very low, although the situation on the ground suggested that people's rights would be violated as they sought food aid as a result of the drought affecting the southern parts of the country in particular. For Harare in particular, a total of fourteen violations were recorded for June 2012. Chipangano features in the short commentary, members of the gang having chased away ZEFA employees installing a transformer at a service station being built near Matapi Police Station. Those responsible alleged that the owner was affiliated to the MDC-T. A female ZANU-PF supporter was allegedly assaulted by two soldiers for wearing a ZANU-PF t-shirt near the Zengeza 4 Service Station.

82. The ZPP Monthly Monitor Report for July 2012 shows, similarly, a decrease in the number of politically motivated human rights violations from the figure recorded in June, from 421 cases to 375 cases. An analysis of violations over the past five years shows that July has had a high number of violations since 2008, when 1,125 cases were recorded in the aftermath of the presidential run-off. The violations trend continued upward in 2009, 1,335 cases being recorded in July that year, before falling to 884 cases in 2010 and rising slightly to 910 cases in July 2011. The executive summary refers to a worrying development in the re-emergence of terror bases across the country, manned by ZANU-PF militias, this trend being observed in Mashonaland West, Central and East provinces and Masvingo.

83. In Mbare in Harare, about fifteen ZANU-PF youths suspected to be members of the Chipangano gang harassed and displaced a female dance group owner from her house, on 12th July, having accused her of performing with her group at Harare Residents' Trust, believed to support the MDC-T. The report describes the major sources of conflict throughout the country's ten provinces as being inter and intra-party conflict between ZANU-PF and the MDC-T. While MDC-T supporters remain the major victim of politically motivated human rights violations, the number of ZANU-PF supporters who have fallen victim to violence has increased significantly, to 20% of victims in recorded cases for the month. Fourteen violations are recorded for Harare. Violations are described as still continuing in Mbare Township, victims sometimes reporting to the police, who do not arrest the perpetrators who are mostly members of Chipangano.

84. The report for August 2012 showed an increase in recorded cases, up from 375 in July to 462. The increase is attributed to the political impasse in the constitution making exercise. The COPAC led process stalled, raising tension and deepening polarisation. The two MDC formations endorsed the COPAC draft, whereas ZANU-PF rejected it and insisted on forcing its own amendments into the draft. The

national census programme fell into disarray as soldiers and members of state security agencies invaded enumerator training centres across the country. Reports from across Zimbabwe suggested that their motive was not political but material as enumerators received a "hefty allowance", described as the incentive for soldiers and others "to seek to muscle in on the programme".

85. An analysis of trends in violations over the past five years showed that the month of August had fewer cases of human rights violations since 2008, when 964 cases were recorded, two months after the presidential run-off. The downward trend continued in 2009, when 527 cases were recorded but numbers increased in 2010 to 848 cases, and then declined the following year, with 720 incidents recorded in August 2011. August 2012 showed a further fall. The Joint Monitoring and Implementation Committee (JOMIC) increased its presence and visibility in the Harare Province, especially in the volatile Highfield suburb, where its vehicles were always on patrol. The increased visibility of the body led to a freer atmosphere and is described as a positive note in the report. However, Harare Province also witnessed clashes between touts, ranks marshals and commuter omnibus operators over charges, linked to the Chipangano gang, or to Mandimbandimba, allegedly aligned to ZANU-PF. ZPP was not able to immediately establish all related incidents but, according to media reports, the touts were demanding US$2 per trip from over 6,000 commuter omnibuses operating in Harare. A total of sixteen cases were recorded in Harare for the month.

86. In the COIS bulletin for August 2012 (at paragraph 2.03), the completion of the census process was noted, as reported in The Herald on 28th August 2012. The census came to an end the day beforehand and finance minister Tendai Biti told journalists that at least 98% of Zimbabwe was covered by the previous Sunday, the mopping up programme being completed on 27th August. He described the process as having been done using UN principles and SADC guidelines. Preliminary results from the census were hoped to be available by the end of the year. The government released US$8,000,000 to the Zimbabwe Statistical Agency, so that enumerators could be paid.

87. Many of the sources for the reports and other material in the bundle were similar to those relied upon by the appellants in their country evidence, including the BBC, South West Radio Africa and newspapers published in Zimbabwe, notably The Herald, The Standard and The Telegraph and The Zimbabwean. The material was by and large concerned with recent events, in the summer and autumn months of 2012. BBC News, ABC News and South West Radio Africa all reported in the third week of September 2012 that President Mugabe had set out plans for a referendum in November and elections in March 2013, proposals denounced as unrealistic by the opposition. The Second All Stakeholders' Conference was reported as having been delayed by COPAC from October 2012. South West Radio Africa reported on 28th September that Mugabe, Tsvangirai and Deputy Prime Minister Mutambara agreed in Harare that the COPAC draft would be the only document used during the conference. COPAC agreed to allow civil society to participate. NewsDay reported the MDC-T as rejecting calls that the elections be held under the current Lancaster House Constitution, insisting that the COPAC led draft should be completed.

88. On 8th September 2012, NewsDay reported that Kombi operators in Harare had threatened to approach President Mugabe if police remained reluctant to confront what were described as ZANU-PF youths demanding cab rank fees in

Harare as the war for control of lucrative commuter omnibus ranks escalated. The drivers had complained that those demanding money from them claimed to be ZANU-PF youths who insisted that nothing would happen to them as the party was in power. One of the drivers said that they had vowed that they would not pay and that the police failed to act while the youths blocked roads and harassed Kombi crews. In the same article, a police spokesperson was reported as saying that all stakeholders have now been engaged to try to get to the bottom of the problem.

89. South West Radio Africa reported on 11th September 2012 that the Zimbabwe National Army had deployed military police to restore order at the Charge Office commuter omnibus rank in Harare. Some of its members had embarked on revenge attacks on touts and rank marshals who assaulted two uniformed members of the army the Thursday beforehand. On the Monday following, twenty soldiers attacked touts, rank marshals and also innocent bystanders. Soldiers in civilian clothes then carried out "another mop-up operation", stationing themselves at strategic points at the rank on Tuesday morning. The soldiers carried out surveillance on touts demanding protection fees from rank marshals and drivers. The radio station's correspondent reported that the soldiers were saying that they wanted to get rid of all extortion business as it had brought anarchy to the streets of Harare. Although the disturbances took place very close to Harare Central Police Station, the police did not intervene. There was calm after disturbances in the morning and the soldiers then returned at lunchtime. The military police then intervened to stop the violence escalating although tension remained in the area. It was widely believed that the gang that assaulted people were Mandimbandimba, an "offshoot of the notorious Mbare based outfit, Chipangano". The gang was described as controlling most flea markets, council owned flats and other bus ranks across Harare and as being synonymous with violence and intimidation and as having led attacks against perceived opponents of ZANU-PF for years. In an earlier report by the same radio station on 7th September 2012, the director of Harare Residents' Trust told a correspondent that the gang was originally let loose by top ZANU-PF officials to ensure the party's grip on power. The party no longer had control as the gang had become financially independent. ZANU-PF was reported as having tried to distance itself from the attacks on the minibus or Kombi drivers, telling the state controlled Herald newspaper that the gangs were not aligned to the party.

90. Early September 2012 also saw a report in The Herald that JOMIC had hailed the three political parties in the Inclusive Government for increasing levels of tolerance of each other and reported a reduction of violence in Masvingo Province. NewsDay reported an article by Mr Antony Reeler on 30th August 2012 that the peace agreement in Zimbabwe remained dysfunctional and that civil society groups had continuously pointed out that an obsession with the Constitution missed a central issue: constitutions do not guarantee reforms, reforms guarantee constitutions. There remained a lack of reform and an impasse, the very latest date for the elections to be completed being November 2013.

91. An opinion piece in The Herald published on 14th August 2012 called for Zimbabweans across the political divide to rally behind President Mugabe's call for people to desist from violent campaigns and to concentrate on working for the development of the country. Prime Minister Tsvangirai was reported as calling for the police to respect the rule of law as the country prepared for a referendum on the Constitution and the elections, in a piece published by allafrica.com in mid

August. The Zimbabwe Election Support Network was reported in The Standard on 16th September 2012 as noting that the ZEC had not been able to implement electoral provisions and lacked the independence and neutrality to bring the political parties in Zimbabwe to book. There had been an inability to speedily deal with electoral disputes and election related violence. The expense of holding the outstanding by-elections was relied upon by President Mugabe as justifying "harmonised elections", to be held in the last week of March 2013, as reported in The Herald on 27th September 2012. An urgent application was made by him and by the government and the commander-in-chief of the Zimbabwe Defence Forces seeking an extension of the deadline to proclaim dates for the by-elections in three vacant constituencies, the extension being granted by the High Court in Zimbabwe.

92. The Zimbabwean reported on 26th September 2012 that the Electoral Amendment Bill, although having completed its passage through parliament, had not been gazetted as an Act. Parliament was due to resume on 9th October 2012.

93. The Standard reported on 1st October 2012 that there were fears that security chiefs in Zimbabwe were meeting behind the back of Prime Minister Tsvangirai. President Mugabe had not called National Security Council meetings for almost five months. Sources told the newspaper that security chiefs continued to meet with President Mugabe on a regular basis. A constitutional expert at the University of Zimbabwe said that the failure to hold National Security Council meetings was a cause for concern, particularly as the country moved towards elections. The Herald reported that the political parties had said they were ready for harmonised elections, so long as reforms and the road map set out in the Global Political Agreement were in place, in a report published on 28th September 2012.

94. South West Radio Africa reported on 13th September 2012 on the "citywide crackdown" launched by the police in Harare on Mandimbandiba, who posed as touts and rank marshals at bus ranks across the city and used intimidation to force minibus drivers to hand over "protection fees". The police launched what was described as a major blitz against all suspected touts, rank marshals and anyone linked to the gang. The operation went wider, the police raiding some premises where people believed to be part of the gang operated and some were identified by ZANU-PF regalia they wore. The report noted that it was likely that some innocent people had been caught up, echoing concerns raised by ZPP. Residents in Harare were reported as wondering why the police had clamped down on the gang, many believing that it was a sign of ZANU-PF infighting.

95. The stance of the Zimbabwean Army, in the light of a threat by generals to ensure that President Mugabe retains power even if he loses the forthcoming presidential elections, was considered in a report by Nehanda Radio on 9th July 2012. The Secretary of Defence, a member of the MDC-T, described a claim by the Defence Forces Chief of Staff that the military would not recognise any leader who had not participated in the war of liberation as personal comments, shared by a few generals who had openly declared their allegiance. The minister was reported as saying that many members of the armed forces who spoke to him disassociated themselves from these statements. The Chief of Staff and a few other elite officers had benefited hugely from Mugabe's patronage but at the level of colonel and brigadier and below, support dwindled. The "top brass" in the security forces were described as unsettled by the likelihood of President Mugabe and ZANU-PF losing the general elections, in an article entitled "Security

chiefs panic" in The Zimbabwean on 18th July 2012. South Africa and SADC were reported as making it increasingly clear that they would not brook another ZANU-PF "stolen election victory", according to a well-informed source. ZANU-PF had been crippled by factionalism and senior officers were reported as making attempts to endear themselves to the MDC. Members of the armed forces speaking to the MDC's national spokesperson, Douglas Mwonzora, had said that they were fed up with the partisan attitude of a few "securocrats" and were willing to serve under any government, including an MDC government.

96. The Africa Review reported agreement between President Mugabe and Prime Minister Tsvangirai on a number of measures to speed up preparations for the elections, in an article published on 2nd October 2012. This was shortly after President Mugabe's application to the High Court regarding the deadline for holding by-elections and proposals to hold harmonised elections in 2013.

97. On 4th October 2012, the Mail and Guardian reported that ZANU-PF's gangs, including Chipangano, were "spinning out of control". A local councillor told a reporter that members of the youth gangs, including "Al-Shabaab", aligned to ZANU-PF, were taking root in urban areas and taking control of poor townships. ZANU-PF's secretary for administration recently ordered Amos Midzi, party chairperson for Harare, to end Chipangano's reign of terror, saying that its activities were damaging the image of the party. The cartel that had taken over taxi ranks, pushing out the police and city council officials, was described as part of a wider network that controlled much of township life, from allocated market stalls to deciding who occupies flats.

APPENDIX C

TRANSCRIPT OF ORAL EVIDENCE

1IN THE UPPER TRIBUNAL

Field House,
Breams Buildings
London
EC4A 1WR

Tuesday, 2nd October 2012

BEFORE:
THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE PETER LANE
DEPUTY UPPER TRIBUNAL JUDGE CAMPBELL

- - - - - - - -

BETWEEN:

CM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

MR MARK HENDERSON (instructed by Turpin & Miller) appeared on behalf of the Appellant.

MR COLIN THOMANN (instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

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Transcribed by Harry Counsell
Court Reporters
Cliffords Inn
Fetter Lane,
London EC4A 3LD
Tel: 020 7269 0370
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TRANSCRIPT OF EVIDENCE OF DEWA MAVHINGA

- - - - - - - -DEWA MAVHINGA
Examination in chief by MR HENDERSON

MR HENDERSON: Could you state your full name, please?

A. My name is Dewa Mavhinga.

Q. And the address at which you are presently living?

A. No 2. Whitehall Road, Cambridge City, 5HLT.

Q. Thank you. I think that you have a part C paginated bundle there. Is the bundle you have a bundle with your witness statement in?

A. Yes.

Q. I think that it is page 27.

A. Yes.

Q. That is your statement, is it?

A. Correct.

Q. Are you familiar with the contents of that statement?

A. Yes.

Q. And is what you said that in that statement true?

A. Yes.

Q. Do you have a date when you signed it? It is the last page of the statement, page 34. Can I check? Were you asked to sign the statement?

A. I checked this by email and confirmed by email that it was a correct statement.

Q. So you have not actually signed it yes?

A. Yes.

THE PRESIDENT: Which day did you confirm that it was correct?

MR HENDERSON: Can I lead on this?

THE PRESIDENT: Yes.

MR HENDERSON: Did you approve that statement by email on 26th September?

A. Yes.

THE PRESIDENT: I have inserted that at the back of the statement so I have an up-to-date picture.

MR HENDERSON: Right. I just have a couple of additional questions for you. Firstly, you referred at paragraph 11 of your statement to the draft Constitution is apparently subject to political negotiation. Can you just tell us what the latest is on that in terms of what is happening COPAC process?

A. That is correct. There is negotiation in terms of proceeding to a second all stakeholders' conference to discuss the contents of the draft Constitution, where initially civil society groups excluded and where ZANU PF, from the ruling party, had submitted a number of reforms, so now it appears that there could be agreement and there could be a second stakeholders' conference early next month and thereafter a referendum on the Constitution.

THE PRESIDENT: So the process that is presently envisaged is possibly a second stakeholders' conference next month, which means November - or are you doing this as of September - and then a referendum after the second stakeholders' conference?

A. Yes, discussions of that and perhaps by the end of October there should be a second all stakeholders' conference and, possibly, in November a national referendum on the Constitution.

Q. Do these developments and the possibility that a draft Constitution will be agreed affect your prognosis of what is likely to happen in the forthcoming elections?

A. Not at all. What is happening with the Constitution is that it is a political negotiation in a compromise document that does not address the fundamental aspects of transforming the society in Zimbabwe in terms of the infrastructure of violence and the security forces, which are the major issues for us in Zimbabwe.

Q. Now, the Home Office have referred to the role of the Zimbabwe electoral commission and I think that ...

THE PRESIDENT: This is the second question that you are going to ask?

MR HENDERSON: Yes. And you mention the electoral commission at paragraph 10 of your statement. You refer to the current chairman of the commission being an improvement. Who actually is the former chairman?

THE PRESIDENT: I think that we had this, did we not? Was it (name given) in 2010?

A. No.

THE PRESIDENT: Then we know the answer.

MR HENDERSON: Very well. What role is the current chairman actually currently performing?

A. A minimal role in terms of overseeing the work of the electoral commission.

Q. And why is that?

A. I believe you have an article that speaks to that.

Q. Just hold on one second.

THE PRESIDENT: This is another?

MR HENDERSON: Yes. You have referred us to this, but just sort of summarise what the problem is with the chairman?

A. The chairman is not full, he is an acting chairperson of the commission, who is from the previous commissions that had been responsible for disputed elections in Zimbabwe.

Q. I am sorry, who is the acting chair?

A. The deputy chairperson of the commission is Ms Joyce Kazembe, who has been with the electoral commission for the last 15 years, so the improvement in terms of Justice Simpson Mutambanengwe as the chair person, he is not effective because he is not substantively getting out there.

Q. And why is he not actually being the chair, what is wrong with him?

A. There have been reports, credible reports, about his physical function, his health condition, as well as he is initially based in Nambia where he has to travel to Zimbabwe, but primarily it is due to his health that he is unable to effectively discharge the duties of chairperson of the commission.

THE PRESIDENT: This document you have just handed up, is this dated 6th March 2012?

MR HENDERSON: I am instructed that it is.

THE PRESIDENT: And that is a time, is it, 06.43?

MR HENDERSON: Yes.

THE PRESIDENT: Does that relate to the report in the Zimbabwean or the date that someone downloaded it?

MR HENDERSON: The date on which it was downloaded is right at the bottom of the page. That is today. We see that at the bottom right-hand corner.

THE PRESIDENT: I see. But the report itself dates ...

MR HENDERSON: I understand that it dates from 6th March. I have been told that that is right.

THE PRESIDENT: OK. Those are your two supplementaries.

MR HENDERSON: I am sorry, I have a couple more brief questions. Some of them are arising from the sort of ...

THE PRESIDENT: That could have been dealt with in the witness statement.

MR HENDERSON: Some of them could not be, sir, because they are arising from late evidence any by the Secretary of State ...

THE PRESIDENT: What are your other two topics?

MR HENDERSON: I am just finishing on this topic. What is the affiliation of the acting chair, political affiliation?

A. ZANU PF, from the ruling party.

Q. What is the current position in relation to the Electoral Amendment Act?

A. We have from 2011 an Electoral Amendment Bill that passed through Parliament but has not been signed into law by the President, so it is before the President at the moment.

Q. I will just check. There were initially moves to allow the diaspora to vote, which ZANU PF opposed?

A. That is correct.

Q. The Bill now before Mugabe, does that include the right of the diaspora to vote or not?

A. It excludes the right of the diaspora to vote.

Q. The Secretary of State has drawn attention in the latest submissions to their point that the MDC ... it is said that the MDC might pull out of elections. You have indicated that elections have to be held next year. Have the MDC adopted any position that they may pull out of the elections that are required by law next year?

A. No.

Q. In material served this morning, the Secretary of State has produced an article. This is page 8 of the updating bundle that Mr Thomann has just given you. It is an article that starts at page 9. "Police in Harare have launched a city-wide crackdown on a gang linked to the notorious Chipangano group arresting more than 300 people since Wednesday". Then it says that the operation has targeted suspected members of the Mandimbandimba. What is that?

A. Mandimbandimba is a name that refers to touts who frequent the city, mainly young men.

Q. This is a crackdown on touts. You referred in your statement to a range of activities being carried out by ZANU PF militia in Harare including requiring people to attend ZANU PF meetings. Is there any crackdown on those sorts of activities?

A. No. The article is referring specifically to a crackdown on the Mandimbandimba touts.

Q. Can you just tell us briefly how this current sort of dispute between the touts and the police and the army started?

A. Well, we understand that it was initiated following an alleged beating of soldiers in uniform by the touts and then a revenge attack by the soldiers in uniform a few days later in which the police then joined in, so it was basically a revenge attack that saw the police joining in.

Q. Obviously, one of the issues is that evidence put in by the Secretary of State that the police have reformed and you have said in your statement that you do not consider that the police have reformed. Does the conduct of the police over the last few days in relation to this dispute lead you to believe that they have reformed?

A. Not at all. In fact, it would confirm that the police have not reformed as they are indiscriminately beating up people in response to these fights between soldiers and the Mandimbandimba group and not at all applying or maintaining law and order. What is happening is that there is an indiscriminate random beating of members of the public.

MR HENDERSON: Those are all my supplementary questions, sir, other than the fact that you see at paragraph 27 that you explain how you obtained a secret video of a forced meeting in Harare this year or how Crisis obtained it. Would this be a convenient moment to show it?

THE PRESIDENT: Yes.

(**Problems with playing video**)

MR HENDERSON: I wonder if Mr Thomann wants to start and then we can maybe show this at the end.

THE PRESIDENT: You have not had sneak preview.

MR THOMANN: I have seen it.

THE PRESIDENT: Then you are better informed than we are. Can you just remind me for my note the date of the events shown in this thing?

MR HENDERSON: I will have to ask. Mr Mavhinga, at paragraph 27, the video that you provided us with, which you refer to at paragraph 27, do you happen to know the date upon which the video was actually taken rather than obtained by Crisis or delivered to Crisis?

A. I believe it was in March or April of this year, 2012. It is dated.

Q. It is dated on the video?

A. Yes.

THE PRESIDENT: We will have to leave it there and let's move on.

Cross-examination by MR THOMANN

MR THOMANN: Mr Mavhinga, is it right that one of the things that your coalition of organisations does is monitoring human rights abuses?

A. Yes, that is correct.

Q. Can you help me with information relating to Zimbabwe? Are you aware of any reports of adverse repercussions for people returning from the UK since April 2011?

A. No, and we have not been monitoring that particular aspect.

THE PRESIDENT: So the answer is in two parts: I am not aware of any adverse information but you do not maintain monitoring of that particular problem?

A. That is correct.

MR THOMANN: You provided us with your views on the situation in Mbare and high density suburbs, are you aware of information as to human rights abuses in the low and medium density suburbs?

A. Yes. In our view, generally, the medium density suburbs and the high density suburbs are more or less the same in terms of demographics and in terms of human rights abuses occurrences.

Q. How would you describe the differences in terms of human rights security between a high and a low density suburb?

A. Well, in terms of the numbers of people and political activities, they are much higher in high density suburbs than in lower density suburbs.

Q. One of the suburbs that we are interested in today is Hatfield, how would you characterise Hatfield?

A. Hatfield is a medium density suburb that is bordering the peri-urban and high density areas of Epworth at the edge of Harare.

Q. Are you aware of any reports of abuse of persons in Hatfield?

A. Not at the moment.

Q. Would you take the view that, compared, for example, with Mbare, Hatfield would be a more secure area?

A. Not necessarily given its proximity to Epworth.

THE PRESIDENT: Not necessarily more secure, but if you have not had any reports of abuse from Hatfield and you have from Mbare, does that help you answer the question?

A. I would be unable to say categorically that Hatfield is more secure than Mbare or Epworth.

MR THOMANN: As regards the high density areas, the focus of much of the information that the tribunal has is on Mbare, could you help us on whether there are any distinctions between Mbare and other high density suburbs around Harare?

A. Perhaps an additional aspect for Mbare is that it is a residential area with huge numbers of people staying there and it is also a transport hub for the capital and, perhaps, the nation in terms of people

travelling there and doing informal business in that area, which would mean that even those that live in other high density suburbs would on a daily basis travel to Mbare to engage in informal businesses like buying and selling ...

Q. In terms of reports that you monitor of human rights abuses, how would you say those differ between Mbare and other high density suburbs?

A. I am sorry, come again.

Q. In terms of the number and frequency of human rights abuses that you monitor, how would you say Mbare compares to other high density suburbs?

A. In terms of reporting, there have been more reports, public reports, of abuses in Mbare than in other high density suburbs given the numbers of people travelling to do business there and those that relate to attack on individuals doing informal businesses.

Q. What, if anything, would you say the significance is of Chipangano being based in Mbare? Would that make a difference to the human rights position between Mbare and other high density suburbs?

A. It would contribute but Chipangano I know is also operating in other high density suburbs across the city.

THE PRESIDENT: I am told, by the way, that our equipment does not recognise your CD. Anyway, think about it.

MR THOMANN: Are you aware of reports of actual infringements by Chipangano outside Mbare?

A. Yes.

Q. And how frequent are those compared to Mbare?

A. I cannot say offhand whether they are more frequent than in Mbare because the reports have related to other high density suburbs, for example, in Budiriro, for example in Epworth and Glen View; we have had reports on Chipangano activities in those areas.

THE PRESIDENT: Just for my note, if I can interject at this stage, this group, when did evidence of its existence become known to you?

A. In terms of ZANU PF ...

Q. No, the Chipangano.

A. I am trying to explain that ZANU PF youth used militia activities because this name emerged perhaps over the course of the last three years, but in terms of their activities, in terms of the existence of the group of ZANU PF aligned supporters who commit these various abuses, it has been ongoing for some time, but ...

Q. I am asking specifically about this group with this name. We have a vast amount of information about what has been going on in Zimbabwe for some years, but this group emerged about three years ago. When did you first become aware of this group's activities and existence?

A. I believe in 2009 ... yes, I believe in 2009.

Q. And has there been any change in the scale of its activities since 2009?

A. It would appear that now is much more organised, much more widespread in terms of the reports. Initially, it was only in Mbare that we had reports of these activities, but now even in other cities across the country we have had reports of Chipangano related activities in Marondera in Bindura and other groups that appeared affiliated to it, even in Kwekwe, so it appears the activities are increasing and the level of organisation.

MR THOMANN: You said that this is a group that has been around for some time.

A. Yes.

Q. And in terms of its current activities, would you accept that there has been a degree of a backlash against it?

A. No, I would not. I would want to distinguish perhaps if there is reference to the Mandimbandimba. Because, if you look at Chipangano as distinct from the touts, then there has not been any backlash, there is a measure or degree of impunity for their activities. We have not had any records of investigations or police arrests or convictions in terms of some of the crimes and abuses that they have committed.

Q. Have you had records of ZANU PF which was distancing themselves from this group?

A. Yes, there have been reports of ZANU PF officials distancing themselves from these reports, but these reports are contradicted by conduct on the ground. We also had reports of senior ZANU PF officials working hand in hand with this group and the failure or the unwillingness by the police to take action on Chipangano. That also testifies to the links with senior ZANU PF officials.

Q. Do you have a copy of the appellant's singular bundle? I think that it may have been one of the lever-arch files you have been given. If you look at page 33 of that bundle, do you find a report in the Zimbabwean?

A. Yes.

Q. And that has a description of Chipangano in the first paragraph. "It is a terror group that is owned, managed and financed by some rogue elements within ... party", the reference being ZANU PF. Then the pronouncement is that "Chipangano has made Mbare and surrounding suburbs no-go areas for MDC activists and peace-loving people of Harare". Would you accept that the rogue element is an accurate description?

MR HENDERSON: Sir, can you just read the next sentence?

MR THOMANN: Yes, of course. "Chipangano is a renegade unholy ..." Is that the sentence?

MR HENDERSON: Yes.

MR THOMANN: "Chipangano is a renegade unholy and ruthless rag-tag terror group who is owned and financed by some politicians in ZANU PF." Then the next sentence, too?

THE PRESIDENT: The witness can read it. The question is what?

MR THOMANN: Do you accept the description as linked to rogue elements in ZANU PF?

A. No. In fact, the challenge is that there has been an attempt to disown for the purposes of publicity and propaganda, which is something that ZANU PF use very well **[SSHD unable to confirm]**,

when, in fact, in terms of the benefits of the terror activities of the party, these are benefiting senior members. What I would accept that is that perhaps there would be a level of in-fighting between individuals who seek to control **[SSHD unable to confirm]** this instrument of violence and then for individuals to benefit from it, but that it is a rogue element, I would not accept.

Q. If I have this right, the quotations are in the smaller case in the middle of this piece and that is a quotation prescribed to Didymus Mutasa, is it?

A. Yes.

Q. Who is ZANU PF's secretary of administration.

A. Yes.

Q. If you look thorough to page 81 of the bundle, there is an article, a briefing by your organisation, which is dated 3rd April 2012. It is describing Chipangano "as an infamous name for the ZANU PF aligned youth militia based in Harare's ... suburb of Mbare". I am interested in the second column three lines from the end, from the bottom, "In the MDC Parties it appears that only the victims are speaking out. Even as they speak, the voices do not bring any confidence to ordinary residents of Mbare. The Mps are equally petrified of Chipangano". Then "Chipangano is reported to be behind a state of violence in many parts of Harare beyond Mbare. In mid-March 2012 the group discussed it in an MDC team rally in Sunningdale bearing many and causing serious injuries. The same grouping was behind the spate of violence in Chitungwiza in late 2011. I am in no doubt that Chipangano was in Mutare during President Mugabe's birthday celebrations in the eastern border town at the end of February 2012".

MR HENDERSON: Again, could you just read to the end?

MR THOMANN: Of course. "As many residents reported instances of violence with many being forced marched to Sakubva stadium for the festival of Mugabe's birthday".

Are those the sort of events that you were describing, these sorts of incidents?

A. Yes, this will be part of the activities carried out by ZANU PF.

Q. Are you aware of any reports of incidents in the lower and medium density suburbs of Harare?

A. No, not at the moment.

Q. You were taken a moment ago to the article at page 8 of the supplemental bundle. You have already been taken to the headline at page 8, which is police launch crackdown on Chipangano linked gang. Your evidence a moment ago was, was it not, that you considered this to be a separate entity that was being cracked down upon, the Mandimbandimba touts?

A. That is correct, yes.

Q. So your view is, is it not, that Chipangano is not implicated in this particular activity?

A. Well, this group is associated or linked to Chipangano.

Q. That is what the police says.

A. Yes.

Q. So you would agree with that, you agree that Mandimbandimba are linked to Chipangano?

A. But not necessarily Chipangano itself not at the core of the militia.

Q. Linked but not the same as?

A. Correct.

Q. And then the piece finishes with a citation. I think that it is a citation by a person called Muchenwa. Is that somebody you have heard of?

A. No.

Q. Let me ask you then, simply, your opinion in relation to the citation, which is quoted as "People are wondering why this is happening, because they have been doing this for years. Many believe that it is a sign of ZANU PF in-fighting with one faction vying for Chipangano's heads". The question for you is, if this is a group that is linked to Chipangano and the police are cracking down on it, does that in any way alter your views on the degree of protection that can be expected from the police?

A. Not at all. Firstly, what is happening here is that the use of the words "cracking down" would imply that there is a measure of law and order in this, but it is not the case, because what is done is random beatings of individuals believed to be members of Mandimbandimba and this is really in response to an initial beating of soldiers, so it is just a revenge attack. If the police are really cracking down, then what would have to happen is that they would arrest without beating up individuals and then they would press charges as the case maybe, but this is not happening. I would not accept that the police have improved in terms of ending impunity or restoring the rule of law.

THE PRESIDENT: I think a few moments ago you were asked whether you knew who Muchenwa was, it looks as if, if you go to the previous page 9, paragraph 4, Simon Muchenwa is South West Radio Africa's correspondent in Harare. Does that ring a bell?

A. Not at all, no.

Q. The South West Radio Africa ...

A. Yes, I know it and the writer of the article, Alex Bell, I know him very well, yes.

Q. And your views of their reliability as a journalistic source is what?

A. Credible, yes.

MR THOMANN: Can we then look at another bundle, which is the Debbie Goodier bundle?

MR HENDERSON: That is the other lever-arch file in front of him.

MR THOMANN: Could we start at tab 21 of that? Do you find there a report in a publication called "News Day"?

A. Yes.

Q. And it mentions Kombi operators approaching President ....

A. Let me just find it.

Q. It is tab 21.

THE PRESIDENT: That was probably the same bundle as I had the last one in, but maybe ...

MR THOMANN: I was on the respondent's bundle previously, this is Debbie Goodier's bundle.

THE PRESIDENT: But she is a respondent.

MR THOMANN: The previous bundle was the appellant's bundle.

THE PRESIDENT: It must be labelled wrongly.

MR THOMANN: Did the tribunal follow me at all?

THE PRESIDENT: Yes, I did. The last document that I was looking at was South West Radio which I have as part of the tab that you handed up this morning which I have called tab 67 in this bundle.

MR THOMANN: Yes.

THE PRESIDENT: Did I put it in the wrong place?

MR THOMANN: No. The tribunal has the right bundle. It is two different bundles for the witness.

THE PRESIDENT: I see.

MR THOMANN: Have you got to tab 21?

A. Yes.

Q. News Day: Kombi operators. First of all, are you aware of an incident between Kombi operators and the touting group? Are you aware of the ongoing tension between Kombi operators and the touting group in Harare?

A. Yes.

Q. And you mentioned an intervention by the armed forces.

A. Yes.

Q. In terms of the operators approaching President Mugabe, what do you consider to be the significance of that?

A. Well, I would not put much significance on that in terms of them having support to stop the ongoing activities of the ZANU PF aligned groups.

Q. And then, if you look at the last two paragraphs of that report, it mentions the police spokesperson, Inspector James Sabau, saying that he will now engage all stakeholders to try to get to the bottom of the problem. He had met the operators today and yesterday and "we will meet the touts to try and address the problem". What do you consider the significance of that to be?

A. Well, I believe that it could be political grandstanding, because what you have here is a straightforward criminal matter, because, where there is extortion or where the touts are forcing Kombi drivers to pay something, the police should simply arrest the individuals implicated and not have to go to President Mugabe for intervention, so this actually confirms that, really, there is no rule of law, because it does not to take the President to intervene for simple criminal matters to be processed or to be addressed.

Q. So you do not think that this is part of a pattern of civic stakeholders and the police standing up to this group?

A. No, I do not see it that way.

Q. Could you turn, please, to tab 30 of the same bundle? You should find there a report again from South West Radio Africa, which is headlined "Harare gripped with fear, soldiers embark on revenge attacks".

A. Yes.

Q. What is mentioned there is a "report on September 11th of the Zimbabwe National Army being deployed, deploying its military police to restore order and peace at the charge office commuter omnibus rank in Harare". Can you first of all confirm where that charge office commuter omnibus rank is in Harare?

A. It is in the centre of the capital, it is in the city centre.

Q. And can you confirm whether you are aware of that incident?

A. Yes.

Q. Do you accept that that is a different group to the overall police operation, there being the army and the military police involved?

A. I am not sure I understand your question, sorry.

Q. We looked a moment ago at what was called a police crackdown arresting 300 people.

THE PRESIDENT: So you are referring back to the ...

MR THOMANN: The previous report. Do you accept that that is a different group involved here, being the army?

A. No, this is basically the same area and incident.

Q. The same area, but the previous report was something attributed to a police inspector, this is a newspaper report about army activities.

MR HENDERSON: Sir, I understood that Mr Thomann was actually referring to the report before last which was the police crack down of 300 ...

MR THOMANN: Yes.

THE PRESIDENT: Quite. I think that the question is, are the army and police different?

A. Yes.

MR THOMANN: Are there two forces involved here or one in your view?

A. I am sorry, in what sense, I am failing to get the question.

Q. The reference in this article is to the army and the military police operating a crackdown on this day and the previous article we looked at in the supplemental bundle referred to a police crackdown.

A. Yes.

Q. Which was described as a city-wide crackdown on gangs linked to the Chipangano group.

A. That is correct, yes.

Q. Is your recollection that this is the same incident or that these are two separate incidents?

A. It is the same incident triggered by the same set of events.

Q. You say that it is triggered by the same set of events, but do you accept that it is two different responses to it?

A. I believe that it is the continuation of the same response by members of the army and the police, because what had triggered this event was the beating up of soldiers and in that case, usually, the ...

and then other soldiers have responded by beating up the touts and then the police joined in, so it is basically the same series of events.

Q. We get quite a lot of that story reflected in the substantive article, you will see that the original problem took place opposite the central police station, but no police intervened. It said then that the soldiers came back and soldiers continued with the assaults and told the touts to beat up their own colleagues ... It seemed to be something starting, as you said, an attack upon soldiers, but then do you see the middle of that second page, there is a paragraph that says, "He said the soldiers had vowed to continue"?

A. Yes.

Q. And then it looks as if the journalist - in the following paragraph - "This time the military police quickly intervened and stopped the violence escalating". Are there three lots of people here, military police, soldiers and police or is it two lots, military and police, or is it one lot, the police?

A. Well, there is the police and then we have soldiers, but from soldiers they also have within their group the military police.

Q. Yes, like the RMP in the UK, yes.

A. Yes. So these are the groups.

Q. Military police are a sub-head of soldiers.

A. Yes, correct.

THE PRESIDENT: I am not quite sure what you get out of that piece, but that is one of the questions that you want to know, is it?

MR THOMANN: The tribunal will wish to note that there is a reference to the originating incident at tab 32, but I do not propose and I do not need to ask ...

THE PRESIDENT: I have been through this quite quickly. However, you are not putting this forward as an example of good impartial law and order keeping, are you?

MR THOMANN: I certainly am not.

THE PRESIDENT: I am rather relieved to hear that.

MR THOMANN: Moving beyond Harare to Karoi and Kariba in Mashonaland West, what can you tell us about the human rights position there?

A. Broadly, Mashonaland West is one of the violence hotspots what is possibly being perceived as a ZANU PF stronghold and also being the President's home province, so from that point of view we have had reports of violence and in some cases involving members of the security forces.

Q. Are you aware of Karoi and Kariba being particular hot spot areas of difficulty?

A. Yes. Karoi and Maringa Kariba, yes.

Q. In terms of the security situation, how would that compare to living in a low or medium density suburb in Harare?

A. It would be difficult to make a general comparison, because some of the areas are rural areas with a different set of challenges than urban areas, where you have traditional chiefs or headmen who

control movement in and out of the areas, but also with urban areas you have got the militia groups, like Chipangano, playing a similar role, so it is difficult to have a clear comparison of the security level, but the bottom line being that the security levels are quite low, owing to a failure by state security agents to maintain law and order or to perform their constitutional duties.

Q. If we move to the political developments, you said in your previous statement to the tribunal that you feared then a violent election in 2011.

A. Yes, that is correct.

Q. What do you think is the significance of that not having happened?

A. Well, myself and many others were of the view that we would have elections and violent ones at that in 2011, given the pronouncements, particularly by ZANU PF. We had drawn from a resolution ... a Congress, a resolution that they would insist on elections but perhaps we underestimated the desire for them to regroup and to consider their benefit from the inclusive government in terms of economic benefits and financial benefits, particularly from the diamond fields in the east of the country, in Marange.

Q. What do you think was the contribution of civic groups, like yourselves, in putting pressure on halting an early election not happening?

A. Well, I believe there was a significant contribution by certain civic groups, particularly in exposing the challenges of the environment and also in persuading the Southern African Development Community to push for conditions to be in place in order for credible elections.

Q. You mention in paragraph 7 of your statement a group around General Mujuru.

A. Yes.

Q. Broadly, what is your assessment of that particular group's approach to a possible transfer of power?

A. The challenge that is there ... my analysis is that following the mysterious death of General Mujuru, in August 2011, it appears that there has been a holding back by this group in terms of seeking to engage around transfer of power or the succession of President Mugabe, because of the widespread suspicion that General Mujuru was murdered for his position which was to say that there should be peaceful transfer of power or that President Mugabe should step aside.

Q. When you describe a willingness to negotiate, that was to negotiate a peaceful transfer of power.

A. Yes.

Q. Is it your view that that group is still to be found within ZANU PF?

A. Yes, but the death of the late General Mujuru significantly impacted on the capacity to seek to reach out to progressive actors saying that they were hoping for democratic change or other plans. Death was felt to have occurred because he was reaching out to the MDC **[SSHD unable to confirm]**.

Q. You mentioned a COPAC process earlier in the draft Constitution.

A. Yes.

Q. And you will be aware of the change of position by ZANU PF in mid-September, the draft to be put to the all stakeholders' meeting.

A. Perhaps I would qualify that. It is not necessarily a change of position, but ZANU PF insisted on a raft of amendments to the draft. That it demanded should be considered. And that there should be a report on the outreach meetings that we carried out to gather the views of the people on the Constitution. So what is there now is that ZANU PF is insisting that on condition that their amendments will be tabled at the second all stakeholders' conference they would be willing to go along, when, in fact, initially, the agreement among all the political parties was that only one document would go to the second all stakeholders's conference, which is a draft Constitution without ZANU PF amendments.

Q. I have somehow get a record of that. Is this an accurate summary of what you have just told us? Prior to September 2012, ZANU PF were asking for a range of amendments to the COPAC draft, now they are prepared for those amendments to be put to a second stakeholders' conference and that is the change?

A. Let me come again. The change is that prior to September 2012, ZANU PF had put amendments that it had demanded should be discussed by the political parties before second stakeholders' conference.

Q. And now they are allowing those amendments to be discussed by the second stakeholders' conference?

A. Yes, but the initial agreement had been that no other amendments would be taken to the second all stakeholders' conference.

Q. I appreciate that. The question was about ZANU PF change of position and I was asking you what the change of position was.

A. OK.

Q. What do you attribute this change of position to?

A. I believe that it is part of the delaying tactics by ZANU PF, given that the constitutional requirements for elections, the current term of Parliament and the President expires in June 2013, by which time we must have elections as a country and, therefore, to take the amendments which they previously agreed was ZANU PF's senior party representatives in COPAC, so COPAC is also made up of ZANU PF, so for them to have a separate list of amendments that effectively re-writes the draft Constitution and insists that they should be discussed at the second all stakeholders' conference would only achieve the effect of delaying the entire process or derailing the process as we approach elections, leaving the real risk that Zimbabwe would again go to elections in the absence of credible reforms.

Q. We may have been proceeding too quickly on this. Could you look at tab 8 of the respondent's bundle? That is the Debbie Goodier's bundle.

THE PRESIDENT: Can we call it the "Rebuttal Bundle"?

MR THOMANN: Yes. You should find South West Radio Africa report headed "Principals agreed to let COPAC deal with Constitution".

A. Yes.

Q. Can I ask you to turn the page and just read to yourselves the first four paragraphs? (**Pause**)

A. Yes.

Q. Do you accept that that is an accurate summary of the developments in September?

A. Perhaps ... just to qualify that this process is proceeding at two levels, the COPAC process. There is the Constitution of Select Committee of Parliament COPAC process, that is in charge of the draft Constitution in terms of the Government's views. Then there are the principals in Zimbabwe, the political leadership comprising President Mugabe, Prime Minister Tsvangirai and Deputy Prime Minister Mutambara.. Then there is the second all stakeholders' conference which is supposed to look at these processes. These processes are going on in parallel. They are not necessarily in line. So the challenge that is there is that COPAC had agreed ... as I said previously, ZANU PF have got senior representatives in COPAC and yet after they had reached an agreement as political parties in Parliament in charge of this process, ZANU PF as a political party then disowned that agreement and came up with this amendment, so ZANU PF is now coming outside of COPAC when it has got COPAC representatives. So this is the challenge, that ZANU PF in addition to what it has agreed within COPAC it has also disowned and insisted on amendments that must be addressed not by COPAC but by the second all stakeholders' conference, but, ultimately, it would still be up to the political leadership led by President Mugabe to decide on the contents.

Q. You have described it as a parallel process, would it be more accurate to say a sequential process in that COPAC comes up with a draft, it goes to the stakeholders' conference and as a third stage it goes back to the principals?

A. No. The confusion there is that there is an attempt to have a people driven process in terms of the global political agreement, so, on paper, it is supposed to be sequential, where COPAC goes to the second all stakeholders' conference and then thereafter to Parliament for discussion, and then thereafter to a national referendum and then, if accepted, it is then into law. But on the ground now what we are having is that the political negotiations are taking an upper hand in terms of the process and COPAC, even though it is ZANU PF in it, has not threatened the process. ZANU PF has disowned the initial agreement that they have made with their representatives and they are insisting that the draft that is there is not reflective of their views as a party. Therefore, they now want to go to the second all stakeholders' conference, not within COPAC, but with their own set of amendments which they are insisting should carry the day. The major differences, really, are around the issue of executive powers, around the issues of amending the powers of the attorney-general in terms of prosecution and the human rights and the impunity and the terms of office and other things.

Q. If following that it is correct that those amendments were dismissed by the MDC and President Mugabe agreed that the COPAC draft, the original draft, without the amendments, should go to the stakeholders' conference ....

A. I am afraid I would have to disagree because that was not the agreement.

Q. Well, it says here, "On Wednesday, Robert Mugabe, Prime Minister Tsvangirai and Deputy Prime Minister Mutambara met in Harare and agreed that the COPAC draft would be the only document used during the forthcoming second all stakeholders' conference". So do you accept that?

A. My understanding is that there are three documents that are supposed to go to the second all stakeholders' conference and one of the documents, which is the national outreach report, containing the views of the people, is actually subject to a Supreme Court application to force COPAC to produce that report of the views of the people so that, even as we speak, there is a Supreme Court case that is pending, that it has to decide on whether or not that document has to be submitted, because one ZANU PF official applied for that to be presented.

THE PRESIDENT: All right. Can we try to get some clarity on this, please? It seems that this Radio report, although it is published on the internet, reports what you have just been shown, that fourth paragraph, and it appears that this report dates from 20th September, although it was printed out later. Now, do you accept that that report is accurate in so far as it goes or do you think that it is wrong?

A. I believe that this portion is not correct, in my view.

Q. So it is not true that Mugabe and Mutambara and Tsvangirai have agreed that the only draft for the second stakeholders' conference will be the COPAC draft?

A. Yes, my understanding is that ZANU PF amendments will be tabled and, in addition to that, another document, the outreach report, is also supposed to be tabled.

Q. And are you aware of any press reporting which supports what you have just told us? Where do you get your information from?

A. There are a number of press reports relating to the court challenge from last week. I believe they are available on the internet. To the effect that the matter is not finalised before the Supreme Court.

Q. The Supreme Court may be looking at something, I do not know, and it may be that what is said here is not comprehensive of all the processes. I am just trying to start off to see whether that statement in itself is or is not an accurate of a recent announcement last week or the week before about this process. I am just trying to go to that. Do you follow?

A. Yes. My understanding is that the ZANU PF separate amendments as a document and the national outreach report, as a separate document, in addition to the COPAC drafts, are the three documents that will be presented to the second all stakeholders' conference. That is my understanding.

Q. OK. That is your understanding and, if your understanding is right, then this report is wrong, because this report says that the only document will be the COPAC draft, so the question that I then ask is, do you base your understanding on recent press reports?

A. Yes.

Q. About the same announcement?

A. Yes, about the negotiations relating to the second all stakeholders' conference, because this is something that is being negotiated even as we speak in terms of ...

Q. I appreciate that it is a moving ball, but ... I think that you have made it plain that you do not agree that that is an accurate statement?

A. No.

MR THOMANN: If you look at tab 3 of the same bundle, you will find a report that says that COPAC delays second all stakeholders' conference.

A. Yes.

Q. If you turn the page, just under the second ring binder, there is the citation by Maddock Chivasa, spokesperson for the National Constitutional Assembly, who dismisses the whole process as a pointless exercise and now needs to be concluded. He said that the outcome would not represent the views of the people of civic society organisations. Then in the next two paragraphs he says that the same political parties that drafted the COPAC draft will also decide what to include after the second all stakeholders' conference. They should just complete their draft of the Constitution, bring it to a referendum and let Zimbabweans vote on it. And then he added that ZANU PF might still bring their own version of the charter to the conference and have their delegates make a contribution based on the amendments that they want.

A. Yes.

Q. Is that the concern that you were referring to a moment ago or are you referring to separate information that you are aware of?

A. No, this is not the concern that I was referring to.

Q. Hypothetically, if ZANU PF had made a climb down in the middle of September that permitted the COPAC process to continue, what would you say the significance of that was in terms of the outlook for an ordered election?

A. I would not put much significance into that so-called climb down, given that at the end of the day the real issues are not about a new Constitution for Zimbabwe. The issues would relate to how to end violence, to dismantle the infrastructure of violence and to end impunity and this is unlikely to be achieved because there is a new document. It is about the conduct, it is about state institutions that are partisan and politicised and supportive of ZANU PF. Those are the bigger questions of the day and these are not necessarily addressed in the draft Constitution, because it is a compromised document that is subject to political negotiation by the political parties.

Q. Do you consider a willingness by ZANU PF to give way on an issue like this as a sign that it is flexible or more flexible in terms of reaching agreement on the road map to elections?

A. No. I believe that ZANU PF ... if there is any perception that ZANU PF has climbed down, it is probably part of a bigger political game plan for ZANU PF, because, in any case, if you look at the contents of the draft document, they do not go far enough to ensure the necessary amendments that would create an environment conducive to the holding of free and fair elections in Zimbabwe, so for ZANU PF it would be a win-win either way, whether there is a draft Constitution that goes to referendum, because the contents are already watered down, so they may want to maximise on the

concessions from the other political players, but, certainly, for reforms the Constitution is not enough to deliver non-violent free and fair elections in Zimbabwe.

Q. You say that it would not go far enough. Is it your view that the new Constitution would go some way towards ensuring greater democratic space?

A. Perhaps on paper, but the bigger issues have to do with the existing institutions that are unwilling to implement reforms on the ground, in fact, what we have now, the Lancaster House Constitution that we have at the moment, can also deliver a measure of democratic elections if it is applied to its letter and spirit, but that is not happening on the ground.

Q. You mentioned earlier that it is your view that the MDC would not refuse to participate in an election that was not free and fair. Do you recall?

A. I am sorry.

Q. Do you recall in response to a question by Mr Henderson at the outset that you mentioned that it was your view that the MDC would participate in an election even if it were not free and fair?

A. I believe that, given the political impasse that is there in Zimbabwe and when the appropriate time comes for elections, in terms of the (unintelligible) which would be around June 20 2013, the MDC would not pull out of elections or at least they have not indicated anything that would hint that they would pull out of elections.

Q. Again, assuming that it is accurate that the MDC on this occasion dug their heels in and insisted that the agreed COPAC draft went to the stakeholders' conference, would that change your views on that? What significance would that have on your views of ...

A. What significance would ...

Q. What significance would MDC digging their heels in on the COPAC draft and ZANU PF giving way have on your views of MDC's readiness to insist upon other democratic changes?

A. Not much significance, because for ZANU PF the big game in town is not the Constitution or referendum but elections and retaining political power or state power, so for them the Constitution is not the big game, as long as there are the mechanisms to ensure that they have their way. In 2008, in March, we had reasonably acceptable conditions in terms of on the paper, regulations for free and fair elections, but the game changer was the violence and the intimidation from ZANU PF when they changed to the security forces for support to cause violence with impunity, so these are the big questions that need to be addressed and not certainly what you read on paper.

Q. Would you accept that a conducive environment is important for elections to take place?

A. Yes.

Q. And is it your view that part of that is the messages sent out by the political parties?

A. Yes.

Q. Could you look at tab 44 of the bundle? That is again the rebuttal bundle. If I can then ask you about the Herald.

A. Yes.

Q. Can you first of all confirm what the nature of the Herald is? Is it an independent or a state-owned newspaper?

A. The Herald is s state-owned newspaper.

Q. And what significance does that have in terms of the independence of the articles in it?

A. Predominantly the Herald publishes views aligned to ZANU PF and, effectively, acts as a propaganda mouthpiece for ZANU PF.

Q. We see the headline there in the article is "Zimbabwe heeds President's anti-violence call".

A. Yes.

Q. And then the editorial commences, "Zimbabweans across the political divide must rally behind President Mugabe's call for people to desist from violent campaigns and concentrate on working for the development of the country. Our country has seen enough violence and we urge Zimbabweans to close ranks and work towards uplifting the Motherland".

A. Yes.

Q. What in your view is the significance of that type of message and article appearing in the Herald?

A. Well, if you look at the context, the editorial is probably from ZANU PF, given that this was on 14th August, two days before the SADC Summit in Mozambique, so this was the time for ZANU PF to speak to SADC to give the message that they are for peace, when, in fact, the conduct on the ground is contrary. For me and colleagues in the civic society movement we are more interested in action on the ground by the police, ensuring that there is law and order and ending impunity. President Mugabe is saying this about anti-violence but perpetrators of violence from 2008 have not been brought to book or they have not been held accountable, so for us that action to hold accountable those who commit violence would be stronger in terms of words than this speech before the SADC Summit, which is meant to be really an exercise of propaganda, as President Mugabe is going to Mozambique to meet other heads of state and also to try to influence them to be soft on Zimbabwe, so that they accept, you know, messages coming from ZANU PF, because this is in the media.

Q. Leaving aside your concerns as to the background of this article, do you consider it to have any significance for the political culture to have this sort of article in the Herald?

A. Not really, not really, because people would be reading between the lines. Like I said, what would have a significant impact on the political culture is action to say that those who commit violence would be held accountable. In terms of the political agreement, the global political agreement, signed by the political parties on 15th September 2008, they committed to apply the laws of the country impartially and to ensure that those that commit violence are held accountable, but nothing has happened, so the people of Zimbabwe know that nothing is happening, so, when empty words are uttered, as in this case, they would also read between the lines and know that this is really not what they mean, because these are people in power, who can push for law and order to be implemented but it is not happening.

Q. Do you know whether Mugabe has ever issued a similar statement in recent years?

A. Yes. In 2009 on a number of occasions Mugabe has said these things and called for non-violence, but we have challenged him to say that there is need for appropriate action and not just to say that there should be no violence when the police are looking the other way, when violence is committed.

Q. The opening paragraph refers to a call by President Mugabe. Do you remember what the occasion was for that call?

A. There have been a number of occasions, but the one that was perhaps the most prominent one was the National Healing occasion where leaders from the three main political parties came together, under the auspices of the organ for national healing and reconciliation and unity and cohesion to jointly call for peace in the country, and the other occasion was on the national heroes day in the second week of August 2012. So these calls have been made but without the necessary action to back them up.

MR THOMANN: Mr Mavhinga, I have no further questions. Thank you very much.

THE PRESIDENT: Is there any re-examination?

MR HENDERSON: Yes, I have just a couple of questions.

Re-examination by MR HENDERSON

MR HENDERSON: You were asked about the links or otherwise between the Chipangano militia and ZANU PF. Who is the leader of the Chipangano militia?

A. The Chipangano militia group is led by the provincial Harare province youth chairperson of ZANU PF.

Q. You spoke about the sort of daily reports about the COPAC process, would it be frank to say that this is a confusing situation at present?

A. It is, yes, given that it is subject to political negotiations that are ongoing, yes.

Q. And I think that you said that the political negotiations are continuing at several different levels.

A. Yes, correct.

Q. And you referred to applications, I think, to release particular drafts.

A. Yes.

Q. Is that because people have not actually seen some of these drafts which are being discussed?

A. That is correct, yes, and they had been in agreement that the drafts and the material gathered from the outreach process would be made available to the public at some point.

Q. Finally, you referred to the role of civil society in making representations in 2011. Can I just take you to your witness statement where you deal with the role of SADC from paragraph 19? You continue to be involved in the negotiations with SADC since 2011?

A. Yes.

Q. And you set out there what has happened. Since making this statement, has your view changed about SADC's ability or inability to influence what will happen in the elections next year?

A. No, it has not changed.

MR HENDERSON: I have nothing further, sir.

Questions by the TRIBUNAL

THE PRESIDENT: Thank you. Can I ask you about paragraph 29 of your statement, please? You are talking about someone returning from the UK to Zimbabwe with no family to support him and going to a high density or peri-urban area, but I think that you told us a little earlier in your evidence that you did not record or you did not monitor what happened to people who were returning from the UK to Zimbabwe. That is right, is it not?

A. Yes. As an organisation we were not monitoring that, but ...

Q. So is your statement based upon information or is that guesswork or hypothesis?

A. It is based upon information that we gathered and also ...

Q. OK, based upon information. From where did you get the information?

A. From part of the business that we have been doing in the general course of our duties. I will just check. And also at a personal level I live in the UK, in Cambridge, but from time to time I travel to Zimbabwe and I ...

Q. I imagine that you are not looking for work in the low-density areas when you are doing that - is that right?

A. Yes, but I am talking about contact or the observation of the activities of ZANU PF groups across the country or in Harare.

Q. Is it based on personal observations; is that what you are telling me?

A. Part of it, yes, but part of it on information, yes.

Q. So when did you last, personally, observe what you are telling us about in paragraph 29?

A. Well, I was last in Zimbabwe in July and I did observe that.

Q. July of this year?

A. July of this year, yes.

Q. And what did you observe then?

A. In particular the requirement for testing their knowledge or presentation of ZANU PF cards.

Q. How did you observe that?

A. When visiting Houghton Park, a suburb that is adjacent to Mbare, I came across one such group that required people to present cards and also to join a ZANU PF meeting..

Q. All right. This could potentially be of some interest and importance, so can I just make sure that I have got it down. When visiting Houghton Park and that is next to Mbare, when visiting that area, which is a high density suburb - is it?

A. It is a medium density suburb, but there is really not much difference between medium and high density.

Q. I think that I have got that. And you saw what?

A. On this occasion there was a meeting of the ZANU PF group, where everyone, really, was required to attend, but it was convened by the ZANU PF group.

Q. And you came in when you saw the meeting or you saw people being required to go to the meeting?

A. People being required to go to the meeting.

Q. How were they being required to go?

A. Basically, being shepherded to say everyone - this is a shopping centre where there are a few shops, so everyone within the vicinity would be directed to the meeting, whether or not there is another route that you are taking, you are specifically directed to the venue of the meeting.

Q. Yes. What about cards? Did you say something about cards?

A. Yes, there is also a requirement ... I did not witness the aspect of presenting ZANU PF cards, but the requirement to attend a ZANU PF meeting, a planning meeting, but I know that from other observations people also would be required to present cards, including what is captured on the video.

THE PRESIDENT: Which, sadly, it does not seem to be compatible with our machine, though one lives in hope that we might find some way of playing it.

MR HENDERSON: We can ...

THE PRESIDENT: Before we deal with the technical stuff, let us complete this. I do not think that we are going to get much further than this witness. I do not know whether that is bad news for your scheduling. I think that that will do from us. Have my questions prompted any response from someone?

MR THOMANN: I have got some supplementals arising out of it.

Further cross-examination by MR THOMANN

MR THOMANN: Were you required to attend this meeting?

A. Yes.

Q. And to produce a membership card?

A. Not on this occasion, no.

THE PRESIDENT: I think that the witness said that he did not really see the requirement for producing a membership card, but he knows that from other information, including the video that we cannot see.

MR THOMANN: You have mentioned the incident in the video. Is it right that those are the two occasions that you are aware of that being required? You have not mentioned any others in your statement.

A. Going back to the beginning of the inclusive government in 2008, in my previous work with Human Rights Watch, we did record a number of occasions where people were required … where buses or public transportation was just directed to ZANU PF meetings and where people were asked questions on ZANU PF, on their knowledge of party slogans to find out whether or not they had been attending these nightly vigils that were called by ZANU PF. So, perhaps, for this year those two occasions, yes, but, if we are to go further back to 2009, then there are many more incidents where we did record ...

THE PRESIDENT: I am pretty sure we do not need to ask you about 2009.

A. OK.

THE PRESIDENT: I think that we are particularly interested in this moment in your evidence is 2011 and 2012. If you have any more information about this activity during those periods, that would be of interest.

A. OK.

MR THOMANN: The statements in your witness statement, the observations about what is currently happening in Harere, the militia activity, is that based just on your observation or is it also based on the work of your organisation and others doing similar work?

A. Observations on the militia activity?

Q. Yes, your opinion on the current level of militia activity.

A. That is based on the work that my organisation is doing and other organisations.

MR HENDERSON: The only point is I wanted to go to paragraph 29.

THE PRESIDENT: That is really all that I put into play, so I think that is the limit of the ....

MR HENDERSON: Yes, that was the only other point.

Further re-examination by MR HENDERSON

MR HENDERSON: On paragraph 29, you refer to somebody returning from this country with no family to support them would end up in a high density or peri-urban area.

A. Yes.

Q. Why would somebody with no family or no other independent support end up in a high density or peri-urban area?

A. Well, clearly, there will be nowhere else to go because of the intransigent arrangements in the low density areas in Zimbabwe, where no one is permitted to sleep on the streets.

Q. I think that you refer to that at paragraph 31.

A. Yes. In terms of informal means of getting income or places where they could build shacks, that would be in the peri-urban areas and not in the low density suburbs where there is surveillance and they cannot build shacks. **[SSHD unable to confirm]**

MR HENDERSON: I have nothing further, sir.

(**Discussion followed and then hearing adjourned until the following morning at 10 o'clock**)

[END It is not recorded that the video was shown during which Mr Mahvinga stated 'It is January 2012 in Buririo and the representative of the ZANU PF local structures in that suburb is doing the speaking.]

1IN THE UPPER TRIBUNAL

Field House,
Breams Buildings
London
EC4A 1WR

Wednesday, 3rd October 2012

BEFORE:

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE P ETER LANE
DEPUTY UPPER TRIBUNAL JUDGE CAMPBELL

- - - - - - - -

BETWEEN:

CM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

MR MARK HENDERSON (instructed by Turpin & Miller) appeared on behalf of the Appellant.

MR COLIN THOMANN (instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

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Transcribed by Harry Counsell
Court Reporters
Cliffords Inn
Fetter Lane,
London EC4A 3LD
Tel: 020 7269 0370

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TRANSCRIPT OF EVIDENCE

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MARK GRIFFITHS

Examination in chief by MR THOMANN

MR THOMANN: Could you give the tribunal your name and title, please?

A. Sure. My name is Mark Griffiths, I am the assistant director in the UK Border Agency responsible for country returns, operation and strategy, responsible for returns to Africa and the Middle East. My role in relation to the witness statement of Anne Scruton, which is one of the exhibits here is that I am her line manager and, unfortunately, she is unable to participate today.

S her line manager how much day-to-day contact do you have with Ms Scruton?

A. Anne will be more aware of the details of the returns processes to Zimbabwe, I am aware of the overview and I do participate in our regular conference calls managing the enforced returns process.

Q. Do you have a copy of her witness statement in front you?

A. I do.

Q. Have you had a chance to read that?

A. I have, yes.

Q. There is one matter that I will ask you about. Is the content of that consistent with your understanding of the position?

A. It is, yes.

Q. In paragraph 6, four lines from the end, it mentions that there have been 22 returns.

A. Yes. That figure should, in fact, read 23. I believe that it a typographical mistake.

THE PRESIDENT: That is a typo as opposed to ... So delete 22 and put 23?

A. Yes.

MR THOMANN: Other than that you said that your understanding is effectively the same?

A. That is right.

MR THOMANN: I have no further questions.

THE PRESIDENT: Just whilst we are on the topic and before it slips my memory, we see that the enforced returns or returns of failed asylum seekers started 6th April 2011. Have they now been suspended after the Court of Appeal or are they continuing?

A. No, they continue. Our last enforced return was in July, I believe. I will clarify that.

THE PRESIDENT: Thank you.

Cross-examination by MR HENDERSON

MR HENDERSON: Mr Griffiths, is it your understanding of the criteria for selecting returnees used internally by the Home Office which was communicated in the letter exhibited to the witness statement?

A. Yes, the factor for return, that is right; the factors that are considered when we decide whether to remove somebody to Zimbabwe.

Q. I just want to ask you a couple of questions about paragraph 8 of Ms Scruton's statement. This says that all arrivals are observed by the migration delivery officer in Harare. Is that right?

A. That is right. Or a representative of that migrations delivery office.

Q. The witness statement said by the migrations delivery office, but you think that it might not be by the migrations delivery officer?

A. In all but four of the enforced returns, it has been by the migrations delivery officer or a representative of the migrations delivery officer in those four enforced returns.

Q. Who is the representative?

A. It will be a member of embassy staff. It will either be our British consul based in Harare or it will be the immigration liaison officer, also based in Harare.

Q. From where did they observe the returned?

A. Physically on arrival. The returnee is observed approaching the immigration desk, accompanied by escorts. A migrations delivery officer makes contact with the lead escorts of the group and asks if there are any issues on the flight that are relevant. He then withdraws and allows the subject to pass through immigration control.

Q. How does the migrations delivery officer get air side?

A. He has an air side pass.

Q. And how does the make contact with the escorts?

A. He has their contact details by mobile phone. It is quite apparent when the flight embarks that the escorts will be visible, he may know them already, but it is apparent.

Q. So the Zimbabwean authorities will be aware that this is a returnee who the migrations delivery officer is observing?

A. Possibly, yes.

Q. Has there been any discussion with the Zimbabwean authorities about this process?

A. I could not answer that question. What, with the migrations delivery officer?

Q. Yes, with the migrations delivery officer going air side to sort of make contact with escorts who are sending back the asylum seekers.

A. I would imagine there will be local discussions about what he is doing at the airport, but I could not answer that question specifically.

Q. Do you know if any thought has been given to whether or not this has any relevance to the risk that the failed asylum seekers may face through attention being drawn to them in this way?

A. I do not believe so. I understand that it is done in a very managed and careful way.

Q. What do you mean by "managed and careful way"?

A. Tactful, not wishing to draw any adverse attention to the group.

Q. You say a "tactful way", how is it tactful?

A. Most of the observation is taking place from a distance, so, aside from the initial contact with the lead escort, then the migrations delivery officer observes the passenger's transit through the airport, which usually takes between 40 and 60 minutes.

Q. When you say observed from a distance, what is the distance?

A. Can I just refer to my notes while answering?

Q. Yes.

A. Are you aware of the migrations delivery officer's response to your supplementary questions before I attended this hearing today?

Q. No. I am sorry, there has been a response from the migrations delivery office to our questions. We put questions in writing.

MR THOMANN: The email response from the migrations delivery officer was not passed on.

MR HENDERSON: Could we see that?

MR THOMANN: I will have to check, but I do not see why not.

MR HENDERSON: We will see that before we do any further cross-examination.

(**Pause**)

MR THOMANN: I am seeing this for the first time, but I can tell that this email is incomplete, the second part of it.

(**Pause**)

I have had a read of that, the exchanges and the preparation is probably, in my view, legally privileged, but I cannot see, having read it, that there is anything in that exchange which the respondent would object to Mr Henderson seeing. There are email exchanges before it and after it which deal with how the witness evidence should be presented ...

THE PRESIDENT: LLLP. Is there any sensitivity in the actual email addresses or the identity of any of the personnel corresponding?

MR THOMANN: The problem is ... but what I can do, if we are given a moment's break, is copy the content and provide it to Mr Henderson if that will assist.

THE PRESIDENT: I rather think that Mr Henderson would quite like to know, if he's asking questions blind and there is something that might guide him. Is there any way that you can read out any of the pertinent answers or are they too lengthy to do that?

MR HENDERSON: Even if it involves a short break, I would rather see it.

THE PRESIDENT: Yes, sometimes seeing things given from diplomatic sources creates one or two problems.

MR HENDERSON: Mr Thomann is saying that there is not a problem with the ...

MR THOMANN: I would probably need formal instructions which I can take if we are given a moment.

THE PRESIDENT: Yes. (**Discussion re provision of document**)

(**Short Adjournment**)

MR THOMANN: The tribunal will see that I have blanked out the address and time at the top of it, because that was the easiest way of arranging a redaction. My understanding is that it was sent at 10.27 yesterday and it formed part of a chain of emails we prepared for the witness evidence which is why the others have not been provided. There is a prospect that that it would have been provided to me. These things are usually provided to me by my instructing solicitor. What I should have said earlier is that I do not recall having seen it in my in-box yesterday.

MR HENDERSON: This is the answers to the questions that we posed in writing, so I have no further cross-examination.

THE PRESIDENT: I see. Can you give us a moment to read this then? (**Pause**) Thank you very much for coming. It looks as if much of the information has now been provided, so we do not have any questions for you. We appreciate your presence today. You can now be released.

(**Witness withdrew**)

(**Discussion re email replies and other documents**)

THE PRESIDENT: We now go back to W77.

W77

Examination in chief by MR HENDERSON

MR HENDERSON: Can you just confirm your name?

A. W77

Q. And there is one preliminary point. The tribunal granted you anonymity after you gave evidence in October 2010. Would you ask to retain that status?

A. Yes, for the safety and security of our staff and programme in Harare.

THE PRESIDENT: What did we do last time? Did we assign a number?

MR HENDERSON: Yes, W77.

THE PRESIDENT: You appreciate that what we did we anonymised you as a witness with a summary of your evidence attached as an appendix to the judgment. That is presumably something that like that we are probably thinking of doing this time.

A. That is absolutely fine by me.

THE PRESIDENT: We will direct that you be known in the published report of these proceedings as W77.

MR HENDERSON: Do you have part C bundle there, the report from you?

A. Yes.

Q. At page 1. Do you recognise this report?

A. Yes, I wrote it.

Q. I have just a couple of supplementary questions and I indicated to the tribunal yesterday that you had done part of the work in your report before you actually went on annual leave and you are just back. Would you just tell the tribunal what the current position in relation to the COPAC process?

A. Yes, it has been quite a process, I think. The latest position is that ZANU PF having objected to the finalised draft to the three political parties, having put in 266 amendments, have changed their tactics

and is now allowing that draft to go through. There are some questions to be raised still about what is the status of those amendments and will they be discussed in the second stakeholders' conference, the date of which has been put back to towards the end of this month.

THE PRESIDENT: Whilst I am on the topic, do you know when the second stakeholders' conference is precisely?

A. No, because it was going to be around this time, the 4th or 5th, and I think that it was put back ... well, theoretically, to about 27th/28th.

Q. Of October?

A. Yes. But that is not certain, like many other things. There is also a court hearing to try to get COPAC itself to release the reports from the hearings that they undertook throughout the country over the last year and that is still a secret document though widely leaked.

Q. Who are the claimants in those proceedings?

A. ZANU PF. At the present time we have the possibility of three separate documents, but only one of which is actually a draft Constitution. The other aspect is that there is no saying what will actually happen in the second stakeholders' conference and some are fearful; - in the MDC and the civic society, indeed - that there will be use of militia to disrupt the proceedings, as happened in the previous COPAC hearings, and that those ZANU PF amendments, loosely known as the Kariba Draft, may well be up for discussion and that might be part of the final submission but nobody is completely clear about that.

MR HENDERSON: You obviously have seen Mr Mahvinga's statement and your heard his oral evidence yesterday, for the sake of saving time, can I just ask you whether or not you agree with his analysis of the effect or lack of effect of the COPAC draft being passed in terms of the prognosis for the elections?

A. The COPAC strategies are geared far more towards elections than getting the Constitution entirely geared to their taste, because, I mean, the Constitution could involve free and fair elections. Essentially, I agree with Dewa Mahvinga's view points on COPAC not being the main thrust that winning the election is the main thrust.

Q. It would appear from the reports that we are getting from what you say, in your report and your current evidence, that ZANU PF may have chopped and changed their position recently.

A. Yes. I would take the view that ZANU PF is quite a canny body of politicians and militia people who are quite prepared to be flexible on short-term tactical manoeuvres in order to maintain what you might call their inflexible long-term strategy of maintaining power and access to resources at all costs.

Q. Just taking these points very briefly, and again it might help you by reference to Mr Mahvinga's evidence, you heard Mr Mahvinga's evidence on the current state of the Zimbabwe electoral commission yesterday. Do you agree or disagree with that?

A. I agree and I would also put in the strong point that Joyce Kazembe, the acting chief, has a very long history of working with the Zimbabwe electoral commission with all its inability to run a free and fair election structure. (Inaudible) It is quite a militarised body, although there are some good people on it. The back-up office staff, as is common in many Zimbabwean institutions, military people or ex-military people.

Q. Do you mean by that the secretariat?

A. The secretariat, yes.

Q. Just moving to the Electoral Amendments Act, which we were told yesterday is currently before Mugabe but he has not yet signed it.

A. That is true. He should have done it within two weeks of getting the Bill, but there is a feeling that maybe they are hanging on to see if it is in line with the impending Constitution (inaudible) .

Q. You said in your report that ZANU PF would not let through with that legislative process any provision allowing the diaspora the right to vote. What has happened with the proposal to allow the diaspora the right to vote?

A. There was a proposal in the draft Constitution for the diaspora to vote. They were not counted in the census. As part of the Electoral Amendment Act going through, the MDC came to the conclusion that the diaspora would not indeed be allowed to vote, citing some financial reasons, but we also think highly ideological reasons from the viewpoint of ZANU PF, given that they think that the diaspora is MDC or certainly not pro ZANU PF.

Q. Again, do you agree or disagree with the evidence that Mr Mahvinga gave about whether the MDC were likely to pull out of elections if ZANU PF used their 2008 antics?

A. I think that on this occasion it is extremely unlikely, because there was a lot of flack last time and there were accusations that they had not defended their supporters sufficiently, although that is possibly ... The likelihood is that Tsvangirai is so much wanting SADC to take steps that, unfortunately, have not really happened, but he is still hanging on in there, if you like, but it is very unlikely that he will be trying to go against SADC. SADC would be very displeased if he pulled out of the election.

Q. Just turning briefly to the second issue that you dealt with in your report from paragraph 23, what developments have there been in urban areas, firstly just to confirm what is your opinion there based on?

A. The opinion there is based on a couple of things in terms of conversations that I have had recently, one with Dr Joann McGregor, who has written extensively, although not yet published, on the whole way that the militia phenomenon known as Chipangano in Mbare and neighbouring areas has been taking over all sorts of aspects of rent control, market stall control, hassling people at bus stations, and how this spread into other urban areas, which I think is in certain points of this particular piece. I also had a reasonably long conversation with Mike Davies who was the ex-chair of the combined

Harare residents' association. We had long discussions about the emerging gang violence in urban areas, particularly in Greater Harare .

Q. You also make references in this section of your report to the views of your local partners.

A. Sure.

Q. What do you mean by "local partners"?

A. These are the four national reference group members. I am chair of the Zimbabwe Europe Network and we have a Zimbabwe International Reference Group comprising major human rights organisations, the NGO coordinating body, the Zimbabwe conference and trade unions, and they were on a delegation to watch the European (inaudible) and they come fairly regularly, and that is also part of the kind of background knowledge of what is happening in the urban areas where they mostly operate.

Q. You indicate in your report that there has been a rise in ...

THE PRESIDENT: Mr Henderson, I do not want to ... I think that you said five minutes, you have now gone to ten and it is coming up to 15. You are here to ask one or two supplementaries.

MR HENDERSON: I am sorry, my recollection was that yesterday you said that I could have 15 minutes in evidence in chief. I am almost at the end.

THE PRESIDENT: Well, that is your little warning sign.

MR HENDERSON: You say in your report that there is currently a marked rise in militia violence including Chipangano. Can I take you to the statement of Jestina Mukoko at page 24, who is the executive director of the Zimbabwe Peace Project. I believe that you have read this statement.

A. I have.

Q. Do you agree with what is said there?

A. I have worked closely with Jestina in the past. Yes.

Q. I think there were questions yesterday about what is Chipangano, what is the militia. How would you describe Chipangano?

A. I think that it is an aspect of the informal nature of state violence. ZANU PF merges into Chipangano and other gangs. But also there is a certain criminal element, but it is mostly politicised criminal violence being used through informal organs of the state with a certain amount of plausible deniability to SADC that they are actually ZANU PF.

Q. Do you agree or disagree with Mr Mhavinga's analysis of the actions of the police and army in the last couple of weeks?

A. Yes.

MR HENDERSON: Thank you.

Cross-examination by MR THOMANN

MR THOMANN: Can I ask you first of all about the position overall in Harare and one source there you refer to in footnote 38 of your evidence is the Zimbabwe Peace Project monitoring.

A. Yes. (Inaudible)

Q. Do you accept that that is generally an authoritative source of trends in violence?

A. Largely speaking, yes, but one of the problems is that their verification system is very good on what they can verify, however they do not necessarily pick up all incidents. As the statement from Jestina Mukoko says, they have to have their monitors anonymous, so it is only when violations are reported, and that can be difficult in urban areas, because the numbers of people and just general (inaudible) .

Q. Would you accept that the general trends upwards or downwards you would expect to be reflected in the Peace Project reports?

A. The general trends have changed quite a lot over the last two years.

THE PRESIDENT: I think that the question is would the ZPP monitor reflect the trends even if it cannot reflect everything whichever happens?

A. That would be correct, yes.

MR THOMANN: Could we have a look at those? You will find in the respondent's bundle. You will find the first at page 419.

THE PRESIDENT: That is tab 7 in mine.

MR THOMANN: It is the bundle with the fewest tabs. It should have ten tabs.

THE PRESIDENT: I think that that first bundle you opened, we are calling the rebuttal bundle, but I think that the one that you have now been handed goes by the title of the respondent's bundle.

MR THOMANN: If you would look at page 419 of that, the very start of tab 7, you will find there the June 2012 Monthly Monitor Report.

A. Sure.

Q. Is that the report that you cite and rely upon in your footnote?

A. I have cited several of these Monthly Monitor Reports.

THE PRESIDENT: 38 cites June 2012.

A. Yes, OK.

MR THOMANN: What I would like you to have a look at is the entry for Harare on page 423. You will find there a table.

A. Yes.

Q. Would you accept that the overall number there recorded is 14 violations? I think that you are on a different page, but I am happy to be on your page if you wish.

THE PRESIDENT: It is page 5. I think that your attention was being directed to the left-hand column number 3, Harare, and 14.

MR THOMANN: What would you say is the significance of the difference between the violations recorded for Harare and for other regions in the table, if you move upwards, for example, Manicaland 37, Midlands 64?

A. There are two possible explanations, one is that the Harare violations have decreased and the other is that people are unable actually to get hold of the number of violations that have taken place. Either of these are possible.

Q. What do you think it says in terms of the difference in security between those regions?

A. I think that what is suggested is that violence moves around from province to province and place to place, depending on the requirements of the militia, the ZANU PF etc. The trends can be up and they can be downwards. There have obviously been periods where they have been quieter, notably around 2009, but I think that you need to look at the kind of longer term trends and how that ties in to things like electoral cycle, SADC summits and things of that nature. There is a lot of externally driven causes for the rise and fall in violence, it is hard to predict. The other aspect, I suppose, is that, if intimidation appears to be working, then sometimes violence might not be necessary, but it is all (inaudible) .

Q. Do you accept that in relation to Harare, it describes a single incident only of the Chipangano gang chasing away a Ready(?) S.A employee?

A. Yes, this one with the three assaults.

Q. You mentioned trends a moment ago. Page 421, the one you were on a moment ago, still in the June report. Would you have a look at figure one?

A. Yes.

Q. They are trends for PMV. That is politically motivated violence, is it?

A. It is.

Q. And what do you say is the significance there of the June reductions from 3,758 in 2008 to 42 in 2012?

A. The June 2008 figures are abnormally high. This is when there was a rampage in violence. That figure is an extremely high figure. There does seem to have been a reduction in 2010. They went up again in 2011. It has gone down again in 2012. If we have a June election in 2013, my estimate will be that it will be much higher, but at the moment it is low - but bearing in mind what I also said about the reporting problem.

THE PRESIDENT: Yes. Well, I have got a note that one obviously has to be cautious about imagining that any one organisation can capture every incident in every part of Zimbabwe all of the time, but I think that the line that has been put to you is that, does this at least show us the trends, because, presumably, those problems about recording everything are a constant and there you have got a snapshot of June records with whatever deficiencies records may have, 2008 to 2012.

MR THOMANN: If one compares the figure with 2011, what do you consider that says, if anything, about the trends in violations between last year and this year in June?

A. Well, the trend as shown by ZPP appear to be downward and I think that that is indisputable. They are possibly the more conservative of some of the organisations trying to collect cases of violations, because they do very much rely on this verification. It is often thought that people who are reporting

political violence, like Amnesty International and Human Rights Watch, they are often accused of double counting things. There is no great evidence for this, but, largely speaking, Amnesty, Sokwanele and other organisations, have reported higher figures in the past than ZPP for the reasons that I outlined.

Q. If we move to July 2012, page 411, that I the previous tab, you should find the ZPP Monthly Monitor for July 2012. Could you again turn to the politically motivated violence figure at figure 1 on page 413?

A. Yes.

Q. You should find there a figure of 375 violations.

A. Yes.

Q. And again could you compare that to, for example, 2011's figure? What do you think the significance there is?

A. Well, it obviously has decreased according to the ZPP method of counting, given that it (inaudible) .

Q. If you look at the final indent below that figure, you should find a 12th July incident.

A. Yes.

Q. "About 15 ZANU PF youths suspected to be members of the notorious Chipangano gang harassed and displaced a female dance group owner from her house in Mbare accusing her of performing with the dance group at ... The trust is accused of supporting MDC".

A. Right.

Q. Do you accept that that again does pick up a Chipangano violation?

A. It does pick up one of the Chipangano violations, certainly.

Q. Do you accept that that in this report it does not pick up any others?

A. No, (inaudible) which ZPP do pick up those violations, that is all that (inaudible) certainly.

THE PRESIDENT: This is PMV, politically motivated violence.

A. Yes.

Q. So someone is making a distinction between crime, extortion and politics?

A. They may well make that distinction. (Inaudible) where they might set the boundaries for political and criminal violence.

Q. But this is what it is telling its readers it is analysing?

A. Yes. I suspect the point there is that it is certainly not a criminal activity in terms of extorting money or anything, but it is at least something political. If Harare residents' trust is deemed by Chipangano to be supporting to the MDC.

Q. Quite .

A. (Inaudible)

MR THOMANN: There is another entry for Harare on page 417. Again, what do you think is the significance of the overall figure there for Harare of 14?

A. Well, it is a very low figure. Obviously, as it says here, a slight decrease in the PMV.

Q. Again, in the last indent box next to it, it speaks of politically motivated violations still continue in Mbare township and sometimes victims report to police who are not arresting the perpetrators who are mostly members of Chipangano.

A. Yes.

Q. Do you accept that that it does not record any incident of violations by Chipangano outside Mbare?

A. Well, it does appear to be that.

Q. What do you think is the significance of that?

A. People are scared to report Chipangano and that the police, they know, will not take any action whatsoever nor (inaudible) except that one incident that we were talking about yesterday.

Q. You accept that it says that the violations continue in the Mbare township.

A. Yes, certainly.

Q. And your response to that is that there may be violations elsewhere but they may not be being reported?

A. There may be violations throughout greater Harare and indeed other townships but they are not being reported.

THE PRESIDENT: Is there any reason why they would report in Mbare but not elsewhere?

A. Well, Chipangano's base is in Mbare.

Q. One would have thought that they might have been able to influence more coded silence or a marker or something where they are based.

A. There is something of that, obviously, but ...

Q. I just wanted to know whether you had any information that you could throw light on.

A. No, not really.

Q. So it is supposition to some extent?

A. Yes.

A. Supposition but widely believed and widely reported, but not necessarily verifiable. That is the element here.

MR THOMANN: If we look at the third report, that is the August 2012 report, you should find at tab 5, again figure one is the starting point that I would like to ask you about and that is the trends for politically motivated violations.

A. 405?

Q. Yes. How do you interpret the reduction in 2010 and 2011 figures and the 2012 figure?

A. I can only repeat what I said before, really.

Q. Could you look at the last indent on that page?

A. Yes.

Q. It mentions a positive note. That is when it refers to the joint monitoring and implementation committee. Could you explain to us who that creature is?

A. It is part of the global political agreement whereby the three parties will set up a monitoring committee to which people could be brought for human rights violations and that there would be some action taken. SADC has tried on occasions to help this committee but not with any great success. It is rare that JOMIC is seen on the streets, as it might be, so it is quite a difference, but, if it is just highlighted there can be other areas. **[SSHD's notes say 'Highfield' not 'highlighted']**

Q. You have described questions that you have as to the effectiveness of JOMIC in your statement. What do you think is the significance of patrols actually being on the streets of Harare by August 2012?

A. I would not be surprised if this is not something to do with the SADC summit to some extent, I think, taking place in that particular month. It may be that they became suddenly more active as far as their numbers ... I do not really know, actually, because when I was writing my report I had not yet seen this.

Q. You also mentioned the increasing visibility of the body had led to a freer atmosphere. Are you able to comment on that?

A. (Inaudible) .

Q. Can I ask you to look at the Harare entry again, please? It is at 408. Again, you will see the overall figure, 16.

A. Yes.

Q. Would you accept that that shows a relatively stable picture?

A. Yes, within the limitations that I have described.

Q. Now, I do not propose to ask you about the table next to it, because what you should see there is that by error somebody appears to have copied the Masvingo entry into the Harare column.

A. Yes.

THE PRESIDENT: So we delete the comment alongside "Mahvinga", because that is just a repeat?

MR THOMANN: Yes.

THE PRESIDENT: This comes out, I see, about a month after the events; 14th September is the publication date of this document.

A. Yes.

MR THOMANN: I have not found an October one.

THE PRESIDENT: Presumably, it will come next week or the week after. I have only taken that from 403, which says that August was published on 14th September and 14th, 17th, 24th, well ...

MR THOMANN: You mentioned Chipangano and the tribunal was interested yesterday in how long this group has been on the scene for. Can you help with that at all?

A. I think that it is about five years. But they always put a shadowy militia group in front of it, so who had heard of it and who had not at certain points is unclear, but, to my knowledge, in general, it was morphed from other ZANU PF militia gangs, anyway.

Q. Do you accept the types of activities described by it, pressure on market holders, pressure to pay affiliation, are not recent ones, they have been tactics which have been in place for some time?

A. Yes. I think that the point about Chipangano is (a) it is very heavily linked into the Harare youth ZANU PF and through that to the senior military people **[SSHD unable to confirm]**. What has happened is it has become more systematised, but also in time militia have been using different places (inaudible) there is still some of that going on. This appears to be about control of people, control of resources on a fairly systematic basis in order to recapture in a sense the urban areas from the MDC, because the MDC took control of nearly every county and there is (inaudible) pattern of trying to unseat these people to undermine the MDC Council, so this is one aspect of that whole overall strategy to drive out MDC (inaudible) in those areas and to undermine their power or the split ...

Q. Would you accept that the type of activities that were described yesterday and that you have described are not properly described as systemic? They do not appear to have a pattern or a system to them.

A. Well, as far as I can see there is a fairly common pattern of extortion from those wanting allegiance to ZANU PF, a pattern of violence, a pattern of intimidation and creating no-go areas in Mbare for MDC Councils. It seems to me that there is a strong pattern of asserting local control which the MDC have not been able to launch a major response.

Q. The reason that I ask you is that you say in paragraph 19 of your statement, three lines down, "ZANU PF's capacity and willingness to use violence do [not] appear to have abated, although intimidation and some violence rather than systemic violence are the current characteristics".

A. Yes, this is the more informal (inaudible) practice that I was talking of. (Inaudible) .

Q. Do you recall that there was evidence of Chipangano activities the last time this tribunal convened?

A. I cannot recall.

THE PRESIDENT: I have looked through our summary of your evidence which does not claim to perfection and I did not see the name and, although I would not claim to have any capacity to remember all these names over two years, speaking only personally, it did not ring a bell as I was reading it up to this one.

MR THOMANN: Can I give you a chance to read what we had about Chipangano last time around which is found in volume 2?

THE PRESIDENT: Volume 2 of last times evidence or of this evidence today?

MR THOMANN: No, last time's evidence. Page 111.

(**Copies handed**)

Q. Having refreshed your memory of that, how do you say that the tactics have changed between the tactics that are referred to here?

A. Well, the group have various arms, they are now better organised, as far as I understand much better at collecting revenues and it is a much more coherent pattern of a multiple strategy for control,

ideological and intimidatory tactics, a closer relationship as far as I understand it with the senior ZANU PF people and also the fact that they have found how lucrative it is. Some of them are extremely well off now, so there is no reason for them not to become better organised and to ensure that they continue their activities. That is what I mean by a more systematic approach.

Q. When it says in the first paragraph "ZANU PF Mbare youths, popularly known as Chipangano, are closing down all markets belonging to opposition supporters in the area of Mbare", do you accept that as a summary of the position in August 2010?

A. I would be surprised that they actually closed down all the markets at that time. It may well be the case ... it is quite possible. I don't know, to be honest.

THE PRESIDENT: Who is the informant, the Zimbabwe Mail? Is there any help you can give us for that?

A. The Zimbabwe Mail is, I think, different from the Sunday Mail, which is definitely a ZANU PF paper. I think that it is one of those independent but not very widely-read newspapers.

Q. But certainly not linked to ... well, it probably would not be linked to ZANU PF, would it?

A. No, I believe it is independent.

MR THOMANN: You described one of the times that you say that ZANU PF, in your view, is gearing up for old election tactics is what happened in the recent census.

A. Yes.

Q. I think that you deal with that at paragraph 4 of your report. There you say in the lasts three lines, "A census process has begun although interrupted by military activities including demands to be employed as enumerators - this is seen a further intimidation of the population, meaning figures are unlikely to be accurate".

A. But the census (inaudible) .

Q. Yes, but before that military personnel wanting to be involved as enumerators, do you accept that a potential motivation there is to be paid as an enumerator?

A. Yes. I certainly accept that that is true, but it could be a reason for disruption of the results.

Q. Can you help us at all with the sort of financial awards that enumerators would expect?

A. That would be in double figures. I don't know the figures. It is a long time since I got that one.

THE PRESIDENT: I am sorry, I am a bit behind, just remind me, which paragraph we are on?

MR THOMANN: Paragraph 4 of the report, the last four lines. Could you turn to the respondent's bundle? That is again the bundle with the fewest tabs. If you look at tab 1, I would like you to have a look at page 6 on that, they should find there there are sections dealing with the census.

A. Yes.

Q. Could you first of all read to yourself 201?

A. (**Pause**) Yes.

Q. Do you accept what is stated there as the chronology of how the census took place?

A. Yes.

Q. What do you know the significance is of the outcome of teachers continuing to be employed as census operators and the army being restricted to being self-enumerators and providing protection?

A. To be honest, this was after I finished my report, so I did not go into the census in any great detail and how that finished off, but, certainly, the acting finance minister, Gordon Moyo, respects civil society. It seems to suggest here that they are certainly going to try to employ teachers as the enumerators, but I do not have the information as to how substantial that was. The census did take place.

THE PRESIDENT: It did take place, yes. This may be an unfair question given what was said just now, do you have any information as to how the census was viewed on completion?

A. I have some knowledge of what happened during the process. People are highly suspicious that involvement of the army, whether it is as enumerators or accompanying others, was viewed with great suspicion. Not everybody felt able to register. There was a certain degree of fear and mistrust attached to the census.

MR THOMANN: What do you think the significance is of the quote by Minister Biti, the MDC Finance Minister, at 2.03 in the middle of that paragraph, where he says that he would like to advise that the process will end today and he was happy to say that the process was using UN principles and SADC guidelines?

A. Biti has always been an optimist but presumably it is reasonably correct from his viewpoint. The viewpoint I was expressing certainly came from civil society people in the early part of that programme and from certain news reports.

Q. If you turn the page, we find a reference to disturbances in the second paragraph down.

A. Yes.

Q. "... population centre was marked by disturbances when ... thousands of prospective enumerators wishing to take part in the process jostled at various centres countrywide to take part in the process". Do you accept that that is the type of disturbance that was recorded rather than army disturbances during the census being carried out.

A. There was also an incident that I think that I mentioned in my report of the police raided a school while the census is going on. I think there was violence certainly at the start and at the time I was doing my report that is due to (inaudible) .

THE PRESIDENT: Whilst we are on that page, do you see under the last quotation at 2.03, at least 30,000 enumerators mostly drawn from the education sector took part in the exercise and the source for that is the Herald, 28th August.

A. Yes.

MR THOMANN: You mentioned a school incident. Are you able to help us whether that was an incident that took part at the start during the training of enumerators or whether it took part during the census?

A. During the census, as I recall.

Q. I know that it is in the appellant's singular bundle. It is not one of the ones that I have flagged up. 113, I think. It is page 28. The entry for 8th August 2012. I think that it is the first four lines there that you were referring today. It says, "Today for the second day running ... girls' school ... enumerators undergoing training".

A. Yes.

Q. "Similar reports are coming in from the rest of the country ..."

A. Yes.

Q. Do you accept that this is again an incident before the census took place?

A. Well, yes, obviously.

Q. Are you aware of any reports of violence or disruption during the actual census?

A. That I have not seen, no.

Q. What do you think the significance of that is in terms of the role of the army in the census?

A. It appears that they were told not to disrupt the census if that is indeed the case that there was less violence and fewer instances of violence as the census actually got underway.

Q. Does that change in any way your view on whether ZANU PF is gearing up for an election using old tactics?

A. No, I do not think that the census is a particularly strong part of the evidence regarding ZANU PF being ready to use violence whenever necessary. As I said before, the tactics change but the long-term strategy is to maintain power.

MR THOMANN: What do you think the significance is of the administrators standing up to the army's demands to take part and be enumerators?

A. Very brave.

Q. Security sector reform I want to talk to you about next. Would you accept that the army, the pattern of the army, does not represent any uniform picture of support for either political party?

A. There appears to be low level soldiers who in the past were disenchanted with their pay, not being paid (inaudible) ... The picture changed to some extent after they were paid. Most of the overt or pro-MDC soldiers or police or whatever have been chased out or put into what you might call non-combative roles in the security forces. The top ranks of generals are ZANU PF. There are some distinctions between the low level and the senior level and some feeling that the medium level are dissatisfied with the way that some of their superiors act and are looking at possible other options, but the senior staff are strongly ZANU PF and will not salute Tsvangirai as he has no liberation credentials.

Q. You have included various articles in your footnote 36. One document that you may have at the end of the Mahvinga evidence is the bundle that I handed to the tribunal yesterday.

A. Yes.

Q. Could I ask you to turn to page 60? Do you find an article headlined "Zimbabwe Army Generals have no support"? You will see that you have cited at footnote 30 an article with that title.

A. Right.

Q. You have cited an article called "Generals have no support" dated 9th July, the same date.

A. Yes.

Q. But you have cited a Daily News version. Now, that appears no longer to be readily available, which is why the Mahandra radio report, with the same title of the same date, is in the bundle. Could you first of all comment on Mahandra Radio as a source of information?

A. Well, it tries to promote debate on Zimbabwean issues, it is reasonably independent, it reports what it says. It is taking part in the general debate about where the security service positions themselves. There is quite a big debate about that, so I have tried to reflect that in my report from different angles.

Q. Yes, you will find there various quotes from Giles Mutsekwa's article, the secretary for defence in Prime Minister Morgan Tsvangirai MDC. What I would like you to read is the last two paragraphs of that.

A. (**Pause**) Yes.

Q. Is that in your view a reflection of the evidence that you gave a moment ago of the army support at the higher echelons of ZANU PF not being reflected at grassroots level?

A. I did not say all grassroots, I said some.

Q. Yes.

A. This seems to be particularly about feeling what certain military leaders have said that they will not salute Tsvangirai… and he is a security threat. They said that at a meeting that some of our partners were at in Sandton at Johannesburg. This is being seen in certain circles as a plot. You would certainly have a few in the military at lower level who would be interested in taking part in a coup, equally I think that it would be very foolish... (inaudible) in favour of letting MDC win. As I said, there is a debate going on about how best the Generals position themselves in [context of a] history of ZANU PF in-fighting and vying for power. Also reflecting itself in terms of an alternative policy position being sought. There is a sense in which army people who are generally intelligent may be testing the wind, maybe looking for alternative possibilities, but more or less that is a backstop position if everything goes wrong, because the totality of the army is of massive support for ZANU PF . Given the fact that there has been a militarisation of most of the state institutions, retired military people are running a large number of the institutions, then there is no reason for them to want to salute Tsvangirai. But my experience and view is that of the institutions that they will support ZANU PF.

Q. You say that there is broad support or the totality is one of support, if you look over the page at page 306, which is a continuation of this article, we are still in a quotation by the MDC defence minister and what is said here in the fourth paragraph down is, "In the last elections heard in 2008 a number of constituencies with large military garrisons voted against Mugabe".

A. Yes.

Q. What do you think the significance of that is?

THE PRESIDENT: I am sorry, you say in the quotation?

MR THOMANN: I think that we are still in the quotation.

THE PRESIDENT: The quotation closed, did it not, at the bottom of the previous page?

A. He is not the defence minister he is responsible for defence in Morgan Tsvangirai's office.

MR THOMANN: Do contradict me if you wish, I read that as still being the account of the defence minister, it may not be, because it continues the next paragraph down, "she said that the Generals were saying ..."

THE PRESIDENT: That is Priscilla Misihairabwi-Mushonga.

MR THOMANN: Whether or not it is a citation, do you accept that a number of constituencies with large military garrisons voted for the MDC?

A. Yes a number and since then, of course, they have been paid better. (Inaudible).

Q. As I was going though this, I was drawn to the sub-paragraph just above that. I think that this is meant still to be what Muchange is saying rather than the journalist, but whoever: "The chief of staff and a few other elite officers have benefited hugely from Mugabe's patronage, whereas at the level of colonel and brigadier and below, the support dwindles according to Mutsekwa".

A. That is not a quote from Muchange.

Q. No, It is according to Mutsekwa. Do you agree with that?

A. It is certainly true that the top ranks have gained more than the middle and lower.

Q. I have got that from your evidence, but level of colonel and brigadier.

A. Being an optimistic, I have to say Mutsekwa is an extreme optimist and has said that the diamond revenue would come through the fiscus and other things would happen and a number of things that never happened would take place **[SSHD unable to confirm]**. It is not like that he is a key expert.

MR THOMANN: Another article that he mentioned in that footnote 30 is one called "Security chiefs panic".

A. Yes. This is in footnote 36.

Q. Footnote 36. Can you recall what that article contained?

THE PRESIDENT: I have a query. This is July 2011 or 2012 or, perhaps, we will find out by looking at it. 2012 it looks like. I just made a marginal note to ask you. Now we have got the details we can get it.

MR THOMANN: Sir, do you remember reading that out or citing it?

A. Yes, I do. I put it in because I wanted to show the debate going on about the role of the security forces. The main thrust of my report that was in there anyway is about ZANU PF and the military trying to maintain complete control for the next elections and thereafter.

THE PRESIDENT: Do you accept that, if what is said in that article is accurate, security chiefs are forming a plan B for the time when they are no longer in control?

A. I do not read it quite that way. I think that what there has been is what happens a lot in Zimbabwe that all sorts of people have different conversations and fly kites to see which way the wind is

blowing, etc. The Wikileak stuff about backstabbing about Chwenga, who is the Zimbabwe defence force's commander, are all symptomatic of some of this in-fighting, seeking to see where the wind is blowing. I think that, if you bear in mind things like what happened to Charles Taylor, who got immunity, promises may not mean a right lot, General Malone is too aware that officers may not (inaudible) political formation comes into power, if it ever did (inaudible) . They will also be aware of the efforts of Mujuru, who is closely associated with Mukoni and elements in MDC, but in many people's estimations they attempt to put the frighteners on anybody who was seriously entertaining, allowing them the Solomon Mjuru assassination as an attempt to put the frighteners on anyone seriously entertaining allowing MDC negotiation. **[SSHD unable to confirm]**

Q. That was August 2011, was it not?

A. That was August 2011, yes. The circumstances since then are very unclear situations as to what actually happened. There are all sorts of ...

THE PRESIDENT: I think that we have the data on that. Thank you for reminding us.

MR THOMANN: Do you accept that the efforts described here postdate that moment?

A. They do, yes. It is certainly true (inaudible) that there were a lot of army officers (inaudible) etc.

THE PRESIDENT: Looking at the last two documents that we have just been looking at, if, taken at face value would suggest, that at least below the top general level there are senior officers who are looking both ways and looking at other strategies, what is your overall comment upon what weight we should give to this?

A. As I say, a lot of it is testing the water, to see what alternatives there actually are, whereas at the same time continuing their major thrust of this strategy to keep ZANU PF in power.

Q. But were you getting reports like this in 2009 and 2010, for example?

A. Not to my knowledge, actually, no. One thing is that, of course, SADC has had large number of officers and people have tried in the past to use SADC army that surrounds it to see what people are actually thinking. Conversations with senior army people are not something I am able to undertake.

MR THOMANN: Let's move on to the police. You do accept that there is a difference in the makeup of the police between urban and rural areas?

A. There has been a large process of weeding people out who have been unreliable. Police throughout (inaudible) rural areas (inaudible)

Q. Do you accept that the rank and file are not selected, though, for political allegiance?

A. They are not selected on political allegiance but it is assumed they would have it.

Q. Taking the situation in Harare, where the police would have day-to-day contact with the population, what significance do you think it is that the population ... it has on that, that the majority of the population in Harare are MDC supporters?

A. I am sorry.

Q. What impact do you think that it has on individual officers on the beat in Harare that their day-to-day dealings are with the population which is in the majority of MDC supporters?

A. They get on with their duties, but to some extent are one of the most corrupt institutions in Zimbabwe. Their main day-to-day interactions with the population should not be shaking them up and down for money, also protecting ZANU PF demonstrations or turning a blind eye to violence and extortion **[SSHD unable to confirm]**. That on the local population (Inaudible) .

Q. Would you accept there would be a difference by reason of that day-to-day exposure between the attitude and makeup of the police in Harare compared with rural areas?

A. They would not be so much involved in day-to-day violence and the activities I have described, but there may well be bussed in to help in a particular situation. They would expect them to be loyal to the regime.

Q. If I can move on to political developments, you have said that you consider one of the key developments to be the impending deadline for elections. That is paragraph 2. This is the version that you sent before you went on your annual vacation.

A. That is right.

Q. What is your up-to-date view on how likely elections are and when they are likely to be?

A. The impression I got yesterday was that the court had granted an extension to the deadline to ZANU PF - of President Mugabe rather - to have to call elections by the end of March 2013 - to call an election by that date.

THE PRESIDENT: This may be an odd message and in which case tell me I am getting the wrong end of the stick. My reading on elections was that there were court proceedings about a group of by-elections which were due to be heard which were in court and someone had asked for an extension for the date when the writs must be moved for those by-elections.

A. Yes. That is now March 2013.

Q. So that answer was, in fact, related to the litigation about the by-elections.

A. Yes. There are 32 by-elections.

Q. Yes, they are sometimes called a mini-general election.

A. That is right, yes. There has a call that those be harmonised with the forthcoming general election.

Q. Because at one stage those writs were due to be moved by 1st October, were they not?

A. That is right, the date has slipped.

Q. And then they went back to court and the judge has now said that you do not have to move the writs until March.

A. Yes, that is the judgment from yesterday.

Q. I see.

A. (Inaudible) .

THE PRESIDENT: No, I mean, before I took a note down, I wanted to see what I was taking a note about, but, actually, it sounds like my question might not have been quite so stupid as I thought it might have been, after all.

MR THOMANN: What do you think that ZANU PF's objective is in terms of elections, would they like to have them sooner or later?

A. ZANU PF have historically always wanted to have early elections, they are concerned about Mugabe's health, they are concerned about the in-fighting that might occur if he dies before elections **[SSHD unable to confirm]** and so they have always sought to bring these as early as possible despite the fact that there would be no money in the budget actually to have them. Firstly, the MDC would wait as long as possible they would like the conditions to be in place for free and fair elections, which is still not (Inaudible) .

Q. What, if any, significance do you think that ZANU PF's objective of having elections early would have on their willingness to compromise with regard to the circumstances in which that election takes place?

A. I think that they would prefer to have elections under the current Constitution, but it is not the be all and end all of their argument or their strategy.

Q. Do you accept that ZANU PF's objective of having early elections is a matter which may drive ZANU PF to be more flexible than it would otherwise be?

A. No, I do not think so. Let me start again. I think that (inaudible) situation, but their ultimate strategy remains the same. I am sorry I keep saying that but ...

Q. You were asked earlier in chief about the Constitution and the COPAC process and you mentioned that COPAC is an organisation made up of the three parties.

A. Yes. (Inaudible) .

Q. Would you have a look at tab 7 of the respondent's rebuttal evidence? You find there an article by South West Radio Africa.

A. I have it.

Q. What is your observation on the reliability of that as a source?

A. They are reasonably credible. They report what they can. They are independent of most … (inaudible) .

Q. You should find an article headed "COPAC in U-turn over civic participation" in this paper.

A. Yes, that is right.

Q. If you turn the page, could you read to yourself paragraphs 3 and 4 ...

THE PRESIDENT: Is that from the Parliamentary Select Committee?

A. Yes. (**Pause**) Yes.

MR THOMANN: What do you think the significance is of the proposal to permit participation by civic society?

A. As far as I am aware, there has been some major debate between COPAC and the civil society. There have been a number of different meetings to try to ensure that the views of civil society are reflected at the stakeholders' conference. It was going to be a massive thing that civil society makes the point that civil society is made up of very pertinent bodies, who debated the Constitution, and they

represented a significant constituency, essentially the lawyers, etc, so it would be unfeasible for civil society not to be there to have a voice given that COPAC is largely a Parliamentary process. Civil society are involved in some of the (inaudible) and given the draft Constitution will be released at that particular stakeholders' conference the civil society ... I think that COPAC more or less accepted that.

Q. Do you read that as a positive sign in terms of the political space that there is currently?

A. It is obviously better if civil society is inside rather than outside.

THE PRESIDENT: Do we read this that previously the arrangements for the stakeholders' conference were set up not to include them and now it has been accepted that they should be included?

A. That is right.

MR THOMANN: The final paragraph of the article says, "He added that COPAC also decided to allow, diplomats, local and international media, the judiciary and other interested stakeholders to observe the process. This has eased fears of violent disruption".

A. There are two paragraphs you have missed out there.

THE PRESIDENT: Yes, read those as well.

MR THOMANN: Read all of it to yourself or should I read it out to you?

THE PRESIDENT: I am sure you can read it for yourself.

A. (**Pause**) Yes, I think there were a lot of suspicions about ... I am sorry I was reading the wrong bit here, was I not? If Shishagia **[?]** think that it is a concern that ... Certainly the MDC elements in it would be concerned to avoid disruption. They are very concerned that ZANU PF and Chipangano or whoever they might use to disrupt the process that the whole debate that has been going on about the Kariba drafts that ZANU PF have been trying to run versus the first draft Constitution, all of these will create a very confused situation, so inviting outside people in is certainly a good tactic, whether it will work is another matter or whether people will come. I assume that most of the diplomats would go.

Q. I think that you told us at the start of your evidence that this has now been put back from October 4th, tomorrow, this weekend, to some time at the end of the month.

A. That is right, that was my latest information. It might change.

Q. Quite.

MR THOMANN: You may remember I asked Mr Mahvinga yesterday what he thought the significance was of the ZANU PF change of position on the documents that the COPAC will be working from; what is your view of the significance of that change?

A. I, largely, as I do on most things agree with (particularly) Dewa Mahvinga ... I think that … the change he point to [had] various aspects one of which was the fact that there was the SADC meeting, (inaudible) changed tactics that different ZANU PF factions had different views on how best to approach this Constitution process and that the key issue would be what might happen at the second

stakeholders' conference and whether items, like security reform and electoral reform, were going to seriously be considered.

Q. Do you consider this to be an occasion where the MDC put down its foot and prevailed?

A. Not really, no.

Q. Why do you say that?

A. I think that it is more to do with the divisions inside ZANU PF and the desire to give SDAC - kind of toss them a bone, if you like, and say that, look, we can be flexible if we want to be, and then go back to their ways. It is not the first time that this kind of concessions are made, but then clawed back.

Q. When you mention there are divisions inside ZANU PF, what sort of factions are you talking about?

A. There are a number. The two major factions are the one led by the late Mujuru, whose wife (inaudible). There is the Mujuru faction. Then there is the Mnangagwa faction which is reportedly more hard line and at the moment seems to be more favoured by Mugabe although he hasn't formally named a successor. The other factions - well, different people come and go, so getting information on it is quite difficult even though we have certain lines to certain people. Sidney Sekeramayi is a contender. Certainly, Kasukwere has made quite a lengthy ...

THE PRESIDENT: I am sorry, I have to try to get some of this down. Can you just take the names a little bit slower. Sidney?

A. Sekeramayi.

Q. And?

A. Saviour Kasukwere. He is largely in charge of the indigenisation aspect, so he is pretty hardline, believed to have the ear of Mugabe. The other thing to be taken into consideration is the fact that Jonathan Moyo has been the chameleon. He seems to be able to influence the President. For instance, it was thought that Moyo was the one telling Mugabe that his position would be compromised under the draft Constitution, hence the 266 amendments that appeared. Since then, obviously, there has been a difference of opinion within those factions as to how best to approach this COPAC Constitution process.

MR THOMANN: What would you describe the position of the Mujuru faction as?

A. At the moment I would say that they are not in favour. They are the ones who are deemed to have been talking to the MDC on a number of occasions. There were even rumours that someone had a deal but that was never proved. I think that they have rowed back from those kind of conversations but they are a little out of favour, I believe.

THE PRESIDENT: Away from Mugabe or ...

A. Mugabe, yes. There is possibly a patriarchal element there, too, towards Joyce Mjuru a woman.

MR THOMANN: When you say there were rumours of a deal, what sort of deal do you mean?

A. There were rumours that Tsvangirai would do a deal with the Mjuru faction but then of course there were rumours of a deal with Mnangagwa. None of this can be taken as anything other than rumour

but the deal would probably involve some significant immunity **[Appellants unable to confirm]**. It was never proved, it was rumours going around. Sometimes these rumours are started quite deliberately to discredit other factions.

Q. You mentioned the Electoral Amendment Bill and the progress of it.

A. An Act now.

Q. Yes. Can you help us at all how that will assist in terms of free and fair elections?

A. I do not have precise information, but it (inaudible) It has elements of free and fair elections in it.

Q. Could you have a look at tab 64 of the rebuttal bundle? That is an article in the Herald. "The Zimbabwe Electoral Amendment Bill passed".

A. Yes.

Q. Then a few paragraphs down, it says "Some of the amendments brought by the Bill include the introduction of a polling based voters' roll. The Bill will also ... with Zimbabwe Electoral Commission to announce an evidential election results within five days of polling. The new Bill also established an electoral court to speedily deal with any electoral disputes and polling station based voters' rolls would be introduced, although ... Patrick Chinaza agreed to postpone their introduction. Police officers will no longer be allowed polling booths inside polling stations while the visually impaired would be allowed to bring any person of their choice to assist them in voting in the presence of a polling officer".

A. Yes.

Q. What is your view on the significance of those changes for the prospect of a fair election?

A. If brought in and if the atmosphere was correct, it would obviously at least provide the possibility of a much freer and fairer election system. The problem is, of course, that those limitations are not necessarily going to be implemented with the security situation. To some extent in 2008 there was the ability to vote reasonably freely, it is what happened afterwards that was the problem. The 2005 elections were not on the actual day of the election completely violent, which is the characteristic of how elections.

Q. Was there then a requirement for the result to be declared within five days?

A. No, which is why it took a month. (Inaudible) It took them a month to release those results.

Q. What impact do you think that that will have on the prospect of post-polling violence?

A. It should in theory, at least, dissipate the kind of anxieties, the ability of militia to gather their troops to ... it should in theory, at least, reduce the violence, but this also depends on the context that I have described, intimidation and violence beforehand ...

Q. You were asked about the electoral commission earlier and is it right that your views of Mutambanengwe and Kazembe reflect those of Mr Mahvinga yesterday?

A. Yes.

Q. And you mentioned that there were a number of good people in the electoral commission.

A. Yes.

Q. Who did you have in mind?

A. The University of Zimbabwe law lecturer called Jeff Boulter, who is a good legal expert I don't personally know many of the others.

Q. He is a commissioner, though, is he not?

A. Yes.

Q. Do you have views on the other five commissioners?

A. I know that mostly they have some kind of connection with the military.

Q. In terms of the current head remaining in place, the acting head, what do you think his significance will be if there is a dispute as to ...

A. It is a she, Joyce Kazembe.

Q. My apologies, the actual head, not the acting one.

A. Simpson Mutambanengwe?

Q. Yes.

A. He is a well-known lawyer who has practised in Namibia in the Supreme Court there.

THE PRESIDENT: He is a judge in Namibia, is he not?

A. Yes.

Q. Is he still a judge?

A. He is a judge. He has been in very poor health. In fact, he has been in poor health since he was actually made the chair of the commission, so his impact has not been great, so this has not been helpful to having a free and fair election because of Kezembe and problems involving the electoral commission.

MR THOMANN: Do you accept that he does remain in place, though?

A. He is a titular head, I would say.

Q. Are you aware of any report that he has resigned?

A. I have not heard that.

Q. Do you accept that the overall makeup of the electoral commission is an improvement on that in 2008?

A. It is a cosmetic change.

Q. What about the commissioner personalities that you have mentioned, do you think that that is an improvement?

A. I am sorry, personalities of who?

Q. The personality of the eight commissioners, do you think that constitution is an improvement from 2008?

A. Not particularly.

Q. Why do you say not?

A. Well, they are not independent. Their ability to reflect what is going on has never been very high except in terms of those who have turned a blind eye to violent elections that there are elections free

and fair. They have not been able to bring in a new voters roll and the current one is a shambles. There are people on it who are 140 years old. One element would be how ... is to deal with this extremely corrupt system they have inherited which is largely speaking why they have not been able to change anything up to this particular election ... The Bill is still not passed, we still do not know what is happening while it is President Mugabe. Up to now they had been unable to really change the way that ...

THE PRESIDENT: Is there any connection with this incomplete process of electoral legislative reform and the judicial decision to defer the mini-general elections?

A. That is an interesting point. I would be interested to hear what civil society and legal people in Zimbabwe thought on that one.

Q. Do we know who the claimants are? I thought the claimants were ZANU PF.

A. Yes.

Q. So they were asking for an adjournment in this particular case?

A. Yes, we think so as to harmonise the elections with the mini-by elections, the mini-elections.

Q. With the main election?

A. Yes.

Q. And there have been no by-elections since 2008?

A. No, the agreement of the global political agreement was that there would be no by-elections. There was some kind of feeling that they might just bring Mps in from the same party, but that did not happen either, so there has been quite a gap.

Q. So as Mps resign or die or something ...

A. And deaths in general, others taking their place so ...

Q. Numbers go down. But no by-elections was a term of the agreement itself?

A. That is right, yes.

MR THOMANN: What do you think the significance of the electoral commission's role was in the process which has led to elections not being called to date?

A. That I do not know.

Q. Are you able to help us at all with the Human Rights Commission bill that you mention in your report?

A. Yes.

Q. I think that it is only mentioned. Can you help us with what that will involve?

A. It does bring a Human Rights Commission, but with severely limited powers. It is likely that no human rights abuses committed before 2009 will be eligible for investigation. It has not really started work and as far as I know it does not have any money.

Q. Moving on to regional engagement, what is your assessment of the current engagement of South Africa?

A. South Africa or SADC?

Q. South Africa to begin with.

A. South Africa is a chief player in this. It is Zimbabwe's neighbour, it suffers from the Zimbabwe crisis. At the same time a lot of events in South Africa are having to take up President Zuma's time, like the diamond mines. Those sorts of things. They are fitful on the Zimbabwe issue. They have tried to visit on a number of occasions and it has been postponed by ZANU PF. They have a committee that visits them regularly (inaudible) a respected member of the African National Party (Inaudible) and has made some encouraging noises. It has always been implementation, so even while they have made significantly more noises about the need for a new (inaudible) and free and fair elections and the need for a number of key reforms, they have not really been able to facilitate that beyond what was done in the global political agreement. There is a feeling, of course, that the old liberation movement of solidarity still persists. A highly critical report by the South African Generals ordered by Mbeke about 2008 violence that has never been released about the conduct of the Zimbabwe Armed Forces has been sat on for two or three years now. The relationship is a tricky one because there are elements in the ANC who would support lots of what ZANU PF do and would use that to reflect back on what they perceive is a corrupt South Africa. South Africa have to play a very careful card. They do not like to be seen as this kind of regional hegemon telling everyone else in the region what to do, for obvious political reasons. I think that the picture is quite focused on South Africa and its ability through SDAC to affect what is going on. There is a great deal in Southern Africa of reliance on sovereignty and non -interference as a kind of key organising principle for different nation states, so, even if you have a regional body, there is very strong feeling that it is interfering with individual states' affairs. This has happened.

Q. You mentioned SDAC's potential role in the change of position in your evidence and the change of position in September on the documents to be put to COPAC. What do you think the significance of that ...

A. I am sorry, what is it?

Q. This was your evidence earlier. You mentioned that one of the factors that could have driven that change of position might have been that there was a SADC meeting in the future. What do you think the significance is of ZANU PF's readiness to change their position on the eve of a SADC meeting?

A. Well, it is part of the pattern that occurs on occasions like this. There were a number of initiatives before the SADC Heads of State meetings in 2009 and 2010 in terms of promises to free up the media airways, promises to suspend or amend or even repeal the two key pieces of repressive legislation, i.e. POSA, but after SADC had the state meeting nothing really changed. So I can see that this is part of a kind of PR pattern, if you like.

Q. Would you accept that the position as regards South Africa's engagement process remains broadly as it was the last time we met at this tribunal?

A. Yes. I think that looking at it on a long-term basis that Zuma has a great interest, but that does not necessarily translate into all aspects of South African policy. But, as I said before, it is fitful.

Q. Moving on to the SADC, you mentioned concerns about SADC observers in your statement.

A. Yes.

Q. What is your current assessment of the likelihood that there would be SADC or AU observers?

A. By insistence it may well come. They would be invited and come. But they would only come for a limited space of time. They would not deal with issues wider than the actual conduct of an election. Quite specifically, I think Dewa Mahvinga referred to some of the meetings that they had with SADC. He said that certain items they could not deal with because it was interference with another nation's affairs, things like security sector reform, the conduct of the armed forces. These are areas that they will not go to, but these are the key areas.

Q. I think that he mentioned in his statement the requirement to confine the army to barracks during the election process.

A. Yes.

Q. Are you surprised that that was not something that was countenanced by SADC?

A. No.

Q. Do you consider it likely that there would be additional funding for observers?

A. If they can find the money, but observers were expected in Angola, so I think they quite specifically told the delegation of civil society people that they really did not have much in the coffers to mount a full-scale observation level and monitoring.

Q. What do you think the prospects are of external funding being found?

A. There may be some through UNDP, which has happened in the past. I think that western governments - you know what we call the fishmongers group of western donors are unlikely to fund and there would have to be certain conditions in place but they have not yet put any in place. They would perhaps have a proposal, but this is some way down the line.

Q. In paragraph 4 of your witness statement, you mention a number of potential tactics.

A. Yes.

Q. You believe that ZANU PF is gearing up for elections and you mention "disenfranchisement through voter roll chicanery, gerrymandering of constituencies and manipulation of polling stations".

A. Yes. (Inaudible) .

Q. Then you say "With no movement on security sector governance, there are concerns that retrenched soldiers are still on the payroll, busy organising structures of violence. Legislation to establish a Human Rights Commission passed through Parliament but its provisions on impunity for abuses until recently attracted much civil society criticism. A census process has begun ..." Then there are lines that we looked at earlier.

A. Yes.

Q. In terms of the potential of tools available to ZANU PF, what do you consider the risks would be if violence were resorted to?

A. ZANU PF has always used tactics of violence sometimes being used, sometimes being threatened, always being implicit.

Q. What do you think the prospects would be of an election resembling 2008 being recognised by SADC?

A. I think that that would be quite difficult, so the tactics might be lower scale violence, intimidation, and remember what happened in 2008 when SADC recognised the election repeated very frequently, especially in the rural areas, especially in those areas that historically ZANU PF like Mashonaland and Manicaland, Operation.

Q. Looking at the position in Harare, do you accept that the international spotlight would be on Harare to an extent that it would not be, for example, in Mazvingo or in rural Maniciland?

A. Yes.

Q. What impact do you consider that that would have on any considerations of the likelihood of violence?

A. It would not necessarily affect it, but, again, ZANU PF have to think of the best ways of getting that vote to their side and that will not just something that happens over the days of elections, it will be a longer term process. Elections are not stolen in a few days, they are stolen in six months.

Q. What impact, if any, do you consider it will have on ZANU PF's choice of tactics that support in Harare is broadly MDC?

A. It has changed, because at one time they decided more or less, I think, that they were not going to win in major urban centres and there obviously has been this attempt to reach out to the cities through a number of different tactics, like people withdrawing city constituencies, so they have large pieces of commercial farms, peri-urban areas, settlers that are forced to support ZANU PF or do support them, anyway, so there has been, both formally and informally, and this is something that Joanne McGregor's report, which when it is published you will be able to see, looks at quite substantially, the use of both formal and informal state mechanisms to recapture the cities for ZANU PF. How successful that will be is another matter. Chipangano is just merely one aspect of reasserting control in the cities and urban area. JUDGE LANE: Have constituency boundaries been redrawn so that the new elections when they come next year will be fought on those new boundaries?

A. Not yet. This is previous.

JUDGE LANE: I am sorry, I did not quite hear that. They have already redrawn the boundaries, so the 2008 elections were fought on the sort of redrawn boundaries that you have just described.

A. Yes, that is right.

THE PRESIDENT: So that is not a change since 2008?

A. No, but it is a previous tactic no change but a tactic they will try to use again **[SSHD unable to confirm]**, no doubt, if they can.

JUDGE LANE: But from what we all know not very successfully in 2008.

A. No, indeed, but they are of course aware that that was not very successful.

MR THOMANN: What would the role of the electoral commission be if there were suggestions that boundaries would need to be redrawn?

A. They would, in theory, at least be expected to be the body that would draw up those constituencies and there will be the expectation, no doubt, that the census would be useful for that, but this is looking like a longer term process than one related to the 2013 election.

Q. The last thing you deal with is the humanitarian position in Zimbabwe. You mentioned particularly food shortages in your statement.

A. Yes.

Q. Are you familiar with the World Food Programme"?

A. I may well have done. I do not work at all in the humanitarian sector, so ...

Q. Your area of expertise is not dealing with the humanitarian position. Are you more interested in political development?

A. I am more a human rights ... my institution .

Q. You may or may not have seen C.O.I.S information on the World Food Programme. Are you aware of any World Food Programme initiatives?

A. No, I am not.

MR THOMANN: Thank you, that is all.

THE PRESIDENT: Thank you very much. It is ten to, Mr Henderson. Do you know roughly how long you might be?

MR HENDERSON: Maybe about 15 minutes.

THE PRESIDENT: Shall we go to five-past and see what happens?

A. I would prefer to do that.

THE PRESIDENT: I think that we would prefer to facilitate that, if you are comfortable at the moment?

A. Yes.

Q. You have been giving evidence since 11 o’clock, you do not need a break?

A. No, I am fine.

Re-examination by MR HENDERSON

MR HENDERSON: Have you got the short bundle with your report in it?

A. Yes.

Q. You were taken to a number of the ZPP monthly reports.

A. Yes.

Q. I had already taken you to the witness statement from them this morning, but if I could just turn to a statement that I had not taken you to and that is the statement of Tony Reeler.

A. Yes.

Q. That starts at page 15 of the bundle.

A. Yes.

Q. Can identify a couple of points in particular and get your view on them? Firstly, paragraph 29, on page 22, one of the most significant recent developments has been an appreciable rise in ZANU PF militia activity in urban areas and over the last nine months, for example ...

THE PRESIDENT: I am sure he can read it. This is arising from cross-examination, is it?

MR HENDERSON: Yes.

THE PRESIDENT: Let's have the question.

MR HENDERSON: Do you agree or disagree with that?

A. Yes, I do.

Q. And just moving back he deals ... well, at paragraph 24 he refers to the peak rise in both rural and urban areas, etc. Then from paragraph 25 he explains the basis and the role of the ZPP monthly reports.

A. Yes.

Q. And indicates that they do not give a true reflection of what is going on on the ground, especially in urban areas. Then he goes on to explain that they do not seek to collate human rights violations like the old Human Rights Forum reports.

A. Yes.

Q. They tend to monitor political process.

THE PRESIDENT: It is a lot of preamble, Mr Henderson, can you get your question out?

MR HENDERSON: What I want to ask the witness about - and I am summarising rather than reading it ...

THE PRESIDENT: Well, I think that this is a slightly odd way of re-examining and ...

MR HENDERSON: It arises out of Mr Thomann's cross-examination.

THE PRESIDENT: It is a slightly odd technique you are adopting, but ask your question.

MR HENDERSON: Are you familiar with what Mr Reeler says about the ZPP reports, if I could look at the conclusion ...

THE PRESIDENT: You can ask that question. Are you familiar with what Mr Reeler says about the ZPP reports?

A. Yes.

THE PRESIDENT: So he is, so you do not need to read it out.

MR HENDERSON: And do you agree with his analysis and his conclusion and, in particular, at the end of paragraph 28 that these are examples rather than a national picture?

A. Yes, I think Jestina Mukoko, who is the director of ZPP, would probably accept this herself, that it is an incomplete picture, based on their particular factors of verification and reporting of their monitors.

Q. And she indicated that that should be a rise in violence ...

THE PRESIDENT: Mr Henderson, focus on the questions, please.

MR HENDERSON: Can you just go back to page 17 of the Home Office's very small bundle? It is a clip of press cuttings.

THE PRESIDENT: Page 18?

MR HENDERSON: Page 17, but the report begins at page 16.

THE PRESIDENT: "Generals had no support".

MR HENDERSON: This is, as you said, reporting the views of the Secretary of Defence for the MDC, who was saying that the army chiefs' statements were designed to unsettle ... It is the last paragraph on the first page.

A. Yes.

Q. You gave evidence that there were a range of political views, no doubt, in the army. You were not taken to the last two paragraphs of the report. Could you just read those, the bottom two paragraphs on page 18 and tell me whether you agree with those?

A. (**Pause**) Yes, that was more or less my analysis.

Q. You said that there is a vast amount of commentary and different people suggesting different things. Are you aware of any commentator who you would regard as serious who would say that one can expect some lower ranks of the army to revolt if they are required to play a role again in the election violence?

A. Not in what I have read.

Q. The Electoral Bill, juts to confirm, it is currently before Mugabe.

A. Awaiting signing.

Q. It has not been signed?

A. It has not been signed. It should be signed within two weeks of receiving it.

Q. Do you know when he received it?

A. I do not know the precise date. I think the two weeks have gone.

Q. Finally, we have seen the reports that civil society are now to be let in to the stakeholders' conference.

A. Yes.

Q. Would you just turn to page 16 of part C , the bundle with your report? This is Mr Reeler's statement dated 25th September. He says at paragraph 6 that the next stage of the COPAC process currently is a very confused situation. Information that we have just received suggests that this could be held next month but completely in-house with all representatives of civil society excluded. The exclusion of civil society representatives was also a recent development.

A. Yes.

Q. Would you agree with Mr Reeler that it is a very confused situation?

A. Yes.

Q. My final question, would you just turn over the page to paragraph 9, and read paragraph 9 and tell me whether or not you agree with that?

A. It is certainly true that a large part of the civil society have seen it as a compromise document but it is a further document basis of a people driven Constitution.

Q. And just to clarify, that was the compromise document originally drawn up in the inter-parte negotiations in COPAC, so there are not any further compromises that were made as a result of the demands that ZANU PF have recently made?

A. No.

MR HENDERSON: I have nothing further, sir.

THE PRESIDENT: Thank you.

Questions by the Tribunal

JUDGE LANE: The first question is just a small question that arises from something in Mr Reeler's reports. Paragraph 24 is talking about groups that operate in urban areas. Chipangano we have heard a lot about that. Just to clarify, Al-Shabab in the Midlands, that has a resonance which ...

A. It is an interestingly provocative name. They changed that from (inaudible) .

Q. Do you know anything about that group?

A. Well, Chipangano was always affixed with the word shadowy then Al-Shabab even more so.

Q. But you would not take it to be Al-Shabab in the sense as its name is understood in Somalia?

A. No.

Q. My other question was concerning the position of the Generals and you were telling us earlier by reference to a number of articles, including the one "The security chiefs panic", that the Generals were testing the waters as to what might be the position if ZANU PF did not win the election, in which case they would no doubt be looking to safeguard their positions in a new state of affairs. In so far as Generals are doing that, and I accept the position is (inaudible), but in so far as they are doing that, would that not point towards there being a reluctance on their part to engage in electoral violence to drive a ZANU PF victory on the basis that, if it failed, they would be in a very difficult position vis-à-vis seeking before the international community to be exculpated from their prior misdeeds?

A. It is certainly a reasonable reading. I would not take it any further than to say that this is in a sense testing the water, if their preferred tactic fails, if the strategy, rather, of being prepared to use violence does not work, and I cannot see why that would not work, because ...

Q. You have got to be sure that it is going to work, have you not? You have to be sure that your violence or that ZANU PF is going to deliver a ZANU PF victory. If you try it and it does not work, then you are left with a difficult position personally, are you not?

A. That is undoubtedly true. What happened, when they did not use violence in 2008, in the first round of voting, was that it was not successful, so the second round was accompanied by mass violence, so I would think that the lesson they would draw from that - or I am very sure they would draw from that - is that violence works.

Q. But you also told us earlier that you think they would be lower key this time because, if they had an election as violent as 2008 in 2013 that would not play at all well with the region.

A. It is a complex situation. They used violence and it won the election, but the violence was so extreme that the region won't accept it. They have to make a calculation on what kind of violence, what kind of softening up of the electorate, what kind of intimidation will work before this next election. It seems that the structures are there ready to be used but how they will be used and in what areas and what form that will take is as yet uncertain.

THE PRESIDENT: I have recorded your evidence previously this morning that it is unlikely that it will be the same form of violence and the same intensity of violence.

A. Sure.

Q. There may be intimidation and there may be other tactics used but not a mere repeat of what happened in the re-run elections of 2008, the second round.

A. Yes, I think that you will probably see a fair bit of rounding up of villagers to attend what we call all-night vigils/purges to declare allegiance to ZANU PF, tightening up the judicial chiefs' control over the population, selected use of violence. These will be tactics used both in the rural areas and in urban areas, as I have already described.

THE PRESIDENT: Thank you very much.

MR HENDERSON: Could I ask a question arising out of that?

THE PRESIDENT: What is it? What is the question and I will tell you whether you can ask it or not? What is the question?

MR HENDERSON: It is a question arising out of the ...

THE PRESIDENT: Yes, but what is the question?

MR HENDERSON: I want to ask the witness about the gist that we were given yesterday on a point that is relevant to the questions that the tribunal just asked.

THE PRESIDENT: It does not sound like it arises out of that. Well, one more.

Further re-examination by MR HENDERSON

MR HENDERSON: You have just indicated that ZANU PF would prefer to use intimidation and lower level of violence so they do not have to then deal with as much criticism from the international community. A gist we were given yesterday indicated that ZANU PF would use just enough violence, as much as violence as they needed to, to win the elections but not more. Would you agree or disagree with that?

A. I think there are elements of control and elements of lack of control. What happened in 2008 was both formal and informal violence unleashed. ZANU PF can control the formal violence from the state rather better than the militia. The militia is ill-disciplined, they tend to be on drink or drugs. They can take place fairly quickly. The danger is always that, while they have a strategy of violence or controlled violence, it may boil up and you may get quite irrational violence, if you want to put it that way.

THE PRESIDENT: Right. Thank you very much. You are free to go now.

(**Witness withdrew**)

(Discussion)

(Adjourned for a Short Time)

(Discussion)

MR IVES

Questions by the Tribunal

THE PRESIDENT: That is your statement?

A. It is.

Q. You are happy with it, are you?

A. I am, yes.

Q. And you can adopt it?

A. Yes.

Q. No one wants to ask you any questions apart from the question that I am about to ask you. I am going to ask you this question. If you think that in answering it you may need to reflect upon it, take a pause and do not just rush at it, OK. As you know, we in the tribunal have been engaged for some weeks in the process of some further information, originally ordered I think by the Court of Appeal, and one of the documents that the appellant has received I think yesterday evening is the document that is now before you. In its full context it was a document that I think under tab 148. I want to ask you, that is, we are told, an FCO paper by which do we understand to mean that that was a paper that the FCO produced for its own purposes and is it based by an official at the FCO on information currently available to him or her?

A. Yes, it was an analysis paper produced for internal use by the FCO by an official on the basis of information that they had gained at that time.

Q. I recall - we have not got the confidential version of that paper - it is March 2011.

A. Yes.

Q. Is it the first part of March or ...

A. To my recollection, it was early March, but I cannot recall without seeing the original.

MR THOMANN: I am told that it is likely to have been before 11th because that was the disclosure ...

THE PRESIDENT: Before yes, I think that it is 4th March 2011. Thank you very much. You may go.

(Witness withdrew)

(Discussion)

CM, Called

THE PRESIDENT: It is important that you speak slowly and clearly, please, so we can hear you. It is important that we do. We start from the position that you have made, I think, two witness statements quite recently for this appeal.

A. Yes.

Q. You have seen those witness statements, have you?

A. I have seen them.

Q. You are happy with them. They represent what you want to tell us?

A. I am quite happy.

Q. Very good. It is likely that what will happen next is that you will be asked questions from the gentleman on my left.

Examination in chief by MR HENDERSON

MR HENDERSON: You say in the statement that you just made today and the final paragraph that you would not want to attend those ZANU PF meetings as you do not support ZANU PF. Would you actually attend them?

A. I would because if I do not I will fear that I would be victimised at any time if I don't, so attending does not mean that I am attending wholeheartedly, it is just for fear for my life.

MR HENDERSON: I have nothing further, sir.

THE PRESIDENT: Thank you.

Cross-examination by MR THOMANN

MR THOMANN: You say at present your house in Hatfield still remains unoccupied is that right?

A. It is correct, yes.

Q. And you say that it is located in [name of road]?

A. Yes.

Q. And you may have heard if you were here yesterday that there was a debate as to the difference between the low and medium and high density suburbs. Do you recall that you initially described Hatfield as a low density suburb?

A. Originally, but that was an error. It is a medium density.

Q. Can you explain why you made that error?

A. Well, I think at the time I was under a bit of stress and I was just answering everything very quickly and I do not know whether it was or not whatever I was saying at that time, but I realised it was an error.

Q. Was part of the error that the residential area around [name of road], in fact, has the character of a low density area; the buildings are spaced out? Was part of the error that the area is actually low density that you live in?

A. It was an error when I said it was low density. It is medium density.

THE PRESIDENT: And that includes [name of road] itself?

A. Yes.

Q. That is also medium density?

A. Yes, it is medium density.

Q. I should say - and you ought to be aware - that with the wonders of modern technology that we have had a quick look at Hatfield on Google satellite in order to try to get a sense of the location. When I briefly did it, I did not see [name of road] come up. Is it near any main thoroughfares [name of road]?

A. Near main what, sorry?

Q. Is it near any particular main through road through the Hatfield area?

A. No, it is not.

THE PRESIDENT: I see.

MR THOMANN: How would you describe the house?

A. It is a three-bedroomed house, lounge and dining, bathroom and toilet.

Q. Does it have a garden around it?

A. A small garden, yes.

Q. And are those the types of houses that are on [name of road]

A. Yes, those are the type of houses.

Q. What would you describe as the difference between that sort of area and a township like Mbare?

A. Like?

Q. One of the townships.

A. OK. In a township, you have a dining room and a kitchen and probably two bedrooms and the toilets sometimes they are not inside, they are outside.

Q. You have attached to your witness statement a report. It is page 41 of the bundle of your specific evidence. Mr CM, is that an article you have seen before?

A. I know that it was with my statement.

Q. Have you had the chance to read it before?

A. I have not had chance.

Q. Would you like a chance now to have a look at it?

A. (**Pause**) I have seen this before.

Q. If you turn the page, page 42, in context, the article refers to someone involved in illegal settlements and the quote that I am interested in is in the second paragraph down starting "Obviously".

A. Yes.

Q. It says there, "Obviously, they ... airport and the nearby medium density suburb of Hatfield". I think that the article has been provided in support of your case that Hatfield is a medium rather than a low density suburb, is that right?

A. That is correct.

Q. Would you accept that read in context that quote indicates that it is a desirable place to live?

A. I am not understanding you.

Q. Do you accept that a reading of this quotation is that persons are to be envied if they live in or near Hatfield?

A. They live near Hatfield.

Q. Do you accept that ...

A. They are near Hatfield, yes.

Q. Do you accept that Hatfield is a desirable place to live in the Harare context?

A. It is.

Q. Can you explain why?

A. Because the houses that are there already are desirable places to be, but the shanty places where they are building now it is not desirable.

Q. Now, you have mentioned that you were interested in relocating to Karoi near Kariba, is that right?

A. Yes.

Q. And is it right that that is Mashonaland West?

A. Yes, it is.

Q. Can you confirm why you would be interested to locate there given the answer that you gave to Mr Henderson a moment ago?

A. I would not want to go back to Hatfield because of fear, because these people are exactly the same people who are the ZANU PF people, so, if I go there, I know quite a lot of these people, you know, these are people who will be looking for me.

Q. You remember that in your previous appeals you were not believed as regards people looking for you in Hatfield.

A. In the previous ...

Q. In the previous stages of this case, do you remember that you were not believed as regards people looking for you in Hatfield?

A. They have always been.

Q. Do you have any new information on that?

A. Not at the moment, but they have always been looking for me ever since I left.

Q. That particular factor apart, there is no reason for you not to live in Hatfield?

A. There is a reason for me not to live there.

Q. Is the only reason that you have that people are looking for you?

A. Yes - for fear of my life.

Q. In terms of the work that you have done in the past, you have given evidence previously that you worked as a business manager for [S] Finance.

A. That is when I was still working.

Q. And you said that you worked after that with your son, D

A. Yes, which never took off very well. It collapsed.

Q. When you say that it never took off very well ...

A. It did not do very well. We started and it never went too far.

Q. What sort of work was it?

A. It was like we were supplying, you know, consumables and furniture. It did not go too far.

Q. Why do you say it did not go too far?

A. Because we didn't do very well.

Q. Do you recall that previously you were not believed as regards your business being attacked in the previous stages of this appeal?

A. Previously?

Q. Do you recall that in previous stages of this appeal you were not believed on that aspect, your business being attacked?

A. It was.

Q. Do you have any new evidence on that?

A. Not new, but the old.

Q. When you say "old evidence", do you have anything apart from your own oral evidence?

A. What I am trying to say is that when it was attacked it never went very far and nothing happened from that time.

Q. Is there any reason why you would not be able to start another business idea with your son, D?

A. D is in Masvingo now and starting any business would need money and I have not any money at all and with the economy in the country now I do not think that it would work out.

Q. When you say that D is in Masvingo, is he working in Masvingo?

A. No, he is not. He is looking for a job there.

Q. If you were back in Hatfield, would there be any reason why D could not join you back at the family home?

A. Well, he has got his own wife and child, so he would not join me at all. He is not working, I am not working, so it is impossible.

Q. You have described all your children as MDC supporters.

A. Yes, I do.

Q. Are you aware of D having had any difficulties as a result of that?

A. Well, when in Masvingo right now he has not had any difficulties, but when he was in Harare he used to.

Q. What sort of difficulties do you mean?

A. Because he was reluctant to go the ZANU PF meetings because he was an MDC supporter.

Q. That is not something that you have mentioned in any of your witness statements, is it?

A. I am sorry.

Q. You have not mentioned that in your witness statements, have you?

A. I am not too sure if it is there. I don’t think that it is there.

Q. I will be corrected if it is there. Can you explain why you have not mentioned that in your witness statements?

A. I think that I overlooked it.

Q. You knew, did you not, that an essential part of your case was going to be that you were going to be at risk in Harare, so would it not be something that you would mention if your son had had difficulties in Harare? Why have you not mentioned that beforehand?

A. I said I overlooked, I think.

Q. Is not the answer that you are now trying to support your case with things that did not actually happen?

A. No.

Q. You have another child in the UK, is that right?

A. Yes, I have, S.

Q. How old is S?

A. How old?

Q. Yes.

A. He is 23.

Q. 23. Can you tell us where he lives?

A. He is in Oxford.

Q. In Oxford. And what is he doing?

A. Nothing.

THE PRESIDENT: Does he have a right to live here or ...

A. No.

Q. So he has an uncertain status?

A. Yes. He has not got the right to live here.

Q. Has he had a negative decision about his future stay or ...

A. Negative, yes.

MR THOMANN: If he were to return with you, is there any reason why he could not live with you in Harare?

A. That house is not habitable at the present time, because it is dilapidated.

Q. You mentioned it having a leaking roof at the moment.

A. Yes, the tiles have been removed.

Q. Now, if that were repaired, would there be any reason for you not to return?

A. I do not see it being repaired because there is no money to repair the roof. It costs a lot of money.

Q. Now, one economic activity that you mentioned you were engaged in before you left Zimbabwe was looking for properties for your aunt. Is your aunt still in Harare?

A. No, she is here.

Q. She is in the UK. And what is she doing?

A. She is doing care work.

THE PRESIDENT: She has a visa for that?

A. Yes, she has.

MR THOMANN: And you mentioned previously that she supported you in Harare.

A. Originally, yes.

Q. Is there any reason why she could not support you now if you went back to Harare?

A. Are you talking about my auntie?

Q. Yes.

A. No, my auntie is here.

Q. Yes, is there any reason that she could not send remittances over to you in Harare?

A. She did not support me when I was in Harare.

Q. You mentioned that you looked for some properties for her?

A. Yes, because they intended to buy a house in Harare which they did not buy. That was before I left. When they said can you look around to see if there are houses of a reasonable price, because they intended to buy a house but they did not buy a house.

Q. Is there any reason why she could not tide you over with some funds when you return to Harare?

A. Well, I do not think that she has any money, enough money to look after me while I am there, even at that time she was not earning enough money.

Q. Presumably, she is on a careworker's salary at the moment.

A. Yes.

Q. And have you asked her whether money would be available?

A. Whether?

Q. Have you asked her whether she could support you?

A. No, she could not. She said so.

Q. Have you asked her?

A. Yes, I did. I did talk to her some other time but she said she could not.

Q. When you asked for support previously, what sort of support was it?

A. Support from?

Q. You have mentioned that you have asked your aunt for financial support. When did you ask your aunt for financial support?

A. I cannot remember. I cannot remember that.

THE PRESIDENT: You cannot remember asking her or you cannot remember when you asked her?

A. I cannot remember asking her.

MR THOMANN: For all we know she would be willing to support you.

A. Sorry.

Q. Is it not right that you do not know whether she would be able to support you or not?

A. She would not be able to support me.

THE PRESIDENT: Why do you say that?

A. Because in care work she is not earning enough money to do so.

Q. That is your judgment, is it? It is your judgment that she would not be able to support you?

A. It is my judgment, yes.

MR THOMANN: May I suggest to you now then that there would be enough money from her to make a real difference to your start in Harare - do you accept that?

A. I do.

Q. You mentioned activity in Reading in the context of an MDC branch and previously you have provided us with minutes of meetings. Those minutes, you may recall, did not record any activity or contributions by you to those meetings. You have not provided us with any additional ones, is that right - any further minutes.

A. No further minutes have been provided.

Q. Do you accept that the minutes that you provided previously reflect your attendance but lack of contributions to those minutes?

A. I do not know why you say lack of my contributions, I am not ...

Q. Well, on the minutes you provided previously, there are not any contributions from you to the meeting that have been recorded?

MR HENDERSON: I am not sure that he understands.

MR THOMANN: The minutes that we looked at previously did not show you as saying anything at those meetings which the minute taker recorded.

A. Yes, I do agree on that, I did not contribute, it did not show me contributing saying something, but ...

Q. Do you accept that that is because you do not tend to say very much at those meetings?

A. I did not say much.

Q. You say that you would be of interest to the CIO in Harare when you returned.

A. Yes.

Q. Do you accept that if the CIO were aware of the minutes of your meetings in Reading that they would not find anything there that you have contributed?

A. Yes, but the fact that I am a member of the MDC and, you know, we contribute funds to support our party at home, that would matter to them.

MR HENDERSON: I have just been given, I think, by your legal representative a photograph. Is that right?

MR HENDERSON: There are copies for the tribunal as well. W83 was going to refer to this. It is a printout from the MDC website.

THE PRESIDENT: This is a bit ... Anyway.

MR HENDERSON: It is evidence that W83 was going to give.

THE PRESIDENT: Well, for God's sake it should be before us before this stage is reached in the proceedings.

MR THOMANN: Have you got a copy of that photograph?

A. Not now. (**Handed**) I have got it.

Q. Do you recognise yourself?

A. Yes, I do.

Q. Are you the gentleman on the far right?

A. Yes, I am.

Q. Do you accept that all that shows is that you attended a function in April 2011?

A. I do agree.

MR THOMANN: Those are all my questions.

THE PRESIDENT: Mr Henderson.

Re-examination by MR HENDERSON

MR HENDERSON: Just in relation to your aunt, you said that she was a low-paid care worker. You obviously have some familiarity with how much she earns as a care worker if she said that she was low paid. But on your understanding would she have enough money to repair your home in Harare?

A. No, she would not.

Q. Mr Thomann asked whether she might be able to tide you over. I am not sure whether it is tied you over until what, but just to clarify in your statement you say that as a 60-year old man, you would not be able to compete for work. Do you think that that situation would improve with time or not?

A. It would never improve at all.

Q. And, apart from the problems in actually living in your home in its dilapidated state, if you were to go back there now, would you be able to find the basics of life, like sort of having food to eat?

A. It would be very, very difficult for me to find that.

MR HENDERSON: That is it.

Questions from the Tribunal

JUDGE LANE: How old is your aunt?

A. She is nearly 60. About 57, nearly 60.

Q. She is younger than you?

A. She should be, I think so.

THE PRESIDENT: Thank you. There are no further questions from us. That completes your evidence.

(**Witness withdrew**)

(**Discussion**)

WITNESS 83, Called

Examination in chief by MR HENDERSON

MR HENDERSON: Could you confirm your name, please?

A. My name is [W83].

Q. And your current position?

A. I am [representative] of MDC UK and Ireland.

Q. And, if you could speak reasonably slowly, so that everyone can make a note of what you are saying ... You have made a witness statement in this case. Can I ask you to confirm that that is your signature and you signed that statement yesterday and you are familiar with the contents?

A. Yes.

Q. And is what you said there true?

A. Yes.

Q. You have drawn attention to a photograph ... is this a printout from your organisation the MDC UK and Ireland website?

A. Yes, it is.

Q. Is that an official website?

A. Yes, it is.

Q. And why did you draw attention to that picture in this case?

A. It was to show that CM actually travelled to Leeds. It was the day that I was elected as […] of MDC UK and Ireland. I also know that the people that are in the photograph are members of Reading.

Q. I want to ask you about one further point. You refer in your statement to the political temperature arising in paragraphs 17 and 20, with the anticipated elections. Do you have any recent example of that rising temperature?

A. There are many examples. On 29th September, some MDC representatives were going to the 13th anniversary of the MDC in Bulawayo.

Q. I am sorry, I do not mean to interrupt you, but you have actually mentioned that in your witness statement. Is there anything more recent that you would like to say?

A. The Minister of Finance Offices were barricaded by ZANU PF war veterans. The ZANU PF war veterans were demanding an increase in their pensions. They were also saying that he is responsible for not supporting the land issue. They specifically said that the Minister of Finance has not provided funding for them to have inputs.

Q. To have?

A. To have inputs for funding purposes. The story is actually widely reported in the Herald, today's Herald.

Q. What is the name of the Finance Minister?

A. He is Tendai Biti.

Q. He is MDC?

A. Yes, he is also the Secretary General of MDC.

Q. And that is just in the last 24 hours.

A. Yes.

Q. These elections are required now by Zimbabwe law to be called in June.

THE PRESIDENT: Where are we travelling, Mr Henderson? He is not your country guidance witness, is he?

MR HENDERSON: No, sir.

THE PRESIDENT: There might be a more ...

MR HENDERSON: I do not think that this is controversial.

THE PRESIDENT: You never know until it comes out, do you, and then I should have stopped you a long time before?

MR HENDERSON: The Home Office have put in press reports about your organisation, the MDC, opposing the elections being brought forward from when they were required to be held in June next year, so opposing earlier elections without reforms. Why have the MDC opposed the elections being brought forward, earlier elections?

A. The MDC's view is that there are not sufficient reforms, particularly in the security sector, but for practical purposes the MDC is actually ready for the elections. I mean, the latest slogan for MDC is the MDC (unintelligible) for real transformation and it is actually a campaign slogan towards the elections.

Q. It has been suggested that when the elections must be called in June the MDC might have pulled out if there was violence and not contest them. Is that right?

A. That is not what is happening on the ground, because there are different political strategies, but in terms of actually the MDC are getting ready for those elections. As the General Assembly, we have already started funding Members of Parliament in the constituencies. The branches themselves ... Reading is also twinned to Mashonda(?) East. They are actually mobilising resources for the funding of those elections in Zimbabwe.

MR HENDERSON: Those are all my questions.

Cross-examination by MR THOMANN

MR THOMANN: I have just one question for you. That relates to your paragraph 20 of your statement. What I am interested in is your opinion that there is a current likelihood that someone being returned would be stopped and asked what they were doing in the UK and whether they have any connection with the MDC. You say that that is your opinion. Do you have any evidence to support that?

A. Well, I do not have any evidence to support that but it is based on contact that I have and I (unintelligible) and I also know very well how government works (unintelligible)

MR THOMANN: Thank you. I have no further questions.

THE PRESIDENT: Thank you.

(**Witness withdrew**)

(**Discussion followed and the hearing was concluded**)