ASYLUM AND IMMIGRATION TRIBUNAL

LK (AA applied) Zimbabwe [2005] UKAIT 00159

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 8 November 2005

Before:

The Honourable Mr Justice Hodge OBE (President)
Mr C M G Ockelton (Deputy President)
Dr H H Storey (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Kuranchie of Refugee Legal Centre
For the Respondent: Mr G Saunders, Home Office Presenting Officer

Neither the decision of the Court of Appeal in GH v SSHD [2005] EWCA Civ 1182 nor the suspension of removals to Zimbabwe affects the force of AA [2005] UKAIT 00144, which remains current country guidance.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Zimbabwe. She came to the United Kingdom on 11 November 1999 and was granted six months leave to enter. Following the expiry of that leave on 11 May 2000, she did not leave the United Kingdom but overstayed. No action was taken against her. On 7 July 2004, she was still in the United Kingdom and decided to claim asylum. On 20 August 2004, she was notified of the Respondent's decision to refuse her asylum and to remove her as an overstayer. She appealed. Her appeal was heard by an Adjudicator,

Miss D M Lambert, and allowed in a determination sent out on 15 November 2004. The Respondent applied for and was granted permission to appeal to the Immigration Appeal Tribunal. Following the commencement of the appeals provisions of the 2004 Act, the grant of permission takes effect as an order for reconsideration by this Tribunal.

2. The basis of the Appellant's claim is that, as a homosexual, she fears persecution in Zimbabwe. Although she attempted to be discreet about her sexual orientation, she suffered persecution for it before she left Zimbabwe and fears that she would do so again. Further, the persecution took the form of a (heterosexual) rape as a result of which she now has an advanced HIV condition. This has become apparent only since her asylum claim was made: as a result, she has also claimed that her removal would breach her rights under Articles 3 and 8 of the European Convention on Human Rights, because she would not have sufficient access to medical treatment if she were returned to Zimbabwe.

3. Since coming to the United Kingdom, she has given birth to a baby, as a result of casual sex following the break up of her relationship with her partner.

4. The Adjudicator accepted the Appellant's story as credible. She accepted also the Appellant's explanation for her failure to apply for asylum either on arrival or soon afterwards. She found that despite the existence of well-organised pressure groups for homosexuals in Zimbabwe the Appellant herself would be at risk if she returned to Zimbabwe, and that there was no reason to suppose that future attempts to be discreet would be any more successful than past attempts had been. For this reason, she declined to follow the conclusions of the Tribunal in JD [2004] UKIAT 00259. She indicated that she would have been inclined to apply the decision of the High Court of Australia in S [2003] HCA 71: but, given her factual findings on the ineffectiveness of discretion, that view was not in the end material to the decision she made.

5. The Secretary of State's grounds of appeal assert that, given that the Appellant had no intention of broadcasting her sexuality, the Adjudicator ought to have followed JD rather than any other authorities referring to the situation where a person might, against their will, be required to hide their sexuality. He argues that the Adjudicator's failure to make a clear finding of fact as to who was responsible for the rape following the discovery of the Appellant's sexual orientation invalidates her decision and that the fact that she would now be returned with a baby further reduces any risk that there would be any adverse reaction to her as a homosexual. The existence of a group called Gays and Lesbians in Zimbabwe (GALZ) demonstrates, in the Secretary of State's view, that the Adjudicator overestimated the risk to the Appellant. The Secretary of State adds that the Adjudicator erred in counting the fact

that her cousin was murdered in Harare as further increasing the Appellant's fear of harm. Lastly, the Secretary of State argues that the Adjudicator was wrong to reach the conclusion that the appeal ought to be allowed under Article 8 simply on the basis that it was being allowed under the Refugee Convention and Article 3.

6. So far as the Secretary of State's specific grounds of appeal are concerned, we are satisfied that only the last-mentioned has any merit. In our view, it is entirely right to say that the Adjudicator should not have allowed the appeal separately under Article 8 without reaching any view on whether the rights protected by Article 8 would be breached by the Appellant's removal. There is nothing in any of the other grounds. It was the Adjudicator's job to decide whether the Appellant was to be believed, and to assess all the evidence before her before reaching a conclusion on the facts. She was amply entitled to decide that, in the light of the Appellant's evidence of her history, which she accepted, the Appellant would be at risk on return. That assessment was properly made on an individual basis. It is not suggested that it ran counter to any applicable country guidance. JD is not a country guidance decision. The Adjudicator appears to us to have taken proper account of its conclusions in reaching her own on the rather different facts of this appeal.

7. As the Adjudicator remarked, the Appellant's illness does not bring her within the band of exceptional severe cases whose removal from the United Kingdom would cause a breach of Article 3 or Article 8. But given her conclusions on the facts, we can see no error of law in her finding that the Appellant was at such risk of ill-treatment for her sexual orientation as to bring her within the definition of a refugee and also show that her removal would expose her to risk of ill-treatment proscribed by Article 3. She was thus entitled to allow the appeal on refugee and human rights grounds.

8. There is, of course, now a shorter route to the conclusion that the Appellant is entitled to refugee status in the United Kingdom. As the Secretary of State recognised, the decision of this Tribunal in AA [2005] UKAIT 00144, which is a country guidance case, might be regarded as leading to the conclusion that the Appellant should in any event be regarded as a refugee. The present reconsideration is by Rule 62(7) limited to the grounds of appeal upon which the Immigration Appeal Tribunal granted permission, but those grounds do as we read them permit us to look generally at the question whether the Adjudicator materially erred in law in allowing the Appellant's appeal on refugee grounds. In this appeal as, we understand, in others, the Secretary of State now argues that the country guidance of AA should not be followed. This appeal therefore provides an opportunity for the Tribunal as presently constituted to give an authoritative view on the arguments being adduced by the Secretary of State.

9. The appeal of AA was heard with a view to giving country guidance on returns to Zimbabwe. A great deal of evidence, both documentary and oral, was considered. The Tribunal found, on the basis of the evidence before it, that a citizen of Zimbabwe involuntarily returned there from the United Kingdom had a well-founded fear of persecution for a Convention reason. The basis for that fear is the way in which those returned involuntarily from the United Kingdom to Zimbabwe appear to be treated at Harare Airport. Following the decision of the Court of Appeal in Mbanza v SSHD [1996] Imm AR 136, upholding R v IAT ex parte Senga (unreported, 9 March 1994), that is sufficient to give the individual in question status as a refugee. For this reason, there was no full investigation in AA of the risk to those returned after they have passed through the airport (if they are allowed to do so); and, as the Tribunal noted in AA, the Secretary of State conceded in that case that any ill-treatment received on return would be "*for a Convention reason*".

10. The decision in AA was communicated orally in court on 14 October 2005. As the Tribunal remarked on that occasion, that oral communication was not the judgment. Under rule 23 of 2005 Procedure Rules, notification of the determination of the Tribunal in an asylum case is to be done in writing to the Secretary of State, following which it is his task to serve it on the Appellant. We understand that that rule was specifically sought by the Secretary of State: certainly he is fully aware of it.

11. The matter is of some importance in the light of one of the arguments adduced before us. The Secretary of State points out that on 14 October, the day on which the Tribunal gave oral notification of its decision, he announced that returns to Zimbabwe had been suspended. He now submits that the suspension of returns to Zimbabwe is an event which took place after the judgment in AA and thus casts doubt upon its continued force. That, in our judgment, is simply wrong. The position on 14 October was that the Tribunal had given a view but had not yet given its determination. If the Secretary of State thought on 14 October that his suspension of returns to Zimbabwe undermined the country guidance about to be given in the judgment in AA, it was obviously open to him to ask the Tribunal to hear further argument before it gave its determination under the Rules. As a result, looking at the matter not only technically, it cannot be said that the suspension of returns was an event which took place after the determination. It did not: it took place four days before the determination was sent to the Secretary of State on 18 October.

12. In any event, reliance on the Secretary of State's suspension of returns on 14 October hardly tells the whole story. As we understand the position, returns to Zimbabwe were suspended in the summer of this year as part of the arrangements made for the adjournment of a number of Judicial Review cases before Collins J and the selecting of AA

as a test case to be heard by this Tribunal. The fact that returns had for the moment been suspended was part of the context in which the Tribunal heard the case of AA. None of the Secretary of State's arguments before the Tribunal in AA suggested that the suspension of returns made any difference to the status of the appellant in that case as he stood before the Tribunal.

13. There is, however, a much more general difficulty in the Secretary of State's argument that a person who would otherwise be entitled to the status of a refugee is not entitled to that status if removal is not threatened. If that were a good argument, there would never be any refugees because the Convention requires (broadly speaking) that refugees are not removed, and the United Kingdom Government's policy is certainly not to remove them (except where "safe third country" arrangements of various sorts apply). A refugee's status as a refugee does not depend on the risk that he will be removed: it is a status that he has while he is in the country in which he has sought refuge. It is easy to lose sight of the fact, but almost the whole of the Refugee Convention is concerned precisely with the incidents of that status whilst he remains in the country which ex hypothesei is not the country of his nationality. Reinforcement of that view, if required, can be found throughout the decision of the Court of Appeal in Saad, Diriye and Osorio v SSHD [2002] INLR 34, to which we shall return in some detail shortly.

14. It is this feature of status that a refugee has that in principle distinguishes refugee claims from claims arising under the European Convention on Human Rights. A claimant under the latter Convention typically (perhaps always in this Tribunal's jurisdiction) claims that the Secretary of State's removal of him will be a breach of the European Convention on Human Rights. He has no particular status while he remains here, save that he has a right not to be removed. But the person who claims that his removal would breach the Refugee Convention is saying something more. He says not merely that he cannot be removed, but also that while he remains he is entitled to all the benefits of the Convention which is, appropriately, entitled the "*United Nations Convention relating to the Status of Refugees*".

15. The final substantive argument raised by the Secretary of State is based on the recent decision of the Court of Appeal in GH v SSHD [2005] EWCA Civ 1182. It is submitted that the effect of that decision is that a claim under the Human Rights Convention or the Refugee Convention cannot now succeed in the absence of a clear indication of the intention to remove and the process of removal. This is, broadly speaking, because the 2002 Act gives only a right of appeal against the decision to remove an illegal entrant or an overstayer, whereas its predecessors gave a right of appeal against the removal directions. There are, however, a number of reasons for concluding that the

decision of the Court of Appeal in GH cannot be intended to have this general effect.

16. The first reason is that, as the Tribunal noted in KF (Iran) [2005] UKIAT 00109, Article 5 of the Immigration (Notices) Regulations 2003 (SI 2003/658), which reflects the wording of its predecessors, requires notices of decisions to refuse leave to enter, to remove or to deport an individual to state the country or territory to which it is proposed to remove him. Without such an indication, the notice is not a valid notice of an appealable decision. Thus the denomination of the country provides the essential context for the appeal. Secondly, the Court of Appeal has itself indicated (we need refer only to AE and FE v SSHD [2003] EWCA Civ 1022, [2003] Imm AR 609 at [67]) that it is necessary to distinguish between the claim under the Refugee Convention and the claim under the European Convention on Human Rights: but in GH the Court of Appeal found itself able to deal with both issues in identical terms.

17. Thirdly, it seems to us that GH cannot have been intended to undermine Saad, Diriye and Osorio, which it does not cite. It is at this point necessary to look at the latter case a little more closely. Of the three claimants before the Court of Appeal there, Osorio had been refused leave to enter but Saad and Diriye had, following consideration of their claims, been granted exceptional leave to remain in the United Kingdom for four years. Their appeal to the Appellate Authorities lay only under s8(2) of the 1993 Act "*on the ground that it would be contrary to the United Kingdom's obligations under the Convention for [them] to be required to leave the United Kingdom after the time limited by the leave*". The Immigration Appeal Tribunal had dismissed their appeals because there was no evidence available to show that, in four years time, when their leave expired, their removal would breach the Convention. The Court of Appeal held that, despite the wording of the statute, that approach was wrong in principle. The United Kingdom, as a party to the Refugee Convention, is bound to afford Convention rights to anyone who is a refugee. It is to be inferred that the United Kingdom does not intend to breach its international obligations. The right of appeal given to unsuccessful claimants, and the duty of Adjudicators to allow an appeal if the decision was not in accordance with the law, should be taken together to give those who claimed to be refugees a right of appeal on the ground that their status had not been recognised as it should have been. As the Court noted in paragraph [72] (vii):

> "Refugee status will necessarily be in issue when an appeal is brought under section 8 in circumstances where there is apprehension of refoulement. It would be both illogical and impractical to require challenges of decisions as to refugee status to be brought by judicial review where refoulement is not intended."

18. It follows that the essence of a refugee appeal by a person who is in the United Kingdom is his assertion of his entitlement to refugee status while he remains here.

19. As the Court noted at [73], s69 of the 1999 Act introduced a right of appeal specifically for the benefit of those who had been refused refugee status but granted leave to remain. There is a similar provision in s83 of the 2002 Act, under which both GH and this appeal were decided. But that right is limited to a person who has been granted leave to remain for a period exceeding twelve months. The general ground of appeal for present purposes is that in s84(1)(g) of the 2002 Act, which is in the following terms:

> "That the removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

20. There is no doubt that that wording might encourage a court to look at the two Conventions together. But the issues are in reality quite different. The removal of a person cannot breach the Refugee Convention unless he is a refugee: that is to say, unless, independently of any proposal to remove him, he has the status of a refugee. The Refugee Convention simply has nothing to say about those who do not have that status. The claim under the Human Rights Convention, however, is a claim which depends primarily on the threat of removal. It is a claim that, although the individual in question has no status or entitlement to status in the United Kingdom, he cannot lawfully be subjected to the removal that the Secretary of State proposes. It is a claim that if the claimant is removed he will be a victim of a breach of the Human Rights Convention. It would no doubt be possible to make observations about whether it is entirely appropriate for the statute to use the same form of words for both types of claim: but it does not matter, because of Saad, Diriye and Osorio. Despite the reformulations in more recent legislation, the ground of appeal in s84(1)(g) and the task of the Tribunal in s86(3) are the same as those that were examined by the Court of Appeal in Saad, Diriye and Osorio. If anything, the importance of a determination of status in refugee cases is underlined by s86(2)(a), which requires the Tribunal to "determine any matter raised as a ground of appeal". Saad, Diriye and Osorio still applies to the determination of refugee grounds of appeal under s84(1)(g): the Tribunal needs to determine whether the appellant has the status of a refugee, and cannot look simply at the risks that would arise from his removal.

21. Those are the reasons why we think it is simply impossible that the decision of the Court of Appeal in GH was intended to have the effect on refugee claims that selective citation of some of the sentences contained in the judgments might suggest. The truth of the matter is

that in GH the Court was dealing with a very specific question, to which it gave a very specific answer.

22. In GH, the appellant was *not* entitled to refugee status. He had failed to establish a well-founded fear of persecution in his own home area of Northern Iraq. He claimed only that he would be exposed to persecution if he were returned to Iraq by being removed to Baghdad. The position is that there may well be ways of removing him that would not expose him to risk. In those circumstances, he is not entitled to assume that the Secretary of State would breach his human rights by removing him in a way that would endanger him. Nothing in the Court's judgments suggests that they were invited to reconsider whether, independently of removal, GH had the right to refugee status.

23. It is no doubt the particular circumstances of GH that caused the Court not only to find no need to cite Saad, Diriye and Osorio, but also to refer at some length to the judgment of Keene LJ in Gardi v SSHD [2002] EWCA Civ 750, [2002] 1 WLR 2755, a case also concerned with a Kurd from Northern Iraq, although that decision itself is of no authority, having been revoked by the Court as having been made without jurisdiction: Gardi v SSHD (No 2) (note) [2002] EWCA Civ 1560, [2002] 1 WLR 3282. It is also the particular circumstances of the case that enabled Scott Baker LJ to describe as "*wholly academic*" the question whether removal directions would, if set, breach the Refugee Convention. It is also no doubt that which allowed Keene LJ to describe the absence of removal directions as "*of fundamental importance in this case*".

24. Enough has been said, we trust, to establish that GH has no specific bearing on the question whether a particular individual is, as he stands before the Tribunal in the United Kingdom, entitled to status as a refugee. AA, on the other hand, is a case about refugee status. It decides that, because of the circumstances in Zimbabwe at the present time, a Zimbabwean citizen who would not return there willingly has a well-founded fear of persecution for a Convention reason and is accordingly entitled to the status of refugee while he remains here. Although the reasoning depends, through the decisions of the Court of Appeal in Danian v SSHD [1998] Imm AR 462 and Mbanza on the projected removal, it is a decision about status, not about removeability. It follows that the reasoning of the Court of Appeal in GH has no perceptible application to the circumstances of those returned involuntarily to Zimbabwe.

25. As the Tribunal recognised in AA, the present state of the law cannot be regarded as satisfactory. Both the principles of procedure and the interpretation of international Conventions have developed in a way which is unusually piecemeal because it has been based on a constantly changing background of the statutory jurisdiction of the Immigration Appellate Authorities and the occasional interaction of

Judicial Review as well as appeals to the higher courts. It might well be that a number of the earlier decisions on refugee status such as Danian and Mbanza would today be formulated rather differently. A comprehensive review of the meaning of the Refugee Convention and the Human Rights Convention as they apply to status and removal, and of the process by which decisions of the Secretary of State can be challenged in the High Court or in this Tribunal, is no doubt extremely desirable. For the present, however, the position is that the decisions of the Court of Appeal to which we have referred bind the Tribunal, following which it has issued country guidance in the form of AA, which it will follow in Zimbabwean cases.

26. That is a further reason for concluding that any error of law by the Adjudicator was not material in the present case. The Appellant is a refugee.

27. For the foregoing reasons, we order that the Adjudicator's determination shall stand.

C M G OCKELTON
DEPUTY PRESIDENT

Date: 16 Nov 2005