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Appeal No. HX44559-01
BS (Liberty Party-CIO-Airport) Zimbabwe CG [2002] UKIAT 06461

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 6 December 2002

Date Determination notified:

11th February 2003

Before:

Mr G Warr (Chairman)
Mr R Baines, JP
Mr A. Smith

Secretary of State for the Home Department

APPELLANT

and

BHEKISIPHO SIBANDA

RESPONDENT

DETERMINATION AND REASONS

1. The Secretary of State appeals the determination of an Adjudicator (Mr P.D. Birkby) who allowed on human rights grounds the appeal of Mr Sibanda, a citizen of Zimbabwe, hereinafter referred to as the appellant, against the decision of the Secretary of State on 12 December 2000 to refuse his asylum application. The Adjudicator dismissed the asylum aspect of the appeal.
2. Mr M. Davidson appeared for the Secretary of State while Mr M. Schwenk, of counsel, instructed by Tahir solicitors appeared for the appellant.
3. The appellant arrived in this country in October 2000 and applied for asylum. he claimed to have had problems with the Central Intelligence Organisation (CIO) after the parliamentary vote in August 2000. He had demonstrated against the unlawful occupation of the farms by the war veterans and had suffered as a result. He was a member of the Liberty Party and he came from the Ndebele tribe.
4. The appellant gave evidence before the Adjudicator who found that the appellant was an intelligent young man (he was born on 14 February 1980) and that he was able to answer questions about politics in Zimbabwe. He

accepted that he might have been a follower of politics. However, the Adjudicator did not accept that the appellant was an active member of the Liberty Party and he did not accept that he had been mistreated by the CIO after the demonstration. In short, the appellant had not satisfied the Adjudicator that there was a reasonable degree of likelihood that the appellant had left Zimbabwe because of his political activities or because of any mistreatment. The Adjudicator was further not satisfied that the appellant had been persecuted because of his ethnic origin. The Adjudicator did not accept that as a failed returning asylum seeker the appellant would be at real risk because of any imputed political belief.

5. The Adjudicator relied on a UNHCR statement on 14 January 2002 to the following affect:

‘The United Nations High Commission for Refugees is gravely concerned about the serious human rights violations in Zimbabwe. Those who have sought asylum in the UK should be offered a safe haven and all deportations stopped. Their return to Zimbabwe under current circumstances could seriously jeopardise their physical safety, their liberty and their life.’

6. The Adjudicator also had before him the views of the Zimbabwe Association concerning removal procedures:

‘The passport of the deportee is put in an envelope addressed to the Chief Immigration Officer (Harare), together with a passenger list. These documents are taken to immigration before the passengers disembark. The Central Intelligence Organisation at Harare see the passenger list in the Chief Immigration Officer’s office before the passengers come into immigration. For deportees the passport will be with the Chief Immigration Officer, meaning that the CIO will have knowledge of the deportee. This results in the deportees being in a very vulnerable position. The Central Intelligence Organisation have an office at the airport, they watch arrivals and departures, they have free access to every office at the airport. The Chief Immigration Officer is also directed by the Central Intelligence Organisation.’

7. The Adjudicator's determination concludes with the following paragraphs:

‘26. With regard to the appellant's asylum appeal, the appellant has not satisfied me that there is a reasonable degree of likelihood that he has a genuine or objectively well-founded fear of persecution for reasons of his political opinions or his ethnic origins were he to return to Zimbabwe. I do not believe there is a serious possibility that he has been persecute for such reasons in the past. I do not believe there is a reasonable degree

of likelihood therefore that he would be persecuted for such reasons in the future. He has not satisfied me that he was ever involved in politics in a way that would have brought him to the notice of the authorities and cause them to take adverse action against him. Furthermore, I do not believe that were he to return to Zimbabwe as a failed asylum seeker in the UK it would be imputed to him that he had a political view opposed to the government in Zimbabwe, and therefore a likely target of persecution. I accept that there is a reasonable degree of likelihood that the evidence produced by the Zimbabwe Association as to the treatment of returnees at Harare Airport is accurate. However I do not accept that the appellant has satisfied me that such returnees would be at real risk because of any imputed political belief. The CIOs may apprehend the appellant at the airport in Harare simply because the appellant was a failed asylum seeker. I therefore dismiss this appellant's asylum appeal.

27. In respect of the appellant's human rights appeal, Mr Walsh has said that Articles 3, 5, 6 and 14 would be breached were this appellant to return to Zimbabwe. I have considered carefully the most recent pronouncements of the United Nations High Commissioner for refugees and I have cited the general risks to failed asylum seekers from Zimbabwe when they are forcibly returned. The UNHCR has recommended that the United Kingdom government suspend its policy of returning people to Zimbabwe. The United Kingdom has stated through the Home Secretary in a press release on 14 January 2002 that all returns are to be suspended until after the March 2002 presidential elections in Zimbabwe after which the situation will be reviewed. I have considered the general situation in Zimbabwe from all the background evidence before me and I have cited some of the dangers that are faced by people return to Zimbabwe. I have cited the evidence of the Zimbabwe Association. Without further evidence, there is clearly a reasonable degree of likelihood that what is being asserted in their press release as to the activities of the CIO at Harare airport is accurate. I have no reason to believe that a return of an asylum seeker forcibly to any other part of Zimbabwe by a different route would be safer. Mr Halliday at one point suggested that a way round the problem would be for the appellant to return to Zimbabwe voluntarily. That may well be, but the decision which is being appealed before me is a decision to return this appellant to Zimbabwe as a consequence of a failed application for asylum. I have to consider whether there are

substantial grounds for believing the appellant would be at real risk of his rights under the ECHR being breached as a consequence of the decision of the Secretary of State. As at the moment the Secretary of State has temporarily suspended returns. The inference I have to draw from this is that there is a real risk of some kind which has been accepted by the Secretary of State. There is no date set as to when returns can commence save that the matter will be reconsidered after the presidential elections. There is nothing in the evidence which leads me to conclude that in the foreseeable future matters will be any different from what they are now. Of course, the political situation may change after the presidential elections, but I am in no position to forecast what that change might be. Clearly the CIOs in Zimbabwe operate at times in an irrational way and are a law unto themselves. It is well documented that they have committed a number of human rights abuses. This appellant, were he to return to Zimbabwe Airport as a returned asylum seeker either now or in the foreseeable future, may well be interrogated by the CIO agents in respect of the failed asylum claim in the United Kingdom. Those agents could well detain him. They could maltreat him, they could treat him inhumanely or even torture him. Those risks are real and well documented. The recent pronouncements of the UNHCR Amnesty International and the inference I draw from the temporary suspension of returns to Zimbabwe via the Home Secretary lead me to the conclusion that this appellant must be at real risk of treatment which could well be contrary to his rights under Article 3 of the ECHR. I also think that he could be unlawfully detained in breach of his rights under Article 5. In all the circumstances therefore I allow the appellant's human rights appeal.

28. Consequently, I direct that this appellant should not be removed from the United Kingdom to Zimbabwe. I further direct that he should be given leave to remain in the United Kingdom until such time as there is no real risk to those returning to Zimbabwe having failed in their applications for asylum in the United Kingdom.'
8. Mr Davison submitted that the Adjudicator had found that there was no previous persecution and the appellant would simply be returned as an ordinary member of the public. There was not real risk for him. The UNHCR letter was a general warning and referred to opposition supporters. The appellant was not one of those. The Zimbabwe Association simply referred to routine entry procedures. The receiving country were always notified of the return of a deportee. There was nothing significant about it. The Home Office suspension of removals did not indicate that all persons were at risk.

For example, a citizen to Zimbabwe who supported the government would not be returned although there would be no question of him being at risk. Reference was made to the Tribunal decision of Mpemba. Any question under Article 5 fell to be determined in the light of the outcome of the Article 3 point.

9. Mr Schwenk submitted that the Adjudicator had rejected all features of the asylum claim although he had not dealt with a Liberty membership card that the appellant said he had had handed over upon arrival. Mr Schwenk conceded that the Adjudicator findings were illogical since he should have allowed the asylum appeal as well as the human rights appeal.
10. The appellant was more than an ordinary member of the public. He was a young man and of the Ndebele tribe. He was also intelligent and a follower of politics. The UNHCR letter was a general application. The CIO in Zimbabwe frequently harassed individuals and the Zimbabwe letter gave cause for concern. The Adjudicator's conclusions were not speculative. The Tribunal in Mpemba had not got the same information as was before this Adjudicator. Mr Schwenk accepted that the Article 5 claim fell to be determined in the light of the success or failure of the Article 3 claim.
11. At the conclusion of the submissions we reserved our determination. The Home Office has apparently suspended returns to Zimbabwe for the time being but that does not mean, in our judgment, that the Home Office accepts that everyone would be at risk if returned. Mr Schwenk relies principally on the same piece of documentary material as impressed the Adjudicator. The Adjudicator noted that the plea of the UNHCR had been endorsed by Amnesty International which had complained that Immigration Officers had ignored the recent intensification of attacks 'on opposition supporters'. To a certain extent the Home Office has heeded the UNHCR call by suspending removals but for the same reasons as we gave earlier, that does not mean that the Home Office accepts that all returnees are at risk.
12. We accept Mr Davidson's submissions that the Adjudicator was wrong to find the statement of the Zimbabwe Association to be of significance. The statement merely confirmed a standard procedures for the return of deportees.
13. Counsel submits that the appellant would be at risk not simply because he was an ordinary citizen. He was a young, intelligent man, who followed politics, and he would also be in trouble because of his ethnic origin.
14. The Adjudicator found that the appellant had not suffered because of his ethnic origin and he sets out his reasons in paragraph 25 of his determination. He concluded in paragraph 26 of the determination that no opinion would be imputed to him on his return to Zimbabwe and that, notwithstanding the views of the Zimbabwe Association, the appellant would not be at real risk because of any imputed political belief.
15. Counsel criticises the Adjudicator for not dealing expressly with the points about the appellant's Liberty membership card. The appellant claims to have handed this over on arrival to an Immigration Officer. The Adjudicator states

that he did not believe that the appellant was an active member of the Liberty Party although he was accepted to have followed politics. We do not feel that the determination is arguably vitiated because of any failure expressly to deal with the question of the membership card. It was not necessary on the Adjudicator's findings to deal with the issue. Whether the appellant had a card or not, he was not an active member. The appellant did not leave Zimbabwe because of political activities or because of the claimed mistreatment.

16. Counsel invites us not to place reliance on Mpemba because the Tribunal in that case had different material before it. It is important to consider each case on its merits and we consider this case on its merits and on the material which counsel has placed before us.
17. Counsel did not draw our attention to any material in the bundle before us. He relied, as we have observed, on the same material as was before the Adjudicator.
18. We do not consider that the appellant would be returned other than as an ordinary citizen. The factors alluded to by counsel would not, in our opinion, mark him out in any way. The Adjudicator was wrong to come to the conclusion on the material before him that the appellant's Article 3 rights would be breached by his return to Zimbabwe. Counsel complains that the determination was illogical. It was illogical, but not in the way counsel maintains. The Adjudicator was right to dismiss the asylum appeal and wrong to allow the human rights appeal. There was no proper evidence before him to justify that course. There is similarly no evidence before us to justify that course.
19. For the reasons we have given, the appeal of the Secretary of State is allowed and the decision of the Adjudicator on the human rights appeal is reversed.

**G. WARR
VICE PRESIDENT**