

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 27 September 2002
Dictated : 27 September 2002

Determination Promulgated
BN (MDC) Zimbabwe CG [2002]
UKIAT 05518.

Before:

Mr A R Mackey - Chairman
Mr M L James
Prof. B L Gomes Da Costa JP

between

The Secretary of State for the Home Department

Appellant

and

Busisiwe NKANGALA

Respondent (Claimant)

DETERMINATION AND REASONS

Representation

For the appellant: Mr G Saunders, Home Office Presenting Officer
For the respondent (Claimant): Mr Mark Symes, representing Refugee Law Centre
(London)

1. The Secretary of State appeals, with leave, against the determination of an Adjudicator, Mr M J Malone, wherein he allowed an appeal by the claimant against the decision of the Secretary of State under human rights grounds.

The Adjudicator's determination

2. The Adjudicator found that the claimant was a 22-year old young woman from Zimbabwe who had been born and lived in Gweru, which the Adjudicator wrongly stated was on the edge of the Midlands Province (it is indeed the administrative headquarters of the province and seat of the Governor). The claimant arrived in the United Kingdom in January 2002 and sought leave to enter as a visitor to see his

stepsister who had just had a baby. During the interview at the airport she sought asylum. The Secretary of State gave notice of refusal on 9 February 2002 certifying the claim under both Conventions. Both parties were represented before the appellant and considerable objective country information was submitted.

3. The appellant claimed that she had worked for a refuse disposal company from some time in 2000 and that it had been involved in smuggling materials from Botswana to Zimbabwe. She claimed she had made three such trips assisting the smuggling operation. She did not know what were in the boxes that were being smuggled but considered it was material being smuggling in for the MDC. She claimed that after fourteen days of arrival in the United Kingdom she had rang her stepfather in Zimbabwe who had told her that some of the people with whom she had been smuggling had been arrested. She states it was that news that caused her to claim asylum. The claimant also stated she was a supporter of the MDC but not a member and had put up posters, in a village where she stayed with her uncle, in support of the MDC in 2000. She feared that on return to Zimbabwe she would be exposed as a failed asylum seeker and treated as a traitor by the ZANU-PF. She also feared harassment from her previous MDC support.
4. The Adjudicator found many aspects of her claim to be unsatisfactory and inconsistent. After considering her evidence the Adjudicator stated that he was unable to accept her account that she had been smuggling on behalf of the MDC and that she had been a supporter of the MDC. He therefore refused her asylum claim. He then went on to consider the ECHR claim noting that he had been unable to accept the account that she had been smuggling for the MDC and been an MDC supporter. He did not consider that there was a reasonable degree of likelihood the appellant would be in danger on return and thus Article 2 of the ECHR would not be infringed. However, in respect of Article 3 he allowed the appeal, finding that there was a real risk to the appellant as a failed asylum seeker and traitor to Zimbabwe. The Adjudicator noted a number of documents in the appellant's bundle including articles in the "Observer" and "Guardian" (24 March 2002, 28 March 2002). These articles indicate a widespread use of torture in Zimbabwe by State agents and that this torture is not only directed against MDC supporters but also people who are regarded as opponents of the State or just people who, in the opinion of the torturers, should be taught a lesson. He noted that it was not directed at specific individuals but against the population of the Midlands Province, which historically had proved troublesome with the ruling ZANU-PF. He also noted the type of torture and degrading treatment forced on both men and women in the Midlands Province.

The Secretary of State's submissions

5. Mr Saunders adopted the grounds of appeal submitted with the leave application. These contend that as the Adjudicator had found the claimant to be incredible that the Article 3 claim should have fallen away in the same manner as the asylum claim. The Adjudicator had failed to link the respondent's circumstances with that of the background information and could not ignore the lack of credibility of the appellant in assessing her risk on return. The question that should have been asked by the Adjudicator was "bearing in mind this claimant's circumstances, would she face a real risk of ill-treatment if she were returned to Zimbabwe?"

6. Mr Saunders also addressed the issue of the appellant returning as a failed asylum seeker and noted that the appellant had entered the United Kingdom on a valid passport seeking leave as a family visitor. She was thus in a situation where there was no need to expose the fact that she was a failed asylum seeker and could simply return on her own passport. Unfortunately neither he nor Mr Symes was able to provide us with a copy of the claimant's passport, although Mr Saunders presumed it was on their files. We were thus given no evidence of the expiry date of the passport.
7. Mr Saunders took us to the expert report which had been submitted to us in the claimant's bundle. This report from Dr Terence Ranger, dated 31 August 2002, was not before the Adjudicator. He submitted that as this appellant was returning on her own passport the risks set out in page 3 of that report for a failed asylum seeker would not apply. In addition he submitted that the comments by Dr Ranger that there was great pressure on young people to join the militias and those returning to their home areas were often placed under pressure would not appear to be a risk to this appellant given that she had moved in and out of Zimbabwe in the past and there was no indication of her encountering problems on return to her home district.
8. Thus, on her return, he submitted there was no indication that she was "pro-United Kingdom" and she would be considered as a person who had visited her stepsister in the United Kingdom and nothing more and thus there was no risk to her.
9. Finally he submitted that the analysis of the Adjudicator at pages 9 and 10 of the determination did not set out a linkage between the maltreatment referred to in the various articles that were before the Adjudicator and this appellant. He urged us to retain the findings of the Adjudicator but to allow the appeal on the basis that there would not be breach of Article 3 of the ECHR.

The claimant's submissions

10. As stated, Mr Symes put before us a considerable amount of new material. He submitted that from an analysis of that material there was a real chance or risk of a breach of Article 3 for this appellant as a young woman returning to the Midlands Province from the United Kingdom. In addition to the newspaper articles referred to by the Adjudicator he also referred us to an Amnesty International Report of June 2002 "Zimbabwe: the Toll of Impunity". At page 10 of that report there is reference to a case study and it states:

"Case study: the case of "A" in Matanga village

In the run-up to the 2000 parliamentary elections, the Mberengwa area of Midlands Province became a "no-go" zone controlled by ZANU-PF and State-sponsored "militia". Roadblocks were set up and access to the area was restricted. Those without ruling party membership cards were beaten up. During the weeks before the parliamentary election, more than 150 cases of torture and assault - including incidents of rape and genital mutilation - were reported to the police in Matanga town, according to the MDC, but there were no arrests. It appeared to visiting journalists that police officers had close ties with the "militias", one foreign journalist was

threatened by a "militia" member who was then seen conferring with the commanding officer of Matanga police station ..."

11. He then took us to the expert report of Professor Ranger. He submitted that he was an eminent authority on Zimbabwe given his clearly illustrious qualifications and background which are set out in the report. Several paragraphs of that report were submitted as relevant:

"2. ...

Between the June 2000 elections and the presidential elections of March 2002 there has been a violent counter-attack on MDC supporters and suspected supporters in Nkayi. Headmen and others have been murdered and the district has been terrorised by the ZANU/PF youth militia. Her uncle has probably been at risk and I am in doubt that if she were to return to the district she would herself be at risk.

3. Gweru is not "near" the Midlands Province as is surmised in [the Adjudicator's determination]. It is the administrative headquarters of the province and the seat of its governor, Cephas Msipa.

...

It voted for Nkomo's ZAPU in 1980 and great efforts and much force was employed to win the area for ZANU/PF in subsequent elections. It is not clear where Nkangala lives in Gweru. Should it be the high density township of Mkoba, of which we heard a lot during the conference [a conference Professor Ranger had recently attended] there is no doubt that it is politically a very turbulent area.

4. The current political situation in Zimbabwe more generally has become increasingly polarised. People do not need to be office-holders in the MDC, nor even members of the party, in order to fall under suspicion or to be the victims of persecution and attack. When I was in Zimbabwe this August, many people complained to me that there was no room "in the middle"; no possibility of neutrality. To adopt a neutral position is to be characterised as a supporter of the opposition. The politburo member, Didymus Mutasa, said two weeks ago that it would be better if all MDC voters and "neutrals" vanished from Zimbabwe leaving only those were "loyal to the revolution". In such a situation it is impossible to predict exactly who will be at risk. In Zimbabwe in August I met a very wide range of people who had been assaulted or threatened and forced from their jobs. In this context Busisiwe Nkangala might well be the object of attack.

...

5. Failed asylum seekers returning to Zimbabwe and identified as such are inevitably regarded as disloyal. They are people who have tried to

throw in their lot with the old colonial "enemy", Britain. There is an accumulating "case-law", regularly reported at the Zimbabwe asylum circle, of returned asylum seekers being taken aside and identified at Harare airport; of some arrests; and of some subsequent attacks on family houses. I could not go so far as to say that every returned asylum seeker would by definition be at risk, but the risk grows as the situation becomes more and more polarised.

6. ... the risk to Ms Busisiwe Nkangala and to others in a similar position is of extra-legal punishment and assault. On return to the country and at the airport, the agents of the Central Intelligence Organisation represent the main threat. In the country as a whole the main threat comes from members of the youth militias under the command of some of the ex-combatants. It should be noted that this makes young asylum seekers particularly vulnerable. There is great pressure on young people to join the militias and those who refuse to do so are stigmatised. (Many university students, returning to their home areas for the vacation, found themselves in this position ...)."

Mr Symes submitted that in addition to the strong body of objective country of origin information, including that contained in the CIPU Report of April 2002, that the Home Office itself acknowledged the deteriorating situation in an exchange of correspondence between the Refugee Law Centre and the Home Office. He referred us to letters in this regard in his bundle and in particular a letter from the Home Office dated 10 June 2002 which states:

"There was no evidence of unsuccessful asylum seekers being routinely or systematically detained or ill-treated on return to Zimbabwe. However, the political and security situation in Zimbabwe was deteriorating rapidly in the run-up to the March presidential election, so the Home Secretary decided to temporarily suspend removals so that we may take stock of the situation, in particular the risk to returnees, once the election has taken place."

He also referred us to a UNHCR letter of 12 June 2002, relating to returns to Zimbabwe, which included a statement that:

"Real or perceived members and supporters of the MDC or any other opposition party or movement continue to be the target of human rights violations, including ill-treatment, torture, arbitrary arrest and detention. Likewise, persons who, because of their background, might be considered to be critical of the current regime are also reported to suffer similar treatment. There have been credible reports of further population displacement, especially in Matabeleland, the stronghold of the opposition MDC, due to continuing political violence.

In the light of these observations, UNHCR reiterates its opinion that it is premature to reconsider the policy of removal of unsuccessful asylum seekers to Zimbabwe, and that under the present circumstances the suspension of removal should be maintained."

12. Mr Symes referred us to a map of Zimbabwe and illustrated the position of Gweru and the proximity to Matabeleland.
13. He submitted that if this appellant returns with her own passport, having been in the United Kingdom since January 2002, there was a real risk to her not only at the airport but after that if at any time she was held in a roadblock and identity was called for. There would be a real risk that her time in the United Kingdom would come to light and there would then be an attribution of sympathy by her to the United Kingdom. He also referred us to reports from the International Bar Association and an article in the "Telegraph", contained in this bundle, showing evidence of risks to those perceived as having political sympathies with the United Kingdom.
14. In his reply Mr Saunders confirmed that the suspension of returns to Zimbabwe was still continuing at the present time. He added the additional submission that this appellant could have available to her an internal flight alternative within Zimbabwe and that she had no particular reason to return to any specific part of the country. Thus she could relocate outside the Midlands Province area and not be at risk.

The issue

15. We found the only issue before us to be whether the determination of the Adjudicator was a safe one on the basis of the submissions presented by the Secretary of State and taking into account the additional objective information submitted to us by Mr Symes?

Assessment

16. At the outset we note the additional information provided in the bundle and in particular the expert report of Dr Ranger can be accepted by us as it is made in support of an Article 3 ECHR claim where we are bound to consider information up to the date of decision. From an analysis of all of that material and an acceptance of this appellant's situation, as a failed asylum seeker returning to Midlands Province in Zimbabwe, that there are substantial reasons for concluding that she would be at a real risk of maltreatment in breach of Article 3.
17. On the basis of the evidence that was before the Adjudicator we were left in some doubt as to whether this appellant, would be at a real risk of maltreatment given the possibility of her using her own passport to return to Zimbabwe. However, particularly on the basis of the expert report of Professor Ranger and the lack of evidence as to whether the appellant's passport is still a valid one, we are satisfied that the benefit of any doubt must be given in favour of the claimant. This conclusion is very much reached on the basis of the personal situation of this appellant as a quite young woman who would be returning from the United Kingdom having spent almost a year in this country and that she comes from what appears to be a "high risk" province of Zimbabwe. We do not consider that an IFA is available to her as at the age of 22 she does not appear to have any apparent support systems available to her in other parts of Zimbabwe, with the possible exception of her uncle and he appears to live in an at-risk area. We consider it would be unduly harsh or unreasonable to expect her to relocate given all the circumstances including her relative youth and lack of family or male support.

18. We reject the submission of the Secretary of State that because this appellant was found to lack credibility the Article 3 claim must fall away with the refugee claim. The lack of credibility was found in respect of the smuggling operations and the appellant's possible association with the MDC. This does not take away the situation of her being a young woman from the Midlands Province who would be returning as a failed asylum seeker having spent almost a year in this country.

Decision

19. We are satisfied that there is a real risk of a breach of Article 3 of the ECHR if this appellant were returned to Zimbabwe. Accordingly, the appeal is dismissed.

**A R MACKEY
Vice President**