



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

Appeal Number: AA/02563/2011

THE IMMIGRATION ACTS

Heard at Birmingham

On 4th June 2013

Determination

Promulgated

On 17th July 2013

Before

UPPER TRIBUNAL JUDGE KING TD

Between

DAVID MUTIMUKULU

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Samra, solicitor of Harbans Singh & Co

For the Respondent: Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Zimbabwe born on 18th March 1967. He entered the United Kingdom on 24th January 2001 using his own passport and was granted six months' leave to remain. On 22nd January 2002 he applied for leave to remain as a student but thereafter made an application to remain under Article 8 of the ECHR. He was granted discretionary leave until 21st July 2007. Thereafter a further application for

leave to remain was refused on 12th February 2009. The appellant claimed asylum on 11th January 2011.

2. That was refused by the respondent under cover of the letter of 18th February 2011.
3. The appellant sought to appeal against that decision which appeal came before Immigration Judge Forrester on 21st June 2011.
4. The appeal was dismissed in all respects.
5. Grounds of appeal were submitted to the effect that there had been an inadequate consideration of the risk of return so far as the appellant is concerned, and also a defective application of Article 8 of the ECHR.
6. Permission to appeal was granted in respect of that matter on 25th July 2011.
7. The appeal came before Deputy Upper Tribunal Judge McCarthy on 21st February 2012.
8. The Judge concluded that there was no error in the approach taken by Judge Forrester to the issue of risk on return, having applied the guidance as set out in **EM and Others (returnees) Zimbabwe CG [2011] UKUT 98 (IAC)**.
9. However, the Judge identified an error in respect of Article 8 of the ECHR and proceeded thereafter to rehear that aspect.
10. The outcome of the appeal was, however, that the appeals of the appellant were dismissed in all respects.
11. Grounds of appeal were submitted against the decision of Judge McCarthy, essentially focused once again upon the risk of return. It is said that the Judge failed to give weight to the finding in **RN (Zimbabwe)** or to the decision in **HJ (Iran)**.
12. It seemed to me that Judge McCarthy has not fully dealt with those aspects in the hearing in respect of asylum and/or humanitarian protection. In the circumstances I propose to review the decision in accordance with Rule 45(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I gave notice to the parties of my intention so to do, indicating that there should be listing in the Upper Tribunal for a rehearing upon that discrete issue, namely the safety of return.
13. No objection to that course of action was raised by either party.
14. On 14th March 2013 the matter was listed before me in pursuance of my decision. Unfortunately the solicitors who had been acting for the

appellant until shortly before that date were Blakemores, and they were made the subject of intervention. Mr Samra of Harbans Singh & Co most courteously attended the hearing but had not had the opportunity of considering the matter in any detail, nor did he have any papers. It was in those circumstances that it seemed to me that fairness dictated an adjournment for the representatives to be better acquainted with the facts.

15. I highlighted for the assistance of the parties that my rehearing was limited to the determination of the profile of the appellant at all material respects in Zimbabwe, and of his activities in the United Kingdom. I indicated that it would be necessary to consider and make findings upon the appellant's profile, and put the parties on notice that any further materials in relation to such matters should be observed prior to the hearing. I observed that it would be necessary to consider and apply the case law in particular **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059** and **RT (Zimbabwe) EWCA Civ 1285**.
16. Thus it was the matter came before me for determination on those issues on 4th June 2013. Mr Samra of Harbans Singh & Co attended on this occasion as he had done in the past. He was content that the matter be determined upon the issues which I had highlighted in the decision and directions dated 28th March 2013. A number of further documents had been submitted by the appellant in pursuance of those directions.
17. It may be helpful at the outset to summarise the situation and circumstances of the appellant as presented to Judge Forrester and set out in that determination.
18. The appellant had adopted his evidence-in-chief, his witness statements of 17th March and 20th April 2011 as well as his screening and asylum interviews. His wife also gave evidence and adopted her statements of 22nd March and 20th April 2011.
19. The appellant is aged 47, born and brought up in Buhera. He married in 1994 and the couple have some eight children aged between 26 and 16, all of whom remain in Zimbabwe apart from one in Australia.
20. Between 1983 and 1999 the appellant worked for the Barclays Bank of Zimbabwe Limited. He was a Ndebele and was a member of the Patriotic Front ZAPU until that organisation merged with the ZANU-PF in December 1987.
21. The appellant asserts that he joined the MDC at its formation in September 1999. He considered himself to be a grassroots activist supporting the MP in the 2000 Parliamentary elections in Harare. Whilst in Zimbabwe he attended a number of demonstrations and events.

22. It was his claim that in September 1999 whilst attending one such event, he was detained and held in custody for three days. He was charged with civil arrest and remained for a further three weeks in custody until released on bail. He was required to return to the local magistrates' court every month and report to Harare police station weekly. At that time he and his family were living at Msasa Park in Harare.
23. His wife left Zimbabwe in October 2000 to come to the United Kingdom for a holiday and three months later he also joined her.
24. It is his case that that arrest and his fleeing bail has created a profile for himself in Zimbabwe.
25. It is his case that following his departure the authorities have been looking for him, calling at his home and asking questions of his children. The authorities took no aggressive action towards his children until December 2008 when his son was beaten up after protesting about the police enquiries. The family moved to a safer place but his daughter Karen was raped by ZANU-PF youths in February 2009.
26. The appellant has returned to Zimbabwe on two occasions to see his children, those being in 2005 and again in 2006. His wife has also returned to Zimbabwe on five occasions, the last being in September/October 2006. The appellant stayed at the home of a relative in Hatfield, Harare, and his children visited him there. On the second occasion he asserts that at Harare Airport, having passed immigration control, he was questioned for around half an hour whilst in the departure area before boarding the plane.
27. In the reasons for refusal the respondent at paragraphs 20 onwards indicated that it was not considered that the appellant had acquired any significant profile or any profile in Zimbabwe.
28. It was noted that the appellant's wife also made an asylum claim in 2009 and subsequently has had her appeal considered by an Immigration Judge and dismissed. It was significant to the respondent that in her asylum claim she had not raised the appellant's problems as a reason why she had left Zimbabwe. She had come to the UK for a holiday. The first problems she claimed to have faced were in 2006. These statements are highlighted in the appeal determination promulgated on 7th October 2009. It is submitted therefore that, had the appellant fled Zimbabwe in 2001 because of the reasons which were now advanced, such would have been mentioned by her at that time.
29. It was noted that the appellant returned to Zimbabwe and experienced no problems passing through the airport, albeit that he had used his own passport. It was considered that if the appellant was indeed wanted by the authorities they would have detained him. It of course is of particular relevance, given the interview which the appellant claims to have had in

2006, when he was merely asked whether he was living abroad and no indication was given as to any knowledge of the authorities as to past wrongdoings. Those matters it is a contended point to the appellant not to be of any interest to the authorities by reason of his profile.

30. It was therefore not accepted that the appellant had been arrested in the circumstances as required.
31. It is also to be noted that there were significant contradictions between the appellant's evidence and that of his wife concerning who it was that was raped by ZANU-PF. It was the claim of the appellant that it was his stepdaughter Karen who was raped. This was set out in the interview and in a statement, whereas during his wife's asylum appeal he had actually testified that it was his daughter Ashleigh who had been raped. At that same hearing his wife had stated that it was Karen who had been raped.
32. It was this matter among others that led the Judge to conclude that the evidence lacked credibility.
33. The claim that the police first visited his home in February 2001 but none of his family received any additional problems until December 2008. It was considered to lack credibility that there would not have been some adverse response by the authorities prior to that, if indeed they had been actively seeking the appellant as he seeks to claim that they were.
34. Significantly it was noted in the refusal letter that at his wife's appeal hearing she made no reference to the attack on the son. No reference had been made either in her asylum claim or that of her appeal hearing.
35. Furthermore, at the wife's appeal hearing she had raised the issue that she had been threatened by green bombers when she returned to Zimbabwe in 2006. In the appellant's own asylum interview he had stated in reply to question 102 that she had not faced any problems when she returned to Zimbabwe.
36. Those issues were raised at the hearing before me by the Home Office Presenting Officer.
37. The appellant indicated that in March 2011 his solicitors had prepared a witness statement for him and had put in the fact that it was Ashleigh who had been raped. The appellant had picked up that error and rung the solicitors who advised him to stick by what was in the statement rather than correct it. It was that he took that advice and gave that evidence at the hearing, notwithstanding that he knew that it was Karen as indeed his wife had said.
38. I am invited to find that that explanation lacks credibility. The appellant had an important job in Zimbabwe and was clearly a man of considerable intelligence. There is no reason why that mistake could not have been

acknowledged at the hearing. I was asked to find indeed that there was a deeper significance undermining credibility, in that the appellant was prepared to give evidence as to what he now accepts was not the correct evidence. I was asked to find that if the appellant was prepared to mislead the court as to one crucial aspect of his evidence he may well have done so on other aspects.

39. The appellant stressed that the reason that he left Zimbabwe was because of the difficulties. He had a good job and therefore there was no reason for him to have left otherwise. His wife did not attend the hearing as he had been advised by his solicitors that her further statement would suffice.
40. As to his ability to leave upon his own passport the appellant said that when he was granted bail he had declared that he did not have a passport. Thus the authorities would not have been on the lookout for it.
41. He insisted that when he returned in September 2005 to see his children he did not go to his own house but slept at a relative's house for ten days. The children came to see him. In 2006 he was questioned at the airport as to why he had a residence permit in his passport. The passport was handed back to him. Because he then had discretionary leave to remain he had a residency permit in his passport.
42. It was also submitted to the appellant that he and his wife had scant regard for the truth. In the United Kingdom his wife had been working upon a false document. The appellant said that he was unaware of that false document and he said that his wife had met a man who agreed to do the papers for her and all had been sent to NASS. The document was shown to the appellant concerning the overpayment of £5,000 to his wife as a result of that fraud. The appellant maintained that he was unaware of that situation.
43. In terms of the appellant's sur place activities in the United Kingdom, it was noted in the reasons for refusal that the appellant claims to have attended the Zimbabwe Vigil demonstration in 2003 and that he had been attending such vigils once or twice a month. It is his claim that his involvement with such vigils would lead to adverse attention from the authorities in Zimbabwe because his face has been published on the internet at the gatherings. It is noted by the respondent in the reasons for refusal that there were thousands of photographs of Zimvigil attendees on the internet, none of which appear to carry the names of the people photographed. It was considered therefore that his presence in such photographs would not lead to the adverse attention of the authorities in Zimbabwe. Indeed the respondents carried out an internet search in the appellant's name and there being no results to indicate that he had attended the vigil or had any anti-government profile.
44. It was to be noted that at the hearing in relation to the appellant's wife it was her claim that she also attended the vigil and that she was also a

member of ROHR. It was the finding of the Immigration Judge on that occasion that her membership was insincere and only entered into in order to create an asylum claim.

45. Indeed at the previous hearing Judge Forrester noted the limited nature of the appellant's sur place activities. As there were some 3.4 billion photographs on the Flickr website in February 2010 with more added every month it was unlikely in the extreme that the appellant would be noticed from those photographs.
46. The Judge also noted that it was of significance that since being in the United Kingdom the appellant had not joined a local branch of the MDC which was considered surprising given his previous claimed involvement with that party. It was noted that both he and his wife had their photographs taken at vigils and the photographs are viewable via Flickr on the internet. They have also both been interviewed by Zimbabwe broadcasting networks, DVDs recordings of those interviews were available to be viewed at the hearing.
47. Reliance is placed upon the updated witness statement of the appellant dated 29th May 2013. It is said that his son who was beaten in 2008 is now in South Africa and has been granted asylum there. He said so far as his activities in the United Kingdom that he was an active member of the MDC having joined the party because he agreed with the party's ideology and aims whilst in Zimbabwe.
48. He said that his children are no longer living in Harare because of the harassment of ZANU-PF and the police. They were dispersed from Msasa Park, Harare to Belvedere where his stepdaughter Karen was raped. They then moved to Ruwa before the boys dispersed and went their separate ways. The girls were taken in by Precious Nufahore who is an MDC councillor for Ward 6 in Norton.
49. His son Mthabis is in Gwanda with his maternal grandmother for the last three years. His son Mqobile is in Goromonzi living with church members.
50. The appellant indicated that he attended Zimbabwe vigils outside the Zimbabwean Embassy.
51. He maintains his claim that he would be unable to relocate anywhere in Zimbabwe. He made reference to the green bombers who act as vigilantes and operate throughout the country. He maintains that there is no perceived difference between high and lower level perceived supporters of the MDC.
52. The appellant also makes a further statement on 6th March 2013 essentially repeating his claim.

53. He said that original he was from Msasa Park in Harare and speaks Shona and Ndebele. He says that he cannot relocate to Bulawayo as the ZANU-PF are in that area and that he does not have any family there. He has a sister in Queque with whom he speaks from time to time.
54. As to the issue of Article 8 he contends that he has family and private life in the United Kingdom having adapted to British culture, as has his wife, three year old niece, nephews and his daughter Alesha born April 2008 with whom he has contact from time to time. She lives with her mother. He also suffers from HIV.
55. As I indicated previously there are a substantial volume of documents in this matter. Bundle A consists of over 430 folios with statements and other relevant personal documents. There is also a further supplementary bundle, bundle B, containing background material of some 657 folios. The majority of those documents were before Judge Forrester and Judge McCarthy.
56. I note in particular the statements of the appellant of 7th February, 17th March and 20th April 2011 and 7th February 2012. I note the screening interview and the SEF interview also.
57. In particular I note the response statement of the appellant of 17th March 2011. In dealing with the questioning at the departure lounge at the airport, an interrogation which lasted half an hour. The appellant indicated that he was asked questions such as “why are you in the UK” and “what are you up to there”. He was asked why he had been granted a UK residence permit and asked about his views regarding Mugabe.
58. He is not a paid up member of ROHR like his wife, but that he attends the organisation fundraising functions. He was not a paid up member of the MDC in the UK, the reason for that being that he was based in Leicester and when he came to the United Kingdom the MDC were more active in the London area. Unlike the MDC there is no subscription to join the vigil other than the travelling costs. He says that the Zimvigil is a grouping of various organisations and has the same objective as the smaller group.
59. The appellant said this attendance at the vigil depended on his work schedule and after he ceased employment his ability to travel was reduced. It is said of his wife that she had contributed two articles to the Zimbabwean, a weekly publication newspaper. She has also been interviewed by the Zimbabwe Broadcasting Network. Those newspaper articles dated 8th February 2010 and 10th December 2009 were enclosed.
60. There is a letter from the MDC Secretary General’s Office of 1st October 2010 confirming that Precious Mufahore had given refuge to the appellant’s daughters and speaks of the wife’s activism in the United Kingdom. The various photographs of the appellant and his wife at the demonstrations are set out as being covered on Flickr. It is said that these

photographs were taken using a particular camera. The dates of 4th December 2010, 11th December 2010 and 5th March 2011 are given as the dates of those photographs. The appellant's wife was seemingly interviewed at one of those demonstrations. A link to that interview is enclosed at page 191 of bundle A.

61. Given the potential importance of details of activities in the United Kingdom to the claim it is significant that, notwithstanding the request in the directions, little evidence has been provided as to the more recent activity of the appellant or his wife in the United Kingdom. The appellant in his oral evidence merely repeated that the Zimvigil was a better platform to make the protest. He and she would attend to build up the numbers and to sing and dance. They were participants rather than organisers of the event. When pressed upon when such events took place the appellant said that there was a large gathering of ROHR in October 2012 and a demonstration by Zimvigil in July 2012.
62. As to the situation of his children, the appellant said that his two daughters were still in Norton, one daughter was in South Africa as was one of his sons. So far as his daughters were concerned one was at high school and the other at college. Norton was 40km from Harare and was a farming town. He confirmed that his sons lived where his statement had placed them.
63. The parties made their submissions to me. On behalf of the respondent it was submitted that there were contradictions or omissions from the evidence of the appellant and his wife when compared. For example, no mention was made by the appellant of his wife's difficulties which she claimed to have had in 2006. There is no mention by her of his difficulties.
64. I was asked to find that the evidence given by the appellant as to his situation and circumstances in Zimbabwe were not credible. He was of no interest.
65. Equally I was asked to find that his activities in the United Kingdom were both insincere and insignificant. Indeed there has been a lack of detail as to precisely when it was that the appellant claims to have carried out such activities. The photographs taken and put on the website were taken of the appellant in order to boost his asylum claim.
66. On behalf of the appellant I was asked to find that he was credible. He had a well-founded fear of returning on the grounds of his having jumped bail. His involvement with the Zimbabwe vigil was long standing.
67. I bear in mind the standard of proof in asylum cases namely a reasonable likelihood or a serious possibility of harm for a Convention reason. I bear in mind the nature of humanitarian protection as enshrined in paragraph 339C of HC 395. A similarly low standard is to be applied to an

assessment of the appellant's human rights, particularly whether there would be a real risk of a breach of fundamental rights.

68. I bear in mind in assessing credibility that the whole context of the claim should be considered so as to give due weight and relevance to individual factors. I bear in mind also that the appellant's wife has not given evidence in this hearing and care should be taken in assessing what she says in her own application if it conflicts or contradicts that which the appellant has said. Thus it is appropriate in certain of the circumstances as set out above to bear those matters in mind.
69. Having considered the matter as a whole I do not find that the appellant is a credible witness, neither as to the events which he experienced in Zimbabwe nor as to his claim to be an active supporter of Zimvigil in the United Kingdom.
70. As to the events in Zimbabwe I note the concerns and criticisms as expressed both by Judge Forrester and indeed by the respondent in the reasons for refusal.
71. The appellant had a responsible job in Zimbabwe and in such a context no doubt had reached an accord with the authorities. I have no doubt that were the appellant to be involved in the activities which he claimed or indeed to be someone subject to arrest and enquiry as he claims, that would have had a significant impact upon his further employment. No details have been given as to that employment and no suggestion has been made that he lost his employment otherwise than voluntarily giving it up to come to the United Kingdom. The very nature of the appellant's fear is enshrined in his claim that he has failed to attend his bail. No evidence of any proceedings or warrants addressed to him have been given and indeed I find it more likely than not that, had he been subject of such interest, he would not have been able to have gone back to Zimbabwe and returned on several occasions. The interview at the airport had the appearance of being a routine one particularly arising from his stamp in the passport.
72. The evidence given by the appellant concerning the rape of his daughter as opposed to Karen is a significant matter as it shows that the appellant is capable of giving incorrect evidence quite deliberately to a Judge when an admission of error on the part of the solicitors would have been a much easier course to take.
73. I do not find it credible that if the authorities were hunting the appellant so persistently from 2001 as he claims, that they would have delayed any overt harassment of his family to 2008 as is claimed. No details of any warrant or legal proceedings for evading bail have been produced. The appellant's children would seem to be able to reside in various parts of Zimbabwe without difficulty, in particular his two daughters attending a school and college.

74. As to the activities in the United Kingdom they would seem to be of limited application. Although encouraged in my directions to give further details as to more recent activities, none were not forthcoming. Though the appellant initially claimed that he attended the vigil several times a month, little evidence has been presented of that frequency. Clearly I accept, as indeed did Judge Forrester, that the appellant has attended on occasions, but such I find to be opportunistic and designed to bolster an asylum claim. I bear in mind that the photographs allegedly taken of the appellant at the vigil seemingly were taken at his request and placed upon the website.
75. Given the vast number of images that are upon the website I too do not find that such creates any significant profile of the appellant so far as the authorities are concerned. Significantly the appellant claims to have been involved in the vigils since 2003 but those attendances created no difficulty for him on his two periods of return. His wife likewise was with him but seemingly she was able to return to Zimbabwe on at least five occasions. It is of significance and undermining of credibility that the appellant makes no reference to the difficulties which he faced in 2006 in his own account, while she made no reference to his difficulties in 2001.
76. I do not find that the appellant is a genuine activist. Even if he is I do not find that the nature and scope of his activities in the United Kingdom are such as to create any significant profile for him on return.
77. I bear in mind the submissions that have been made together with the supplementary skeleton arguments of March 2013 as enshrined in bundle B.
78. In considering the risk of return it is necessary to bear in mind **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC)**. This generally revisits the country guidance given in **EM**.
79. It is recognised that there is significantly less politically motivated violence in Zimbabwe compared to 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 to the United Kingdom having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to ZANU-PF.
80. The position can likely be otherwise in a case of a person without ZANU-PF connections, returning to 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. That adverse attention may well involve a requirement to demonstrate loyalty to the ZANU-PF.

81. The situation is not uniform across relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described, in reality does not do so.
82. In general a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is unlikely to face significant difficulty.
83. Similarly a returnee to Harare will in general face no significant difficulties if going to a low density or medium density area. Whilst the socioeconomic 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 or would be reasonably likely to engage in such activities but for the fear of thereby coming to the adverse attention of ZANU-PF.
84. A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF even if he or she has a significant MDC profile.
85. It was noted that the economy of Zimbabwe has markedly improved since the period considered in **RN**.
86. The appellant and his family have lived in various areas of Zimbabwe for much of their lives and there is no reason why the appellant cannot return to Harare. Indeed there would seem to be little reason why the appellant cannot live with or near to his daughters in the area which they reside. Similarly, given the ability of the appellant both to speak Shona and Ndebele there is no reason why he could not relocate to many areas within Zimbabwe in safety.
87. Significantly also the appellant’s political profile such as he claims was that he had been a member of ZAPU which merged to ZANU-PF. Given his employment I find that at the time that he was living in the United Kingdom he would have had an accommodation with the authorities.
88. So far as **RT** is concerned it is contended that the appellant will be forced to lie about his activities in the United Kingdom were he to return. I find that they were activities designed to bolster an asylum claim. For many years the appellant had been granted lawful residence in the United Kingdom on account of his HIV and health conditions. There is no reason at all why the appellant could not give that explanation where pressed upon the reason why he had been away for so long.
89. So far as his motivation to continue his political activities in Zimbabwe I bear in mind **HJ (Iran)** but have found the appellant to lack credibility both as to his political activities in Zimbabwe and the genuine nature of his activities in the UK. I find that he is neither someone who would be compelled to act politically in Zimbabwe nor someone who would feel compelled out of fear to conceal his genuine political views.

90. So far as Article 8 was concerned that was considered at length on a previous occasion, and there was no request that I revisit that area. The only further detail which has been provided in all the recent statements does not, it seems to me, significantly alter that position or the findings made therein.
91. Overall therefore I find that the appellant may return to Zimbabwe either to one of his home areas or to where his daughters now reside or indeed to another part to be close to his family without fear of violence or retribution. Clearly he is a man of intelligence, having skills which would equip him to find employment, support himself and his wife.

Decision

The appeal in respect of asylum is dismissed. The appeal in respect of humanitarian protection is dismissed. The appeal in respect of human rights is also dismissed.

Signed

Date

Upper Tribunal Judge King TD