Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05406/2009

THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2013

Date Sent
On 30 October 2013
…………………………………

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

RC
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z. Jafferji, Counsel
For the Respondent: Ms A. Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe, born on 26 May 1975. She arrived in the UK on 8 August 2002 as a visitor. An application for further leave to remain was refused on 6 November 2003. On 3 March

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2009 she made a claim for asylum which was also refused and a decision was made on 8 June 2009 to remove her to Zimbabwe.

2. Her appeal against that decision was dismissed by First-tier Tribunal Judge M.A. Khan after a hearing on 3 November 2009. An application for reconsideration was granted and the appeal came before a Panel headed by Burton J, sitting as a judge of the Upper Tribunal. The appeal was again dismissed. Permission to appeal was granted by the Court of Appeal. The appeal was allowed by consent and remitted to the Upper Tribunal.

3. The remitted appeal was heard by Deputy Upper Tribunal Judge Plimmer on 24 February 2012 and again dismissed. Permission to appeal was refused by a judge of the Upper Tribunal but granted by the Court of Appeal. By consent the appeal was remitted for a second time to the Upper Tribunal and now comes before the Upper Tribunal for a third time.

4. In the Statement of Reasons it is recorded that the Upper Tribunal

> "materially erred in law by failing to expressly consider whether the Claimant may be required to demonstrate loyalty to Zanu PF when returning to Masvingo and whether it would be unduly harsh to expect the Claimant as a single mother with two children as her dependents to relocate to Harare, an area in which she has not previously resided. The parties are therefore in agreement that the matter should be remitted to the Upper Tribunal for consideration in light of the current case law."

5. Before me the parties agreed that the hearing was to be a *de novo* hearing. Having said that, it was also agreed that certain paragraphs of Judge Plimmer's determination could be preserved, being unaffected by the error of law. The extent to which parts of Judge Plimmer's determination can stand, as agreed by the parties before me, is set out below under the 'assessment' heading.

6. The following is a very broad summary of the appellant's claim but it by no means encapsulates the factual complexities involved in the appeal. She claims that she would be at risk on return to Zimbabwe from her husband, who has made threats against her and at whose hands she suffered domestic violence. She would also be at risk on the basis that she would be required to demonstrate loyalty to the regime and because she used to be a teacher in Zimbabwe. Her brother, now deceased, was also a teacher and an active supporter of the MDC. The appellant's father-in-law used to be a Zanu-PF mayor in the area in which the appellant lived with her husband and the appellant's husband has influence in the area.

Oral evidence

7. In examination-in-chief the appellant adopted her witness statement dated 28 February 2012. She said that Veronica Chiromba and Barbara

Mutondo are not at the hearing because they are at work and could not get the day off. Veronica lives in Stevenage and Barbara lives in Walsall. She had asked them to attend previous hearings. Veronica attended one hearing but could not attend the second because she had just started a new job. Barbara said that she had been unable to attend a hearing because she was working. They are both aware that she is relying on her statements.

8. In cross-examination she said that she decided to work at a nursery school in Zimbabwe because she liked working with children. She worked at that particular nursery school because she wanted to be a little bit away from where she lived with her husband. Her brother had free accommodation for her. Her husband did not say anything about her work because she thinks he had freedom whilst she was away.

9. At that time she had problems in her marriage because her husband was a womaniser. She told him that she would be coming home at weekends. Her child was living with her at the time.

10. She had no option but to leave her children with her husband when she came to the UK. She was scared. She could not have brought them with her because they did not have passports. He could easily see if she was going to try to bring them with her. She did not want to be caught before she disappeared. If she had taken the children to a relative her husband would wonder what was happening. They ended up living with her half-sister. The children were scared, just as she was.

11. When she found out that her husband was living with another woman it was easier to get them to her half-sister. He is not a caring man so he would not have cared about them moving out. He has lots of children. She called Elizabeth, her half-sister, and her husband agreed to the children going there. He said that he did not care. His family members believed the stories that her husband had told about her so they did not want the children either.

12. She was asked about [32] of her witness statement in which she said that had she stayed in Zimbabwe the children would have ended up with their father for the rest of their lives because it would have been impossible for her to keep custody of them in the event of a divorce. As to this apparent inconsistency between her witness statement and her evidence, the appellant said that if she was there this would be the case because if they divorced she would want the children and he would want her to come back to him as his wife. He would want that because he is a man who is full of himself and no-one can walk away from him or can do anything unless he says so.

13. As to how he let her go to work at the nursery and the children to live with her sister, being at the nursery gave him freedom to do whatever he wanted, and she would come back at the weekends. She does not know what was in his mind regarding the children being with her sister,

but maybe he thought that he would see her again and that if he lets the children go she would come back. What her children tell her however, is that he threatens them saying that he is just waiting for their mother to come back. They tell her not to come back and that they would rather suffer in not going to school than that she should come back and die.

14. Asked about her witness statement at [36] in which she stated that he threatened her through her sister, she said that she thinks that that threat was made some time last year. He makes those statements all they time when they meet or when he passes her in the street. They live in the same town.

15. In relation to her sister, Elizabeth's, witness statement, saying that the children's father does not bother to visit them, the appellant said that that is true. He would stand by the doorstep and shout and then go, but she would not call that a visit. Her daughter's letter states that their father does visit, because maybe to the children they regard that as a visit; if someone comes to the doorstep, to her daughter, J, that would be a visit. The children do see him in town at "unintentional" meetings.

16. She could not live in Chiredzi where her parents lived because her husband is a known man and has friends and relatives who could easily know where she is. His sister lives in Chiredzi and it is not far from there to Masvingo; about three hours' drive.

17. In re-examination she said that her husband has never beaten the children although the way he speaks to them is violent.

18. In answer to my questions she said that her husband used to work running his parents' business when they were still alive. As far as she knows he is not working now as the business has collapsed. She does not know if he has any income because he does not help the children to go to school. Sometimes her friends help them to pay the school fees. She has two children both girls. J is aged 17 and E is 14.

19. She does not think that she would be able to live in Harare because her husband is everywhere and so is his family. The only relatives she keeps in touch with are her half-sister and her children.

20. In further cross-examination she said that she and her parents do not talk because they blame her a lot for the death of her brother. She had not mentioned that before because no-one had asked her. She does not know how they saw it but they may think that her husband was involved in her brother's death. Since she left Zimbabwe she had never heard of her parents visiting J and E.

21. In further re-examination she said that Janet Hute had not come forward to give evidence before because she did not mention the matter to her.

They had lived in the same town and she did not want her to be involved.

22. Janet Hute adopted her witness statement in examination-in-chief. In cross-examination she said that the appellant would be killed if she went back because the same government is in power and her husband is still the same. The children always say her husband says that if she comes back he would kill her.

23. In answer to my questions she said that she does not speak to the children at the moment. She knows what her husband says to the children because the last time she mentioned the children to the appellant she told her about it.

Submissions

24. The parties made preliminary submissions which are reflected in the following summary. Further reference to the submissions is made as necessary in the course of my assessment of the issues.

25. On behalf of the respondent Ms Holmes relied on the refusal letter in so far as now relevant to the issues to be determined. The appellant was not a credible witness. There was no real explanation as to why she left the children with a violent man who did not care about them. There was no explanation of why she did not take them with her or leave them with a relative. Her husband allowed her to go and teach and let them go to another family member.

26. The appellant's sister states that her husband does not visit but her daughter says that he does. Her account of his coming to the door and shouting is not a credible explanation for the inconsistency. Her sister does not refer to such harassment or violent conduct.

27. She gave a vague account of her husband knowing everything and is everywhere as an explanation for her inability to go to Chiredzi or Harare. She had not mentioned that before, nor her parents' attitude to her in relation to the death of her brother.

28. So far as the witness statements of other witnesses are concerned, it was submitted that for various reasons not much weight could be attached to them. Janet Hute's evidence was based on hearsay in many respects and she left Zimbabwe in 2002.

29. There would be no risk to the appellant on return, from her husband or from anyone else. Even if one were to accept that there was a degree of domestic violence there is no reason why she could not go to Chiredzi or Harare.

30. A nursery teacher is not the same as a senior school teacher. She would not be perceived as an MDC supporter. It was a long time ago that she lived with her brother E.

31. As regards Article 8, she has no family in the UK but has family in Zimbabwe. Although she had been in the UK a long time that is not enough to make her removal disproportionate.

32. In relation to the argument concerning paragraph 395C and the decision in Okonkwo (legacy/Hakemi; health claim) [2013] UKUT 00401 (IAC), that was a medical case and in any event, paragraph 395C no longer applies to her.

33. Mr Jafferi relied on the skeleton argument dated 21 March 2012. It was submitted that the appellant’s account had been consistent and was supported by other witnesses. It was not disputed that the appellant's husband’s father had been a Zanu-PF mayor. I was referred to the evidence given at previous hearings.

34. The appellant would not be able to relocate as she would eventually be found by her husband, most likely through her children or her sister who live in the same town as her husband. The reasonableness of relocation has to be considered in terms of whether she could relocate with her two children. That issue has also to be considered on the alternative basis that her fear it is not objectively well founded but is a subjective fear, taking into account the fact of domestic violence.

35. Aside from her husband the appellant would be at risk in her home area where she could be asked to demonstrate loyalty to Zanu-PF.

36. The decision in Okonkwo was relied on. The removal decision was made in this case in 2009 and throughout the appeal process the asylum policy guidance in terms of legacy cases ought to have been take into account. Although this was not itself a legacy case the issue is relevant in ‘395C’ cases. There was a delay in enforcing her removal. She arrived in 2002 and further leave was refused in 2003. There was no removal decision. Although it was not culpable delay it was delay as categorised in the policy guidance. Although the guidance was not in existence at the time of the decision it did exist at the time of the hearing before Immigration Judge Khan in November 2009 and again when Mr Justice Burton and Upper Tribunal Judge Eshun heard the appeal in October 2010.

37. This argument was not advanced previously but the case law had not been developed by the time of the hearing before Deputy Upper Tribunal Judge Plimmer in April 2012. Residence of 6 years would have been a relevant matter to take into account. The decision with respect to paragraph 395C was unfair and the matter needs to be remitted to the Secretary of State. The ‘new’ immigration rules would be applied but regard would have to be had to the issue of ‘unfairness’ as set out in Okonkwo.

38. So far as Article 8 is concerned, her length of residence was relied on. It was submitted that it would be open to me to find that even if there

would not be a risk from her husband but there had been domestic violence, it was relevant that she feared return. In addition it is relevant to take into account that during a large part of the appeal process Home Office policy suggested that she should be allowed to remain.

My assessment

39. As already indicated, at the start of the hearing the parties were able to agree that it was not necessary to revisit every factual issue that had been considered by Judge Plimmer. It was agreed that the findings at [15] and [42] of Judge Plimmer’s determination could stand. Neither party suggested that the principles in Devaseelan [2002] UKIAT 00702 had any application to this appeal in terms of revisiting findings that had already been made in the light of further evidence.

40. It is as well also to state that whilst the appellant had previously raised concerns about the conduct of her asylum interview, no submissions were made to me by either party in relation to the interview. I proceed on the basis that those issues are no longer of relevance to the issues left to be determined.

41. Before elaborating on the further extent of the agreement between the parties, it is worth recording that Mr Jafferji submitted that the main issue on which Judge Plimmer found against the appellant was in terms of the “ongoing threat” from her husband and he suggested that the area of (factual) dispute could be confined to that matter. He accepted that on that basis, the negative credibility findings would also have to be accepted, for example that the appellant's husband had no part to play in the appellant's brother’s death. Ms Holmes indicated that she had doubts about whether the issues could be confined to the question of the threat from the appellant's husband unless I suggested that that was appropriate.

42. However, I indicated that it was for the parties to come to agreement on the areas of dispute, albeit that if the issues could be narrowed so much the better. I adjourned for a short period to allow the parties to discuss the matter further.

43. It was ultimately agreed that [42]-[45] of Judge Plimmer’s determination could stand and that the matters determined by her from [47] onward, that is [47]-[52], were to be revisited. A further refinement was that it was agreed by Mr Jafferji that the risk factor advanced at [10v)] of the skeleton argument was not settled and would have to be the subject of a finding by me. That ‘risk factor’ as set out in the skeleton argument is that “The Appellant is known as an MDC supporter, and is known to have lived with her brother, [E], who was an active MDC member.” It

was accepted however, that there was no finding in the appellant's favour that the appellant is a known MDC supporter. The risk to the appellant in this respect was said to be on the basis of having lived with her brother which would lead to a perception of being a supporter.

44. To make clear the context of my conclusions, I now set out the findings of Judge Plimmer that are agreed between the parties do not require revisiting:

- The appellant's husband’s father was the Mayor representing Zanu-PF in Masvingo in the period prior to 2001 [15].

- The appellant was a nursery school teacher in Zimbabwe [42].

- It is reasonably likely that the appellant’s brother, E, was harassed on account of his MDC/anti-Zanu-PF activities, and he has died. The appellant's husband did not play “any material role” in his death. The appellant's husband was not interested in trying to persuade the appellant to support Zanu-PF [43].

- The appellant may have been subjected to some pressure from her husband regarding her brother’s affiliation with the MDC but the appellant has accepted that she has never played any material role in supporting the MDC [44].

- E’s political activities have not led to other members of her family being targeted for a long period of time. The appellant accepted in oral evidence that she did not have any information that anyone from her family may have been targeted since 2006, when she claims that her brother died. She no longer regarded E as a reason to have subsisting fears. It is not reasonably likely that anyone would continue to regard the appellant as a person who may be associated with her brother’s MDC activities “when he died in 2005 and when her other family members have not suffered in any way because of this since at least 2006” [45].

45. The conclusions at [47]-[52], which were agreed between the parties were matters that needed to be considered afresh, are:

- The appellant is reasonably likely to have suffered violence at the hands of her husband and that this led in part to her departure from Zimbabwe [47].

- Her claim to be scared of her husband has been largely consistent and is supported by her sister and her daughter’s school [47].

- The appellant's husband may have some influence in his local community [47].

- The evidence regarding alleged threats (from her husband) is so inconsistent, vague and implausible that they cannot be reasonably likely. It is not credible that the appellant's husband has shown any continuing interest in her since her departure from Zimbabwe [51].

- The claim that her husband would remove the children from her or her sister's custody if she were to return is not credible [52].

46. Although not specifically canvassed at the hearing, the following further findings are consistent with those referred to in [44] above, and thus do not require to be revisited.

    - Although the appellant may have been aligned to her brother and his MDC activities this was a long time ago and she has shown no interest in pursuing MDC activities over the course of many years [53].

    - The appellant's husband may have suspected her to have been an MDC supporter in the past [54].

47. It is as well at this point to indicate that the only background material relied on behalf of the appellant, aside from that in the country guidance decision of CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC) was a two page report entitled Gender Equality and Social Institutions in Zimbabwe dated January 2012. It refers amongst other things to the prevalence of violence against women, particularly domestic violence and the lack of protection afforded to women. It also refers to child custody issues.

48. The appellant's claim to fear her husband personally, is related to what is said to be a risk to her on account of an imputed political opinion of support for the MDC. Whilst there is that interrelationship, those strands of the appeal also, potentially, each stand alone. Whilst recognising therefore that there is that connection between those aspects of her claim, a useful starting point is the claimed fear of her husband.

49. Relevant preserved findings are that the appellant's husband's father was the Mayor representing Zanu-PF in Masvingo in the period prior to 2001 and that the appellant may have been subjected to some pressure from her husband regarding her brother's affiliation with the MDC.

50. The appellant says that she was the victim of domestic violence, including physical violence, whilst married to her husband. I have set out the appellant's evidence and the challenges to her account in cross-examination, as well as the submissions. In short, it is not accepted that her husband was violent towards her.

51. I note that on the Tribunal file is a statement dated February 2012 in the name of the appellant's sister Patricia. However, that statement was not referred to by Mr Jafferji, is not in the appellant's bundle and was

not the subject of any submissions at the hearing before me. I therefore proceed on the basis that it is not evidence that is relied on.

52. Aside from the appellant's evidence there is a witness statement from Veronica Chiramba dated 29 February 2012. She states that she has known the appellant since 1988 in Zimbabwe, that her husband was known to be a violent person and that the appellant suffered many years of domestic violence. The political tensions between him and the appellant's brother made the violence worse although she only discovered the full extent of it when she discussed matters with the appellant in the UK.

53. Ms Chiramba gave evidence before Immigration Judge Khan. There is reference to her witness statement of 30 October 2009, which I also have before me. Materially, she said in evidence before Judge Khan that she was aware that the appellant was in an abusive marriage. Judge Khan's determination was ultimately set aside and was remitted for a *de novo* hearing. At the subsequent Upper Tribunal hearing before Mr Justice Burton it was found that Judge Khan had made a factual error in his assessment of Ms Chiramba's evidence. The detail of that factual error is not relevant for present purposes. Although Judge Khan's determination was ultimately set aside, there is no reason why the record of Ms Chiramba's evidence, as distinct from the conclusions on that evidence, cannot be taken into account. Mr Jafferji sought to go further, suggesting that at the hearing before Judge Khan there was no challenge to her credibility. I do not consider it appropriate to explore that assertion. That determination having been set aside, all that the appellant can rely on from that determination on this distinct issue is that that witness gave evidence of domestic violence, which appears also to have been contained in a witness statement of October 2009.

54. Ms Chiramba did not attend to give evidence and therefore before me at least her evidence has not been tested. Although I take into account that she did in fact appear as a witness at the hearing before Judge Khan, the fact that I have not had the opportunity of seeing and hearing the witness does affect the weight to be attached to her written statement. Mr Jafferji did not seek an adjournment to allow for the attendance of Ms Chiramba or Barbara Mutondo. I bear in mind the appellant's evidence which is set out above, as to why neither attended and why Ms Mutondo has never appeared as a witness.

55. Ms Mutondo says in her witness statement that what she knows about the appellant's relationship with her husband she has learnt from the appellant, not from first hand knowledge. She states that she was told that she was badly beaten and abused by her husband and that her emotion at the time of telling indicated to her that what she was told is true.

56. That Ms Mutondo's evidence on this issue is hearsay does not mean that no weight can be attached to it; it is admissible evidence but the

weight to be attached to it is less than if it were first hand evidence of the facts. Further, because the evidence has not been tested before me, that further reduces its weight.

57. Janet Hutu’s evidence supports the claim that the appellant was subject to domestic violence whilst in Zimbabwe. Indeed, that aspect of her evidence as contained in her witness statement was not the subject of any cross-examination. I note that Ms Hutu has not previously given written or oral evidence in support of the appeal. However, I am satisfied that the appellant gave a satisfactory explanation for that fact, as set out above.

58. There is also a letter in the appellant's bundle from J’s school which refers to her having revealed physical and emotional abuse against her mother by her father.

59. The appellant has satisfactorily explained the issues raised in submissions on behalf of the respondent in terms of why, if her husband was violent towards her, he would have let her work away from home as a nursery teacher and why he would have allowed the children to be taken to the appellant's half-sister to live. I am satisfied that it is reasonably likely that in Zimbabwe she suffered domestic violence from her husband. On this she has been consistent and, whilst the weight to be attached to the evidence in support of that claim varies, I am satisfied that there is credible evidence from other sources to the same effect.

60. So far as the appellant's claimed present fear of her husband is concerned, the suggestion that threats have been made against her is again supported, to varying degrees, by other witnesses. Ms Chiramba states in her witness statement of 2009 that the appellant told her that her friend Tsitsi, presumably from Zimbabwe, told the appellant that the appellant's husband had made threats against her to his own friends in Zimbabwe. Her latest witness statement contains similar information. In both statements she gives an account of having gone to South Africa in 2009 on holiday and meeting the appellant’s children there. When she joked that the appellant would be coming to Zimbabwe to visit them they got upset and cried saying that their father would kill the appellant if she came back. In her first statement she recalls that when she asked them why they said that, the appellant's daughter E told her of an incident when their father showed her a knife when she was misbehaving and said that he would use it to kill their mother if she came back. In the witness statement of February 2012 however, she said that the explanation for the upset was that they had overheard him saying to people that he would “see to mum” when she came back. The knife incident is also recounted but not in that context.

61. Ms Mutondo’s witness statement does not significantly support the appellant's claim that she is at risk from her husband on return in terms of threats that he is said to have made. The reference to the risk to her

on return from her husband is at [17] where she states that from what she knows of Zimbabwe and from what the appellant has told her about what her husband has been saying and has done, the consequences of her return could be fatal. That evidence is vague and could not be explored at the hearing as she did not give live evidence.

62. Janet Hutu's witness statement is recent. Although undated, it was sent to the Tribunal on the day of the hearing and she had not previously made a witness statement. The fact that the statement is recent is relevant because in it she does not make any mention of having knowledge of any specific threats made against the appellant by the appellant's husband, albeit that she states that the appellant's life would be in danger were she to go back. In evidence, in answer to my questions, she said that the appellant had told her that her children say that her husband makes threats.

63. There was inconsistency in the evidence in relation to whether the appellant's husband does or does not visit the children, as submitted by Ms Holmes. Elizabeth, the appellant's half-sister, says in her witness statement that she looks after the appellant's children. At [9] she says that even though their father can visit them anytime he wishes, he does not bother. She goes on to state that on the occasions when they do bump into him he makes threats to kill her. The undated letter from the appellant's daughter J, refers to violence in the marriage but also states that she is scared to see her father even though he visits them. There is therefore an evident inconsistency in relation to whether or not he visits.

64. The appellant sought to explain the inconsistency by saying that although he does not visit he would stand on the doorstep and shout. I do not accept that this is a satisfactory explanation for the inconsistency. J's letter states that she is scared to see her father "even though" he visits them. On the basis of the appellant's explanation it is reasonable to have expected her to say that she is scared of him *because* he visits.

65. Furthermore, the letter from J says nothing about any threats made when they occasionally meet their father in the street, in the context of the evidence from the appellant's half-sister that he does not care that the children hear the threats. Elizabeth also refers to an occasion when threats were made to J in front of her friends and her coming back home terrified, saying that she did not care if she never saw her mother again as long as she was safe. In her letter J gives her age then as 15 years. It is reasonably likely that if the threats as described by her aunt had been made, there would have been some reference to them in the letter. The only reference to threats is made immediately after she states that he visits, when she goes on to say that he talks about their mother and that he would catch up with her no matter how long it takes.

66. The appellant left Zimbabwe in August 2002. Her account is of her husband being a womaniser and having another woman at the time that she left Zimbabwe. On one view, those facts suggest that he would have no interest in the appellant sufficient for him to threaten her. It is relevant that he has a history of violence towards the appellant and this is consistent with what is said, in effect, about his having a sense of self importance which may indicate a wish to harm the appellant because of the perceived slight of her leaving him.

67. However, in weighing up the evidence I have come to the view that it is not reasonably likely that the appellant's husband has made threats towards the appellant since she has been in the UK or has threatened to harm her should she return. The evidence is inconsistent or otherwise unsatisfactory for the reasons I have set out. I do not accept as reasonably likely therefore, that she would be at risk from him were she to return. For completeness, on the basis of that finding, I do not accept even that the appellant has a subjective fear of her husband.

68. At this point it is convenient to resolve a further matter that remains in issue (see [43] above), namely the claim that on return her children would be taken from her by her husband. I have taken into account the one piece of background evidence to which I was referred and which has a bearing on this issue. However, there is no evidence that the appellant's husband has sought to gain custody of the children whilst the appellant has been in the UK. Her evidence is that he did not care for the children in any event. I do not accept that the appellant's claim in this respect is supported by the evidence.

69. The appellant would be returning to her home area of Masvingo, the place given as her home area in the skeleton argument and indeed, in her witness statement. I have considered the question of risk on return with reference to the decision in CM which affirmed the decision in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98(IAC).

70. The Statement of Reasons put before the Court of Appeal, being the basis for the Consent Order in the appeal before me, included the question of whether the appellant would be required to demonstrate loyalty to Zanu-PF on return to Masvingo. The appellant's skeleton argument has not been updated for this appeal and is based on EM. Mr Jafferji, in opening submissions suggested that Masvingo was a volatile place which added to the risk to the appellant. The skeleton argument refers to [189] of EM. That paragraph in full states that:

> "Although, as a general matter, the risk of persecution and other serious ill-treatment in Zimbabwe, including the rural areas, has significantly declined, as at 28 January 2011, compared with the position under review in RN, the evidence before us raises serious concerns as to the position of a Zimbabwe citizen without ZANU-PF connections, returning from the United Kingdom after a significant absence to live in Mashonaland West, Mashonaland Central, Mashonaland East, Manicaland, Masvingo or

> Midlands province. Such a person, returning to a rural part of such a province, where the chief or headman is likely to be an acolyte of ZANU-PF, may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control, unless, of course, the Immigration Judge is entitled to conclude that the returnee is likely to be associated with such elements. An Immigration Judge would be so entitled to find where the appellant's evidence of past history, place of residence and family and social connections is to this effect, or where a case has been rejected and the proper inference is that the denials on these issues were untruthful: see MA (Somalia) [2010] UKSC 49. In these cases the Immigration Judge is entitled to conclude that loyalty would not be challenged or that it would otherwise not create a difficulty. Apart from this category, however, we conclude that returnees to these areas would face a real risk of persecution because of a continuing risk of being required to demonstrate loyalty. In the light of the judgment of the Court of Appeal in RT (Zimbabwe) [2010] EWCA Civ 1285 we recognise it is no answer to a loyalty challenge that the returnees could be expected to mislead the inquirer as to where loyalties lay."

71. In submissions before Deputy Upper Tribunal Judge Plimmer, Mr Jafferji accepted that the appellant would be returned to Masvingo City and not a rural part of Masvingo, and as such she would not be in the category of persons who would be required to demonstrate loyalty to Zanu-PF. The skeleton argument relied on before me does not contend that the appellant would be subjected to any loyalty 'test' as envisaged in the CM. That said, in submissions Mr Jafferji did contend that, even putting aside a (direct) threat from her husband, there was still a risk that she would be required to demonstrate loyalty to the regime.

72. I was not referred to any background evidence in support of that contention, aside from a general reliance on the current country guidance. The only background material put before me, as already indicated, was that in relation to Gender Equality in Zimbabwe.

73. It was not contended that the appellant would be returning to a rural part of Masvingo where, in accordance with CM, there could be said to be a risk to certain persons. I bear in mind the fact, now accepted, that the appellant's husband's father was a significant Zanu-PF figure in Masvingo, having been the Zanu-PF mayor there, albeit that that was prior to 2001. From the preserved findings of fact, it is also evident that the appellant's husband was at least associated with Zanu-PF. He has plainly been hostile to the appellant in the past as my findings in relation to domestic violence make clear. The appellant would be returning after a long period of absence abroad but as I have already indicated, she would not be returning to a rural area of Zimbabwe.

74. Whilst relying on country guidance evidence which the skeleton argument suggests indicates political volatility in Masvingo Province, Mr Jafferji did not refer me to any current evidence in relation to the extent of Zanu-PF's presence in Masvingo Province, or in particular in the city itself following the recent elections. Even if Zanu-PF does have a

significant presence in Masvingo City, it was not contended that that fact alone would create a risk to this appellant.

75. Although I accept that on the facts of the appellant's case she would not be able to demonstrate loyalty to Zanu-PF were she to be required to do so, on the basis of the evidence put before me I am not satisfied that it is reasonably likely she would be subject to any such requirement on return to her home area. She does not have a significant MDC profile. Whilst her brother E did have such a profile, it is established in the preserved findings (see [44] above] that the appellant did not play any material role in supporting the MDC and it is not reasonably likely that anyone would continue to regard her as a person who may be associated with her brother's MDC activities.

76. I do not find that the evidence establishes that her husband has any political or other influence in his area such as would create a risk to the appellant, in terms of her having to demonstrate loyalty or otherwise. The appellant's father-in-law was undoubtedly influential at one time, and the evidence shows that the appellant's husband himself was associated with Zanu-PF when the appellant was in Zimbabwe. However, I have rejected the only evidence that has been put before me which is said to show ongoing contact between the appellant's husband and the family in Zimbabwe, that evidence relating to the alleged threats. In addition, the appellant did not appear to have much knowledge of his circumstances beyond stating that she did not think he was working because his parents' business that he used to be involved with had collapsed. She did not know whether or not he had any income.

77. The appellant was a nursery school teacher, again a fact that is now established. According to her witness statement of February 2012 at [13], she started that work in approximately September 1996. Her work as a nursery teacher in Chiredzi continued until 2002 when she left the country. The period of her employment is referred to in her witness statement and in the letter from Triangle Limited dated 28 February 2012, which describes her as a pre-school teacher at Dunuza Primary School. Although I was not referred to the evidence that the appellant gave on this issue before Judge Plimmer, at [23] it is recorded that she said that she was not a qualified teacher and she did not require any qualifications to work as a nursery teacher. Her brother had obtained the job for her. Those are relevant facts that I have taken into account.

78. CM reaffirms the assessment made in RN that those who are or have been teachers are in an enhanced or heightened risk category, the significance of which will need to be assessed on an individual basis. Ms Holmes submitted that being a nursery teacher is not the same as having been a senior school teacher. However, in the first place, it does not seem to me that in RN a distinction was made between teachers at different levels of the education system. It is reasonable to be sceptical about whether those associated with Zanu-PF would be concerned with

the subtlety of what level of teacher an individual was. Secondly, in RN the teacher's potential as an opinion former was referred to, as well as the fact of schools having been used as polling stations, as the appellant also points out in her witness statement at [28].

79. The position of teachers, more specifically in terms of a geographical assessment, was more recently considered in NN (Teachers: Matabeleland/Bulawayo: risk) Zimbabwe CG [2013] UKUT 00198(IAC), a decision not referred to by the parties in the appeal before me. That decision reiterates the reasons why teachers have been subjected to adverse treatment by those associated with the regime, including because of their imputed support for the MDC. Again, it is clear that the mere fact of being, or having been, a teacher would not be sufficient to establish risk on return.

80. Whilst the appellant would not on the facts as found be regarded as someone who would be at risk purely because of her brother's MDC activities, his background is a relevant consideration. Her brother was also a teacher, at Dunuza Secondary School. That has not been disputed. In her witness statement she refers at [56] to other teachers in the family. These were I, who died from AIDS, her brothers D and R, as well as her sister P, the latter three having left Zimbabwe she says when things started changing and when teachers were being harassed. She also mentions another sister, A who was also a teacher and who also died of AIDS. There is no evidence that the appellant suffered any difficulties as a result of those other family members having been teachers in Zimbabwe, but that family background is nevertheless a relevant consideration.

81. The applicable country guidance cannot, and does not purport, to provide a checklist for the assessment of risk in respect of an asylum claimant. Whilst the country guidance is not to the effect that a person who is or was a teacher would be at risk on return for that reason alone, each case being fact specific, I am satisfied that in the appellant's case she would be at risk when that fact is taken into account. She was a teacher. Her brother was an active member of the MDC, albeit some years ago and was also a teacher. The appellant has been out of the country for many years. The evidence does not indicate that she has any affiliation to Zanu-PF which, whilst that would not indicate a risk in terms of any loyalty test, does mean that she would not be able to use any such connections as a mechanism of protection against hostility from Zanu-PF or those associated with them. Her family background includes the fact that other close family members were teachers.

82. Whilst for the reasons I have given I am not satisfied that the appellant would be at risk from her husband, it is reasonably likely that she would not be able to turn to him for any support in terms of deflecting adverse attention from her.

83. In summary therefore, the conclusion I have come to is that the appellant has established a well founded fear of persecution in her home area on account of an imputed political opinion because of her former occupation as a teacher, combined with her particular background and circumstances.

84. The question of internal relocation therefore arises. I do not consider that she could go and live in Chiredzi, which I do not take to be her home area. Her evidence is that it is relatively close to Masvingo and the map provided to me confirms that. In any event, Chiredzi is the place where her and her brother taught and it is in Masvingo Province.

85. The only other place of internal relocation advanced on behalf of the respondent was Harare. The question is, would it be reasonable to expect the appellant to relocate to Harare without undue hardship.

86. It is not suggested that the appellant has ever lived in Harare. There is nothing to indicate that she or her family have the financial resources to be able fund the costs of whatever accommodation could be found for her there. I bear in mind the evidence from the appellant that her husband has not provided for her children’s school fees and that sometimes friends provide those funds. It is implicit in the findings I have made in relation to the lack of interest in the family or contact with the family by the appellant's husband that I accept that evidence.

87. Mr Jafferji suggested that, realistically, the question of internal relocation has to be considered on the basis that she would live with her children. On the other hand, given that she has been separated from her children in the UK, she would be in no worse position in that respect in Zimbabwe even if she lived in Harare and they continued living with her half-sister in Chiredzi. Indeed, she would at least have a better chance of seeing them in Zimbabwe then when living in the UK.

88. I do not consider that it would be reasonable to expect the appellant to relocate to Harare without her children. I agree with Mr Jafferji’s proposition to the effect that the question should be looked at on the basis that she would live with her children. Whilst they have been separated whilst the appellant has been in the UK, to some extent that has been an enforced separation in the sense that she is at risk in her home area, given my findings. In any event, I consider that it is inherently unreasonable to expect the appellant to live in Zimbabwe without her children.

89. If her children are to live with her, they would have to leave the area where they were born and have been brought up. They are aged 17 and 14 and will undoubtedly have settled lives in their home area. They would be moving to an area where they have not lived and where accommodation would have to be found for the three of them, with limited funds. They would have to re-establish themselves in education.

In all these circumstances, I am not satisfied that the appellant does have available to her the option of internal relocation.

90. In the light of my conclusions in respect of the asylum ground of appeal, the appellant's removal would also constitute a breach of her human rights under Article 3 of the ECHR.

91. Given my conclusion that the appellant has established an entitlement to refugee status, it is not necessary for me to go on to consider in detail the two other bases on which it is contended that the appellant should succeed in her appeal, namely the 'legacy/395C' point, and Article 8. The former does however, require rather more consideration than the latter.

92. The 'legacy' argument runs thus: there was a policy between 2009 and 2012 to the effect that residence of between 4-6 years and 6-8 years would be significant in terms of whether it was right to remove someone under paragraph 395C. When paragraph 395C was considered in this case, the policy had not yet been changed in a way that would favour her case. The policy changed in August 2009 and the decision in her case was made in June 2009. The policy was never applied to her even though it was in existence throughout the appeal process. The point was not previously advanced on her behalf because the case law had not developed.

93. The result, so Mr Jafferji contended, was that I should find that the immigration decision which is the subject of this appeal, is a decision that is "unfair" and the removal decision should be remitted to the Secretary of State for fresh consideration.

94. It seems to me that this submission is misconceived. It is acknowledged that the 'policy' that is relied on was not one that existed at the date of the decision in question. The 'policy' is presumably a reference to Chapter 53 of the Enforcement Instructions and Guidance ("EIG"), which changed in August 2009 (see Hakemi [2012] EWHC 1967 (Admin) at [7]). The decision in this appeal is dated 8 June 2009, being a decision to remove the appellant as a person subject to administrative removal under section 10 of the Immigration and Asylum Act 1999. The policy contended for in terms of length of residence did not come into existence until August 2009.

95. I do not see on those facts how it could be said that the decision is 'unfair', in other words, not in accordance with the law, when at the very least at the time it was taken it was a lawful decision. It could not have become unlawful because subsequently a new or different approach to removals was instituted. The argument is more properly directed towards a proportionality argument under Article 8, but for the reasons given below I do not find that it has any purchase on an Article 8 assessment either.

96. Mr Jafferji conceded that the appellant's was not a ‘legacy’ case; she did not apply for asylum until 3 March 2009 and a decision in her case was made on 8 June 2009. I was not referred to any of the authorities on legacy cases, of which the most recent is now Geraldo [2013] EWHC 2763 (Admin), decided after the hearing of the appeal before me.

97. In Hakemi the terms of the applicable EIG are set out. One of the factors to be taken into account is delay on the part of the UKBA. The delay relied on in this appeal is delay after the refusal of the appellant's application for further leave to remain on 6 November 2003. It is said that there was delay in that no steps were taken to remove the appellant after that decision.

98. I do not accept that the delay contended for on behalf of the appellant comes within the terms of the sort of delay described in the EIG as set out in Hakemi. There was no delay in dealing with the application by the appellant. When her application for further leave to remain was refused, she would have been told that she should leave the UK. She made no further contact with the Home Office and only made further contact with the asylum application in March 2009, an application which was decided promptly.

99. I do not consider that the decision in Okonkwo supports the appellant's argument on this issue. That case concerned a wholly different set of factual circumstances and was a case in which the EIG was applicable at the date of the immigration decision in question, unlike in this appeal.

100. So far as Article 8 is concerned, a reasoned factual assessment is unnecessary in the circumstances, that (alternative) ground being subsumed within the asylum and Article 3 grounds. I have already made clear my views on the ‘legacy/395C’ argument.

Decision

101. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made, allowing the appeal on asylum grounds, and on human rights grounds with reference to Article 3.

Anonymity

I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the anonymity of the appellant and consequently this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

8/10/13