Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00432/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 17 September 2013	**On 15 October 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

BERNARD FINLAY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, instructed by Leonard & Co., Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellant is a citizen of Zimbabwe who was born on 3 October 1971. He arrived in the United Kingdom on 14 April 1990 and was granted indefinite leave to remain on the basis of British ancestry. On 23 July 1997 he was convicted at Winchester Crown Court of murder and sentenced to life imprisonment. The appellant was notified of his liability to be deported and he claimed asylum. On 20 February 2013, the Secretary of State refused the appellant's claim for asylum and humanitarian protection and

under Art 8 of the ECHR. In that letter, the Secretary of State certified under s.72(9) of the Nationality, Immigration and Asylum Act 2002 that the presumption under s.72(2) of that act applied, namely the presumption that the appellant had been convicted by a final judgment of a particular serious crime and constituted a danger to the community of the UK applied. The Secretary of State also made a decision that s.32(5) of the UK Borders Act 2007 applied. On 19 February 2013, the Secretary of State signed a deportation order pursuant to the automatic deportation provisions of the UK Borders Act 2007.

2. The appellant appealed to the First-tier Tribunal. That Tribunal (Judge Britton and Dr T Okitikpi) dismissed the appellant's appeal. First, the Tribunal concluded that the appellant's deportation would not breach Art 8. Secondly, the Tribunal concluded that, given that the appellant had never been involved in politics or a member of a political party, he could safely be returned to Zimbabwe and so dismissed the appeal on asylum grounds and under Art 3 of the ECHR.

3. On 25 June 2013, the First-tier Tribunal (DJ Garratt) granted the appellant permission to appeal to the Upper Tribunal, primarily on the ground that the First-tier Tribunal had arguably erred in law in failing to adjourn the hearing in order that a report to be shortly produced by the Parole Board dealing with the appellant's future risk to the community could be considered by the Tribunal. Permission was also granted on the basis that the Tribunal had failed to apply s.72 of the 2002 Act and make findings in relation to the presumption that the appellant constituted a danger to the community.

Scope of the Appeal

4. In response to that grant of permission, in a rule 24 reply the Secretary of State stated at para 2 as follows:

> "The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing."

5. That is a familiar phraseology seen in rule 24 notices where the Secretary of State concedes the error of law and invites the Tribunal to find as such and to remake the decision.

6. On behalf of the appellant, Mr Slatter, whilst accepting that the decision of the First-tier Tribunal in relation to Art 8 could not stand and would have to be remade, nevertheless maintained that the First-tier Tribunal's decision in respect of the asylum claim also could not stand. In his oral submissions, he developed a number of arguments.

7. Mr Slatter submitted that prior to the First-tier Tribunal hearing the Court of Appeal had granted permission to appeal against the country guidance case of CM (Zimbabwe) [2013] UKUT 00059 (see CM (Zimbabwe) v SSHD [2013] EWCA Civ 660 (13 June 2012)) which the First-tier Tribunal had

applied in this appeal. The First-tier Tribunal should have adjourned the appeal in order to determine, when the transcript of the permission hearing was available, the scope of the challenge in the Court of Appeal to the country guidance in CM. He submitted, relying upon SG (Iraq) v SSHD [2012] EWCA Civ 940 at [77] *per* Maurice Kay LJ, that in granting permission in CM the Court of Appeal had indicated that the entirety of the country guidance was being challenged (see Laws LJ at [42]). As I understood Mr Slatter's submission, in the light of this, his submission was that the applicable guidance that the First-tier Tribunal should have applied was not CM but rather the previous country guidance that was in force, namely RN (Returnee) Zimbabwe CG [2008] UKAIT 00083. As a subsidiary submission to that, Mr Slatter submitted that if the Tribunal had applied RN then the appellant should have succeeded.

8. On behalf of the respondent, Mr Richards accepted that the First-tier Tribunal had erred in law in failing to adjourn in order to consider the soon to be produced report of the Parole Board. That report has, in fact, been produced and was filed with the Upper Tribunal under cover of a letter from the appellant's solicitors dated 13 August 2013. Mr Richards accepted, therefore, that the decision in respect of Art 8 could not stand and had to be remade taking account of all the evidence, including the Parole Board's report. However, he did not concede the other ground upon which permission to appeal was sought. In particular, he did not accept that the First-tier Tribunal's decision to dismiss the appeal on asylum grounds and under Art 3 of the ECHR was wrong in law. Further, he did not accept that the First-tier Tribunal was obligated to adjourn the hearing pending the outcome of the Court of Appeal's decision in the most recent country guidance case for Zimbabwe in CM (Zimbabwe) [2013] UKUT 00059.

9. In my judgment, Mr Slatter's submissions are unsustainable. He relied on a paragraph in the judgment of Maurice Kay LJ in SG (Iraq) at [77] which is in the following terms:

> "In future, when a Country Guidance case is the subject of an application to this Court for permission to appeal, the Civil Appeals Office will seek to ensure that it is dealt with expeditiously. The application will not be referred to a Lord Justice for consideration on the papers. It will be listed as soon as is practicable before one or more Lord Justices as an oral application for permission to appeal, on notice to the Respondent. If permission is granted, the Court will endeavour to make clear whether it is the whole of the guidance which will be reviewed on the hearing of the substantive appeal or only part of it. If the latter, the Court will identify which part or parts, as was done by Carnwath LJ in *PO (Nigeria v Secretary of State for the Home Department* [2011] EWCA Civ 132, at paragraph 58. This should assist the tribunals and practitioners in relation to other pending cases. When permission to appeal has been granted, whether by the Upper Tribunal or by this Court, the Court will endeavour to arrange an early listing of the substantive appeal."

10. That paragraph has to be seen in the context of what was said by the court in SG (Iraq) as a whole. Maurice Kay LJ agreed with the judgment of Stanley Burnton LJ who gave the leading judgment. At [50] Stanley

Burnton LJ endorsed the view of Mr CMG Ockelton (sitting as a Deputy High Court Judge) in the case of R (Qader) v SSHD [2011] EWHC 1765 (Admin) at [33]-[35] where he concluded as follows:

> "33. ... I do not derive any assistance from submissions about what Pill LJ may have thought or intended in granting permission in *HM*, or from speculation about what the outcome of the appeal to the Court of Appeal may be. There are many reasons why permission may be granted, one (albeit only one) of which is to allow a higher court to give its approval to a process or decision that has been challenged. And it is not unknown for challenges in the Court of Appeal to country guidance decisions to be successful solely in relation to the specific appellant, leaving the guidance itself essentially unimpaired. No substantive conclusion can be drawn from the grant of permission; but nor on the other hand can it be assumed, as Mr Dunlop would have it, that the only issues to be considered by the Court will be related to the Tribunal's procedure.
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> 34. The proposition that a decision endorsed as country guidance by the President of the Immigration and Asylum Chamber of the Upper Tribunal loses its force by being challenged, or even by permission to appeal it being granted, I regard as entirely unarguable. The Tribunal has reached a reasoned decision after a review of a mass of relevant evidence. That conclusion remains binding within the terms of the Practice Direction, unless or until it is overturned on appeal or replaced by other guidance. And even if that were not so, it remains in the highest degree relevant to the issues that a decision-maker (whether the Secretary of State, or a representative seeking to advise a claimant) needs to take into account. On many questions, there is no country guidance at all, but that does not prevent the Secretary of State taking decisions, including decisions rejecting fresh claims and imposing certification under s 94. A challenged country guidance decision cannot be worse than no guidance at all.
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> 35. The country guidance system has been endorsed by Parliament in s 105 of the 2002 Act (as amended), and by the Court of Appeal, and appears to be regarded with the highest respect by the Courts in Strasbourg and Luxembourg. That is not to suggest that individual country guidance decisions are infallible, but it is a good reason for supposing that it would be undesirable to render it wholly ineffectual. But the claimant's submission would, if accepted, have that effect. Whenever a decision was under challenge nobody would be entitled to rely on it, however reliable it might otherwise appear to be, until the challenge was resolved and (if necessary) further guidance had been given – which might itself be subject to challenge. That cannot be right: it is both unnecessary and wasteful of resources."

11. As that makes abundantly clear, country guidance remains binding upon the First-tier Tribunal (and indeed the Upper Tribunal) unless and until it is overturned on appeal by the Court of Appeal or departed from by the Upper Tribunal itself. The mere grant of permission to appeal against a country guidance case does not deprive that decision of its authoritative force within the Tribunal structure as country guidance.

12. As Stanley Burnton LJ stated at [67]:

> "A Country Guidance determination of the Upper Tribunal (Immigration and Asylum Chamber) remains authoritative unless and until it is set aside on appeal or replaced by a subsequent Country Guidance determination."

13. As I have said, Maurice Kay LJ agreed with Stanley Burnton LJ's judgment; as did Gross LJ. Nothing in [77] said by Maurice Kay LJ was, in my judgment, intended to detract from the very clear view expressed by Stanley Burnton LJ.

14. Consequently, I reject Mr Slatter's submissions that simply because permission to appeal had been granted by the Court of Appeal in CM, it ceased to be authoritative country guidance for the purposes of the First-tier Tribunal hearing this appeal. On the contrary, it remained authoritative and the First-tier Tribunal was required to apply it to the facts and circumstances as found in relation to this appellant.

15. I note that there was no suggestion before the First-tier Tribunal that more recent "cogent evidence" since the Upper Tribunal's decision in CM justified departure from it. Consequently, the First-tier Tribunal did not err in law in applying CM to the appellant's case and it did not err in law in failing to adjourn the hearing in order that more information could be obtained about the scope of the appeal being run in the Court of Appeal in CM.

Other Grounds

16. Mr Slatter also submitted that the First-tier Tribunal had erred in law in its assessment of the appellant's risk on return in the light of RT (Zimbabwe) [2012] UKSC 38 and HS (Returning asylum seekers) Zimbabwe CG [2007] UKAIT 0094 as regards the risk to the appellant on return to Harare Airport. He submitted that, on the basis of those decisions, the appellant would be at risk on return because he would be required to claim allegiance with ZANU-PF which he did not have. Mr Slatter did not, however, put before me the decisions in RT and HS. I indicated at the hearing that I intended to look at those decisions after the hearing. Having done so, I reject Mr Slatter's submissions. As the Upper Tribunal made clear in CM, the country guidance in HS concerned with the risk on return to Zimbabwe at Harare Airport remained correct (see [202]-[205]). The risk from the CIO, recognised in HS, is to those who are perceived or regarded as low-level MDC supporters. The evidence before the First-tier Tribunal, which led to its finding in para 45, was that the appellant:

> "has never been involved in politics or a member of a political party. We are satisfied that the appellant will not be a target of any violence and will be able to go through the airport without any problems and return to Bulawayo in safety."

17. That finding is wholly consistent with, indeed it complies with, the country guidance in HS. The Supreme Court's decision in RT does not affect that guidance as, again, the Upper Tribunal made clear in CM. In amending its earlier country guidance in the light of RT, it reflected that decision in relation to the risk of individuals once they have returned to their home area and any risk to them whilst there. The Tribunal stated its guidance as follows:

> "5. A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic 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, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF."

18. Nothing in that adjustment to the country guidance affects the guidance in relation to any risk at the airport.

19. Consequently, I reject Mr Slatter's submission that the First-tier Tribunal erred in law in finding that the appellant had failed to establish that he would be at risk on return to the airport at Harare.

20. Finally, Mr Slatter, as I understood his submissions, submitted that the appellant should have won on the basis of CM. That submission cannot stand in the light of the guidance in CM itself. It will be recalled that the appellant comes from Bulawayo. In its country guidance in CM, the Upper Tribunal said this:

> "A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF, including the security forces, even if he or she has a significant MDC profile."

21. The appellant is from Bulawayo. As I have already noted, this appellant had no political profile at all. He had no basis for succeeding in the light of CM.

22. For all these reasons, the First-tier Tribunal did not err in law in finding that the appellant could not succeed in establishing that he was a refugee.

23. That said, I accept that the Tribunal should first have considered whether the certificate under s.72(9) of the 2002 Act applied. That is a statutory requirement set out in s.72(10) of the 2002 Act where it is stated that:

> "The Tribunal .... hearing the appeal –
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> (a) must begin substantive deliberation of the appeal by considering the certificate, and
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> (b) if in agreement that presumptions under sub-section (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal, must dismiss the appeal insofar as it relies on the ground specified in sub-section (9)(a)."

24. In other words, the Tribunal should determine whether the appellant has rebutted the presumption that he has been convicted of a particularly serious crime and constitutes a danger to the public and, therefore, whether the certificate is to be upheld first. Only if the certificate is not upheld should the Tribunal go on and consider the merits of the individual's asylum claim. Although the First-tier Tribunal clearly was in

error in failing to do that, that error could not possibly have been material to their decision in relation to the appellant's asylum claim. For the reasons I have already given, the First-tier Tribunal was properly entitled to conclude that his asylum claim (and under Art 3 of the ECHR) could not succeed.

Disposal

25. The only live issue, therefore, left in the appellant's appeal is whether his deportation would breach Art 8 of the ECHR.

26. Mr Slatter invited me to remit the appeal to the First-tier Tribunal as, in effect, their failure to adjourn the hearing in order to consider the forthcoming Parole Board report had denied the appellant a fair hearing. Mr Richards did not express any dissent from that invitation. In all the circumstances, and having regard to para 7.2 of the Senior President's Practice Statements, I am satisfied that the proper disposal of this appeal is to remit it to the First-tier Tribunal to remake the decision in respect of Art 8.

27. To that extent, the appellant's appeal to the Upper Tribunal is allowed and the appeal is remitted to the First-tier Tribunal to remake the decision in respect of Art 8. The appeal should be heard by a differently constituted panel.

Signed

A Grubb
Judge of the Upper Tribunal