Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01307/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 26 November 2013	**On 16 December 2013**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

TGM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr K H Forrest, Advocate, instructed by McGlashan MacKay, Solicitors

For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant appeals against a determination by a panel of the First-tier Tribunal comprising Judge D'Ambrosio and Mr Eames, promulgated on 2 September 2013, dismissing his appeal against deportation to Zimbabwe. An anonymity order remains in place.

The Grounds of appeal to the Upper Tribunal

2) The grounds go only to the Refugee Convention aspect of the case. The material parts of the grounds are these:

> … Discussion of the appellant's Refugee Convention submission … is contained between paragraphs 73-82 of the decision … It held *inter alia* that the appellant would not be at risk on return because the recent election victory of Zanu-PF meant that the ruling authorities would have no interest in persecuting these perceived as their enemies (paragraph 80) … The panel erred because:-
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> … the panel accepts that before the recent election the appellant would have been at risk (first sentence, paragraph 80). It must be assumed … that it accepted that he would be returned to a rural area and falls into the category described in headnote 3(2) of … CM Zimbabwe CG [2013] UKUT 59 (IAC) …
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> The effect … is that (i) the panel may have sustained this ground of appeal had it not been for the result of recent elections and (ii) it contradicts CG. There has been no CG case on Zimbabwe following the recent election. It what it was doing was seeking to establish CG … it erred in law. It had no authority to do so. In any event, there was no evidence on the basis of which adequate findings would be reached. The conclusion (paragraph 80) is entirely inconsistent with the finding/observation … that had it not been for the results of the election, the panel would have found that there was a real risk on return.
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> … The appeal should be allowed because the panel found that had it not been for the election result, there would have been a real risk on return.

The Country Guidance

3) CM held as follows:

> *(1) There is no general duty of disclosure on the Secretary of State in asylum appeals generally or Country Guidance cases in particular. The extent of the Secretary of State's obligation is set out in R v SSHD ex p Kerrouche No 1 [1997] Imm AR 610, as explained in R (ota Cindo) v IAT [2002] EWHC 246 (Admin); namely, that she must not knowingly mislead a court or tribunal by omission of material that was known or ought to have been known to her.*
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> *(2) The Country Guidance given by the Tribunal in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) on the position in Zimbabwe* ***as at the end of January 2011*** *was not vitiated in any respect by the use made of anonymous evidence from certain sources in the Secretary of State's Fact Finding Mission report of 2010. The Tribunal was entitled to find that there had been a durable change since RN (Returnees) Zimbabwe CG [2008] UKAIT 00083. The Country Guidance in EM does not require to be amended, as regards the position at that time, in the light of-*
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> *(a) the disclosure by the Secretary of State of any of the materials subsequently disclosed in response to the orders of the Court of Appeal and related directions of the Tribunal in the current proceedings; or*
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> *(b) any fresh material adduced by the parties in those proceedings that might have a bearing on the position at that time.*
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> *(3) The only change to the EM Country Guidance that it is necessary to make as regards the position* ***as at the end of January 2011*** *arises from the judgments in RT (Zimbabwe) [2012] UKSC 38. The EM Country Guidance is, accordingly, re-stated as follows (with the change underlined in paragraph (5) below):*

(1) As a general matter, there is significantly less politically motivated violence in Zimbabwe, compared with 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 from the United Kingdom, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.

(2) The position is, however, likely to be otherwise in the case of a person without ZANU-PF connections, returning from 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 and those they control. The adverse attention may well involve a requirement to demonstrate loyalty to ZANU-PF, with the prospect of serious harm in the event of failure. Persons who have shown themselves not to be favourably disposed to ZANU-PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (RT (Zimbabwe)).

(3) The situation is not uniform across the relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described in the preceding paragraph, in reality does not do so. For example, the evidence might disclose that, in the home village, ZANU-PF power structures or other means of coercion are weak or absent.

(4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee is a MDC member or supporter. A person may, however, be able to show that his or her village or area is one that, unusually, is under the sway of a ZANU-PF chief, or the like.

(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.

(6) 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.

(7) The issue of what is a person's home for the purposes of internal relocation is to be decided as a matter of fact and is not necessarily to be determined by reference to the place a person from Zimbabwe regards as his or her rural homeland. As a general matter, it is unlikely that a person with a well-founded fear of persecution in a major urban centre such as Harare will have a viable internal relocation alternative to a rural area in the Eastern provinces. Relocation to Matabeleland (including Bulawayo) may be negated by discrimination, where the returnee is Shona.

(8) Internal relocation from a rural area to Harare or (subject to what we have just said) Bulawayo is, in general, more realistic; but the socio-economic circumstances in which persons are reasonably likely to find themselves will need to be considered, in order to determine whether it would be unreasonable or unduly harsh to expect them to relocate.

(9) The economy of Zimbabwe has markedly improved since the period considered in RN. The replacement of the Zimbabwean currency by the US dollar and the South African rand has ended the recent hyperinflation. The availability of food and other goods in shops has likewise improved, as has the availability of utilities in Harare. Although these improvements are not

being felt by everyone, with 15% of the population still requiring food aid, there has not been any deterioration in the humanitarian situation since late 2008. Zimbabwe has a large informal economy, ranging from street traders to home-based enterprises, which (depending on the circumstances) returnees may be expected to enter.

(10) As was the position in RN, those who are or have been teachers require to have their cases determined on the basis that this fact places them in an enhanced or heightened risk category, the significance of which will need to be assessed on an individual basis.

(11) In certain cases, persons found to be seriously lacking in credibility may properly be found as a result to have failed to show a reasonable likelihood (a) that they would not, in fact, be regarded, on return, as aligned with ZANU-PF and/or (b) that they would be returning to a socio-economic milieu in which problems with ZANU-PF will arise. This important point was identified in RN ... and remains valid.

(4) In the course of deciding CM's appeal, the present Tribunal has made an assessment of certain general matters regarding Zimbabwe ***as at October 2012****. As a result, the following country information may be of assistance to decision-makers and judges. It is, however,* ***not*** *Country Guidance within the scope of Practice Direction 12 and is based on evidence which neither party claimed to be comprehensive:*

(a) The picture presented by the fresh evidence as to the general position of politically motivated violence in Zimbabwe as at October 2012 does not differ in any material respect from the Country Guidance in EM.

(b) Elections are due to be held in 2013; but it is unclear when.

(c) In the light of the evidence regarding the activities of Chipangano, judicial-fact finders may need to pay particular regard to whether a person, who is reasonably likely to go to Mbare or a neighbouring high density area of Harare, will come to the adverse attention of that group; in particular, if he or she is reasonably likely to have to find employment of a kind that Chipangano seeks to control or otherwise exploit for economic, rather than political, reasons.

The fresh evidence regarding the position at the point of return does not indicate any increase in risk since the Country Guidance was given in HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094. On the contrary, the available evidence as to the treatment of those who have been returned to Harare Airport since 2007 and the absence of any reliable evidence of risk there means that there is no justification for extending the scope of who might be regarded by the CIO as an MDC activist.

The Findings in the First-tier Tribunal

4) At paragraphs 73-76, under the heading of "the Refugee Convention Political Persecution Claims", the panel rejected as incredible any real risk based on an alleged connection to the appellant's father and the appellant's uncle. Under the heading "The Refugee Convention Particular Social Group claims", the panel continued:

77. It is claimed that the Zimbabwe authorities will persecute the appellant as a member of a PSG because for the past ten years he has been living in the UK. The implication is that Zanu-PF authorities and their supporters would consider members of that PSG to be political opponents.

78. The appellant's solicitor relied on ***CM*** and ***EM***: being ***CM (EM Country Guidance: disclosure_ Zimbabwe CG [2013] UKUT 00059 (IAC)*** and ***EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)***. He submitted those determination give guidance to the effect that there is a real risk that appellant will be asked to show that he was loyal to and would vote for the Zanu-PF regime; that such questions are more likely to occur in rural areas. He submitted that since the appellant's home area is a rural area, there is a real risk

that he would find it difficult to avoid adverse attention amounting to serious ill-treatment from Zanu-PF authority figures and those they control.

79. **But we find that there is not a real risk that the appellant will suffer persecution by reason of such PSG. We so find for the following reasons.**

80. We accept that **before the recent Presidential election** there would have been a real risk that the appellant would have been asked to show that he was loyal to and would vote for the Zanu-PF regime. **But we find that there is no longer such a risk for the following reasons.** The purpose of the Zanu-PF supporter questions to strangers was to threaten them with harm if they would not vote for Mr Mugabe and his party. But there is no longer the need for any such threat (or related questions). Mr Mugabe won (by a very comfortable majority of 61 per cent) the very recent Presidential election. Whatever the views of the other nations, the African nations surrounding Zimbabwe have not criticised the presidential voting system and procedures as being unfair. The Zimbabwe Constitutional Court dismissed the MDC petition which sought to challenge that election outcome. Zanu-PF supporters in Zimbabwe have good reason to feel strong and confident. They probably now see MDC supporters as a spent force whom they need not fear. Therefore (compared to the past), it is not likely that they will randomly question the appellant or other strangers about their political loyalties.

81. In any event, it would not seriously offend the appellant's conscience or his core beliefs to tell Zanu-PF supporters that he would be loyal to a Zanu-PF government if he were asked to do so. His father was employed by an education department controlled by a Zanu-PF government . And by his own evidence, the appellant has no interest in politics, whether in the UK or in Zimbabwe. It is a matter of indifference to him whether Zanu-PF or MDC wield political power in Zimbabwe.

82. For the foregoing reasons and from the evidence in the round we find that the appellant has ***failed to prove*** to the required standard that he has a well-founded fear of persecution ***anywhere in Zimbabwe***: (1) by reason of actual or imputed political opinion or (2) by reason of membership of a PSG.

5) The appellant refers to the relevant UT Practice Directions and Guidance Note and to DSG and Others (Afghan Sikhs: Departure from CG) Afghanistan [2013] UKUT 148 (IAC), which is headnoted as follows:

> 1. A judge may depart from existing country guidance in the circumstances described at Practice Direction 12.2 and 12.4 and the UT (IAC) Guidance Note 2011, No 2 (paragraphs 11 and 12).
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> 2. The evidence before the judge in the present case justifies his departure from the country guidance …

Secretary of State's Response under Rule 24

6) The response to the grant of permission to appeal includes the following:

> 3. The judge found that prior to the Presidential elections the appellant would have been [at] risk of being required to demonstrate loyalty to Zanu-PF. However the judge found that matters had changed and gave reasons for his conclusion. The judge had already put this point to the representatives, paragraphs 31 onward refer.
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> 4. The Court of Appeal in KH Sudan 2008 EWCA Civ 887 at paragraph 4 stated as follows:
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> 5. Baroness Hale's concurring speech in AH stresses what is uncontroversial, that no country guidance case is for ever; it is a factual precedent, as Laws LJ has aptly called it, and as such is open to revision in the light of new facts – new either in the sense of being newly ascertained or in the sense that they have arisen only since the decision was promulgated – provided in each case that they are facts of sufficient weight.
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> 6. It was open to the judge to consider that the result of the elections with a considerable vote for Zanu-PF was a material issue altering the risk analysis.
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> 7. The respondent does not consider that the judge gave any adequate reasons for finding the appellant to be at risk in his home area. It is submitted that this must be the basis of the finding at paragraph 80 the appellant would have been asked to show loyalty. However given the nature of the appellant's family background as Zanu-PF supporters it is far from clear why the judge found a real risk.
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> 8. However and in the alternative the respondent's position is that it is clear from … CM … that even if it were accepted that the appellant would be at risk in his home area, there is an internal relocation opinion.
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> 9. The head note of CM at 7 and 8 [quoted] makes it clear that there is an internal relocation option to Harare and Bulawayo …
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> 10. The appellant is young and fit and educated with supportive family in both the UK and Zimbabwe. Internal relocation is a self evident option rendering any error in law to be not material.
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> 11. No material error in law is disclosed.

Submissions for the Appellant

7) Mr Forrest supplied a skeleton argument and expanded upon it as follows. The First-tier Tribunal could depart from country guidance, but only where there was either credible fresh evidence which had not been considered in the CG case, or if the CG case had become out of date by reason of developments in the country. The panel was not entitled to depart from CM/EM, because the recent elections indicated little or no likelihood that Zanu-PF had ceased to persecute political opponents. A bundle of further background evidence (Inventory of Productions 2) was tendered. Mr Forrest referred to item 5, a Home Office Operational Guidance Note (OGN) of November 2013. At paragraph 3.9.22 this says that following the elections in July 2013 the situation has not changed significantly from that considered in CM. There were continued reports of ill-treatment of perceived MDC supporters, particularly in certain

Zanu-PF areas, although there were a few incidents of similar difficulties in MDC dominated areas, namely Matabeleland North, Matabeleland South, low density areas of Harare and Bulawayo. This showed that the panel's findings at paragraph 80 could be nothing other than speculative.

8) Mr Forrest submitted that the observation at paragraph 81 that it would not "seriously offend the appellant's conscience" to say that he would be loyal to Zanu-PF was inconsistent with RT (Zimbabwe) [2013] UKSC 38.

9) Mr Forrest acknowledged that the next question was whether the errors of law make any difference. He raised a criticism of the determination at paragraph 73-76 where there are findings of no risk through two family members. The panel had not made it entirely clear why there was no positive finding in respect of the appellant's uncle, failing to say whether it did believe that the appellant would be at risk "on return in his own right, as opposed to because of alleged political opinions of two family members." That was important because, applying CM, a person might be at risk without Zanu-PF connections on returning to a rural area, and the appellant would be returning to a rural area. The panel had held that before the recent elections the appellant would have been at risk on return, and there was a tension between this finding and the findings of paragraph 75 and 76. Thus, it was at least unclear whether the errors of law would have made a difference to the outcome, and the absence of clear findings was enough to require a fresh decision.

10) In response to the Rule 24 note, Mr Forrest relied on the submissions already made to establish that there was error of law in respect of declining to follow country guidance. On internal relocation, he said that the panel failed to apply the law to the particular circumstances of the appellant.

11) Finally, Mr Forrest said that the appeal should be remitted to a differently constituted First-tier Tribunal panel under directions for it to make clear findings on "(i) whether this appellant will be at risk on return, and (ii) even if he would be if returned to his home area, whether his personal circumstances indicated that he could internally relocate."

12) I enquired what information was before the First-tier Tribunal as to where the appellant's area of return might be, and whether that was identified as an area of potential risk from Zanu-PF. Mr Forrest said (and Mr Matthews agreed) that this did not appear to have been addressed in the First-tier Tribunal. It is mentioned only at Appendix 2 of the First-tier Tribunal determination, a summary of the evidence from the appellant's mother, where the following appears in the summary of her cross-examination:

> "In Zimbabwe she lived with her husband and children in Mashengo (which used to be called Fort Victoria, in Mashingo Province) near an area called "Real Zimbabwe" about 5 hours drive from Harare. There she had a house which her late husband sold when he returned to Zimbabwe."

13) Neither party was able to assist on whether this information places the appellant's origins in a Zanu PF or MDC region, or one with any particular history of difficulties. Mr Forrest said that lack of enquiry into whether the appellant's potential area of return was one of risk was another reason for a further hearing.

14) I further enquired whether there was information on whether the appellant is Shona, Ndebele or of some other ethnicity, which might impact on whether he could reasonably be expected to live in Harare, in Bulawayo, or somewhere else. No such information was on record.

Submissions for the Respondent

15) Mr Matthews relied upon the Rule 24 response. He went firstly to the question of how CM, without any modification, would apply to the appellant's Refugee Convention case. He said that guidance is inevitably against the appellant. He did not hold any actual political opinion and had no connection to the MDC, so at best there could be a case based on imputed political opinion. The determination at paragraph 81 was not well framed in stating that it would "not seriously offend the appellant's conscience or core beliefs to tell Zanu-PF supporters that he would be loyal", which suggested an incorrect legal approach. However, there was nothing to show that the appellant might be called upon to manifest loyalty. It is well established that there is no such risk at Harare Airport, his point of return. The appellant had put no information before the Tribunal about where his home area should be considered to be, and it was for him to make his case. He has been in the UK since age 11. Under the heading of proportionality at paragraph 147 the panel noted that he has education, training and work experience which should be transferable to any country and would suit him to find reasonably well paid work in Zimbabwe, especially in the cities, so as to enable him to accommodate and support himself. Although internal relocation had not been expressly addressed, it was an obvious point to which both sides should have given attention, in the light of the findings in CM/EM. The obvious options for the appellant were to locate himself in Harare or in Bulawayo. Even if the Upper Tribunal required to make a fresh decision, there was no need to remit to the FtT or to fix any further hearing, as it was plain on the facts and on the guidance that the decision could only be against the appellant. The panel correctly directed itself about the law on internal relocation at paragraphs 57 to 59, but unfortunately did not return to the subject. Whether there was an error was immaterial, because on those findings which were reached the appellant failed to show that he would be returned anywhere he might be at any risk, and even if his return did imply that he might be expected to go to a home area where a risk was present, he had the option of internal relocation.

Reply for the Appellant

16) Mr Forrest argued that paragraph 147 of the determination was directed to a proportionality assessment and should not be prayed in aid of an internal relocation consideration. Headnote 3-8 of the country guidance required consideration of the appellant's individual and socio-economic circumstances. That was apt for a further hearing. Mr Forrest accepted that the onus was on the appellant to show where in the country he might be at risk.

Discussion and Conclusions

17) The respondent's deportation decision did not deal expressly with internal relocation. It was based on the appellant in a previous appeal having failed to establish any risk in terms of the Refugee Convention; there having been no significant change in his circumstances since that determination; and the country situation, under reference to CM, having improved. The decision refers simply to the proposition that the return of a failed asylum seeker with no significant MDC profile does not result in that person facing a real risk of having to demonstrate loyalty to Zanu-PF.

18) Given the history, the appellant had to show to the contrary how his case did benefit from the guidance in CM/EM. He failed to do so. He would be returned to Harare as a person with no Zanu-PF connections. There is nothing to place him at risk there, even in a high density area. Wherever his "home" in Zimbabwe might be – and it was for him to clarify that –his case fell at that hurdle.

19) The case the appellant argued in relation to his father and uncle, which is not the subject of a ground of appeal, was rightly found at paragraph 75(1) and (2) to take him nowhere.

20) I assume here that the appellant is from Masvingo (as the Province name is usually spelled). That is a Zanu PF stronghold, and so is the strongest conclusion he could have hoped for, if any thought had been given to the matter. Even if that leads to a finding of risk to an apolitical person returning after years in the UK, the relocation option is obvious. The individual and socio-economic assessment can be taken from paragraph 147, where it is neatly and concisely set out. It is no less applicable for having been said in the proportionality context.

21) I uphold the submission for the respondent that any error is immaterial. That includes any error in saying that the appellant's conscience would not be seriously offended by professing loyalty; that may well be true in fact, but it is not a legal test against him.

22) Whether there is any error at all might have been a good question. The First-tier Tribunal might have resolved the case by applying country guidance as it stood. It preferred the route of considering whether the Presidential election (a major recent event of potential significance) changed the circumstances. Having taken that route,

the reasoning at paragraph 80 is logical. Representatives did not address whether further evidence could, in principle, be used to scrutinise the conclusion reached. If it turns out from other (and probably later) evidence to be wrong, that might more obviously be characterised as grounds for a fresh claim, rather than legal error. In the event, the point is academic.

23) The determination of the First-tier Tribunal does not err in law on any point which requires it to be set aside, because the appellant's appeal inevitably failed, applying country guidance (as it stood then and as it stands now) to its facts. The determination shall stand.

27 November 2013
Judge of the Upper Tribunal