IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01808/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 4 November 2015 **On 2 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

E M
~~(ANONYMITY DIRECTION NOT MADE)~~

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. W. Bhebhe of Freeman Harris Solicitors
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kelly promulgated on 18 June 2015 in which the Appellant's appeal against the Respondent's decision to refuse to grant asylum was dismissed.

2. Permission to appeal was granted as follows:

> "I am further satisfied that there is an arguable error of law in the decision in that following a finding that the Appellant may be stopped and questioned at the airport the Judge goes on to find that she will not be subjected to serious ill-treatment. This does not take account of the two-

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stage process identified in HS (Zimbabwe) CG [2007] UKAIT 00094 and TM (Zimbabwe) [2010] EWCA Civ 916. In addition if she stopped and questioned at the airport the Judge failed to identify whether she would fall in a risk category. I am satisfied that there are arguable errors of law in the decision."

3. I heard submissions from both representatives following which I reserved my decision.

Submissions

4. Mr. Bhebhe relied on the grounds and the skeleton argument.

5. Ms Isherwood relied on the Rule 24 response. She submitted that there was no material error of law in the decision. The Appellant had made a number of applications to remain and her last report of call was an asylum application. I was referred to paragraph [31] which referred to the previous decision. In paragraph [33] the judge correctly identified that it was necessary for him to consider whether the situation was different today.

6. The judge had considered the cases of HS (Zimbabwe) (paragraph [37]), EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) (paragraph [40]), and CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) (paragraph [18]). She referred to paragraph [1] of the headnote to HS (Zimbabwe). The Appellant had not been found credible. She referred to paragraph [3] of the headnote. As the Appellant's asylum claim had not been accepted, she would be returning as a failed asylum seeker and would not be of any interest to the authorities.

7. I was referred to paragraph [38] of the decision. The Appellant would not proceed to the next stage as set out in HS (Zimbabwe) beyond the initial screening. The judge's findings in paragraph [39] were open to him based on the case law before him. I was referred to paragraph [7] of the skeleton argument. Nowhere in caselaw did it state that length of residency in the United Kingdom put an Appellant at risk. In relation to paragraph [8] of the skeleton argument, the Appellant had a low level profile. In relation to paragraph [10] and the case of HS (Zimbabwe), the Appellant did not fall within the category who would be subject to the second stage interrogation. She would not have to lie.

8. In conclusion she submitted that it was a sustainable decision with reasoned findings and the grounds were a mere disagreement with the findings of the judge.

9. In response the Appellant's representative referred to paragraph [38] of the decision and the risk of being subjected to screening. He submitted that it was an intelligence led investigation and therefore the authorities would know who was arriving on the plane. He submitted that the Appellant's name could be found on the internet today as a critic of the regime. She was anti-Zanu PF. He submitted that the judge needed to assess what would happen at the airport. It was agreed that activities

which were political and adverse to the regime would raise the alert at a screening interview. The Appellant would then be taken to the more intensive second stage interrogation. He submitted that the CIO would not have read her asylum decision and the finding that the article written by the Appellant was an attempt to bolster her asylum claim. All the Zimbabwean authorities would see was the Appellant's name on the internet associated with anti-regime views. It was therefore likely that she would be taken for the second stage interrogation which involved the risk of serious mistreatment and a breach of Article 3.

10. He submitted that the situation had not changed since CM (EM country guidance; disclosure) Zimbabwe. The reaction of the security agents and operatives at the airport was unknown and was arbitrary. They would be alert to anyone who had condemned or criticised the regime. The judge's approach was materially flawed and the decision contained a material error of law. The Appellant's risk of persecution was highly likely.

Error of law

11. I have carefully considered the grounds and the decision, together with the caselaw referred to above.

12. The judge sets out his approach in paragraph [37].

> "37. As well as assessing any risk to the Appellant in Zimbabwe generally, I must also consider what would happen at Harare airport. I must consider whether or not on arrival the Appellant would be identified as someone who was of interest to the regime. If she were to be so identified and questioned about her political activities in the United Kingdom, I must consider whether or not those questioning her would accept a truthful answer from the Appellant along the lines that she engaged in the activities to bolster her asylum claim and whether they would therefore let her go on her way or, alternatively, whether she would face a real risk of persecution or serious ill-treatment. In considering these matters, I have regard to the country guidance case of HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094."

13. At paragraphs [38] and [39] he sets out his conclusions as a result of his consideration of the caselaw:

> "38. Although far from inevitable, there is a risk that the Appellant would be subjected to a screening interview at Harare airport and that any internet search may reveal her *sur place* activities and the article that she wrote for the Zimbabwean newspaper. However, I also find that any checks at Harare airport are likely to be intelligence led. An intelligence led organisation, having carefully considered the evidence, would come to the conclusion that, notwithstanding her *sur place* activities in 2013, the Appellant is no more than a low level activist who does not appear to be particularly active at the present time. She wrote the newspaper article almost two years ago. She has not provided evidence of any further articles that she has written since. It has been nearly two years since the ACTSA News booklet was published with the Appellant's photograph in it and the photographs of the Appellant attending demonstrations also date back to 2013. I therefore find

> that the Appellant is unlikely to be perceived as a person with anything other than a low-level profile at the time.
>
> 39. In addition, if the intelligence agencies have infiltrated anti-regime organisations in the UK as suggested by the Appellant, they will know very well who the serious activists are and equally that this Appellant is a low level MDC member who engaged in a burst of activity in 2013 in order to bolster her asylum claim in the UK. I therefore find that in the event that she is stopped and questioned at the airport, she is unlikely to be subjected to serious ill-treatment and will be allowed to carry on with her journey unharmed. I therefore find that the Appellant has not shown to the low standard that she would be at real risk at Harare airport."

14. Paragraph 3 of the headnote to HS (Zimbabwe) states:

> "The process of screening returning passengers is an intelligence led process and the CIO will generally have identified from the passenger manifest in advance, based upon such intelligence, those passengers in whom there is any possible interest. The fact of having made an asylum claim abroad is not something that in itself will give rise to adverse interest on return."

15. Paragraph 11 of TM (Zimbabwe) states:

> "Although the Central Intelligence Organisation ("CIO") had taken over responsibility for monitoring returnees at Harare airport, the AIT found that the conclusion in HS remained valid; the CIO were only concerned to detect those who were adverse to the regime, principally those perceived to be politically active in the MDC, although the AIT in HS accepted that critics of the regime would also be of interest."

16. I have considered paragraph [34] of HS which sets out the analysis of the tribunal in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 regarding the procedure on return to the airport. Paragraph 249 of AA (Risk for involuntary returnees) Zimbabwe states:

> "The purpose of the initial interview is to establish whether the deportee is of any interest to the CIO or the security services. The deportee will be of interest if questioning reveals that the deportee has a political profile considered adverse to the Zimbabwean regime." Paragraph 250 of AA (Risk for involuntary returnees) Zimbabwe provides that an individual will be taken away for interrogation "if such a political or relevant military profile is suspected".

17. It is apparent that that there need only be a suspicion of a political profile in order for an individual to be taken away for the second stage interrogation. The headnote to HS (Zimbabwe) refers to passengers in whom there is "any possible interest". TM (Zimbabwe) refers to those "perceived" to be politically active, as well as critics of the regime. AA (Risk for involuntary returnees) Zimbabwe refers to those how are "suspected" of having a political profile.

18. The judge finds in paragraph [38] that there is a risk that the Appellant would be subjected to a screening interview. He finds that an internet search may reveal her activities and the article that she wrote. However he then finds that "on a careful consideration of the evidence", the CIO

would come to the conclusion that she was no more than a low level activist.

19. The two-stage process set out in HS (Zimbabwe), following AA (Risk for involuntary returnees) Zimbabwe, does not refer to any "careful consideration" of the evidence but rather a suspicion of a political profile.

20. The judge does not refer to this two-stage process in the decision. He refers only to the checks at the airport which he finds would reveal her *sur place* activities and the article. Following the caselaw, I find that he was required to consider whether, on discovery of these *sur place* activities and the article, there was a reasonable likelihood that the Appellant would be subject to the second stage interrogation. In order for this to be the case, all that the Appellant needs to show is that there is a suspicion of a political profile.

21. In paragraph [39], there is no reference to the two-stage process, but only to being stopped and questioned at the airport. I therefore find that the decision involved the making of an error of law insofar as the judge failed to take account of the two stage process set out in HS (Zimbabwe) and AA (Risk for involuntary returnees) Zimbabwe.

Remaking

22. The judge finds in paragraph [38] that there is a risk that the Appellant would be subjected to a screening interview. He finds that an internet search may reveal her activities and the article. Paragraph 250 of AA (Risk for involuntary returnees) Zimbabwe provides that an individual will be taken away for interrogation "if such a political or relevant military profile is suspected". I find that there is a reasonable likelihood that the Appellant will be taken away for interrogation following the discovery of the article and her *sur place* activities. I find that there is a reasonable likelihood that this information would be enough to cause the CIO to suspect that she has a political profile.

23. Following HS (Zimbabwe) and AA (Risk for involuntary returnees) Zimbabwe, the second stage of interrogation "carries with it a real risk of serious mistreatment sufficient to constitute a breach of article 3." I therefore find that by being taken for the second stage of interrogation, there is a real risk that the Appellant will be seriously mistreated contrary to Article 3.

24. Paragraph 251 of AA (Risk for involuntary returnees) Zimbabwe goes on:

> "If the reason for suspicion is that the deportee has a political profile considered to be adverse to the Zimbabwean regime that is likely to be sufficient to give rise to a real risk of persecutory ill-treatment for a reason that is recognised by the Refugee Convention."

25. It is therefore necessary to consider whether the Appellant has a political profile considered to be adverse to the Zimbabwean regime. The judge based his conclusions on the fact that the authorities would accept would accept a "truthful answer from the Appellant along the lines that she

engaged in these activities to bolster her asylum claim" [37]. Mr. Bhebhe submitted that there was no reasonable likelihood that the CIO will have read the decision where it was found that her activities were undertaken to bolster her asylum claim. Neither are there any grounds for believing that the authorities would accept this explanation.

26. I was referred to the case of RT (Zimbabwe) [2012] UKSC 38. Paragraphs [71] and [72] state:

> "71. As a general proposition, the denial of refugee protection on the basis that the person who is liable to be the victim of persecution can avoid it by engaging in mendacity is one that this court should find deeply unattractive, if not indeed totally offensive. Even more unattractive and offensive is the suggestion that a person who would otherwise suffer persecution should be required to take steps to evade it by fabricating a loyalty, which he or she did not hold, to a brutal and despotic regime.
>
> 72. As a matter of fundamental principle, refusal of refugee status should not be countenanced where the basis on which that otherwise undeniable status is not accorded is a requirement that the person who claims it should engage in dissimulation. This is especially so in the case of a pernicious and openly oppressive regime such as exists in Zimbabwe. But it is also entirely objectionable on purely practical grounds. The intellectual exercise (if it can be so described) of assessing whether (i) a person would - and could reasonably be expected to – lie; and (ii) whether that dissembling could be expected to succeed, is not only artificial, it is entirely unreal. To attempt to predict whether an individual on any given day, could convince a group of undisciplined and unpredictable militia of the fervour of his or her support for Zanu-PF is an impossible exercise."

27. The judge found that the Appellant had engaged in political activity in the United Kingdom, by joining the MDC and the Zimbabwe Vigil Coalition. Although he found that this was to bolster her asylum claim, he accepted at [36] that "opportunistic activities *sur place* is not an automatic bar to asylum". He found that it was unlikely that she would be perceived as a person "with anything other than a low level profile at the present time" [36]. In paragraph [37] he states that they will know "that this Appellant is a low level MDC member". He has found that she has a profile, albeit low level.

28. I find that, given that there is a reasonable likelihood that the Appellant will be taken for the second stage of interrogation, given that the reason for the suspicion will be that she "has a political profile considered to be adverse to the Zimbabwean regime" given that she is a member of the MDC, following paragraph 251 of AA (Risk for involuntary returnees) Zimbabwe I find that there is a reasonable likelihood that she will face a real risk of persecutory ill-treatment for a Convention reason.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and I set it aside.

I remake the decision allowing the appeal on asylum and human rights grounds.

Signed Date 26 November 2015

Deputy Upper Tribunal Judge Chamberlain