Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/03273/2015**

THE IMMIGRATION ACTS

Heard at Birmingham
On 19 January 2016

Decision and Reasons Promulgated
On 27 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LORRAINE RUMBIDZAI MUCHEMWA
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
For the Respondent: Ms R Manning (counsel) instructed by French & Company, solicitors.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge A M S Green, promulgated on 20 May 2015, which allowed the Appellant's appeal on asylum and article 8 ECHR grounds.

Background

3. The Appellant was born on 23 September 1968 and is a national of Zimbabwe. The appellant entered the UK in August 2000. On 22 April 2002 the appellant applied for leave to remain in the UK as a student. The respondent granted that application and subsequently granted further leave to remain until 7 March 2006. On 8 November 2005 the appellant applied for indefinite leave to remain in the UK. The respondent refused that application on 19 May 2006. On 29 September 2009 the appellant claimed asylum. The respondent refused the appellant's application on 22 October 2009. The appellant unsuccessfully appealed that refusal of asylum, and her appeal rights became exhausted on 15 March 2010.

4. On 19 January 2011 the appellant lodged further representations which were rejected by the respondent. The appellant again lodged further representations and, on 30 November 2012, the respondent rejected those further representations. The appellant did not have a right of appeal against either rejections of further representations.

5. The appellant lodged representations for a third time of 9 December 2014. The respondent rejected those further representations on 11 February 2015, and on that occasion served the appellant with a decision giving her a right of appeal.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge A M S Green ("the Judge") allowed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged and on 10 June 2015 Judge Fisher gave permission to appeal stating

> "2. The grounds seeking permission assert that the Judge erred in law by failing to follow the country guidance in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC)
>
> 3. In his decision the Judge attached considerable weight to a country experts report from Dr Laurel Birch de Aguilar. In CM, the tribunal has the advantage of hearing evidence from a number of witnesses. It is arguable that the Judge erred in law, on the basis that the material before him did not justify his departure from the existing country guidance"

The Hearing

8. Ms Johnstone, for the respondent, moved the grounds of appeal, and referred me to CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC). She told me that there was no adequate reason for the judge to prefer the expert report from Dr Birch to the established country guidance. Ms Johnstone was critical of the content of Dr Birch's report, arguing

that although Dr Birch responded directly to the questions she was asked, her focus was entirely on risk in Harare, and her answers proceeded on the erroneous basis that the appellant had attended school in Harare. Ms Johnstone told me that the Judge's findings at [23] were unsafe, and argued that there was inadequate reason for the Judge to depart from country guidance. Ms Johnstone argued that the Judge has not adequately considered the history of applications made by the appellant and makes no reference to the earlier decision refusing the appellant's original claim for asylum on 18 January 2010 (AA/13798/2009). Ms Johnstone said that the appellant's article 8 ECHR claim should have been considered in terms of paragraph 276 ADE of the rules, and that the question which should have been asked was whether or not there were very significant obstacles to reintegration in Zimbabwe; that was not the test applied by the Judge. Ms Johnstone asked me to find that the decision is tainted by a material error of law, to set the decision aside, and then to remake the decision in accordance with country guidance case law.

9 (a) Ms Manning, for the appellant, told me that the decision does not contain any errors of law, material or otherwise. She adopted the terms of the skeleton argument produced for this appeal, and argued that the focus is on Harare, because it is to there rather than the appellant's hometown (Makoni) to which the appellant will be returned. She invited me to consider the terms of the expert report & to find that the expert does not suggest that the appellant went to school in Harare, but does take account of the appellant's years at university there and her employment there. She told me that the only conclusion that can be reached is that there are many people in Harare who know the appellant. The appellant has been in the UK for 15 years, so that (it was argued) she will inevitably be asked questions.

(b) Ms Manning took me to the decision and invited me to read the decision as a whole. She told me that in the decision the Judge sets out very carefully why he preferred the expert's report to the existing country guidance. She told me that Dr Birch wrote a carefully considered report based on her experience and referred me to Dr Birch's CV. She told me that Dr Birch's report was not an exercise in speculation, but was an accurate reflection of the situation in Zimbabwe.

(c) Mrs Manning argues that the appellant's leg injury (which causes significant mobility problems) is a factor which must be taken account of, & which creates a significant disadvantage to the appellant. She argued that it is not possible for the appellant to find employment in Zimbabwe and that all of these were factors which the Judge took into account in finding that it would be unduly harsh the appellant to return to Zimbabwe. She told me that all of the medical evidence was accepted by the Judge and not challenged by the respondent. She told me that the decision is one that has been carefully made on the specific facts of this case. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

10. In R and Others v SSHD [2005] EWCA Civ 982 the Court of Appeal endorsed Practice Direction 18.4 which states that any failure to follow a clear,

apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as a ground for review or appeal on a point of law. The Court of Appeal said that it represented a failure to take a material matter into account.

11. Country guidance is a starting point from which the Judge is entitled to depart if the evidence the parties choose to put forward justifies such departure. Absent that, like cases should be treated alike, informed by the country guidance, as is made clear by the Senior President's Practice Direction:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
>
> (a) relates to the country guidance issue in question; and
>
> (b) depends upon the same or similar evidence.
>
> 12.3 ...
>
> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

12. The respondent's position is that the country guidance case of CM is cast in stone, but that is an incorrect interpretation of the country guidance system and the practice direction quoted above.

13. At [14] & [15] the Judge and not only makes reference to the dismissal of the appellant's earlier claim claimant 2010, he quotes directly from it. At [16] he correctly takes that determination as his starting point. The respondent's criticism that the guidance set out in the case of Devaseelan has not been followed is entirely without merit.

14. At [18] the Judge quite clearly considers the case of CM. At [18(ii)] the Judge sets out the appellant's undisputed profile as a person without Zanu PF connections returning to a rural area of Zimbabwe after 15 years in the UK.

15. At [20] the judge observed that "*CM is authority for the proposition that it would be safe for the appellant to return to Harare or Bulawayo as she would be unlikely to face a loyalty test. However Dr Birch takes the opposite view ...*" He then sets out Dr Birch's opposite view. At [21] he acknowledges that the contrast between CM and Dr Birch must be resolved and quotes [238] of CM taking the guidance that if the conditions deteriorate after the promulgation of the country guidance case a First-tier Judge is able to act on the fresh evidence.

16. What the Judge has done in this case is take guidance from the extant country guidance case of CM, and then consider an expert report which deals

specifically with the facts and circumstances applicable to this individual appellant. The Judge has flawlessly followed the guidance at [238] of CM. He has considered the risk categories set out in the case of CM and then found that country guidance *"… Is not a straitjacket*". The Judge found that the expert report of Dr Birch is a report which can be relied on, and he factored Dr Birch's conclusions into his own assessment of potential risk to the appellant on return. In doing so he correctly reminds himself of both the burden and standard of proof.

17. If the Judge had simply ignored the expert report, or if the Judge had simply found that the expert report was irrelevant and should be discarded because it didn't fit squarely into the *ratio* of CM, then the case would be tainted by material error of law. Instead the Judge considered country guidance and considered the facts and circumstances applicable to the appellant and then set out cogent reasons for distinguishing this individual appellant's case from the risk categories set out in CM. The conclusion might surprise the respondent, but there is nothing wrong with the Judge's fact finding exercise and he has correctly considered country guidance before reaching this conclusion.

18. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

19. I heard submissions from Ms Johnstone in relation to whether or not the correct test was applied in terms of paragraph 276 ADE of the immigration rules. Submissions were also made in relation to whether or not the correct approach was taken to the medical evidence and how that evidence engages article 3 ECHR. These are entirely new matters about which the appellant was not given fair notice. Permission to appeal was sought solely on the question of the conflict between the expert's report and the country guidance case. In any event at [29] the Judge finds that the medical evidence is not sufficient to engage article 3 ECHR. I cannot competently consider the submissions in relation to paragraph 276 ADE because permission has not been sought to appeal on the ground.

20. At [30] the Judge finds that the appellant succeeds on asylum grounds and humanitarian protection grounds. Although no submissions were made in relation to those findings, it is *pars judicis* to collect obvious errors. Humanitarian protection can only competently be considered as an alternative to a grant of asylum. As asylum was granted, the appellant's claim on humanitarian protection grounds must be refused.

21. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

22. No errors of law have been established. The Judge's decision stands.

DECISION

23. The appeal is dismissed. The decision of the First tier Tribunal stands.

Signed Date 22 January 2016

Deputy Upper Tribunal Judge Doyle