IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06607/2015

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 11 February 2016	**On 01 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

W M K (ZIMBABWE)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms R Petersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Boylan-Kemp sitting at Sheldon Court, Birmingham on 4 August 2015) dismissing his appeal against a decision by the Secretary of State to refuse to recognise him as a refugee, as otherwise requiring international human rights protection; and against the Secretary of State's concomitant decision to remove him to the UK as a person subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999. The First-tier Tribunal did not make an anonymity direction, but

in view of the nature of the appellant's asylum claim, I consider it is appropriate that the appellant is accorded anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. Permission to appeal was refused by the First-tier Tribunal, but on a renewed application for permission, Upper Tribunal Judge Plimmer granted permission to appeal on 16 November 2015 for the following reasons:

> "3. The grounds of appeal have been prepared by the appellant himself. They focus on the judge's findings [54-58] that there is insufficient evidence that the Zimbabwean authorities will be able or inclined to link his anti-state online presence in the form of a pseudonym with him. The judge accepted that the appellant's uncle was involved in the MDC [52] in the manner claimed by the appellant [37]. In these circumstances the judge was obliged to consider whether there is a real risk of the authorities carefully scrutinising his activities upon return. The judge was not "persuaded" by the appellant's evidence but arguably applied an impermissibly high burden of proof. It is also arguable that the judge has given insufficient reasons why a period of two years away from Zimbabwe does not amount to "significant absence."
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> 4. The judge was well aware of the appellant's studies at De Montfort University but was concerned as to how the appellant was supporting himself [78] yet it is apparent that no questions were put to the appellant regarding this and this may have arguably caused unfairness."

The Decision of the First-tier Tribunal

3. Both parties were legally represented before Judge Boylan-Kemp. The appellant's case was that he had approximately 30 siblings. His mother lived in Mozambique, and his father had moved to the United States where he had died in 2011. After his father left for the USA in 1999 the appellant was looked after by his extended family, living with his Uncle "G" from 2002 until he came to the United Kingdom as a student in November 2012. Uncle G was a member of the United People's Party (UPP) and stood as an independent candidate in his local area. The UPP was absorbed into ZANU-PF in 2013. At that point, Uncle G defected to the MDC.

4. The appellant was educated to A level standard in Zimbabwe. In 2010 he undertook a diploma in French language at the University of Algeria in Algeria. On 4 November 2012 he came to the UK on a student visa. He returned to Zimbabwe on 7 July 2013.

5. On his return, the appellant said he was immediately subjected to harassment from unknown persons. He was denied access to the communal well, he was heckled in the street on the basis of his imputed political affiliation, and he received threats of torture and death. The harassment was due to his relationship with his uncle who had defected to

the MDC. The appellant himself had never had any personal involvement with the MDC.

6. The appellant also received verbal harassment from local villagers because they believed him to be gay due to a Facebook picture of him being dressed in a high school skirt. The appellant was not gay. The appellant reported the abuse to the police, but they did not respond to his complaint.

7. On 12 July 2013 a ZANU-PF rally was organised. The appellant did not attend the rally, and as a result people attended his home and threatened to torture him for being a traitor. The following day he travelled to Harare and stayed with a friend. The appellant then returned to his home, and found that it had been burnt to the ground. He was advised that this had been done by the youth militia, who had been looking for him. So the appellant then flew back to the UK, and claimed asylum on his arrival in the UK on 24 July 2013.

8. At the time of the hearing before the First-tier Tribunal, the appellant was following a computer science degree at an English university. He had successfully completed his first year, and had just entered his second year.

9. Since being in the UK, the appellant has started an online petition relating to the abduction of a human rights activist by the name of Itai Dzamara. He had also written a blog under the name of John Smith. The appellant's evidence was that the authorities in Zimbabwe would be able to trace him through his IP address.

10. On the issue of risk on return, the appellant contended he would face persecution and risk of death and serious harm due to his perceived political affiliation and his perceived homosexuality. He would not be able to relocate because he was an MDC supporter and there was a test of allegiance to the ZANU-PF everywhere in Zimbabwe.

11. The judge received oral evidence from the appellant, and he was cross-examined by the Presenting Officer.

12. In his subsequent decision, the judge set out his reasons for dismissing the appellant's asylum claim at paragraphs [34] onwards. The judge addressed in considerable detail what he characterised as differing accounts given by the appellant of the incident where one night a flash mob of 30 to 40 ZANU-PF youth militia passed through his homestead in order to recruit people to an upcoming rally.

13. At paragraph [45], the judge said upon consideration of "these varying accounts", he found the appellant's evidence as to what happened during the incident was inconsistent. It had developed and become more personal to him each time he had recounted the incident. The judge found that in his asylum interview it appeared that what he was describing was

an attempt by the youth militia to encourage everyone in the locality to attend an upcoming rally and that their actions were not directed specifically or personally towards him. In his witness statement, his evidence was that the youth militia's appearance at the homestead was directly due to him not attending the rally and because they believed he was a traitor for not being present. Then, during the hearing, he had given evidence that the group had also made screams and chants about his picture on Facebook. The judge found that the apparent discrepancies in the appellant's account of the incident undermined his credibility.

14. The judge went on to discuss in detail the appellant's varying accounts of what had happened next. He concluded, at the end of paragraph [48], that the inconsistencies in the appellant's evidence as to chronology and focus of "these incidents" undermined the credibility of his account.

15. At paragraph [49], he said he had also given weight to the fact that despite saying he was attacked and persecuted in his witness statement, the appellant's oral evidence was that he was not physically assaulted.

16. At paragraph [50] the judge said he was not persuaded that the appellant had come back from Harare to find that his uncle's home had been destroyed as described, or that, if it had been destroyed, that the reasons for the destruction related to him.

17. At paragraph [51], he found not credible the appellant's evidence that he fled to Harare where he sold what possessions he had to raise sufficient monies to travel to the UK and it was at this point that he then decided to return to his uncle's home to collect the reminder of his possessions. He did not find it credible that if the appellant was in fear of persecution as he asserted, he would have chosen to return to his uncle's home to collect some identifiable belongings when he already had the money to leave the country without placing himself at further risk.

18. Overall, whilst he accepted the appellant's uncle might have had involvement with the MDC (although the appellant had not produced any evidence to substantiate this), he was not persuaded the appellant himself was persecuted whilst in Zimbabwe. He found that the appellant was not at risk of persecution on return due to imputed political opinion through association with his uncle as the uncle was now living in South Africa; and when the appellant was living in Zimbabwe, he did not suffer any physical harm, either actual or attempted.

19. The judge went on to address the appellant's *sur place* claim. The appellant said that since arriving in the UK he had been politically active via an online blog and Facebook page in the name of John Smith, and that he had been in communication with a controversial blogger in Zimbabwe. The appellant had produced various online materials and screen shots at pages 21 to 30 of his bundle to substantiate this claimed activity.

20. In evidence-in-chief, the appellant was asked how the Zimbabwean authorities would know that he was the person responsible for the petition and blog as he had used a generic name (John Smith) and there was nothing in either of the sources to link the appellant to this name. The appellant replied that as he had used the same computer for his university work, the Zimbabwean authorities would be able to trace the online activity through his IP address, and thereby identify him as the person responsible for the creation of the petition and the blog. Under cross-examination the appellant confirmed that he had no evidence that the Zimbabwean authorities could use his IP address to glean his identity. He had never linked the John Smith account to his own name, and therefore he did not know how the Zimbabwean authorities would actually link it to him.

21. At paragraph [57], the judge said he was not persuaded by the appellant's evidence or by the submissions of his legal representative that the Zimbabwean authorities had the capability to discover the identity of an individual via an IP address search, nor was he persuaded that the Zimbabwean authorities had been assisted by either China or Russia in developing this level of online intelligence.

22. On the issue of risk on return, the appellant's representative relied on **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059** for the proposition that the appellant might well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those that they controlled, given that he would be returning from the United Kingdom after a significant absence to a rural area of Zimbabwe, other than Matabeleland North or Matabeleland South.

23. The judge accepted that the appellant's home in Zimbabwe was not in Matabeleland North or Matabeleland South, but rather it was in the north east of Harare and therefore there was a potential for the appellant to experience difficulty in his return. But he found the appellant had not had a significant absence from Zimbabwe. He had been in the UK for a relatively short period of just over two years. Also during this time he had been involved in higher education and therefore his time in the UK had an element of legitimacy to it. Furthermore, between 2010 and 2011 the appellant had spent time in Algeria, also for the purposes of engaging in higher education. He had not faced any hostility on his return home due to his absence.

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, the appellant relied on a skeleton argument dated 2 February 2016 and the evidence attached thereto which he had served pursuant to Rule 15(2A).

25. In his skeleton argument, he relied on an article dated 11 January 2016 entitled "20 cops arrested for complaining about late salaries on

WhatsApp". The article reported that at least twenty police officers in Bindura were questioned last week after they allegedly made "bad" comments over delayed salaries and bonuses on a WhatsApp group that they had created. Although not stated in the article, the appellant said that it had been later revealed that a government agent had infiltrated the group, and this agent had thereby discovered the content of the WhatsApp communications. The appellant said that he had offered to construct websites on behalf of activists in the UK, and some of them might be wolves in sheep's clothing. Thus he might have unknowingly revealed his identity to spies for the Zimbabwean government.

26. In addition, the university in England which he attended had a distinct IP address. So when he had made anonymous postings on Facebook, it would have been apparent to the reader that the postings originated from this particular university.

27. He had now been four years away from Zimbabwe, including the period from July 2013 to February 2016. He had spent nine months completing a French course in Algeria, not two years as wrongly stated by the respondent. He had returned from Algeria as a youthful 20 year old with a valid reason for travel, which perhaps explained why he had not faced any trouble going through immigration on that occasion. It was also necessary to bear in mind the cyclical nature of Zimbabwe's political violence. The Zimbabwe of 2011, when he returned from Algeria, was different from the Zimbabwe of July 2013, when he returned from the UK.

28. In his oral submissions, he confirmed that it was not his case that he could be traced to an individual IP address. He had used the university's Wi-Fi in order to post things online. He had posted messages online for over a month prior to the hearing in the First-tier Tribunal. He indicated to me that he was no longer engaging in such activity. His Facebook account had now been blocked, so he did not have access to it. He believed that the Zimbabwean government were responsible for closing down his Facebook account. All his postings to Zimbabwean websites were getting removed, so he had given up such online activity before his Facebook account was closed.

Discussion

29. The judge correctly directed himself as to the appropriate burden of proof in paragraph [10] of his decision, namely that he needed to apply the lower standard of proof of "a real risk" as opposed to the higher standard of proof of the balance of probabilities. Accordingly, when the judge refers at paragraph [57] to not being "persuaded" by the appellant's evidence or by the submissions of his legal representative, it should be inferred that the judge is applying the lower standard of proof, not an impermissibly higher standard of proof.

30. Having reviewed the evidence that was before the First-tier Tribunal, I find there is no merit in the suggestion that the judge did in fact apply an

impermissibly high burden of proof. The judge has given adequate reasons for finding that the appellant's limited sur place activities did not engender a real risk of persecution on return. The additional evidence that the appellant has since filed with the Upper Tribunal does not, in my judgment, take matters any further. It does not retrospectively cast doubt on the soundness or safety of the judge's decision that there was not a real risk that the appellant would be personally connected with the online activities in which he had engaged so as to engender a real risk of him being persecuted on that account by state or non-state agents on return to Zimbabwe.

31. The judge gave anxious scrutiny to the question of whether there was a real risk of the authorities carefully scrutinising his activities upon return on account of his uncle's involvement with the MDC or on account of his absence abroad. As submitted by Ms Petersen, the judge rejected the appellant's account of past persecution on return to Zimbabwe in July 2013, and it was therefore entirely logical that the apprehended risk to the appellant from his uncle's historic involvement with the MDC was going to be even less now, as his uncle had moved to South Africa.

32. The judge's task was to assess risk on return at the date of the hearing (4 August 2015). It was open to him to find that there was not a real risk of the appellant facing adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those whom they controlled in the event of a hypothetical return to Zimbabwe in August 2015, for the reasons which he gave in paragraph [62]. The error of law challenge by the appellant overlooks the fact that, in addition to the time which he had spent in Algeria, when he returned to Zimbabwe in July 2013 he had also spent some eight months in the UK. So cumulatively he had spent nearly two years abroad, but nonetheless he did not encounter, in the light of the judge's primary findings of fact, hostility amounting to persecution, despite the fact that in the interim his uncle had switched his allegiance to the MDC.

33. Turning to the appellant's alternative claim under Article 8 ECHR, I find there is no unfairness in the judge's observation at paragraph [78] that he had no information as to how the appellant was supporting himself financially in respect of his living costs. The appellant had the benefit of legal representation and it was incumbent on him to produce evidence of financial independence, if he wished to rely on this as a positive factor in the proportionality assessment. It was not the duty of the judge or the Presenting Officer to try and establish whether the appellant was financially independent by asking him questions as to how he was supporting himself in respect of his living costs. Furthermore, even if he was financially independent, this was not going to have a significant impact on the proportionality assessment, following **AM (S117B) Malawi [2015] UKUT 260 (IAC)**.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Monson