Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09287/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 November 2018	**On 21 December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CNP (ZIMBABWE)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:
For the Appellant: Ms Z Kiss, Home Office Senior Presenting Officer
For the Respondent/
Claimant: None.

DECISION AND REASONS

1. The Specialist Appeals Team appeals on behalf of the Secretary of State for the Home Department ("the Department") from the decision of the First-tier Tribunal (Judge Rothwell sitting at Hatton Cross on 14 May 2018) allowing the claimant's appeal against the refusal of her protection claim which she had brought on the basis that she had a well-founded fear of persecution in her home area of Zimbabwe on account of her *sur place* activities in the UK, and that internal relocation was not a reasonable

option. The Judge also allowed the claimant's appeal under Article 8 ECHR, and there is no appeal against this finding.

The Reasons for Granting Permission to Appeal

2. On 24 October 2018 Upper Tribunal Judge Gill granted permission to appeal for the following reasons: "*It is arguable that Judge of the First-tier Tribunal Rothwell may have materially erred in law in assessing the future risk in the appellant's home area and in her consideration of whether she has a safe and reasonable internal flight relocation option.*"

Relevant Background Facts

3. The claimant is a national of Zimbabwe, whose date of birth is 9 May 1977. She entered the United Kingdom as a visitor on 27 August 2003. Her visa was valid until 27 February 2004. She applied for leave to remain as a general visitor, and her application was refused on 18 October 2004. However she remained in the UK. On 12 December 2008 she was served with a removal notice as an overstayer. On 2 March 2011 she was served with a notice of decision that she should be removed from the UK.

4. Her appeal against this decision came before Judge Walker sitting at Newport on 16 June 2011. Both parties were legally represented. The claimant relied solely on human rights grounds in order to resist removal. In his subsequent determination, the Judge found that the claimant was not a genuine visitor, but had entered the UK in order to obtain employment as a Nurse. He found that the claimant had not established any family life in the UK, and that the private life she had established was "*limited".*

5. It is suggested in the decision letter of 7 September 2017 that the claimant challenged the outcome of this appeal by way of judicial review, rather than by a statutory appeal. At all events, whichever route the claimant took, it was unsuccessful. She was served with another notice as an overstayer on 20 October 2014. It appears that she claimed asylum in response to this notice, but she failed to attend her asylum interview unit appointment on 19 January 2015. She is recorded as eventually claiming asylum on 9 May 2017.

6. Her claim was that since December 2014 she had been attending rallies outside the Zimbabwean Embassy in London every Saturday. She said that she had joined the London branch of the ROHR (Restoration of Human Rights), and she had recently become a member of the ROHR Committee. She said that the Zimbabwean authorities would have a specific interest in her, because she was known as an activist as a result of her presence outside the Embassy being picked up by the Embassy Surveillance cameras and also because her name and picture were on the ROHR website.

7. On 7 September 2017 the Department gave their reasons for refusing her claim for asylum or humanitarian protection. In her asylum interview, she had incorrectly stated that the ROHR was a sub-section of the MDC (Movement for Democratic Change). The background information stated that the ROHR was a non-political organisation. When she was asked about the address of the Zimbabwean Embassy, she said that it was in central London, but she did not know the street or district that it was in. The ROHR website had been researched, and the list of names of the main members of the Board had been found. She did not appear on this list. In addition, no photographs of the named members of the committee were on the ROHR website.

8. On the issue of risk on return, the case law of **EM & Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)** found that the evidence did not show that, as a general matter, the return of a failed asylum seeker from the UK, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the Zanu-PF. In addition, a returnee to Harare would in general face no significant difficulties, if going to a low-density or medium-density area.

9. It was noted that she claimed to be from Marondera, which background information showed was in Mashonaland East. The Country Information report on Zimbabwe dated January 2017 did not indicate that there would be any risk on return to this part of Zimbabwe.

The Hearing Before, and the Decision of, the First-tier Tribunal

10. Both parties were legally represented before Judge Rothwell. In her subsequent decision, the Judge found that the claimant had been involved in the ROHR and the vigil, and she had seen photographs of her attending. The Presenting Officer did not dispute that she had been involved, but disputed the frequency of her attendance. The claimant's partner, SN, confirmed that they attended every week. There was also a letter from Rose Benton, Zimbabwe Vigil Coordinator, who confirmed the claimant's association with them. The Judge accepted that the claimant could be found online, although she had not produced any screenshots that showed her picture and her name together.

11. On the issue of risk on return, the Judge found that although the claimant had not been a member or even involved in the MDC, demonstrating outside the Zimbabwean Embassy "*on a very regular basis*" and being involved in the ROHR would be enough for the Zimbabwean Government to assume or perceive that she opposed the current Government.

12. She considered that the claimant would be at risk in her home area. She found that her absence for some 14 years would attract the interest of the Zanu-PF. She would be unable to show her allegiance to the Government, as she had been away for so long. Accordingly, she would be at risk of serious harm.

13. She had considered whether she could relocate within Zimbabwe, but she was a pregnant woman who suffered from HIV and had no family support in Zimbabwe. Accordingly, it would be unduly harsh to expect her to relocate, especially when she had been away for so long.

The Hearing in the Upper Tribunal

14. At the hearing before me to determine whether an error of law was made out, there was no appearance by the claimant, or by her legal representative, Mr A Billie of A Billie Law Ltd, who had represented her before the First-tier Tribunal. There was, however, an appearance by the claimant's partner, SN, who had given evidence in support of her appeal before the First-tier Tribunal.

15. SN produced a letter dated 22 November 2018 which had been signed by the claimant. She had noticed that the Department was not arguing against the ruling on Article 8 grounds. Considering the stance taken by the Department, she asked to be excused from the hearing on 30 November 2018. She did not have anyone to look after their baby in her absence. She continued: "*Since I no longer oppose the application made by the Home Office, I have informed my legal representatives not to appear on my behalf on 30 November 2018.*"

16. However, in my file there was a Rule 24 response dated 19 November 2018 from Mr Billie making detailed submissions as to why the decision of the First-tier Tribunal did not disclose any error of law, and submitting that the grounds of appeal to the UT were nothing more than an attempt to re-argue the appeal.

Discussion

17. It is strongly arguable that the claimant has conceded the error of law challenge of the Department, as her letter post-dates the Rule 24 Response opposing it. But in case she has not, I address the error of law challenge on its merits.

18. In reaching her conclusions on risk on return, the Judge relied on the country guidance given in **CM (Zimbabwe)** which reflected the position as it stood in October 2012, which was over 5 years before the date of the hearing of the appellant's appeal in the First-tier Tribunal.

19. As highlighted in the Department's grounds of appeal, paragraph (3) of the headline guidance in **CM (Zimbabwe)** states as follows: "*The situation is not uniform across the rural areas and there may be reasons why a particular individual, 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.*"

20. In support of the case that Judge Rothwell had failed to factor in "*where the claimant is actually from in the analysis of risk,"* Ms Kiss submitted an undated printout from the internet reporting an upbeat message from the new Mayor for Marondera. He is quoted as saying that they have one Zanu-PF councillor and 11 from the MDC Alliance, but they are not going to segregate their Zanu-PF colleague. While the majority of councillors are affiliated to the MDC Alliance, this does not mean they will not work together peacefully to develop their town.

21. It is not shown that this particular piece of evidence was before the First-tier Tribunal, but it illuminates the fact that it was inherently unsatisfactory for the First-tier Tribunal Judge to base her assessment of risk on return to the appellant's home area on the general situation in rural areas as it stood in October 2012, and not to engage with the background evidence cited in the refusal decision that the political climate in the appellant's home area had improved as of 2017.

22. I also do not consider that the Judge's finding on the viability of internal relocation was adequately reasoned. Although she was HIV positive, the Judge rightly held that this did not give rise to an Article 3 medical claim. Although she was pregnant, this argued for her removal being delayed until she had given birth (depending on the stage of her pregnancy), rather than establishing that internal relocation was an unduly harsh option. In finding that the claimant did not have any family support in Zimbabwe, the Judge does not appear to have applied **Devaseelan** and taken as her starting point the findings of Judge Walker on this issue in his determination of 28 June 2011. He held that the claimant still had her closest relatives in Zimbabwe, namely her mother and her sisters. In addition, the appellant's case before her was that she was in a durable relationship with SN, a claim which the Judge accepted, but she nonetheless fails to entertain the likelihood of SN supporting the appellant financially in Zimbabwe in a place of relative safety, such as Harare, if she were to be removed.

23. Of course this was all theoretical, as the Judge accepted that the claimant had established family life in the UK with SN and his two daughters by a previous relationship, and that it would be contrary to the best interests of his children for the claimant to return to Zimbabwe to obtain entry clearance.

24. While the Judge gave adequate reasons for finding that requiring the claimant to return to Zimbabwe to obtain entry clearance would be a disproportionate outcome justifying the claimant being granted Article 8 relief outside the Rules, the Judge did not give adequate reasons for finding that the claimant met the more onerous test of establishing that internal relocation would be unduly harsh. (By the same token, the Judge did not give adequate reasons for finding that the claimant met the requirements of Rule 276ADE(1)(vi). But this is academic, as the claimant succeeds under Article 8 outside the Rules.)

25. Accordingly, the decision on the protection claim and the claim under Article 3 ECHR is vitiated by an error of law, such that it must be set aside and remade. The extent of the fact-finding that will be required means that the First-tier Tribunal is a more appropriate forum for remaking.

Notice of Decision

The decision of the First-tier Tribunal allowing the claimant's appeal on human rights (Article 8 ECHR) grounds did not contain an error of law, and accordingly the decision stands. The decision of the First-tier Tribunal allowing the claimant's appeal on protection grounds and/or under Article 3 ECHR contained an error of law, and accordingly the decision is set aside. The claimant's appeal on these grounds is remitted to the First-tier Tribunal at Hatton Cross for a *de novo* hearing (Judge Rothwell incompatible).

Direction Regarding Anonymity

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

Signed Date 5 December 2018

Deputy Upper Tribunal Judge Monson