IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004984

First-tier Tribunal No:
PA/60480/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 February 2025

Before

UPPER TRIBUNAL JUDGE RUDDICK
DEPUTY UPPER TRIBUNAL JUDGE Ó CEALLAIGH KC

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr A. Mullen, Senior Home Office Presenting Officer
For the Respondent: Mr S. Muzenda, Longfellow & Co. Solicitors

Heard at Field House on 22 January 2025

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to

identify her. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge CR Cole ("the Judge") allowing MC's appeal against the refusal of her protection claim.

2. To avoid confusion, we refer hereinafter to the parties as they were in the First-tier Tribunal, such that further references to the "appellant" are to Ms MC and to the "respondent" are to the Secretary of State.

3. On 4 December 2024, the Upper Tribunal made an anonymity order in this matter on the grounds that the appellant has made a claim for international protection. There has been no application for that order to be set aside.

Background

4. The appellant is a citizen of Zimbabwe who was born in Zimbabwe in 1971. It is accepted that she arrived in the UK on 28 March 2001 on a student visa. She was subsequently granted one period of further leave, from 11 June 2002 through 30 September 2002. A subsequent, out-of-time application for further leave was refused, and on 28 April 2008, she made a fraudulent application for recognition of a right of abode. This led to a conviction on deception offences on 17 September 2009, and to a sentence of 18 months' imprisonment. In 2009 and 2010, the appellant raised several further protection and human rights claims, none of which were successful.

5. On 2 August 2013, the respondent made a decision to deport the appellant, and the appellant's appeal against that decision was dismissed by the First-tier Tribunal on 12 December 2013. On 10 September 2015, the appellant lodged further submissions. These were then supplemented by additional submissions in May 2017, November 2018, January 2020 and June 2022. These submissions were considered together and finally refused by the respondent in a decision dated 27 October 2023.

6. The respondent's decision noted that the appellant had raised both protection and human rights issues in her various submissions. These included that she was at risk of persecution for reasons of her political opinion as a supporter of the MDC and at risk of treatment in violation of Article 3 ECHR because she is HIV+ and would not be able to access treatment in Zimbabwe, and that her removal would be a disproportionate interference with her Article 8 rights, given her family and private life ties in the UK and the difficulties she would face reintegrating in Zimbabwe. The respondent refused these further submissions on all grounds, and the appellant appealed.

The Judge's decision

7. The appellant's appeal came before the Judge at Manchester on 29 August 2024 and, in a decision dated 9 September 2024, he allowed it on protection grounds.

8. The Judge set out the issues in the appeal at [10-13]. He recorded that it was confirmed at the hearing that the appellant was no longer pursuing an Article 3 claim based on her HIV status, and that no submissions on Article 8 had been raised either in the appellant's skeleton argument or at the hearing. He therefore considered that the only issue before him was whether the appellant would be at risk of persecution in Zimbabwe on account of her political activities in support of the MDC, in particular her blogging.

9. At [14-15], the Judge listed the evidence before him and at [16-17] he confirmed that the appellant had given evidence and he had heard submissions from both representatives, which he had taken into account.

10. The Judge's "Findings and Reasons" begin with a confirmation that he has taken into account all of the evidence before him [19], followed by a self-direction as to the lower standard of proof of a "reasonable degree of likelihood."

11. The Judge considered the findings in the appellant's deportation appeal [24] and the fact of her deception conviction [25] before concluding that she "will do and say almost anything to try to fabricate a means to remain in the UK." He then said that he had carefully considered her written and oral evidence in this appeal, and concluded that it was "not reasonably likely that the Appellant has a genuine political belief that is opposed to the Zimbabwean regime" [26] and that her blogging was motivated by an attempt to "manufacture a real risk of serious harm on return to Zimbabwe". [27]

12. He then directed himself at [28] that "I must still assess the evidence with anxious scrutiny and reach a conclusion as to whether the Appellant's non-genuine activities are sufficient to place her at real risk on return."

13. Based on submissions by Mr Muzenda, who represented the appellant below, the Judge accepted that the risk to the appellant should be assessed in accordance with the guidance set out in HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094, and he identified the key question as whether the appellant would be taken aside for a further interrogation by the CIO (the Zimbabwean security services) when she arrived at the airport in Zimbabwe [29-30].

14. The Judge then rejected the appellant's account to have been threatened by the Zimbabwean authorities at a redocumentation interview in 2018 [31-32]. He identified the central issue in the appeal to be whether the appellant would be at risk because of her blogging, in spite of its insincerity [33].

15. The Judge found at [35] that the appellant's blogs were "articulate and well-presented opinion pieces that are clearly critical of the ZANU-PF regime". Given the lack of evidence of the reach of the blogs, however, the Judge found that the appellant had not established that they would have already come to the attention of the Zimbabwean authorities [34-40].

16. He then considered Mr Muzenda's submission that the blogs would be discovered by the CIO after the appellant's arrival in Zimbabwe, because they would be uncovered by a simple Google search of her name [41]. He concluded that they would, for the following reasons.

17. First, although the appellant's blogs did not reflect any genuinely held political beliefs, she would not delete them prior to removal.

> "[W]hen considering the Appellant's history and her determination to remain in the UK at all costs, I find that it is reasonably likely that the Appellant will play a game of brinkmanship with the Respondent and refuse to delete her online profile (or possibly she will only delete it at the last possible moment prior to deportation). Her desperation to remain in the UK is likely to be greater than her fear of facing serious harm in Zimbabwe." [46]

18. Secondly, taking into account the guidance about social media set out in XX (PJAK – sur place activities Facebook) Iran CG [2022] UKUT 00023 (IAC), the Judge found that if she did delete her online profile, there was a real risk that it would still be discoverable via search tools such as Google for "at least a few days and possibl[y] a number of weeks" [47].

19. Third, at [50-55], the Judge set out key excerpts from the country guidance in HS and AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 ("AA(2)") and then applied this to the Appellant's profile. He concluded that on arrival in Zimbabwe, the Appellant would be identified as a deportee and diverted for questioning by the CIO.

20. Fourth, at [56], he found that it was reasonably likely that the Appellant's website would be discovered at this point, given the first and second findings summarised above.

21. Fifth, the blogs would indicate that she is a politically active supporter of the opposition and critic of the Zimbabwean regime [58].

22. Sixth, the appellant would tell the truth if interrogated, namely that she had attempted to fabricate an asylum claim and was not a genuine supporter of the opposition or critic of the regime [59].

23. Seventh, although this was a "particularly difficult issue to resolve" [61], taking into account what is known about the CIO and the Appellant's history of being repeatedly disbelieved, the Judge found that it was reasonably likely that the CIO would not believe the Appellant's protestations of innocence and she would be taken for "second stage interrogation" by the CIO [62-67].

24. At [52], the Judge had cited the guidance at AA(2) at [251] that "second stage interrogation carries with it a real risk of serious mistreatment sufficient to constitute a breach of article 3 [… or] persecutory ill-treatment."

25. The Judge therefore reluctantly allowed the appeal on Refugee Convention and article 3 grounds.

The grounds of appeal

26. The respondent appealed on a ground entitled "Failing to give adequate reasons for findings on a material matter: Exception 1 to the NIAA 2002". The heading appears to be cut and pasted from another application for permission to appeal, but the content of the grounds is clear enough. The respondent argues that the Judge's conclusion was not adequately reasoned. Two errors were particularised:

    (i) The Judge had failed to give adequate reasons for why the appellant would come to the attention of the CIO. The Judge had "failed to give any reasons for finding that the CIO are aware of her, or have any adverse interest, particularly as she has been absent from Zimbabwe for some 24 years and there is little evidence of the reach or influence of […her] posts."

    (ii) The Judge had failed to consider that the appellant's family, who had been found to be ZANU-PF supporters, would be able to vouch for her on return.

27. In a decision dated 26 October 2024, First-tier Tribunal Judge CJT Lester granted permission to appeal, noting that the Judge's reasoning was "unusual".

The hearing

28. The hearing in this matter was conducted by CVP. We were at Field House and the representatives appeared by videolink. We are satisfied that the hearing was conducted fairly and effectively.

29. We had before us a consolidated bundle in four parts, for a total of 936 pages. We also had a very brief skeleton argument filed by the appellant's solicitors on 16 January 2025, but at the hearing before us Mr Muzenda informed us that he did not rely on it.

30. We heard submissions from Mr Mullen. He clarified that the respondent was raising a rationality challenge to the decision, and then he particularised that challenge in various different ways. We intend no criticism when we say that his argument shifted somewhat in the course of his submissions; the decision is, as First-tier Judge Lester noted, "unusual". Ultimately, his submissions can be summarised as follows: the Judge had made a clear finding at [40] that it is not reasonably likely that the appellant's blogs have already come to the attention of the authorities,

and he had not given adequate reasons for finding that it was reasonably likely that they would come to their attention after arrival. The Judge had proceeded on the premise that they would do a Google search of her name. However, in contrast to, for example, the country guidance cases on Iran, there was no positive evidence in HS or elsewhere that the CIO does routine Google searches on returnees. It was not reasonably open to the Judge to find that they would in this case.

31. Mr Mullen did not pursue the submission made in the grounds that it was an error for the Judge not to have considered whether the appellant's family would be able to vouch for her with the CIO. In our view, he was wise not to, as there is no evidence in the determination, the Respondent's Review or the refusal decision that this submission was made below. It is trite that it is not normally an error for a Judge to fail to consider a point that a party failed to raise below. See Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC).

32. Mr Muzenda emphasised the long-established principle that a person who is insincere may still be entitled to refugee status; what matters is how they will be treated on return.

33. He then addressed what had become the respondent's main point: was it open to the Judge to infer from the evidence before him that the CIO would conduct a Google search on the appellant on return? He drew our attention to the discussion of the methods of the CIO at the airport in the country guidance cases before the Judge and made two points: first, that the country guidance cited by the Judge at [52] established that "all persons identified as deportees will be diverted for questioning by CIO officers who are required to produce a report in respect of all persons who have been forcibly removed to Zimbabwe from the United Kingdom"; second, that the country guidance more generally described the Zimbabwean authorities as expending considerable resources on gathering intelligence on potential opposition activists abroad, and in this context it was entirely reasonable to infer that the CIO at the airport would use the investigation techniques available to them, including a Google search. Conducting such a search would be a basic part of simply "doing their job".

34. We reserved our decision, which we now give with our reasons.

Discussion

35. In deciding whether the Judge's decision involved the making of a material error of law, we have reminded ourselves of the principles set out in a long line of cases, including Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201, at [26], Yalcin v SSHD [2024] EWCA Civ 74, at [50] and [51], Gadinala v SSHD [2024] EWCA Civ 1410, at [46] and [47], and Volpi & Anor v Volpi [2022] EWCA Civ 464, at [2-4] and of the danger of "island-hopping", rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

36. We have also remined ourselves of the principle first set out in Danian v Secretary of State for the Home Department [1999] EWCA Civ 3000, which is the basis on which the appellant's appeal was allowed in spite of the adverse credibility findings made against her. In that case, Lord Justice Brooke, with whom Lord Justices Buxton and Nourse agreed, endorsed the UNHCR's summary of the legal principles that apply to opportunistic claims such as these:

> "an asylum-seeker who can establish that he/she has a well-founded fear of persecution on Convention grounds should fall under the scope of the inclusion clauses, irrespective of whether the actions giving rise to such fear have been carried out in good or in bad faith. Accordingly, even if the applicant has created a claim to refugee status by resorting to opportunistic post-flight activities, it would not be right to deprive him of international protections and return him/her to his/her country of origin if it is established that the consequences of such return may result in persecution for one of the reasons enumerated in the 1951 Convention.
>
> "We realise that this may encourage the misuse of the asylum system by persons who, without having real protection needs, want to create a refugee claim for themselves through irresponsible/ opportunistic actions. This consideration is, no doubt, an important one, as the misuse of the asylum system may eventually be detrimental to the interests of bona fide asylum-seekers and genuine refugees. For this reason, UNHCR would not object to a more stringent evaluation of the well-foundedness of a person's fear of persecution in cases involving opportunistic claims.
>
> "In this connection, it should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the claimant's home country, either because they will not come to the attention of the authorities of that country or because the opportunistic nature of such activities will be apparent to all, including to those authorities."

37. The respondent does not dispute that this is the correct approach and does not say that the Judge did not follow it. He obviously did. He carefully considered the questions of whether the appellant's opportunistic activities would come to the attention of the Zimbabwean authorities, and whether those authorities would recognise them as opportunistic. Another Judge might have come to a different conclusion, but each step in his chain of reasoning about how the appellant would behave both before and after her deportation and how the CIO would behave on her arrival was based on the evidence before him and the extant country guidance.

38. The respondent ultimately seeks to challenge only one step in that chain of reasoning: that the CIO would conduct a Google search on the appellant on arrival. We note that there has been no challenge to the Judge's conclusions that the appellant would only delete her online profile at the last minute, if at all, or that the guidance in XX means that a Google search conducted on arrival was reasonably likely to disclose her blog, or that the CIO would not believe the appellant if she protested that the blogs were entirely cynical.

39. We agree with Mr Muzenda that, given that HS says that every deportee is referred to the CIO for questioning, and that the CIO would then be required to prepare a report, it was open to the Judge to infer that the CIO would conduct a Google search on the appellant in the course of this process. HS was promulgated in 2007, and it endorsed findings about airport procedures made in AA(2), which in turn had been promulgated in 2006. It is not surprising, therefore, that these cases make no specific reference to the conducting of Google searches to uncover deportees' online profiles, and it would be wrong to draw conclusions from their silence on this question. We cannot find, however, that the Judge's inference from what is said about the CIO's investigations in those cases (that it is reasonably likely that they would conduct a Google search now) is one that no reasonable judge could have drawn.

40. For these reasons, the Judge's decision did not involve the making of a material error of law.

Notice of Decision

The decision of First-tier Tribunal Judge Cole dated 9 September 2024 did not involve the making of an error of law. The Secretary of State's appeal against that decision is dismissed, with the consequence that Ms MC's appeal against the Secretary of State's refusal of her protection claim remains allowed.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 January 2025