Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05581/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 October 2013	**On 30 October 2013**
	.....

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

KS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Muzenda, Solicitor
For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Zimbabwe, born on 23 April 1981. Her appeal against the Secretary of State's decision of 30 May 2013 to remove her to Zimbabwe was dismissed by First-tier Tribunal Judge

Flynn after a hearing on 12 July 2013. Permission to appeal having been granted, the appeal came before me.

2. The appeal to the First-tier Tribunal was on asylum and human rights grounds, the latter including matters concerned with the appellant's health. A very brief summary of the basis of the appeal suffices to put into context what follows.

3. The appellant claims to come from a rural part of Zimbabwe. She came to the UK as a student. In the UK she became a member of the MDC and Restoration of Human Rights group ("ROHR"), participating in various activities, until ill-health caused her to have to cease those activities. She fears persecution on return on account of her support for the MDC which she would continue when she returns. She would be questioned on return at the airport which would be a difficult experience for her because of her various health conditions. On questioning she would say that she did not support Zanu-PF and intended to work for the MDC. The appellant would be required to demonstrate loyalty to the regime. She would not be able to relocate to Harare.

Submissions

4. Mr Muzenda relied on the grounds of appeal to the Upper Tribunal. I was referred to the decision in HS (returning asylum seekers) Zimbabwe [2007] UKAIT 00094 in terms of the risk of questioning on return. The mere fact of being refused asylum in the UK was not sufficient to establish risk but she would be of further interest and would be subjected to further interrogation. The First-tier judge was wrong to state that the appellant would be unlikely to be questioned on return.

5. The delay in claiming asylum was not even the six years from when it is said she had a fear of return. She would not have claimed asylum from the first day of attending a political meeting.

6. There was no sufficient basis for the judge to have concluded that the appellant stopped her political activities in the UK because she had lost interest. There was medical evidence which supported her account in this respect.

7. Even though there is no indication from the determination that submissions had been made in relation to the reasonableness of internal relocation, it is likely that submissions on the point would have been made. The point was in any event an obvious one.

8. So far as Article 8 is concerned, it was conceded that at the hearing it had been said on behalf of the appellant that Article 8 was not a "forceful" ground.

9. It was also accepted that during the course of the hearing the judge had allowed the appellant suitable breaks and ensured that she was able to

give her evidence. It was not suggested that there was procedural unfairness in this respect on the part of the First-tier judge.

10. Mr Tarlow relied on the 'rule 24' response. The judge had considered the evidence in relation to the appellant's political activities and the extent to which that would create a risk on return. There was no medical evidence addressing the question of why the appellant gave up her political activities.

11. Although in considering Article 8 the judge did not refer to her medical conditions, she was obviously aware of them.

12. The primary finding was that the appellant could return to her home area, therefore any error in the assessment of internal relocation is not material.

13. Despite what is said about questioning on return, the appellant's political activities were some years ago in the UK and would not generate further interest.

14. In reply it was submitted that the appellant intended to carry on her political activities on return. On questioning she would not be able to articulate her position because of her medical issues. Following the screening interview the appellant had been given an apology by the UKBA for the way the interview was conducted. There was evidence from the asylum interview that she had difficulty answering questions.

My assessment

15. In CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC), the Tribunal referred to the guidance in HS. The Tribunal did not purport to give country guidance on the issue of risk at the point of return at the airport, confining itself expressly to stating that it was giving country information. It stated that the fresh evidence regarding the position at the point of return does not indicate any increase in risk since country guidance was given in HS. It went on to conclude that the available evidence as to the treatment of those who have been returned to Harare Airport since 2007 and the absence of any reliable evidence of risk there means that there is no justification for extending the scope of those who might be regarded by the CIO as an MDC activist.

16. Mr Muzenda did not seek to support his argument as to risk at the point of return with reference any background evidence, relying solely on the decision in HS. The relevant paragraphs of HS are the following:

"

> "264. The CIO has taken over responsibility for the operation of immigration control at Harare airport and immigration officers are being replaced by CIO officers. We accept also that one of the purposes of the CIO in monitoring arrivals at the airport is to

identify those who are thought to be, for whatever reason, enemies of the regime. The aim is to detect those of interest because of an adverse military or criminal profile. The main focus of the operation to identify those who may be of adverse interest remains those who are perceived to be politically active in support of the opposition. But anyone perceived to be a threat to or a critic of the regime will attract interest also.

265. The fact that the CIO has taken over responsibility for monitoring all returning passengers at Harare airport is not something that effects the level of risk. The evidence before AA(2) was that all deportees were handed over to the CIO for questioning in any event. Then, as now, those deportees will have been identified in advance from the passenger manifest and the CIO will have formed a preliminary view as to which, if any, are of further interest.

266. Large numbers of passengers pass through the airport. The CIO continues to recognise that it cannot question everyone; and so there is a screening process to identify those who might merit closer examination. We see no reason to suppose that the heightened role of the CIO would change this. There are now additional demands upon the CIO as it is responsible for monitoring all passengers passing through the airport, both on arrival and departure. We have set out the evidence that indicates in whom the CIO has an interest. This will be those in respect of whom there is any reason to suspect an adverse political, criminal or military profile of the type identified in AA(2). In addition, those perceived to be associated with what have come to be identified as civil society organisations may attract adverse interest as critics of the regime.

267. There is no evidence that ordinary passengers returning from the United Kingdom experience any difficulty in passing through the airport. In fact, the evidence is to the contrary. Nor is there a real risk that those returning to Zimbabwe after being refused leave to remain after the leave initially granted has expired are regarded with suspicion or treated otherwise than as ordinary travellers.

268. Nor is there evidence of any consistent pattern of treating any differently those who have not claimed asylum in the United Kingdom but who have been forcibly removed to Zimbabwe because they have been refused leave to enter or remain. There is no evidence that any of the twenty three “immigration deportees” removed since August 2006 have experienced any such difficulties. We have accepted that all those who are deportees will be identifiable as such upon return to Harare airport and so will generally be subjected to some enquiry before being allowed to pass through the airport.”

17. Although not all returnees are questioned, of note is [268] to the effect that all deportees will be identifiable as such upon return to Harare airport and so will be subjected to some enquiry before being allowed to

pass through the airport. In these circumstances the First-tier judge's conclusion at [46] that the appellant is unlikely to be questioned at the airport is not a sustainable one. What the consequences of any questioning would be is another matter. That depends to some extent on the judge's other findings in relation to the appellant's political activities, her intentions and motives.

18. I do not accept that there is any merit in the complaint about the judge's findings in terms of the timing of the appellant's claim for asylum. It appears from [34] of the determination that it was submitted on behalf of the appellant that the delay in claiming asylum was not the ten years contended for on behalf of the respondent, but six years. Indeed, what was argued on behalf of the appellant as recorded at [34] is consistent with [32] where the judge set out the submissions on behalf of the appellant. I mention this because in submissions to me Mr Muzenda, who represented the appellant before the First-tier Tribunal, argued that the delay was not even six years.

19. The judge referred at [35] to the appellant's evidence that her mother sent her to the UK so that she would be safe "which is a clear indication that the appellant had at least some degree of fear when she entered the UK." He also referred to, and accepted, her evidence that she believed that her aunt would take steps to regularise her status, but did not find it credible that she would have maintained that belief until she left her aunt's house some five years later. He also noted that even after recovering her passport and realising that no steps had been taken there was nothing to show that she undertook any further action for approximately five years. She had said in her witness statement at [9] that her claim was based on her *sur place* activities but did not claim to have been involved in them prior to 2007.

20. On any view, on the judge's analysis of the facts, which is supported by the evidence, there was a delay of several years before the appellant claimed asylum. That is a matter that the judge was entitled to take into account. At [37] she stated that this "has caused some damage to her credibility" and that she has therefore "treated her evidence with a degree of caution."

21. In relation to the appellant having ceased political activities in the UK, the judge noted that she had not been involved in political activities for more that two years (see [38]). That conclusion follows from the appellant's evidence recorded at [17] and [25] (two and a half years), and no complaint is made about that finding of fact. The complaint is in terms of the judge's conclusions as to why she stopped those activities. The appellant's case is that it was as a result of her medical conditions, set out at [4] and referred to elsewhere in the determination. At [4] those conditions are recorded as dyslexia, dyspraxia, thyroid eye disease, ADHD, and back pain.

22. At [39] Judge Flynn referred to the respondent's submissions to the effect that the medical evidence did not support the claim that she stopped her political activities because of her health, and he accepted that submission. It is not the case that the judge failed to take into account the medical evidence. She did take it into account and referred to it more than once in the determination. She also noted that the claim that she stopped her political activity because of her health was inconsistent with her continued membership of her Church. No complaint is raised before me in relation to that aspect of the findings.

23. There was medical evidence to support the appellant's claim that she has the conditions she referred to, that evidence being both in the appellant's and respondent's bundles. However, the grounds of appeal to the Upper Tribunal do not identify any medical evidence that was before the First-tier judge which refers to the reasons for her having given up her political activities in the UK, and none were referred to at the hearing before me.

24. The judge took into account the appellant's explanation for ceasing political activity, and gave reasons for rejecting that account. The conclusion that the appellant had lost interest in political activity more than two years ago is a sustainable one, being a reasonable inference from the evidence.

25. In this context it is argued that the findings at [50] are inconsistent. The judge there stated that "I am satisfied that the appellant lost any interest she may have possessed in politics and human rights more than two years ago…I am satisfied that her original involvement with the MDC and ROHR was principally to bolster her asylum claim." I do not accept that there is the inconsistency contended for in terms of the conclusion that she had an interest in politics yet only became involved to bolster her claim. Judge Flynn referred to "any interest *she may have possessed*" and stated that her "original involvement" was "principally" to bolster her claim. She did not in fact conclude that the appellant really did have a commitment to political activity for its own sake and without an underlying motive.

26. She noted at [43] that the appellant did not participate in any political activities in Zimbabwe. She made her claim after significant delay. At [38] the judge made findings as to the extent of her political activities in the UK which were that they were "intermittent and were not at a high level". She accepted that the appellant had taken part in some fund-raising events such as selling T-shirts but not that she was involved in soliciting donations or in the recruitment of members and supporters. She found that the appellant was not, to the use the words of the appellant's statement, "making a significant contribution to the struggle for liberation." It has not been suggested that those findings as to the extent of the appellant's activities are unsustainable.

27. Against this background the judge was entitled to come to the conclusions that she did about the appellant's interest in political activity, such as it was, having ceased more than two years ago. Thus, she was entitled to conclude at [50] that it was not reasonably likely that the appellant will take part in politics in the future on return or that she would be forced to lie about her political beliefs.

28. It is plainly relevant whether or not the appellant's home area is a rural area of Zimbabwe, given the present country guidance on the issue. However, there is no merit in the assertion in the grounds to the effect that the judge had failed to give adequate reasons for rejecting the appellant's claim that she comes from a rural area. The grounds assert that "there was no evidence to show that it was anything else either." However, as Mr Muzenda acknowledged, it is for the appellant to establish that matter, it being an issue of obvious significance. The judge was entitled to reject her evidence in that respect, in the context of an account in which the appellant's credibility was found wanting in significant respects. In passing, I note that no background evidence was put before me to support any express or implied suggestion that the judge made an error as to fact in terms of whether the appellant's home area is a rural area.

29. Having come to the view that there was no error of law in the judge's primary assessment in terms of risk to the appellant on return to her home area, whatever may be said about her conclusions as to the reasonableness of internal relocation is irrelevant.

30. Returning then to the error in the judge's conclusions about the questioning of the appellant at the point of return at the airport. Whilst [268] of HS suggests that the appellant would be subject to some enquiry, it is not reasonably likely that that enquiry would reveal anything other than that the appellant does not intend to pursue any political activity in Zimbabwe and that her involvement in such activity in the UK was principally to secure residence status in the UK. She would also be able truthfully to state, if asked, that her political activities ceased over two and a half years ago. This is in line with the judge's findings.

31. Whilst it could be said that the appellant would find any questioning difficult in the light of her health conditions, there is nothing to indicate that that would arouse heightened interest in her.

32. Thus, whilst I am satisfied that the judge erred in concluding that the appellant would be unlikely to be questioned at the airport, in so far as that could be characterised as an error of law, it is not one that requires the decision to be set aside because it could not have affected the outcome of the appeal, on the evidence before her.

33. In relation to Article 8, it is said in the grounds that the judge failed to undertake the balancing exercise appropriately, taking into account the

appellant's length of stay and her medical history. It is also said that the UK had assumed responsibility for her medical condition “to the extent that they are testing some new drugs on the [appellant]”.

34. In the assessment of the Article 8 ground, Judge Flynn did not expressly refer to the appellant's health conditions. It would have been preferable for her to have done so. However, it is clear from the determination that she was aware of them. It seems to me to be unlikely that she did not take them into account when considering proportionality. At [54] she dealt with the appellant's health in the context of Article 3. In the next paragraph but one she went on to consider Article 8. At [62] she concluded that there were no particular compassionate circumstances, and she concluded that her personal circumstances, amongst other things, were not such as to make her removal disproportionate. She also referred to her “length of residence in the UK”.

35. I am satisfied that the judge conducted the proportionality exercise appropriately and did not fail to take into account any material factors, in particular the appellant's health. Even if she failed to take her health into account, the medical evidence that was before her was not such as would or could have led to a different outcome. It is also to be born in mind that the appellant said in evidence that she has her mother still in Zimbabwe.

36. Significantly, it was said on behalf of the appellant by her representative, recorded at [31], that the appellant did not have a forceful Article 8 case. If the judge's articulation of her reasons for finding that the appellant's removal was proportionate was, on one view, light on detail, that is hardly surprising given the way the Article 8 ground was advanced before her.

37. I do not accept that it could be said that the UK had accepted responsibility for the appellant's treatment by virtue of some new drugs being tested on her. Even if such responsibility had been assumed, on the facts of this appeal that would not have rendered her removal disproportionate.

38. In conclusion, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal except in relation to the issue of questioning at the point of return. However, that is not an error of law that means that the decision should, in my discretion, be set aside.

Decision

39. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision however, is not set aside and the decision to dismiss the appeal on asylum, humanitarian protection and human rights grounds stands.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

18/10/13