Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06154/2012

THE IMMIGRATION ACTS

Heard at Belfast Laganside **Determination Promulgated**
On 3 July 2013

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms M. O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr M. Brennan, Solicitor

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Zimbabwe, born on 22 December 1979. She arrived in the UK on 21 May 2012. Her application for asylum was refused and a decision made on 13 June 2012 to remove her to Zimbabwe. Her appeal against that decision was allowed by First-tier Tribunal Judge Farrelly after a hearing on 7 August 2013.

The determination of the First-tier Tribunal

3. In detailing the findings made by the First-tier judge, the basis of the appellant's claim is apparent. Judge Farrelly found at [15] that the appellant grew up in a village (which at [8] was said to be in Nyaki district, North Matabeleland), and that she has limited education. She had not claimed any political views but the judge accepted that she had voted for the MDC in the last election.

4. It was accepted to the lower standard that she lived with her uncle and his wife and that her uncle was employed as a driver for Zanu-PF politicians and that he was away for long periods of time working in Harare. Again, at [16] he accepted that the appellant was visited by three men from the CIO enquiring about her uncle, although she did not know why they were looking for him. They assaulted her and threatened to come back. Her uncle's wife was out at the time of the visit when the appellant was assaulted, but having been told of what happened decided that they should move because the men may come back. It seemed "likely" that because the uncle worked for Zanu-PF, the party would have his contact details.

5. At [20] he stated that it was harder to accept that this incident was of such significance that it prompted the appellant's departure from Zimbabwe. She had never had problems with the authorities before and the authorities had indicated no interest in her, rather that they were interested in her uncle. He rejected the account of having had no further contact with her uncle's wife, having been helped by a stranger to go South Africa, arrange documentation, travelling with her to Belfast and then abandoning her.

6. At [21] he quoted from [48] of the refusal letter. He stated that he found merit in what was said in that paragraph. In essence it suggested that the warning and intimidation by the CIO simply reflect their tactics and does not necessarily mean that the appellant would face consequences. That paragraph of the refusal letter goes on to state that if the CIO were interested in her uncle for a reason unknown to her it is not reasonably likely that she would face mistreatment amounting to persecution because of his activities or because she would be unable to provide information about him.

7. At [22], summarising his findings he concluded further that the appellant fled and remained in hiding but that it was not credible that she remained in hiding for two months in an area not far from her home village (two hours walking distance). It was not credible that the incident would have led her to leave "in genuine fear". He found that the incident did not cause her to leave Zimbabwe.

8. After reviewing the authorities on Zimbabwe the judge went on in [32] to decide that the appellant would be safe in her home area, an area populated by the Ndebele where the MDC are strong and the activities of Zanu-PF restricted. She would be able to relocate in any event, to Bulawayo, Harare or the areas where she has family connections. The appellant is not educated but has been able to sustain herself in the past and could do so on return.

9. In relation to risk, he found at [33] that there is a real risk that the appellant would be questioned by the CIO at the airport on return. This is because she would be returning from the UK and the CIO can identify those returned against their wishes and who are potentially failed asylum seekers. Further, the appellant comes from an area of MDC support. There are road blocks at which the person may be expected to know the latest Zanu-PF party songs.

10. Lastly, at [34] it was concluded that on return the CIO will question the appellant about her history. "Given that the CIO operates on intelligence it may be that they have some information connecting the appellant to uncle. Consequently, in this situation; and indeed even without the link to her uncle; it seemed likely she will be called upon to display her loyalty to the regime." The only way she could display loyalty would be by making false representations. He went on to refer to the decision in RT (Zimbabwe) [2012] UKSC 38.

Submissions

11. The argument for the Secretary of State is straightforward. It is that the judge's conclusions about risk on return are inconsistent with the decision in HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094. Mere arrival from the UK would not mean that the appellant would be of interest. The credibility findings are such that the appellant would not be of interest in the intelligence-led process at the airport.

12. Mr Brennan also relied on the decision in HS which, he submitted, is still good country guidance albeit on a limited basis. There were some positive credibility findings made by the First-tier judge, and to which I was referred. Although the judge found that the appellant was assaulted by the CIO he did not refer to the details of that assault as set out in the appellant's witness statement.

13. Mr Brennan referred to various parts of the decision in HS. The CIO clearly had an interest in the appellant's uncle and there would be a risk to her by association. It is not asserted that there would be adverse interest just because she is a returnee. The CIO are completely in control of security at the airport.

My conclusions

14. At the time of hearing before Judge Farrelly, the appeals against the decision in EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) had been allowed and the cases remitted to the Upper Tribunal. Thus, before Judge Farrelly the applicable country guidance decision was RN (Returnees) Zimbabwe CG [2008] UKAIT 00083. Subsequently, in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC), the decision in EM was affirmed. Thus, by this meandering route, it is established that before Judge Farrelly, EM did in fact represent the appropriate country guidance.

15. Neither party before me suggested that anything turned on this assessment of the country guidance cases. In the final analysis, a phrase I use advisedly in this

context, I agree. Neither party has sought to argue an error of law in the decision of the First-tier Tribunal in terms of the incorrect application of country guidance. However, in my assessment of any error of law and the consequences of such being found, it is necessary to record that the appropriate country guidance was EM.

16. The issue before me is a relatively narrow one. Did the First-tier judge err in law in his conclusion that there would be a real risk of persecution either at the airport or en route to her home area? If so, what should follow.

17. The judge's conclusions as to risk on return are to be found at [33] and [34]. The risk was found to arise because the appellant comes from an area of MDC support and there are road blocks at which the person may be expected to know the latest Zanu-PF party songs. The judge also appears to have concluded at [34] that the need to demonstrate loyalty would also arise at the airport and she could not be expected to lie.

18. The Secretary of State's grounds at [5] contest the finding that there would be any requirement for the appellant to demonstrate loyalty at the airport.

19. At [266] of EM it was said that the country guidance regarding risk at the airport continues to be as set out in HS, read with the findings on that issue in SM and Others (MDC – internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100 and AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061.

20. In RN at [262] the Tribunal stated as follows:

> "It is the CIO, and not the undisciplined militias, that remain responsible for monitoring returns to Harare airport. In respect of those returning to the airport there is no evidence that the state authorities have abandoned any attempt to distinguish between those actively involved in support of the MDC or otherwise of adverse interest and those who simply have not demonstrated positive support for or loyalty to Zanu-PF. There is no reason to depart from the assessment made in HS of those who would be identified at the airport of being of sufficient interest to merit further interrogation and so to be at real risk of harm such as to infringe either Convention."

21. The country guidance in CM also, in essence, affirmed the country guidance in relation to the situation at the point of return as set out in HS, although in CM the Tribunal expressly stated that it was not giving country guidance on that issue. In any event, in assessing whether there is any error of law in the decision of the First-tier Tribunal in the appeal before me, CM would more clearly come into play should the decision of the First-tier Tribunal be set aside to be re-made.

22. From RN, the country guidance decision applied by the First-tier judge, it is evident that it is the CIO and not the "undisciplined militias" that are responsible for monitoring returns at the airport. In so far as the First-tier judge concluded at

[34] that the appellant would be required to demonstrate her loyalty to the regime at the airport, I consider that he was wrong to have come to that conclusion.

23. However, the guidance HS from [264] is to the effect that the intelligence led process at the airport is to identify those who may be of interest to the regime. The mere fact of returning as a failed asylum seeker would not be a basis from which to conclude that an individual would be at risk.

24. Judge Farrelly stated at [34] that "Given that the CIO operates on intelligence it may be that they have some information connecting the appellant to uncle (sic)". For the Secretary of State it is submitted that this is speculation. What has to be borne in mind however, is that the appellant's account of the CIO having come to the appellant's home in search of her uncle was found to be credible. It was also found to be credible that, as she stated in her witness statement, the CIO said that they would come back, and threatened her as to the consequences if she did not give them information as to her uncle's whereabouts.

25. It is not altogether surprising that the Secretary of State should characterise as speculation the judge's conclusion that the CIO (at the airport) "may" have some information connecting the appellant to her uncle. The use of that phrase could easily lead to the conclusion that this is only speculation. However, on an assessment of the determination as a whole, it is apparent that what Judge Farrelly was saying was that it is "reasonably likely" that there would be information linking the appellant to her uncle. That was a conclusion he was justified in coming to on the basis that it was the CIO that came looking for him and the CIO who monitor returns to the airport in an intelligence-led process. The appellant is his niece and she has been questioned about him already.

26. I am satisfied that there was sufficient evidence before the judge for him to come to the view that it is reasonably likely that there would be further interest in the appellant on return, that further interest in HS being identified as the point at which the real risk of ill-treatment arises.

27. On that basis, it is of little significance that the judge concluded that the visit by the CIO was not the cause of the appellant leaving Zimbabwe (see [20] of the judge's determination). That does not affect the question of what interest in her there is reasonably likely to be on return.

28. Given the area of Zimbabwe that the appellant comes from, I consider that the judge was wrong to conclude, as he appears to have done in the last sentence of [33], that she would be at risk in terms of having to show loyalty to the regime en route to her home area. That is not consistent with the decision in EM. However, in so far as that amounts to an error of law, it is not an error of law that requires the decision to be set aside, in the light of the judge's satisfactory assessment of risk at the point of return.

29. On the basis of the challenge made to the determination as expressed in the grounds and in submissions, I am not satisfied that there is any error of law in the

First-tier judge's decision, or at least none that requires the decision to be set aside.

Decision

30. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to allow the appeal on asylum grounds therefore stands.

Anonymity

I make an anonymity order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only. No report of these proceedings may identify the appellant.

Upper Tribunal Judge Kopieczek

8/07/13