



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/04154/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 27 November 2014

Determination Promulgated  
On 18 February 2015

Before

THE HON. LORD BURNS

UPPER TRIBUNAL JUDGE JORDAN

Between

CASTRO MOYO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr T. Rehman, Counsel

For the Respondent: Mr M. Shilliday, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. The appellant is a citizen of Zimbabwe born on 26 November 1980. He arrived in the United Kingdom on 4 April 2006 when he claimed asylum. His application was

refused and his appeal was dismissed on 15 October 2006. A further three submissions were made by him, each of which were refused. By decision of 4 June 2014 the respondent refused to grant him refugee status under paragraph 336 of the Immigration Rules HC395 but granted him discretionary leave to remain until 4 December 2016. He appealed against that decision to the First-tier Tribunal. The Tribunal, chaired by Judge Hague, sat to consider his case on 28 August 2014.

2. Upon application for asylum being made on 25 April 2006, the respondent refused that application in a letter dated 16 June 2006. He appealed against that refusal to the First-tier Tribunal. That appeal was heard on 19 October 2006 before Judge Frankish who refused it. We were provided with a copy of the determination and reasons. We will make reference to its terms in due course. However, we observe at this stage that the appellant gave evidence before Judge Frankish and stated, among other things, that he was beaten up in 2003 when people were looking for his uncle William Dube who was, at the time of the appeal, in the United Kingdom. He claimed that Mr Dube had been "a very high person to [sic] the MDC in Bulawayo", often arranged meetings and distributed literature about the MDC and was the point of contact in the appellant's locality for people wanting to join the MDC. The appellant claimed he was very close to and greatly influenced by his uncle rendering it inevitable that the appellant would become a member of the MDC and "fight for the cause". They worked together extremely closely both politically and through Mr Dube's business. Upon Mr Dube leaving Zimbabwe, the appellant claimed to have assumed Mr Dube's role in the MDC.
3. However, at the time of the appeal in October 2006, the appellant stated that, although Mr Dube was in the United Kingdom, he had not established contact with him and, accordingly, Mr Dube was not led as a witness on the appellant's behalf. Judge Frankish was unable to accept that the appellant had completely lost touch with his uncle and was understandably sceptical of the appellant's claim to have been so greatly influenced by his uncle, to have worked so closely with him, to have largely followed in his footsteps, and to know that his uncle was in the United Kingdom yet not to have any idea where he then was. Judge Frankish concluded that the uncle was "nothing more than a prop to bolster the claim of MDC activism."
4. At the hearing of 28 August 2014 before Judge Hague, the appellant again gave evidence. He maintained that he was at risk of persecution in Zimbabwe on the grounds of his actual or imputed political opinion as a person opposed to the Mugabe regime. He claimed that he had come to the adverse attention of the authorities prior to his departure from Zimbabwe on the same basis as he had maintained before Judge Frankish. Accordingly, he advanced the same contentions before Judge Hague to the effect that his close connection with his uncle, Mr Dube, and the fact that he had taken over the role of his uncle within the MDC had brought him to the adverse attention of the authorities in Zimbabwe which rendered him at risk on return.
5. Judge Hague noted at paragraph 7 that Judge Frankish had disbelieved the appellant and had considered the appellant to be no more than a general MDC supporter. He

considered that the findings of Judge Frankish formed the starting point of consideration of the case since the facts relied on by the appellant were not materially different and much of the same evidence was relied upon. Accordingly, these matters did not fall to be re-litigated but that his findings should be made in line with them. He referred to *Devaseelan v SSHD* 2002 UKIAT 000702. However, William Dube attended the hearing before Judge Hague and gave evidence. It was argued on behalf of the appellant that the evidence of William Dube permitted Judge Hague to depart from the earlier findings of Judge Frankish and that he ought to have made an assessment of Mr Dube's credibility and to have dealt with the evidence accordingly. However, Judge Hague considered that the comments by Judge Frankish about the absence of William Dube were only part of Judge Frankish's reasoning. That reasoning was not vitiated by the appearance of William Dube at the hearing in August 2014. Since Judge Hague had, independently, found the appellant to lack credibility, he proceeded upon the factual basis found by Judge Frankish and concluded that the appellant was no more than a general MDC activist while in Zimbabwe.

6. The appellant also advanced arguments in relation to his political activity in the UK with "Zimbabwe Lets Unite" (ZLU), a pressure group allegedly set up with the object of uniting opposition against the Mugabe regime. It was contended that this would be known to the authorities in Zimbabwe and would cause him to be arrested and persecuted if returned. Judge Hague rejected these contentions for the reasons that he gives. These findings are the subject of criticism in this appeal to the extent set out in the second ground of appeal with which we deal below.
7. Mr Rehman argued before us that Judge Hague had erred in his approach to the previous appeal determination by Judge Frankish because of the evidence given by William Dube. He pointed out that Mr Dube's evidence had been unchallenged by the respondent. It was clear that he did have the role attributed to him by the appellant, that the Mugabe regime was aware of the connection between Mr Dube and the appellant and Mr Dube had been granted refugee status in the United Kingdom. The evidence of Mr Dube accordingly justified the revisiting of Judge Frankish's findings in relation to the appellant's evidence that he had come to the attention of the authorities before he left Zimbabwe and therefore would be at risk on return. Judge Hague had made no findings on Mr Dube's credibility. He was obliged to do so and that failure was a material error of law.
8. Reference was made to the statement of Mr Dube dated 19 August 2014 which was submitted to Judge Hague. Since this is the foundation of what is claimed to be a material error of law by Judge Hague in his assessment of the appellant's appeal, we set out the terms of that statement in full:

"I William Dube currently residing at [ - ] will say as follows:

1. I arrived in the United Kingdom on 29 January 2004 and claimed asylum at the airport. My claim was initially refused and my appeal was dismissed. I believe the main reason for the refusal was that it

was not accepted I was a Zimbabwean national. I subsequently made a fresh claim and was granted five years leave to remain as a refugee. I have now have indefinite leave to remain in the UK.

2. I was heavily involved in MDC campaigns in Felabusi. I had started this in 1999 but became heavily involved in 2002 to 2003. I was involved in youth campaigns and organising rallies in the area. There was no specific title that was given to me but I had got very excited at the creation of the party and wanted to get involved as much as I could.
  3. I was captured by Zanu PF militia in the area on several occasions and tortured. I kept reporting this to the police station and they kept saying they would look into it but nothing was ever done.
  4. Eventually I decided I could not take it anymore so I decided to flee Zimbabwe. I left with some other guys and travelled to South Africa. I stayed with some MDC members there for about six months. I then travelled to the UK where I claimed asylum.
  5. The basis for my claim for asylum was that I feared for my life as a result of the treatment that I had previously received in Zimbabwe due to my involvement with the MDC.
  6. Castro Moyo's father is my cousin. In Western culture he (Castro) would refer to me as his uncle, but in our culture he refers to me as his young father.
  7. I'm aware that Castro said that he was targeted by Zanu PF militia in Zimbabwe after I had left, who wanted to know where I was. I was not aware at the time that this had happened to him because I was not in contact with him. However, it is entirely plausible that this could have happened because Zanu would have been aware that he was related to me.
  8. I got back in touch with Castro in 2008 and since then we have continued to be in touch.
  9. I believe that Castro Moyo would be at risk in Zimbabwe as a result of his association with me and also his activities in the UK."
9. Mr Rehman argued that Mr Dube's statement confirmed that he was involved with MDC and that his application for refugee status had been granted on that basis. The appellant's claim to have come to the adverse attention of the Zimbabwe authorities as a consequence of his connection with his uncle was also confirmed by the statement. In addition, the fact that Mr Dube himself had been an activist in the MDC was also confirmed thus supporting the contention that the appellant would be at risk on return to Zimbabwe on account of his association with the work of his

uncle, whose role the appellant had assumed. These considerations demonstrated that the approach of Judge Hague in proceeding upon the factual basis found by Judge Frankish erroneous in law. The evidence of William Dube provided a proper basis upon which the findings of Judge Frankish could be overturned.

10. Judge Hague at paragraph 7 of the determination proceeded upon the basis that the evidence of William Dube did not undermine the findings of Judge Frankish on the critical matter as to whether the appellant had been anything more than a general supporter of the MDC prior to leaving Zimbabwe. Judge Frankish had found that the appellant's evidence to the effect that he had an important role within that organisation was incredible. It is true to say that that conclusion was arrived in the context that Judge Frankish considered it wholly implausible that the appellant would have lost touch with his uncle and thus the uncle's absence at the hearing indicated that the appellant's account was neither truthful or reliable. However, as Judge Hague pointed out, Judge Frankish's assessment proceeded upon the basis that Judge Frankish did not find the appellant himself credible or reliable in those matters. That is why Judge Frankish described William Dube as being nothing more than "a prop" to bolster the appellant's claim of MDC activism.
11. The question for us comes to be whether the evidence of William Dube, as advanced before Judge Hague, was such that his approach to it amounts to a material error of law. We therefore turn to consider the terms of William Dube's evidence. We ask ourselves whether anything in it could to have led Judge Hague to a different conclusion than Judge Frankish on the appellant's claim to have been an important figure in MDC was incredible, which was the critical fact in issue. If there is, then Judge Hague could be properly said to have erred in a material way.
12. First it must be recognised that there are significant discrepancies between the account of the appellant and that of Mr Dube in certain important matters. First, the appellant claimed that he worked very closely with his uncle and had been so greatly influenced by him that he largely followed in his footsteps (paragraph 13 of Judge Frankish's decision). He had also claimed that he himself had assumed his uncle's role (see paragraph 11). He described William Dube as a very high person to (*sic*) "the MDC in Bulawayo". His uncle had responsibility for membership of the MDC, publicity and the organisation of events.
13. When one examines the statement of William Dube it is immediately apparent that he does not confirm that he and the appellant worked closely together in MDC business. As to Mr Dube's role within the MDC it is notable that he describes himself as being heavily involved in MDC campaigns in Felabusi. As noted above, the appellant described Mr Dube as being a very high person to the MDC in Bulawayo. Further, far from claiming, as the appellant did, that Mr Dube was heavily involved in membership, publicity, distribution of literature and the organisation of events, all that Mr Dube says about his role was that he was involved in youth campaigns and organising rallies in an unspecified area. Accordingly, the role ascribed to Mr Dube by the appellant is not supported by Mr Dube himself either in terms of geographical location of any activities in which he

was involved or in the nature of those activities. Accordingly, the role he claimed to have assumed from his uncle and which brought him to the adverse attention of the authorities is not in any way supported by Mr Dube's evidence.

14. There are other discrepancies. Whatever his role may have been, Mr Dube does not confirm that the appellant worked closely with him while performing it. Mr Dube says nothing about being assisted in any way by the appellant. The appellant was criticised by Judge Frankish for being unable to "provide a persuasive title for this important role on the part of his uncle", merely stating that his uncle's full title was "secretary". By contrast, Mr Dube states at paragraph 2 "there was no specific title that was given to me". Accordingly there is direct conflict between the evidence of the appellant and his uncle on that, albeit relatively minor, matter. Mr Dube does not support the appellant's contention that it was because of the close association between him and the appellant that the appellant became a member of MDC.
15. Having regard to these discrepancies and to the fact that in the above respects the evidence of William Dube manifestly failed to support the contentions of the appellant as to the reasons why he might be at risk on return due to his political activities in Zimbabwe, we are quite unable to conclude that Judge Hague's approach to the evidence of William Dube represents anything that approaches a material error of law. Judge Hague was entitled to come to the view that he did upon the credibility of the evidence of the appellant himself and further to find that the evidence provided by William Dube did not provide any proper basis upon which the findings of Judge Frankish should be revisited, far less disturbed. For these reasons we reject the first ground of appeal.
16. Mr Rehman also argued that Judge Hague had materially erred in his treatment of the evidence of a further witness, Mr Kevin Ngwenya, who was a fellow member of ZLU, which organisation the appellant had joined after coming to the United Kingdom. Judge Hague found at paragraph 12 that the ZLU was a sham organisation brought into existence solely for the purpose of creating a false appearance of *sur place* political activity among failed asylum seekers in the UK. On that basis he concluded that the empty nature of ZLU would make it insignificant to the authorities and of no substantial concern. It was argued that Mr Ngwenya had been granted asylum by the respondent. In the case worker's notes dealing with Mr Ngwenya's application, it was said that he would be at risk at the airport on return and identified by the CIO because of his *sur place* activities. Judge Hague, it was said, erred in failing to have regard to the case worker's findings and ought to have considered whether there was a valid reason to treat the appellant differently from Mr Ngwenya. Reference was made to *AA (Somalia) v SSHD* [2007] EWCA Civ 1040. In that case the Court of Appeal considered the relevance of a previous tribunal determination in respect of a third party which was founded on the same set of facts. The court found that the previous determination of the tribunal was not binding on the second judge but formed a starting point and regard ought to be had to it before factual conclusions are reached. Mr Rehman argued that the activities in which Mr Ngwenya had involved himself were the same as those of the appellant and that the ZLU had not been regarded as a sham

organisation by the case worker who dealt with Mr Ngwenya's case. The failure to give due consideration to the case worker's findings constituted a material error of law.

17. We are unable to agree with that contention. There is a very important distinction to be made between the findings of a case worker on an application for asylum and the findings of a tribunal. The Tribunal has the advantage of seeing and hearing witnesses who appear before it and of receiving submissions from parties upon it. In this case, Judge Hague had the advantage not only of seeing the statements advanced by the appellant and Mr Ngwenya but also heard evidence from them (see paragraph 11). In paragraph 11 Judge Hague points out that Mr Ngwenya conceded that ZLU was not in contact with any organisations in Zimbabwe and that it was not teamed up with any organisations in the United Kingdom. He could not even say whether people in Zimbabwe would have any knowledge of it. Judge Hague points out the contradictions between the evidence of Mr Ngwenya and that of the appellant. He found that it was apparent that no function or activity could be attributed to the ZLU. For those reasons the judge was fully entitled to come to the view that ZLU was a sham organisation. It was nothing to the point that a case worker may previously have come to a different view on the basis of information of which we are, in any event, unaware. We therefore reject this ground of appeal.
19. Although the grounds of appeal also contained a further ground to the effect that Judge Hague had shown bias against the appellant, Mr Rehman very properly did not seek to argue that particular ground.

## **Decision**

20. The appeal is refused.

The HON. LORD BURNS  
29 January 2015