Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/11464/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 October 2015	**On 13 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

AD
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Haywood of counsel
For the Respondent: Mr N Bramble, a Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. This is an appeal by the appellant against a decision of the First-tier Tribunal dismissing his appeal against the Secretary of State's decision taken on 17 December 2014 to refuse to grant his claim for asylum.

Background Facts

3. The claimant is a citizen of Zimbabwe who was born on 8 September 1998. He entered the UK in July 2008 as a student with a visa valid until 31 October 2012 to undertake a degree course in accountancy and finance at Canterbury Christ Church University. He ceased his studies at the end of the second year because he was not able to afford to continue with his studies. He did not inform the Secretary of State or make an application for leave to remain on a different basis. From that point he had no valid leave to remain in the UK. He started working in the UK as a carer. In April 2012 he arranged to pay £3,000 to an organisation called fast track visa experts to obtain a visa. He was arrested at the USA embassy on 3 June 2013 and interviewed by an immigration officer about his passport. He was served with form IS151a on 3 June 2013 informing him of his immigration status and liability to detention and removal. He was detained on 8 September 2014 and released on 22 September 2014.

4. He claimed asylum on 29 September 2014. That application was refused because the Secretary of State was not satisfied that the appellant had demonstrated that he would be at real risk of persecution on account of his political opinion or that he was in need of Humanitarian protection or that his removal would breach Articles 2 or 3 of the European Convention on Human Rights. The Secretary of State also considered that he did not qualify under the Immigration Rules HC395 (as amended) ('the Immigration Rules') for leave on the basis of his Article 8 rights and that there were no exceptional circumstances to consider a grant of leave to remain outside of the Immigration Rules.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 9 June 2015, Judge Thanki dismissed the appellant's appeal. The First-tier Tribunal found that the appellant does not have a genuine fear of persecution in Zimbabwe and that, even if his claim was accepted at its highest, he would not be at risk on return. The judge also found that the appellant's private life rights required little weight to be attached to them, that there was no evidence that the appellant's partner would have any difficulties in settling in Zimbabwe and that his removal was in accordance with the law and necessary in a democratic society in order to maintain an effective immigration policy.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal. On 1 July 2015 First-tier Tribunal Judge Landes granted the appellant permission to appeal. Judge Landes considered that it was arguable that the First-tier Tribunal Judge's assessment of proportionality was flawed and that it is arguable that the judge

did not take account of the background material when making findings as to the appellant leaving Zimbabwe. Thus, the appeal came before me.

Legislative Provisions

Nationality and Immigration Act 2002 ('NIA Act')

7. As from 28 July 2014 statutory provisions in a new Part 5A of the NIA Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

8. The relevant generally applicable considerations in s.117B are as follows:

"117B **Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

…

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

Discussion and Summary of the Submissions

Ground 1- failure to give reasons for rejecting the appellant's claimed ill treatment

9. The grounds of appeal assert that the judge failed to give adequate reasons for rejecting the appellant's claim to ill treatment. The judge states, at paragraph 91, *'As a member of the MDC it is not credible that the ZANU-PF would maintain such an interest in the appellant'* yet gives no reasons to support this conclusion. Mr Haywood submitted that if you look at the position at paragraph 79 of the decision onwards the first two paragraphs set out the background and at the end of page 11 the judge outlines the appellant joined the MDC, says he was abducted, taken to their base, subjected to harassment, violence etc. There was no criticism by the judge or suggestion that there was vagueness or discrepancies regarding the activities. The evidence is merely recorded without comment the appellant is left with uncertainty as to whether the evidence is accepted or unaccepted. It was a wholly unreasoned finding.

10. Mr Bramble submitted that Judge Landes in granting permission gave a clear indication that the approach to the asylum claim was not material. Irrespective of whether the judge has given full reasons for rejecting the claim the key issue is

paragraph 113 where the judge goes on to consider the appellant's claim at its highest as a general member of the MDC and has given reasons why there is no risk on return irrespective of any merit in the first ground.

11. I consider that the quote from paragraph 91 of the judge's decision has been taken out of context. It must be considered in light of the preceding paragraph where the judge records the much more high profile role in the MDC that the appellant's 'brother' was engaged in. The judge records that no such activity is claimed by the appellant apart from general membership. The judge is recording that as a 'general' member he did not find it credible that the ZANU-PF would maintain such an interest.

12. However, I do accept Mr Haywood's submission that the background materials at that time (as set out in RN (Returnees) Zimbabwe GC [2008] UKAIT 00083) indicates that even as a 'general' member he may well have been targeted in that way.

Ground 2 – Adverse credibility findings regarding safe departure from Zimbabwe

13. The grounds assert that the judge found at paragraph 97 that, '*The appellant was able to leave for the UK using his own passport and showing the student visa. It is not therefore, credible that he was the objection [sic] of attention by the ruling party.*' This finding is said to be irrational. In RN the Upper Tribunal set out the position within the country which was that the violence is not controlled by the State but by undisciplined militias. It is closely aligned but it is not systemised. The interest does not follow through to the airport. For the judge to make a strong finding regarding the lack of problems at the airport shows a misunderstanding of the country guidance and the situation in Zimbabwe.

14. Mr Bramble submitted that the judge, at paragraphs 77 and 78, sets out that he has given consideration to the totality of the evidence and is aware of the duty of anxious scrutiny. In setting that out clearly the judge tells us that everything had been considered. Even if there are errors there are not material.

15. I consider that the judge was entitled to take the lack of any problem that the appellant had in leaving the country into account when assessing the appellant's claim overall. The finding in paragraph 97 follows from an assessment of the appellant's claim that the ZANU-PF activities intensified against him once they became aware of his having secured a student visa to go to the UK.

Ground Three - Undue weight placed on biodata information

16. The grounds assert that at paragraph 86 the judge refers to details of a visa application in which the appellant provided the details of his biological father and J D as his parents. The judge found, *'It maybe [sic] that the appellant regarded her as his mother but it does not explain why he had to mention her name…I find the appellant did not declare his biodata accurately and that effects [sic] his overall credibility.'*

17. It is not clear that the weight placed on the biodata information by the judge has had a determinative effect or 'tipped' the balance on the findings of the judge so as to amount to 'undue' weight. It is one of many factors that the judge considered affected the overall credibility of the appellant. The background is relevant. The information on his birth certificate (obtained in 2006) was that his father was shown as AC and his mother as MM. In his screening interview he said that his father was PDC and his mother was SS and that his aunt/foster parent was JC. In the student visa application (in 2008) he had recorded JD as his mother. The judge was not satisfied that there was a real explanation given as to why he did not give his real mother's name. I consider in light of the different names given the judge was entitled to find that the appellant did not declare his bio data accurately and was entitled to find that this affected his overall credibility.

Ground Four – Unlawful Assessment of photographic evidence

18. The grounds set out that the judge found, at paragraph 93, that '*the appellant has torture marks of which he produced photographs but no medical evidence of the claimed torture marks. I therefore place little weight on his claim of injuries.*' It is asserted that in of itself the absence of medical evidence is an insufficient reason for placing little weight on the photographic evidence. The Upper Tribunal noted in KV (Scarring-Medical Evidence) Sri Lanka [2014] UKUT 230(IAC) that generally scarring cannot be dated beyond 6 months. The appellant's injuries were inflicted nearly seven years ago. The judge erred in treating the absence of medical evidence as determinative. The judge's point about a requirement for corroboration is an error of law.

19. I do not consider that the judge was suggesting that there was a requirement for corroboration or that the absence of medical evidence was determinative. If he had done so he would have rejected the evidence. The judge placed little weight on the photographic evidence in the absence of medical evidence when he was assessing the evidence in the context of the appellant's claim which he was entitled to do.

Ground Five – Failure to determine whether the appellant would be forced to conceal his political beliefs

20. It is asserted that the judge failed to determine whether the appellant would be forced to conceal his political beliefs. The judge made no findings as to whether the appellant's political beliefs were genuinely held, and if so, whether he would be forced to conceal those beliefs in order to avoid persecution. Mr Haywood submitted that there was no finding on whether the appellant was politically active in Zimbabwe and the judge has not found what his stance would be on return.

21. I accept that the judge did not record findings about the appellant's beliefs and if genuinely held whether he would have to conceal those beliefs on return. The judge did record, at paragraphs 90 and 91, that in contrast to the appellant's

brother's activities the appellant did not claim any high level activities and his claim was only as a member of the MDC. However, the lack of a specific finding is not material for the reasons set out below in my conclusions on grounds one to five.

My conclusions on grounds one – five.

22. With regards to grounds one–five, although the judge has given inadequate reasoning in some regards (as discussed above) none of these are material. When considering the risk on return the judge has, in any event, considered the appellant's claim 'at its highest'. The judge records at paragraph 113 that *'…His account, taken at the highest is that he was a general member of MDC and not an activist (unlike his cousin GC)'*. The judge considered the case of EM & Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) and concluded that in that case the view of the Upper Tribunal was that a failed asylum seeker returning from the UK with no significant MDC profile would not result in that person facing a real risk of having to demonstrate real loyalty to the ZANU-PF. Further, that it is possible for returnees to return to less hostile environments elsewhere in the country and that a person can return to rural Matabeeland North or South or Bulawayo and be unlikely to face adverse attention. The judge also notes that the decision indicates that a returnee could locate in a non-urban area of Harare. The judge also considered the case of NN (Teachers: Matabeleland/Bulawayo: risk) Zimbabwe CG [2013] UKUT 00918 (IAC) referring to the headnote in which it is recorded that a teacher will not face a heightened risk if he returns to rural Matabeleland North or South even if he is a MDC member or to Bulawayo even if he has a significant MDC profile.

23. No substantive challenge was made to the judge's findings in respect of the appellant's risk on return other than a challenge to a lack of finding on his political beliefs and whether he would be forced to conceal them. Also there was no suggestion that it would be unduly harsh to expect him to relocate if that were necessary. Given the judge's findings and the case law cited it is clear that the appellant does not face a risk of persecution on return even as a member of the MDC. There was therefore not a material error of law in the judge's decision on the asylum claim.

Ground Six – Flawed assessment of proportionality

24. The grounds assert that although the judge accepts that the appellant is in a genuine relationship with Miss H, a British Citizen, and that Miss H is pregnant with their child, he found that it would be proportionate for the family to relocate to Zimbabwe. At paragraph 102 the judge found *'I also note from the objective evidence that Zimbabwe has white people as its citizens and [Miss H], as a white woman, would have no more difficulty that other white citizens in Zimbabwe'*. The judge gives no indication on which objective evidence he has relied on, in the absence of such indication this finding is irrational. A migrant is bound to experience more socio-economic difficulties than a citizen. The correct test is

whether, in light of her particular characteristics, it would be proportionate for Miss H to relocate to Zimbabwe.

25. Mr Haywood submitted that the judge is plainly wrong to say he was not presented with any evidence showing difficulties that Miss H would face in Zimbabwe. He failed to have regard to the 'Zimbabwe 2013 Human Rights Report' contained within the appellant's bundle. The judge also failed to have regard to the Foreign and Commonwealth Office's report 'Zimbabwe-Country of Concern'. There was evidence that there would be difficulty on return. In response to my question where I asked for a reference to that evidence Mr Haywood referred to the objective evidence that in Zimbabwe there is gender inequality and for example the State Department Report at B49 of the bundle records that the ZANU-PF are seldom arrested or charged when abusing property rights against the white minority. The judge simply doesn't consider Article 8 in respect of Miss H and whether it is reasonable for her to follow the appellant to Zimbabwe. At paragraph 107 the judge was wrong to conclude that he had no evidence to show the appellant's partner would have any difficulties settling in Zimbabwe.

26. Mr Haywood submitted that from Miss H's detailed witness statement it is clear that she has never lived in another country and she has a good relationship with her immediate and large extended family. Further, Miss H was expecting the birth of her child. The judge does not assess proportionality of the proposed interference to Miss H's private life. Her relocation to Zimbabwe would leave her facing an alien cultural environment, she would be unable to complete her degree, and would be separated from her own family. The rights of the family unit must be considered as a whole when assessing the proportionality of removal under Article 8. The flawed assessment of the circumstances facing Miss H in Zimbabwe and failure to assess the interference to her own private life renders his overall conclusion regarding Article 8 unsustainable.

27. Mr Haywood submitted that there were two strands to the claim, because there is family life it is accepted that there is a relationship and she was expecting a child in judging materiality the protection claim has to be less emphatically put. There is an interaction between the two, risk on return is relevant to Article 8. If the conditions fall short of risk on return they are still relevant to Article 8. The judge took an erroneous approach and adopted a cavalier attitude to the assessment of the upsetting effect on Miss H's life, relying on the comments of Sedley LJ in AB (Jamaica) v Secretary of State for the Home Department [2007] EWCA Civ 1302; [2008] 1 WLR 1893.

28. Mr Bramble submitted that regarding Article 8 the key ground is that the judge has incorrectly dealt with insurmountable obstacles. With regard to the bundle at B43 there is reference to three quarters of households being headed up by a woman. However the appellant's partner is not returning as a lone female, they would be returning as a family unit, this passage is therefore not relevant. The judge has considered insurmountable obstacles and has taken into account the

difficulties of white people in Zimbabwe and has considered the individual circumstances of the partner.

29. Although I have set out fully the grounds of appeal and submissions on the Article 8 issue I consider that even if there were errors of law in the judge's assessment of proportionality these are not likely to be material and would not have made a material difference to the outcome of this case.

30. This is because, even if it were unreasonable for Miss H to relocate to Zimbabwe, little weight is to be accorded to that relationship as it was established at a time when the appellant was unlawfully in the UK. In assessing the proportionality of the appellant's removal, on the facts of this case, the balance clearly fell in favour of the appellant's removal as found by the judge and the appeal was bound to fail.

31. The judge at paragraph 103 sets out that he has considered section 117B of the 2002 Act finding that the appellant's private life requires little weight. At paragraphs 106 to 110 the judge considers factors weighing in the balance when considering the proportionality of the appellant's removal. It is not an extensively well-reasoned approach but it does consider the relevant factors. When assessing the proportionality and weighing the factors in favour of and against removal section 117B(1) of the 2002 Act requires a judge to weigh in the balance the criteria that maintenance of effective immigration controls is in the public interest. This weighed heavily against the appellant given his immigration history. He entered the UK in July 2008 as a student. He ceased his studies at the end of the second year. From that point he had no valid leave to remain. He started working unlawfully in the UK. He obtained, in what can only be described benignly as the most dubious circumstances, a false visa. He was arrested in June 2013 and was served with form IS151a on 3 June 2013 informing him of his immigration status and liability to detention and removal. He was detained on 8 September 2014 and released on 22 September 2014. On 29 September 2014, over 6 years after he entered the UK, he claimed asylum.

32. Factors weighing against removal, as set out by the judge, are the appellant's relationship with Miss H and his private life in the UK. However those factors must be accorded little weight. The appellant entered into a relationship with Miss H at a time that he was in the UK unlawfully. In accordance with section 117B (4) of the 2002 Act a judge must accord little weight to the relationship with Miss H given the circumstances in which it was formed and to accord little weight to his private life.

33. The judge concluded that the Secretary of State's decision was in accordance with the law and necessary in a democratic society in order to maintain an effective immigration policy.

34. There were no material errors of law in the First-tier Tribunal decision.

35. Evidence was submitted to the Upper Tribunal shortly before the hearing in the form of the birth certificate of Miss Hs's child. Mr Haywood accepted that this was only relevant if I were to find a material error of law. As I have not found a material error of law I have not taken this evidence or this fact into account.

Decision

36. There was no error of law such that the decision of the First-tier Tribunal is set aside.

Signed P M Ramshaw Date 12 October 2015

Deputy Upper Tribunal Judge Ramshaw