Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00099/2018

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19th March 2019	**On 22nd March 2019**

Before

UPPER TRIBUNAL JUDGE MR JUSTICE DINGEMANS
UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

TL
(anonymity order made)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr E Waheed, instructed by Freemans solicitors

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we 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 appellant in this determination identified as TL. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. Mr TL is a Zimbabwean National and is now 43 years old. He arrived in the UK in May 2007 and applied for asylum. His application was refused by the Secretary of State but following a successful appeal before immigration Judge Grimshaw of the Asylum and Immigration Tribunal in September 2007 he was recognised as a refugee. The basis of his claim for asylum was that he had been a member of the Movement for Democratic Change (MDC) in Zimbabwe since 2000 and that he had two same-sex relationships while living in Zimbabwe and described himself as a gay man. Judge Grimshaw found as credible his claim that although he was an ordinary member of the MDC he had been perceived to be an active member following discovery by the green bombers of MDC leaflets in his shop. Judge Grimshaw found that TL's sexual orientation was known to the authorities and that Zimbabwe would not be "a safe place" for him to be returned.

2. In January 2013 TL was granted indefinite leave to remain. In June 2016 he was convicted of making false representations and sentenced to 12 months' imprisonment. On 10 November 2016, TL what served with a notice of intention to revoke his refugee status. From that letter it seems TL was issued with notice of the Secretary of States duty to deport him because he was a foreign criminal who had been sentenced to a period of imprisonment of 12 months. We do not have a copy of that letter, but nothing turns on that. TL made representations on 11 August 2016 and 24 November 2016 setting out why in his view he should be neither deported and nor should his refugee status be revoked.

3. A deportation order was signed on 17 May 2018 in accordance with s32(5) of the UK Borders Act 2007. On the same date the Secretary of State took a decision to revoke his protection status and to refuse his human rights claim.

4. TL appealed that decision. His appeal was heard and allowed by First-tier Tribunal Judge Row for reasons set out in a decision promulgated on 9 November 2018. The Secretary of State sought permission to appeal on the following grounds

> "The appellant a National from Zimbabwe as acknowledged at paragraph 2 of the determination meets the criteria of a foreign national criminal. It is respectfully submitted that the FTTJ has materially heard in law in his approach to a revocation of refugee status.
>
> At paragraph 19 of the determination the FTTJ relies on the authority of *MS (Art 1C(5)) Mogadishu* [2018] UKUT 196. It is contended that the court of appeal authority of *MA (Somalia)* [2018] EWCA Civ 994 of Lady Justice Arden should take precedence over that of the Upper Tribunal authority of *MS (Art 1C(5)) Mogadishu* [2018] UKUT 196."

5. Permission to appeal was granted by First Tribunal judge Grant -Hutchison in the following terms:

> "It is arguable that the judge has erred in law by relying on the authority of *MS (Art 1C(5)) Mogadishu* [2018] UKUT 196 and not *MA (Somalia)* [2018] EWCA Civ 994 [in] coming to a decision."

6. Permission to appeal was not limited. Nor did the grant of permission treat the grounds as any wider than a challenge to paragraph 19. The appeal first came

before the Upper Tribunal on 24th January 2019. There was no request to amplify or amend or clarify the grounds upon which permission was sought. The hearing was adjourned, and directions made for filing and service of skeleton arguments, and, if either party sought to rely upon any further evidence, a rule 15(2A) notice must be served. Neither party served a 15(2A); both parties filed and served skeleton arguments.

7. First-tier Tribunal Judge Row held:

> "11. Having persuaded Judge Grimshaw of his political opinion and sexual orientation the appellant does not appear to have pursued either his political activities or his sexuality with any great enthusiasm in the United Kingdom. He could not provide no [sic] evidence of any involvement in political activity other than saying that he attended a rally on 8 May 2018.
>
> 12. The appellant seems to have begun a heterosexual relationship with his partner …, a female and a British citizen, in 2009 … There was no evidence that the appellant had engaged in any homosexual activities with anyone since he was granted asylum and his evidence was that he had not.
>
> 13. The respondent has not taken any point on the appellant sexuality. The findings of Judge Grimshaw are not binding upon me but they are not to be ignored. In the absence of evidence to the contrary they are to be taken as having decided the issues in dispute between the parties.
>
> 14. The appellant was convicted …
>
> 15. The respondent argues that the situation in Zimbabwe has changed since the removal of the former president Mr Robert Mugabe. There is a new regime. The appellant would therefore no longer be at risk of persecution or harm there. The respondent's reasoning is set out at pages 3-6 in the refusal letter. It is not necessary for me to recite this in full. The reasoning is based partly on the change in leader in Zimbabwe and the country guidance in **CM (EM country guidance: disclosure) Zimbabwe** [2013] UKUT 00059. That case indicates that low-level members of the MDC are not likely to be at risk. There are areas of Zimbabwe where are they could be at risk but areas where they would not be. The respondent did not deal with the question of the appellants sexuality at all in the refusal letter saying that it had not been raised in representations made.
>
> 16. The country guidance in **LZ (homosexuals) Zimbabwe CG** [2011] UKUT 00487 indicates that male homosexuality is a criminal offence in Zimbabwe but prosecutions are very rare. Some homosexual suffer discrimination, harassment and blackmail. Personal circumstances may place some at risk. It is open to a homosexual man at risk in his community to move elsewhere. The police and other state agents do not provide protection.
>
> 17. It is argued on behalf of the appellant that he would still be at risk because of his political opinions and sexuality. The appellant relies upon a letter from UNHCR dated 16 January 2017 in the respondent's bundle which indicates that homosexuals are still at risk of persecution and harm and that the changes in Zimbabwe over a relatively short period of time do not indicate a fundamental and durable change. The appellant also relies upon newspaper articles from [sic] in the appellants fundable showing that political opponents of the current regime were still at risk of persecution and harm.

> 18. The burden of proof is upon the respondent to show that revocation of refugee status is justified under paragraphs 333A and 339A the respondent relies upon paragraph 339(v). On the facts of this appeal I do not find that the respondent can show that revocation is justified. The appellant says that he is at risk from the authorities because of his MDC affiliation and because of his homosexuality which is illegal in Zimbabwe. In the country guidance is that the authorities will not provide protection to the appellant. If the appellant, either because of his political opinions or sexuality, cannot avail himself of the protection of the Zimbabwean authorities and then paragraph 339A(v) cannot apply.
>
> 19. Although both country guidance cases referred to above indicate that the appellant could move to a part of the country where he would not be at risk. The Upper Tribunal case of MS (Art 1C(5)) Mogadishu 2018 UKUT 196 indicate that the respondent is not entitled to revoke a person's refugee status solely on the basis of the change in circumstances in one part of the country of proposed return. The appellant has to be able to rely upon the protection of the Zimbabwean authorities. If he cannot, and if you can only escape risk in some parts of Zimbabwe, paragraph 339A(v) does not apply. It also cannot be said that the changing situation in Zimbabwe is of such a significant non-temporary nature that the appellant's fear of persecution can no longer be regarded as well founded. If the appellant cannot rely upon the protection of the state and would have to live in a part of Zimbabwe where he might be safe this cannot be the case."

8. The Secretary of State does not, in terms, take issue with paragraph 13 of judge Row's decision. Although the Secretary of State in his grounds seeking permission to appeal submits that the First-tier Tribunal judge has materially erred in law, we do not accept the proposition that such a formulation includes a challenge to paragraph 13 of the First-tier Tribunal decision. The skeleton argument is addressed to what is described as the "critical passage" of the determination – paragraph 19. In particular the skeleton refers to the case of *MS*, *MA* and, since the Secretary of State grounds were initially submitted, the Upper Tribunal reported case of *AMA (Article 1C(5) – proviso – internal relocation) Somalia* [2019] UKUT 00011. The challenge is to paragraph 19 of the decision only.

9. The headnote of *MS* reads as follows

> "The Secretary of State is not entitled to cease a person's refugee status pursuant to Article 1C(5) of the Refugee Convention solely on the basis of a change in circumstances in one part of the country of proposed return."

10. The nub of Upper Tribunal Judge Kopieczek' s reasoning in *MS* is to be found in paragraphs 51-57:

> "51. The Secretary of State's position as set out in the decision letter dated 15 September 2015 states at [53] and [54] that the circumstances under which the appellant was granted refugee status have now changed, because although it was accepted he was from Kismayo, "you were granted refugee status due to the situation in Mogadishu". However, relying on *MOJ & Ors*, the Secretary of State says that "there has now been a significant and enduring change in Mogadishu". Quite clearly therefore, the Secretary of State puts the situation in Mogadishu at the heart of the decision to cease the appellant's refugee status.

52. However, in my judgement the Secretary of State's approach in this respect is fundamentally flawed. The basis of the appellant's refugee claim (or more accurately the basis of his mother's claim upon which he was a dependant) is that he had a well-founded fear of persecution in the country of his nationality, Somalia. That well-founded fear of persecution arose in his home area of Kismayo. Naturally, the issue of internal relocation would have been a factor that was considered at the time of the decision to grant refugee status to the family. Presumably, although the information has not been provided, internal relocation to Mogadishu was not considered a viable option at the time. In my view it is contrary to the humanitarian principle of surrogate protection under the Refugee Convention for the Secretary of State to be able to seek to identify an area of a country where it could be said that an individual no longer has a well-founded fear of persecution, and to which he could now relocate if the claim were now made.

53. The UNHCR's Cessation Guidelines make the point that not being able to move or to establish oneself freely in the country of origin would indicate that the changes have not been fundamental. The Secretary of State does not suggest that the appellant's claim to refugee status in terms of the risk to him in his home area has been extinguished by reason of fundamental and durable changes in the country as a whole.

54. Although it was suggested on behalf of the respondent in submissions that there was no difference in principle between the grant or the cessation of refugee status, because a person is only a refugee so long as there is no safe area of return, I do not agree. There is, in my judgement, a very significant philosophical and indeed practical difference between the grant and the cessation of refugee status, illustrated by the UNHCR Cessation Guidelines, but also reflected in the two authorities to which I have referred.

55. If the Secretary of State's position was to hold good, it would mean that a person claiming asylum would be in a more advantageous position than a person who already has refugee status and whose status the Secretary of State seeks to rescind. Thus, if the person whose claim for asylum depends on an assessment of an internal flight option, that individual would have that issue assessed on the basis of undue harshness and the reasonableness of internal relocation. However, in the case of a person whose refugee status is to be taken away, once it is decided that there is a part of the country in which the change of circumstances is of such a significant and non-temporary nature that the person's fear is no longer regarded as well-founded (in that area), that individual may be returned without the sort of examination of the issues of undue harshness and reasonableness of return to that particular area which would occur in considering a grant of refugee status. That is so notwithstanding the respondent's Asylum Policy Instruction on revocation of refugee status which I have set out at [42], which does not provide full coverage of the issue of internal relocation.

56. Thus, what was recognised in *Hoxha* as being the need for a "strict" and "restrictive" approach to cessation clauses would be significantly undermined. Put another way, it would make it easier to cease a person's refugee status than to make a grant of refugee status; a position which is contrary both to logic and principle.

> 57. In those circumstances, I am satisfied that the FtJ was correct to conclude that the respondent was not entitled to cease the appellant's refugee status on the basis only of the change in circumstances in Mogadishu since his claim was made. That is not to afford the UNHCR Cessation Guidelines a status of being determinative of the issue in question, but in my view it does mean that those Guidelines are correct in what they say in this respect."

11. Paragraph 2(1) of *MA* sets out the conclusions of the Court of Appeal in so far as relevant to the cessation clauses:

> "2. For the reasons given below, and in the light of the careful submissions that we have had on the important decision of the Court of Justice of the European Union ("CJEU") in Joined Cases C-175/08, C-176/08, C-178/08, C0179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, 2 March 2010 (" Abdulla "), I have concluded that:
>
> > (1) A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee. The recognising state does not in addition have to be satisfied that the country of origin has a system of government or an effective legal system for protecting basic human rights, though the absence of such systems may of course lead to the conclusion that a significant and non-temporary change in circumstances has not occurred."

12. The Upper Tribunal heard *AMA* after *MA*; its headnote reads

> "(1) The compelling reasons proviso in article 1C(5) of the 1951 Refugee Convention, as amended, applies in the UK only to refugees under article 1A(1) of the Convention.
>
> (2) Changes in a refugee's country of origin affecting only part of the country may, in principle, lead to cessation of refugee status, albeit it is difficult to see how in practice protection could be said to be sufficiently fundamental and durable in such circumstances.
>
> (3) The SSHD's guidance regarding the role of past persecution can not in itself form a lawful basis for finding that removal would lead to a breach of the Refugee Convention, given the limited appeal rights at section 82 of the Nationality, Immigration and Asylum Act 2002, as amended and SF and others (Guidance – post-2014 Act) Albania [2017] UKUT 120 (IAC) 10 when read in its proper context."

13. *AMA* considered *R v Special Adjudicator ex parte Hoxha* [2005] 1 WLR 1063, [2005] UKHL 19, which does not appear to have been brought to the attention of the Court of Appeal in *MA*. *Hoxha* was raised by Mr Waheed in his submissions but, although it *may* be relevant in some cases, we are satisfied that at this stage of determining whether the First-tier Tribunal Judge erred in

law such that his decision is set aside, it is not relevant. *AMA* considered whether there was a divergence between *MS* and *MA:*

> "42. I appreciate that at first glance this might appear inconsistent with Judge Kopieczek' s observation in MS that there is a "*very significant and practical difference between the grant and the cessation of refugee status*". However, upon closer scrutiny, any difference in approach between MA and MS is more apparent than real. At no stage in his reasoning did Judge Kopieczek suggest that the cessation enquiry is a wider or more generalised one that includes the consideration of humanitarian standards unrelated to the requirements within the Refugee Convention. Indeed, Judge Kopieczek appears to agree with the need for symmetry between the grant and cessation of refugee status, when he deprecates any differences in approach to the consideration of internal relocation at [55]. Similarly, Arden LJ's approval of symmetry between the grant and the cessation of refugee status, does not obviate the obvious differences that exist. First, the burden of proof is on the applicant to establish that he is entitled to refugee status, but the burden of proof is upon the state to demonstrate that refugee status should cease. Secondly, there is a strict and restrictive approach to cessation for reasons explained by Lord Brown in Hoxha at [65-66] and the UNHCR Cessation Guidelines. That is reflected in the high and exacting test that must be met. Contrast this with the benefit of the doubt given to asylum claimants. Thirdly, whilst the same lower standard of proof must be applied when deciding whether the person meets the requirements of the Refugee Convention at both stages (see [88] of Abdulla), for there to be cessation there is the discrete and additional requirement that any change in circumstances must be of a "significant and non-temporary" nature, such that the factors which formed the basis of the refugee's fear of persecution may be regarded as having been "*permanently eradicated*" (see [73] of Abdulla).
>
> 43. Notwithstanding the differences set out above, I accept there remains a symmetry between the grant and the cessation of refugee status. As the CJEU observed in Abdulla at [89]:
>
> > "At both of those stages of the examination, the assessment relates to the same question of whether or not the established circumstances constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution."
>
> 44. In addition, the individual approach to determining whether a person is entitled to refugee status remains when considering whether to revoke that status. As the CJEU in Abdulla indicates at [76], for the purposes of assessing a change of circumstances, regard must be had to "*refugee's individual situation*". In MA, Arden LJ approved of the "*individualised approach*" in this respect, at [49].
>
> 45. All the ingredients in article 1A(2) of the Refugee Convention must therefore be met at both stages of the examination: when determining status and whether to cease that status. This commonly requires the following: (i) a well-founded fear of persecution; (ii) for reasons relating to a Convention Reason; (iii) making the person unable or unwilling to avail himself of the protection of the country. The final

ingredient is based upon the principle of surrogacy and necessarily includes an enquiry as to whether the person can be expected to seek protection in another part of his country of origin. The widely accepted test is whether the person can be reasonably expected to internally relocate – see Januzi v SSHD [2006] UKHL 5 at [7-8] and [48-49].

46. The wording of article 1C(5) also supports this symmetrical approach. It clearly refers not just to "*the circumstances in connection with which he has been recognised as a refugee*" having "*ceased to exist*" but also to the person not being able to avail himself "*of the protection of the country of his nationality*". The principle of surrogacy is therefore found in both article 1C(5) and article 1A(2) of the Refugee Convention. There is therefore a prima facie argument that if a person is able to avail himself of protection in one part of the country then (unless that protection lacks the positive qualities required of it, including being effective / durable / fundamental / significant / non-temporary), they do not meet the refugee definition, and if they are being considered for cessation they are no longer a refugee. In other words, if effective protection is available then a person does not meet the definition of a refugee.

47. However, the reality of the situation is that the expectation that a person can avail himself of the protection of another part of his country of nationality, i.e. through internal relocation, only arises for consideration where it is accepted that there is a well-founded fear of persecution for a Convention Reason in the home area of that country. It is difficult to envisage how and in what circumstances a well-founded fear of persecution can be said to be "non-temporary", "significant" or "permanently eradicated" in a country for a particular person, wherein it is accepted that it continues in the person's home area of that same country and / or the person cannot safely move around the country. The necessary requirement for the changes to be fundamental and durable is most likely to be absent. It follows that the availability of internal relocation is generally unlikely to be a material consideration when applying article 1C(5) of the Refugee Convention or article 11 of the QD.

14. The difficulty with paragraph 19 of the decision is that the First-tier Tribunal judge has failed to undertake an examination of whether TL is a refugee in his home area before turning to consider whether internal relocation was a viable option. If TL is no longer a refugee, then the question of internal relocation does not arise. Whilst the first four sentences of paragraph 19 may, in some circumstances, be uncontroversial, it is plain that there has to be an individualised approach to TL's individual situation. This has not been done. This is because the First-tier Tribunal judge has asserted (5th sentence of paragraph 19 – set out in paragraph 7 of this decision above), that the changing situation in Zimbabwe is not sufficiently significant (we paraphrase) without any analysis of the current situation in Zimbabwe. Such consideration should have involved an analysis of whether the Country Guidance cases of *CM* and *LZ* meant that TL who was recognised as a refugee in 2007 because he was a low level MDC supporter and because of his homosexuality but whose political activity has, since 2007, consisted of attendance at one rally in May 2018 and

who has not, on the evidence, expressed his sexual orientation in any obvious way since recognition as a refugee, remained at any relevant risk.

15. Instead of this analysis the First-tier Tribunal judge has summarised the effect of the findings of *CM* and *LZ* as being to the effect that TL could move to a part of the country where he was not at risk. That was part of the findings made in those cases. However this ignores the fact, recorded by the First-tier Tribunal judge in paragraph 15 of the decision, that CM had indicated that low-level members of the MDC were not likely to be at risk. The decision as to internal relocation cannot stand absent a decision on whether TL is or is not a refugee and the extent to which it is necessary to consider internal relocation in the reaching of that decision. It will be recalled that the reasons given by the Secretary of State for revocation were that the security situation in Zimbabwe had changed significantly; the decision was not taken on the basis that TL remained at risk of being persecuted in Hwange (his home area) but could internally relocate. Although, as found in *AMA*, there is little significant difference in the *ratio* of *MS* and *MA*, it is to be recalled that *MS* was a decision on an individual who was found to be a refugee in his home area and for whom internal relocation was found to be unduly harsh; a similar factual matrix applied in *AMA*. *MA* concerned an individual who had been found in the past to be a refugee in Mogadishu and the intention was to return him to Mogadishu.

16. Therefore, for the reasons set out in paragraphs 14 and 15 above, the application of *MS* by the First-tier Tribunal Judge as set out in paragraph 19 of the First-tier Tribunal decision is too stark. This is because it fails to illustrate the careful analysis required, as explained in *MA* and *AMA*, in determining whether a decision to revoke refugee status is correct, in accordance with the relevant burden and standard of proof.

17. For these reasons we are satisfied that the First-tier Tribunal judge erred in law in his finding that the Secretary of State was not entitled to revoke TL's refugee status.

18. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal.

19. When we have set aside a decision of the First-tier Tribunal, s.12(2) of the TCEA 2007 requires us to remit the case to the First tier with directions or remake it for ourselves. In this appeal the nature and extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

20. We note the First-tier Tribunal judge found that TL did not meet either of the Exceptions in s117C Nationality, Immigration and Asylum Act 2002. There was no cross appeal by TL against that finding. We did not hear submissions from either party in that regard.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision and remit it for hearing before the First-tier Tribunal.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 20th March 2019

Upper Tribunal Judge Coker