Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00035/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2020	**On 15 April 2020**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

G M (ZIMBABWE)
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant:	Mr Pardon Tapfumanayi, a legal representative with P T Law and Associates
For the respondent:	Mr Nigel Bramble, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of G M who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.
Any failure to comply with this direction could give rise to contempt of court proceedings.

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1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to revoke his refugee status on cessation grounds. The appellant is a citizen of Zimbabwe.

Background

2. The appellant came to the United Kingdom by air on 11 October 2002, to join his wife, also a Zimbabwean citizen, who had been recognised as a refugee, because she was a teacher. The wife's recognition was by the Secretary of State: she did not have to appeal through the IAC Tribunals. The couple had two daughters together, born while they were both in Zimbabwe.

3. The appellant made an application for asylum on arrival, citing MDC membership and activity. The respondent refused the appellant refugee recognition on 3 December 2002 but granted him exceptional leave to remain in line with his wife's refugee status, until 5 December 2006.

4. At a hearing on 29 April 2003, Adjudicator Dubicka recorded that the Home Office Presenting Officer had decided to withdraw her 2 December 2002 notice of decision to grant the appellant only exceptional leave to remain. The Judge's decision says this:

> "1. This was an appeal by a citizen of Zimbabwe, on asylum grounds, against a decision by the respondent to grant only exceptional leave to remain instead of recognising the appellant to be a refugee. Having read the bundle, it came as no surprise that Mr Russell for the respondent said he intended to withdraw removal directions, and amended this to [withdrawal of] the notice of decision, when it was pointed out there were [no removal directions]. I explained to the appellant that this meant that a decision was outstanding and I expressed the hope that the one made would be consistent with that made in the case of the appellant's wife. She, without needing to appeal, was recognised as a refugee and her account accepted. When the husband described the same events, his account was rejected, which in some respects conflicted with the view of the same facts put forward by the wife. This made the decision in this appeal incomprehensible, and unsurprisingly, it could not stand.
>
> 2. The decision having been withdrawn, the appeal is withdrawn and in those circumstances, there is no appeal to determine. This is only on the basis that the respondent seeks to make another decision.
>
> This determination serves as a notice in accordance with Rule 42 of the Immigration and Asylum Appeals [Procedure] Rules 2002."

5. On 6 August 2003, having heard nothing from the respondent, the appellant wrote to the Home Office as follows:

> "I have enclosed my appeal [decision number provided] heard at Immigration Appellate Authority at Sheldon Court, Birmingham, on 29 April 2003, where the Home Office representative, Mr Gareth Russell, informed us that they (Home Office) had withdrawn their decision to grant me exceptional leave to remain. He said a decision *consistent to my wife* was to be made in six weeks, but up to now, I have not heard from the Home Office. I expected that you have a huge workload of cases, but I have now

> waited for more than four months, without hearing from you. May you please speed up my application.
>
> Lastly, to find work without a passport is difficult, so may you please send me my passport as it is my only form of identity.
>
> Thank you for your cooperation."

On 27 October 2003, the appellant was granted refugee status and indefinite leave to remain. The respondent did not say on what basis: whether it was because he was the husband of his wife, a Zimbabwean teacher, or on the basis of his own claimed MDC activities and membership.

6. The appellant received three convictions for driving related offences between 26 February 2004 and 17 June 2005.

7. The appellant's marriage failed, and his wife began a new relationship, taking their two daughters with her to her new home.

8. On 23 April 2005, the appellant followed his ex-wife to her home, which he entered by force. He stabbed her repeatedly and cut her throat, in front of their two daughters and two friends of the daughters: the four young girls who witnessed the murder were aged between 7 and 11 years old.

9. On 6 December 2005, when the appellant had been in the United Kingdom just over 3 years, he was sentenced to life imprisonment for murder, with a minimum term of 15 years. His parole hearing is on 1 April 2020.

10. On 19 July 2017, the appellant was served with a decision to deport him to Zimbabwe as a foreign criminal, pursuant to section 32(5) of the UK Borders Act 2007. The appellant made written representations under section 33 in respect of the maintenance of his refugee status.

11. By a letter dated 6 October 2017, the respondent observed that:

> "By way of background it is noted you were granted refugee status due to protection concerns relating to your political opinion. It was claimed that you were a low-level member of the Movement for Democratic Change (MDC) political party."

12. Mr Bramble informed me that having reviewed the appellant's file, this decision was taken before the respondent's computer system began, and that beyond what is set out above, the respondent no longer has any record of the reason why refugee status was granted to the appellant.

13. On 19 March 2019, the respondent revoked the appellant's refugee status and refused his human rights claim. She did so because of the seriousness of his offence, noting that the OASys report found that he continued to present a high risk to his daughters and to any future intimate partners. He had continued to try to contact his daughters, despite being prohibited from so doing.

14. The respondent revoked the appellant's refugee status by reference to Articles 1C(5) and 1C(6) of the Refugee Convention the circumstances in connection with which he was recognised as a refugee had ceased to exist. So far as relevant, Article 1C of the Refugee Convention is as follows:

> "C. This Convention shall cease to apply to any person falling under the terms of section A if: …(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

It is plain that Article 1C(6) is not relevant: this appellant has Zimbabwean nationality.

15. The respondent considered the appellant's claimed political profile with the MDC in reaching that part of her decision, deciding that the exceptions to deportation did not apply to this appellant. There was no private and family life in the United Kingdom, either with his deceased wife or their surviving daughters. The respondent did not consider that there were any significant obstacles to the appellant's reintegration in Zimbabwe.

First-tier Tribunal decision

16. On 6 November 2019, First-tier Judge Andrew heard this appeal and dismissed it. She made no anonymity direction, but the Upper Tribunal has done so, as children are involved in this appeal.

17. The appellant told the First-tier Tribunal in evidence that since going to prison in 2005, he had not been politically active at all for the MDC.

18. The First-tier Judge relied on the case of *CM* (country guidance – disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) which confirmed the guidance given in *EM and others* (returnees) Zimbabwe CG [2011] UKUT 98 (IAC), save for a limited change to the guidance arising out of the decision of the Supreme Court in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38.

19. The First-tier Judge took account of the respondent's Zimbabwe CPIN dated February 2019 and held at [43] that simply being a member of an opposition group or a civil society organisation of human rights defender would not place a returning failed asylum seeker at risk of persecution. The Judge found that the appellant could

return safely either to his mother's house outside Harare or his former area of residence in Bulawayo. The humanitarian protection and Article 2 and 3 ECHR claim fell with the international protection claim.

20. In relation to the lack of rehabilitation facilities in Zimbabwe, the First-tier Judge relied on *SE (Zimbabwe)* [2014] EWCA Civ 256 which held that there was no requirement to consider the prospects of rehabilitation for non-European Union citizens, even where, as in Zimbabwe, the prospects of rehabilitation were worse in Zimbabwe than in the European Union, and that the Tribunal in *SE* had been entitled to exclude that factor from its consideration.

21. In relation to Article 8 ECHR, the Judge considered paragraph 276ADE(vi). At the hearing, the appellant's representative had accepted that the Article 8 ECHR claim would stand or fall with the international protection and Article 2 or 3 claims. Section 117B(6) did not apply as there were no qualifying children.

22. Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) applied to the appellant, but section 117C(3) meant that unless the appellant could bring himself within Exception 1 or Exception 2, the public interest required his deportation. On the facts of this appeal, neither was applicable. Section 117C(6) required the appellant to show very compelling circumstances over and above the Exceptions, but the First-tier Judge was satisfied that he had not discharged that burden.

23. The appeal was dismissed, and the appellant appealed to the Upper Tribunal.

Permission to appeal

24. Permission to appeal was granted on the basis that the Judge should have obliged the respondent to clarify the precise basis on which the appellant was granted refugee status. The burden of establishing durable change arguably fell on the respondent, but materiality would have to be considered in the light of *JS (Uganda) v Secretary of State for the Home Department* [2019] EWCA Civ 1670.

25. The First-tier Judge had arguably conducted the factual analysis at the heart of the decision in a vacuum, and therefore the weight ascribed to, for example, the factors set out in the UNHCR letter were arguably tainted by that factual error.

26. Permission was granted on all grounds.

Rule 24 Reply

27. There was no Rule 24 Reply on behalf of the respondent.

28. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

29. For the respondent, Mr Bramble reminded me that the appellant's wife was granted asylum on application, without the need for an appeal, because she was a Zimbabwean teacher. He contended that the First-tier Judge had not erred in reaching her conclusion: Mr Bramble relied on the decision of the Court of Appeal in *Secretary of State for the Home Department v JS (Uganda)* [2019] EWCA Civ 1670 (*JS (Uganda)*) at [71]-[74] and [154]-[158] in the judgment of Lord Justice Haddon-Cave, with whom Lord Justice Newey agreed, and [188]-[192] in the concurring judgment of Lord Justice Underhill.

30. For the appellant, Mr Tapfumeneyi applied for an adjournment to require the respondent to provide details of the basis on which the appellant was granted refugee status. That application was refused. Mr Bramble had already indicated that there is no information available beyond that given above. Mr Tapfumeneyi contended that although the appellant had applied for refugee status as his wife's dependant, he had received it in his own right on MDC grounds.

31. The First-tier Tribunal had been furnished with up-to-date information regarding the situation for MDC activists and members in Zimbabwe today, which was to be found in his bundle. The Tribunal had evidence on which it could and should have departed from the *CM (Zimbabwe)* country guidance.

32. In addition, the First-tier Judge had misdirected himself in fact at [43] in considering the risk to a returning *failed* asylum seeker. This appellant was a *successful* asylum seeker and that was a material error of fact which fatally infected the Judge's decision. The appellant relied on the report of the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr Clement Nyaletsossi Voule on his visit to Zimbabwe in September 2019, dealing with the democratic transition in Zimbabwe following the removal of President Robert Mugabe on 21 November 2017. Mr Tapfumeneyi relied on the entirety of that report and in particular, the testimonies of victims and the record of violence against anti-government protesters.

33. Mr Tapfumeneyi also relied on the lack of rehabilitation available for prisoners and former prisoners in Zimbabwe. In the United Kingdom, the appellant was due for consideration for parole on 1 April 2020, and had thus far been a model prisoner.

34. I reserved my decision, which I now give.

Analysis

35. There are two possible analyses of the respondent's grant of refugee status to this appellant. If it was granted to him in line with his wife's refugee status based on her former profession as a teacher in Zimbabwe, as the appellant's letter of 6 August 2003 asserted, then *JS (Uganda)* applies. The narrow view, that his refugee status

ended when his wife died, was not approved in *JS (Uganda).* The correct analysis is set out at [188]-[192] in the judgment of Underhill LJ:

> "188. The starting-point is that JS was not granted refugee status in his own right – that is, because of any risk of persecution to which he personally was subject. He was admitted, under the Family Reunion Policy, because his mother had previously been admitted as a refugee. That is clear from the unchallenged findings of the FTT set out by Haddon-Cave LJ at para. 24.
>
> 189. Admission on that basis did not mean that JS was himself entitled to any rights under the Convention. The Convention only confers rights on persons who themselves satisfy the definition in article 1A (2). …
>
> 190. I should like to observe, at the risk of spelling out the obvious, that this issue only arises in cases where the risk of persecution which leads to the grant of protection to the "primary" refugee does not also extend to his or her family members: very often of course it will, either because they share the same characteristic as gives rise to the risk or because the persecutor will extend his persecution of, say, a political activist to his or her family members irrespective of their own conduct or opinions. I do not wish to be understood as saying that there may not be very strong reasons for the admission of family members even where they personally are not at risk: I say only that those reasons do not derive from the Convention itself.
>
> 191. Mr Husain argues that, even if JS was not entitled to any rights under the Convention, the basis on which he was admitted entitled him as a matter of domestic law to be treated as if he had Convention rights, so that he was entitled to the substance of the protections under articles 32 and 33. … I wish to say, however, that I am not convinced that the statement in the Family Reunion Policy that beneficiaries of it would be admitted "as refugees" can reasonably be read as entitling them to the full protections of the Convention in circumstances where some at least of its provisions are not easy to apply to persons who are not themselves at risk – a point made by Sales LJ in relation to article 1C (5) itself at para. 46 of his judgment in *Mosira*.
>
> 192. Assuming in JS's favour that he was entitled as a matter of domestic law to be treated as if he were a Convention refugee, I believe that the Secretary of State was entitled to "cease" that protection under article 1C (5) on the basis that, as the FTT found, the circumstances in Uganda that had led to his mother being granted refugee status no longer apply. Those seem to me to be the relevant circumstances in a case where, as we are assuming for present purposes, a person has acquired refugee status on a derivative basis, because they are the circumstances which led to protection being granted to the person from whom his own status derives. As I understand it, this is substantially the same as Haddon-Cave LJ's reasoning at paras. 157-158. I agree that Mosira does not compel a different conclusion, for the reasons which he gives at paras. 142-152. (I am not myself sure that MM (Zimbabwe), to which he refers at paras. 159-164, advances the argument because the issue there was different.)"

The appellant's wife was granted refugee status as a teacher. That risk was personal to her and in my judgment, following her death the appellant cannot rely on it.

36. If, as asserted in the respondent's letter of 6 October 2017, the grant of refugee status was personal to the appellant and was based on his low-level membership of the MDC, then it is necessary to consider whether the First-tier Judge erred in declining to depart from the country guidance in *CM (Zimbabwe)*. The updated country guidance in *CM (Zimbabwe)* so far as relevant to MDC members and activists is as follows:

> *"(1) As a general matter, there is significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in RN. In particular, the evidence does not show that, as a general matter, the return of a failed asylum seeker from the United Kingdom, having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to the ZANU-PF.*
>
> *(2) The position is, however, likely to be otherwise in the case of a person without ZANU-PF connections, returning from the United Kingdom after a significant absence to a rural area of Zimbabwe, other than Matabeleland North or Matabeleland South. Such a person may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF authority figures and those they control. The adverse attention may well involve a requirement to demonstrate loyalty to ZANU-PF, with the prospect of serious harm in the event of failure. Persons who have shown themselves not to be favourably disposed to ZANU-PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (RT (Zimbabwe)).*
>
> *(3) The situation is not uniform across the relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described in the preceding paragraph, in reality does not do so. For example, the evidence might disclose that, in the home village, ZANU-PF power structures or other means of coercion are weak or absent.*
>
> *(4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee is a MDC member or supporter. A person may, however, be able to show that his or her village or area is one that, unusually, is under the sway of a ZANU-PF chief, or the like.*
>
> *(5) A returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. Whilst the socio-economic situation in high-density areas is more challenging, in general a person without ZANU-PF connections will not face significant problems there (including a "loyalty test"), unless he or she has a significant MDC profile, which might cause him or her to feature on a list of those targeted for harassment, or would otherwise engage in political activities likely to attract the adverse attention of ZANU-PF, or would be reasonably likely to engage in such activities, but for a fear of thereby coming to the adverse attention of ZANU-PF.*
>
> *(6) A returnee to Bulawayo will in general not suffer the adverse attention of ZANU-PF, including the security forces, even if he or she has a significant MDC profile."*

37. The First-tier Judge took the appellant's account at its highest (see [36]), noting that the appellant was last suspected on his own account of low-level MDC activities in 2002, before leaving Zimbabwe. He has not been active in support of the MDC since then.

38. At [43]-[44] in the First-tier Judge's decision, he said this:

> "43. The view of the Courts appears to be that the guidelines in *CM* remain and simply being an opposition member or member of a civil society organisation or human rights defender would not place a returning failed asylum seeker at risk of persecution.
>
> 44. It is against this background that I have considered the appellant's claim. I am unable to find, as the appellant's representative has asked me to, that the country information that has been produced in the appellant's bundle is sufficient to overturn the guidelines in *CM.*"

39. The documents in the appellant's bundle mentioned at [44] included the UN Special Rapporteur's report dates from September 2019. I am not prepared to find on that basis that the report was not considered. I have read the report myself and it is clear that there were repressive measures in 2018 against persons who demonstrated on various grounds, including anti-Government protests. It also records that the government of Zimbabwe cooperated fully with the Special Rapporteur and was seeking to take measures to prevent a repetition of those events. I do not consider, on that basis, that the Special Rapporteur's report contains material on which the First-tier Judge should have departed from the country guidance in *CM (Zimbabwe).*

40. The First-tier Judge did not err in finding that there was no real risk of persecution for this appellant if he were to be returned. The appellant's low-level MDC activities are now 18 years ago and it is not asserted that he undertook any pro-MDC activities in the United Kingdom before his incarceration, nor while he has been in prison.

41. The appellant's mother and brother remain in Zimbabwe (albeit perhaps intermittently). The Judge took into account the appellant's economic concerns and the tertiary qualifications he had obtained in the United Kingdom, which would enable him to get a better job on return.

42. For all of the above reasons, I am satisfied that the First-tier Judge dealt properly with all of the evidence before him and gave proper, intelligible and adequate reasons for the conclusions reached, and in particular, for not departing from the country guidance in *CM (Zimbabwe).*

43. The appellant's appeal is dismissed. The decision of the First-tier Judge is upheld.

DECISION

44. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law. I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson* Date: 16 March 2020

Upper Tribunal Judge Gleeson