



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00104/2017

THE IMMIGRATION ACTS

Heard at Manchester
Via Skype for Business
On 14 August 2020

Decision & Reasons Promulgated
On 25 August 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

RM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Clark, instructed by Luqmani Thompson & Partners
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision which I promulgated on 10 February 2020, I set aside the decision of the First-tier Tribunal. My reasons were as follows:

1. The appellant was born in 1995 and is a male citizen of Zimbabwe. He was sentenced at Harrow Crown Court on 3 October 2011 to 6 years detention at a young offenders' institution, having pleaded guilty to one count of affray contrary to section 3 of the Public

Order Act 1986. His offence concerned a group attack upon a fellow pupil at school. By a decision dated 1 August 2017, the Secretary of State decided to cease the appellant's refugee status in accordance with Article 1(C)(5) of the Refugee Convention and to issue a certificate under section 72 of Nationality Immigration and Asylum Act 2002. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 2 July 2019, allowed the appeal in respect of the cessation decision, finding that there had 'not been a significant and non-temporary change in conditions in Zimbabwe such that the factors which formed the basis of the appellant's fear of persecution may be regarded as having been permanently eradicated'; dismissed the appeal in respect of the section 72 certificate; dismissed the Article 3 ECHR appeal on the basis that the appellant would not be at risk from the CIO and would be able to internally relocate within Harare; dismissed the Article 8 appeal finding that the appellant's deportation to Zimbabwe would not be disproportionate.

2. The appellant appeals only in respect of the dismissal of the appeal on Article 3 ECHR grounds. The Secretary of State appeals against the decision not to uphold the cessation decision.

3. First-tier Tribunal Judge O'Callaghan (as he then was) has produced an extremely thorough and characteristically cogent decision. However, I find that he has fallen into legal error.

4. Although there are cross appeals, both representatives acknowledged that the issues surrounding Article 3 ECHR and the cessation of the appellant's refugee status overlap to a significant degree. The issue which arises in this appeal was characterised by Mr Clarke, who appeared for the appellant, as a 'bifurcation of risk' as regards the level of threat which may face a returnee to Zimbabwe first at the airport, where he or she may face a real risk of harm at the hands of government agencies including the CIO and, beyond the airport, when living within the wider community in Zimbabwe. I agree with both advocates that a tension is manifest between the country guidance decisions of SM and others (MDC-internal flight - risk categories) Zimbabwe CG [2005] UKIAT 00100 and HS (Returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094 on the one hand and CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 59 (IAC) on the other. In the present case, the Secretary of State accepts that the appellant is the son of an individual which was an active MDC member when living in Zimbabwe and that the appellant would be recognised as such on arrival at the airport. The Secretary of State in his submissions plays down the likelihood of any risk arising at the airport so many years after the appellant and his father (who is also refugee in the United Kingdom) left the country. On the respondent's submission, the appellant would be able to pass through Harare airport and thereafter (in line with the position set out in CM) would be able to live safely in Zimbabwe, if necessary, by relocation within Harare. The appellant submits that a real risk continues to exist at the airport where, upon being recognised, the appellant would be likely to be arrested and thereafter at real risk of harm. The appellant submits that the First-tier Tribunal properly acknowledged [98] that SM continues to be relevant country guidance but wrongly concluded [168] that the appellant would not be at Article 3 ECHR risk as he had not produced any specific objective evidence that addressed position of the children of known MDC members particularly, those who had been absent with their MDC parent from Zimbabwe 'for approaching two decades.'

5. Mr Clarke submitted that, at the part of his analysis where the judge had considered the Article 3 risk to the appellant at the point of return to Zimbabwe, he had made no reference been made to SM and HS and that his failure to do so was an error of law. It was

not incumbent upon the appellant to produce 'specific objective evidence' given that his circumstances were already addressed in extant country guidance.

6. I find that there is that merit in that submission. The judge was right to draw attention to the length of time which has lapsed since the appellant and his father left Zimbabwe. However, in doing so, he appears to have overlooked the full import of the concession made by the Secretary of State, namely that the appellant would be recognised by the authorities upon his return to Harare airport. I am not satisfied that the judge's otherwise exhaustive analysis has been completed by adequate reference to the relevant country guidance on this particular point.

7. The threat to the appellant which may or may not exist at the airport also goes to the question of the cessation of his refugee status. The Secretary of State may be right to emphasise the findings of the Upper Tribunal in CM regarding the lack of risk to the appellant whilst residing in, for example, Harare. However, it remains necessary to consider the level of risk to this appellant, recognised as the child of a former MDC activist, at the point of return to Zimbabwe. I consider that the only proper and safe course of action is, at the resumed hearing, for the Upper Tribunal to consider all evidence and background material which is now available in order to determine the actual level of risk facing this appellant both at the airport and subsequently whilst living Harare. If there is no risk either at the airport or in the wider community, then the cessation decision should stand. If, on the other hand, it is the case that risk exists at the airport (as I understood his submissions, Mr Clarke did not suggest that, if he is able to pass through the airport, the appellant would be at risk thereafter) the appellant may succeed under Article 3 ECHR and, given that the risk may be posed by state agents, in respect of the cessation decision also.

8. I set aside the decision of the First-tier Tribunal. All findings shall stand in respect of Article 8 and the section 72 certificate. The decision in respect of the cessation decision is set aside as is the decision in respect of Article 3 ECHR. I understand that the appellant's father has recently re-established contact with the appellant (he attended the initial hearing with the appellant) and it may be necessary to hear evidence from him. With that in mind, the cessation decision and Article 3 ECHR will be reconsidered by the Upper Tribunal at a resumed hearing on a date to be fixed at Field House. Both parties may rely upon fresh evidence, provided copies of any documentary evidence (including witness statements) are sent to the other party and filed at the Upper Tribunal no less than 10 days prior to the resumed hearing. Both parties shall send to each other and file at the Upper Tribunal skeleton arguments addressing all issues which remain to be determined no later than 3 days prior to the resumed hearing

Notice of Decision

9. The decision of the First-tier Tribunal promulgated on 2 July 2019 is set aside. All findings shall stand in respect of Article 8 and the section 72 certificate. The decision of the Secretary of State to cease the appellant's refugee status and the Article 3 ECHR decision will be reconsidered by the Upper Tribunal (Upper Tribunal Judge Lane) at a resumed hearing on a date to be fixed at Field House. Both parties may rely upon fresh evidence, provided copies of any documentary evidence (including witness statements) are sent to the other party and filed at the Upper Tribunal no less than 10 days prior to the resumed hearing. Both parties shall send to each other and file at the Upper Tribunal skeleton arguments addressing all issues which remain to be determined no later than 3 days prior to the resumed hearing

2. At the resumed hearing at Manchester on 14 August 2020, I heard the submissions for both parties; there was no further oral evidence. I reserved my decision.
3. The central issues in this appeal had been identified in the error of law decision. In essence, I am required to determine whether the appellant will face a real risk of ill-treatment either at the point of his return through the airport in Zimbabwe or subsequently whilst living in his home area of that country or in such other area of Zimbabwe as it may not be unduly harsh to expect him to reside. I have to decide whether circumstances in Zimbabwe have changed in a manner that justifies the cessation of the appellant's refugee status. The burden of proof in relation to cessation falls upon the Secretary of State (see *Secretary of State for the Home Department v. MS (Somalia)* [2019] EWCA Civ).
4. The appellant was only a child (aged 11 years) when he came to the United Kingdom and was granted refugee status in line with his father who still resides in this country. The father's claim for international protection is summarised in Mr Clarke's skeleton argument (quoting, in turn, from the summary in Judge O'Callaghan's decision). The father had "*transferred his allegiance and became an active member of the MDC, holding a ranking position*" after previously being a member of the ZANU-PF [FTT/19]. He was the son of a village leader in Manicaland Province in Eastern Zimbabwe. and decided to stand as an elected official for the MDC when "*travelling through a check point in Murambinda, Manicaland Province, he was beaten to the point of being abandoned and left for dead by members of the Zimbabwe Republic Police, who are colloquially referred to as the 'black boots'.*" He was under surveillance by the "CIO both prior to and consequent to the assault." The Secretary of State has not sought to remove the refugee status of the appellant's father.
5. The appellant now relies upon the expert report of Dr Hazel Cameron. Dr Cameron has in-country experience of contemporary Zimbabwe and has drawn on a number of materials including her own published work and also reports from the Immigration and Refugee Boards of Canada and Australia. Dr Cameron states that risk categories such as those defined in the country guidance of *SM, TM, MH* (MDC - Internal flight - Risk categories) Zimbabwe CG [2005] UKIAT 00100 remain entirely apposite and that the persecutory intent of the Zimbabwean authorities remains unaltered. Recent statements by President Mnangagwa had, in her opinion, matched election rhetoric which accompanied the election violence of 2008. Dr Cameron considered that the appellant's profile is the son of a recognised refugee and prominent defector from ZANU-PF to the MDC would lead to his to be identified by the CIO prior to arrival at the airport. That identification would lead, in turn, to a level interrogation during which the appellant would be exposed to a real risk of ill-treatment.
6. Mr Bates, who appeared for the Secretary of State, made a number of criticisms of Dr Cameron's evidence. He submitted that the expert witness appeared to consider that the political situation in Zimbabwe is worse now than before the promulgation of the country guidance of *CM (EM country guidance; disclosure) Zimbabwe CG* [2013] UKUT 00059(IAC). He compared her assessment with evidence referred to in the recent

CPIN which indicated that levels of violence now were nowhere near as high as they had been in 2008. He drew attention to the fact that Dr Cameron relied upon unpublished research which had not yet been peer-reviewed. Mr Bates's submissions also focused on the lapse of time since the appellant had come to the United Kingdom. The risk to the appellant was likely to have diminished during that period and it was unlikely now, given that the focus of political opposition has moved on to, for example, food and fuel activism, that, although they would recognise the appellant on arrival as the son of a defector and MDC activist, the authorities at the airport would have no interest in the appellant who had no known involvement in *sur place* whilst in the United Kingdom.

7. Whilst considering the Secretary of State submissions, I am reminded that it is for the Secretary of State to discharge the burden of proving that circumstances in Zimbabwe have changed to the such an extent permanently such that cessation of refugee status may be justified. While she is, of course, entitled to criticise the expert report upon which the appellant relies Secretary of State did not produce herself any up-to-date evidence on the clinical situation in Zimbabwe beyond the most recent CPIN Report. Moreover, whilst the criticisms of Dr Cameron were skilfully made by Mr Bates, I do not agree that the weight attaching to her evidence should be diminished for the reasons which he advances. The research upon which Dr Carmen relies appears, in the most part, to constitute her own work; as Mr Clarke submitted, the fact that she was required to rely upon her own research is indication of her expertise.
8. I also agree with Mr Clarke that Mr Bates's criticisms do not shake the central narrative of Dr Cameron's evidence; whilst Zimbabwe may not appear regularly in the headlines in Western Europe at the present time, that is not because of any reduction in the efforts made by the government there to suppress opposition, at times, violently. It seems clear from the country evidence that in recent years the MDC has fragmented and, in consequence, offers a less credible sustained threat to the governing regime. However, that does not necessarily mean that the governing regime is any less hostile towards their political opponents. It was a striking feature of this case that the party upon whom the burden of proof rests as regards cessation, that is the Secretary of State, was unable to bring before me any evidence of a fundamental and durable change in the political situation in Zimbabwe. Such evidence as was before me and to which I give weight (such as that of Dr Cameron) whilst it may not show any significant deterioration of the situation equally does not indicate any durable change for the better.
9. My primary finding, therefore, is that the Secretary of State has failed to discharge the burden of proof upon her as regards justifying cessation. The Secretary of State's 'lapse of time' argument, although initially attractive, sits uneasily in the context of such evidence as the Tribunal has concerning the recent conduct and pronouncements of the ruling Zimbabwean regime. As it cannot be proved on the evidence that the appellant will now not be at risk in the, then his refugee status should not be brought to an end. That conclusion on the particular facts in this appeal is wholly consistent with the relevant jurisprudence: see, in particular,

Salahadin Abdulla & Others v. Germany (C-175/08) [2011] QB 46; *Secretary of State for the Home Department v. MA (Somalia)* [2018] EWCA Civ 994. It follows that, as I have found that the appellant will be exposed to real risk immediately upon arrival, it is not necessary also to consider whether he would be able to live safely in his home area or relocate within Zimbabwe.

10. What, in practical terms, is reasonably likely to happen to this appellant upon arrival at the airport in Zimbabwe? The passenger manifests will be known in advance by the CIO based at the airport. Both parties agree that the appellant's name will be linked to that of his father. The CIO will be aware of his identity; the question is whether its officers will consider it necessary or expedient to subject the appellant to an interrogation during which his personal safety may be at real risk. I acknowledge that it may be the case that, depending on the operational circumstances on the actual day of his arrival, it is possible that the appellant's profile is not so high that the CIO would always consider it absolutely necessary to stop and interrogate him in any event. However, the appellant's forced removal will lead him into the first stage of the screening process at the airport and both parties accept that the relationship to his father is likely to lead to his entering the second stage of that process. The Secretary of State submits that the appellant himself has never openly opposed the Zimbabwean government; absent the link to his father, there would be no obvious reason to harm the appellant. However, as Mr Clarke submitted, there is no reason to suppose that a repressive regime, unnerved by political unrest at home, will always adopt thoroughly rational modes of conduct when questioning those who, for whatever reason, present as political opponents. Against the background of entering the second stage of interrogation as the close relative of a known political opponent of ZANU-PF, I find that the Secretary of State has failed to show that either the lapse of time or any changes within Zimbabwe have eliminated all risk which this appellant might face at that point of entry to his country of nationality.
11. Accordingly, I find that the appellant's appeal against the cessation of his refugee status should be allowed. For the same reason, his appeal on Article 3 ECHR grounds is also allowed.

Notice of Decision

The appellant's appeal against the cessation of his refugee status and on Article 3 ECHR grounds is allowed.

Signed
Upper Tribunal Judge Lane
Date 20 August 2020



Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.