IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05682/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 September 2014	**On 6th Nov 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STAE FOR THE HOME DEPARTMENT

Appellant

and

TABATH MUTANGA

Respondent

Representation:

For the Appellant: Mrs R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Dr M Mavaza, Walters, Solicitors

DECISION AND REASONS

1. The respondent, Tabath Mutanga, was born on 1 May 1970 and is a female citizen of Zimbabwe. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant has appealed against the decision of the Secretary of State dated 27 May 2013 to refuse

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to grant her asylum and to make directions to remove her from the United Kingdom. Her appeal was allowed by the First-tier Tribunal (Judge Cohen) in a determination promulgated 9 April 2014. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. There is effectively one ground of appeal. Although the judge, in assessing risk on return, made reference to *CM (EM Country Guidance; Disclosure) Zimbabwe [2013] UKUT 00059 (IAC)* and *EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC)* at [7] it appears that at [22] he applied the out of date country guidance of *RN (Returnees) Zimbabwe CG 2008 UKIAT 00083.*. At [22], the judge wrote:

> "The appellant has undertaken numerous political activities whilst in the UK. I accept that the appellant has attended a Zimbabwe Vigil on a regular basis from the photographs provided to me and letter from the organisation. I accept the evidence of the appellant having published a website against the regime. I am compelled from the weight and quality of the evidence provided to me to accept that the appellant has been a political activist on behalf of the opposition including the MDC in the UK. I find that this would become known to the authorities in Zimbabwe and place the appellant at great risk upon return. I find having regard to the risk factors of *EM* and *RN* Zimbabwe that the appellant has a number of identifying factors that would place at risk upon return (sic) as well as her sur place political activities she has been out of Zimbabwe for a number of years, has been present in the UK and will be returned as a failed asylum seeker. I find that she would not be able to demonstrate support for the ZANU-PF on upon return. I conclude that the appellant would be at risk based upon her UK political activities based upon the current prevailing political situation in Zimbabwe upon return. In the light of these factors I am satisfied the appellant has a well-founded fear of persecution [upon] return to Zimbabwe. I find that her asylum claim falls to be allowed."

3. Later, at [24] the judge observed:

> "I note that having regard to the present case law that whilst returnees are returned with contempt and suspicion on return and face a hostile atmosphere that does not in itself indicate a real risk of persecution. Based on my findings above the appellant is of adverse interest to the authorities I find that she comes within the risk categories identified within the case. The appellant has attended the Zimbabwe Vigil and has spoken out against the regime in a TV broadcast. I find the appellant would be of interest to the authorities based upon political opinion. I find the appellant comes into the risk categories identified in the case law. I find the appellant cannot demonstrate loyalty to the regime. Based on my findings, I find that the appellant would be of interest to the authorities on return.

Leaving aside the somewhat circular argument that is set out in the latter paragraph, it is unclear to which "case" the judge is referring at [24]. The respondent is right to point out that the guidance of *EM* (reaffirmed by *CM*) differs from that in *RN*. Having said that, the Secretary of State's grounds of appeal do not seek to challenge the findings of Judge Cohen. That aspect of the case is further complicated by the outcome of a hearing before Upper Tribunal Judge Freeman in this appeal on 9 June 2014. Judge

Freeman did not actually set aside the First-tier Tribunal determination on the basis that it contained an error of law although he indicated in his ruling and directions that the judge's failure to apply the appropriate country guidance was "was material enough in this case to require a fresh hearing." The remainder of the ruling and directions concerns Judge Freeman's attempt to link the instant appeal with that of the appellant's daughter (AA/00490/2014) which I happened to hear at Bradford on 1 July 2014. At that time, I was not aware of the appeal proceedings concerning Tabath Mutanga the current appellant. I dismissed the Secretary of State's appeal against the decision of the First-tier Tribunal allowing the daughter's appeal on asylum and human rights grounds.

4. Having considered Judge Cohen's determination carefully, I remain concerned that it remains unclear exactly upon what basis he has allowed the appeal. His reference to "the case" at [24] appears to invoke one of the items of country guidance jurisprudence to which I have referred above but it is not clear which one. This may perhaps have not been a significant problem if the risk factors to which the judge referred were those detailed in *EM* and *CM*. However, the judge appears to go beyond the guidance of those cases by placing weight on the fact that the appellant would not be able to demonstrate support for ZANU-PF (a feature of the country guidance in *RN* but of much less significance in *EM* and *CM*). It was also not clear how the judge's findings that the appellant's *sur place* activities would be known to the Zimbabwean authorities (therefore exposing her to possible risk) may be reconciled with the existing country guidance. In the light of these observations, I have decided to set aside the determination. However, I preserve the following facts which are not tainted by the error of law which I have identified: (i) the appellant published a web page in the United Kingdom concerning politics in Zimbabwe (ii) the appellant's daughter was targeted and sexually abused by a member of ZANU-PF and has undertaken MDC activities in Zimbabwe and the United Kingdom (iii) the appellant has attended the Zimbabwe Vigil in the United Kingdom (iv) the appellant's house was raided in Zimbabwe and at that time she came to the attention of the Zimbabwean authorities (v) the appellant's claim that her husband worked for the government in Zimbabwe investigating claims of ZANU-PF corruption and that her father was allegedly killed by the authorities are matters of little weight. The First-tier Tribunal to which this case is now remitted will need to have regard to those findings considering risk on return in the light of the current country guidance. The analysis will need to focus on the nature of the appellant's political profile in Zimbabwe (if any) and I accept that this may require further evidence in order to provide the Tribunal with an adequate matrix of facts upon which to make its risk assessment.

DECISION

5. The determination of the First-tier Tribunal which was promulgated on 9 April 2014 is set aside. The appeal will be remitted to the First-tier Tribunal (not Judge Cohen) for that Tribunal to remake the decision.

Signed Date 10 October 2014

Upper Tribunal Judge Clive Lane