IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03804/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2016	**On 1 April 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

[T C]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Rwegasira (Duncan Lewis & Co Solicitors, Harrow Office)
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Zimbabwe born on [ ] 1975. He arrived in this country on 30 August 2000 and applied for asylum on 10 December 2013. This application was refused on 10 February 2015. He appealed against

the decision and his appeal came before a First-tier Tribunal Judge on 7 May 2015.

2. Although the respondent refused the appellant's application for asylum, concessions were made in the respondent's decision letter.

3. The concessions made are helpfully summarised in paragraph 27 of the decision of the First-tier Judge as follows:

> "The respondent accepted that the appellant was a member of the MDC and that he had been detained and beaten on two occasions because of this. It was also accepted that he had continued his political activities in the UK and says there was a good chance that his name would have been brought to the attention of ZANU-PF."

4. These concessions appear at paragraphs 18, 19 and 25 of the decision letter.

5. The First-tier Judge concluded her determination on the asylum aspect of the case as follows:

> "39. The Respondent clearly accepted in the refusal that the Appellant was a member of MDC and that he had been detained and beaten on 2 occasions because of this and that he had continued his political activities in the UK and so there was a good chance that his name would have been brought to the attention of Zanu PF. This was not specifically challenged by Mr Lawson at the hearing. The issue before me, then, and the ground for refusal, was the risk on return to Zimbabwe and whether the Appellant could relocate.
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> 40. Mr Lawson raised issues regarding the Appellant's credibility, concerning, for example, his departure from Harare. However, he has provided no fresh evidence to support these issues over and above the points made in the refusal.
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> 41. I therefore consider solely the issues of risk on return and internal relocation.
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> 42. I take account of *CM (EM Country guidance)* Zimbabwe CG [2013] UKUT 00059 in which it was held, restating EM, that there was significantly less politically motivated violence in Zimbabwe and that as a general matter, the return of a failed asylum seeker from the UK having no significant MDC profile, would result in that person facing a real risk of having to demonstrate loyalty to Zanu PF.
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> 43. The issue here, then, is whether the Appellant has a significant MDC profile, and I note that it has been accepted that he was

arrested twice and beaten. However, I note that he was able to leave Zimbabwe using his own passport. In my view it is reasonable to suppose that if his name had been on a list held by the authorities this would have been picked up at the airport and he would, had he been of adverse interest, have been held and prevented from leaving the country.

44. I do not consider it credible that CIO officials would be less likely to be in attendance at the airport during the day. I particularly note that the Appellant caught an international flight during the day and not just any international flight but one to the UK, a destination for many asylum seekers from Zimbabwe and a country with which the Zanu PF regime has and had a less than happy relationship. It is reasonable, therefore, to suppose that CIO would be specially interested in passengers travelling to the UK and would be more, rather than less, likely to be in attendance at the time of such flights.

45. The Respondent also said there was a "good chance" that the Appellant's activities in the UK had come to the attention of the Zimbabwean authorities. However, I remind myself that the burden of proof rests with the Appellant, and in my view, even at the low standard, he has not provided independent evidence that his activities have indeed brought him to the attention in the form of, among other things, photographs taken at Zimvigils.

46. I also do not find it credible that the authorities would issue a warrant for the Appellant's arrest some years after he left the country, given the lack of evidence that the authorities knew or were likely to know of his activities here.

47. I also note that the Gweru branch of the MDC specifically wrote to the Appellant saying that they had not given information about him to the authorities.

48. I am therefore not satisfied that the Appellant has a significant MDC profile such that there would be a risk on return.

49. CM goes on to state that a returnee to Bulawayo would not suffer the adverse attention of Zanu PF even if he had a significant MDC profile. However, I note that the Appellant does not speak Ndebele and is Shona and take particular account of the finding in CM that relocation to Matabeleland, including Bulawayo, may be negated by discrimination, where the returnee is Shona. In my view therefore relocation to Bulawayo would not be an option for the Appellant.

50. This consideration is not applicable to Harare, however. The Appellant is a fit man, aged 39, and is well educated. He has no

dependants and no-one, then, economically reliant on him. He has also kept up connections in Zimbabwe, through the local MDC branch. He is, therefore, in a good position to find employment in Harare. It would not therefore, following EM and CM, be unreasonably or unduly harsh to expect him to relocate there.

51. I find, therefore, that while the Appellant has a well-founded fear of persecution for a Convention reason, namely his political opinion, he would not, for the reasons I have set out above, be at risk on return and could reasonably relocate to Harare.

52. I dismiss the appeal on asylum grounds.

53. On the evidence before me there is no evidence to suggest that the Appellant would face a real risk of suffering serious harm if he returned to the country of origin.

54. I dismiss the appeal on humanitarian protection grounds."

6. She went on to dismiss the appeal under Articles 2, 3 and 8 of the ECHR.

7. The appellant applied for permission to appeal. Permission to appeal was refused by the First-tier Tribunal. The Upper Tribunal granted permission on 10 August 2015. The Judge's decision in respect of Article 8 is not the subject of challenge. In granting permission the Upper Tribunal Judge specifically commented on the second ground of appeal where the appellant had taken issue with the Judge's approach to the case in the light of the concessions that had been made. In paragraph 25 of the refusal letter the respondent had accepted that the appellant was continuing his political activities in the UK "and as such, there is a good chance your name will have been brought to the attention of the ZANU-PF". The Judge it was submitted in paragraph 15 of the grounds had failed to engage with the question of whether the appellant's MDC profile had grown since he left Zimbabwe "such that he was able to leave his country of origin but would not be able to safely return".

8. In ground 1 issue was taken with what the Judge said in paragraph 44 of the determination about officials being less likely to be in attendance at the airport during the day which appeared to be a finding based on assumptions and not on evidence. Furthermore it was not the appellant's case that the officials would be less likely to be in attendance during the day. It was his case that he had been informed that he had the best opportunity of leaving Zimbabwe on a day time flight.

9. In ground 3 it was submitted that the appellant did not fall within the general class of returnees identified in **CM (Zimbabwe) [2013] UKUT 00059**. In ground 4 it was submitted that there had been developments

in the objective evidence since the case of **CM** which the Judge had not dealt with.

10. In the respondent's response it was submitted that what was said in the decision letter at paragraph 25 "did not constitute a concession of fact but a reason for taking the case at its highest".

11. It was submitted that the Judge was right to suggest that the burden was still upon the appellant to substantiate his claim in the light of **TK (Burundi) v Secretary of State [2009] EWCA Civ 40**.

12. It was also pointed out that the Judge had disbelieved a substantial part of the appellant's claim as to the relevance of his profile some fifteen years later.

13. At the hearing Mr Rwegasira relied on his skeleton argument and the grounds. He pointed out that the issues had been narrowed by the respondent at the First-tier Tribunal hearing. The Judge had gone behind concessions of fact. The Judge had found it not to be credible that the authorities would issue a warrant for the appellant's arrest some years after he had left the country. This was a warrant dated 20 June 2013. No specific reasons had been given for her implied finding that the document was fake. The arrest warrant had not been issued for the appellant's *sur place* activities. In respect of what was said at paragraph 47 the authorities would not rely on MDC branches. There had been developments since the country guidance case with **CM**. The determination was materially flawed in law and should be remitted for re-hearing.

14. Mr Avery submitted that what was said in the decision letter was not a definitive statement and it turned on the words "good chance". The appellant had undoubtedly left on his own passport without being stopped and it would be bizarre to suggest that the officials would not be working during the day. Mr Avery submitted that the Judge had not accepted the appellant's account nor had she accepted the arrest warrant and it had not been necessary to say whether the warrant was false or not. Even if the appellant had been active in the UK it would not necessarily mean that he had a significant MDC profile. The Judge had been correct to apply the country guidance case and there was no reason for not applying it.

15. In reply it was submitted that the appellant was not in a general class of returnees as indicated in the skeleton argument before the First-tier Tribunal. He had been a longstanding member of the MDC and had met top MDC officials and had been arrested and beaten on two occasions and had an outstanding politically motivated arrest warrant against him. It was accepted that he had continued his political activities in the United Kingdom and had come to the attention of ZANU-PF and moreover his family were known for anti-government activities. The appellant had a

significant MDC profile, was known to ZANU-PF and would attract further attention in Zimbabwe due to his continued political activities upon return.

16. At the conclusion of the submissions I reserved my decision. I can only interfere with the Judge's determination if it was materially flawed in law.

17. I accept the submission made on behalf of the appellant that there were important concessions made by the respondent in the decision letter. These concessions are recorded by the Judge in her determination. Significantly the Judge does not record any attempt by the respondent to withdraw the concessions that had been made. In the Rule 24 response reference is made to *TK (Burundi)* but it does not appear to me that the circumstances in that case are similar to the circumstances in this case. Neither party sought to draw my attention to any particular part of *TK (Burundi)* apart from the point made in the refusal notice that the burden rests upon an appellant to substantiate his claim. It is said in paragraph 16 of the judgment:

> "Where evidence to support an account given by a party is or should readily be available, a Judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanations for that failure. ..."

At paragraph 21 of the judgment Thomas L.J. states as follows:

> "The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

18. However, in this case the respondent had made clear concessions of fact. It was not necessary for the appellant to deal with the matter which had been conceded. It is always open to the respondent to withdraw a concession and the principles are summarised in **NR (Jamaica) [2009] EWCA Civ 856** and **CD (Jamaica) [2010] EWCA Civ 768** where the Court of Appeal accepted at paragraph 15 the summary in the former case in the following terms:

> "A Tribunal can allow a concession to be withdrawn if there is good reason in all the circumstances to do so and if it can be done with the absence of prejudice. No principle will govern every case, but the most important feature of any decision is that the Tribunal must put

itself in a position in which the real issues of dispute on the merits can be decided, so long as that can be done without prejudice to one side or the other ...".

19. Of course in this case there does not appear to have been any attempt to withdraw the concession. Indeed this is not submitted by the respondent in her response. Where an appellant comes to a hearing to meet a case which includes concessions he will not be equipped or prepared to deal with those matters which he understands are not the subject of dispute. Unless given fair warning that the concession no longer stands he has no chance to meet the case against him. The appellant was in effect criticised in paragraph 45 of the decision for not providing evidence of a matter which he was fully entitled to expect was not disputed.

20. I have come to the conclusion that the appellant has identified a material error of law in the decision resulting in the potential for unfairness.

21. The respondent in this case in a carefully drafted decision letter made important concessions of fact. Such concessions are extremely helpful in order to identify the issues which need to be resolved and therefore greatly assist the Tribunal in reaching its decision. Where, as the representative commented in this case, the Judge "takes a sterner view" than the respondent did and goes behind a concession properly made by the respondent then it appears to me that the error does infect the decision and a remittal for a fresh hearing is appropriate. The other points made by the representative might not on their own render the decision unsustainable but where an unfair approach is identified it would not be right to let the decision stand.

22. The appeal is allowed. The appeal will be remitted for a fresh hearing on all issues save Article 8 as the findings in relation to Article 8 are not the subject of challenge.

23. Anonymity order made.

Fee Order

24. No fee has been paid and none is payable.

Signed Date 23 March 2016

G Warr
Judge of the Upper Tribunal