Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number
DA/00170/2012

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2013

Determination promulgated
On 1 November 2013
…………………………………

Before

Upper Tribunal Judge J. E. Coker
Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Priscilla Dube
(Anonymity direction not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation

For the Appellant: Mr. Saldanha of Howe & Co.
For the Respondent: Ms. Everett, Home Office Presenting Officer.

DETERMINATION AND REASONS

Background

1. This appeal was first listed before us on 26 October 2012 pursuant to the 'Decision and Directions' given by Upper Tribunal Judge Hanson on 14 September 2012. The Appellant had appealed against the decision of the First-tier Tribunal comprising First-tier Tribunal Judge Cameron and Mr. A. P. Richardson JP promulgated on 19 June 2012 dismissing the appeal of the Appellant against the Respondent's decision dated 14 March 2012 to make a deportation order.

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2. The Appellant is a citizen of Zimbabwe born on 2 October 1977. She arrived in the UK on 13 January 2002 holding a South African passport and was granted six months leave to enter as a visitor until 19 July 2002. The Appellant made subsequent applications for leave to remain as a student and was granted successive periods of leave until 31 July 2004. On 27 July 2004 the Appellant applied for further leave to remain but was refused on 29 September 2004. On 13 July 2005 the Appellant applied for reconsideration of this latter decision but the refusal was maintained. On 3 April 2009 the Appellant applied for asylum. Pending consideration of her asylum claim the Appellant was convicted on 12 June 2009 at Solihull Magistrates Court on four counts of obtaining leave to enter or remain in the UK by means of deception and on 7 August 2009 at Warwick Crown Court she was sentenced to a total of 14 months imprisonment. On 28 August 2009 the Appellant was served with a Notice of Liability to Automatic Deportation. On 10 January 2010 the Appellant completed her custodial sentence and was detained under immigration powers. On 3 March 2010 an asylum screening interview and a substantive asylum interview were conducted and the Appellant was released on bail. The Appellant's application for asylum was refused and a decision was taken to deport the Appellant on 6 March 2012 and a Deportation Order was signed on 14 March 2012.

3. The Appellant appealed to the IAC on asylum grounds and human rights grounds. Her appeal was dismissed by the First-tier Tribunal for reasons set out in the determination promulgated on 19 June 2012.

4. The Appellant sought permission to appeal to the Upper Tribunal which was granted by Designated Immigration Judge McClure on 10 July 2012 on the basis that the First-tier Tribunal had relied upon the case of **EM (Returnees) Zimbabwe CG [2011] UKUT 98**, a decision which had been set aside and remitted to the Upper Tribunal for reconsideration by the Court of Appeal.

5. The Respondent filed a Rule 24 response dated 26 July 2012 in which it was indicated that the Appellant's application for permission to appeal was not opposed and the Tribunal was invited to determine the appeal afresh.

6. The issue of 'error of law' was considered by Upper Tribunal Judge Hanson who determined the matter in the following terms:

"1. Having regard to all the circumstances, including the Secretary of State's Rule 24 Reply dated 26th July 2012 in which she indicates she does not oppose the appeal following the quashing of EM and Others by the Court of Appeal, the Upper Tribunal, pursuant to rule 34, has decided without a hearing that the decision of the First-tier Tribunal does contain an error of law, as identified in the grant of permission, read with the grounds of application, and should be set aside and re-made by the Upper Tribunal.
2. The appeal will accordingly proceed to a hearing for the purpose of considering evidence relevant to the re-making of the decision limited to an assessment of the risk to the appellant on return in light of the current country guidance case law and background country information in light of the preserved findings detailed below.
3. … (i) The parties shall prepare for the hearing on the basis that the findings of fact of the First-tier Tribunal at paragraphs 69–72, 76, 89, 92–99 and 101 to 104 shall stand."

7. The relevant passages in the First-tier Tribunal's determination are in the following terms:

"69. This is an appeal against the making of an order under section 32(5) of the UK Borders Act 2007 which states that the Secretary of State must make a deportation order in respect of a foreign criminal subject to the exceptions in section 33.

70. The appellant has submitted that she comes within the exceptions contained in section 33 in particular that the decision is in breach of her convention rights and under the ECHR.

71. No issue has been taken as to the appellant coming within the definition of a foreign criminal and she has clearly been sentenced to a period in excess of 12 months imprisonment.

72. It would appear from paragraph 364A that paragraph 346 does not apply where the Secretary of State must make a deportation order in respect of a foreign criminal under section 32(5).

…

76. It is clear from this determination [HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094] that it is now accepted that the CIO have taken over responsibility for monitoring all returning passengers at Harare airport and that all deportees or handed over to the CIO for questioning but they are not at that stage at risk it is only if they are detained

for further questioning. It also confirmed at paragraph 265 that the CIO will have identified certain persons in advance from the passenger manifest.

…

89. We do not however find the appellant credible that she did not know about asylum when she came to this country. She has clearly stated that she did not claim in South Africa because she did not consider herself to be safe. It is also the case that asylum is an issue which is discussed frequently by the national news and must have been an issue which would have been discussed between herself and other Zimbabweans who were in a position of claiming asylum in this country.

…

92. [Mr Sikholiso Dube – no relation – the pastor at the Appellant's church in the UK] has confirmed during oral evidence that [the Appellant discussed the issue of her rape in Zimbabwe] in 2004/2005 and that he specifically told the appellant that she should tell the authorities. The appellant therefore was aware of the issues and had discussed the difficulties in 2004, at the latest 2005 but did not claim asylum until 2009. We find that this delay of itself gives rise to an adverse credibility finding.

93. The appellant has been consistent with regard to her evidence as to how she was abducted while walking down the street and taken into a group of others who were then taken into the bush area and the woman raped. She has also been consistent with regard to where the money that she subsequently gave of the agent came from.

94. There are a number of credibility issues with regard to this area in particular the fact that she states that the monies were approximately half an inch in depth of notes and that she was not searched even though she was stripped. There is also an inconsistency with regard to her witness statement and the evidence given in the screening interview. Within her witness statement she states that the driver who took from Zimbabwe to South Africa introduced to the agent whereas at question 8.3 of the screening she states she contacted a friend in the UK who put her in contact with the agent.

95. Although there are some inconsistencies in the appellants evidence the core of her claim has remained consistent. We take into account the low burden of proof in relation to asylum claims and we also take into account the general position of women in Zimbabwe and in particular the use of rape as a method of control and intimidation generally. Paragraph 22.35 of the 2011 COIR confirms this and also confirmed that this has been a long-standing problem.

96. The appellant's evidence is therefore consistent with the overall objective evidence available as to the treatment of women and on the lower standard of proof we are prepared to accept the appellant's evidence that she was taken on

her way home and was subsequently raped. There is nothing inherently implausible in the appellant's statement that the Zanu PF members became drunk and that she was able to flee and again applying the lower standard of proof we are prepared to accept that this was the case.

97. The appellant states that she has had a limited involvement with the MDC in Zimbabwe attending some meetings and she states putting up flyers and giving out leaflets. She accepts that she was not active but was a supporter. Her family she states were targeted but only on a limited basis in that her mother was beaten up in the market and they had stones thrown at the house that night. The appellant has not given any further information as to the family itself been targeted and there is nothing to indicate that they were subsequently targeted after she left Zimbabwe either as a result of their own MDC activities or as a result of the appellant escaping from Zanu PF.

98. We do not therefore accept even to the low standard of proof that the appellant was subsequently looked for by the Zanu PF authorities after her escape nor that she would be shown as of interest on any records kept by the authorities which would be accessed during her arrival at Harare airport. The fact that there have been no further problems for her family would indicate that even at a local level there is no further interest in the appellant.

99. The appellant in this country has attended the vigil on one occasion and a local meeting but clearly is not active and she would not have come to the adverse attention of the authorities due to her actions in this country.

…

101. The appellant came to this country in 2002 and has therefore been out of Zimbabwe for over 10 years. She entered with a false South African passport and there is no evidence before us that she would have any valid Zimbabwean documents with which she could return. She would therefore be returned utilising travel documents obtained by the UK authorities.

102. The appellant was born in Bulawayo and lived her whole life there. Her current evidence is that her family including her two children were living in that area although she states that she has not had contact with them since 2008. We do note that in the presentence report it states that she last had contact with her mother in 2007. We also note within the presentence report that in 2009 the appellant is stated to have a good relationship with her partner albeit that there were tensions due to her remand. Her younger daughter was returned to Zimbabwe in the care of her partner's sister. We do not therefore find it credible that the appellant would not have been aware of the position of her younger daughter even that she was still with her partner, her daughter's father, in 2009 and believe that she has been less than truthful in relation to the contact she has had with her family.

103. The appellant is 34 years old and has problems with ulcers and on her evidence is suffering depression although her doctor has not prescribed any medication for this. She has lived the majority of her life in Zimbabwe and has family in the Bulawayo area.

104. Taking into account the findings we have made above, that is that although we accept that the appellant was abducted and raped, we do not accept that she had or currently has an MDC profile which would bring her to the adverse attention of the authorities or the Zanu PF on return to Bulawayo."

8. At the hearing on 26 October 2012 (when the Appellant was represented by Mr Arkhurst of Counsel and the Respondent by Ms Tanner) we heard submissions as to how the decision should be remade in light of **EM** having been set aside by the Court of Appeal. There was, unfortunately, delay in writing up the determination, and although a draft was prepared it was overtaken by promulgation of new country guidance in **CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC)**. The case of **CM** was significant in that it concluded that the findings in **EM** were not vitiated by reliance on anonymous material, and further reiterated much of the guidance given in **EM**: this was particularly pertinent to the instant case because the basis of permission to appeal and Judge Hanson's conclusion on error of law were based on the fact that the Court of Appeal had quashed **EM** and remitted it to the Upper Tribunal. In the circumstances we resolved that the case should be relisted for further submissions. However it seems that there was an error in relisting (the case was listed before a different Tribunal), and then unfortunately before it could again be relisted a member of the presently constituted Tribunal sustained a serious accident. We repeat here the apologies extended to the parties at the hearing today.

Today's Hearing

9. We are grateful for the measured and realistic submissions of Mr Saldanha. He acknowledged that the case presently before the Tribunal was in respect of asylum and that there was no Article 8 issue. Without making any concession he identified that there was an issue as to whether the Tribunal had to remake the First-tier Tribunal's decision at all in light of **CM**'s effective restoration of the guidance in **EM**. In the event that the Tribunal were to remake the decision, he relied on two further items of evidence: a report from SW Radio Africa dated 16 September 2013 referring to an incident of rape in Epworth, Mbare, and an arson attack; and a report from Radio Vop Zimbabwe dated 17 October 2013 referring to a declared intention to revive the training of

youth militia. These were of relevance because the Appellant had been a victim of sexual assault at the hands of militia. Mr Saldanha submitted that the general country situation was not entirely stable and that the results of elections were strongly contested.

10. Ms Everett in brief submissions essentially relied upon the fact that the guidance in **EM** upon which the First-tier Tribunal had relied had effectively been reinstated, and submitted that the two reports produced on behalf of the Appellant today did not dislodge the findings and conclusions in **CM**.

11. Mr Saldanha did not seek to reply to Ms Everett's submissions.

Analysis

12. Mr Saldanha's query as to whether the Tribunal needed to re-make the decision at all – which we acknowledge was expressed as not intended to be a concession – was nonetheless a realistic recognition of the difficulty presented to the Appellant's case by **CM**. Moreover it raises an interesting issue as to the approach that should now be taken to the 'error of law' finding made by Judge Hanson. However, whilst we explore this below, in our judgement whether the case is now approached on the basis of error of law, materiality of error of law, or remaking the decision, the conclusion is ultimately the same: the Appellant is not entitled to international surrogate protection and the appeal is to be dismissed.

13. The First-tier Tribunal in relying upon the case of **EM** was relying upon a case that was subsequently found by the Court of Appeal to have been determined in error of law. Although subsequently the substance of the country guidance given in **EM** was found on consideration and analysis in the case of **CM** to be sound, the findings in **CM** do not have the effect of overturning the legally flawed nature of the decision in **EM**. Accordingly, the First-tier Tribunal in the instant case in relying upon **EM** was relying upon a legally flawed decision and its own decision was necessarily tainted. Accordingly, we do not consider that the subsequent findings in **CM** in any way justify revisiting the conclusion of Judge Hanson herein that "*the decision of the First-tier Tribunal does contain an error of law*".

14. What is perhaps now more contentious is whether or not such an error of law required that the decision of the First-tier Tribunal "*should be set aside and remade by the Upper Tribunal*" as stated in the 'Decision and Directions' given by Judge Hanson. Whilst there is no longer an express materiality test in statute or secondary legislation, materiality is nonetheless a relevant consideration to the discretion enjoyed by the Tribunal as to how to dispose of a case in the event of error of law. In raising the question of the need to remake the decision Mr Saldanha is implicitly recognising both that discretion, and the effective restatement of the *substance* of the country guidance in **EM** in **CM**.

15. In so far as the First-tier Tribunal relied upon **EM**, its decision-making was informed by the *substance* of the guidance given notwithstanding the legally erroneous basis of its derivation. The effective 'reinstatement' of that guidance renders the legally flawed nature of the First-tier Tribunal's reliance upon **EM** immaterial to the substance of the First-tier Tribunal's considerations and fact-finding.

16. This, then, begs the question of the status of Judge Hanson's 'Decision and Directions' in light of developments that post-date the giving of the 'Decision and Directions'. We emphasise that because both parties recognised that the outcome of the appeal would likely be the same regardless, we did not hear developed submissions on this issue. However, it is our view that because the procedure in the Upper Tribunal is a continuous process and the interlocutory 'Decision and Directions' given at the error of law stage is not in its nature a final decision, it is open to us to revisit the issue of whether the decision of the First-tier Tribunal should be set aside and remade notwithstanding an error of law.

17. Essentially for the reasons already identified – the First-tier Tribunal's reliance upon the substance of the country guidance in **EM** has now been shown by the findings in **CM** not to have been materially factually flawed notwithstanding the erroneous nature of the decision-making process in **EM** - it is clear to us, and we do not understand it to be seriously disputed by Mr Saldanha, that the error of law was not material to the outcome. In such circumstances we do not consider it appropriate to set aside the decision of the First-tier Tribunal.

18. For completeness, however, we have considered the position if we had reached a different conclusion on setting aside and were to remake the decision. Necessarily our starting point would be the country guidance

in **<u>CM</u>** applied to the particular facts of the Appellant's case with reference to the preserved findings of the First-tier Tribunal set out above.

19. In respect of the country situation we have also taken into account the material submitted by Mr Saldanha today: Ms Everett made no objection to it being admitted into evidence. We make the following observations in respect of that additional material:

(i) The two incidents referred to in the report of 16 September 2013 both took place in districts of Harare and are accordingly not evidence that undermines anything in the country guidance in respect of the situation in Bulawayo. Further and in any event, we note that both incidents related to the targeting of MDC-T officials. The rape victim had been working at a shop owned by an MDC–T official at a time when the shop had been attacked and burnt by a ZANU PF gang. Whilst in no way seeking to diminish the nature of the atrocity perpetrated against a 19-year-old girl the context of that atrocity was an attack targeted on an MDC official and as such is not, in our judgement, evidence of a more generalised risk to persons without a significant MDC profile. Similarly, the other incident referred to was an arson attack on a kitchen belonging to an MDC-T district youth organising secretary.

(ii) The declared intention reported in the article dated 17 October 2013 to revive compulsory training of youth militia, whilst ominous and possibly intimidating in nature is seemingly contingent upon obtaining funds. As such there is no evidence that training has recommenced at the date of the hearing before us, or that any such training has led to an increased level of violence such as to displace any of the conclusions in the current country guidance.

20. In all of the circumstances we accept Ms Everett's submission that the two articles produced by Mr Saldanha do not justify a restatement of the current country guidance.

21. Accordingly in applying the country guidance to the particular facts of the Appellant's case it seems to us the following conclusions are inevitable.

(i) At the point of return, Harare airport, the lack of specific interest in the Appellant (see First-tier Tribunal at paragraph 98 and 104), is such that there is no real risk to the Appellant, pursuant to the guidance in

HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094 (see First-tier Tribunal at paragraph 76), as affirmed and further commented upon in **CM** (e.g. see head note at paragraph 4(d)).

(ii) The situation in the Appellant's home area of Bulawayo where she had lived her whole life prior to leaving Zimbabwe, and where she has family (First-tier Tribunal at paragraphs 102–104) is such that she would not reasonably likely face adverse attention even if she had an MDC profile (**CM**, headnote at 3(6)) – which she does not.

(iii) The general situation in the country is such that the Appellant is unlikely to face any risk in travelling from Harare to Bulawayo. This is because she has no profile such as to be of specific interest, and because the general situation is such that she is highly unlikely to be the subject of a 'ZANU PF loyalty test': see **CM**, headnote at 3(1).

22. Accordingly, were it the case that we were satisfied that the error of law was material to an extent that the decision of the First-tier Tribunal required to be set aside and remade, we would remake it dismissing the Appellant's appeal. However, for the reasons given above, in the event we determine that notwithstanding the error of law the decision of the First-tier Tribunal is not to be set aside and stands: the Appellant's appeal remains dismissed.

Decision

23. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 31 October 2013