**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/00879/2010

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 14 – 21 October 2013** | **On 13 January 2014** |
| | …… |

**Before**
**UPPER TRIBUNAL JUDGE JORDAN**
**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**The Secretary of State for the Home Department**

Appellant

**and**

**JK**

Respondent

**Representation:**
For the Appellant: Ms J. Isherwood, Home Office Presenting Officer
For the Respondent: Mr J. Howard, Fountain Solicitors

**DETERMINATION AND REASONS**

**Introduction and immigration history**

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge T. Jones following a hearing before him on 16 February 2010. For the sake of continuity, we shall refer to JK as the appellant as he was before the First-tier Tribunal and the Court of Appeal.

2. This is one of seven appellants whose appeals were remitted by the Court of Appeal in its decision *SS & Ors (Zimbabwe) SSHD* [2013] EWCA Civ 237. One of the six appellants (SC) has been granted leave to remain by the Secretary of State. We heard the appeals by the remaining appellants on dates between 14 and 21 October as directed by the Court of Appeal. Ms Isherwood represented the

respondent and Mr Howard the appellants in each case. We heard generic submissions from the representatives on the current situation in Zimbabwe in the light of the further country guidance decision by the Upper Tribunal in *CM* (EM country guidance, disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) approving the earlier country guidance decision in *EM (Zimbabwe) & Ors v SSHD* [2011] UKUT 98 (IAC) and specific submissions in each case at the conclusion of all the evidence.

3. We have made separate determinations for each appellant. Our analysis of the case law is of application to all six appeals and is therefore reproduced without amendment in each determination, save where the specific circumstances of an appellant require additional consideration.

4. The appellant is a citizen of Zimbabwe who was born on 13 December 1973. He married S.E.K. in a traditional ceremony in Zimbabwe in 1998. They have three children. A son, P, was born in Zimbabwe on 29 October 1998. The appellant's wife entered the United Kingdom as a student in 2000, travelling alone. The appellant travelled to South Africa in January 2002, claiming that he left as a refugee, having earlier left their son with his mother-in-law in Bulawayo. He arrived in the United Kingdom with P where he was lawfully permitted to enter as a dependant of his wife or, in his own right, as a student. His leave to remain continued until 30 November 2007.

5. Since the appellant's arrival in the United Kingdom the couple were married in a civil ceremony in June 2004. K was born on 27 June 2006. Their third child was born after the appellant's appeal had been determined. Both younger children were born in the United Kingdom.

6. The appellant did not claim asylum until 23 November 2009, by which time he had been in the United Kingdom for nearly 8 years. His application was refused although he was granted discretionary leave to remain in the United Kingdom until 22 December 2012. No decision to remove him has been made. This is a s. 83 'up-grade' appeal.

**The determination of Judge Jones**

7. The determination of the appellant's appeal heard by Judge Jones followed a hearing in Bradford on 16 February 2010. In his determination, the Judge rejected the appellant's claims to have been a member of the MDC in Zimbabwe or to have been detained and ill-treated as he claimed. He rejected the evidence that the appellant had attended meetings in the United Kingdom (in relation to which he could not recall the location) and his presence at vigils outside the Zimbabwe High Commission since 2003 as an attempt "*to embolden his claim in relation to MDC affiliation in the United Kingdom*". He rejected the evidence of a MDC membership card as materially assisting his claim as it had been completed after the event with the relevant ticks and initials completed at what appeared to be the

same time and by the same hand. He placed little or no weight upon other written material from the MDC in the United Kingdom. However, he allowed the appeal for the following reasons set out in paragraph 27 of the determination:

> However, the appellant's claim bearing in mind the Country Guidance decision in *RN (Zimbabwe)* [2008] UKAIT 00083 is such that in respect of the appellant's claim highlighted within his first statement that he would be unable to show support for the present regime is something that I find is well made out, applying the appropriate standard, on the basis of imputed political opinion. I find that he has a well founded fear of persecution and a real risk of his protected rights being breached at this time if he were returned to his home country in light of this authority. It is clear that he has not voted in any of the more recent elections, that he has been in the United Kingdom for a significant period of time, and if returned doubtless would be noted as having made an unsuccessful claim which are in themselves capable of giving an enhanced risk on return. If challenged on return to his home area, or even indeed if travelling if challenged, he would be unable to demonstrate any support for the present regime, and be completely unaware of campaign slogans or songs. As such, determining this appeal, I note reference therein to *RN* as regards paragraphs 231, 234 and 259 and the objective material supplied on behalf on the appellant.

8. The reference to paragraphs 231, 234 and 259 of the decision in *RN* was to incorporate the following reasoning in the determination:

> 231. But, apart from in those circumstances, having made an unsuccessful asylum claim in the United Kingdom will make it very difficult for the returnee to demonstrate the loyalty to the regime and the ruling party necessary to avoid the risk of serious harm at the hands of the War Veterans or militias that are likely to be encountered either on the way to the home area or after having returned there. This is because, even if such a person is not returning to one of the areas where risk arises simply from being resident there, he will be unable to demonstrate that he voted for Zanu-PF and so he may be assumed to be a supporter of the opposition, that being sufficient to give rise to a real risk of being subjected to ill-treatment such as to infringe article 3.
>
> 234. For these reasons, a person not able to demonstrate loyalty to Zanu-PF or with the regime in some form or other will be at real risk having returned to Zimbabwe from the United Kingdom having made an unsuccessful asylum claim. That will be regardless of the mechanics of his return. Those with whom he would have to deal in his home area or other place of relocation would be concerned, once he had failed to demonstrate any links with Zanu-PF, not with the method by which he had been returned from the United Kingdom but simply with the fact that his having made an asylum claim here demonstrated him to be a disloyal person who had not supported the party in the elections and as a potential supporter of the MDC.
>
> 259. The fact of having lived in the United Kingdom for a significant period of time and of having made an unsuccessful asylum claim are both matters capable of giving rise to an enhanced risk because, subject to what we have said at paragraph 242 to 246 above, such a person is in general reasonably likely to be assumed to be a supporter of the MDC and so, therefore, someone who is unlikely to vote for or support the ruling party, unless he is able to demonstrate the loyalty to Zanu-PF or other alignment with the regime that would negate such an assumption.

9. First-tier Tribunal Judge Kelly, sitting as a Deputy Upper Tribunal Judge, allowed the Secretary of State's appeal to the Upper Tribunal as disclosing an error of law but he did so with considerable hesitation and remarking that "*the judge should not therefore a reproach himself for what I have ultimately concluded was an error of law*." In finding this error, Judge Kelly relied upon paragraphs 246 and 230 in *RN* (in that order):

> 246. So, this will be a question of fact to be resolved in each case. This may come down to a simple assessment of credibility. But immigration judges are well accustomed to making such judgements. An appellant who has been found not to be a witness of truth in respect of the factual basis of his claim will not be assumed to be truthful about his inability to demonstrate loyalty to the regime simply because he asserts that. The burden remains on the appellant throughout to establish the facts upon which he seeks to rely.
>
> 230. It remains the position, in our judgement, that a person returning to his home area from the United Kingdom as a failed asylum seeker will not generally be at risk on that account alone, although in some cases that may in fact be sufficient to give rise to a real risk. Each case will turn on its own facts and the particular circumstances of the individual are to be assessed as a whole. If such a person (and as we explain below there may be a not insignificant number) is in fact associated with the regime or is otherwise a person who would be returning to a *milieu* where loyalty to the regime is assumed, he will not be at any real risk simply because he has spent time in the United Kingdom and sought to extend his stay by making a false asylum claim.

10. It is accepted by the respondent that the appellant commenced work as a Customs Officer in Harare in March 1994 when he was about 20 years old. He remained in post until he left Zimbabwe in January 2002, spending tours of duty in various other locations across Zimbabwe.

**The decision of the Court of Appeal in *SS and others (Zimbabwe) v SSHD***

11. In *SS and others (Zimbabwe) v SSHD* [2013] EWCA Civ 237, the Court of Appeal in remitting the appeal to be re-heard by the Upper Tribunal said, amongst other things, in relation to JK:

> 68. The Upper Tribunal decided, by determination dated 6 June 2011, that there had, on the bases advanced and by reference to *RN (Zimbabwe)*, been a material error of law on the part of the First-tier Tribunal. It was among other things held "with considerable hesitation" that there was insufficient evidential basis for Immigration Judge Jones' conclusion that JK would not be able to demonstrate his loyalty to Zanu-PF on return. In my view, a proper basis was indeed made out for setting aside the decision of Judge Jones on the footing of a material error of law. The decision was set aside and a continuation hearing was directed, the findings of fact of Immigration Judge Jones being preserved: although in the event further oral evidence was permitted to be given by JK. At the continuation hearing, emphasis was placed by the Secretary of State on JK having been a customs officer in Harare and so would be one in respect of whom

loyalty would be assumed. Reliance was also placed on *EM (Zimbabwe)*. The conclusion was that the Secretary of State's appeal should be allowed.

69. Permission to appeal was refused by the Upper Tribunal but was granted by Moses LJ after an oral hearing.
70. I would reject Mr Mahmood's argument that JK's appeal now should be allowed outright. The appeal was by no means assured of success in the light of *RT (Zimbabwe)* and the country guidance in *RN (Zimbabwe)*, let alone that contained in *EM (Zimbabwe)* as now restated in *CM (Zimbabwe)*. In the light of the finding that JK was a government customs officer for a number of years and one in whom loyalty would be assumed, and in the light of the adverse credibility findings, it is by no means to be accepted without further examination that he was not a Zanu-PF supporter, notwithstanding his sur place activities in the United Kingdom such as they were; or that he would (if stopped) be unable to demonstrate loyalty or be required to lie. Further (although the matter may need further investigation) the milieu from which he came also may suggest that he may not be at risk of being stopped and interrogated. But these further matters also indicate, in my view, that it likewise would not be right to dismiss this appeal outright.
71. I can see no basis for saying that it would in any event be unjust for the appeal not to be allowed outright but to be remitted. We were told in fact that SK has since been granted five years' discretionary leave to remain: but I do not think that can alter the otherwise appropriate disposition.

12. On 30 May 2013,I gave directions for the resumed hearing to be conducted on the basis of this direction.

**The Country Guidance**

13. In *CM (EM country guidance; disclosure)* Zimbabwe CG [2013] UKUT 00059, the Tribunal reviewed the authorities of *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083; *RT (Zimbabwe)* [2010] EWCA Civ 1285: *RS and Others (Zimbabwe – AIDS)* Zimbabwe CG [2010] UKUT 363; *HS (returning asylum seekers)* Zimbabwe CG [2007] UKAIT 00094 and in particular, the Country Guidance given by the Tribunal in *EM and Others (Returnees)* Zimbabwe CG [2011] UKUT 98 (IAC). The assessment in *EM* as to the position in Zimbabwe at the end of January 2011 had not been vitiated by the Tribunal's reliance on anonymous evidence from certain sources in the Secretary of State's Fact Finding Mission report of 2010. The Tribunal was entitled to find that there had been a durable change since *RN (Returnees)* Zimbabwe CG [2008] UKAIT 00083. The only change to the *EM* Country Guidance relating to the position as at the end of January 2011 arose from the judgments of member of the Supreme Court in *RT (Zimbabwe)* [2012] UKSC 38.

14. The guidance as re-stated, with the appropriate amendments, was that, as a general matter, there was significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in *RN*. In particular, the evidence did not establish that, in general, 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.

15. The position was, 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 might well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU-PF figures in a position of authority or those whom they controlled. Such adverse attention might well involve demonstrating loyalty to ZANU-PF, with the prospect of serious harm in the event of failure.

16. In accordance with *RT*, persons not favourably disposed to ZANU-PF were and remain entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty. However, the situation was not uniform across the relevant rural areas. For example, the evidence might disclose that, in the home village, ZANU-PF power structures or other means of coercion were weak or absent. That said, as a general rule, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South was highly unlikely to face significant difficulty from ZANU-PF elements, including the security forces, even if the returnee were a MDC member or supporter. (So, too, with a returnee to Bulawayo, who would not generally suffer any such adverse attention even if he or she had a significant MDC profile.) There might be exceptions: an individual might be able to show that his or her village or area was one that was, unusually, under the sway of a ZANU-PF chief or the like.

17. A returnee to Harare would 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 was more challenging, in general a person without ZANU-PF connections would not face significant problems there (including a 'loyalty test') unless he or she had 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.

18. In relation to internal relocation, a person's home for the purposes of internal relocation is a matter of fact, not necessarily determined by a person's rural homeland. In most cases, it was unlikely that a person with a well-founded fear of persecution in a major urban centre such as Harare would have a viable internal relocation alternative to a rural area in the Eastern provinces. For example, relocation to Matabeleland (including Bulawayo) might be negated by discrimination, where the returnee is Shona. However, internal relocation from a rural area to Harare or Bulawayo was, in general, more realistic but, as the test was whether it was reasonable/not unduly harsh, consideration had to be given to the individual's social and economic circumstances.

19. So much was stated to be Country Guidance. In the course of *CM (EM country guidance; disclosure)*, the Tribunal (as at October 2012) made an assessment – albeit not in an authoritative capacity - of other evidence about Zimbabwe. The picture then presented by the evidence as to the general position of politically motivated violence in Zimbabwe did not materially differ from the position in *EM and others (Returnees)* decided on 14 March 2011. The fresh evidence regarding the position at the point of return did not indicate any increase in risk since *HS (returning asylum seekers);* the evidence as to the treatment of those who had been returned to Harare Airport since 2007 meant there was no justification for extending the scope of those who might be adversely regarded by the CIO.

20. For our purposes, this summary of the Country Guidance is sufficient.

**The hearing before us**

21. The appellant comes from the Mabvuku, described in a Wikipedia extract provided by Mr Howard as a high density suburb, some 17 km east of Harare.

22. In examination in chief, the appellant dismissed as irrelevant the fact that he was a customs officer. He joined as a cadet before the MDC was born and claimed it would have no bearing on whether he would perceived to be a supporter of ZANU-PF. He said he was born in Murewa where his mother comes from. His uncle still lives there. He told us it is an area of poor economic activity and he did not have the means to live there. It is situated in Mashonaland East, 100 miles from Harare.

23. He described that his wife came from Murewa. She used to live with her mother there. He told us that he met his wife in Bulawayo where his wife's mother had moved.

24. He described his activities in the United Kingdom. He is involved with Silence Breaker, a project where those involved learn how to rebuild and restore donated used computers which can be used to maintain contact with those back in Zimbabwe. It is linked with Restoration of Human Rights (ROHR). The project engaged five participants in workshop activities.

25. The appellant produced material that he had been approached by a friend in Zimbabwe, James Chidhakwa, who attempted to be selected as the MDC candidate for the Mabvuku Tafara constituency. He described Mr Chidhakwa as one of his closest friends. He produced Facebook entries indicating that, using a pseudonym, he had communicated with Mr Chidhakwa. He had also provided Mr Chidhakwa with £20 in sterling to help his campaign.

26. The pseudonym effectively concealed his identity and he gave no clear evidence as to any other means by which he could be identified.

27. In a statement made by the appellant on 22 August 2013 he said that he was a supporter of the MDC. He told us that he has no other involvement with the MDC in the United Kingdom.

28. He described in paragraph 7 how he had spoken to his mother in June 2013 and she had told him she was encountering problems in her village because she was considered an outsider. Although the appellant attributed this malign activity to his involvement with the MDC, he provided no basis for making this claim. In particular, there was no evidence the village elders knew of his activities. He also stated that on 31 July 2013, his brother who lives in Mashonaland East told the appellant he was unable to vote in the July 2013 elections. There is background material that both the MDC and ZANU-PF prevented voters from exercising their vote but this does not otherwise advance the claim of the appellant.

29. Pausing there, it is difficult to attribute persecutory motives in the context of a land dispute unless a decision-maker hears from both sides (which he is never likely to do) and hears evidence of the legal rights of those involved and the ability of the legal owner to protect his rights. We would not infer, as a matter of course, that the complainant is a victim without remedy.

30. In a manuscript statement dated 30 November 2009, the appellant's stated that his brother was then in Harare. He also spoke of two sisters both living in Harare.

31. In his evidence to us, he said that he participated by sending clothes to a children's charity. Save for the payment of £20 to Mr Chidhakwa, he has not made any other contributions to the MDC. He was not currently attending the vigil outside the Zimbabwean High Commission and last attended on 24 October 2012. Before that he attended a vigil in March 2011. He described how he had last paid his membership contribution for the MDC in Zimbabwe in July 2012. He said that he would not claim to be a prominent member of the MDC. He accepted that he had requested a new card but it had not been sent to him. Although he sends money to his brother and sisters, he was not able to say it was used for his MDC subscription: he conceded it could have been used to purchase food.

32. He described how he was in touch with three of his former work colleagues, two of whom were no longer working for the Zimbabwean customs.

33. In cross-examination he accepted that he has his mother, his brother and two sisters remained in Zimbabwe. His brother lives in Glen Norah but he has family members in Mabvuku, including a sister and a cousin. His siblings are married. He has many cousins, the children of his uncles and aunts. He described how, in the aftermath of the land dispute involving land owned or occupied by his mother, she herself had attended ZANU-PF meetings but only to avoid trouble. His mother's activities would not, therefore, prejudice to him, wherever his mother's true political affiliations lay.

34. The appellant's wife was born in Gweru and lived in Bulawayo. The appellant worked there. In each of the three Bulawayo seats, the MDC-T achieved convincing victories over ZANU-PF.

**Our assessment**

35. It is clear from the evidence before us that Mabvuku is represented in Parliament by the candidate from the MDC. The full election results following the Zimbabwe elections in 2013 are provided at pages 2167 to 2172 of the bundle. In Mabvuku, the MDC candidate polled 7,917 votes while ZANU-PF managed 6,319. In Glen Norah the voters also succeeded in placing an MDC candidate in Parliament. He polled 6,672 votes whilst his ZANU-PF rival managed just 1,984. We do not find it in any way surprising than very different conditions arise in Mashonaland East where, in Murewa South, ZANU-PF won a resounding victory winning 17,368 votes whilst the MDC-T(Tsvangirai – the principal component of the fragmented MDC) only polled 1,729. In Murewa North, the gap between the two parties was somewhat less but ZANU-PF still succeeded in a substantial polling victory.

36. These results are very much in line with the divisions drawn in the country guidance.

37. We are satisfied that the appellant has no MDC profile in the United Kingdom. Indeed, the appellant really accepted this. Nor do the activities that the appellant and his wife perform for the Catholic Church, for children's charities, for Silence Breaker create a profile that would be of interest to the CIO, even if those activities became known to it. There was, however, no evidence of a mechanism by which those activities would come to the attention of the Zimbabwe authorities either here or in Zimbabwe or that, if they did, they would be perceived by the CIO as being anti-regime.

38. In these circumstances, the appellant will not be identified as a returnee or deportee with a profile that is likely to cause him difficulty. We are not required to decide whether the appellant could call upon his former colleagues in the Zimbabwe Customs to protect him because he will not need to turn to them. Rather, the appellant's account of his employment history in Zimbabwe will not result in any adverse inferences being drawn if he is required to tell it. There are a number of places to which the appellant might return where he has lived in the past without difficulty. The evidence about the density levels of population centres in Zimbabwe was inconclusive as discussed in the determination in relation to B.C. The Secretary of State did not argue that Mabvuku was a low or medium density area. On the material before us it was not possible to make a definitive assessment on whether it is a high density area but, for the purposes of this appeal only, we are prepared to accept that Mabvuku is such an area. We treat it as part of Harare, although it is 17 km distant from it.

39. In applying paragraph 215 (5) of *CM* we focus our enquiry on the following considerations:

> (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.

40. The material we have seen clearly establishes an MDC presence there and an electorate that has not been cowed by the activities of ZANU-PF. That does not entirely eliminate the risk of marauding ZANU-PF supporters attempting to wreak havoc, particularly at times of increased political activity. But nor does it establish that the ordinary MDC sympathiser stands at real risk from them. Whilst it is not material in this appeal, the background material relating to the 2013 elections does not suggest there was the same level of violence that so marred the 2008 elections. Applying the criteria identified in *CM*, the appellant is not at risk of serious harm on return to Mabvuku.

41. We do not suggest the appellant should (or is required to) return to Mashonaland.

42. It is also possible for the appellant to return to Bulawayo where his wife lived and where he worked. This is identified in the background material as a place to which the appellant might safely return, with or without a significant MDC profile. In so deciding, we have applied the approved thinking set out in paragraph 215 (6 ) of *CM:*

> (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.

43. Mr Howard submits that JK speaks Shona which he argues negates internal relocation as being viable (relying on the words in *CM* that 'relocation to Matabeleland (including Bulawayo) might be negated by discrimination, where the returnee is Shona.'

44. The US State Department Country Reports on Human Rights Practices 2011, published on 24 May 2012, noted that, according to Zimbabwe government statistics, the Shona ethnic group makes up 82 percent of the population and Ndebele 14 percent. Historical tension between the Shona majority and Ndebele minority resulted in marginalization of the Ndebele by the Shona-dominated government. According to Jane's Sentinel Security Risk Assessment: Zimbabwe', 13 September 2011, the Shona majority makes up around 75 per cent of the

population, the Ndebele minority comprise about 20 per cent. In paragraph 225, the Tribunal stated:

> 225. We accept the evidence of the appellants that a Shona, without family or other significant contacts in Bulawayo, seeking to move to that city from outside Matabeleland, is likely to face social difficulties, in addition to others of the kind we have just described. In particular, he or she may face discrimination in relation to jobs and housing. It is, however, apparent from the evidence of Professor Ranger and the civil society interviewees in the FFM report, that in previous decades there was a significant pattern of migration of Shona to Bulawayo in search of work, and that, as a result, some 20% of the population of that city is Shona. It would, accordingly, not be necessary for the newcomer to speak Ndebele, in order to get by in Bulawayo, although linguistic problems may be relevant in determining the issue of whether it would be unreasonable or unduly harsh for such a person to live in that city.

45. We note the use of the expression, '*may face discrimination*'. The matter is not clear-cut. It goes without saying that Zimbabwe is not divided by linguistic differences or otherwise no Shona speaker could live without persecution (or in circumstances where it would be unduly harsh for him to do so) in a Ndebele-speaking area or *vice versa*. In the appeal of JK, the couple met in Bulawayo where his wife lived and the appellant has worked there. This is a far more telling piece of narrative, rooted in experience rather than in more abstract terms. There is no evidence that, on return now, circumstances have so altered that the appellant cannot reasonably settle in Bulawayo.

46. Mr Howard also seeks to rely upon the fact that members of the family of JK's wife, including her mother and three sisters, have been involved with the MDC and were granted refugee status in the United Kingdom in 2002. Once again this is a factor that we take into account, without (for the reasons we have given in the preceding paragraph) treating it as a determinative risk category.

47. The grant of refugee status to other family members must, in some cases, be a factor to which considerable weight be attached. In the case of a well-known dissident, whose activities are widely known in the public domain and who is granted refugee status, it is readily understandable that family members might be placed at risk by the authorities in an oppressive regime whose actions are not always the result of rational thinking. This may be no more than guilt by association. There is, therefore, nothing inherently improbable in taking into account the fact that a relative has refugee status but the circumstances must be examined critically to determine the weight to be attached to it as a factor. Although this factor arose in the context of the appeal in JK, there may be other examples in the six appeals before us where the thinking is also applicable.

48. In *KM (Zimbabwe) v Secretary of State for the Home Department* [2011] EWCA Civ 275 (17 March 2011) Pill LJ recited in paragraph 6 of his judgment the factual concession made by the Secretary of State in the case of KM:

> 6. On behalf of the Secretary of State, it is accepted that the appeal should be allowed to the extent of the case being remitted to the Upper Tribunal. The Secretary of State's reason was that "it is arguable that the [Tribunal] failed to give adequate consideration to the assessment of risk on return in light of the country guidance case of *RN (Zimbabwe)* and *HS (Zimbabwe)* and any risk that may arise if the appellant were to be questioned on return regarding his son's asylum grant". I would add that, in the light of the paragraphs from *RN* already cited, the absence of a 'profile' in Zimbabwe is insufficient protection. Support for or loyalty to the regime must be 'demonstrated'. At the hearing before this court, Miss Grange, for the Secretary of State, accepted that there is a real risk that the appellant's son having obtained asylum because of his MDC's sympathies would come out on the appellant's return.

This was repeated by Lord Dyson when the matter came before the Supreme Court:

> 13. The Court of Appeal allowed his appeal and remitted the case to the Upper Tribunal. The leading judgment was given by Pill LJ: [2011] EWCA Civ 275. The Secretary of State accepted that the appeal should be allowed by the Court of Appeal because it was arguable that the Tribunal had failed to give adequate consideration to the assessment of risk in the light of the guidance in *RN.* … It was conceded by the Secretary of State that there was a real risk that '*the appellant's son having obtained asylum because of his MDC's sympathies would come out on the appellant's return*' (para 6 of Pill LJ's judgment); and that the fact that KM's son had been granted asylum '*may place the appellant in an enhanced risk category by making it more difficult for him to demonstrate his loyalty to the regime*' (para 12).

49. Hence, the fact that KM was at risk because his son had been granted asylum was *conceded* by the Secretary of State. No such concession was made by Ms Isherwood and rightly so because there is no evidence that this information will emerge. First, the grant appears to have taken place in 2002. Second, the process of recognition is essentially a confidential one. Third, the outcome of recognition is the grant of leave to remain, endorsed in a vignette in a passport which makes no reference to the grantee being a refugee from the country that has issued the passport. The issue of leave to remain may have happened for a number of reasons; marriage, length of stay, student presence, work related reasons, avoiding the inference that the grant of leave to remain is short-hand for refugee status. Most importantly, there is no evidence that the Zimbabwe authorities are able to maintain a record of those granted asylum by the United Kingdom authorities and then relate the grant back to family members, all the more so family members by marriage. The logistics of such a process would be formidable.

50. The appellant is not at risk at the airport in accordance with the guidance afforded by *HS (Returning asylum seekers)* Zimbabwe CG [2007] UKAIT 00094 and *SM and Others (MDC – internal flight- risk categories)* CG [2005] UKIAT 00100, repeated in *RN (Returnees)* Zimbabwe CG [2008] UKAIT 00083, upheld in *EM and Others (Returnees)* Zimbabwe CG [2011] UKUT 98 (IAC) and confirmed in CM

(EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059(IAC) and in the Court of Appeal.

51. There is no Article 8 claim as this is a section 83 'up-grade' appeal.

DECISION

The Judge made an error on a point of law and we substitute a determination dismissing the appeal on Refugee Convention grounds.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
23 October 2013