Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02189/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 November 2014	**On 23 December 2014**

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE DEANS

Between

D.M.
(Anonymity Direction continued)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Lay of Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal with permission against a decision by the First-tier Tribunal (Judge Pirotta) dismissing an appeal on asylum, humanitarian protection and human rights grounds.

2. At the end of the hearing we reserved our determination, accepting that if we were to find in favour of the appellant the appeal should be remitted to the First-tier Tribunal.

3. The appellant was born on 2 December 1960 and is a national of Zimbabwe. According to the appellant, she entered the United Kingdom as a visitor in April 2002 with leave for 6 months. She twice unsuccessfully sought leave to remain as a student but on the third attempt, in December 2002, she was granted leave until April 2005. She was subsequently given leave until April 2006. An application in July 2006 for indefinite leave to remain was rejected. The appellant then applied for humanitarian protection but this was also rejected. Two further applications were rejected in 2007 and a subsequent appeal was withdrawn, according to the appellant without her instructions.

4. In 2009 the appellant claimed asylum but her claim was rejected by the respondent. The appellant appealed against this decision and the decision was then withdrawn for reconsideration by the respondent in January 2010. In March 2014 the appellant was served with a removal decision, against which this appeal has been brought.

Decision of the First-tier Tribunal

5. The Judge of the First-tier Tribunal ("the Judge") noted that the appellant was a teacher in Zimbabwe and did not feel safe there because of the prevailing political tension and because of her own, her second husband's, her son's and her extended family's political activities. She claimed that as a former teacher with no family in Zimbabwe outside Harare she would be unable to relocate internally and would not be able to provide for herself.

6. The Judge found that the appellant had lived in various places in Zimbabwe from birth in 1960 until 2002. She was a teacher but was not employed at government schools but by businesses in different towns to teach employees and employees' children at schools on their own business premises. The appellant was never involved in operating polling stations, persecuted for being a teacher, or involved in elections, or accused of manipulating voters or influencing students, parents or other voters. She was never arrested at school or forced to chant slogans for Zanu-PF. She was not intimidated or abducted and did not otherwise come to the attention of Zanu-PF, the Border Gezi or the Green Bombers or war veterans.

7. The appellant was able to study, obtain qualifications, live, work, move about the country to pursue her career, marry twice, have 3 children, obtain her own passport and leave Zimbabwe using it, without coming to the adverse attention of the authorities. She was never arrested, detained, or questioned and never faced any other problems apart from the general difficulties that were pervasive in Zimbabwe at those times.

8. As regards the appellant's own political activities, the Judge found that the appellant was never a member of the MDC and was not known either to

the authorities or to Zanu-PF. She had an aunt, M M, who was politically prominent, but there was no evidence that the appellant was targeted because of her relationship with her aunt. The appellant lived at her aunt's home for a time, but related only one incident of political violence occurring there. The appellant had never been directly attacked herself.

9. The appellant has not taken part in any MDC activity in the UK but has attended some ZimVigil meetings, although she has not attended one for some years. She was a member of the Labour Party and of a peace organisation. The Judge was not satisfied that the appellant's activities in the UK would have brought her to the attention of the authorities in Zimbabwe, including the CIO. The appellant said she was not involved in Zimbabwean politics in the UK because she was disillusioned. The Judge did not find it credible that the appellant would become politically active if she returned to Zimbabwe.

10. The Judge referred to the appellant's evidence to the effect that she had other family members involved in politics, in addition to M M. Her son, S N, was deported to Zimbabwe after having made two unsuccessful asylum claims. He has returned to live with his stepbrothers and there was no evidence of any adverse treatment having been accorded to him after his return.

11. The Judge noted that the appellant had submitted a letter in support of her asylum claim purporting to have been written by T Biti of the MDC. This stated that the appellant's son had been framed for killing the wife of a war veteran, J C. The Judge did not find this letter to be a reliable document or its contents to be credible. The appellant's account, like her son's, was that he had been arrested twice by the police but not for any specific crime and had never been charged. The Judge concluded that the letter submitted by the appellant was a false document. She also found that the appellant was not a reliable witness and was given to exaggeration. Even the account the appellant had given of her son's political activity and two arrests was inconsistent with the accounts he had given in his application and appeal, differing, in particular, in respect of the dates, the reasons for the arrests, and his political activities.

12. The appellant's second husband, J W, submitted a letter in which he said he joined the MDC in 1999 and left Zimbabwe in 2001 because of concern for the party and for himself. However he had separated from the appellant in 1990 and made no mention of any persecution of either the appellant or himself. He was granted refugee status in Canada in 2004 after an appeal. The appellant also referred to her brother-in-law, A N, who was said to have been a dissident and involved in political activity along with the appellant's son. There was no evidence from the appellant's son to suggest that A N was persecuted. The Judge found that there was no credible evidence that A N was of adverse interest to the authorities, although it was claimed that he had been arrested once.

13. The Judge had before her two expert reports, one by Dr Peel and another by Dr Steve Kibble. She found the report by Dr Peel was out of date as it related to events before November 2009. The Judge considered that the conclusions in Dr Kibble's report concerning the risk to the appellant on return to Zimbabwe relied on the assumption that she had given a truthful account of being a political activist known to the authorities and to organisations supporting the regime. The Judge pointed out that Dr Kibble was unable to compare the appellant's account with her son's account, and unable to analyse evidence concerning other family members in Zimbabwe and the lack of evidence of persecution of the appellant and these other family members.

14. The Judge found that the appellant's profile as a teacher was entirely different from those who were caught up in hostilities during elections as the appellant had never worked in a government school and was never a polling officer. She had never been harassed by the regime or its agents or forced to attend rallies or to do anything against her will. The Judge did not accept that teachers or former teachers in the appellant's position faced a greater risk of social or political discrimination, suspicion or political hostility. She found that in any event there was no credible evidence that the appellant's former employment would be known or remembered 12 years after she left.

15. Having found the appellant would not face persecution or serious harm in Zimbabwe, the Judge considered the appeal under Article 8. The appellant had shown that she had a close connection with her daughter and son-in-law, her former daughter-in-law and her grandchildren, particularly one child who has special needs. The appellant had another former daughter-in-law and grandchild in the UK but the evidence was that she had no relationship with them. The appellant lives with her daughter in Northampton, but travels to London to pursue activities for her church. The Judge noted that the appellant's daughter pays for full time child care for her daughter, who is under school age, and pays for child care for her son, who attends school. The Judge accepted that the appellant has a good relationship with these children and with her daughter and son-in-law but was not satisfied that she was "pivotal" in the running of their household or played a role which could not be fulfilled otherwise. The appellant was not the children's main carer and did not play a special role in their upbringing. The best interests of the children would continue to be served if they remained with their parents as at present.

16. The judge found that the appellant's granddaughter, A, who is the daughter of the appellant's son, is severely disabled and has behavioural as well as medical problems. She is cared for by her mother and her mother's new partner and her mother's parents, who live close to A in London. The appellant has a good relationship with A but the appellant is involved with the family for only part of one weekend every month and for some time in the summer. There was no credible evidence that the child was emotionally dependent upon the appellant. There was no evidence

that the best interests of A would not be protected if the appellant returned to Zimbabwe, or that she could not visit Zimbabwe with her parents.

17. The appellant was extensively involved in church activities but she could pursue these activities in Zimbabwe. At the age of 53 the appellant had spent all her life in Zimbabwe apart from the last 12 years. She would be able to establish her life again in Zimbabwe and the interference with her private and family life arising from her removal would not be disproportionate.

18. The Judge accepted that there had been an "inordinate" delay by the respondent in making a decision, during which time the appellant had taken the opportunity to develop a place in society and with her family and improve her employment skills. However, the degree to which the appellant was committed to her family, to the church and to her other activities was not so great that her commitment had to continue in the UK.

The grounds of appeal

19. So far as the rejection of the claim for asylum or humanitarian protection is concerned, the appellant contends that the Judge did not address, or even cite, the country guideline case of **NN (Teachers: Matabeleland/Bulawayo: Risk) Zimbabwe CG** [2013] UKUT 198 and made a finding on the risk to teachers in paragraph 45 of the determination which directly contradicted the findings of the Upper Tribunal in NN. Further, the finding that the appellant had submitted a false document with her asylum application was reached through procedural unfairness amounting to an error of law, because that allegation was not foreshadowed and not put to the appellant when she was giving her evidence.

20. So far as Article 8 was concerned, it was contended that the Judge had failed to have regard to a material consideration, namely that the appellant is HIV positive. It was alleged that the Judge erred in making the proportionality assessment by failing to have regard to the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014. Two further specific criticisms are:

    a) that the Judge did not take into account the delay of 4 years in the making of the respondent's decision on the asylum claim, in terms of EB (Kosovo) [2008] UKHL 41, and

    b) that the Judge did not make proper findings in respect of the relationship between the appellant and her daughter and grandchildren, and the findings which were made were contradictory.

21. Finally on Article 8, it was contended that the Judge did not properly address the correct test in relation to proportionality of removal in terms of either Gulshan [2013] UKUT 650 or Huang [2007] UKHL 11.

Discussion

22. Logically the first issue that arises is whether the Judge's finding about the letter from the MDC being a "false document" (paragraph 35 of the determination) was the result of procedural unfairness. As already recorded, the Judge found that this letter was inconsistent with the other evidence given by the appellant and the evidence given previously by her son. On behalf of the appellant, Mr Lay submitted that it could be inferred that this finding "leaked" into the Judge's assessment of the other evidence and, in particular, coloured her approach to the appellant's general credibility. He relied on **RR (Challenging evidence) Sri Lanka** [2010] UKUT 000274.

23. The expression "false document" is ambiguous: it could mean that the document was not what it purported to be, i.e. it was a forgery (which is the sense in which Mr Lay invited us to interpret the Judge's finding) but it could also mean that its contents were untruthful. There are two main issues arising here. The first is whether, as a matter of procedural fairness, the Judge was entitled to make a finding on this matter without giving the appellant notice of the point, and the second is whether the Judge went too far in making a finding to the effect that the document was false. The challenge before us is confined to the first issue (ground 7 of the grounds of appeal).

24. On behalf of the respondent, Mr Whitwell referred us to paragraph 14 of the respondent's refusal letter of 21 July 2009, at which the respondent stated that the appellant's reliance on this letter called into question both the credibility of her evidence and the weight which could be placed upon it. The respondent did not suggest that the letter was fabricated, but referred instead to the case of Tanveer Ahmed [2002] UKAIT 00439. The respondent correctly drew from this case that documents should not be looked at in isolation when deciding whether reliance could be placed upon them, but should be looked at in the round with the rest of the evidence.

25. Mr Lay submitted that although this was in the earlier refusal letter of 21 July 2009 it was not raised in the respondent's subsequent refusal letter of 27 March 2014.

26. That letter refers to the appellant's son's asylum claim and its outcome in paragraphs 16-19. At paragraph 19 it is pointed out that the appellant had provided a letter from MDC with regard to her son's political activities and this would be considered in accordance with the principles of Tanveer Ahmed. Then, at paragraph 27 of the letter there is a comment by the

respondent similar to the comment in the refusal letter from 2009, reading as follows:

> "You have submitted an undated letter from the MDC signed by T Biti which details your son S's involvement with the MDC and states "He lived [*sic*] Zimbabwe to United Kingdom in 2000 after he was framed that they killed the wife of J C the Zanu-PF's war veteran." The letter has been carefully considered but has not been found to assist your credibility as it is considered that this statement does not support your claim that he was detained by the police twice in 2000 and that he was arrested but not charged on both occasions (AIR Q.17, Q.60, Q.65, Q.68, Q.71). You also failed to mention the charges made against your son in your asylum interview. This calls into question the credibility of both your evidence and the weight which could be placed upon the letter."

27. There is then a reference to the principles set out in Tanveer Ahmed and the conclusion is expressed at paragraph 29 that, having examined the appellant's claim as a whole "no weight can be placed upon this document".

28. It has to be acknowledged that the respondent's assessment of the weight to be given to this letter and the way it should be assessed, in terms of Tanveer Ahmed, has more to recommend it than the more forthright conclusion by the Judge that the document was "false". However, on the issue of procedural fairness, we find Mr Lay to have been mistaken in his submission to us that this letter was not the subject of comment (or challenge) in the refusal letter of 27 March 2014. We note that when he said this, Mr Lay was responding to part of the submissions by Mr Whitwell for the respondent. Clearly Mr Lay spoke out on the basis of a mistaken recollection and would not have made that submission had he been in a position to check the content of the letter.

29. We accept Mr Whitwell's submission that there was no procedural unfairness to the appellant arising from the Judge making adverse findings about this letter in the context of her credibility findings. The appellant was put on notice both in the refusal letter of 2009 and the refusal letter of 2014 that the reliability of this letter was in issue, that the respondent's position was that no weight should be afforded to it and that it called into question the credibility of the appellant's evidence. As long as the appellant knew that the respondent did not accept it as being a reliable document, or one on which any weight could be placed, she had sufficient forewarning to be able to deal with the matter. In terms of procedural fairness it was unnecessary for her to be told any more than that its reliability was not accepted, although it was clear from both refusal letters that the respondent considered there were material inconsistencies between the contents of the letter and the appellant's and her son's own accounts of why he left Zimbabwe and that it potentially had an adverse effect on their credibility.

30. The appellant was legally represented and could have offered an explanation in respect of the letter either in her witness statement or in her evidence at the hearing or in both. She did neither. In the circumstances that we have described, the fact that no explanation appears to have been provided does not lead to the inference that the appellant was taken by surprise. The Judge was clearly entitled to refer to the letter and to make adverse findings about it, including on credibility, without unfairness to the appellant. We therefore reject the allegation of procedural unfairness.

31. As already indicated, the question of whether the Judge was entitled to refer to the letter as a "false" document is a rather different one. There was no finding that the appellant was responsible for creating the document, and that inference cannot be drawn from the Judge's finding. The Judge certainly regarded the letter as contradicting the appellant's other evidence and she was entitled to do so. In the light of those contradictions and the fact that the appellant's son has faced no difficulties on his return to Zimbabwe she was also entitled to conclude that its contents were untrue, regardless of its authorship. We do not consider that in this context the use by the Judge of the terminology "false" constituted an error of law.

32. Even if the finding could be read as a finding that the document was not authentic, which was the way in which Mr Lay urged us to interpret it, it added nothing of significance to the points taken against the appellant, because it did not matter whether the letter was genuinely written by someone in the MDC. What mattered was whether what it said was true. The letter was relevant to the assessment of credibility; the Judge made use of it for this purpose; the Judge did not err in law in so doing, let alone in a material respect.

33. We therefore turn to the question whether the Judge properly assessed the risk to the appellant as a teacher or former teacher and whether she had proper regard to the country guideline case of **NN**. If it was clear that the Judge did take the guidelines into account, then it was unnecessary for her to have made specific reference to them in her determination, although it would have been preferable had she done so. If she did not take the guidelines into account, there will have been a material error of law in the determination.

34. Dr Kibble considered the risk to the appellant as a former teacher stating, in particular, at paragraph 25:

> "The likelihood that a newly arrived person would be able to enter the formal job market, for example in the teaching sector, is so low as to be considered negligible. Here NN can be considered relevant. Additionally teachers were especially targeted during previous elections due to them being perceived as natural MDC supporters and

were under suspicion as they acted as electoral officers. There is also an element of "Pol Potism" within Zanu-PF who prefer to see the population as clients and therefore dependent on the party. As such teachers and indeed preachers would be seen as too independent minded and therefore possible objects of suspicion."

35. The Judge considered this risk principally at paragraphs 48 and 49 of the determination, which read as follows:

"48. Dr Kibble did not have the advantage of having all the evidence and acknowledged that his remit was not to determine the appellant's credibility. He did not know that she had submitted a false document from the MDC, nor could he compare the appellant's account with that of her son, know of the determination in his case or analyse the evidence concerning other family members in Zimbabwe and the lack of evidence of persecution of the appellant and these persons. I accept that the report provides a general picture of events and developments in Zimbabwe at this time and an analysis of the case law concerning risks. However, the circumstances described cannot apply to this appellant because she is not a truthful witness, the events alleged had not been established to have taken place, to the lower level of proof required of an appellant, the appellant has no political profile in Zimbabwe or the United Kingdom and cannot be considered to be or have been a member or supporter of MDC.

49. The evidence of risks to teachers in the past and currently cannot apply to the appellant whose profile as a teacher is entirely different to those who were unwittingly caught up in hostilities during elections as she never worked in a government school, was never a polling officer, has never been harassed by the regime or its agencies into political activity, slogan singing or chanting, attending rallies or doing anything against her will. I am not satisfied to the appropriate standard of proof required of an appellant that she would be known as a teacher from the past 12 years ago or more or that she would have to seek work as a teacher if returned. The entire premise of the risk feared is misconceived." [emphasis added].

36. Mr Lay raised three main criticisms. First, he submitted that although a case by case evaluation was required, the country guideline case of NN should be the starting point and the issues arising from it needed to be addressed with reasons. The Judge did not take that approach and there is no reference to NN in the determination, save by inference to be drawn from the passing reference to Dr Kibble's report in paragraph 48 which we have underlined.

37. Mr Lay referred to paragraph 9 of the skeleton argument which was before the First-tier Tribunal. As Dr Kibble pointed out, there was a heightened risk for teachers. On the basis of the country guidance and Dr Kibble's report, a teacher would be regarded as an opinion former even if the

teacher had no political profile. Yet the Judge did not address that risk in the determination, which he submitted she should have done, even if she rejected the appellant's account of her politicial activities. The appellant had worked as a teacher for 20 years in Zimbabwe and had also worked as a teacher in the UK. Mr Lay submitted that it was unrealistic to suppose that the appellant, having been a teacher for so many years, would seek to carry out any different job on her return. However we must set those submissions against Dr Kibble's opinion that it was fanciful that she would be able to obtain employment in the teaching sector (particularly given that the company schools in which she used to teach no longer exist).

38. Secondly, Mr Lay submitted that there was a contradiction in the judge's findings between stating, for example at paragraph 49, that there was evidence of a risk to teachers, and her statement at paragraph 45 where she recorded:

> "There is no credible evidence that teachers or former teachers face a greater risk of social or political discrimination, suspicion or attract political hostility."

39. That finding follows immediately after, and is made in the context of a finding that:

> "There is no credible evidence that [the appellant] would be recognised as a teacher if she returned or that her former employment would be known or remembered 12 years after she left".

40. Thirdly, Mr Lay referred to the appellant's evidence that, as a teacher in the town of K, she had left in order to avoid getting into trouble once it became a Zanu-PF stronghold; yet the Judge made no reference to her evidence about those matters and failed to take it into account in evaluating risk. The appellant records that she left her job in 1993 and moved away because it was becoming increasingly unsafe for her to work there due to her political beliefs and activities and her relationship to her brother-in-law.

41. Mr Lay helpfully provided a copy of a map which had been before the First-tier Tribunal, highlighting the towns in which the appellant had worked. He also referred us to a useful chronology of her career, at pages 2-3 of the skeleton argument. Mr Lay pointed out that the appellant's home village was in the area of Kadoma, to the south west of Harare. Mr Lay submitted that the appellant was facing return to Harare, where there was a danger to teachers. He submitted that the Judge did not adequately address the risk to teachers in high density areas at paragraphs 48 and 49 of the determination.

42. So far as internal relocation was concerned, the Judge considered whether the appellant could return to Bulawayo or some other area in which she would not encounter Zanu-PF. Mr Lay pointed out that the appellant had

only lived in Bulawayo for two years in the 1980s. The company schools in which she had worked no longer existed. The appellant faced a risk of discrimination as a Shona in Matabeleland and Bulawayo, in accordance with CM (EM Country Guidance) Zimbabwe CG [2013] UKUT 00059. According to Dr Kibble's expert report the appellant would struggle to get a job and find accommodation. She would be worse off in Bulawayo than in Harare, where she had family.

43. For the respondent, Mr Whitwell referred to the risk factors set out at paragraph 40 of NN. He submitted that the Judge properly addressed these at paragraph 49 of the determination. Reference was made in NN to a "geographic filter" and persecution could be avoided by relocation, as considered at paragraph 58. Mr Whitwell submitted that not all teachers faced a heightened risk on return to Zimbabwe, and the country guidance did not go that far. It was necessary to look at their individual circumstances. The Judge did this at paragraph 49 of the determination where there was an appropriate analysis. The question of whether the appellant could work as a teacher on return was a different one.

44. Mr Whitwell acknowledged that the appellant was related to a significant political figure with whom she was likely to be associated. He referred to paragraphs 53 and 54 of NN. The Judge addressed this at paragraph 46 of the determination, and no criticism was made of that. The appellant was not at risk from being a teacher without more, such as a political profile. If there was no risk to the appellant in Harare, as the Judge was entitled to find, then any argument on internal relocation fell away.

45. We appreciate why the absence of any specific reference to the latest country guidance case has given rise to complaint, particularly since there is a brief reference at paragraph 59 of the determination to three other country guideline cases, but no reference anywhere to NN. However, the Judge cannot have overlooked NN. She had before her the appellant's skeleton argument, in which NN was cited and quoted. The Judge also had before her Dr Kibble's report, to which she referred in assessing the question of the risk to the appellant as a teacher or former teacher.

46. In our judgment, although it might have been better if the Judge had specifically referred to what was said in NN about the risk to teachers, she does expressly accept in paragraph 48 that Dr Kibble set out in that passage of his report a general picture of events and developments in Zimbabwe and an analysis of the case law concerning the risks. Nothing is said by the Judge to criticize that analysis. The sole point the Judge is making about Dr Kibble's report in paragraph 49 is that his assessment of the risks to the appellant is premised on accepting that the appellant is telling the truth about her alleged political profile, whereas the Judge found that she was not.

47. It is therefore to be inferred that the Judge has taken what Dr Kibble has said as an accurate reflection of the country guidance. Whilst obviously

this approach is less satisfactory than an express reference to NN, it does not constitute a material error of law, unless that approach led the Judge to overlook a material factor or otherwise misdirect herself on the guidance. As Mr Lay acknowledged, the Judge had to form an assessment of the risk to the appellant having regard to her individual circumstances, as well as to the country information and country guideline cases. In our judgment she was entitled to reject the appellant's account of her political profile and evaluate the risks identified by Dr Kibble in the light of that rejection. She was also entitled to draw the distinction that she did between teachers who worked in government schools and teachers with a profile like the appellant's, who had only worked in the private sector and never encountered any direct hostility.

48. It seems to us that the real problem in the present case is that the absence of any express reference to the leading case on country guidance is coupled with a statement in paragraph 45 which is, on the face of it, completely at odds with that guidance. It may well be that in context what the Judge meant in paragraph 45 was that there was no credible evidence that former teachers with a profile such as that of the appellant faced heightened risks on return, which is what she went on to state in paragraph 49; but that is not the only way in which the earlier passage can be interpreted. In such circumstances it would be unsatisfactory (and unfair to the appellant) for us to make the assumption that the Judge did not fall into error by making contradictory findings in the manner that Mr Lay contends she did.

49. We are reinforced in that view by the failure by the Judge specifically to engage with the point made by Dr Kibble and in NN about teachers being regarded as opinion formers. Mr Lay contends that a lack of political profile would not, in itself, mean that such a risk was not present, particularly in Harare or its environs. It may be that the answer to that point lies in the Judge's express findings (referred to in paragraph 38 above) that the appellant was unlikely to be recognized as a teacher or former teacher on return; but the Judge does not make that link. It would be inappropriate for an appellate Tribunal to draw an inference that the Judge had addressed that risk when there is nothing expressly on the face of the determination to indicate that she did.

50. Mr Lay also submitted that in evaluating risk the Judge disregarded the appellant's evidence of her reasons for leaving K in 1993. The chronology lodged with his skeleton argument states that from 1985 to 1993 the appellant worked as a teacher in K and left in 1993 due to political problems. The appellant addressed her reasons for leaving K in her witness statement of 7 July 2014, which was before the First-tier Tribunal. She records that her first husband's brother, A N, was politically active in the K area and worked closely with the MDC. The appellant said she supported A N in his work and attended meetings with him - often secret ones. After the company the appellant was working for was taken over by the government the area became a Zanu-PF stronghold.

51. The appellant does not record any specific abuse or mistreatment she received in K. She said left because of a general fear that it was becoming a Zanu-PF stronghold and therefore dangerous for those involved with opposition activities. The appellant's case is that she left K before she suffered any mistreatment, by reason of a fear that she would encounter problems of this nature if she remained there as an opposition activist.

52. Although the Judge did not make any specific findings in respect of this incident, she did reject the appellant's general account of her political involvement and she did expressly find that there was no credible evidence that A was of any particular interest to the authorities. Since the appellant's account of why she left K was so integrally bound up with the credibility of her account of her political activities, and the Judge plainly disbelieved her about those, it was not an error of law, let alone a material error for the Judge to have omitted to make specific findings about the reasons why she left K.

53. Mr Lay has strongly argued before us that the findings made by the Judge in relation to the appellant's claim for international protection were flawed by errors of law. We have not accepted his arguments in their entirety but we are persuaded, for the reasons given above, that the Judge erred by failing to consider fully the risk factors relating to teachers arising from the case of NN and by appearing to make findings on the risk to teachers which were contrary to the country guidance. Accordingly we set aside the Judge's decision. We are satisfied that in view of the extent of the fact-finding required the appeal should be remitted to be heard before a differently constituted First-tier Tribunal, in accordance with Practice Statement 7.2(b).

Article 8

54. Having decided to allow this appeal in respect of the claim for international protection it is unnecessary for us to deal in detail with the challenge in respect of the Judge's findings under Article 8. Given that, at its highest, the evidence of Dr Kibble was that it might be difficult for the appellant to obtain the medication she requires to treat her condition, we are not persuaded that the judge erred in law in her approach to proportionality. We note the specific finding made by the Judge at paragraph 62 of the determination that the appellant is not in need of medical treatment or specialist services which are not available in Zimbabwe. The Judge found that the appellant's medical condition was currently under control and there was no evidence that her life was threatened by it. These comments were made in the context of Articles 2 and 3 rather than in relation to Article 8, but these findings nevertheless show that that the Judge directed her mind to this issue.

55. It was submitted that the Judge did not deal adequately with the question of delay. We note that at paragraph 76 of the determination the Judge

referred specifically to the respondent having delayed making a decision "for an inordinate time". The Judge stated that during this period the appellant took the opportunity to develop her place in society, her relationship with her family and her employment skills. She recognised that the place of the appellant in her family and outside it had been enhanced by the passage of time, but the appellant nevertheless intended to maintain her own life, career and work and to live apart from her family if she were able to do so. Accordingly the Judge was entitled to find that this was not a case where delay would tip the balancing exercise in favour of the appellant.

56. The Judge also had regard to the appellant's relationship with her grandchildren. It is stated at paragraph 20 of the application for permission to appeal that according to the Judge there was no "credible" evidence of the appellant's relationship with her disabled grandchild, A. This is not an accurate reflection of what is said at paragraph 70 of the determination, where in relation to A the judge stated that although the relationship with a grandmother was different to a relationship with other adults "there is no credible evidence that the child is emotionally dependent on the appellant, from whom she is separated for most of the month." We are satisfied that this is a finding that the Judge was entitled to make upon the evidence and we do not consider that she misconstrued the evidence in the course of the balancing exercise.

57. The remaining submissions for the appellant in relation to Article 8 are of a more directly legal nature. It is said that the Judge did not have regard to section 117B of the 2002 Act, as inserted by the Immigration Act 2014, and did not properly consider the legal basis of the proportionality test. On the first of these issues, we note that submissions in respect of section 117B formed part of the appellant's skeleton argument before the First-tier Tribunal. In this regard it was pointed out that the appellant is able to speak English and that private and family life was established in the UK at a time when she was here lawfully between 2002 and 2007, and subsequently while she was awaiting a response to her asylum claim. It was also submitted that the appellant received unlawful advice in 2008 from an unregistered adviser.

58. The Judge was clearly aware of the appellant's immigration history and of the extent of her private and family life and addressed these in some detail. It does not follow from the fact that the appellant can speak English and the fact that she was here lawfully for a considerable period that in the balancing exercise the public interest in maintaining effective immigration control is outweighed. These factors may be regarded less as positive factors in the balancing exercise than as indicating the absence of negative factors. Although the Judge did not specifically refer to section 117B, it is apparent that she had the appropriate factors in mind in the balancing exercise and she therefore made no error of law in this regard.

59. It was suggested that the Judge did not seek to resolve any inconsistency that might be thought to arise from a comparison of the Upper Tribunal case of Gulshan with the principles set out by the House of Lords in Huang. According to the application for permission to appeal, at paragraph 22, in terms of Gulshan the appellant had to show something "exceptional" to succeed outside the Immigration Rules, whereas in terms of Huang the judge needed to consider only whether the removal of the appellant was reasonable in the circumstances. It was submitted by Mr Lay that the Judge did not properly address either test.

60. We do not accept that there is any such tension between Gulshan and Huang. The new Immigration Rules are intended to reflect previous domestic and Strasbourg jurisprudence on Article 8, but although they are intended to be comprehensive, there may still be cases falling outside the Rules in which the removal of an individual will amount to a disproportionate interference with his or her Article 8 rights. Although in Gulshan the Upper Tribunal certainly referred to arguments about "exceptional" circumstances, the phrase used by the Tribunal in its conclusions was whether there were compelling circumstances not sufficiently recognised under the Rules, and thus whether removal would be "unjustifiably harsh". The Judge did not need to refer to the Gulshan test, provided that she approached the balancing exercise in the correct legal manner; there is nothing on the face of her determination to suggest that she failed to do so.

61. The Judge in this appeal simply referred to proportionality and, in particular, to the best interests of the grandchildren. She carried out a straightforward balancing exercise of the type envisaged in Huang and made no error of law in so doing.

62. The final argument put before us by Mr Lay at the hearing was that the Judge did not have proper regard to paragraph 276ADE in relation to private life. In particular, Mr Lay pointed out that this provision had been amended in favour of an appellant in relation to whether there would be very significant obstacles to the appellant's integration into the country to which she would have to go.

63. The difficulty Mr Lay faces in this regard is that it does not appear to have been argued before the First-tier Tribunal that the appellant satisfied paragraph 276ADE. Furthermore, even if it had been raised before her, the findings made by the Judge and recorded at paragraph 57, (albeit in respect of the asylum grounds) were that the appellant would have available to her a home with her brother, his children, or other extended family, or with her son in Zimbabwe. The judge further found, at paragraph 73, that the appellant could participate in religious and social activities in Zimbabwe and, at paragraph 74, that she could participate in churches, social groups or clubs. It was not disputed that she might have difficulty in finding employment but the Judge found at paragraph 75 that she would be able to establish her life again using the qualifications,

experience and skills she had acquired in the UK. The Judge appears to have accepted that the appellant would be able to rebuild her life with relatives in Zimbabwe until she was fully independent. Accordingly, on the fact-findings made by the Judge, Mr Lay's argument in respect of paragraph 276ADE would not have succeeded, even had it been presented before the First-tier Tribunal.

64. Although we do not find that the Judge erred in law in her consideration of Article 8, we are conscious that the balancing exercise under Article 8 may be affected by findings on country conditions in Zimbabwe to be made when the appeal is heard again by the First-tier Tribunal. For this reason we do not consider that the Judge's findings and reasons under Article 8 should be preserved.

Conclusions

65. The decision of the First-tier Tribunal did involve the making of a material error on a point of law.

66. We set aside the decision and remit the appeal to be heard by a differently constituted First-tier Tribunal for the decision to be re-made. None of the findings made by the Judge of the First-tier Tribunal are preserved.

Anonymity

67. The First-tier Tribunal made an order for anonymity. We continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) for the reasons given by the First-tier Tribunal.

Signed Date **22 December 2014**

Upper Tribunal Judge Deans