



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/09818/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20<sup>th</sup> December 2019**

**Decision & Reasons  
Promulgated  
On 11<sup>th</sup> March 2020**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MC  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer  
For the Respondent: Ms N Ostadsaffar of Counsel, instructed by Longfellow Solicitors

**DECISION AND REASONS**

1. In a decision promulgated on 9 October 2019, I found an error of law in the decision of First-tier Tribunal Judge Richards-Clarke promulgated on 28 March 2019 and set aside the decision. A copy of the error of law decision is contained in the annex and the history set out therein will not be repeated here save as where necessary. The hearing was adjourned for

remaking in the Upper Tribunal on the relatively narrow issue of whether the Appellant would be at risk on return to Zimbabwe as a member of the MDC who was also active in the Zimbabwe Human Rights Organisation (the "ZHRO"). For ease I continue to refer to the parties as they were before the First-tier Tribunal, with MC as the Appellant and the Secretary of State as the Respondent.

2. In the error of law decision and further directions issued to the parties on 5 November 2019, I preserved the findings of fact in paragraph 43 of the First-tier Tribunal decision, that the Appellant is a member of the MDC and active in ZHRO.

### **Immigration Law and Rules Relevant to the Appellant**

3. So far as relevant to this appeal, section 32 of the UK Borders Act 2007 states that a foreign criminal is a person who is not a British Citizen, who is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. Section 32(5) of that Act requires the Secretary of State to make a deportation order in respect of a foreign criminal unless one of the exceptions in section 33 applies. The first exception is where removal of the foreign criminal would breach his or her rights protected by the European Convention on Human Rights or would place the United Kingdom in breach of its obligations under the Refugee Convention.

#### *Refugee Convention*

4. It is for an Appellant to show that he is a refugee. By Article 1A(2) of the Refugee Convention, a refugee is a person who is out of the country of his or her nationality and who, owing to a well-founded fear of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion, is unable or unwilling to avail him or herself of the protection of the country of origin.
5. The degree of likelihood of persecution needed to establish an entitlement to asylum is decided on a basis lower than the civil standard of the balance of probabilities. This was expressed as a "reasonable chance", "a serious possibility" or "substantial grounds for thinking" in the various authorities. That basis of probability not only applies to the history of the matter and to the situation at the date of decision, but also to the question of persecution in the future if the Appellant were to be returned.
6. Under the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, a person is to be regarded as a refugee if they fall within the definition set out in Article 1A of the Refugee Convention (see above) and are not excluded by Articles 1D, 1E or 1F of the Refugee Convention (Regulation 7 of the Qualification Regulations).

#### *Country Guidance*

7. The current country guidance in relation to Zimbabwe is contained in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC), from which neither party sought any departure. So far as relevant to this appeal, the guidance is as follows:

- (1) As a general matter, there is significantly less politically motivated violence in Zimbabwe, compared with the situation considered by the AIT in RN. In particular, the evidence does not show that, as a general matter, the return of a failed asylum seeker from the United Kingdom, having no significant MDC profile, would result in a person facing a real risk of him to demonstrate loyalty to the ZANU PF.*
- (2) The position is, 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 may well find it difficult to avoid adverse attention, amounting to serious ill-treatment, from ZANU PF authority figures and those they control. The adverse attention may well involve a requirement to demonstrate loyalty to ZANU PF, with the prospect of serious harm in the event of failure. Persons who have shown themselves not to be favourably disposed to ZANU PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (RT (Zimbabwe)).*
- (3) The situation is not uniform across the relevant rural areas and there may be reasons why a particular individual, although at first sight appearing to fall within the category described in the preceding paragraph, in reality does not do so. For example, the evidence might disclose that, in the home village, ZANU PF power structures or other means of coercion are weak or absent.*
- (4) In general, a returnee from the United Kingdom to rural Matabeleland North or Matabeleland South is highly unlikely to face significant difficulty from ZANU PF elements, including the security forces, even if the returnee is a MDC member or supporter. A person may, however, be able to show that his or her village or area is one that, unusually, is under the sway of a ZANU PF chief, or the like.*
- (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 fear of thereby coming to the adverse attention of ZANU PF.*

*(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.*

*(7)...*

*(8) Internal relocation from a rural area to Harare or (subject to what we have just said) Bulawayo is, in general, more realistic; but the socio-economic circumstances in which persons are reasonably likely to find themselves will need to be considered, in order to determine whether it would be unreasonable or unduly harsh to expect them to relocate.*

*(9) The economy of Zimbabwe has markedly improved since the period considered in RN. The replacement of the Zimbabwean currency by the US dollar and the South African rand has ended the recent hyperinflation. The availability of food and other goods in shops is likewise improved, as has the availability of utilities in Harare. Although these improvements are not being felt by everyone, with 15% of the population still requiring food aid, there has not been any deterioration and humanitarian situation since late 2008. Zimbabwe has a large informal economy, ranging from street ages to a home-based enterprises, which (depending on the circumstances) returnees may be expected to enter.*

*(10) ...*

*(11) In certain cases, persons found to be seriously lacking in credibility may properly be found as result to have failed to show a reasonable likelihood (a) that they would not, in fact, be regarded, on return, as aligned with ZANU PF and/or (B) that they would be returning to a socio-economic milieu in which problems with ZANU PF will arise. This important point was identified in RN ... and remains valid.*

### **The Appellant's Immigration and criminal history**

8. The Appellant is a national of Zimbabwe, born on 20 December 1973, who claims to have arrived in the United Kingdom in April 2004, claiming asylum on 27 April 2004, which was refused on 4 June 2004 by the Respondent. In April 2005, the Appellant was deemed to be an absconder for failing to comply with temporary admission restrictions.
9. On 7 December 2005, the Appellant was convicted of the first of numerous driving offences, the detail of which is not necessary to set out in this decision. In light of the Appellant's convictions, he was served with a liability to deport notice on 12 October 2010, with a further liability to

deport notice on 23 November 2010 and finally a notice of decision to deport on 20 December 2010. The Appellant's appeal against deportation was dismissed on 25 May 2011 and his appeal rights were exhausted on 21 July 2011.

10. The Appellant made further representations on 29 July 2011 which were refused under paragraph 353 of the Immigration Rules on 19 September 2011. Further representations followed on a number of occasions up to and including 15 February 2013. These were refused on 11 March 2014 with no right of appeal and a signed Deportation Order was then made on 8 April 2014.
11. The Appellant made further protection and human rights representations on 17 November 2015, 9 February 2016 and 4 March 2016. The Appellant was convicted of further motoring offences on 15 December 2015, for which he was sentenced to 16 weeks imprisonment and disqualified from driving.

### **Explanation for refusal**

12. Upon consideration of the latest further submissions, the Respondent accepted that a fresh claim had been raised for the purposes of paragraph 353 of the Immigration Rules but refused the protection and human rights claims. The Appellant's asylum claim was based on a risk of return to Zimbabwe on the grounds of political opinion as an MDC supporter who had engaged in *sur place* activities in the United Kingdom. He also claimed a fear return of his father who was a senior official in Zanu PF, and of his uncle. The Respondent referred back to the adverse credibility findings made by the Tribunal when the Appellant's appeal was dismissed in 2011 and referred to the Appellant's use of multiple identities and previous documents being relied upon, including birth certificates, which were not genuine.
13. Overall the Respondent considered that the Appellant had no significant political profile United Kingdom, that he had only undertaken *sur place* activities to attempt to bolster his claim and that he was not a genuine activist. In any event, the Appellant could relocate to an MDC stronghold in Zimbabwe and there would be no risk on return to there. Essentially for the same reasons, there would be no need for humanitarian protection and no breach of Articles 2 and 3 of the European Convention on Human Rights.
14. The Appellant's claimed mental health problems were taken into account but the Respondent concluded that treatment was available on return to Zimbabwe. The Respondent did not accept that the Appellant was in a genuine and subsisting relationship in the United Kingdom, as the Appellant had provided no evidence of the same and there was no claim that he had any dependent children in the United Kingdom either. The private life exceptions to deportation were not met and there were no very compelling circumstances to outweigh the public interest in the

Appellant's deportation. Finally, the Respondent refused to revoke the Deportation Order pursuant to paragraph 390 the Immigration Rules.

### **The Appellant's claim**

15. In his first written statement for the purposes of the present appeal proceedings, signed and dated 10 May 2017, the Appellant describes his family in Zimbabwe, including his daughters (at the date of the statement aged 15 and 17). The statement reiterates, in essence, the Appellant's initial claim and account that was before the First-tier Tribunal in 2011 for his appeal against the earlier refusal of his asylum claim. The Appellant describes being a founding member of ZHRO, attending demonstrations and attending meetings. The remainder of the statement responds to the reasons for refusal letter and adds that his father sends people to his wife's parents to threaten them and tell his wife to leave him.
16. In his written statement signed and dated 1 March 2019, the Appellant states that he attends the vigil every Wednesday outside of the Zimbabwean embassy and he plays the drums. He has been confronted about this by the CIO because of the disturbing noise and attention of passers-by to the cause, such that the Appellant's name and face are known. The vigil is recorded live on *Facebook* and some are also on *YouTube*. The Appellant has attended other demonstrations and organised petitions.
17. The Appellant confirms that he intends to carry on with his activities if returned to Zimbabwe, but has no place to return to other than his home area. The Appellant is worried for his daughters, particularly as one has a young baby and was recently widowed; the other is at home being cared for by a friend of the Appellant's mother and the Appellant is unable to provide financial support to either of his daughters.
18. In his written statement signed and dated 5 December 2019, the Appellant states that he is an active member of the MDC-T with the MDC High Wycombe and Slough branch in the United Kingdom, taking part in the party's activities at branch level, including attending meetings and taking a lead role in demonstrations. In addition, the Appellant supports other organisations and groups working towards change in Zimbabwe, including the ZHRO and the Restoration of Human Rights Zimbabwe (the "ROHR").
19. The Appellant was a founding member of the ZHRO in 2016 and was selected to be in the Executive Committee as Human Resources team. The Appellant recruited over 300 members. He attends vigils (beating drums outside the embassy), demonstrations and an annual walk from Brighton to London to raise funds and awareness. In addition, he assists with organising visits for those from Zimbabwe and attends events for MDC leaders when they come to the United Kingdom. The statement includes a number of photographs of the Appellant at such events. The Appellant is named (using a mixture of his two other identities) on flyers promoting the Wednesday vigil.

20. The Appellant states that he will never stop being an activist and will continue to work for sustainable change in Zimbabwe.
21. In 2014 the Appellant met his wife, they married culturally and continue to live together.
22. There are a number of letters and documents from Mr John Burke in support of the Appellant. In a document titled 'Witness Declaration' signed and dated 8 May 2017, Mr Burke states that he has known the Appellant since 2012 and is prepared to act as a witness for him. The document sets out generic material about the dangers of protest in Zimbabwe but contains no information about the Appellant specifically. There is a separate 'Activity Record' about the Appellant dated 7 February 2017 signed by Mr Burke on ZHRO headed paper.
23. In a letter dated 5 December 2019, Mr Burke describes the Appellant as one of the founder members of ZHRO with a substantial attendance record, including at the Wednesday vigil (with over 80 attendances between March 2017 and December 2019); at two London ZHRO branch meetings (in October 2017 and June 2018) and one national executive meeting (in January 2018). The letter then includes details and photographs of the Appellant's involvement at a number of what are described as high-profile demonstrations, including the presentation of a petition to 10 Downing Street in January 2019 (although the Appellant did not attend the actual presentation of the petition as he failed to obtain the necessary security clearance to do so because of his criminal convictions), a remembrance event in February 2019, an MDC politician visit in June 2019 and a protest in October 2019. An appendix to the letter contains extracts of news articles about conditions in Zimbabwe.
24. The bundles contain two statements from FM, the Appellant's wife. In her signed statement dated 3 May 2017, she states that she first met the Appellant in 2012 and they underwent a traditional marriage before living together. FM states that she is afraid to go back to Zimbabwe because of threats from the Appellant's father.
25. In her unsigned statement dated 1 March 2019, FM states that she is traditionally married to the Appellant and at the date of the statement was four months pregnant. She was granted indefinite leave to remain at the end of 2015 and works as an adult registered nurse. FM refers to the Appellant's political activities, his current health, his concern for his two daughters and states that the Appellant's father is always threatening both her and the Appellant.
26. FM did not attend the hearing, nor was there any further or updated evidence from her prior to the hearing before me.
27. The Appellant's bundle also contains various letters, minutes and activity records primarily from the ZHRO and MDC, photographs, as well as newspaper articles and background country evidence about Zimbabwe. It

is not necessary to refer to each piece of evidence in this decision, but I have taken it all into account even if it is not all expressly referred to herein.

### **The hearing**

28. The Appellant attended the oral hearing, confirmed his details and adopted his written statements dated 10 May 2017, 1 March 2019 and 5 December 2019.
29. The Appellant confirmed that he was a member of the Slough branch of the MDC in the United Kingdom and as a member he attended meetings, demonstrations and generally promoted the MDC. Meetings are held monthly in the first week, demonstrations were irregularly and reactive to events in Zimbabwe.
30. The Appellant met Mr Burke at the vigil outside the Zimbabwean embassy in 2014 and co-founded the ZHRO with him in October 2016, an organisation for the restoration of human rights following on from the ROHR group which has suffered from corruption. The Appellant sees Mr Burke on weekly basis at a vigil. There was trouble at one of the vigils in January 2019 when the President's picture was taken and put upside down, following which questions were asked by the CIO.
31. The Appellant's wife did not attend the oral hearing to give evidence as she had just completed a night shift. The Appellant confirmed that he lives with her and continues to be in a relationship with her.
32. In cross-examination, the Appellant was asked about further details on his latest written statement which were not contained in earlier statements. The Appellant suggested in relation to his claimed role in the ZHRO as the Executive Committee Human Rights team that he had meant to put it in earlier statements and he could not give a reason why he had previously failed to mention having recruited 300 people to the ZHRO.
33. Mr Kotas asked the Appellant about different MDC factions in Zimbabwe. The Appellant stated that he was just a member of the MDC and could name two different factions, with a split after the elections in 2008/2009 and a further division in the last five or six years but he could not recall the date. He named a number of factions.
34. The Appellant started attending vigils outside of the Zimbabwean embassy as soon as he was released from detention in 2012. The Wednesday vigil started in March 2017 and before that there was a Saturday vigil mixed with the Zimbabwe vigil run by Rose Brandon. The Appellant was a member of the Slough branch of the MDC because he had attended before and it is an active branch, although he could not give further details, for example about the journey to such meetings from his home in Gravesend.
35. In relation to the ZHRO, the Appellant did not initially know how many people founded the organisation, but accepted that the number was 26.



On the front desk he handed out pamphlets and signed a register for people. The Appellant took part in London branch meetings and had attended more than two. He could not explain why only two were referred to in the letter he relied on in evidence.

36. The Appellant was asked about Mugabe's deposition from power, which he said was in 2017 or 2018 but could not remember exactly when even though it was a significant event. When referred to the minutes of the ZHRO meeting after this event, the Appellant could not identify where the issue was discussed and stated that he thought that it would not have been discussed at the time because it didn't have any value. The meetings are about matters in the United Kingdom and wasn't relevant to mention.
37. It was suggested to the Appellant that he was not a genuine activist or supporter and had joined the ZHRO purely to bolster his asylum claim. In response he stated that he is a powerful activist, attending the vigil every Wednesday and that the organisation has more important matters to discuss than Mugabe being ousted. The Appellant stated that on return to Zimbabwe he would continue to be politically active, having been a member of the MDC in Zimbabwe and in the United Kingdom.
38. Mr John Burke attended the oral hearing, confirmed his details and adopted his written statements dated 7 February 2017, 8 May 2017 and 5 December 2019; with one correction that he had known the Appellant since 2014 and not 2012. Mr Burke had become involved in the Zimbabwe vigil in late 2013. He sees the Appellant normally weekly at the vigil, probably three times a month.
39. In cross-examination, Mr Burke stated that he became politically involved in 2014 because of the injustice in Zimbabwe and having found out about the problems there. He has given evidence in support of asylum appeals before the Tribunal for five or six other people, to attest to their political activities. Mr Burke believed all of them to be true activists and would not comment on whether he had any suspicion of people bolstering their claim as it was a matter for their belief.
40. The ZHRO has a signed-up membership of about 350, including 50 to 75 core activists. All of them are asylum seekers in the United Kingdom, with some having been granted asylum. Mr Burke was questioned as to whether all of these people were genuine asylum seekers or whether he questioned whether they may have other motives. His view was that everyone was fleeing from persecution and suffering and he didn't question their motives at all. He thought all of these asylum seekers were genuine and if he had the choice he would give leave 'carte blanche' to them all from Zimbabwe. Mr Burke found it insulting when it was suggested that he may not have made an objective assessment of the situation.

41. In relation to the Appellant, Mr Burke stated that he was an activist who had handed in petitions to government and had made complaints to the embassy. The Appellant was well aware of the situation in Zimbabwe, receiving information from friends and family about life there. Mr Burke asserted that the Appellant was aware that Mugabe had been deposed on 17 November 2017 and when asked if it was surprising that he did not, stated that the Tribunal was an intimidating and stressful environment, such that he would understand if the Appellant was weird on dates or times.
42. Mr Burke considered that the Appellant would be at risk on return to Zimbabwe because of his profile as part of the organisation, which had a huge media presence including four websites, five Facebook pages and two Facebook groups. The Appellant attended vigils, has submitted petitions to other embassies, complained to the BBC about sanctions and there was an activity record of his involvement. This included a record of the Appellant's attendance at vigil since 2012, a date which Mr Burke did not stand by as he had not checked the details and relied upon records kept by Rose Benton who keeps zimvigil registers.
43. As to branch meetings, Mr Burke attends only occasionally as he doesn't like meetings and hasn't been to any recently. He did attend the branch meeting in December 2017 but did not recall Mugabe being deposed being discussed at the meeting. When asked why not, Mr Burke stated that this was a fledgling organisation run by volunteers and amateurs. He made a similar comment about the minutes taken and repetition between them, he was not concerned by a bit of copying and pasting. Mr Burke was asked about another significant event, the anniversary demonstration which was not referred to in the next branch meeting minutes, about which he said it wasn't surprising that it wasn't discussed, it was a congratulation of fundraising only and he was at the meeting. He confirmed that meetings did take place, opposite where the vigil is held that he doesn't remember the name of the building. When prompted that it was the Royal Festival Hall, he stated it was in the green room on the fourth floor.
44. Mr Kotas suggested that either the ZRHO was not a genuine organisation, or if it was it was irrelevant in that it didn't deal with actual issues going on in Zimbabwe. Mr Burke stated that it was all genuine, it was a voluntary organisation but not irrelevant.
45. I asked Mr Burke further about the organisation and planned events. He stated that the anniversary demonstration was not organised through branch meetings but on a spur of the moment basis to avoid information being leaked in advance. There was no plan to burn a portrait at the event but someone bought one along. He described the ZHRO as an amateur organisation, but one which had a successful event which must have been publicised as lots of people attended. New members were recruited to the organisation through attendance at the vigil and filling out membership forms. Members are actively recruited through word-of-mouth. As to the

Appellant's role in recruitment, Mr Burke was sure that he had bought a few members along. When told that the Appellant had claimed to have recruited over 300 members, Mr Burke stated that this was an exaggeration which he described as poetic licence.

46. Mr Burke was asked if the Appellant had a formal role within the ZHRO, to which he stated that he didn't like titles and there was no hard and fast organisation or roles as he did not see them as beneficial. To the extent that particular roles did exist, the Appellant would be described by default as recruitment officer as he sent a few membership forms on. When asked if this could be described as a member of the Human Resource team, Mr Burke said 'sort of, yeah'. The Appellant is a member of the confidential platform, a *Facebook* page and *Whatsapp* group in relation to marketing and that is the form through which decisions are made, such as on planning demonstrations.
47. I asked Mr Burke if he considered that all Zimbabweans are at risk. He stated that they were not because there was a divided diaspora which included Zanu PF infiltrators and members who have been granted leave and citizenship as a matter of underhand tactics. Mr Burke confirmed that he did not vet any members of the ZHRO and it was always a possibility that Zanu PF members had sought to join.
48. In re-examination, Mr Burke stated that he used several different *Whatsapp* groups to communicate with members, which was the most effective way to communicate with people spread around the United Kingdom. There were only two or three people involved in ZHRO who have any experience of running an organisation and Mr Burke encourages independence amongst members as the organisation grows and develops. He would be involved in the allocation of titles and responsibilities to some extent but also wanted to develop ownership and a culture of delegation to smaller groups.

### **Closing submissions**

49. In closing on behalf of the Respondent, Mr Kotas submitted that this appeal had, in light of the evidence given, become one in which there was a significant issue of credibility and extensive findings and background evidence were not in the circumstances likely to be required. It was accepted that extant country guidance probably still applies since 2013, Zanu PF remain in power in Zimbabwe, albeit with a different leader, with the same political structures and tensions and same desire for consolidation of power.
50. The issue is whether the Appellant has a significant MDC profile or whether he would be at risk on return as a political agitator perceived as anti-Zanu PF and a threat to the regime. There is a preserved finding that the Appellant did not leave Zimbabwe for the reasons he claimed, he was not previously a member of the MDC and could have internally relocated. The First-tier Tribunal found in 2011 that he had no significant MDC profile and

no real risk of needing to demonstrate loyalty to Zanu PF. The Appellant must therefore rely on *sur place* activities. It is not necessarily the case that those protesting outside of the Zimbabwean embassy are at risk, but a fact sensitive assessment is required. The Appellant has gradually exaggerated his involvement in various organisations and there needs to be a quantitative assessment of his role.

51. In May 2017, the Appellant stated in his written statement that he was a member of and attending meetings of the MDC in April 2017, but there was little other evidence of what he did. Only in his statement dated 5 December 2019 as any detail of the Appellant's activities, for example that he had recruited 300 people to the ZHRO, which was in direct contradiction with the evidence of Mr Burke. It was also suggested that it was astonishing that the Appellant did not know of Mugabe being deposed there is nothing to suggest that this Appellant has any memory or mental impairment. The Appellant was not aware of different splinter groups of the MDC which have existed since 2014, which is highly relevant given that he has been protesting and stating that he has been a political activist since 2012, but does not know the background to his own party or recent party information. The Appellant did not know about the founding members of ZHRO despite claiming to be one of them.
52. Although Mr Kotas did not go so far as submitting that the meeting minutes for the ZHRO were fabricated, what they did shows that the organisation itself is totally irrelevant and/or incompetent. The meeting minutes contain no discussion of any significant events such as Mugabe being deposed or what may happen next and it is no answer for Mr Burke to simply say that this is an amateur organisation and it is not credible to simply say that the deposition of Mugabe, for example, is not relevant.
53. Mr Kotas invited me place little weight on the evidence of Mr Burke given that he was unsure in his evidence on key issues, he did not vet or undertake any checks on members of ZHRO and stated that most members were seeking asylum. Mr Burke was unaware of the Appellant's claimed role within his own organisation. He also undermined his own credibility in seeking to criticise the Respondent and claim that all of those like the Appellant are at risk. He is not a dispassionate activist for Zimbabwe and the true picture is that his organisation is an ad hoc rather than a formal one. It cannot be perceived as anything other than self-serving given the contents of the ZHRO meeting minutes which were loosely drafted and irrelevant.
54. Although it can be the case that a fabricated asylum claim can still place a person at risk on return to their home country, this was not the case in Zimbabwe, where a significant MDC profile is required which this Appellant simply does not have. The latest country information contained in the Country Policy and Information note Zimbabwe: opposition to the government, February 2019 (the "CPIN"), notes that violence often flares around election time and that smaller opposition parties are less likely to be of adverse interest to the authorities.

55. Mr Kotas submitted that there was no need to descend into the detail of the situation in the Appellant's home area or as to whether he could safely relocate to Harare given that he has not been of adverse interest to the authorities in the past and would not now be perceived as having any significant MDC or anti-Zanu PF profile. If the Appellant was interviewed on return, he could give the honest response that he attended protests in London for the purposes of an asylum claim only.
56. In closing on behalf of the Appellant, Ms Ostadsaffer submitted that the Appellant was nervous and this was a stressful environment such that the credibility issues that the Respondent had picked on in terms of missing information, was not significant. The Appellant had answered questions put to him which were not specific as to dates and information. In relation to the absence of discussion of key issues in branch meeting minutes, Mr Burke's evidence was that there were other forms of communication used, including *Whatsapp* groups.
57. The Appellant has accepted that he is only a member of the MDC and it was not suggested that he has or had a prominent role within that organisation, but he does have a significant role in the ZHRO. There are pictures of him at the vigil and he is linked to an MDC member as part of his profile opposing the regime. There is online information about the Appellant containing his photograph, his attendance at vigils, and his role within the ZHRO. It was accepted however that the information that is available online only shows the Appellant's attendance at vigils.
58. On the Appellant's account, he plays the drums outside the Zimbabwe Embassy which has led to friction with the CIO and him being approached on numerous occasions. The Appellant is known to them as an opponent and this is likely to be communicated to the Zimbabwean authorities on return which itself places the Appellant at risk. The Appellant's claim is also that he is likely to continue to engage in political activity on return to Zimbabwe and will continue to be an activist.
59. In relation to the CPIN, it was submitted that this contained evidence of violence against MDC activists and discrimination against both senior and low-level party members, who are subject to harassment by the current regime. The Appellant has attended vigils and is known to CIOs in the embassy, which has raised his profile and the level of discrimination, threats and violence he would face on return. He is a prominent opponent and activist.
60. Counsel for the Appellant accepted that there is nothing in the background country information about the ZHRO, only general information in the CPIN about opposition activists, with a focus on organisations within Zimbabwe. Other background evidence does point to discrimination against members of the opposition, for example the lack of food distribution to such people. It was also suggested that violence and human rights violations were not just linked to election periods, but were ongoing and around the time of

fuel protests. Other evidence from newspapers showed continuing attacks on opposition supporters not just at election time.

61. The Appellant is of Shona ethnicity, a matter accepted by the Respondent, and would not therefore be able to internally relocate to Bulawayo or Matabeleland, and would be unable to return to his home area. It was submitted that there would also be an issue of internal relocation to Harare because of the high density of Zanu PF there and it would also be unduly harsh and unreasonable because of his activism. It was submitted that the Appellant would be at risk on return at the airport and in Harare. The Appellant has no family connections in Zimbabwe, no property and would be unlikely to receive any food aid distribution. The current health, food and economic crisis will affect the Appellant on return and with no assistance to reintegrate he would face destitution.

### **Findings and reasons**

62. In accordance with the error of law decision and subsequent directions, the re-hearing of this appeal is confined to the relatively narrow issue of whether the Appellant, as a member of the MDC and active in ZHRO, would be at real risk of persecution on return to Zimbabwe. Over the course of the Appellant's appeal and prior immigration history, he has relied on a number of different matters both in relation to his protection and human rights claims, including being at risk on return due to his father's involvement in Zanu PF and that his removal would be a breach of Articles 3 and/or 8 of the European Convention on Human Rights because of his medical conditions, private and family life in the United Kingdom. A number of these matters, including the Appellant's claimed previous involvement with the MDC in Zimbabwe, arrest and detention there, continued to be raised in the skeleton argument before the First-tier Tribunal. However, at the oral hearing before me, the previous skeleton argument was not expressly relied upon and the hearing proceeded for both parties solely on the narrow issue identified previously in the Upper Tribunal. In these circumstances, I make no further findings in relation to the wider protection or human rights claims previously made and the appeal remains, as it was before the First-tier Tribunal, dismissed on human rights grounds.
63. In accordance with the principles in *Devaseelan*, the starting point in this case is the previous findings of fact of Immigration Judge Kebede and Mrs J Holt in a determination promulgated on 25 May 2011. Further to detailed reasons being given for significant adverse credibility findings, the conclusions of the First-tier Tribunal were as follows:

*"59. In light of the above, we do not consider that the appellant has presented a genuine account of his involvement with the MDC and his experiences in Zimbabwe. We do not accept that he was anything more than a supporter of the MDC and we do not accept that he ever held the role of ward co-ordinator. We do not accept that he was abducted, detained and tortured by the Zanu-PF and we do not*

*accept that he left Zimbabwe in the circumstances and for the reasons claimed. We do not accept that he was a friend of, and worked together with Francis Chinozvinya. However, even if he was his friend, we do not accept that the death of Francis Chinozvinya was connected to the appellant in any way or that any interest in him arose out of the friendship.*

*60. We consider that such concerns also lead us to doubt that the appellant's involvement with the MDC in the UK is anything other than as a supporter of the party. We place no weight upon the letter produced at page 22 of the appellant's bundle and find merit in Mr Archie's submission that the reference to the appellant as "her" suggests that the letter has been cut and pasted and does not in fact come from the organisation itself. We also note the inconsistencies in the appellant's evidence as to the position held by the author of the letter within the MDC branch and we conclude that the letter does not amount to reliable evidence of involvement with the party in the UK."*

64. There is nothing in the Appellant's claim before me which provides any basis for departure from these findings and although he still maintains that he was an active member in the MDC and fled Zimbabwe for that reason, he does not seek to depart from the findings in 2011, relying only on his *sur place* activities in the United Kingdom with the MDC and ZHRO. The findings of the First-tier Tribunal remain relevant to the assessment of the remaining narrow issue of risk on return on the latter basis because of the significant adverse credibility findings previously made, in particular, that the Appellant had sought to embellish a *sur place* claim.
65. In addition to the findings of the First-tier Tribunal in 2011, there are also preserved findings of fact from the decision of First-tier Tribunal Judge Richards-Clarke promulgated on 28 March 2019, that the Appellant is a member of the MDC and active in ZHRO.
66. There are also a number of matters not in dispute between the parties. These include that the Appellant is of Shona ethnicity whose home area is in Mashonaland, where, in accordance with the country guidance in CM he could face a risk of being required to demonstrate loyalty to Zanu PF and because of his ethnicity, it would be unreasonable for him to internally relocate to Bulawayo. It is also not in dispute that the Appellant has in the past used two or three different identities (the third being a mixture of the other two) and has produced two different birth certificates. Further, his criminal history is not in dispute.
67. In accordance with the country guidance in CM, as a general matter, the return of a failed asylum seeker from the United Kingdom, having no significant MDC profile, would not face a real risk of having to demonstrate loyalty to Zanu PF. The Appellant has not claimed to have any significant MDC profile, nor is there any evidence of anything beyond membership and a very basic level of participation in branch activities. It was clear from the Appellant's oral evidence before me that he does not keep up to

date with the details of developments within the MDC in Zimbabwe and his limited involvement in the United Kingdom is on a more practical basis (for example attending demonstrations and the vigil) rather than being particularly involved in the underlying politics in Zimbabwe or party politics within the MDC and its various factions/groups.

68. Further, in the context of the previous findings of the First-tier Tribunal that the Appellant was not a member of the MDC in Zimbabwe, nor that he had any political profile there at all and was, in 2011 at its highest only a supporter of the MDC who had manufactured a *sur place* claim for the purposes of asylum; there is nothing in this part of the claim to suggest that the Appellant would be at risk on return from his membership of the MDC, nor that he would be required to demonstrate loyalty to Zanu PF on return to Harare in accordance with the general guidance in CM.
69. The key issue in this appeal is the Appellant's involvement in ZHRO and whether this, alone or in combination with his membership of the MDC, would place him at real risk on return to Zimbabwe. It is necessary to make more specific findings about the organisation, the Appellant's involvement in it and as to the background country evidence about such organisations.
70. The ZHRO was founded in 2016 by John Burke and others, including the Appellant. The ZHRO's objectives, as recorded in branch meeting minutes, letters and the website, are first to support those in the diaspora in the United Kingdom (including with education, financial hardship, employment, legal advice, supporting applications for asylum and appeals) and then assist those in Zimbabwe (including through the monitoring of human rights abuses, obtaining redress for victims, research, education, awareness and public support of human rights).
71. Although the ZHRO is said to be a politically active organisation campaigning for improvements and change in Zimbabwe, such that it is opposed to Zanu PF, the evidence before me of the organisation contains very little of substance in relation to Zimbabwean politics at all. For example, there is little or no reference at all to very significant developments in Zimbabwe, such as Mugabe being deposed from power, let alone any formal response or statement about such events or even discussion about the possible impact of such a significant event. Although there is reference to fundraising and attendance at the vigil in meeting minutes, there is very little evidence of any detailed or direct political campaigns or strategy. Further, there is reference to petitions and the like to Downing Street and other embassies, but little evidence on the planning for this, the content or follow up.
72. Mr Burke's evidence was that there were other forums of communication, primarily through *Whatsapp* groups, but no evidence of the same was provided and in any event these are private groups with no information publicly available or connected with ZHRO, nor connection to the Appellant specifically. In addition, when asked questions on matters of actual



political activity, Mr Burke reiterated in oral evidence that the ZHRO was an amateur volunteer association and implied that as such, exacting standards should not be applied to it. Overall however, I find that the ZHRO is, at its highest, a small organisation in the United Kingdom (with only 50-75 active members) which makes little substantive political contribution to campaigning against Zanu PF or regime change in Zimbabwe beyond what is already in place through, for example, zimvigil. There is nothing to suggest any scope or even awareness of ZHRO outside of the United Kingdom.

73. There was no evidence before me from either party as to whether the authorities in Zimbabwe have any awareness of, let alone any adverse interest in the ZHRO as an organisation or adverse interest in its members as opponents of Zanu PF. Other than the country guidance in CM, the main other source of background information available (at least in terms of assessing risk) was in the CPIN. This only deals with political organisations, NGOs and the like within Zimbabwe and is silent as to organisations outside of the country. Although the CPIN documents some examples of incidents to low level members of the MDC and other smaller political parties; when read as a whole, there is little to show any real risk to members of smaller political parties and organisations which are not considered to pose any significant challenge to Zanu PF and the focus remains on those at senior levels in the largest MDC faction. At its highest, ZHRO would only be comparable with one of the very small political parties or organisations and I do not find would by its nature therefore be considered as posing any challenge to Zanu PF and thereby its members would not be at risk on return.
74. As to the Appellant's role within ZHRO, I find that he has significantly exaggerated this in his latest written and oral evidence, which was not supported by the evidence of Mr Burke. In particular, the Appellant claimed to have been selected to be in the Executive Committee of ZHRO as 'Human Resources Team', a title and position that Mr Burke had no knowledge of at all and specifically did not confirm that the Appellant had any specific title or role in the organisation, at best, by default he could be a recruitment officer. Further, in his latest written statement, the Appellant stated that he had personally recruited over 300 members to ZHRO, whereas Mr Burke's evidence was that he had brought 'a few' members along and that the organisation as a whole only had around 350 members, of which only 50-75 were core activists. There is nothing in the evidence before me to depart from the previous findings of the First-tier Tribunal that the Appellant had sought to embellish a *sur place* claim. I find that he has continued to do so.
75. Although Mr Burke strongly and passionately supported the Appellant's claim and I was in no doubt he believed that the Appellant, like any other Zimbabwean who was not a member of Zanu PF, would be at risk on return to Zimbabwe and therefore deserving of protection and leave to remain in the United Kingdom; his evidence and support was of very limited value to the Appellant's claim for a number of reasons. First and

most importantly, it was not wholly consistent with the claims made by the Appellant as to his role and importance within ZHRO.

76. Secondly, if anything, Mr Burke played down the importance of ZHRO itself as an organisation, stressing that it was a small or fledging organisation and a relatively informal association run by volunteers and amateurs.
77. Thirdly, Mr Burke did not undertake any objective assessment of potential or actual members of ZHRO as to their political objectives or motives. His evidence was that all members are (or were) asylum seekers, for whom he had personally given evidence in support of 5 or 6 in the course of their protection appeals and that he had not questioned or considered the motives of any of them for being involved in or with ZHRO. The point was emphasised by his acceptance that the organisation could include by Zanu PF members as no checks are made. In the absence of any assessment at all of individuals and a presumption that all were genuinely fleeing persecution in Zimbabwe, Mr Burke had prevented himself from making any objective assessment of members, including of the Appellant. Mr Burkes seemingly unconditional support of the Appellant in the course of this appeal therefore adds little weight to the Appellant's claim and credibility.
78. Fourthly, although Mr Burke claimed that ZHRO had a huge media presence, including 4 websites, five Facebook pages and five Facebook groups; not all of this was in evidence before the Tribunal and in submissions on behalf of the Appellant, it was accepted that his personal media profile as part of ZHRO or otherwise extended only to his attendance at vigils.
79. I find that the Appellant's activities for ZHRO most likely bring him within the 50-75 core activists in the organisation and that he participates in the vigil (including by playing the drum), attending meetings and has had some involvement in the petitions organised by ZHRO, albeit these are fairly limited and there is nothing to indicate that the Appellant had a key organisational role in such petitions beyond collecting some of the signatures. Although the Appellant claims that he has been identified as the person who plays the drums at the vigil, I do not find that this of itself places him in any different position to those attending the vigil and participating in the protest and singing. I find overall that the Appellant has exaggerated his role and media presence as part of ZHRO and although most likely a core activist, he does not have prominent or public leadership role. As such, this, taken alone or cumulatively with his MDC membership would not be such as to lead him to be of adverse interest to the authorities on return to Zimbabwe or at real risk of persecution there. The Appellant falls within the general position in the country guidance in CM.
80. In any event, even if the Appellant did have such a significant role in ZHRO as claimed, given my findings about the relatively small nature of

the organisation and the lack of interest in such small groups even within Zimbabwe, this would not affect my overall findings on risk on return.

81. It is accepted that the Appellant can not return to his home area and would be returned to Harare. In accordance with CM, a returnee to Harare will in general face no significant difficulties, if going to a low-density or medium-density area. The socio-economic situation in high-density areas is more challenging but in general, a person without Zanu PF connections will not face significant problems there unless he or she has a significant MDC profile (which the Appellant does not) or would otherwise engage in political activities likely to attract the adverse attention of Zanu PF. Neither party made any express submissions on where in Harare the Appellant would return and whether this would be a low/medium-density area or a high-density area. For the purposes of this part of the decision, I take the Appellant's claim at its highest that he would return to a high-density areas and assess the risk on return in the worst-case scenario.
82. Although the Appellant has stated that will never stop being an activist and will continue in his activities on return to Zimbabwe, I do not find that to be credible given the adverse credibility findings from the previous First-tier Tribunal and those that I have made in the course of this decision. The Appellant has been found not to have presented a genuine account of his involvement with the MDC and his experiences in Zimbabwe or why he left and has exaggerated his involvement with both the MDC (originally as a member and being found only to be a supporter) and more recently his role within the ZHRO. I find that he has embellished his *sur place* claim for the purposes of his protection appeal rather than involvement in organisations here for genuine political reasons. I do not find that the Appellant would be likely to undertake any, or at least any significant political activism on return to Zimbabwe or behave in any way differently to what he did when he was last in Zimbabwe. If asked about his activities on return to Harare airport, the Appellant could give a truthful answer about his limited activities in the United Kingdom motivated by his asylum claim.
83. For these reasons, I find that the Appellant would not face a real risk of persecution on return to Harare and that he could safely internally relocate there. For essentially the same reasons, I do not find that the Appellant would be at risk on return to the airport as he would not be of any adverse interest to the authorities.
84. The final question is whether it would be unreasonable or unduly harsh for the Appellant to internally relocate to Harare. The country guidance in CM is that there needs to be a consideration of the socio-economic circumstances of the individual and reference is made to continuing difficult conditions but a marked improvement in the economy since the previous country guidance and an end to hyperinflation.
85. On behalf of the Appellant, submissions in relation to the reasonableness of internal relocation were limited to the assertion that return to Harare

would be unduly harsh and unreasonable because of the high density of Zanu PF there and because of the Appellant's activism. There was no evidence before me as to the density of Zanu PF supporters in Harare nor that there should be any departure from the country guidance in CM as to the general position on return there. I have also found that the Appellant would not undertake any significant activism, if any at all, on return to Zimbabwe so that is not a reason as to why internal relocation to Harare would be unreasonable or unduly harsh.

86. It was further stated that the Appellant had no family connections in Zimbabwe, no property and would be unlikely to be entitled to food aid; such that he would face destitution on return. This is however at least in part contrary to the Appellant's own evidence (and to some extent that of his wife's written evidence) that he does have family and connections in Zimbabwe including his father (albeit the Appellant has previously claimed to be at risk from him), his two daughters (one of whom lives with a friend of his mother) and his wife's parents; albeit he did not disclose where in Zimbabwe any of these people were living or whether any of them could or would provide him with any support on return. In 2004 the Appellant also had an aunt and cousin-sister in Zimbabwe who he claimed assisted him leaving the country, although there is no further reference to whether they are still there now.
87. The Appellant stated on arrival to the United Kingdom in 2004 that he had run two businesses in Zimbabwe and between him and his family, they had sufficient resources to pay \$15 million (Zimbabwean dollars) to an agent to leave the country. Even though the claim as to the Appellant's activities in Zimbabwe and reason for him leaving has not been accepted, he was at the time he left supporting his family and/or being supported by his own family with sufficient resources to leave and had experience of running his own businesses. In the United Kingdom the Appellant has stated that he was a motor mechanic by profession but had been unable to continue to work because of his immigration status and/or criminal convictions. When not working, the Appellant's evidence in 2011 before the First-tier Tribunal was that he was living with his friend, cousin or girlfriend and was financially supported by them. There was no further specific evidence before me as to the Appellant's financial or other circumstances in the United Kingdom since 2011, save that he has in more recent years been living with his wife.
88. There is little dispute that the socio and economic situation in Zimbabwe is poor and the Appellant relies on recent newspaper articles to support this and the lack of access to food and medical facilities. There was however no submission that there should be a departure from the country guidance in CM or the recognition that there had been improvements in the economy.
89. I find that it would not be unreasonable or unduly harsh for the Appellant to internally relocate to Harare, taking into account the following factors. First, the Appellant has family in Zimbabwe and a friend who is

accommodating and supporting one of his daughters. Secondly, the Appellant has a wife in the United Kingdom (although he did not specifically rely on this relationship before me, nor did she attend the appeal hearing to support the Appellant) and friends/supporters here and that he has been financially supported and accommodated by such persons in the United Kingdom over an extended period of time when he has not been working. It has not been suggested that such persons would no longer support the Appellant, at least initially, on return to Zimbabwe. Thirdly, the Appellant has a work history in Zimbabwe having owned two businesses and a trade and work history in the United Kingdom as a mechanic. Fourthly, the Appellant speaks a language spoken in Zimbabwe. Fifthly, although the Appellant has in the past relied on poor health, there was no up to date evidence before me of any diagnosis or treatment and this was not a factor relied upon in evidence or oral submissions such that it can be inferred that the Appellant is currently in at least reasonable health without any treatment needs which could not be met in Zimbabwe. Finally, it is for an individual to show that they would be destitute on return and overall, the Appellant has not, despite the acknowledged difficult economic conditions in Zimbabwe, established that there would be a real risk of this based on all of his known circumstances and experience.

90. For all of these reasons, I do not find that the Appellant would be at real risk on return to Harare and his appeal is therefore dismissed on asylum grounds. As above, there was no distinct claim before me on humanitarian protection, Article 2 or Article 3 grounds and the Appellant's human rights claims have already been dismissed.

### **Notice of Decision**

For the reasons set out in the attached error of law decision, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

The decision is remade as follows:

The appeal is dismissed on protection grounds.

The appeal is dismissed on human rights grounds.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed   
2020

Date 9<sup>th</sup> March

Upper Tribunal Judge Jackson

**ANNEX**



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/09818/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 September 2019**

**Decision & Reasons  
Promulgated**

.....

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MC  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Kandola, Senior Home Officer presenting officer  
For the Respondent: Ms N Ostadsaffer of Counsel, instructed by Longfellow Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Richards-Clarke promulgated on 28 March 2019, in which MC's appeal against the decision to refuse his protection and human rights claims, in the context of deportation, dated 31 August 2016 was

allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with MC as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Zimbabwe, born on 20 December 1973, who claims to have arrived in the United Kingdom in April 2004, claiming asylum on 27 April 2004 which was refused on 4 June 2004 by the Respondent. In April 2005, the Appellant was deemed to be an absconder for failing to comply the temporary admission restrictions.
3. On 7 December 2005, the Appellant was convicted of the first of numerous driving offences, the detail of which is not necessary to set out in this decision. In light of the Appellant's convictions, he was served with a liability to deport notice on 12 October 2010, with a further liability to deport notice on 23 November 2010 and finally a notice of decision to deport on 20 December 2010. The Appellant's appeal against deportation was dismissed on 25 May 2011 and his appeal rights were exhausted on 21 July 2011.
4. The Appellant made further representations on 29 July 2011 which were refused under paragraph 353 of the Immigration Rules on 19 September 2011. Further representations followed number of occasions to 15 February 2013. These were refused on 11 March 2014 with no right of appeal and a signed Deportation Order was then made on 8 April 2014.
5. The Appellant made further protection and human rights representations on 17 November 2015, 9 February 2016 and 4 March 2016. The Appellant was convicted of further motoring offences on 15 December 2015, for which he was sentenced to 16 weeks imprisonment and disqualified from driving.
6. Upon consideration of the further submissions, the Respondent accepted that a fresh claim had been raised for the purposes of paragraph 353 of the Immigration Rules but refused the protection and human rights claims. The Appellant's asylum claim was based on a risk of return to Zimbabwe on the grounds of political opinion as an MDC supporter who had engaged in *sur place* activities in the United Kingdom. He also claimed a fear return of his father who was a senior official in Zanu PF, and of his uncle. The Respondent referred back to the adverse credibility findings made by the Tribunal when the Appellant's appeal was dismissed in 2011 and referred to the Appellant's use of multiple identities and previous documents being relied upon, including birth certificates, which were not genuine.
7. Overall the Respondent considered that the Appellant had no significant political profile United Kingdom, that he had only undertaken surplus activities to attempt to bolster his claim and that he was not a genuine activist. In any event, the Appellant could relocate to an MDC stronghold in Zimbabwe and there would be no risk on return to there. Essentially for the same reasons, there would be no need for humanitarian protection



and no breach of Articles 2 and 3 of the European Convention on Human Rights.

8. The Appellant's claimed mental health problems were taken into account but the Respondent concluded that treatment was available on return to Zimbabwe. The Respondent did not accept that the Appellant was in a genuine and subsisting relationship in the United Kingdom, as the Appellant has provided no evidence of the same and there was no claim that he had any dependent children in the United Kingdom either. The private life exceptions to deportation were not met and there were no very compelling circumstances to outweigh the public interest in the Appellant's deportation. Finally, the Respondent refused to revoke the Deportation Order pursuant to paragraph 390 the Immigration Rules.
9. The Appellant's appeal was initially allowed by First-tier Tribunal Judge Herbert in a decision promulgated on 31 July 2017, in which an error of law was found by the Upper Tribunal and the appeal was remitted to the First-tier Tribunal for a de novo hearing.
10. Judge Richards-Clarke allowed the Appellant's appeal all grounds and revoked the Deportation Order in a decision promulgated 28 March 2019. The findings in the previous appeal in 2011 were considered, but on this occasion the First-tier Tribunal considered that there was credible evidence of sur place activities for ZHRO and the MDC which gave rise to a well-founded fear of persecution on return to Zimbabwe. The First-tier Tribunal did not find that there was any available option to internally relocate to Harare or Bulawayo (the latter because of the Appellant's Shona ethnicity). There was no express consideration of the Appellant's Article 8 claim.

### **The appeal**

11. The Respondent appeals on four grounds as follows. First, that the First-tier Tribunal failed to give clear or adequate reasons why the Appellant has such a significant political profile in the United Kingdom that he would come to the attention of the authorities in Zimbabwe. His involvement in the MDC is not of itself sufficient, so reliance must be based on his activities for the ZHRO. Secondly, the First-tier Tribunal failed to consider the possibility of bias in the evidence from the ZHRO, particularly when considered in the context of the previous adverse credibility findings made against the Appellant. Thirdly, the only evidence that the Appellant was more than a member of the ZHRO is contained in a letter, but no oral evidence was given by the author before the First-tier Tribunal. Finally, the Country Policy and Information Note "Zimbabwe: Opposition to the government" dated February 2019 (version 4) (the "CPIN") was available and should have been taken into account by the First-tier Tribunal rather than version 3 of the same dated April 2018, given that it does not indicate anyone connected with the ZHRO to be of adverse interest to the authorities in Zimbabwe. Overall, the Respondent's position was that a person with the Appellant's profile was not at risk on return to Zimbabwe

in accordance with the country guidance case of CM (EM Country Guidance: disclosure) Zimbabwe CG [2013] UKUT 00059.

12. At the oral hearing, Mr Kandola relied on the written grounds of appeal and the grant of permission to the Upper Tribunal. He emphasised that the previous appeal determination in 2011 was the correct starting point in accordance with Devaseelan and that this contained a very damning adverse credibility assessment of the Appellant, with findings that his claim to have been a member of the MDC was an entire fabrication. Seven years on, the Appellant has made a further *sur place* claim in relation to activities in the United Kingdom and although Mr Kandola did not say that a later genuine *sur place* claim could not be accepted, it would be difficult to establish a genuine claim. It was submitted that the First-tier Tribunal erred in placing significant weight on the evidence from the ZHRO in paragraph 31 onwards of the decision, given that the author of the letter did not attend the hearing, although it was accepted a different individual did attend and give evidence on this point.
13. In the decision of the First-tier Tribunal, there is repeated reference to evidence relied upon by the Appellant not being challenged by the Respondent, which although inconsistent with the records from the Home Office Presenting Officer available to Mr Kandola; was accepted not to be a point raised in the grounds of appeal and therefore was not pursued further.
14. The main issue relied upon by the Respondent is that the First-tier Tribunal failed to deal with the evidence in the CPIN which did not indicate that the ZHRO had any significant role in opposition to Zanu PF, nor that any of its supporters would be at risk on return as a result. It was accepted that the CPIN focused primarily on activities of the MDC, but it was submitted that there would have been reference to ZHRO if activities of that organisation cause significant effect of concern. It was submitted that the burden was on the Appellant to show that he had a profile which would give rise to a risk on return, but his claim is founded on activism for an organisation which is not listed in any objective material is of interest to the authorities in Zimbabwe.
15. On behalf of the Appellant, Ms Ostadsaffer submitted that the First-tier Tribunal considers in detail the evidence before it of the Appellant's involvement with the MDC and the ZHRO in paragraphs 31 onwards of the decision. In paragraph 53 of the decision, the First-tier Tribunal Judge was satisfied that in the intervening years since the previous appeal determination in 2011, the evidence now shows that the Appellant is an activist rather than a supporter who would come to the adverse attention of the authorities on return to Zimbabwe. That conclusion has not been challenged on the evidence, which included the Appellant's specific role within ZHRO and that he has been identified and approached by the CIO at the Zimbabwean Embassy about his role in protests outside of it. The First-tier Tribunal made positive credibility findings in relation to the evidence of the co-founder of ZHRO who attended the hearing and gave

oral evidence to the effect that the Appellant was a founding member of the organisation.

16. In relation to the CPIN, Ms Ostadsaffer submitted that this document dealt only with organisations based in Zimbabwe and not those in the United Kingdom, nor did it offer any view on other organisations outside of Zimbabwe. In any event, it outlined potential risk to opposition party members and organisers who play a greater role in organising demonstrations, rather than just participating in them. The CPIN shows that party members can be at risk, and in this case it was found that the Appellant was more than just a member but also an activist who has been critical of and involved in demonstrations against the government; which clearly establishes a risk on return to Zimbabwe to him. Overall, it was open to the First-tier Tribunal to find that the more recent evidence outweighs the earlier adverse credibility findings in 2011.

### **Findings and reasons**

17. It is necessary to set out in more detail the structure and parts of the decision of the First-tier Tribunal when assessing the grounds of appeal, in particular the first ground of appeal that there was a lack of adequate reasons for the conclusion of risk on return. In paragraphs 9 to 13 of the decision, there is a very brief summary of the documents before the First-tier Tribunal and the three people, including the Appellant, who gave evidence. The decision itself does not set out in any detail the evidence given by each of the witnesses, referring only to this being set out in the record of proceedings. In paragraphs 14 and 15, the parties' submissions were respectively summarised.
18. In paragraphs 26 to 29, reference is made to the previous Tribunal determination promulgated on 25 May 2011, in which the Appellant's appeal was dismissed and reference is made to this as the starting point in accordance with Devaseelan. It is further noted that the Appellant did not seek to challenge any of the previous Tribunal findings but founded his appeal on activities in the United Kingdom since then. In paragraphs 31 to 42 of the decision, there is then a further summary of the documentary evidence before the First-tier Tribunal and a number of references to such pieces of evidence not being challenged by the Respondent. The First-tier Tribunal attached at least some weight to most of these documents as supporting the Appellant's claimed involvement with the MDC and ZHRO in the United Kingdom, including attending branch meetings and engaging in activities, such as walks and protests.
19. In particular, the activity record of the Appellant in relation to ZHRO and the evidence of Mr J Burke, a co-founder of that organisation, is dealt with in paragraphs 39 and 40. Mr Burke was found to be *"somewhat passionate in his evidence and I do not consider that he would attend the Tribunal to give evidence on behalf of someone that had not taken part in the activities claimed and/or did not actively support the cause that Mr Burke fervently believes in"*. For this reason, the Judge attaches

significant weight to Mr Burke's evidence and from this is satisfied of his involvement in the ZHRO.

20. The decision of the First-tier Tribunal then sets out in paragraphs 43 to 46 its findings as to the Appellant's *sur place* activities and credibility findings, as follows:

*"43. ... For the reasons that I have set out above I am satisfied that in the United Kingdom the Appellant has engaged in activities demonstrating against the Zanu-PF Government in Zimbabwe. I am satisfied that the Appellant is a member of the MDC and active in ZHRO, a human rights organisation that is critical of and demonstrates against the current Government in Zimbabwe. The Appellant relies on the online evidence of his activities and his profile and recognition as the drummer at demonstrations outside the Zimbabwean Embassy.*

*44. In reaching this finding I have had regard to the adverse credibility findings made against the Appellant by the First-tier Tribunal in 2011. The findings related to the Appellant's involvement with the MDC and his experiences in Zimbabwe before his arrival in the United Kingdom in or around 2004. At this time the Tribunal found that the Appellant was no more than a supporter of the MDC while in Zimbabwe and during his time in the United Kingdom and that he had attempted to embellish his account to pursue his asylum claim. In this respect I do not depart from the findings of the First-tier Tribunal in 2011.*

*45. That said, I am reminded that a person may still be at risk of persecution even if the past persecution has been rejected as unbelievable ... Notwithstanding the findings that the Appellant did not present a genuine account of his involvement with the MDC and his experiences in Zimbabwe; fabricated his account of being activist of being abducted, detained and tortured by Zanu-PF in Zimbabwe and to have produced contradictory birth certificates together with an unreliable letter of his involvement in the MDC in the United Kingdom in the attempt to embellish his claim I do not consider that it follows that the Appellants "sur place" activities are not genuine. In this respect I reminded that in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) the Tribunal held that in assessing the effect of an Appellant's lies (whether to the Secretary of State or a judicial fact-finding), it is unnecessary to construct a prescribed set of steps from the judgements of the Supreme Court in MA (Somalia) [2010] UKSC 49, particular if they might lead to a "mechanistic" rather than a holistic approach. The significance or "negative pull" of the lie will possibly depend not only the strength of the background evidence but whether the lie - looked at in its own terms - is about an issue that is central to the disposition of the appeal. Where a person tells lies about issues which that person thinks are important to the claim but which, because of the passage of time or otherwise, are not, it is open to the Tribunal, given the earlier lies, to approach with caution the persons evidence regarding matters that are central to the current claim.*

46. Here, the Appellant has been found to have told significant lies in the past about his activities in Zimbabwe. These lies are central to the appeal in 2011 and do have a “negative pull” in my assessment of the Appellant’s credibility now. I have considered the totality of the evidence and while I do place significant weight on the adverse ability findings of the panel of Immigration Judge Kebede and Mrs J Holt (Non-Legal Member), I find that on balance, the positive findings set out above outweigh the challenge to the Appellant’s credibility in relation to his activities in the United Kingdom. I say so in particular reliance on the documentary evidence from the MDC and that from ZHRO, the photographic evidence of the Appellant at demonstrations and the oral evidence of Mr Burke.”

21. The First-tier Tribunal deals with whether there is a risk on return to Zimbabwe for this Appellant from paragraph 52 to 57 of the decision. It is necessary to set out some of those findings in detail, which are as follows:

“53. First, I am satisfied that the Appellant has discharged the burden of proof to the lower civil standard that substantial grounds been shown that there is a real risk of a reasonable degree of likelihood of him suffering prosecution for a Convention reason or serious harm is defined in the immigration rules in her [sic] country of return. I say so because I am satisfied that the objective evidence before me demonstrates that the situation in Zimbabwe continues to be such that the Appellant would be at risk on return. I say this because I am satisfied that in the intervening years since the First-tier Tribunal decision in 2011 the evidence before me is that the Appellant is now an activist rather than a supporter and would come to the adverse attention of the authorities on return. At the time of the First-tier Tribunal panel hearing in 2011 the current country guidance EM and others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC). This was before the judgements in RT (Zimbabwe) [2012] UKSC 38 and the changes necessary to be made to EM ... When the Upper Tribunal revised the country guidance in CM ... found that “(3) The only change to the EM Country Guidance that it is necessary to make as regards the position as at the end of January 2011 arises from the judgements in RT (Zimbabwe) [2012] UKSC 38. The EM Country Guidance is, accordingly, re-stated as follows (with the change underlined in paragraph (5) below): ... (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 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 fear of thereby coming to the adverse attention of ZANU-PF.”

54. I am satisfied that the Appellant now falls within the Country Guidance case of CM ... As a returnee that “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". This adverse attention may well involve a requirement to demonstrate loyalty to Zanu-PF, with the prospect of serious harm in the event of failure and the persons who have shown themselves not to be favourably disposed to Zanu-PF are entitled to international protection, whether or not they could and would do whatever might be necessary to demonstrate such loyalty (RT (Zimbabwe)). Further, the Appellant's fear is of persecution or serious harm is from the state or proxies of the state and so he would not be able to avail himself of the protection of the authorities."*

22. The first ground of appeal is that the First-tier Tribunal failed to give clear reasons why the Appellant has such a significant profile that he would come to the adverse attention of the authorities in Zimbabwe, particularly in light of the country guidance in CM that in general a failed asylum seeker returning to Zimbabwe, with no significant MDC profile, would not face a real risk of having to demonstrate loyalty to Zanu-PF other than a person with a significant absence returning to a rural area of Zimbabwe (with some exceptions).
23. In paragraph 43 of the decision, there is a finding that the Appellant is a member of the MDC and active in ZHRO and there is no departure from the previous findings of the Tribunal in 2011, that at that time the Appellant was no more than a supporter of the MDC and that he had attempted to embellish his account to pursue his asylum claim. There is no express finding by the First-tier Tribunal that the Appellant now has any significant profile within the MDC, nor that he is anything more than a member of the same. Although the Judge considers the Appellant's previous significant lies in the past about his activities in Zimbabwe, these are considered to be outweighed by the positive findings set out about the Appellant's more recent activities in the United Kingdom. There is however, no express consideration of whether these activities or account have been embellished, as was found to be the case, including on a similar claim of *sur place* activity by the Tribunal in 2011.
24. Further to those factual findings, the Judge goes on in paragraph 53 to conclude that he is satisfied first, that the objective evidence before him demonstrates that the situation in Zimbabwe continues to be such that the Appellant would be at risk on return; and secondly because the evidence now is that the Appellant is an activist rather than a supporter (with no distinction between the MDC and the ZHRO made, contrary to the earlier finding) and would come to the adverse attention of the authorities on return. There is however no reference at all to what the objective evidence relied upon is or why that demonstrates that the Appellant would be at risk on return to Zimbabwe now, in light of the country guidance or otherwise. In the absence of any significant MDC profile, which has not been found in relation to this Appellant, there is nothing identifiable in the objective evidence before the First-tier Tribunal to show that he would be at risk on return even as an activist for ZHRO and in fact the only background evidence referred to at all in the decision is the CPIN from

2018, the parts quoted predominantly referring back to the guidance in CM.

25. For these reasons I find that the First-tier Tribunal erred in failing to give adequate or clear reasons as to why the Appellant would be at risk on return to Zimbabwe as an activist and why for this reason he would come to the adverse attention of the authorities on return. The conclusion is simply entirely unexplained from what precedes it in the decision.
26. The First-tier Tribunal further concluded in paragraph 54 that the Appellant now falls within the country guidance of CM on the basis that he would or would be reasonably likely to engage in political activities on return to attract the adverse attention of Zanu-PF. There is no further explanation or reasoning at all as to the basis for this finding, within the decision or apparent from the evidence before the First-tier Tribunal. The Appellant's written evidence only goes so far as stating that he intends to carry on with his activities even if returned to Zimbabwe and that he has chosen to take a stand against repression. There is no detail in those statements, and no assessment of its likelihood by the First-tier Tribunal, particularly in the context of very significant earlier adverse credibility findings that claims have been embellished.
27. I find a further error in this part of the decision for failure to give adequate or clear reasons as to why the Appellant would be at risk on return to Zimbabwe. This is particularly so, given that as is raised in the fourth ground of appeal, the most up-to-date CPIN in February 2018 does not identify any specific risk on return for anyone other than MDC activists, except perhaps a moderate risk of violence towards People First supporters, but that those involved with less significant opposition parties only face a low level of official discrimination because they do not presently pose a significant threat to Zanu-PF.
28. On the basis of these errors, which cannot be said to be immaterial to the outcome of the appeal, it is necessary to set aside the decision of the First-tier Tribunal. It is not therefore necessary to consider in any detail the further grounds of appeal relied upon by the Respondent. However, I would reiterate the failure by the First-tier Tribunal to consider whether the Appellant's more recent *sur place* activities have been embellished as his similar claim in 2011 was, referred to in paragraph 27 above, in relation to the lack of consideration of possible bias in the evidence Mr Burke from the ZHRO. In relation to the more up to date CPIN, this evidence will in any event will need to be taken into account in the remaking of the decision under appeal.
29. This appeal has a relatively lengthy history, having already been heard in the First-tier Tribunal twice following the first decision being set aside for error of law by the Upper Tribunal. In these circumstances and where, aside from the point raised in the second ground of appeal, there is no substantive challenge to the main findings of fact, I am of the preliminary view that it would be appropriate to preserve the finding that the

Appellant is a member of the MDC and active in ZHRO as set out in paragraph 43 of the decision. The remaking of this appeal would therefore be on the relatively narrow issue of whether as such, the Appellant would be at real risk of persecution on return to Zimbabwe, which can appropriately be determined in the Upper Tribunal. However, the parties are at liberty to make representations within 14 days as to what if any facts are to be preserved and the future disposal of this appeal; further to which directions will be given for the same.

30. Separately, although not specifically raised as a ground of appeal, the notice of decision given by the First-tier Tribunal is on its face defective and would need to have been set aside in any event. The notice of decision stated:

*“59. The appeal is allowed for the maintenance of refugee status under the 1951 Convention.*

*60. The Deportation Order is revoked.”*

31. In accordance with Part V of the Nationality, Immigration and Asylum Act 2002, a person has a right to appeal against the refusal of a protection and /or human rights claim, or the revocation of a person’s protection status and only on the grounds set out in section 84, for present purposes, that removal of the Appellant from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention and/or would be unlawful under section 6 of the Human Rights Act 1998. The appeal should therefore be allowed or dismissed only on these grounds. The statement that the appeal should be allowed for the maintenance of refugee status under the 1951 Convention goes beyond this and does not make sense in circumstances where this Appellant has never been granted refugee status, it is not and never has been a revocation case. Further, the First-tier Tribunal has no power to revoke a Deportation Order, that is a matter for the Respondent upon implementation of a decision under appeal.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

### **Directions**

The parties are at liberty, but are not required, to make written submissions as to the future disposal of this appeal within 14 days of the date on which this decision is promulgated.



**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  
2019



Date 7<sup>th</sup> October

Upper Tribunal Judge Jackson