**INNER HOUSE, COURT OF SESSION**

**[2014] CSIH 47**

**Lady Dorrian** **XA148/13**

OPINION OF LADY DORRIAN

in the application for leave to appeal

By

EN

Applicant;

Against the decision of the Upper Tribunal (Immigration and Asylum Chamber)

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Act: Bovey QC et Winter; Drummond Miller LLP for Peter G Farrell, Glasgow**
**Alt: McIlvride; Office of the Advocate General**

28 May 2014

[1] The applicant is a Zimbabwean national whose claim that, if she were to be returned to that country, she would be at risk of persecution or serious harm because of her support for the MDC, was rejected by the First Tier Tribunal as incredible. Prior to leaving Zimbabwe she had been living in Harare, although her original home was in the area of Gutu. At the time of the hearing, the general violence of the situation in Gutu was such that it was conceded by the Home Office that it was not a place to which returnees could reasonably be sent. However, the First Tier Tribunal concluded that the applicant could safely be returned to Harare. Moreover, she would be able to go to South Africa, a country of which her partner was a national.

[2] The First Tier Tribunal accepted that the applicant might have been a member of DMC in the late 1990's but decided that her knowledge of the party was so vague, and her lack of active support for the party so apparent that even if she had been a member, her profile would be so low that she would not be at risk. In her asylum interview the applicant denied active support of the party and as the First Tier Tribunal noted that on her own admission she did not have a profile in the party (para 63). The First Tier Tribunal noted that prior to leaving Zimbabwe she had lived in Harare for 6 years, without incident, and had returned to her original home area of Gutu on 3 occasions, also without incident.

[3] In arguing that she could not return to Harare, her representative put before the First Tier Tribunal a report dated November 2011 from Asylum Research Consultancy (ARC) which the First Tier Tribunal was told is a "new organisation established in October 2012. ARC was established to provide country information research allegedly to support asylum claims and to undertake research, advocacy and training to improve the quality of refugee status determinations." The report placed particular emphasis on information regarding violent incidents in Harare, the vulnerability of women, and the lack of support for working women, which was said to post-date, and displace, the country guidance contained in the case of *EM & Ors (Returnees) Zimbabwe CG* [2011] UKUT 98.

[4] On appeal, the Upper Tribunal decided that although *EM* had been superseded by the case of *CM (EM Country Guidance; Disclosure) Zimbabwe CG* [2013] UKUT 00059, the country guidance in *EM* remained valid, having been altered only very slightly in *CM*. It also concluded that the ARC report did not displace that guidance.

[5] The applicant seeks leave to appeal against that decision, on two broad grounds: first, that the country guidance has indeed been superseded by the ARC report; and secondly, that both tribunals failed to apply the correct test for internal relocation.

**Submissions for the applicant**

[6] Recognising that the applicant must satisfy the court that the proposed grounds of appeal raised an important point of principle or that there was some other compelling reason for the appeal to proceed, counsel submitted that two points of principle were raised in the case, first, whether the country guidance in *EM* was still valid at the time of the hearing; and secondly, whether harshness was part of the internal relocation test.

[7] He submitted that the country guidance in *EM* was contradicted by the ARC report, that the First Tier Tribunal did not properly consider that report, and that the Upper Tribunal had erred in law in concluding otherwise. The ARC report in a number of places contradicted the country guidance on risk contained in *EM*, and contained a wealth of material on subject of reasonableness which that case did not address. The matter was not dealt with by the First Tier Tribunal and was disregarded expressly by the Upper Tribunal.

[8] As to the issue of the internal relocation, the application of a test that it would be unreasonable or unduly harsh for someone to relocate was sanctioned by high authority but para 3390 of the Immigration Rules referred only to reasonableness. This issue reflected a conflict between the Refugee Convention and the Qualification Directive. In fact the tribunals here had applied neither test. They had applied a test of risk, applicable only to the asylum question. At para 78, the First Tier Tribunal had found the applicant not to be credible, but it had recorded that "although she may be a member or supporter of MDC, she had failed to demonstrate she would be at any particular risk if she were to be returned to Zimbabwe". The First Tier Tribunal was accordingly applying the risk test to internal relocation, and neither there or anywhere else did it consider the test of reasonableness, or even harshness. The finding that the applicant may be a member of MDC, giving her even a low profile, was relevant because the ARC report indicated that supporters of MDC were at risk. The Upper Tribunal at para 39 appeared to rewrite the factual basis upon which the First Tier Tribunal proceeded, recording that the applicant "is not and never was an active MDC member, she is not political" and that "She was never known as someone who opposed ZANU-PF", whereas by virtue of membership of MDC she did oppose ZANU-PF. The Upper Tribunal judge accepted (para 39) that the applicant could not go to Gutu, then cast doubt by referring to her having been there 3 times when living in Harare. To say that she could return to Harare, based on the criteria in *EM*, was to say that she would be safe there, not that it would be reasonable for her to return there.

[9] In the circumstances of this case, nothing turned on the fact that counsel had expressly invited the Upper Tribunal to apply the test of whether it would be unreasonable or unduly harsh for the applicant to return, since neither tribunal had applied that test.

[10] It had been submitted in the note of argument for the respondent that this was not in any event a case of internal relocation since Harare had been the applicant's home when she resided in Zimbabwe. That was not the factual position before the First Tier Tribunal, where repeatedly in her evidence she referred to attacks on her home (in Gutu) and since this was a matter of fact, the case should proceed on the basis that Gutu was her home.

[11] The First Tier Tribunal and the Upper Tribunal both found that as an alternative to Zimbabwe, she could go to South Africa. This was an irrelevant consideration because it was

Zimbabwe to which the respondent sought to send her, and if she would be at risk of persecution there she qualified as a refugee, even if there were other places in which she could safely live.

[12] There was in any event another compelling reason for the appeal to be heard, based on the combination of errors in law, failure to consider the ARC report and the poor quality of reasoning of both tribunals which meant that the basis upon which they proceeded was not clear.

[13] Counsel recognised that his submissions were somewhat narrower than the grounds raised in the petition but advised that were leave to be granted the only grounds to be advanced would be those he had addressed.

**Submissions for the Respondent**

[14] Counsel for the respondent submitted that the original decision had been made on two alternative grounds. First, that the applicant "could live as before in Harare" (Para 36 Upper Tribunal) and, alternatively, that she could go to South Africa with her partner. It was clear that the conclusion was that she was not at risk of persecution or serious harm, and, in any event, as someone not in need of international protection, it was open to her to go with her partner to South Africa and live there.

[15] The starting point was the conclusion that she would not face a real risk of persecution if she returned to Zimbabwe, and in particular to the place where she previously lived, namely Harare. The question of internal relocation did not truly arise. Although the term internal relocation had been used in the determination, this court was not bound to treat the case as one of internal relocation if the factual findings dictated otherwise.

[16] In any event, insofar as the case was treated as one of internal relocation, the Upper Tribunal was right to consider that on a fair reading of the whole of the First Tier Tribunal determination, including the reference to the materials taken into account, it was plain that they had decided that there was no basis to conclude that it would be unreasonable or unduly harsh for the applicant to return to Harare. There was no error in law for this court to consider.

[17] The ARC report was referred to expressly by the First Tier Tribunal judge as part of the materials she had taken into consideration, and was expressly dealt with by the Upper Tribunal at para 41. In these circumstances, it could not be said that the First Tier Tribunal failed to have regard to it, nor that the Upper Tribunal erred in reaching the view that the report did not require any reassessment of the existing country guidance.

**Discussion and decision**

[18] The applicant's claim that ZANU-PF activists had repeatedly come to her father's home looking for her and uttering threats, assaulting members of the family who refused to disclose her whereabouts, and eventually burning down some of their homestead, was dismissed as fabricated. That adverse credibility finding effectively disposed of her claim based on asylum or risk of serious harm on account of political views.

[19] It was at this point that matters became slightly complicated. Before coming to the UK the applicant had spent the previous 6 years living in Harare. One might expect Harare to be the place to which she would return and that therefore no question of internal relocation would arise. How, then, did it come about that the First Tier Tribunal, and the Upper Tribunal, in addressing the question of the applicant's return, used the phrase "internal relocation"? The answer lies partially in the approach taken by the Home Office, and partially in that taken by the applicant herself. In the original refusal letter the Home Office conceded that the general situation arising in Gutu at the time meant that it would not be a safe place for her to return. The letter then considered return to Harare and concluded that this was an option. At the time of the hearing, the applicant maintained that if she were to return, she would be expected to return to Gutu (why that should be was never explained) which was impossible, as the Home Office conceded. As a result the First Tier Tribunal, and the Upper Tribunal, considered whether she could return to Harare, but also addressed that question in terms of relocation. It may be less than clear at times whether the tribunal was looking at this as a simple issue of return to Harare or of relocation but as I shall indicate, that does not affect the ultimate conclusion. The history narrated in this paragraph not only explains the approach taken by the First Tier Tribunal and the Upper Tribunal, it explains the particular importance which both placed on the fact that she had lived and worked in Harare for a period of 6 years prior to coming to the UK.

[20] In addressing the question of where a person's home was, one should bear in mind the guidance in *EM,* that:

> 219 " Before analysing the scope for those at real risk of persecution in their home area to relocate to another part of Zimbabwe, it is necessary to clarify what is meant by "home area" in this context. In common with many other parts of Africa and, indeed, other parts of the developing world, Zimbabwe has seen a process of urbanisation, whereby persons from rural areas have migrated to the cities, for the purpose of seeking work.....
> 220 A person who has migrated from the countryside to city, or whose forebears did so, may well look on his or her rural place of origin as their "home area". ... For our purposes, however, in determining whether a person is entitled to asylum or other international protection, a person's home area must be established as a matter of fact. Someone who, for example, has for years before leaving Zimbabwe made his or her home in Harare must have a claim to international protection assessed by reference to whether that person is at real risk of persecution in Harare; and, if so, whether he or she can reasonably be expected to relocate to another part of Zimbabwe, where no such risk exists and where it would not be unduly harsh to do so ..... The fact that the person concerned feels an attachment to a rural area, and even has relatives living there, does not mean that that area falls to be treated as the home area for the purposes of determining entitlement to international protection."

[21] The applicant did not in fact maintain that Gutu was still her home: rather she spoke of attacks on her family home or homestead, but it was plain that she had made her life in Harare, which had become her home. If the place to which the applicant would return would be Harare, then in fact no question of internal relocation as it is properly understood did arise, and despite the use of the term "internal relocation" it seems to me that the First Tier Tribunal , having regard to the emphasis which it placed on the fact that she had lived there for 6 years, with only 3 visits to Gutu during that time proceeded, primarily on the basis that the applicant was simply returning to the place which had been her home, rather than that she was relocating internally. This is also reflected in the phrase used by the Upper Tribunal that she could live in Harare "as before".

[22] Even if I am wrong in my reading of the determinations in this regard, and it could be said that either tribunal did treat the matter purely as a question of internal relocation, they did so only under reference to a question of whether it was unreasonable or unduly harsh for the applicant to return to Harare, applying the test they were specifically invited to apply by counsel for the applicant. They can hardly be criticised for doing so. It was argued that

both tribunals tended to conflate the issue of potential risk in Harare with that of whether it would be unreasonable or unduly harsh for the applicant to return there, but in my view that is not a fair criticism. Once the claim for asylum or humanitarian protection had been disposed of, both tribunals were simply addressing the question of return as one of where it would be reasonable for the applicant to go. In those paras where the First Tier Tribunal and Upper Tribunal were considering the question of risk, for example, First Tier Tribunal, para 78, Upper Tribunal, para 43, they were considering it in the proper context of whether the applicant was in need of asylum or international protection. They were correctly addressing that issue and were not conflating that test with any question of internal relocation.

[23] Turning to the question of whether the country guidance in *EM* has been displaced by the ARC report, the Upper Tribunal considered that report in detail and concluded that it did not do so. The Tribunal noted that the instances of ill treatment of people in Harare referred to in the report related to those known to support MDC. It is clear that the Upper Tribunal carefully examined both the terms of the ARC report and the cases of *EM* and *CM*, and considered whether the nature and content of the report was such as to enable it to conclude that the guidance in *EM* was no longer valid. It decided that although the ARC report flagged up in detail some of the concerns identified in *EM* it did not displace the general conclusions in*EM*.

[24] Examination of the reports of ill treatment in the ARC report confirm that they are submitted under the heading "Treatment of persons perceived to support the MDC in Harare". The first 6 pages of the report are thus not relevant to the position of the applicant and the Upper Tribunal was correct to say, at least in this regard, that no further analysis of the report was needed. The country guidance in *EM* as clarified in *CM* reflects the position as at January 2011. The information in the ARC re militia outposts is taken from the end of January 2011, May 2011 and one report in the October of that year. As to the remaining matters of relevance, the economic situation and the role of women, the report elaborates on the position but does not contradict the general evidence contained in *EM*. In my view this is a very uncertain, and inadequate, basis upon which to displace the detailed country guidance arising during a similar timeframe and issued by a specialist tribunal. I fully recognise that the validity of country guidance may change as time passes and that in situations where there has built up over time a body of evidence contrary to the position as

expressed in the country guidance, a tribunal or court may be justified in departing from it. This is not such a case.

[25] The First Tier Tribunal recorded in detail the submissions made in respect of the ARC report, but proceeded on the basis that it was the country guidance in *EM* which applied. That is correct on law and it cannot be concluded from the fact that the report was given no detailed consideration in its reasoning that the First Tier Tribunal must have failed to have regard to it, or the submissions relating to it. Rather, as the Upper Tribunal noted, it suggests that the First Tier Tribunal found that the report impacted little on the applicant's case.

[26] It must be borne in mind that the applicant's account based on political affiliation has been rejected as incredible. Moreover, other aspects of her evidence, in particular the account she gave regarding the history of her asylum application, the reasons for failing to apply between 2002, when her leave to remain expired, and 2011, and the explanations for lack of activity in relation to a 2005 claim for discretionary leave to remain, were all rejected. The First Tier Tribunal bluntly stated:

> "Taking the evidence in the round, the Appellant has developed a story which is designed to bolster and manufacture an asylum claim."

The applicant has no connection with the UK. She has no family here. Her partner is a South African national whose own claim for asylum has been rejected. The applicant is an intelligent woman who has been to college and who worked in Harare as a nanny prior to coming to the UK. The Upper Tribunal noted that the First Tier Tribunal Judge "..has referred to the unemployment in Zimbabwe and the violence there but she still found that the applicant on return will be no more at risk than any other woman in Harare with no political profile." Her claim to be at risk because of political affiliation was roundly repelled as not based on credible evidence. At the time of the original hearing, her child had not been born, and there was no separate article 8 issue for the First Tier Tribunal to consider. The comment that the applicant could in any event go to South Africa was made in the context of a conclusion that she was not a person in need of international protection and the criticism made of the tribunals on this point is without foundation.

[27] A fair reading of the papers in this case suggests that the First Tier Tribunal, having rejected the substance of the applicant's claim based on political affiliation, concluded that she could return to Harare, a course which would be neither unreasonable nor unduly harsh. There was material before it which allowed such a view to be reached, and it does not

appear arguable, despite the points made regarding, for example, the ARC report, that material and relevant information was omitted or not considered. In reality, much of what the applicant wishes to argue is based on a challenge to the way in which the First Tier Tribunal, and the Upper Tribunal, assessed the material before it. As was noted in *MA (Somalia) v SoSHD* [2011] 2 All ER 65, a court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the tribunal's assessment of the facts. The proposed grounds of appeal do not in my view give rise to any important point of principle or practice and there is no other compelling reason for the court to hear the appeal. The application will therefore be refused.