Asylum and Immigration Tribunal

HS (returning asylum seekers) Zimbabwe CG [2007] UKAIT 00094

THE IMMIGRATION ACTS

Heard at Field House
23rd – 26th July 2007

Before

Mr C. M. G. Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Storey
Senior Immigration Judge Southern

Between

HS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Henderson, Counsel instructed by the Refugee Legal Centre.
For the Respondent: Mr S. Kovats, Counsel instructed by the Treasury Solicitor.

1. *Failed asylum seekers do not, as such, face a risk of being subjected, on return to Zimbabwe, to persecution or serious ill-treatment. That will be the case whether the return is voluntary or involuntary, escorted or not.*

2. *The findings in respect of risk categories in SM and Others (MDC – Internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100, as adopted, affirmed and supplemented in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 are adopted and reaffirmed. The Tribunal identifies one further risk category, being those seen to be active in association with human rights or civil society organisations where evidence suggests that the particular organisation has been identified by the authorities as a critic or opponent of the Zimbabwean regime.*

3. *The process of screening returning passengers is an intelligence led process and the CIO will generally have identified from the passenger manifest in advance, based upon such intelligence, those passengers in whom there is any possible*

interest. The fact of having made an asylum claim abroad is not something that in itself will give rise to adverse interest on return.

4. *The Tribunal adopts and reaffirms the findings in AA in respect of the general absence of real risk associated with any monitoring of returnees that might take place after such persons have passed through the airport and returned to their home area or re-established themselves in a new area.*

5. *Country conditions have continued to deteriorate but are not generally such as to bring about an infringement of Convention rights for returnees or to require the grant of humanitarian protection.*

DETERMINATION AND REASONS

Introduction and scope of reconsideration

1. In this determination the Tribunal reconsiders the country guidance given in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 in the light of the judgment of the Court of Appeal in AA (Zimbabwe) v SSHD [2007] EWCA Civ 149 and the additional evidence the parties have chosen to submit.

2. The appellant, who was born on 23rd June 1965, is a citizen of Zimbabwe. She arrived in the United Kingdom in May 2002 and was granted leave to enter as a visitor for six months. Just before that leave expired she applied unsuccessfully for leave to remain as a postgraduate (medical) doctor. She then applied for leave to remain as a highly skilled migrant. When that application was refused she claimed asylum. This was on the basis that she was at risk on return to Zimbabwe because she had attracted adverse attention from the authorities while working at a state hospital both by participating in a strike and by taking photographs of the injuries of a patient who had been attacked by government supporters and because of her father's claimed involvement with the MDC.

3. Reconsideration has been ordered of the decision of the immigration judge who, by a determination dated 31st March 2006, allowed the appellant's appeal against the decision of the respondent made on 13th February 2006 that the appellant should be removed from the United Kingdom after her asylum and human rights claims had been refused.

4. The immigration judge rejected as untrue the whole factual basis of the appellant's claim to be at risk on return to Zimbabwe and, at the first stage reconsideration hearing on 1st March 2007, the appellant's representatives did not seek to challenge those findings. The immigration judge gave clear and cogent reasons for disbelieving the appellant's evidence. She referred, as she was bound to, to the then binding country guidance case AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 CG ("AA(1)") and said:

> "Had it not been for the country guidance case law that binds me I would have dismissed the appellant's appeals."

5. At the first stage reconsideration hearing it was agreed that the immigration judge was wrong in law to allow the appeal on this basis. AA(1) was itself found by the Court of Appeal to be wrongly decided: AA and LK v SSHD [2006] EWCA Civ 401. This means that any appeal allowed solely in reliance upon it is also materially wrong in law and cannot stand. See: OM (AA(1) wrong in law) Zimbabwe CG [2006] UKAIT 00077.

6. That being the case the decision of the immigration judge to allow the appeal has been set aside and the Tribunal must substitute a fresh decision to allow or dismiss the appeal. But the Tribunal has directed, with the agreement of the parties at the first stage reconsideration hearing, that there is no reason at all to disturb the unchallenged findings of fact made by the immigration judge and set out between paragraphs 13 and 18 of her determination, the effect of which is summarised above. (The full text of the Tribunal's decision at the first stage of this reconsideration is set out in the first annex to this determination.) This means that the appellant would be returned to Zimbabwe as a person with no profile such as to attract attention other than that, having made clear that she is unwilling to return voluntarily, she would be identifiable upon arrival at Harare airport as someone who had been forcibly removed from the United Kingdom. Although such deportees will not be identified as failed asylum seekers, the respondent accepts that they should not be expected to lie about having made a claim for asylum in the United Kingdom if asked about this on return.

7. At the commencement of the hearing before us Mr Henderson, who appeared for the appellant, sought to widen the scope of the reconsideration. This was on the basis that the appellant's brother had appealed successfully against a decision that he should be removed from the United Kingdom as an illegal entrant after his asylum claim had been refused. His claim was based in part upon the assertion that his father had been an MDC activist well known in his area for holding MDC meetings at the family farm, something that the immigration judge who allowed this appellant's appeal found not to be true. As that much had been accepted by the adjudicator who allowed the brother's appeal, Mr Henderson submitted that the appellant should be allowed to reopen her claim to be at risk on return on account of the family profile of support for the MDC.

8. Mr Kovats, for the respondent, resisted this application. It was, he submitted, far too late to widen the scope of the reconsideration as directed by the Tribunal with the agreement of the parties at the earlier hearing. In any event, the fact that the appellant's brother had persuaded an adjudicator that his father had suffered persecution on account of his activities on behalf of the MDC did not establish that the immigration judge who dismissed the appellant's appeal was wrong to reject a similar claim made by the appellant.

9. The Asylum and Immigration Tribunal (Procedure) Rules 2005, as amended, sets out clearly the procedure to be adopted by a party seeking to introduce fresh evidence. Paragraph 32 of those Rules deals with the evidence to be considered upon reconsideration of an appeal:

Evidence on reconsideration of appeal

32. - (1) The Tribunal may consider as evidence any note or record made by the Tribunal of any previous hearing at which the appeal was considered.

(2) If a party wishes to ask the Tribunal to consider evidence which was not submitted on any previous occasion when the appeal was considered, he must file with the Tribunal and serve on the other party written notice to that effect, which must -

(a) indicate the nature of the evidence; and

(b) explain why it was not submitted on any previous occasion.

…

10. Regard is to be had also to what is said in the Asylum and Immigration Tribunal Practice Directions:

14.1 Subject to paragraph 14.12, where an appeal has been ordered under section 103A to be reconsidered, then, unless and to the extent that they are directed otherwise, the parties to the appeal should assume that the issues to be considered at the hearing fixed for the reconsideration will be whether the original Tribunal made a material error of law (see rule 31(2)) and, if so, whether the appeal should be allowed or dismissed, by reference to the original Tribunal's findings of fact and any new documentary evidence admitted under rule 32 which it is reasonably practicable to adduce for consideration at that hearing.

…

14A.3 A party who wishes the Tribunal on reconsideration to consider any evidence that was not before the original Tribunal must indicate in the notice under rule 32(2) whether the evidence is sought to be adduced:-

(a) in connection with the issue of whether the original Tribunal made a material error of law; or
(b) in connection with the substitution of a fresh decision to allow or dismiss the appeal under rule 31(3), in the event of the original Tribunal being found to have made a material error of law.

11. This was considered by the Court of Appeal in DH (Serbia) and others v SSHD [2006] EWCA Civ 1747:

22. As far as what has been called the second stage of a reconsideration is concerned, the fact that it is, as I have said, conceptually a reconsideration by the same body which made the original decision, carries with it a number of consequences. The most important is that any body asked to reconsider a decision on the grounds of an identified error of law will approach its reconsideration on the basis that any factual findings and conclusions or judgments arising from those findings which are unaffected by the error of law need not be revisited. It is not a rehearing: Parliament chose not to use that concept, presumably for good reasons. …

23. It follows that if there is to be any challenge to the factual findings, or the judgments or conclusions reached on the facts which are unaffected by the errors of law that have been identified, that will only be other than in the most exceptional cases on the basis of new evidence or new material as to which the usual principles as to the

reception of such evidence will apply, as envisaged in rule 32(2) of the Rules. It is to be noted that this rule imposes the obligation on the parties to identify the new material well before the reconsideration hearing. This requirement is now underlined in the new Practice Direction 14A. This sets out in some detail what is required in such a notice.

12. The appellant's brother, whose appeal had been allowed in March 2004, well before the date of the appellant's appeal was heard by the immigration judge two years later in March 2006, could have been called to give evidence at the appellant's appeal but he was not. As Mr Henderson accepted, there has been no notice as required by Rule 32. There have been two directions hearings since the first stage reconsideration hearing but no request was made to widen the agreed scope of the reconsideration hearing that was to follow.

13. A formal application to widen the scope of the reconsideration was made to the Tribunal for the first time only on the first day of what had been set down as a five day hearing. Mr Henderson made no such application, nor did he give any indication that he intended to, when he appeared for the appellant, instructed by the Refugee Legal Centre, at the directions hearing on 14th May 2007. At that hearing it was with the agreement of both parties that the Tribunal reaffirmed the direction that the issues before the Tribunal were to be determined on the basis of the facts as found by the immigration judge. It is now said to be a failure on the part of the appellant's former representatives that the brother was not called to give evidence earlier, but this has not been put to them for comment as required by BT (Former solicitors' alleged misconduct) Nepal [2004] UKIAT 00311.

14. The findings of fact made by the immigration judge are unaffected by the error of law that has led to the need for a reconsideration of this appeal. In those circumstances, following DK (Serbia), those findings ought not to be revisited.

15. There are other compelling reasons not to depart from this approach. Generally, where there is an earlier determination of a person other than the appellant in respect of which there is an overlap of the factual basis of the claim, regard should be had to that earlier determination as a starting point in the assessment of the issues resolved in that earlier determination. This is the effect of Deevaseelan [2002] UKIAT 00282, TK (Georgia) [2004] UKIAT 00149 and Ocampo v SSHD [2006] EWCA Civ 1276. On the other hand it is clear from Ocampo that there is no concept of *res judicata* or issue estoppel in asylum appeals. But the adjudicator who allowed the appeal of the appellant's brother did so on evidence that was significantly different from that put before the immigration judge who rejected as untrue the factual account of this appellant.

16. Since the date of the hearing the Court of Appeal has explained and followed Ocampo in AA (Somalia) & AH (Iran) v SSHD [2007] EWCA Civ 1040. This makes clear that, where there is an earlier decision relating to another person but in respect of which there is a material overlap of evidence, findings of fact upon issues common to both should not be revisited unless there is good reason to do so. The Court of Appeal's prospective hearing of this case was referred to at a preliminary hearing in respect of this appeal that took place on 4th May 2007.as potentially having relevance to this appeal. Although this was heard by the Court of Appeal on 18th July 2007 the judgement did not become available until 25th October. We have received from the appellant's representatives a letter dated 2nd November 2007 in

which their submissions as to the effect of AA and AH are set out. We have had regard to those submissions. We considered whether we should seek further submissions from the parties in respect of AA & AH but decided not to. For the reasons that follow, this would not assist the appellant and would only serve to delay further the promulgation of this determination.

17. It is of fundamental importance to keep firmly in mind that we are concerned here not simply with an appeal but with the reconsideration of an appeal. The reconsideration is necessary because it was an error of law for the immigration judge to apply flawed country guidance to his unchallenged (at least until recently) findings of fact. Importantly, the immigration judge, in reaching those findings, had taken account of the fact that the appellant's brother, although he had not been called to give evidence, had been recognised as a refugee: see paragraph 9 of the determination.

18. Hooper LJ, in giving what was a dissenting judgement in AA(Somalia), set out what was said by the Tribunal below in AA:

> "… and the fact that a previous court or other decision-maker has reached a view on facts which are in issue in the present appeal is not of itself any evidence as to those facts. On the other hand, in the general interests of good administration, it is probably true to say that decisions should not be unnecessarily divergent. It is that principle of good administration which, so far as we can see, provides the sole basis in logic or on authority for saying that the result of the previous litigation may be relevant in the present appeal.
>
> What then is its relevance? It can surely only be this: that the previous decision can be taken as establishing the issue in question unless there is any reason not to take it as establishing that issue in question. It has no evidential effect. It does not even give rise to a presumption. It is simply a starting point. That is, indeed, what was decided in TK, as we have seen. ... [T]he old decision remains, but only as long as there is no reason for displacing it."

19. But here, as we have explained, there are good reasons for displacing the earlier findings. Further, we are reconsidering the decision of the immigration judge and not hearing the appeal afresh. Carnwath LJ said in AA (Somalia) that the applicable principles:

> "… reflect the well-established principle of administrative law that "persons should be uniformly treated unless there is some valid reason to treat them differently."

20. We heard from Mr Walker, who was the only witness called by the respondent to give oral evidence and whose evidence we consider in detail below, that the respondent does not agree with the decision of the adjudicator who allowed the brother's appeal. He said that leave should have been sought to appeal to the IAT because that determination is materially legally flawed. But leave was not sought. The respondent's present view of the validity of the adjudicator's decision plays no part in our decision on the scope of the reconsideration now before us.

21. The appellant's brother arrived in the United Kingdom as long ago as December 1997. He has not returned to Zimbabwe since then. The MDC did not come into existence until 1999, (even though the appellant claimed at her interview that her father was a member in 1998). The appellant's brother has described becoming an

active MDC supporter in the United Kingdom. He has no first hand knowledge of the activities the appellant says her father engaged in on behalf of the MDC. It is readily apparent from the evidence in and the determination of the appeal of the appellant's brother, which the appellant has chosen to put before us as an exhibit to her brothers statement dated 25th June 2007, that an examination of that material and a comparison with the appellant's evidence demonstrates significant contradictions and inconsistencies. These relate mainly to the chronology of events in respect of which, had they occurred, it would be reasonable to expect a consistent account to be given.

22. But it is not on this basis that we rejected Mr Henderson's application to broaden the scope of the reconsideration as identified at the first stage of the reconsideration process, but for all the reasons set out above.

Issues

23. At the directions hearing on 14th May 2007 it was agreed that the issues to be determined are whether, on the basis of the findings of fact made by the immigration judge and set out between paragraphs 13 and 18 of the determination dated 31st March 2006, upon return to Zimbabwe: (i) the appellant faces a well founded fear of persecution for a reason recognised by the Refugee Convention; or (ii) the appellant faces a real risk of being subjected to serious harm so that she qualifies for the grant of humanitarian protection; or (iii) the appellant faces a real risk of being subjected to ill treatment such as to infringe her rights under Article 3 of ECHR.

24. The findings of fact made by the immigration judge and preserved for the purposes of reconsideration are that this appellant has no possible adverse personal profile other than as a consequence of her failed asylum claim. Thus, the two real issues to be addressed are whether the appellant would be at risk on return on account of having made an unsuccessful claim for asylum in the United Kingdom, whether her return was voluntary or involuntary and, secondly, whether the general country conditions are themselves sufficiently poor as to enable the appellant to resist removal to Zimbabwe on that account alone.

25. At a preliminary hearing on 14th May 2007 the Tribunal made an agreed direction in relation to the general issue of risk on return in the following terms:

> "In terms of evidence the Tribunal takes as its starting point the record and summary of evidence as set out in the determination of the Tribunal in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 ("AA(2)"), read in the light of the decision of the Court of Appeal in AA (Zimbabwe) v SSHD [2007] EWCA Civ 149."

26. The Tribunal has made an order under section 11 of the Contempt of Court Act 1981 that prevents the disclosure of the identity of most of the sources of the material which we take into account and to which we refer in this determination. Where we refer to a witness or an organisation by name that is because they have not sought anonymity and are content to be identified.

History of the *AA* litigation

27. A moratorium on enforced returns to Zimbabwe in respect of all those having no right to remain, including those who had not made an asylum claim, was introduced in January 2002 after a newspaper report of ill treatment of a failed asylum seeker removed to Zimbabwe. Removals recommenced on 16th November 2004.

28. In a determination promulgated on 11th May 2005 the Tribunal assessed the evidence relating to the treatment of asylum deportees on arrival in Zimbabwe, as well as identifying risk categories for returnees to Zimbabwe in general, in SM and Others (MDC – Internal flight – risk categories) Zimbabwe CG [2005] UKIAT 00100. The Tribunal found, at paragraph 42, that:

> "… returnees are regarded with contempt and suspicion on return and do face a very hostile atmosphere. This by itself does not indicate that all returnees are at real risk of persecution…"

And at paragraph 51(i) the Tribunal concluded that:

> "There is no general risk for failed asylum seekers of a breach of article 3 as a result of the current hostility towards such returnees."

29. But on 7th July 2005 the respondent suspended the involuntary return of failed asylum seekers once more after reports appeared in the press of such returnees being mistreated by the authorities in Zimbabwe and after judicial review proceedings were brought in the High Court. Those proceedings were stayed until the Tribunal gave country guidance in AA(1).

30. The appellant in AA(1) was also a person who was found to have no relevant profile on return to Zimbabwe other than that he had been refused asylum after putting forward a claim to be at risk in Zimbabwe that was found to be untruthful. Before the Tribunal he relied solely on the fact of having made an unsuccessful asylum claim. The Tribunal made clear, at paragraph 36, how it viewed such a claim:

> "It will be seen at once that his argument is distinctly unattractive. This country, like any other signatory to the Refugee Convention, takes a pride in giving proper shelter to those who seek its protection having fled from persecution, or fear of persecution, elsewhere. The Appellant is not such a person. If his argument is successful, there is a risk that any Zimbabwean can obtain the protection of the Refugee Convention simply by coming to the United Kingdom and claiming asylum, even though there is no merit at all in his claim. If the Appellant's claim is right, residence as a refugee in the United Kingdom and all the benefits, whether by standard of life, employment, social security, or health services, which such residence offers are potentially open to any Zimbabwean who could manage to get here and who is prepared to indulge in a cynical manipulation of the asylum system. No court in any country that is a party to the Refugee Convention would wish to see the Convention abused in that way."

31. But, in allowing the appellant's appeal, the Tribunal recognised that in assessing risk on return the appellant's motives in making his claim were immaterial. The question to be addressed was simply whether the evidence established the existence of such a real risk. The Tribunal concluded that:

> "… on the evidence before us the process by which the United Kingdom authorities enforces the involuntary return of rejected asylum seekers to Zimbabwe exposes

them to a risk of ill-treatment at the hands of the CIO [Central Intelligence Organisation]."

32. The Court of Appeal allowed the respondent's appeal against that decision: AA and LK v SSHD [2007] EWCA Civ 401. This was because the Tribunal was said to have been wrong to say that the body of evidence all went one way and wrong also to say that the respondent had not relied on any evidence that individual Zimbabwean returned failed asylum seekers had not been ill treated. The Tribunal was said also to have misapplied a concession made on behalf of the respondent as to the reason for any persecution that might occur. The Tribunal, although applying the decision of the Court of Appeal in Mbanza v SSHD [1996] Imm AR 136, upholding R v IAT ex parte Senga (unreported, 9 March 1994) upon which it regarded itself as bound, was found to have erred also in not making any finding as to whether the appellant, should he pass through the airport, would be at risk on return to his home area in Zimbabwe. The Court of Appeal explained that an appellant is not a refugee if he was able to make a safe return voluntarily even if he would be at risk if returned forcibly. This was because, in such circumstances, he was not outside his country of nationality owing to a well founded fear of persecution but because he chose not to return to it.

33. At a hearing commencing on 3rd July 2006 the Tribunal considered AA's case afresh. Its determination was promulgated on 2nd August 2006 as AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 ("AA(2)"). The Tribunal had before it all the evidence that was put before the Tribunal in AA(1) and a good deal more besides. The Tribunal heard oral evidence from a country expert, Professor Terence Ranger, three witnesses who had worked at the old airport at Harare before it was replaced by a newer, larger one and two witness called by the respondent who were able to give evidence about the respondent's policy and procedures for enforcing removals of Zimbabwean asylum seekers whose claims had failed. The Tribunal had also a large array of documentary evidence about country conditions in Zimbabwe and the evidence of a number of NGOs who may or may not be expected to be aware of whether there was systematic ill treatment of deportees from the United Kingdom.

34. The Tribunal in AA(2) carried out a detailed analysis of the evidence relating to 39 individual returnees and then set out its conclusions as follows:

"

244. A person who is returned involuntarily to Zimbabwe having made an unsuccessful asylum claim in the United Kingdom does not face on return a real risk of being subjected to persecution or serious ill-treatment on that account alone. That is so whether or not the removal is escorted. Each case must be considered on its own facts. We reaffirm the country guidance in SM and Others (MDC – internal flight-risk categories) CG [2005]UKIAT 00100. The evidence before us demonstrates that those at risk upon return to Zimbabwe continue to fall into the risk categories identified and set out in SM. This is subject to what we say about those whose military history discloses issues that will lead to further investigation by the security services upon return to Harare Airport and those in respect of whom there are outstanding and unresolved criminal issues.

245. There continue to be three flights a week from the United Kingdom to Harare Airport. These are generally fully booked with ordinary travellers who pass freely and without difficulty in and out of Zimbabwe. Anyone who is indistinguishable

from the ordinary traveller will not have any difficulty in passing through the airport. A person who has made an unsuccessful claim for asylum but who makes a voluntary return, with or without the assistance of an IOM reintegration package, will be indistinguishable from the ordinary traveller unless there is reason to believe that he will be identified on return as falling within one of the risk categories we have identified.

246. A person who has made an unsuccessful asylum claim and has exhausted his rights of appeal will still be able to arrange a voluntary return until he is detained for the purpose of removal. After he has been detained for removal his travel documents will be held by the airline staff even if the person being removed is co-operative and compliant.

247. All those returned involuntarily to Zimbabwe will be identified as deportees as the respondent has no plans to change the method of removal. This will mean that the returnee will either be escorted, in which case the escort will hand the passport over to the authorities at Harare Airport or, if not escorted, the travel documents will be retained by airline staff who will hand them over to the authorities at Harare Airport. Although the airline staff has discretion with regard to the travel documents, the evidence does not indicate that in any significant number of cases the deportee is allowed possession of the documents before disembarking.

248. All persons identified as deportees will be diverted for questioning by CIO officers who are required to produce a report in respect of all persons who have been forcibly removed to Zimbabwe from the United Kingdom, whether escorted on the plane or not. There is no indication that the authorities in Zimbabwe have any means to distinguish between deportees who have made an unsuccessful asylum claim in the United Kingdom and those who have been removed simply because they have no leave to remain.

249. The purpose of the initial interview is to establish whether the deportee is of any interest to the CIO or the security services. The deportee will be of interest if questioning reveals that the deportee has a political profile considered adverse to the Zimbabwean regime. Further interrogation away from the airport may also follow if enquiries reveal aspects of a military history to be followed up such as being absent without leave or being involved in military activities outside Zimbabwe. Also, the CIO will refer to the police any issues of outstanding criminal matters such as arrest warrants. There is no evidence that the fact alone of a past criminal conviction, as opposed to an unresolved allegation of criminal activity or an outstanding arrest warrant, will give rise to such an interest. There is also no evidence that the simple fact that a returnee has in the past served in the Zimbabwean army will prevent the passage of a returnee through the airport after this first stage enquiry.

250. If such a political or relevant military profile is suspected, or if there are outstanding criminal matters to be resolved, the deportee will be taken away by the relevant branch of the CIO for interrogation. The evidence does not suggest that the CIO has any interest in manufacturing or fabricating evidence to create suspicion that is otherwise absent.

251. This second stage interrogation carries with it a real risk of serious mistreatment sufficient to constitute a breach of article 3. If the reason for suspicion is that the deportee has a political profile considered to be adverse to the Zimbabwean regime that is likely to be sufficient to give rise to a real risk of persecutory ill-treatment for a reason that is recognised by the Refugee Convention. That will not necessarily be the case where the only matter of interest is a relevant military

history or outstanding criminal issues. Each case must be considered on its particular facts.

252. A deportee from the United Kingdom who, having been subjected to the first stage interview at the airport, is allowed to pass through the airport is likely to be the subject of some monitoring in his home area by the local police or the CIO. This monitoring may take the form of being required to report to the local police station for questioning or may be significantly lower key such that the subject may not even be aware of it. If nothing untoward is discovered the authorities will lose interest and the monitoring will cease. It may take some considerable time, certainly a period of months, before the monitoring ceases.

253. The objective evidence does suggest that the police and the CIO are capable of acting in a seriously abusive manner towards those they perceive to be dissident or in some way an enemy of the state but the evidence does not support the assertion that there is a real risk of persecutory ill-treatment for those who are being monitored solely because of their return from the United Kingdom.

254. The general country conditions are extremely difficult. There is some evidence that newcomers to an area, and not necessarily just newcomers from abroad, are watched and might attract some interest. That evidence does not establish a real risk that persecutory ill-treatment will follow as a result. There is no evidence of societal disapproval of those who have been abroad, whether to claim asylum or not. The returnee may or may not have a home to which he can return and relatives to whom he can turn for support. Very many Zimbabweans, perhaps most, have to deal as best they can with food shortages and other difficulties arising from the collapsed economy. Those difficulties will not generally be sufficiently severe to enable an appellant to rely upon article 3 to resist removal.

255. A failed asylum seeker can chose to return to Zimbabwe voluntarily, with or without the assistance of IOM and where he will face no real risk of harm because he will be indistinguishable from the ordinary traveller. It might be argued that a person may face a real risk of persecutory ill-treatment on an involuntary return to Zimbabwe because of what might emerge from the interview that would take place following an involuntary return but would not following a voluntary return. In those circumstances he will not be able to succeed in an asylum appeal unless he can demonstrate that a similar risk exists should he agree to return voluntarily. This was considered by the Court of Appeal in this case who said at paragraph 99 that:

> "…a person who can voluntarily return in safety to the country of his nationality is not a refugee, notwithstanding that on a forced return he would be at risk. Such a person is not outside his home State owing to a well-founded fear of persecution. Neither s 84(1)(g) of the Act of 2002 nor Article 33 of the Convention can begin to demonstrate the contrary, since neither enlarges the "refugee" definition; and a safe voluntary returnee is outside the definition."

256. The Court of Appeal did not deal with the question of whether a person who can voluntarily return in safety can rely upon article 3 to resist an involuntary return. It is not necessary, in order to decide this appeal, for us to address that either. It may be that such a person cannot succeed under article 3. He has chosen in those circumstances to expose himself to a claimed risk unnecessarily. It would be his decision to do so that would expose him to that risk and not the act of the United Kingdom in returning him compulsorily as a consequence of his refusal to return voluntarily. In any event, a refusal to exercise a voluntary return option, in the knowledge that the only alternative is a forced return, may be cogent evidence

that the returnee himself is satisfied that no such real risk exists on a compulsory return."

35. But the Court of Appeal has upheld part of the appellant's challenge to those conclusions and has ordered reconsideration to the limited extent indicated: AA (Zimbabwe) v SSHD [2007] EWCA Civ 149.

36. The Court of Appeal remitted AA(2) for further, limited, reconsideration because it considered that the Tribunal in AA(2) did not deal adequately with the evidence of two important witnesses, identified as witnesses 5 and 6 ("W5" and "W6"), these being the two witnesses who had worked with military intelligence, one of whom, W6, was based at the old Harare airport. Although neither had worked at the new airport and had both left Zimbabwe some years ago, they both said they were able to describe current procedures at the new airport because they had remained in contact with former colleagues who worked at the new airport.

37. It is, of course, important to identify clearly the extent of the reconsideration of AA(2) required by the Court of Appeal and so we set out what was said in this regard by May LJ:

> 30. The case advanced on behalf of AA in this appeal is both general and particular. The general case is that it was not rationally open to the Tribunal on the evidence as a whole to find that there was a two-stage screening interview process at the airport, and that the first stage was to be regarded as risk-free for those without an adverse political profile, a questionable military history or outstanding criminal matters. The direct experience of W5 and W6 was out of date. It ended in 1998 and 1996 respectively. It was at a time when there were few returning asylum seekers from the United Kingdom. It was at a different and less spacious airport. The Tribunal's findings were incompatible with what is known about Zimbabwe generally, with what is known about how the CIO operates, and the experiences of a significant number of the individual returnees properly considered. It is said that, in contemporary circumstances, the division of the procedure into two stages was illusory. It was extrapolated from evidence which did not include suspicion of the person returning to Zimbabwe. Now a failed asylum seeker returning from the United Kingdom would be regarded with suspicion and hostility and would probably be revealed to be a failed asylum seeker. In these circumstances, interrogation by intelligence services, whom W6 regarded as no longer professional, for a period of several hours must constitute a real risk of serious ill-treatment in the light of the evidence as a whole.
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> 31. We are not persuaded that this general case alone predicates an error of law sufficient to sustain this ground of appeal. We have carefully considered the written and oral evidence of W5 and W6. Their direct experience was not contemporary, but they both had contacts in Zimbabwe. Their evidence did sustain a finding of a two-stage process. Apart from particular points about their evidence, which we consider below, and subject to possible further consideration of the evidence and information about individual returnees in the light of the particular points and generally, we consider that it was open to the Tribunal to make the factual evaluative judgment in this respect which they did.
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> 32. The particular part of this ground of appeal is, however, more persuasive. Those advising AA considered that the Tribunal's written determination had failed to take account of parts of the evidence of W5 and W6 which supported the case that involuntarily returning failed asylum seekers faced a real risk of serious ill-treatment

even at a first stage screening interview. There was no transcript of the evidence of these witnesses, but the notes of evidence taken by members of the Tribunal have been provided to us. In summary the relevant parts of that evidence are as follows.

33. W5 said in his statement that his current contact at the airport told him that all returned asylum seekers were handed over to the CIO who carried out thorough questioning and then decided what should be done. In re-examination, as noted by the Chairman and another member of the Tribunal, he explained that the thorough questioning, as he understood it, involved the use of crude techniques, which he referred to as coercion.

34. W6 also explained in oral evidence what happened at the airport in the screening interview. As noted by the Chairman of the Tribunal, he said "there was abuse at the airport; kicking, beating, not torture". The note made by another member of the Tribunal was to the same effect, but noticeably that was when W6 worked at the airport. He left, he said, because of corruption in government and things going the wrong way. These days, he said, the Zimbabwe Intelligence Services were no longer professional.

35. This evidence of W5 and W6 as to significant violence at the airport did not stand alone. It was reflected in some of the complaints made by or on behalf of some of the individual returnees, and in our judgment it should have been addressed. Mr Kovats accepts that the Tribunal's decision says nothing about hitting and kicking at the airport. The reference to thorough questioning is quoted, but there is no reference to the explanation by the witness of what he understood those words to mean. Whether or not there was violence at the airport was, in the context of this case and in the context of the Tribunal's own conclusions as outlined above, an important issue. Not having heard the evidence, we are unable to say with any confidence how, if this had been addressed, it may have affected the evaluation as a whole. It might thus be seen, as we indicated earlier, as pivotal. It could have been determinative of the appeal, as is apparent from the structure of the Tribunal's judgment.

…

38. However, the question whether failed asylum seekers with no adverse political profile or relevant military or criminal attributes returning involuntarily to Zimbabwe face a real risk of inhuman or degrading treatment is obviously a finely balanced one. We have indicated that, in our view, a reconsideration of the evidence of W5 and W6 might tip the balance. Since we regard the evaluation of this evidence about procedures at the airport as pivotal, and since it is intrinsically bound up with the general evidence about the attitude and practice of the CIO, we shall not embark on an analysis of the Tribunal's handling of that evidence in isolation. We note in particular, however, the submissions in paragraphs 97 to 102 of AA's skeleton argument to the effect that the Tribunal failed to take explicit account of the evidence of W1 and W2 as to physical ill-treatment of those questioned by the CIO.

39. Reconsideration of the evidence of W5 and W6 may also require reconsideration, in the light of all the evidence, of the impact which the evidence and information about the 39 individual returnees, taken as a whole and with the other evidence, may have on the appeal. We say this for two reasons. First, ground 5 of the present appeal seeks to challenge the Tribunal's conclusions about three of the individual returnees.

40. There were two inconsistent accounts of R4's treatment when he was removed in January 2005. According to the first, he was intensively questioned, then released; according to the second, he was beaten by the CIO during intensive questioning at the airport. The Tribunal regarded the second account as unreliable for evaluative reasons which are by themselves sustainable, if their earlier conclusions about procedures at the airport are also sustainable, but which otherwise may require reconsideration. One of their reasons was that the first account given by R4 was consistent with the evidence they had received concerning procedures at the airport. If, as we think, the Tribunal's conclusion about procedures at the airport requires reconsideration, so too may their conclusion about R4.

41. Second and generally, the Tribunal's conclusions about the individual accounts taken as a whole (see paragraphs 229 ff to which we have already referred) drew (in paragraph 231) on their earlier conclusions about the evidence of procedures at the airport. Since, as we think, the balance is a fine one, reconsideration of the evidence of W5 and W6 will require reconsideration also of the relevance of evidence about the risk of violence to voluntary and involuntary returnees, who were not merely failed asylum seekers, to those of whom AA is taken to be representative. We note, for instance, submissions on behalf of AA that the evidence of R25 (W7) and R26 (W8) was inconsistent with a conclusion that a real risk of serious ill treatment only arises when a returnee is taken away from the airport. R25 and R26 were MDC activists (not merely failed asylum seekers) whose evidence complained of serious ill treatment and showed that there are sufficient facilities to enable beatings to be inflicted during questioning at the present international airport.

42. Ground 5 also seeks to criticise the Tribunal's findings in relation to R19, but the criticism is insubstantial. The information about R19 was extremely vague and there was no indication at all of the nature of the problem he was said to have encountered. That remained so with the addition of Ms Harland's evidence that the problems, whatever they were, occurred at the airport.

43. Criticism of the Tribunal's decision in relation to R31 seems to us to have more substance. She was not an asylum seeker and the information about her came from what appears to be an internet news report. She was a student who had been refused an extension of her leave to remain in the United Kingdom. At the airport, she was, according to a report, subjected to a hostile interview during which she was struck across the mouth when she asked why the interviewers would not believe she was just a student. After about three hours of interview, she said that she had an uncle in the Zimbabwean national army. He was contacted and she was released. As she left, she could hear the shouts and groans of two other deportees. In paragraph 205 of its determination, the Tribunal said that the treatment to which this witness claimed to have been subjected did not amount to serious ill-treatment such as to engage Article 3. We have difficulty understanding why not. We agree that trivial violence to an interviewee might not engage Article 3. But Mr Nicol pointed to what was said by the European Court of Human Rights in *Ribbitsch v Austria* (1995) 21 EHRR 573 at paragraph 38 about injuries deliberately inflicted on a person in police custody, as follows:

    "The court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the rights set forth in Article 3 (art 3) of the Convention."

    The brief account in relation to R31 does not give us the impression that, properly considered and in context, the violence was trivial. In saying this, we take account of

Mr Kovats' submission that the physical violence in *Ribbitsch* was gross and that the issue was whether the injuries had been sustained accidentally; and that other cases in which the court has found physical mistreatment of those in detention by state officials went well beyond that complained of in the case of R31. Mr Kovats referred in *Ireland v United Kingdom* (1978) 2 EHRR 25, paragraphs 92-130; *Tomasi v France* (1992) 15 EHRR 1, paragraphs 105-115; *Selmouni v France* (2000) 29 EHRR 403, paragraphs 82-89; and *Balogh v Hungary*, [2004] ECHR 361, application 47940/99 (20 July 2004), paragraphs 10 and 45-46. The Tribunal went on to point out that the news report was clearly intended to fulfil a journalistic point, and that R31 could not be identified, so the Secretary of State was unable to test the account in any way. That certainly affects the weight to be given to the evidence. But, unless the account was to be wholly disregarded, the point in relation to the Tribunal's perception of the threshold for Article 3 violence for this returnee did need to be addressed.

38. It is common ground that the reconsideration of these issues can be conducted in this appeal. The appellants are not the same but the issues are. Both parties are represented by the same legal representatives and both counsel have appeared throughout the AA litigation.

Overview of evidence

39. Apart from one person who was removed involuntarily following AA(2) there have been no such removals of failed asylum seekers since November 2004. This means that there is no recent direct evidence of such removals and so the risk faced by those who might now be forcibly removed to Zimbabwe after making an unsuccessful asylum claim must be assessed on the basis of other evidence. That evidence, broadly, falls into the following categories. As well as the evidence of Witnesses 5 and 6 there is background evidence about the country conditions generally. We have the benefit of expert evidence from Professor Ranger and witness 66. That evidence assists the Tribunal in that it provides an opinion as to what inferences can be drawn from the objective evidence by those who are said to be well informed and so in a position to express such an opinion. There is also evidence from other informed sources who do not hold themselves out to be experts. This category of evidence includes what is said by the NGOs, staff working at the British Embassy in Harare and journalists and others who maintain an interest in Zimbabwean affairs. The respondent relies also upon the evidence of Mr Walker, a Senior Executive Officer in the Country Specific Asylum Policy Team of the Asylum Policy, Border and Immigration Agency and upon the information collected by the IOM.

40. We have regard also to the evidence concerning the individual returnees, which has been updated by further enquiries made by Ms Sarah Harland of the Zimbabwe Association.

41. Without making this determination needlessly long we cannot separately analyse all the evidence that has been put before us but in reaching our conclusions we have, of course, had regard to all the evidence, paying particular attention to that to which we have been specifically referred.

The legal test in assessing risk.

42. The Court of Appeal approved the test applied in AA(2) as was set out at paragraph 31 of that determination:

> "The issue is whether the evidence establishes a real risk. The Appellant does not need to show a certainty or a probability that all failed asylum seekers returned involuntarily will face serious ill-treatment upon return. He needs to show only that there is a consistent pattern of such treatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does. So, is there evidence pointing to a substantial number of cases in the context of general evidence showing that involuntarily returned failed asylum seekers are at real risk of being subjected to serious ill treatment on that account alone?"

This does not mean, of course, that the assessment of risk is to be based solely upon our assessment of the evidence concerning those who have been subjected to enforced return in the past. That is just part of the overall picture. As there is no current evidence of what happens to asylum deportees, inferences must be drawn from the evidence as a whole. As the Tribunal said in AA(1):

> "… the Appellant needs to establish a real risk to returned asylum seekers. He does not need to show that all, or nearly all, returned asylum seekers are harmed. He needs only to show that all returned asylum seekers are at real risk. He can do that, as a matter of logic (and in our judgement as a matter of law) by any evidence that properly leads to the conclusion in question."

The existing country guidance: SM and Others (MDC-internal flight-risk categories) CG [2005] UKIAT 00100.

43. Having heard evidence from Professor Ranger the Tribunal in SM found that the evidence established that those identified on return to Zimbabwe as persons who had been deported from the United Kingdom would be subject to interrogation:

> "41. The Tribunal accepts from his evidence and from the news reports in Zimbabwe that those deported to Zimbabwe from the United Kingdom will be subject to interrogation on return. In the light of the interest and comment the resumption of returns has raised in the government press in Zimbabwe it seems to us to be inevitable that this will be the case. If it is being asserted by the Zimbabwe government that returns are being used as a cloak for British agents and saboteurs to be smuggled into the country, it is likely that those returns will be carefully monitored whether for that reason or to identify and intimidate opponents to the regime. The reports in the newspapers in Zimbabwe are consistent with there being an atmosphere of suspicion to those returned. The returnee in the New Zimbabwe report was released following a telephone call made to an uncle serving in the army but only after an intimidating interview. We take into account that before returns were suspended there was some evidence that returnees were investigated. We have our doubts about the story of the returnee in the article from January 2002 and his escape out of an airport lavatory window at Harare and his subsequent travel to South Africa, but in any event we are concerned with returns at the present time. We also approach with caution the reports that a number of recent returnees have never re-appeared once they were taken from the plane by CIO agents and that others have disappeared. No names or details have been provided and if, as Professor Ranger says the returns have been carefully monitored, we would have thought such details would be available.

42. Nonetheless the Tribunal is satisfied in the light of the statements made by the Zimbabwean authorities that returnees are regarded with contempt and suspicion on return and do face a very hostile atmosphere. This by itself does not indicate that all returnees are at real risk of persecution but that returnees are liable to have their background and circumstances carefully scrutinised by the authorities. We are satisfied that those who are suspected of being politically active with the MDC would be at real risk. We agree with Professor Ranger that if the authorities have any reason to believe that someone is politically active the interrogation will be followed up. There is a reasonable degree of likelihood that this will include treatment sufficiently serious to amount to persecution."

44. Two observations might be made concerning that extract from SM. First, Professor Ranger has identified the first returnee mentioned in paragraph 41 above as the person referred to in these proceedings as witness 8 or returnee 26. The individual who was released following the intervention of her uncle is Returnee 31.

45. Secondly, as we shall see, the word "interrogation" when used in the context of the CIO in Zimbabwe has acquired a very particular meaning and is quite different from what is referred to as an interview. It is clear to us that the Tribunal in SM did not intend to import that meaning into the process of interrogation referred to above and so this is not a finding that all those questioned by the CIO on return to Zimbabwe will be questioned in a manner that can be expected to be accompanied by violence.

The background country evidence

46. In AA(2) the Tribunal described the general country conditions in Zimbabwe as poor and deteriorating. That deterioration has continued. This is acknowledged by Mr Kovats who sets out this summary in his skeleton argument:

> "The population of Zimbabwe is about 13 million: 18 June 2007 Home Office Border and Immigration Agency Country of Origin Information Report on Zimbabwe ("COIR") paragraph 1.04 [R178]. It has been estimated that about 3.4 million of them have left the country, most to South Africa: 1 July 2007 Observer article [A vol.A 770].
>
> …
>
> Inflation is spiralling out of control, and the currency is effectively worthless: COIS [R175]. A United Nations report published on 14 June 2007 predicted that the country would collapse within 6 months: COIR [R175]. The shops have been emptied by panic buying: 5 July 2007 Guardian article [A vol.F 774]. On 5 April 2007 the Catholic bishops of Zimbabwe issued a pastoral letter which was a damning indictment of the Zimbabwean government [A vol.A 403-406]. On 10 July 2007 the BBC reported Archbishop Ncube as saying that the situation had become life threatening. It has been said that only remittances from abroad and revenue from platinum mining keep the country going: COIR paragraph 2.08 R181-R182]; 8 July 2007 Times article [A vol.A 780].
>
> The unemployment rate is 80%: COIR paragraph 7.02 [R197]. 80% of Zimbabweans live on less than US$1 a day: COIR paragraph 2.08 [R181].
>
> The judicial system bows to the executive: COIR paragraph 13.13 [R254-R255].

> The public health service has collapsed: COIR paragraphs 29.01 [R327] ICRC [A vol.A 576]. Zimbabwe has the world's lowest female life expectancy, 34 years: COIR paragraph 25.01 [R304]. One in 12 children dies before the age of 5: COIR paragraph 26.05 [R312]. There are 1.8 million orphans and vulnerable children, largely as a result of AIDS: COIR paragraph 26.20 [R316]. Approximately 1.6 million Zimbabweans are HIV+: COIR paragraph 29.26 [R333]. About 3,000 are dying from AIDS every week: COIR paragraph 29.05 [R327-R328]. The BBC has reported that you need a ZANU-PF card to get treatment at government hospitals: COIR 29.24 [R332].
>
> The World Health Organisation estimates that about 5 million Zimbabweans are unable to meet their minimum food requirements: COIR paragraph 29.01 [R327]. Drought will further reduce the harvest this year: COIR paragraph 30.22 [R348]. Food distribution was used as a political tool in the 2005 election: COIR paragraphs 30.28 [R349] and 30.31 [R350]. The CIO is in charge of grain distribution: COIR paragraph 11.62 [R233].
>
> The electricity and water systems are in crisis: COIR paragraph 29.04 [R327].
>
> Around 700,000 people lost their homes in Operation Murambatsvina, and a total of about 2.4 million people were affected, directly or indirectly: COIR paragraphs 31.01 [R352] and 31.10 [R354]. About 500,000 farm workers lost their homes in the government's land seizure programme: COIR paragraph 30.04 [R343-R344]. There are approximately 1.7 million internally displaced people in Zimbabwe: COIR paragraph 33.01 [R361]. 75% of families deported to rural areas in Operation Murambatsvina have returned to urban areas [A vol.A 4]. The report by the Zimbabwe Peace Project, entitled Partisan Distribution of Food and other forms of Aid at District Level: the Case of Manicaland (September 2006) [A vol.A 8-33] provides evidence of the distribution of aid on political grounds but does not indicate significant discrimination against returnees as such. Only 14 of the 74 case studies concerned persons who had returned from abroad, and of those only 1 had returned from the United Kingdom. "

47. In his skeleton argument Mr Henderson points to evidence that the purpose of operation Murambatsvina was to drive the urban population into rural areas under the control of the Mugabe regime so as to prevent any uprising in the cities. He refers to a report from Human Rights Watch published in September 2005 in which it was said:

> "The scale of destruction is unprecedented in Zimbabwe. Indeed, there are few if any precedents of a government so forcibly and brutally displacing so many of its own citizens in peacetime"

48. In a more recent report, published on 28th March 2007, it is said that the suppression and harassment of perceived or potential opponents of the regime continues:

> "The government of Zimbabwe has permitted security forces to commit serious abuses with impunity against opposition activists and ordinary Zimbabweans alike, Human Rights Watch said today. Security forces are responsible for arbitrary arrests and detentions and beatings of opposition Movement for Democratic Change (MDC) supporters, civil society activists and the general public."

The deputy Africa director at Human Rights Watch is quoted in the same report as saying:

> "The government of Zimbabwe has intensified its brutal suppression of its own citizens in an effort to crush all forms of dissent. The crackdown shows the government has extended its attack on political dissent to ordinary Zimbabweans, which should prompt the Southern African Development Community to act quickly."

Although the reports concerning state sponsored violence against Zimbabwean citizens indicate that the primary targets are those perceived to be the ruling party's political opponents, this report gives examples of abuse suffered at the hands of the police by ordinary citizens who were not conducting themselves in a manner such as to identify themselves as political activists:

> "Human Rights Watch recently spent two weeks in Zimbabwe interviewing many victims of abuse and witnesses to the political unrest in the cities of Harare, Bulawayo and Mutare. Witnesses and victims from Harare's high-density suburbs of Glenview, Highfield and Mufakose told Human Rights Watch that for the past few weeks police forces patrolling these locations have randomly and viciously beaten Zimbabweans in the streets, shopping malls, and in bars and beer halls.
>
> Police forces have also gone house to house beating people with batons, stealing possessions and accusing them of supporting the opposition. The terror caused by the police has forced many families in the affected areas into a self imposed curfew after dark."

49. The view that abuse is now being visited by the authorities upon a wider range of victims than those who involve themselves in opposition activity is expressed in another more recent Human Rights Watch report dated May 2007 entitled "Bashing Dissent": Having made reference to the arrest and detention of hundreds of MDC members following a ban upon political rallies and meetings imposed in February 2007 the report observes:

> "The arrest and severe beating of these opposition leaders and civil society activists by police and state security officers marked a new low in Zimbabwe's seven-year political crisis. It ignited a new government campaign of violence and repression against members of the opposition and civil society – and increasingly ordinary Zimbabweans – in the capital Harare and elsewhere throughout the country. The ominous statements by Zimbabwe's President Mugabe on March 17 and 29, 2007 that the opposition members and civil society activists deserved to be "bashed" by the police highlighted the government's blatant disregard for the basic human rights of its citizens that authorities at all levels have shown during Zimbabwe's political crisis."

50. In an Independent On Line report dated 1st June 2007 it is said that:

> "President Robert Mugabe has urged Zimbabwe's security forces to remain on high alert to thwart attempts to topple his government by the opposition and his western foes, official media reported on Friday"

President Mugabe, addressing a ceremony for graduating police officers, said:

> "Our security forces have heightened their vigilance in order to thwart the subversives manoeuvres of those who engage in crimes of political violence. I wish to call upon people of Zimbabwe to unite against the shameless British arm-twisting tactics being orchestrated through the MDC and the so called civil groups."

51. That evidence establishes that conditions for the ordinary citizen of Zimbabwe are exceedingly difficult and those politically active in opposition to the regime or who are identified as active critics of the regime continue to face a real risk of being subjected to serious ill-treatment if they fall into the hands of the agencies of the state. The risk categories identified in SM will need to be revisited in the light of the evidence about the treatment of those active in human rights organisations and what are referred to as the "civil society organisations".

52. But that is not the main issue in this appeal which is concerned with the question of whether a person identified on return to Harare airport as a failed asylum seeker would face a real risk of being subjected to serious harm on that account alone. We are concerned also with an assessment of the risk faced by such a person after he or she has passed through the airport and returned to his or her home area or other place of intended residence.

53. There is no current evidence of how that class of persons is treated. But in assessing that risk the Tribunal can look at the current country evidence with the assistance of the expert opinion available in the light of what is known about the experiences of those who were forcibly returned to Zimbabwe, even though those removals were suspended some time ago. Put another way, inferences must be drawn from what is known to occur today in Zimbabwe as to how failed asylum seekers are likely to be treated, if they are identified as such upon return.

Country conditions and article 3 of the ECHR.

54. Before embarking upon that enquiry we consider the argument advanced on the appellant's behalf that the general country conditions in Zimbabwe are now so bad that there would be an infringement of her rights under article 3 of the ECHR if she were required to return.

55. Article 3 of the European Convention provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

56. In submitting that there would be an infringement of article 3 Mr Henderson relies upon what was said by Lord Brown at paragraph 24 of his speech in R (Bagdanavicious) v SSHD [2005] UKHL 38. He said that it was important:

> "to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk "emanates from intentionally inflicted acts of the public authorities in the receiving country" (the language of para 49 of *D v United Kingdom* 24 EHRR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection."

57. Although Mr Henderson asserts in his skeleton argument that it is not in dispute that the present humanitarian catastrophe "emanates from the intentionally inflicted

acts" of President Mugabe's regime, that is not so. As Mr Kovats makes clear in his submissions, the respondent's position is that the food shortages, interruption in water and power supplies, and the other consequences of the collapsed economy may well be the result of governmental incompetence and crop failures due to the lack of farming expertise and drought but it is not the purpose of governmental policy to visit deprivation upon the people of Zimbabwe.

58. We do not accept that the current economic crisis and near collapsed infrastructure is a deliberate, intended consequence of the actions of the government. Subject to what we say below about Operation Murambatsvina, the evidence simply does not establish that the current country conditions are the intended aim as opposed to the unintended consequence, of government policy.

59. We do accept that poor living conditions are capable of raising an issue under article 3 if they reach a minimum level of severity. See: Pancenko v Latvia No 40772/98. A similar view was taken by the House of Lords in R v SSHD ex parte Adam, Limbuela and Tesema [2005] UKHL 66. At paragraph 7 Lord Bingham said:

> "… Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. …… But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative means of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. .."

60. This concept of a varying threshold to engagement of article 3, dependant upon the responsibility of the receiving state for the circumstances complained of, is analogous to that discussed below in the context of the risk of ill-treatment faced by deportees to Zimbabwe at the hands of those concerned with their reception at Harare airport. But we have found that the difficult living conditions are not visited upon the people of Zimbabwe generally by the deliberate actions of the state. Other than those who have been made homeless and displaced to areas where they have no support mechanisms to fall back on as a consequence of Operation Murambatsvina, citizens of Zimbabwe face such difficulties as they have to confront as a consequence of ill-judged political initiatives, economic mismanagement and unusually bad weather conditions affecting further the capacity of the country to produce crops.

61. That being the case the appellant faces a high threshold in seeking to establish that the act of the United Kingdom in returning her to Zimbabwe will expose her to a real risk of having to live in circumstances that will represent an infringement of her rights protected by article 3.

62. The country conditions, poor as they are, do not establish that the generality of those returning to Zimbabwe today would be subjected to conditions that are sufficiently grave as to infringe article 3. Even if conditions were life threatening, that in itself would not enable the appellant to rely upon article 3 to resist removal. That much is established from what might be referred to as the article 3 health cases. As can be seen from N v SSHD [2005] UKHL 31, there would be no infringement even where:

> "in almost all these cases stopping the treatment will lead in a very short time to a revival of all the symptoms from which the patient was originally suffering and to an early death."

63. Further, the evidence does not establish that everyone presently living in Zimbabwe is doing so in the conditions of near complete deprivation that some evidently are. The WHO report referred to in paragraph 46 above notes that 5 million Zimbabweans are unable to meet their minimum food requirements. That means, of course, that something approaching a similar number are able to. We have heard evidence of how people survive which we discuss later in this determination. Support, both material and financial, can be and is provided to some by relatives living abroad. Many houses have been demolished and many people have been required to relocate to areas they might not have chosen, but many are not subjected to those difficulties. There is free movement across borders with some neighbouring countries and we have before us accounts of those who make regular trips across the border to buy goods or to trade.

64. We find that returnees, whether deportees or voluntary returnees, do not all face living conditions sufficiently severe to reach the article 3 threshold. This does not mean that each such claim must fail. Each case must be considered on its own facts. That is acknowledged by the respondent's own Asylum Policy Instruction on discretionary leave:

> "There may be some extreme cases (although such cases are likely to be rare) where a person would face such poor conditions if returned – e.g. absence of water, food or basic shelter – that removal could be a breach of the UK's Article 3 obligations…"

65. The appellant is a qualified doctor who has worked at a state hospital in the past. It can be seen from the Country of Origin Information report that there is a huge demand for medical professionals and, despite what she says in a recent witness statement (which we deal with below), there is no reason to believe that she will not immediately be welcomed back into practice and hence relatively well paid employment.

66. Large numbers of people lost their homes in the course of Operation Murambatsvina. This appellant has parents living in Bulawayo. There is no suggestion that her father, having left the farm, has had any difficulty in obtaining and retaining the accommodation he now occupies. The appellant's mother continues to have access to their former home on the farm, even if the land is no longer in their possession. The appellant has not suggested that her parents have been unable to feed and accommodate themselves or otherwise provide for themselves. Her brother is settled in the United Kingdom. She can, if it be necessary, look to him for support as very many Zimbabweans with relatives abroad do. Hers is by no means an extreme case.

67. There may be some people whose living conditions are sufficiently desperate to establish the required minimum level of severity necessary to engage article 3. The evidence indicates that some have no housing, income, access to basic services including healthcare and education as well as no dependable source of drinking water or adequate supply of food or basic shelter. But there are also a large number

of Zimbabweans who continue to travel to Zimbabwe as ordinary passengers and it is not reasonably likely that would be the case if all those in Zimbabwe at any given time faced a real risk of experiencing the more extreme living conditions possibly experienced by some.

68. We are satisfied that the evidence does not establish that removing this appellant to Zimbabwe would bring about an infringement of the United Kingdom's obligations under article 3 on account of the general country conditions or the living conditions that she would be returned to.

The respondent's case.

69. The respondent accepts that there are some categories of persons who would be at risk of being subjected to persecutory ill-treatment at the hands of the agencies of the state upon return to Zimbabwe. But the respondent does not accept that those identified on return to Harare airport as persons who have unsuccessfully claimed asylum in the United Kingdom are such a category.

70. We heard oral evidence from one witness on behalf of the respondent. Mr Mark Walker, Senior Executive Officer in the Country Specific Asylum Policy Team of the Asylum Policy, Border and Immigration Agency. He has provided evidence at each stage of the AA litigation.

71. Mr Walker adopted his witness statement dated 26th June 2007 as all he wished to say in his evidence in chief. Not everything in the statement is within the personal knowledge of Mr Walker. He received and passes on information received from a variety of sources, some identified and some not.

72. Mr Walker confirmed that after the suspension of enforced returns of failed asylum seekers was lifted following AA(2), just one such person was removed before the Secretary of State once more undertook to defer involuntary removals to Zimbabwe on 26th September 2006.

73. He said that did not mean that there was a moratorium on all involuntary removals. Since that date 23 Zimbabweans who had been refused leave to enter or remain in the United Kingdom but who did not claim asylum were forcibly returned to Zimbabwe. One of these returnees was deported following his conviction of an offence of possessing cannabis, an offence for which he was imprisoned for two years. He has given details of his experiences on return. He is identified as Witness 56 ("W56").

74. W56 said that the police were waiting for him at Harare Airport when he arrived on 19th March 2006. After passing through immigration he was taken to their office at the airport and asked about the offence. When he said that he was simply carrying a case for a woman who was not herself arrested they told him he was not co-operating and so he was taken to Harare Central police station where he was questioned for three hours before being released. He was asked to give the names of other Zimbabweans in prison in the United Kingdom. He was told he would be beaten at the police station but this did not happen. He was not physically ill-treated at any stage and although he was told that he would be the subject of continuing attention, he was not aware that he was.

75. There is no report that any of the other 22 persons removed involuntarily to Zimbabwe since September 2006 has been subjected to ill-treatment upon return, either at the point of entry or upon return to their home areas.

76. Mr Walker described how an officer from the British Embassy in Harare meets key NGOs and representatives of the IOM on a monthly basis and reports of the information obtained from those sources are produced. We do not propose to embark upon a detailed analysis of this part of the evidence. With regard to the evidence of the IOM we take the same view as did the Tribunal in AA(2) in concluding that the monitoring then proposed of returnees under the pilot project described in the draft Memorandum of Understanding with the IOM was of no direct relevance to the assessment of the risk on return to any *particular* returnee, as the IOM is not in a position to observe what goes on before a passenger emerges from immigration control. All that can be said of this evidence is that it does not assist the appellant in establishing that abuse does occur at the airport.

77. There is now some information from the IOM monitoring exercise but, with one exception, that relates to those who were not removed as failed asylum seekers and would not have been identified as such at the airport because it may be assumed that the Zimbabwean authorities were well aware that removals of such persons had been suspended.

78. With regard to the NGOs, again we find this evidence really takes the matter not much further either way. Insofar as that evidence concerns the general country conditions or describes the excesses of state agents, that does no more than repeat what is before the Tribunal from other sources. We have regard to this category of evidence as providing further confirmation of those conditions. Those organisations are unable to comment on the treatment of failed asylum seekers forcibly returned to Zimbabwe because there have been no such returns, apart from the single case in July 2006, for some considerable time. We do take account of the opinions expressed as to how they believe involuntarily returned failed asylum seekers identified as such would be treated but it is, of course, for the Tribunal to assess that risk based upon the evidence available.

79. A significant part of Mr Walker's evidence concerns information he passes on that has been obtained by two unidentified officials associated with the British Embassy in Harare. They are referred to as BE1 and BE2, and their evidence, as it is reported by Mr Walker, is as follows.

80. As he travelled through the airport BE1 engaged in casual conversation a number of individuals working for the Civil Aviation Authority of Zimbabwe, Air Zimbabwe and the management of the airport. From these conversations BE1 gleaned information which he or she believed to be true because the sources were apparently "speaking in good faith". The information included that military personnel were present at the airport only infrequently and required specific authorisation to enter airside or the arrivals area and that CIO officers will normally pick out any passenger they wish to interview as he or she leaves the baggage collection area where there is a line of interview booths. Other offices are available in the Civil Aviation Authority of Zimbabwe above the terminal.

81. BE1 said that his informants had told him that:

> "In practice it is extremely rare (the individual from the Civil Aviation Authority of Zimbabwe said "never") for individuals to be picked out and interviewed by CIO officers at the airport; the expectation was that this would happen elsewhere if required.
>
> If CIO or other security personnel were intent on using violence against an arriving passenger, they would be very unlikely to do so at the airport."

82. BE2, who was said to be familiar with operations at Harare Airport, informed Mr Walker that CIO officers, equipped with the passenger manifest, monitor arriving passengers. They are rarely at immigration desks but may have the means of monitoring arrivals through a new immigration computer system as immigration officers type in details.

83. Mr Walker says also:

> "British Embassy officials have also spoken to one person familiar with the operation of the airport, but who is not willing to be identified, who told the Embassy that returned failed asylum seekers would have a routine interview with the CIO airport team and little or no follow up afterwards. That person has never heard of returnees coming to any harm."

84. Mr Walker produces a statement from another individual, who declines to be identified and is known only as "X". He was contacted by Embassy officials because he is familiar with the operation of the airport in Harare. He says in that statement that individuals returning to Zimbabwe voluntarily would be of no interest to the authorities as they would be indistinguishable from other passengers. Those returned involuntarily would be of interest only if something was already known of them or if they have some form of political profile. Apart from the recent attack on Nelson Charmisa, which took place outside the airport building, after he had been denied passage though the airport, X has never heard of or seen instances of physical violence at Harare Airport or of anyone being taken away from the airport by the Zimbabwean authorities.

85. In the statement of X he says also that he has never come across, or heard of, a Major of the name referred to by Witnesses 5 and 6.

86. In his witness statement Mr Walker said that the British Embassy had made enquiries about the individuals referred to by Witnesses 5 and 6 ("W5 and W6"). The Embassy has "good and comprehensive records of officers of the Zimbabwean Defence Forces, including those who worked in military intelligence between 1980 and 2001. But, there is no trace on that database of either W5, who claimed to work in that capacity at the airport between 1993 and 1998, or of the Major who is said to be the source of W5's information about procedures at the new airport.

87. In response to the assertion that there was no Major working in military intelligence to supply up to date information to W5 and that W5 himself was not a military intelligence officer as he claimed, the appellant's representatives assembled and submitted a large array of evidence to the contrary. Subsequently, Mr Kovats said in his skeleton argument:

> "In light of the information provided in the further statements of witnesses 5 and 6 the respondent accepts that witness 5 worked for Zimbabwean military intelligence and is not contesting the existence of the Major."

88. As became plain from Mr Walker's oral evidence, those words were chosen carefully. Mr Walker declined to confirm, when asked to do so in cross examination, that he now accepted that the Major did exist. He simply accepts that he is not able to put before the Tribunal sustainable evidence to establish that he does not. That being the case, he accepts also that in view of the evidence concerning the Major put forward by the appellant the Tribunal is bound to accept that the appellant has established to the standard required that the Major does exist and that he has carried out the role described by W5 and W6.

89. To what extend does this concession made by the respondent have a broader effect? Mr Henderson submits that no weight at all should be placed upon the evidence of Mr Walker that originates from unidentified sources associated with the Embassy in Harare. Mr Henderson points out that the Tribunal is asked by the respondent to rely upon evidence that is given third hand and to accept Mr Walker's assessment of the sources as being reliable. In Mr Henderson's submission such evidence should not be seen as reliable.

90. Of course, the same could be said of the evidence of W6 who declines to identify his sources. At least "X" has provided a written statement so that we can see his words rather than those recalled and passed on by those to whom he spoke. But in the one respect that it has been possible to check the accuracy of the information passed on to him, thought by Mr Walker to be correct and reliable, it has been found to be wrong. This, in our view, so undermines this part of the evidence that we are unable to rely upon it at all. There is no independent reason for finding it to be reliable: the only evidence is that it is not.

91. Mr Walker also addresses that part of the appellant's case that raises repeated references to the attitude of the Zimbabwean authorities who are seen to be associated with Britain. Mr Walker points to evidence of co-operation between the Zimbabwean authorities and this country in the interests of its citizens who wish to benefit from being in the United Kingdom. Through the Chevening Scholarship and the Canon Collins Chevening Scholarship programmes, administered by the British Council in Zimbabwe, 74 people came to the United Kingdom to study. At least 23 scholars who have benefited from these scholarships since 2004 have returned to Zimbabwe to assume responsible positions in the public sector. Some are now senior civil servants. Others are managers in government agencies, banks, business and the media. There is no suggestion that any of these people have experienced any difficulty in travelling in and out of Zimbabwe even though it would be apparent that they had been in the United Kingdom for some time.

92. There has been no suggestion either that these people have been accused of being indoctrinated in the United Kingdom and sent back as spies or to destabilise President's Mugabe's regime or to bolster the opposition.

The Central Intelligence Organisation

93. The current Country of Origin Information report (COIR) upon Zimbabwe notes that:

> "The Central Intelligence Organisation was formed by the Rhodesian authorities in the late 1960s as the country's main civilian intelligence agency. It was later taken over by the Zimbabwean government, ideologically re-oriented and placed under the Ministry of National Security in order to adopt a protective role for the new regime.
> …
>
> Since 2000, the CIO has been used to spearhead the ZANU-PF political-economic program, including farm occupations and the suppression of opposition politicians and media.
> …
>
> The CIO has taken over immigration security at Harare International Airport in its search for dissidents (mostly MDC activists), especially on flights to the UK and the US. It justifies this action within the remit of co-operation in the international fight against terrorism.
> …
>
> Dr Diana Jeater, Principal Lecturer in African History at the University of the West of England, noted in a briefing paper that: "The CIO and police have always been very efficient at being able to identify and locate people within Zimbabwe … There is good evidence that the CIO keeps lists of people who are suspected of sympathy with opposition positions…
> …
>
> CVNI.com noted that "Over the last couple of years, the CIO has been widening its scope of operations. The agency now works actively with the ZANU-PF youth organisation; which is part of the state funded training programme of the Ministry of Youth Affairs. They are trained in a network of "youth camps" across the country and in a short time have become a paramilitary extension of the CIO."

94. The COIR report contains also a report that in Matobo district, 68 km south of Bulawayo, state agents had asked local traditional leaders to compile lists of the names of all known opposition supporters in the area.

95. Efforts to obtain information about and to identify those associated with the opposition are not confined to Zimbabwe itself. At paragraph 11.72 of the COIR report:

> "… A report broadcast by SW Radio Africa (Zimbabwe news) in July 2005 stated that: "There is mounting concern that a significant number of state security agents from Zimbabwe are infiltrating groups in the UK under the pretext of helping asylum seekers or even claiming asylum themselves. Several meetings have been disrupted by rowdy elements who claim to be genuine activists. The growing fear is that Mugabe is sending spies into the UK who will be collecting information on activists in the country…" **[89aj]** The Institute for War and Peace Reporting noted on the 23 June 2006, that Mugabe had CIO operatives working in Britain. **[77r]** ZimOnline reported on 16 April 2007 that an intelligence source claimed that CIO operatives had in the past "…been assigned special surveillance missions on opposition leaders when they visit neighbouring countries." **[49br]"**

96. When commentators speak of the CIO they often mean to refer to the plain clothes security agents who are responsible for much of the widely reported state sponsored violence perpetrated upon those perceived to be enemies of the regime

of President Mugabe. But the CIO is in fact comprised of a number of branches, of which the Military Intelligence Branch is branch 3. As we heard from witnesses 5 and 6, in order to avoid confusion most people refer to the civilian branch as the CIO and refer to the other branches by their name as that will generally identify their role within the CIO.

97. There is ample evidence of the propensity of the CIO to use violence. We have referred to this already in this determination when considering the background country information. In his skeleton argument Mr Henderson refers to what was said by the Court of Appeal, summarising the evidence before the Tribunal in AA(1):

> 30. Professor Ranger described the man who is currently in charge of the CIO as someone who was notorious for using violence against political opponents. The CIO was now invested with responsibility for food distribution. It was also currently involved in Operation Murambatsvina ("the clean-up operation") which started in May 2005 and was concerned with the destruction of thousands of homes in urban areas. In November 2002 this man said: "We will be better off with only six million people, with our own people who support the liberation struggle. We don't want all these extra people". He has accused Britain of conspiratorial interference in Zimbabwean affairs and is said to believe that many British spies have been infiltrated into the country.
>
> 31. The professor considered that the violence used by the CIO could not be attributed to a lack of discipline by "rotten apples", with those affected having a right of complaint to a higher authority. Beatings during interrogation were a fundamental part of CIO practice and would not be punished. The CIO used interrogation, torture and killings to achieve its aims. Professor Ranger referred to a recent report entitled "Zimbabwe: The Face of Torture and Organised Violence!" (*Redress*, March 2005). The author of this report asserted that the use of torture was deeply ingrained, particularly within the CIO, whose budget was increased sixfold in 2004. Professor Ranger believed that the nature and outlook of the CIO did not appear to have changed in the thirty years he had known it. He said it has always hunted down opponents of the regime, often using extreme violence.
>
> 32. There was no real dispute about this part of the professor's evidence"

98. The view expressed by many who have provided evidence to the Tribunal is that since then there has been a further deterioration in the way in which the CIO conduct themselves and that the scope of their operations has widened.

99. A number of witnesses, including W5 and W6, have referred also to the fact that the quality of recruits to the CIO has deteriorated. Training is shorter and so the operatives act with less professionalism.

100. Mr Henderson asks the Tribunal to place considerable weight upon the views of Witness 2. He is a widely respected representative of Source F, itself a well known and respected organisation. In his witness statement, dated 25th June 2007, W2 said this:

> "Anyone held even by the ordinary police for questioning, even for an hour or two will routinely face some physical ill treatment. The CIO are more brutal. The increasing politicisation, and decreasing professionalism and heightened impunity of the ordinary police gives rise to an increased risk to such people in their home area. And in the same way as I put the increasing brutality of the security forces down to

> the message of impunity created by the encouragement of the leadership, so their increasing emphasis on the role played by Britain in fomenting the opposition, in particular in the context of blaming the UK for the recent dramatic deterioration, is likely to create an increased risk for anyone suspected by the CIO or police of being a sell-out/traitor because they had sought asylum in the UK."

101. This view needs to be examined carefully. First, anyone held for questioning by the police or the CIO will have been picked up because the authorities have some reason for having an interest in them. Second, this view stands out from many others in that W2 says not only will those identified as political opponents be at risk but that "anyone suspected by the CIO or police of being a sell out/traitor because they have sought asylum in the UK" would be as well. It is important to recognise that this is not evidence of, or based upon evidence of, what is happening to such people in Zimbabwe today. This is the view of W2 about what is likely to happen to returned asylum seekers, based upon his assessment of the behaviour of the CIO and police generally.

102. The evidence concerning the CIO establishes clearly that anyone who comes to the attention of the CIO and is perceived to be an enemy of the regime faces a very real risk of being subjected to physical ill-treatment. The evidence demonstrates also that although the range of people perceived to be enemies of the regime has widened, it is those seen to be leaders, activists, and those actively supporting the MDC who are the principal focus of the apparatus deployed to secure the continued authority of President Mugabe's regime.

103. It is clear also that the economic resources available to the state are increasingly under pressure. The government invests those resources where it believes it will best benefit in protecting its political survival. It is noted at paragraph 11.73 of the COIR report that a sign of how essential the security forces are to the survival of President Mugabe and the ruling party is demonstrated by the huge wage increases awarded to CIO agents who are now paid Z$5 million a month compared to the Z$90,000 per month earned by those ordinary workers who retain employment.

104. We consider it significant that the regime has invested considerable resources in seeking to infiltrate groups in the United Kingdom to identify those who support the opposition or who are "activists in the country". This does indicate that it distinguishes those people from Zimbabweans present in the United Kingdom generally. It is noteworthy that it has not been suggested that those carrying out that function in the United Kingdom are collecting information about those who have made an asylum claim, but that they are concerned to identify those considered to be activists.

The evidence of Professor Ranger

105. The Tribunal observed in AA(2) that the professor might be thought to be well placed to express an expert view on country conditions in Zimbabwe. He has more than 45 years of familiarity with the country. He has known Robert Mugabe and other senior leaders of ZANU-PF throughout that time. He has spent periods teaching at the University of Zimbabwe, most recently between January 1998 and June 2001. He last visited Zimbabwe in August last year. He maintains regular contact with human rights activists in Zimbabwe, some of whom have visited him in the United Kingdom.

106. In his first report dated 28th July 2005 Professor Ranger said that the views of the Zimbabwean regime of those who had sought asylum in the United Kingdom could be deduced from ministerial statements and comments reported in the state press. He referred to the often reported statement by Jonathan Moyo, then Minister of Information, published in the Herald newspaper in December 2004:

> "Threats by the United Kingdom to deport 10,000 Zimbabweans could be a cover to deploy elements trained in sabotage, intimidation and violence to destabilise the country before and during next March's parliamentary elections….. There had been, for some time, a number of media reports that as part of Britain's illegal regime change agenda, it had been training some Zimbabweans in acts of sabotage and violence."

107. When giving evidence before the Tribunal in AA(2) the professor said that he had not included in his report reference to a contradictory statement made by The Minister for Justice to the Zimbabwean parliament the day before that:

> "Zimbabwe will unconditionally take back all those returned from the UK"

and that those returned by the United Kingdom

> "will be welcomed"

because he believed the earlier statement to reflect the true position. He referred to other hostile comments made by representatives of the Mugabe regime at about the same time.

108. He referred to press reports in the Zimbabwe state-sponsored press in December 2004 attacking asylum seekers as "accomplices in London's campaign of destabilisation against this country over its land policies" and to a letter published in the newspaper referring to failed asylum seekers being returned to Zimbabwe as "Blair's mercenaries" who had been trained to cause "havoc and sabotage". Professor Ranger described assertions of the "British conspiracy" that have been put about for years. In 2002 it was asserted in the Zimbabwe Sunday Mail that thousands of Zimbabweans were undergoing secret military training and that Britain was recruiting former soldiers from Zimbabwe to be deployed in a military offensive against Zimbabwe.

109. In a more recent report dated 25th June 2007, prepared for these proceedings, the professor responded to a request from those commissioning the report to comment upon developments since summer 2006. He said that it seemed clear that conditions in Zimbabwe "have reached a new stage of confrontation and extremity". President Mugabe had respondent to the widespread international criticism of his attempts to eliminate political opposition by saying that his critics can "go hang".

110. Relevant to the question of safety on return for failed asylum seekers was the fact that the CIO has taken over "total responsibility" for immigration control at Harare airport. As noted above, in the current Country of Origin Information Report, at paragraph 11.54, it is said, citing from Jane's Security Sentinel – Country Profile on Zimbabwe that the CIO has taken over this function "in its search for dissidents, especially on flights to the UK and the US" At the same time, according to a report

published in the Independent on March 25th 2007, the government is removing civilians from the Department of Immigration at border posts and airports and replacing them with security and intelligence officers.

111. That this change has had an effect upon movement through the airport is indicated by the fact that four leading members of the opposition have been prevented from leaving Zimbabwe via the airport and one, the M.P. Nelson Chamisa, was beaten, and prevented from leaving on a flight to Brussels. Two women activists were prevented from leaving Zimbabwe to seek medical treatment abroad for injuries sustained in police custody.

112. Professor Ranger says in his latest report that the present attitude of the Zimbabwean regime towards the United Kingdom is evidenced by the stories carried in two state-sponsored Zimbabwean newspapers on 21st June 2007. One, entitled "Plot to destroy Zim economy exposed" offered "shocking details of a major plot by the British and American governments to bring Zimbabwe's economy down to its knees and incite an uprising against the Government." Professor Ranger says that although much of this may be rhetorical, his contacts in Zimbabwe who have access to men such as Didymus Mutasa, head of Security in Zimbabwe, assure him that he is personally convinced of the existence of British plots.

113. In this report Professor Ranger was asked to respond to this question:

> "What inferences would you draw as to the risk to someone who had sought asylum in the UK and is transferred into CIO custody for questioning at the present date as opposed to July 2006"

Perhaps unsurprisingly in view of what is said above, it is the professor's view that such risk is enhanced because of the intensity of the humanitarian crisis, the CIO's total control of the airport, the revival of the youth militia, the asserted link between opposition and civil society organisations and violence and the renewed insistence on the assertion of British subvention and control of these organisations.

114. Under the heading "Conclusions" Professor Ranger says in this report:

> "In short, conditions in Zimbabwe have evidently worsened sharply over the past year and particularly the last six months. More and more Zimbabweans have been defined as traitors and enemies, particularly those with international and especially British connections."

115. A significant matter arises in connection with these words of Professor Ranger. His evidence before the Tribunal in AA(2) was that the Zimbabwean regime "criminalises" anyone connected with Britain. The Tribunal found that in that he went too far. The evidence before us was that there were three direct British Airways flights from the United Kingdom to Harare airport each week. Very recently British Airways has discontinued all flights to Zimbabwe, citing business, rather than security reasons. But there are also three direct Air Zimbabwe flights each week as well as a significant number of non-direct flights that travel to Harare via Kenya, South Africa and elsewhere. The evidence before us indicated that these flights are generally full, although that may not be the case in respect of British Airways if declining passenger levels contributed to their decision to discontinue flights. But it is apparent that, overall, passenger traffic remains at a high level. Many passengers

are Zimbabwean citizens who are “connected to Britain” in that they have an immigration history involving business of one kind or another with Britain. There is no evidence that these people are in any way “criminalised” on that account or that they are in any way impeded in passing through the airport. Indeed the evidence is to the contrary.

116. In his oral evidence to us Professor Ranger explained that when he referred to people being “connected” with Britain he means connected in the eyes of the authorities. It would include those persuaded to claim asylum in Britain and not, for example those who come to study. He said that anyone who can be identified as a failed asylum seeker would be regarded as connected with Britain.

117. One has to look very hard at the professor’s evidence to find upon what, other than his own assessment of the conduct of the authorities generally, he bases the view expressed in the final sentence of the extract of his report reproduced above. It is notable that elsewhere he refers to sources, but here he does not. We are, therefore, at this point dependant only upon his unsupported opinion which, as an expert witness, he is entitled to express. But, it is for the Tribunal to decide what weight to give to that in the context of the evidence before us as a whole.

118. In his conclusions in his recent written report he said that more and more Zimbabweans have been defined as traitors, particularly those with British connections. In his oral evidence he said anyone identified as a failed asylum seeker would be regarded as connected to Britain, and so regarded as a traitor and an enemy. In this regard we have the same reservation as we expressed in respect of the evidence of W2. This is not evidence of what has happened to failed asylum seekers or how they are regarded by the authorities on return to Zimbabwe. This is the professor’s view of how they would be regarded. It is clear that the near hysterical political rhetoric blaming the British government for all the problems being experienced in Zimbabwe continues. But we cannot see that the professor has been able to point to any evidence that the allegations of treachery visited upon anyone “connected to Britain” - absent some other reason for believing them to be political opponents - has led to any individual difficulties that would not have arisen in any case.

119. W69, whose evidence we consider below, makes clear in his recent witness statement that President Mugabe has settled views of the British government and welcomes any opportunity to criticise it in the most extravagant terms. W69 said:

> “Mugabe genuinely hates the UK, which he believes is the major player in attempts to overthrow him. He blames the UK for influencing the European Union and the United States against his regime. He makes hate filled speeches against Britain and there is real venom in his voice. He hates the British government. He refers to the Cabinet as the “gay gangsters” on the basis that there have been out homosexuals in the Cabinet [sic]. Before the travel ban was imposed, he loved to go to Harrods and his inability to do so really angers him. The travel ban on Mugabe and the senior ZANU people really hurts and angers him.”

120. But it is difficult to find reliable or compelling examples of those people upon whom this hatred has been visited on this account alone. In making this observation the Tribunal has very much in mind the accounts of the individual returnees.

121. Professor Ranger, in his oral evidence, noted also that there was no evidence of any increased violence in the run up to the elections in 2006.

122. It is difficult also to reconcile the professor's view that the CIO and the Zimbabwean government regard all those who have claimed asylum in the United Kingdom as traitors and sell outs who, on that account alone, should be subjected to persecutory ill-treatment on return with the significant body of evidence concerning attempts to obtain intelligence from the United Kingdom. If it were the case that the CIO regarded all failed asylum seekers to be opponents of the regime who should be taken for interrogation and subjected to torture it is difficult to understand why such extensive effort and resources should be invested in infiltrating Zimbabwean groups in the United Kingdom in order to identify political activists and not those who had made an asylum claim and had no other basis for remaining in the United Kingdom.

123. In cross examination Professor Ranger was asked about his last visit to Zimbabwe last summer. He travelled by direct flight and was admitted without difficulty. Yet he accepts that he is known to be a critic of the regime. He was unable to explain why he had no difficulty in passing through the airport other than to surmise that as he was a well known person in Zimbabwe – a school has been named after him – it would be an embarrassment to the government if any action had been taken against him.

124. The professor was asked if the authorities in Zimbabwe were aware than many Zimbabweans who came to the United Kingdom were not refugees but economic migrants. He said that it is the contention of the Zimbabwean regime that all Zimbabweans who come to this country are economic migrants. It does not accept that any had any reason to claim asylum. Therefore those that have claimed asylum came as economic migrants and were persuaded to tell lies in order to claim asylum. Those who worked abroad to provide financial support for relatives at home might be said to be patriotic. The Diaspora is important in keeping the economy afloat.

125. On the other hand, Professor Ranger explained, in the eyes of the authorities in Zimbabwe, a person who has made an asylum claim must have told lies about human rights abuses and that is why failed asylum seekers returned to Zimbabwe are treated with suspicion.

126. What is hard to understand, if that were the case, is why there is no consistent pattern of evidence to be found in the reports of the individual returnees who were identified as failed asylum seekers of being asked the nature of their claim, or the lies that they were perceived to have told in support of the false claim.

127. The professor explained how those Zimbabweans living abroad who were not failed asylum seekers were important to those who remained in Zimbabwe because of the financial and other support they were able to send home. He said the view was that such persons do not need to return to Zimbabwe as it was acceptable for them to remain abroad to send money for school fees, hospital fees and so on.

128. He explained that there is a thriving trade in food parcels ordered and paid for from the United Kingdom but delivered to family members in Zimbabwe. The companies

offering this service advertise openly both in Zimbabwe and in the United Kingdom. He is aware of one person who sends six deliveries of groceries each month to her extended family in Zimbabwe. The professor himself employs a carer to look after his wife, this carer being a Zimbabwean lady who is present in the United Kingdom having been granted leave to remain as a student. She sends such food parcels on a regular basis to her family in Zimbabwe. The carer, incidentally, had recently returned from a visit to her family in Bulawayo and had made no report of any difficulties. Professor Ranger said that there was no difficulty with such transactions, whether involving food parcels or money. The authorities did not regard this as "dirty money" even where the funds or parcels arose from relatives in the United Kingdom.

129. Reinforcing this aspect of his evidence he said later that when President Mugabe spoke about Zimbabweans outside Zimbabwe as being unpatriotic he did not, in the professor's opinion, refer to every Zimbabwean but only to failed asylum seekers.

130. In his most recent written report Professor Ranger said:

> "However, the CIO take-over [of immigration control at Harare airport] has consequences for Zimbabweans returning from Britain. It has been clear for some time that "failed" asylum seekers, deported from the UK, will be automatically drawn to the attention of the CIO at the airport. Now, every returnee, including voluntary ones, will be subject to CIO scrutiny."

The professor made clear in his oral evidence that such returnees who were not failed asylum seekers would be subject to "CIO scrutiny" but not to "CIO interrogation".

131. This evidence is significant for two reasons. It is established by the evidence that failed asylum seekers cannot all be "automatically drawn to the attention of the CIO at the airport" as a discernible class of passengers because there is nothing that identifies any returnee, automatically, as some one who has made an unsuccessful asylum claim in the United Kingdom. This information will be known to the authorities at Harare airport only if it is volunteered by the returnee himself or if there is intelligence to that effect from the United Kingdom.

132. The CIO officers at the airport will be able to identify from the passenger manifest all those who have been deported from the United Kingdom, as opposed to failed asylum seekers who have returned voluntarily, and each of these may be asked if they have made an asylum claim in the United Kingdom, although it can be seen from the individual accounts that this is far from being uniform practice.

133. Secondly, in his evidence the professor appears to agree that there is a sifting process inherent in the initial questioning at the airport. He distinguishes between "scrutiny" and interrogation.

134. Our conclusion upon the evidence of Professor Ranger is that his clear opinion, sincerely held, that all failed asylum seekers would be identifiable as such upon return to Harare airport and would on that account alone be subjected to serious ill-treatment is one that does not sit easily with the evidence as a whole and is far from determinative upon the issue of risk on return.

The evidence of Witness 66

135. In order to protect the anonymity of this witness we are unable to set out in this determination the full details of his career and the experience that Mr Henderson says qualifies this witness to express an opinion upon country conditions in Zimbabwe today. But we have, of course, had regard to those matters in reaching our assessment of his evidence. W66 worked in a professional capacity in Harare until July 2002 when he settled in the United Kingdom.

136. Since moving to the United Kingdom W66 has maintained an interest in human rights issues, not just in Zimbabwe but in respect of human rights issues worldwide. He made a short visit to Zimbabwe in August last year.

137. W66 has prepared two written reports for these proceedings. The first, dated 24th June 2007, was in response to a series of questions posed for him to consider by the appellant's representatives. The second, which appears to be undated, is said to be in response to the statement of the respondent's witness Mr Walker.

138. W66 made clear in his oral evidence that he has no personal knowledge of the experiences of any individual returned to Zimbabwe and bases what he says on the reports he has read in order to keep in touch with what is happening in Zimbabwe today. He said:

> "My area of expertise is not the treatment of involuntary returnees."

139. In his first report W66 speaks of a recent further serious deterioration in the situation in Zimbabwe in that there has been an increase in the level of violence meted out to political opponents of the regime. He said that President Mugabe "has launched his characteristic campaign of violence against all those who he sees as the enemy". The primary target is the MDC. W66 describes the current political climate as being "at its worse for decades" with widespread arrests and abductions of MDC-linked individuals who are subjected to torture and against whom false allegations are made of involvement in bombings and attacks on police and ZANU-PF members.

140. W66 says that at risk are those perceived to be MDC supporters but that, in his view, this has come to mean anyone who is suspected not to be "in line with" ZANU-PF.

141. It was the coming together of the two factions of the MDC at a prayer meeting on March 11th 2007 that sparked off the recent sharp deterioration in events for opposition supporters. Since then, according to W66, brutal attacks on MDC personnel have continued and every day there are new reports of people being detained, tortured, "disappeared" and even murdered.

142. W66 also detects there to have been a serious deterioration in the situation of those perceived to be political opponents of the Mugabe regime in Zimbabwe since events of Mach 2007 when a number of prominent MDC people were detained and ill-treated in police custody with the apparent approval of the President. In response to a request to comment upon the risk faced by a failed asylum seeker returned today to Zimbabwe from the United Kingdom, W66 says that given the recent sharp

deterioration taken together with recent "anti British rhetoric", the risk is currently considerably greater than it was a year ago.

143. It will be remembered that, apart from a visit lasting a few days in August last year, this witness has been away from Zimbabwe since 2002. His evidence is based upon what he has been told by people who have not been identified and upon what he has read. Much of his evidence concerns that which is not, in any event, in dispute. It has been the case for some years that those in Zimbabwe active in support of opposition of the regime will be at risk of being subjected to serious ill-treatment if they fall into the hands of the CIO, the police or any of the other groups of people used by the regime to achieve its aims.

144. We have regard to what W66 says about the widening scope of those subject to this repressive attention from the state. The categories of interest have been expanded to include those active in what is often termed civil society. For example, W66 describes how an organisation called the National Constitutional Assembly, a group which is not part of the MDC and is to some extent a rival to it, is often targeted and its leaders have often been beaten, arrested and tortured. Church leaders have been abused if outspoken against the regime. "Human rights defenders" have been attacked as have ordinary people who have tried to rebuild homes destroyed during Operation Murambatsvina. W66 concludes from all this that:

> "The main political threat to the Government, however, is still the MDC (even though it has been weakened since it split in late 2005) and therefore the organisation which bears the brunt of its violence, particularly during elections. For all these reasons the position of asylum seekers has to be assessed within the current lawless climate in Zimbabwe."

145. This is the reasoning that underpins the views of both W66 and Professor Ranger. Their view is that because the state authorities are known to act with impunity in subjecting those seen as a threat to the continued authority of the regime to violent repression, therefore asylum seekers identified as such on return to Harare airport would be considered within that class of persons who should be seen as potential opponents and so treated as such. W66 states:

> "There can be little doubt that any Zimbabwean, whether directly or indirectly involved in anti government activity, is now regarded as a legitimate target for physical attack. I would go further and say that anyone who is perceived as not being loyal to the regime is also in danger. "

146. Thus, the effect of the evidence of this witness is that anyone involved in anti government activity or who is perceived to be disloyal to the regime will be at risk and so if those identified on return are identified as being disloyal because they have made an asylum claim in the United Kingdom, they will be at risk.

147. It is W66's view that because President Mugabe continues to blame the United Kingdom for leading a regime change crusade against him this will influence the agents of the state in their dealings with people so that those who have claimed asylum in the United Kingdom will be considered disloyal and so suitable candidates to be ill-treated. But interestingly, W66 says that it is the appellant's claimed MDC family connections that would "substantially increase the risk" she faced on return.

148. Once again, this view is not based upon evidence that people have been ill-treated because they have claimed asylum in the United Kingdom but is the opinion of this witness of what he believes would be the case, based upon what is happening in Zimbabwe generally.

149. As we know from the evidence before the Tribunal, and from that referred to by Professor Ranger in particular, it is the view of the Zimbabwean government and the CIO that the vast majority of those who claim asylum abroad do so not to escape persecution but for economic reasons. There is no reason to suppose that those in Zimbabwe who support the ZANU-PF party, especially those at a low level who would have shared many of the experiences of the difficulties of every day life in Zimbabwe in recent times, would consider themselves personally disqualified from seeking economic betterment by moving to the United Kingdom and extending their stay by pursuing an asylum claim. We did not understand either witness to suggest that not to be so. That would be another reason for seeking to identify from those returned as failed asylum seekers those who are associated with the opposition or otherwise of adverse interest, apart from being returned in those circumstances.

The evidence of Witness 69

150. Mr Henderson has made references to the evidence of this witness, both in his skeleton argument and in his closing submissions. He regards him as an important witness. Although protected by the anonymity order, and thus referred to as W69, his identity will be readily ascertainable from the information upon which Mr Henderson relies. For that reason we do not repeat in this determination the information concerning W69's professional activities and background but we have taken that into account in assessing his evidence.

151. The view of W69 of the reception awaiting those now returned to Zimbabwe as failed asylum seekers is perhaps best summarised by what he has said in his most recent statement, made in response to the evidence submitted in this appeal by the respondent:

> "I have been told that the Home Office state that "The Zimbabwean Government's stated policy is that it will unconditionally welcome all deportees and that the source for this statement appears to be press coverage of the Tribunal's ruling last summer which attributes comments to Chinamasa that asylum seekers will be welcomed with "open arms", that there was "never a genuine reason to justify them seeking asylum in Britain" and "These are people who were incited by the British to leave Zimbabwe for political reasons". I consider the proposition that all deportees from the UK will be welcomed unconditionally to be hogwash. It is not credible that asylum seekers returned from the UK will be unconditionally welcomed by the CIO, state police and militia, and ZANU-PF. What form would this welcome take? I remain of the clear view as I indicate in my statement that they would be viewed as sell outs and treated accordingly."

And:

> "Given the poisoned atmosphere, and given the mistrust, the CIO will be all the more interested in interrogating returned asylum seekers to find out what they have been up to. They have been told these people are traitors."

152. In offering his view of how he believes failed asylum seekers would be treated if returned to Zimbabwe today, this witness says first that President Mugabe has admitted he now has serious competition from the MDC. That is, in our view, significant because it illuminates the real motivation behind the arrangements that would be put in place for the management of such returnees. This witness goes further and says that President Mugabe perceives Zimbabweans outside the country as unpatriotic. In that (if he applies the description to all Zimbabweans outside the country, and nothing he says suggests otherwise) he offers a different view to the opinion expressed by Professor Ranger which we have discussed above. W69 says also that the regime perceives the Zimbabwean community in the UK as being pro-MDC.

153. There can be little doubt that the regime perceives the community in the United Kingdom to include those who support the MDC. But the evidence simply does not support the view that the Zimbabwean authorities regard all its citizens who have been staying in the United Kingdom as opposition supporters and thus worthy of attention on return as being of interest as adverse to the regime. That is clear from the evidence of the large numbers of ordinary travellers, who of course are voluntary returnees, including the lady working for Professor Ranger, who are clearly part of the Zimbabwean community in the United Kingdom and who periodically return to visit friends and family in Zimbabwe without difficulty. It is not in dispute that amongst Zimbabweans in the United Kingdom are a number of persons working for the Zimbabwean government or who are members or supporters of ZANU-PF.

154. It is said on behalf of the appellant that involuntary returnees from the United Kingdom will be seen as a danger or threat to the regime in Zimbabwe when voluntary returnees are not. In order to justify such a conclusion there would have to be evidence that the Zimbabwean authorities believe that the United Kingdom allows friends of the regime of President Mugabe (whose regime, it is said, the United Kingdom opposes) to travel freely but throws out of the United Kingdom those who are its own friends (i.e. enemies of President Mugabe's regime). There is simply no evidence to that effect. We deal with this in more detail below.

Procedures at the airport: W5 and W6

155. Of these two witnesses who gave oral evidence before us, we heard first from W6, who has provided evidence at each stage of the AA litigation. He has made a number of witness statements. In this determination we refer mainly to two of them, as those have been relied upon by the parties. The first statement made in July 2005 was prepared for the purpose of the judicial review proceedings. Where we refer to his second statement we refer to one signed on 7th July 2007.

156. W6 has a military background. Importantly, he served as a sergeant with Military Intelligence, being part of a team based at the old Harare international airport for a period of two and a half years between 1993 and 1996 before coming to the United Kingdom where he has been granted refugee status. Before joining Military Intelligence he served in the army in other capacities. In his first statement made in July 2005 he said that in 1980 he was seconded as a soldier holding the rank of private to the President's Regimental Institute. In his second statement he said that

this posting was as an accounts clerk. By the time he gave oral evidence before us he felt able to say that he worked with that Institute as an accountant.

157. The written evidence adopted by W6 was in line with his evidence in AA(2). Indeed, he incorporates into his statement in this appeal most of what he said in his statement put before the Tribunal in AA(2). The Tribunal in AA(2) summarised that evidence as follows:

"

87. The next witness, Witness 6, who has also been granted refugee status in the United Kingdom, was a sergeant or section leader with the military intelligence branch of the CIO based at Harare airport for two and a half years until 1996. His role was to check upon passengers passing through the airport. In the witness statement which he adopted as part of his evidence he began by saying this:

> "I set out below in outline, the procedures that applied (and that, I believe, still apply) when a Zimbabwean citizen is deported back to Zimbabwe from another country. These are standard and longstanding procedures. I am in regular touch with former colleagues who still work at the airport, and I have no reason to believe that these procedures have changed significantly. These procedures would also apply where a person had been identified from the passenger manifest and was of interest."

88. Witness 6 said that the deportee would be interviewed initially at the airport by a team comprising representatives of the military, the police and the CIO. He explained that in fact each is a branch of the CIO but the term "CIO" is used to distinguish the internal security branch, whereas the nature of the other two relevant branches, the police and military intelligence, is obvious from its name. He continued :

> "In the interview room, each agency would interview the deportee about any issues of concern they might have. For example, the police would interview the deportee about any criminal matters that might be outstanding, the military about whether the deportee was a former soldier and any issues about being absent without leave or having conducted military activities outside Zimbabwe, and the CIO would check for any political activities.
>
> Once it was decided which agency would have custody of the deportee, the deportee would be taken by that agency for interrogation with the benefit of the report of the agency that had led the airport interview."

In his oral evidence this witness made clear, as did Witness 5, that not all deportees were taken away by one of the three agencies for interrogation. He said "It depends how valuable the subject is whether they were taken away". When a person is released that was not the end of it as there would be monitoring in the persons home area.

89. This witness said that there was a significant difference between an interview and an interrogation. He knew what went on at the interrogation stage because a former colleague who currently works in army counter intelligence central administration had seen reports of such interrogations. In his witness statement he said:

> "It should be understood that there is a significant difference between a person being interviewed (eg on arrival at the airport), and a person being interrogated. Within the Zimbabwean intelligence community, the implication of a person having been interrogated (and hence an interrogation report) is that the interrogated person will have been ill-treated."

And in his oral evidence:

> "There is not an interrogation at the airport, just an interview. I took part. That's why I was there, to interview. When the detainee was taken away from the airport he is handed over to somebody else."

90. Witness 6 said that the approach to those being returned from the United Kingdom was based not just upon the initial interview but was intelligence led. People working with the London Embassy were recruited from the Zimbabwean community in the United Kingdom. Intelligence was collected and sent back to Harare:

> "People in Harare are well briefed by people in London so they know who they are interested in. If you do any activities in the UK you put yourself in a situation. This is so we have a record to be used – to be a member of this organisation in London – you must be monitored. I know that because that is what happened when I worked at the airport."

91. Finally, this witness made clear that the sifting nature of the initial interview is genuine and is conducted professionally. Information that might give rise to suspicion is not fabricated in order to justify further enquiry:

> "The questioning at the airport was intelligence led. We knew something about it. Our purpose was to produce a true and good report. We were not trying to cook up a case. We do not cook up intelligence."

158. But, as is clear from what was said by the Court of Appeal, reproduced above, the Tribunal in AA(2) failed to deal with what W6 said in his oral evidence before the Tribunal concerning the abuse that he said went on at the airport, that is to say at the first or interview stage of the two stage process. That evidence is restated by W6 in his latest statement:

> "As I told the Tribunal when I gave oral evidence, during such interviews at the airport, there would be abuse but not torture. Anyone who was of sufficient interest to be questioned for say an hour or more would be liable to abuse. People would be beaten but not too hard because it was not discreet enough. If the person was worth more effort then he would be taken away from the airport for questioning and torture."

159. It might be thought astonishing that a witness who was called on behalf of the appellant to establish that a returnee to Harare airport is at risk of precisely the sort of hitting or kicking that W6 described in his oral evidence should make no mention at all of such treatment in the written statements prepared for the judicial review proceedings or the statement prepared for the appeals in AA(1) and AA(2). In contrast, adding to what he said in his statement reproduced above, W6 has subsequently gone on to say this:

> "It would be quite common for a deportee to be roughed up during interview. They would be kicked, hit and slapped in order to intimidate them and make them too frightened to lie. I have seen this hitting and kicking at the airport. Whatever agency was leading one of these interviews of a deportee at the airport, there would be likely to be some roughing up. There is a tradition of that sort of abuse."

160. If there is any reason why this apparently crucial evidence was not included in his earlier witness statements we were not told what it was. It is also out of step with the

experiences of the majority of individual returnees who have given an account of how they were treated during these initial interviews at the airport. With few exceptions, those who do complain about being physically ill-treated at the airport are those about whom the CIO had some reason to have an interest for reasons other than the fact that they arrived in Harare as deportees. In so observing, we have had regard to the analysis of these returnees undertaken and offered by Mr Henderson in which he attempts to demonstrate that the number of returnees experiencing no adverse experiences represented a very much smaller proportion of the relevant number of such cases to be considered. But, with respect, for the reasons we set out below (at paragraph 208) when dealing with the evidence concerning the individual returnees, we do not accept that his analysis is sustainable in the light of the findings of fact we have made and what we say in this determination.

161. It must be remembered that here W6 is speaking of his own claimed experiences when he was working at the old airport more than ten years ago. He himself has never dealt with any asylum seekers returned from the United Kingdom or anywhere else. All the deportees he dealt with were those who had been deported from another country because of having committed a criminal offence.

162. It is hard to understand why, if a member of Military Intelligence or a CIO officer felt the need to ill-treat someone physically in the privacy of an interview room at the airport, he would feel any need to act with discretion. The evidence indicates clearly that agents of the state act with impunity, facing no real prospect of any form of censure for acting with unrestrained brutality towards those deemed suitable candidates for such treatment. This, after all, is the whole basis of the appellant's claim that she would be at risk as a failed asylum seeker.

163. The assertion that a person becomes at risk of physical abuse as the period of detention becomes extended may be thought to be in line with what is known of the CIO. The purpose of the screening process, which clearly does take place on arrival at the airport, is to identify those who may be of interest. It is those who are thought to be of interest who are at risk. The evidence of the individual returnees demonstrates that it is very frequently the case that the initial screening interview is concluded relatively quickly.

164. W6 was asked about this in cross-examination. The point he was asked to deal with was clear and simple but, as was the case often during the cross examination of this witness, when he was asked to deal with apparent difficulties in his evidence, his answer was evasive and largely incoherent. We set out this exchange reproduced from the transcript:

> Q. "Anyone who was of sufficient interest to be questioned for say an hour or so would be liable to abuse." Does that mean that if you weren't questioned for an hour or so you were not liable to abuse?
> A. No, no, no. That's not the case; its just the person himself. Some people when you just say, "Have a seat here" automatically prepared just to say, within to or three minutes, then there are some people who are prepared, who can resist; so, you know when such people end up abusing.
> Q. Why would someone who is not of interest, either to the police or the CIO or the army service, why would such a person like that be abused at the airport?
> A. Oh, actually I think the problem is you are in a first world country. You are talking about a third world country, whereby, you know, abuse is like our daily bread,

> because we want things as soon as possible you know, so we can call somebody – if we called you, "Sit here" so of an aggressive nature you see, so it end up abusing the person."

And, once W6 had agreed that not everyone passing through the airport was liable to be the subject of abuse, he was asked who would be at risk. W6 said that it depends upon the interest in that person. But, if someone facing simple questions tried to resist or was awkward, for example by saying "I know my rights. I'm not supposed to be asked," then they would be liable to be abused.

165. If that much were correct it may be an explanation for the experience described by R31, whose account was a matter of concern before the Court of Appeal. She described how she was slapped across the face after she had demanded to know why the interviewers were not accepting her assurance that she had returned because her student visa had expired.

166. W6 says that he is not someone who is himself inclined to ill-treat those with whom he dealt as an agent of the state in Zimbabwe. He said in his recent statement:

> "When posted to Mozambique and Matabeleland I did not use torture although I was present when electric shocks were used. I used to get complaints that my interrogations took much longer to produce reports because I used different techniques other than torture. My colleagues who used to torture produced reports much more quickly"

167. It is reasonable to assume that if complaints were made by the colleagues of W6 about his reluctance to use torture, then that would have been known to his superiors. That being the case he would not be likely to be seen as an appropriate person to lead the Military Intelligence team based at the airport, under the overall supervision of a major who was based away from the airport, if that role required those concerned routinely to abuse and ill-treat those held back for questioning.

168. As mentioned above, W6 left Zimbabwe more than ten years ago, he has never visited the new airport facility at Harare and he has never himself had to deal with failed asylum seekers returned from the United Kingdom. In discussing these issues he says he relies upon what he has been told by his two former colleagues who remained in Zimbabwe after he left to come to the United Kingdom. It is said that he does not simply pass on that hearsay evidence but that, because of his own knowledge of the work of Military Intelligence at the airport, he is able to express a view as to whether what he has been told has about it a ring of truth such that he accepts it to be accurate.

169. But, the fact remains that this is not evidence about what happens today at the airport. It is evidence about what he says he has been told happens. That being the case, some assessment must be made as to the reliability of his sources and the value of the information he received from them. These contacts are said to be senior non-commissioned officers from different sections of Army Counter Intelligence. One works in Army Counter Intelligence central administration in Harare, and the other works as an operative in the International Airport. W6 has no further contact with either because the first has resigned and the other has been transferred to other duties.

170. The former colleague who worked not at the airport but in administration has no personal knowledge of what goes on at interviews at the airport because he was not

present. He is able to read the interrogation reports that are prepared. W6 said in his first statement:

> "My former colleague who currently works in Army Counter Intelligence central administration has confirmed to me that he has seen reports of interrogations of returning Zimbabweans who had sought asylum in the UK. It should be understood that there is a significant difference between a person being interviewed (e.g. on arrival at the airport) and a person being interrogated. Within the Zimbabwean Intelligence community the implication of a person having been interrogated (and hence an interrogation report) is that the interrogated person will have been ill treated. I am not able to give the names of my informants, and they are not willing to give a statement even anonymously, as it would put them in danger."

171. The information this contact is able to provide is limited to what he is able to glean from interrogation reports. The evidence is that interrogation, which is to be distinguished from the interview that takes place at the airport, is something that takes place after a person has been found to be of interest and so is taken away for that purpose. It is difficult to see how the reading of such reports can assist the witness to know what now goes on at the airport. However, despite the very clear distinction drawn by W6 above between interrogation on the one hand and the interview at the airport on the other, his new evidence before us was that these reports did relate also to interviews at the airport.

172. That is difficult, if not impossible, to reconcile with W6's own evidence. In his witness statement, reproduced above, W6 says clearly that it is interrogations that give rise to the risk of ill-treatment, that interviews are to be distinguished from interrogations and that it is only in respect of interrogations that a report is produced. If that were correct then his colleague, whose knowledge of the treatment of failed asylum seekers came only from the reading of such reports, would have information only about what happened after such people had been found to be of interest and had been taken away from the airport for interrogation.

173. Even if the term "interrogation" here is used loosely and does include the reports prepared from the questioning at the airport, there are still difficulties with this evidence. There would seem to be no reason at all to suppose that such reports would include an account of an interviewee being physically ill-treated. That would only serve to undermine the value of the information obtained from the interview. Further, even in a climate of impunity, it is difficult to see why the author of such a report would make a written acknowledgement of having abused someone in his custody.

174. It was important to establish, if at all possible, precisely what it was that this contact told W6. In cross-examination Mr Kovats sought to obtain from W6 a clear answer to this question but, again, when faced with a clear and specific question about a matter at the very core of his evidence the witness simply failed to provide an answer. The best that W6 could do was to say:

> "I asked how was the airport these days and received: we've got some interrogation reports coming from the interrogation department. But of course I won't discuss it too deep because of the security of the police."

and:

> "He was just saying that they are receiving interrogation report from the airport, from people who were coming from this country, going to Zimbabwe."

Mr Kovats persisted, saying that he was trying to find out exactly what W6 was told:

> "It was about interrogation reports from people, failed asylum, coming from UK, passing through Harare airport"

175. This line of questioning ended with the witness saying that he thought that those selected for interrogation were those who were detained and deported to Zimbabwe. We do not accept that this is what he was told by his contact because if it had been it would have been reasonable to expect this information to have been provided much earlier than it was. Further, if that was the information supplied the witness would not have said that this is what he *thought* to be the case.

176. The other contact upon whom W6 relies is a Military Operative based at the airport. Such a person would be in a position to know how passengers passing through the airport were treated by the CIO and Military Intelligence and who would be of interest to the authorities. But what exactly did W6 learn from this contact? When one examines W6's written evidence it can be seen that there is no indication of anything that W6 was told by his contact at the airport about what actually happens to people as they pass through. In the first statement prepared for the judicial review proceedings W6 said simply that he had heard from both contacts that the CIO considers that the deportation of asylum seekers was a process used by the British authorities to smuggle spies into Zimbabwe. In the more recent statement he says that both contacts told him that deportees who do pass through the airport are monitored or followed up in their home areas.

177. W6 was asked in cross examination what he was told by this contact. He said that this contact at the airport phoned him on a neighbour's phone at the airport. Being an intelligence officer he was aware the phone might not be secure. He did not ask a direct question and his contact did not give him a direct answer but W6 said he knew what he meant. He was asked again, later in cross examination, whether he asked this former colleague at the airport to describe exactly how passengers are treated when they arrive at the airport. We reproduce this from the transcript of his evidence:

> A. Well, it says they do the same procedure, but they got more space, so by more space it means they might change some of the techniques.
>
> Q. The extent of your knowledge is, same procedure, more space?
>
> A. Yes, but you can always evaluate it, it was every month you had a security threat, so that you can adjust it.

178. This arose from something W6 said in his more recent written statement (emphasis added):

> "There is now a much larger international airport, and as I told the Tribunal a year ago when I gave oral evidence, the actual procedure ***may*** have expanded in the new airport where there are better facilities. They ***may*** now have cells. My friend has said that there is "enough space" now and the CIO facility is further away from the passenger facilities."

179. This illustrates that although W6 claims to be able to provide evidence about what happens now at the new airport because he has information from contacts in Zimbabwe, in fact this is not so. He bases what he says upon what he thinks may be the case.

180. W6 was asked also about a proposal of the respondent's that, in order to enhance the prospects of an escorted deportee making an unhindered passage through the airport, the escorts could remain on the plane or remain airside so that the deportee, with his travel documents, would be indistinguishable from other passengers. W6 said this would not work because the presence of those escorts would become known. That was because:

> "… the staff of, let us say, Air Zimbabwe, the staff will tell us. Even the pilots will tell us. We have got what you call, those who put fuel, the jet fuel in the plane. They will know he is on board and we have got those who clean the airplane, we know to talk to those, everyone. Even the staff of the airline, even it – when a plane arrives at the airport that is staff of Air Zimbabwe put more food on the plane…."

181. But none of that would be necessary to discover the presence of escorts or, indeed, that the plane contained a passenger who had been deported to Zimbabwe. Before the Tribunal is the unchallenged evidence of Ms Cheryl Cates, Deputy Director in the Enforcement and Compliance Directorate within the Border and Immigration Agency. This establishes that there is a global and uniform practice that the passenger manifest identifies passengers who are accompanied or unaccompanied deportees and those who are escorting deportees by the appropriate letters appearing next to their name. W6 said that he would have access to the passenger manifest. It was one of the sources of information. It is little short of fanciful that a person who had in fact been personally concerned with the monitoring of deportees returned to Harare airport over a two and a half year period would be unaware of this and would believe instead that the presence of detainees or their escorts had to be detected by the sort of enquiries W6 has referred to.

182. W6 claims to have personal knowledge of the procedures at the airport and the mechanisms used by the CIO to identify those who may be of interest. In particular, he would be interested in those who had been deported. He spoke of passports being examined to see if stamps indicated that they were likely to be asylum seekers. But of course no stamp would give such an indication. The most that could be discerned would be that someone was an overstayer in the United Kingdom or had been refused leave to enter or remain. Again, we would have expected that someone with the experience of airport procedures this witness claimed would have known that.

183. All this leads us to entertain very real concerns about the reliability of W6's evidence. It emerged during his oral evidence that he did not base what he said about procedures at the airport simply upon what he had been told by these two contacts considered in the light of his own personal knowledge of the CIO:

> "What have I learnt about developments in the CIO since I left? Well there are so many sources of information. I still have friends in the army, police in the CIO itself. And just to speak to other people who were in the CIO but who have got, I can say maybe experts, like journalists and so forth as well as the newspapers, like foreign language newspapers, there are loads of language newspapers in Zimbabwe, so there is quite a lot of information."

184. But we have no information at all about these additional sources of information, disclosed for the first time during the course of his oral evidence. We have no basis upon which to judge the reliability of those sources or the extent to which W6 has understood and repeated accurately what they intended to convey. The material that is peculiar to W6 is unreliable. Even if, which is far from clear, he has had regard to sources that are reliable those sources would not be peculiar to him. Thus W6's evidence adds nothing of any real evidential weight to the appellant's case

185. For these reasons we do not feel able to rely upon W6 as a witness who is in a position to describe authoritatively or reliably the processes to which those returned forcibly to Zimbabwe are now subjected. Most of what he says about his own experiences of working at the airport is undermined by what we say above and the rest is based upon speculation and conjecture, arrived at in the light of unidentified news reports produced by journalists he considers as experts. We accept that W6 was based at the old airport as part of a Military Intelligence team but we do not accept that this witness played a role that involved the routine monitoring of passengers or deportees or that he is in a position to speak about what went on in interviews at the airport conducted by the civilian branch of the CIO. For the reasons given above, we reject his evidence that he personally witnessed low level violence or "roughing up" at the airport.

186. We consider next the evidence of Witness 5 (W5).

187. W5 has also provided evidence at each stage of the AA litigation. He gave oral evidence before us and adopted an additional witness statement dated 26th June 2007, which incorporates much of what he said in his earlier statements.

188. In AA(2) the Tribunal summarised his evidence as follows:

> 257. … Witness 5 was recognised as a refugee after he came to the United Kingdom in June 1998. He had been a Lieutenant Colonel working with the CIO, attached to the military intelligence branch, known as Branch 3. Between 1991 and May 1998 he was based at the school for military intelligence in Harare but from around 1993 until May 1998 he was Adjutant to the NCOs carrying out day to day security procedures at the airport. This meant that those NCOs were under his command.
>
> 258. Witness 5 left Zimbabwe before the new airport terminal had been opened but he says that he knows from those still working at the new airport that procedures have changed only in that security measures have become even more stringent.
>
> 259. Dealing first with "ordinary travellers", Witness 5 explained that the CIO would receive the passenger manifest in advance, from which they would identify those travellers they were interested in and these people would be approached after they had passed the immigration desk but before they collected their luggage. Then, at the old airport, there were no real facilities for interrogations to be carried out and so the passenger would be taken away to CIO headquarters.
>
> 260. Sometimes an immigration officer would refer a passenger to the CIO. When this happened the person would be questioned at the airport by representatives of the security services present at the airport. If found to be of interest he or she would be taken either by the CIO to headquarters, by the police to the police station or by the military intelligence branch to the barracks on the outskirts of the city.

261. Witness 5 told us that during the time he was in Zimbabwe they never saw any returned asylum seekers from the United Kingdom but he confirmed what he had said in his statement how other deportees, mainly from South Africa, were dealt with. After the pilot had handed the passport to the immigration officer the deportee would be taken to a separate room until all the other travellers had been processed after which they would be handed over to the CIO.

262. Witness 5 has kept in touch with an old friend from military intelligence in Harare, Major [ ], who is based at the airport today. When they spoke on the telephone in mid 2005 they discussed the proceedings that had been brought in the High Court. In his witness statement Witness 5 said this:

> "Major [ ] told me that all the returned asylum seekers are questioned because they are all considered to be a security risk. It is believed by the security services that the returned asylum seekers have been trained in military procedures and espionage in the UK and are now being sent back to destabilise the country. He told me they are all handed over to the CIO who carry out thorough questioning and then decide what is to be done. Major [ ] went on to tell me that those asylum seekers who are released are nonetheless kept under surveillance."

And the Tribunal concluded from this evidence:

> "Thus, it is clear that there has always been and continues to be a screening process carried out at the airport. All deportees will be questioned to see if there is any reason to pursue the enquiry further and it is only those in respect of whom something of interest arises from this initial interview, or from intelligence received before arrival, who will be taken away for interrogation. We consider it significant that this witness, as do others, distinguishes between an interview or questioning at the airport and the "interrogation" that is conducted of those taken away from the airport. Witness 5 said that he had never seen anyone being tortured at the airport, although he added that there was limited space at the old airport."

189. As the Court of Appeal has pointed out, in reaching those conclusions the Tribunal did not deal directly with an important part of his evidence. W5 did not say in his initial witness statement, obtained by AA's legal representatives as part of their case that asylum seekers faced a real risk on return to Harare airport, that there would be any physical ill-treatment at the airport. But he did say in his oral evidence in AA(2) that the "thorough questioning", as he understood it, involved the use of "crude techniques" which he referred to as "coercion".

190. W5 sought to clarify this part of his evidence in his most recent witness statement. At paragraph 14 of that statement he said:

> "The CIO might take the lead in interviews at the airport or he might be interviewed first by the police and then passed on to the CIO. There were no facilities at the old airport to carry out any proper interrogation and for this reason I would be surprised if someone was subjected to proper torture at the airport. However, "low level" ill-treatment where someone was roughed up a bit in the office was of course possible. I did not witness questioning at the old airport because I was not doing that work although I had administrative responsibility for the operatives who worked there.

> However, I would not be at all surprised that someone being interviewed by the CIO was roughed up in their office. People have grown up in a violent society from colonial times. Slapping and kicking is common so I certainly would not doubt that people being questioned by the CIO were treated like that at the old airport. I would not call that torture - it is not something to write home about. It is viewed as quite a low key in Zimbabwe. Someone who has this roughing up would never try to complain. They would think themselves lucky and would want to ensure that they avoided the real torture that would likely ensue if they made a fuss about it."

191. It can be seen that here W5 is not describing what he knows to be the case but what he thinks may have been. He, of course, has not himself been involved with the questioning of passengers at the airport and has no direct personal experience of what went on. He had other responsibilities apart from "administrative command" of the small team of Military Intelligence staff that was based at the airport. He confirmed to us in his oral evidence that he knew of what went on because he "normally" received written reports from his men at the airport. Asked what was in these reports he said:

> "All operational matters, there is forms that we would use where people are writing intelligence reports that will end up with a comment or assessment of a situation."

192. Thus, although he had administrative command of the team at the airport for the five years between 1993 and 1998 he does not claim to have personal knowledge of a single specific incident of ill-treatment during questioning at the airport.

193. So, as W5 cannot tell us what went on at the old airport, or what goes on today at the new airport from his own direct experience of those matters it is important to establish clearly upon what he bases his evidence. It is also essential to establish what this witness means when he refers to the "thorough questioning" that he says all asylum seekers are subjected to upon return to the airport as part of the process of deciding whether he or she is of sufficient interest to be taken away for interrogation.

194. We consider first the information available to W5 about current procedures at the new airport. This, he said, comes only from his old friend and colleague, a Major [ ]. The major is referred to in this way because W5 does not wish his name to be disclosed. It might be thought, looking the evidence of W5 as a whole, that he must have had regular and detailed contact with this source. But it emerged in W5's oral evidence to us that, in fact, his evidence is based upon one single conversation with this source, in July 2005.

195. W5 said that he could remember this conversation clearly and he recalls exactly what he asked and what the Major told him. That asylum seekers were being returned to Zimbabwe from the United Kingdom was a topic covered in the newspapers. W5 said that "out of curiosity" he asked the Major how asylum seekers were being dealt with. The Major said:

> "We question them thoroughly."

196. W5 was reminded that he said in his witness statement that *all* asylum seekers were handed over to the CIO for thorough questioning and he was asked if this

meant that they were all subjected to thorough questioning or to torture. W5 said:

> "I think he was only referring to those who might be of interest to the CIO, the police or the military.
>
> …
> I think, from my experience, those people who are questioned are those people who have been identified already, who they want to speak to."

197. This, of course, is what the Tribunal found to be the case in AA(2). The question that remained was whether the process of the "thorough questioning" conducted to identify those of interest was also accompanied by a real risk of ill-treatment.

198. This is the exchange that took place as W5 was asked in cross examination about this single conversation with the Major in July 2005:

> Q. And what did he tell you happened to passengers at the airport?
>
> A. He told me about the questioning, because when the deportations started it became big news everywhere, so I was just asking for interest's sake. And then he told me that they do thorough checks there.
>
> Q. And did this con(versation) take place in English or Shona?
>
> A. It took place in both English and Shona. Because in my dialect we usually mix English and Shona. (Major used Shona phrase meaning thorough questioning)
>
> Q Is there any particular reason why the Major did not use the word "interrogation" or indeed the word "interview"?
>
> A It means one and the same thing as far as I understand it, from the Shona perspective.

199. So, in fact, all that the Major told W5 during a telephone conversation W5 described as "just a general talk", was that passengers at the airport are subjected to thorough checks.

200. It is perhaps surprising that the Major, a serving officer working with the CIO and responsible for the Military Intelligence team at the airport should be willing to supply any information to W5 at all. The major knew at the time of this conversation that he was speaking to a person who had travelled to the United Kingdom to claim asylum and was closely associated with the MDC in the United Kingdom.

201. As we have seen, it is W5's evidence that there is indeed a filter process to which those identified at the airport as failed asylum seekers are subjected in order to identify those who are of interest to the police, the CIO or the military. But we are asked to conclude that W5's evidence supports the assertion that all returned asylum seekers face a real risk of being ill-treated, whatever their personal profile because all are subjected to "thorough questioning" as part of that filter process which W5 says is the same thing as interrogation, which, as every knows, carries with it a likelihood of torture.

202. In his most recent statement W5 said this:

> "[The Major] used a Shona phrase which means "thorough questioning". What was meant by that phrase was clear to me as a former intelligence officer: he meant an interrogation such that would be expected to be accompanied by ill-treatment and torture. Interrogation at the hands of the CIO is routinely supported by the use of torture."

203. But if it were truly the case that W5 believed that the thorough questioning to which all asylum seekers would be subjected at the airport would be expected to carry with it ill-treatment and torture it is impossible to understand why he did not say so in his first two witness statements, both of which were obtained to support the assertion of such a risk.

204. And this is not what the Major told W5. It is his interpretation of what the Major said. The only information passed on by the Major was that all asylum seekers, because they were considered to be a security risk, will be handed over to the CIO at the airport and will face "thorough questioning". The Major chose to use a Shona phrase which could have meant either "interview" or "interrogation". W5 chose to place upon that phrase the latter meaning but he cannot know that the Major intended that also. The Major chose not to say that all asylum seekers would be interrogated. That thorough checks are made, or thorough questioning is carried out at the airport as part of the process of identifying those who are of interest and so are to be taken away for interrogation, does not support the interpretation placed upon it by W5.

205. We are satisfied that the evidence given by W5 is not objective, fact based nor a reliable indication of what goes on at the airport today, any more than it is reliable evidence of the risk faced by passengers passing through the old airport.

206. Certainly, W5 has a keen interest in all that is wrong with Zimbabwe today. He says in his most recent statement:

> "In the UK I am chairperson of the Hertfordshire branch of the MDC… I know most of the top leadership in the UK with whom I have worked together for many years. My late cousin brother was the national chairman.
>
> I am also a commentator on Zimbabwean issues, especially military, security and policing issues on SW Radio Africa. That is a short wave radio station which is based in the UK and broadcasts to Zimbabwe. The Zimbabwean regime attempts to jam it … the station's journalists are banned from Zimbabwe. "

207. There is ample background evidence concerning the propensity of the CIO to use violence against those perceived to merit that treatment. But for the reasons given above we do not find that the repetition by this witness of an account of that propensity establishes that violence is used routinely against those passengers passing through Harare airport who are identified as or who are perceived to be asylum seekers returning from the United Kingdom and in respect of whom there is no reason to suspect any more.

208. All that is established by the evidence of W5 is that he was told by his contact in Zimbabwe that only those failed asylum seekers who were of interest to the CIO on account of an adverse political, criminal or military profile would be subjected to thorough questioning and *those would have been identified in advance of arrival*. Put another way, they were not of interest simply on account of being perceived to be failed asylum seekers returning to Zimbabwe from the United Kingdom but because they attracted the attention of the CIO on or in advance of arrival, they being identified as someone in whom there was reason to have such an interest.

The evidence concerning individual returnees

209. In AA(2) the Tribunal carried out a detailed examination of the evidence then available concerning the experiences of the individual returnees. This led to the conclusion that this evidence did not point to there being a consistent pattern of involuntarily returned failed asylum seekers being subjected to ill-treatment on that account alone such as to engage either Convention, either at the airport or on return to their home areas after passing through the airport.

210. Mr Henderson submits that this evidence should be approached somewhat differently. In his skeleton argument, at paragraph 153-4, he says this:

> "It was not A's case that an inference of ill-treatment should be drawn simply from the lack of information about a returnee. However, there was plainly no basis to draw the contrary inference (that lack of information was evidence of safety).
>
> It followed that when the AIT stated that "At its highest this evidence can only demonstrate that a very small minority of the 210 failed asylum seekers returned involuntarily may have been subjected to ill-treatment", it was not intending to suggest that an inference of safety should be drawn in relation to those returnees about whom no information was available. If it did intend to compare the total number of cases about which the information indicated ill-treatment on return with the total number of returnees rather than with the total number about which anything was known, it erred. Such an approach could only be sustained if there was a finding that those about whom no information could be obtained were more likely to have returned safely."

211. But this is to overcomplicate what is a straightforward process. The burden of proof remains throughout upon the appellant to demonstrate to the required standard the facts upon which she wishes to rely. There is no question of "an inference of safety" in the absence of any report at all. In seeking to establish that all involuntarily returned failed asylum seekers face a real risk of harm on return to Harare airport the appellant relies, as part of her case, upon the evidence of what has happened to such persons in the past. If there is no information about how a returnee was treated on return then that does not assist the appellant in establishing that there is a consistent pattern of abuse. But the fact of that person being returned does not lose all significance. It is, and it is no more than this, evidence that such person returned and there is no evidence to suggest he or she came to harm.

212. Mr Henderson has demonstrated that a number of those returnees said to be involuntarily returned failed asylum seekers must have been immigration

returnees so that the accounts of the former constitute an even smaller sample from which to draw conclusions as to how such persons were treated as a group or class. We accept that the smaller the group the less significance can be attached to an analysis of their collective experiences. But that evidence is before us and we take it into account.

213. Ms Sarah Harland, of the Zimbabwe Association, has made further enquiries about those returnees, and some others, to update the information available about their experiences on return. She sets out what she has discovered in what is now her fourth witness statement, dated 26th June 2006.

214. In this statement Ms Harland says why she believes that the information she has discovered since first describing the circumstances of their return should lead the Tribunal to different conclusions than were reached in AA(2). But, having examined what she now says, and bearing in mind all the evidence now before the Tribunal, we see no reason at all to depart from the findings in respect of those individual returnees. We consider briefly the new information she offers.

215. The initial report concerning returnee 4 (R4) was that at the airport he was "intensively questioned" but allowed to pass through the airport after persuading the CIO officer who questioned him that he was an overstayer and not an asylum seeker. He made no claim that he was physically abused. He then left Zimbabwe and went to Botswana. Subsequently, a member of the Zimbabwe Association who had been detained with R4 in the United Kingdom told Ms Harland that he had spoken to R4 who now said he had been beaten during questioning.

216. That person, unidentified previously, is now identified as C.K., described as "a very well known political activist" whose own immigration status in the United Kingdom remains unresolved. Ms Harland says that the first report does not refer to the beating because she had not thought to ask R4 if he had been beaten and, presumably, he did not say anything about that when asked how he was treated. More recent information is that R4, whose account of the circumstances in which he had returned to Zimbabwe was one upon which the Tribunal explained it could not rely, had been detained when attempting to leave Zimbabwe recently and has not been heard from since being taken to a youth training centre.

217. None of this is reason to cast doubt upon the reliability of the first report that was unaccompanied by any account of ill-treatment at the airport, even though R4 had every opportunity of describing such ill-treatment, had it occurred.

218. Returnees 8 and 11 made no allegation of being ill-treated on return in the initial reports that were obtained about the circumstances of return. The Tribunal in AA(2) found that "the persistence of the Zimbabwe Association eventually secured an indication in the vaguest terms that some form of ill-treatment had been inflicted", but saw no reason not to rely upon the first reports that no such difficulty was encountered on return.

219. In her recent witness statement Ms Harland makes clear that she is most uncomfortable with what she sees as the implicit criticism made of her

persistence in seeking further information. But the Tribunal does not mean to suggest any dishonesty or lack of integrity about her efforts to compile information. The point is that repeated approaches have been made to some sources of information. As a result, changes in the account of events given have been recorded. That does not mean that more weight should be given to the later account that support the appellant's case, than to the initial account which does not. The first account given might well be thought to be more reliable.

220. Returnee 19 (R19) was someone about whom Ms Harland became aware only after AA's case came before the Court of Appeal. Having been informed by an unidentified minister of religion that a member of his congregation told him that R19 experienced unidentified problems upon being returned to Zimbabwe, Ms Harland spoke to R19 by telephoning him on his mobile phone but that conversation disclosed no complaint of ill-treatment on return. Although R19 did not say so, Ms Harland assumes that he did not feel able to say anything at all about any adverse experiences, not even to hint at them, for fear that the mobile telephone conversation might be monitored.

221. In her recent statement Ms Harland says that she has exchanged text messages with R19 as well as some very brief calls. She did not ask if he had been ill-treated but did ask, in a text message, if he had been detained and if so for how long. He responded by saying that "he was indeed detained (although he did not say how long for, and I did not press him on this) and that his leg continues to pain him."

222. Ms Harland assumes this is a reference to a detention at the airport, although that much is far from clear from this exchange. There is also no specific connection between the painful leg and the detention, although we appear to be invited to assume some connection. We have no idea of what, if any, activities R19 has involved himself since his return to Zimbabwe. This response needs to be considered in the context of the exchange as a whole but that context is not before us.

223. This is not, in our view, clear evidence to support the proposition that failed asylum seekers returned to Zimbabwe face a real risk of being ill-treated at the airport.

224. Ms Harland's fresh comments concerning Returnee 21 (R21) throw up further concerns about this part of the evidence generally.

225. The adjudicator dismissed R21's appeal because he was found to have "embellished and exaggerated his story". In her statement prepared for AA(2) Ms Harland said that the Zimbabwe Association "learned of [R21] through his partner in the UK". The Zimbabwe Association understood that R21 was removed involuntarily at the end of 2004 and failed to emerge from the airport to meet his family who had gone there to meet him. He later contacted his family and said that he had been detained at the airport and held for six months, during which time he had been ill-treated. It was not clear how he secured his release but he had left Zimbabwe and was calling from South Africa. But it was established that no such person was removed. R21's partner no longer wished to co-operate with the Zimbabwe Association.

226. In her recent statement Ms Harland says that the information about the method of removal was not categorical which is why she said that it was understood that the removal had been involuntary. But if there was no suggestion that this had been an enforced removal, it is difficult to see on what basis Ms Harland felt able to say that she understood it had been.

227. Further concern arises from the fact that Ms Harland says she did not speak to R21's partner, the source of this information, at any stage. We do not know whether a record was made by the unidentified representative of the Zimbabwe Association of what was said by R21's partner (and if so whether all that was said is recorded in the statement) or whether this was an anecdotal account recalled sometime after the event by someone unconcerned about the need for accuracy.

228. This account, we find, does not take the appellant's case any further.

229. No fresh information is given concerning Returnee 22 (R22) but further evidence of the methodology deployed in assembling the content of Ms Harland's statement emerges from what she now says about R22. Once again, Ms Harland did not herself speak to the source of the information. She explained how she is able to include this account in her statement:

> "I learnt of the case through a female friend of [R22] in the UK who herself learnt the information not from [R22] but from [R22]'s mother …. My contact in the UK merely passed on the limited information she had gleaned from the mother".

We do not know who this friend is or whether she is to be regarded as independent. If her own immigration status is unresolved she may herself have an interest in the outcome of these proceedings.

230. There is even less certainty about the circumstances of Returnees 23 and 24 because of what Ms Harland says now. Once again, from what we are now told, they cannot be taken to be involuntary returnees at all. Ms Harland says, as she did, erroneously, concerning R21, that she understood these to be involuntary returnees. But once again there is no indication upon what she bases that understanding. This is important because, of course, if they were not involuntary returnees it could not have been that alone that gave rise to any difficulties they might have experienced on return.

231. This is also a case where Ms Harland has not spoken to or otherwise communicated with either returnee himself. The Zimbabwe Association had received this report from a family member in the United Kingdom who had not himself spoken to R23 or R24 but to someone in Zimbabwe with whom the United Kingdom relative was in infrequent contact. Thus this information, when passed on by Ms Harland, is third hand.

232. Ms Harland has had further contact with Returnee 38's sister in the United Kingdom and says that she has told her that R38, who is trying to get into South Africa, has told her that he:

> "… is not ok; so many people are being arrested; people have fear; there is so much intimidation."

But this appears to relate to country conditions generally rather than the risk faced by failed asylum seekers, on that account alone, returned from the United Kingdom to Zimbabwe.

233. Those are the returnees about whom information is provided by the Zimbabwe Association. There are others we need to consider as well.

234. Returnee 31 (R31) was not a failed asylum seeker but someone who had failed to secure an extension of her leave to remain as a student. We know of her only what is contained in a short internet news report from "NewZimbabwe.com" dated 2nd March 2005. Her real name is not known and the date of the flight upon which she says she was one of three deportees is not known.

235. According to the internet news report, R31 and the other two deportees were separated on arrival at Harare airport and taken to recently constructed CIO interview rooms. She was the subject of a hostile interview conducted by two plain clothes men who identified themselves to her as "state security guards" who wanted to know what she had been doing in the United Kingdom and what was her role with the MDC. She was told that they had information that she was a mercenary. She described how she was struck once across the mouth when she asked why they would not believe she was just a student.

236. After three hours of this R31 said that she then "remembered" that she had an uncle serving in the Zimbabwean national army. At her request the two state security guards stopped questioning R31 and telephoned him. When he promised to keep her in check she was allowed to go. As she left the building she said she could "still hear shouts and groans from the other two deportees". That is something that places her apart from every other returnee who has given an account of what happens on return to the airport, for no one else, to whose account we have been referred, has described hearing the groans or cries of others under "thorough questioning" at the airport.

237. The Tribunal in AA(2) clearly felt unable to place much reliance on this evidence but did not say that it should carry no weight at all. The Court of Appeal was concerned that the Tribunal may not have dealt with this evidence correctly, saying that unless the Tribunal found that it was to be wholly disregarded it was not justified in concluding so easily that the slap to R31's face would not be sufficient to engage article 3 of the ECHR.

238. The first question to be addressed is whether the ill-treatment described in the news report about R31 was sufficiently serious to cross the article 3 threshold.

239. It is clear that, as a matter of common sense, there must be a minimum level of severity below which there will be no infringement. If it were otherwise then any physical contact between detainees and those detained, for example the application of handcuffs or a search of the person, would give rise to an infringement.

240. The European case law generally anticipates as a starting point that there will be at least some evidence of injury. For example, in Selmouni v France 25803/94 [1999] ECHR 66 at paragraph 87:

> "The Court considers that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention."

In Balough v Hungary 47940/99 [2004] ECHR 361:

> "… it was difficult for a victim to prove that he had been subjected to police brutality in custody. For that reason, it was for the Government to provide a plausible explanation for his injuries and to prove that its agents were not responsible for those injuries."

And in Adan, Limbuela and Tesema, quoting with approval what was said in Pretty v United Kingdom 35 EHRR 1:

> "As regards the types of "treatment" which fall within the scope of article 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be categorised as degrading and also fall within the prohibition of article 3….."

241. The circumstances in Pretty were, of course, very different, but the principles involved are the same. The high water mark of the argument that any application of physical force applied to a person in detention will cross the article 3 threshold is Ribitsch v Austria. At paragraph 38:

> "The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention."

242. The report of R31's experiences did not suggest she suffered any injury or actual bodily harm. But we accept that a young girl under questioning at Harare airport by CIO officers who is slapped on the face, even though no injury results, would most likely fear as a result that worse was to come, whether it did or, as in this case, did not. We accept that in those circumstances the blow, if it were accepted to have occurred, might be sufficient to cross the article 3 threshold. Therefore we must consider again the evidence about R31.

243. We proceed on the basis that the Tribunal in AA(2) did not make sufficiently clear findings concerning R31. The Tribunal was satisfied that:

> "The way in which this article is written demonstrates that its purpose is not to set out an objectively balanced assessment of the account but is clearly intended to fulfil a journalistic point. It is not possible to identify the true identity of this person and so the respondent has no opportunity of establishing that such a person was removed at all."

244. For our part we would have no difficulty in finding that this evidence does not carry any weight. We find not reasonably likely that a person who could bring such an experience to an end so easily by mentioning the existence of a relative serving in the army would not do so until having suffered hostile questioning for three hours. The claim to be able to hear others being abused at the airport stands alone. There is no indication at all as to the means by which the facts were communicated to NewZimbabwe.com.

245. But it is not part of the respondent's case that R31 does not exist and so we assess the evidence on the basis that this account is true. This was a young girl who did not sit meekly in the interview room but asked to know why her word was not good enough. She had said she was merely a student and that should be accepted. We recall the evidence of W6. Although we have rejected as unreliable his evidence of treatment of returnees at the airport, he is in a position to speak of the general behaviour of the CIO. He said that if someone facing simple questions tried to resist or was awkward, for example by saying that he or she knew their rights, then they were likely to be abused.

246. On R31's account she was slapped because she was impertinent. She interrupted the questioning. That is not to be condoned but it demonstrates that the reason she suffered that ill-treatment was not because she was identified as a deportee from the United Kingdom but because of how she conducted herself. Absent that there was no indication that she would otherwise have attracted such treatment.

247. That does not establish that anyone subjected to the first stage screening interview faces a real risk of being treated in a similar way. It establishes only that a person who conducts themselves in such a way as did R31 does face such a risk. The evidence does not indicate that persons being interviewed by the CIO would generally act in such a way as did R31. The evidence is to the contrary.

248. R31 describes hearing groans and shouts from the other two detainees. That evidence is difficult to assess. There is no other similar account in the context of which to consider it. We do not, of course, know anything at all of the personal profiles of the other two detainees. This does not establish that they attracted adverse attention at the airport simply on account of being a failed asylum seeker returned from the United Kingdom. At best it stands alone as evidence that, if those groans were the result of blows (which were not discerned) or any other form of ill-treatment being applied in the interview room, then at least on this occasion there was ill-treatment at the airport itself.

249. There has been just one enforced return of a failed asylum seeker following AA(2). The experiences of that person are available to the Tribunal because he was assisted on return by the IOM who visited him on four occasions as part of the monitoring of the resettlement package made available to him. As we have explained above, generally the IOM monitoring process will not assist in an assessment of the level of risk faced by any particular returnee. Nevertheless, this information concerning the one recent forcibly returned failed asylum seeker

is available and, as one party to the proceedings specifically relies upon it, we have regard to it.

250. The IOM registration form, completed shortly after his arrival at the airport on 30th August 2006, says this:

> "Had problems because escorts told immigration officials that he was being escorted (unnecessary because had valid passport). Immigration questioned him on where he lived, wrote it down and asked why he was being deported."

251. The "problem" appears to be no more than that he was questioned about the reasons for his enforced return rather than being allowed to pass through unhindered as an ordinary traveller.

252. There is no reason at all to doubt the accuracy of this account because it was recorded by the IOM after he had been allowed to leave the airport. But this account is impossible to reconcile with the evidence of other witnesses who insist that such questioning would always be carried out in a hostile manner and that all deportees arriving at the airport are handed over to the CIO for hostile questioning that can be expected to be accompanied by at least low level violence or "roughing up".

253. This returnee was visited by the IOM on 13th September, 28th September, 31st October and 30th November. He reported no difficulties from the authorities and said that he was able to attend the polling station and vote in the October 2006 elections and had had no problem in doing so.

254. Professor Ranger has provided evidence of a person identified only as "M" who, having been removed to Zimbabwe from the United Kingdom, was detained upon arrival at Harare airport and later subjected to torture. The professor deals with this in a statement dated 15th June 2007. He knows of this case because he was asked to look at the case papers and to prepare a report.

255. We do not know much about the activities M involved himself in before leaving Zimbabwe in March 2001 and travelling to the United Kingdom. All we are told is that

> "because of the dangers to which his activism had exposed him M was sent to the United Kingdom on an exchange programme".

He did not make a claim for asylum in the United Kingdom. He was arrested as an overstayer in June 2003 and deported back to Zimbabwe. On arrival the immigration officer appeared to be expecting him because having looked at M's passport he made a telephone call and M was taken to a room. Another telephone call was made and two men arrived, introducing themselves as coming from the President's office. We know from other evidence that CIO officers sometimes introduce themselves in that way.

256. M's account of his experiences upon return is this. He says he was taken from the airport to a disused army barracks where he was subjected to severe torture. He was asked about being a member of the MDC and about spying for Britain. When he regained consciousness he found himself dumped close to his home.

He was taken by a member of the MDC to the border. M crossed over into Botswana and claimed asylum at the British High Commission. His claim was processed by UNHCR who recognised him as a refugee.

257. But this evidence reinforces that which is not in dispute. It does not assist with the issues to be addressed in this appeal other, perhaps, than providing further confirmation that, if interrogation and abuse is going to take place, it will do so elsewhere than at the airport during an initial interview. M did not suffer any physical ill treatment at the airport. He had clearly been identified before arrival as someone in whom the authorities had sufficient interest to justify him being taken for interrogation off the airport.

258. M was, clearly, politically active in Zimbabwe. It is apparent that those activities were known to the authorities because otherwise it would not be said that he had to flee from Zimbabwe because of the dangers to which his activism had exposed him. On his own account, even if accepted at its very highest, he did not attract abusive ill-treatment on return because he was a failed asylum seeker. He had not made any such claim. If he was ill-treated it was because he had been identified as someone of adverse interest because of his individual political profile and what was known about him.

Conclusions

259. The Court of Appeal ordered that the Tribunal reconsider the country guidance given in AA(2) mainly because the Tribunal did not deal expressly with important evidence of W5 and W6 which, if accepted, might be pivotal to what was seen as a finely balanced decision. This is because it would indicate that the first stage of the screening process found to take place at the airport would be accompanied by a real risk of violence. If that were found to be the case, then it would be necessary to revisit the findings in respect of the accounts of the individual returnees. They had been assessed in the light of the Tribunal's understanding of the evidence of W5 and W6 that violence would accompany only the second stage of the process, where a person was taken for interrogation. We have identified above the other areas of concern expressed by the Court of Appeal.

260. We have examined carefully those issues about which the Court of Appeal expressed concern. We have more extensive and up to date background and expert evidence as well as the benefit of hearing further evidence from W5 and W6 and receiving detailed submissions from counsel. We have explained why, as a result, we see no reason to take a different view of the evidence as a whole from that taken by the Tribunal in AA(2). Indeed that is the view we reach ourselves on the basis of all the evidence now available. We have explained why the evidence of W5 and W6 does not support the proposition that violence is used during the initial interview that will take place at the airport. The evidence before us reinforces the finding that there is a two stage process at the airport and that anyone identified during the initial questioning that takes place at the airport as being of interest will be taken for interrogation. At that second stage there is a real risk of serious harm, but not before.

261. Given that, in the light of the findings of fact set out in this determination, the basis upon which concern was expressed about the conclusions of the Tribunal in AA(2) has fallen away, it might be thought that would be sufficient to determine the issues in this appeal. But we must make clear our findings generally on the further, more up to date evidence we have considered.

262. We cannot in this determination discuss all the evidence that has been put before us. The determination is long enough without doing so. But we have had regard to all that the parties have referred us to. For the reasons given above we do not feel able to rely upon those parts of Mr Walker's evidence that depends upon the new information provided by the British Embassy. We have reviewed the deteriorating country conditions, taken account of the views of the expert witnesses and looked carefully at the new evidence relied upon by the appellant, including the additional and new information concerning individual returnees.

263. The general country conditions in Zimbabwe continue to deteriorate. Many people in Zimbabwe struggle to have access to sufficient food. Water and electricity supplies are sporadic. Shops have been affected badly by recent attempts by the government to control the ever spiralling inflation that has brought the economy to near collapse. Shelves are empty and there is no sign that business owners are able or willing to restock since they may well be required to sell goods at less than cost price.

264. The CIO has taken over responsibility for the operation of immigration control at Harare airport and immigration officers are being replaced by CIO officers. We accept also that one of the purposes of the CIO in monitoring arrivals at the airport is to identify those who are thought to be, for whatever reason, enemies of the regime. The aim is to detect those of interest because of an adverse military or criminal profile. The main focus of the operation to identify those who may be of adverse interest remains those who are perceived to be politically active in support of the opposition. But anyone perceived to be a threat to or a critic of the regime will attract interest also.

265. The fact that the CIO has taken over responsibility for monitoring all returning passengers at Harare airport is not something that effects the level of risk. The evidence before AA(2) was that all deportees were handed over to the CIO for questioning in any event. Then, as now, those deportees will have been identified in advance from the passenger manifest and the CIO will have formed a preliminary view as to which, if any, are of further interest.

266. Large numbers of passengers pass through the airport. The CIO continues to recognise that it cannot question everyone; and so there is a screening process to identify those who might merit closer examination. We see no reason to suppose that the heightened role of the CIO would change this. There are now additional demands upon the CIO as it is responsible for monitoring all passengers passing through the airport, both on arrival and departure. We have set out the evidence that indicates in whom the CIO has an interest. This will be those in respect of whom there is any reason to suspect an adverse political, criminal or military profile of the type identified in AA(2). In addition, those perceived to be associated with what have come to be identified as civil society organisations may attract adverse interest as critics of the regime.

267. There is no evidence that ordinary passengers returning from the United Kingdom experience any difficulty in passing through the airport. In fact, the evidence is to the contrary. Nor is there a real risk that those returning to Zimbabwe after being refused leave to remain after the leave initially granted has expired are regarded with suspicion or treated otherwise than as ordinary travellers.

268. Nor is there evidence of any consistent pattern of treating any differently those who have not claimed asylum in the United Kingdom but who have been forcibly removed to Zimbabwe because they have been refused leave to enter or remain. There is no evidence that any of the twenty three "immigration deportees" removed since August 2006 have experienced any such difficulties. We have accepted that all those who are deportees will be identifiable as such upon return to Harare airport and so will generally be subjected to some enquiry before being allowed to pass through the airport.

269. This demonstrates that, despite the political rhetoric of President Mugabe and other highly placed members of the ruling party, the fact alone of returning to Zimbabwe having spent time in the United Kingdom, even if there is some irregularity discernable from stamps in the passenger's passport, does not give rise to any real risk on return to Harare airport.

270. The question, then, is whether in respect of a deportee who has made an unsuccessful asylum claim before being returned to Harare airport, but about whom nothing is known such as to give rise to any adverse interest, he will be identified and detained for questioning, either at the airport or elsewhere.

271. It may seem to be extremely unlikely that someone who has been found to have given an untruthful account in support of an unfounded asylum claim pursued in the United Kingdom would be driven as a matter of integrity to volunteer on return the information that he or she has made an asylum claim in the United Kingdom. But the respondent accepts that the Tribunal cannot be asked to assess the risk faced by such returnees on the basis that they are expected to lie to immigration officials on their return. Therefore, we proceed on the basis that the fact of the failed asylum claim will be disclosed to anyone who asks.

272. It seems to us that there are three main reasons advanced why it is claimed that those who have made an unsuccessful asylum claim in the United Kingdom might be at risk if returned involuntarily to Zimbabwe and the fact of the asylum claim became known. First, it is said they would be seen to be as disloyal, since they must have told lies about the regime. Second, they may be seen as spies or saboteurs, sent by Britain to cause trouble for the regime. Finally, it may be thought that they are supporters of the opposition MDC party and so opponents of the regime.

273. Nearly a quarter of the population of the Zimbabwe has left the country. It is clearly the case that the Zimbabwean government and its agents are fully aware that the overwhelming majority of these are economic migrants. It is Professor Ranger's evidence that the fact that a person has sought to prosper economically in the United Kingdom will not lead to him being thought of as

disloyal. Loyalty can be demonstrated by having provided a stream of financial support for those family members who have remained at home.

274. It is reasonable to assume that the Zimbabwean government and its agents are well aware of the ways in which those of its citizens outside the country seek to support those who remain behind. The services of companies who deliver within Zimbabwe groceries and other goods ordered and paid for here are advertised openly. There is no evidence that the authorities seek in any way to obstruct the delivery of these goods. It is, no doubt, recognised that without food and money sent by Zimbabweans living abroad the situation in Zimbabwe for those that remain would be even worse.

275. Professor Ranger says also that the position of the Zimbabwean government is that there are no true asylum seekers from Zimbabwe. Those who have claimed, other than criminals who do not wish to return to face the consequences, have been persuaded by the British to tell lies about the Zimbabwean authorities. The fault lies there rather than with the Zimbabwean citizen who left not to claim asylum but to improve his economic circumstances and perhaps those of relatives who remain in Zimbabwe. As we have noted above, there is little evidence that the authorities have translated the anti British rhetoric and assertions of disloyalty made against those in the United Kingdom into adverse action against any of its citizens returning to Zimbabwe in whom there is otherwise no interest.

276. There is certainly evidence of the political rhetoric portraying Britain as using asylum seekers as a cloak to conceal spies and saboteurs being sent back to destabilise the situation in Zimbabwe. The issue to be addressed is whether that assertion is believed and acted upon.

277. As a matter of logic that claim is nonsense. It is difficult to see why the authorities in Zimbabwe would think that someone who sought to remain in the United Kingdom but is being forcibly removed should agree to spy for the country that was deporting him. If Britain did wish to send spies to Zimbabwe it is hard to understand why they would seek to send them within a small group of identifiable people who are likely to attract at least a screening interview on return to Harare airport. There is something in the region of 50,000 people travelling in and out of Zimbabwe each year. The vast majority of those, regarded as ordinary passengers, pass through the airport unhindered. Plainly, the Zimbabwean authorities will be aware that there are in the United Kingdom supporters of the MDC and critics of the Zimbabwean regime who have not claimed asylum.

278. It is said, of course, that rationality is not a characteristic displayed by the Zimbabwean government and its agents. But even witness 66, who is said to be in a position to know, said in evidence that the purpose of the rhetoric was to demonstrate that people were foolish to go abroad to claim asylum. Those who do will be sent back. Thus, there is no benefit in fleeing from the country. He said, referring to the claim by Mr Mayo that thousands of asylum seekers were being trained in Britain, that this was, in his view, no more than a response to what was going on at that time: He added:

"I do not think they believed it. Nor the CIO operators on the ground."

279. We do not accept either that all those seen as having claimed asylum in the United Kingdom will be thought to be supporters of the MDC on that account alone. As noted earlier, the suggestion that the Zimbabwean authorities proceed on the basis that anyone with a connection with Britain must be considered a supporter of the MDC is impossible to reconcile with the significant effort put into obtaining intelligence concerning those in the United Kingdom who *do* support the opposition. After all, there would be little point in sending CIO operatives to infiltrate groups in the United Kingdom if everyone retuned was, in any event, to be presumed to be a supporter of the MDC and an enemy of the state qualifying for detention and interrogation.

280. We have examined above, at paragraph 249, the only actual recent evidence of how a failed asylum seeker, compulsorily returned to Zimbabwe, would be treated after he or she passed through the airport and returned to their home area. That individual was told that he would be monitored after being released from the police station but he was not aware of that happening. He did not experience any discriminatory exclusion from food or services and there is nothing to suggest that, having returned home, he was treated any differently from anyone else returning home after a period abroad.

281. The evidence before us does not indicate any reason to reach a different view from that reached by the Tribunal in AA(2) that there may well be some form of post-airport monitoring of those returned involuntarily from the United Kingdom but that will not be persecutory and will cease if nothing of interest comes to light. There is no real evidence of returnees being subjected to discriminatory deprivation of food aid or other services on account of having been in the United Kingdom.

282. For all these reasons we adopt and reaffirm the guidance given in AA(2), set out above at paragraph 34 of this determination. We identify one further risk category. The evidence indicates that those associated with the civil society organisations that have attracted adverse interest from the Zimbabwean authorities will face the same level of risk as those perceived to be political opponents of the Zimbabwean regime.

HS's appeal

283. Should the appellant, being a person about whom nothing is known to make her of adverse interest to the authorities in Zimbabwe, choose to return voluntarily she will, on return, be indistinguishable from an ordinary passenger returning from the United Kingdom and so will be at no risk of attracting any interest such as may require her to disclose the fact of having made an unsuccessful asylum claim in the United Kingdom. There is no reason to suppose that her passage through the airport would be hindered.

284. The appellant says she will not return voluntarily and so will be removed. On arrival at Harare airport she will be identified as a deportee, whether escorted or not. An examination of her passport will indicate that she entered the United Kingdom lawfully but that her leave has expired. Her passport may show also

that she applied unsuccessfully for leave to remain in a different capacity. That is not something that will excite further interest.

285. If she discloses the fact of having made an unsuccessful asylum claim while in the United Kingdom, in the absence of some other reason for the CIO to entertain interest in her that fact alone will not give rise to any real risk that she would be taken for further more intense questioning or interrogation. That may explain the accounts of the returnees who say they were not asked whether they had claimed asylum in the United Kingdom. A positive response would not in itself lead to any reason for further action in the absence of other intelligence, in which case the returnee would already have been identified as a candidate for interrogation.

286. The appellant would, therefore, be allowed to pass through the airport after, at most, a relatively short screening interview.

287. As a deportee from the United Kingdom who is returning home after having spent some time away the appellant may well attract some interest on return to her home area, or wherever she chooses to go to re-establish herself. This interest will be from whoever represents the authorities in the area to which she has gone. There is nothing about this appellant to give rise to any intense monitoring or any adverse interest from those authorities that will cause the appellant any difficulty.

288. This appellant has relatives in Zimbabwe as well as a brother who is settled in the United Kingdom to whom she can look for support, should it be required, both financial and material. She is herself a medical professional whose services will be much in demand. She is in a better position than many returning to Zimbabwe after a period of time away. There is no reason to suppose that she will not be able to find accommodation and employment relatively quickly. She said in a witness statement at B/240 that when it becomes known that she has been in the United Kingdom and has made an unsuccessful asylum claim the practicing certificate she would need to work as a doctor would not be granted. But that is difficult to reconcile with our findings generally and with what is known about other well qualified professionals returning from Britain to Zimbabwe who are accepted into influential posts. Those persons, such as the Chevening scholars, are not of course failed asylum seekers. But in view of our findings generally we do not accept that the appellant would be disqualified from working.

289. For these reasons we find that the appellant does not have a well founded fear of persecution on return to Zimbabwe for any reason at all. Having considered her individual circumstances, we find that there are not substantial grounds for believing that she faces a real risk of serious harm, whether on account of general country conditions or otherwise.

290. The appellant has not established there to be a real risk that she would be subjected to any ill-treatment such as to infringe her rights under article 3 of the ECHR.

291. We do not understand there to be any claim that requiring the appellant to return to Zimbabwe would infringe article 8. Such a claim would not be made out. The appellant suffers from hypertension, a condition controlled by medication. She says that she would be unable to access that medication in Zimbabwe and so would be at risk of having a stroke. But there is no evidence in support of that assertion. In view of what is known about the ability to have items sent from abroad it may be that the appellant's brother in the United Kingdom could be called upon to assist should there be any interruption in the access to medication.

292. The appellant has not established any family life in the United Kingdom. In view of the time that the appellant has been in the United Kingdom, she may well have established a private life, but it has not been demonstrated that she could not enjoy that private life equally well in Zimbabwe. Any interference that might arise would, plainly, be proportionate to the legitimate aim being pursued in requiring her to return.

Summary of conclusions

293. The appeal is dismissed on asylum grounds.

294. The appellant does not qualify for the grant of humanitarian protection.

295. The appeal is dismissed on human rights grounds.

Signed Date: 9th November 2007

Senior Immigration Judge Southern

ANNEX 1

REASONS FOR THE DECISION THAT THERE IS AN ERROR OF LAW IN THE DETERMINATION

1. Reconsideration has been ordered of the decision of Immigration Judge Foudy who, by a determination dated 31st March 2006, allowed the appellant's appeal against a decision of the respondent made on 13th February 2006 that the appellant should be removed from the United Kingdom as an illegal entrant after her asylum and human rights claims had been refused.

2. The appellant, who is a citizen of Zimbabwe, was born on 23rd June 1965. She arrived in the United Kingdom on 11th May 2002 and was granted leave to enter as a visitor for six months. She then sought to secure further leave to remain in various capacities, including as a highly skilled migrant on the basis of being a fully qualified medical doctor. It was after those applications were refused that the appellant claimed asylum on the basis of being at risk on return because of her support for the MDC and because of what she had done in the course of her employment as a hospital doctor.

3. The immigration judge rejected as untrue the whole factual basis of the appellant's claim to be at risk in Zimbabwe and the appellant's representative does not seek to challenge those findings. It is unambiguously clear from the determination that the immigration judge would have dismissed the appeal if she had not been bound to follow the then binding country guidance case of AA (Involuntary returns to Zimbabwe) CG [2005] UKAIT 00144.

4. It is now agreed between the parties that, although the immigration judge cannot possibly be criticised for having allowed the appeal on this basis, she was in fact wrong in law to do so. This is because that country guidance case was itself found to be wrongly decided by the Court of Appeal in AA & LK v SSHD [2006] EWCA Civ 401. This means that any appeal allowed solely in reliance upon it is also materially wrong in law and cannot stand. See: OM (AA(1) wrong in law) Zimbabwe CG [2006] UKAIT 00077.

5. That being the case the decision to allow the appeal cannot stand and shall be set aside. The Tribunal must now substitute a fresh decision to allow or dismiss the appeal.

6. But that cannot be done today. The Tribunal must consider the appellant's position in the light of the current objective country evidence. The Tribunal is aware of the extremely fluid country conditions in Zimbabwe which might be thought to have deteriorated significantly in some respects since the appeal came before the immigration judge a year ago. This may or may not be relevant to the appellant's human rights claim. The appellant's representatives wish to have the opportunity of putting forward up to date objective evidence and to advance those arguments and, in view of the overriding objective of fairness set out in the Procedure Rules, it is right that they should be able to do so.

7. But there is no reason at all to disturb the unchallenged findings of fact made by the immigration judge and set out between paragraphs 13 and 18 of the determination. This means that the issues at large at the second stage reconsideration hearing shall be limited to submissions upon the appellant's position on return to Zimbabwe in the light of the current objective country evidence in addition to any recent expert evidence the appellant's representatives may wish to rely upon.

ANNEX 2

Findings of fact made by the immigration judge and set out between paragraphs 13-18 of her determination

Findings

1. I accept that the Appellant is a Zimbabwean national because she has been consistent in this part of her claim and she entered the UK on a valid Zimbabwean passport. The Respondent accepts the nationality of the Appellant.

2. I also accept that the Appellant is not willing to return to Zimbabwe voluntarily. She gave that evidence before me and I also find that her history of making several applications to enter and remain in the UK are further evidence of her unwillingness to return to her home country.

3. I accept that the Appellant is a qualified doctor because she has been consistent in this part of her claim and the Respondent takes no issue on her occupation.

4. I do not find it credible that the Appellant was involved, either personally or through her family, in supporting the MDC for the following reasons:

a) the Appellant stated in her interview that her father had been a member of the MDC since 1998 (Q18). She also stated that when she returned to Zimbabwe from Germany (and she returned in 1998) there was a new party that was promising change, namely the MDC (Qs 17). However I find that the CIPU report records that the MDC was not formed until September 1999 (CIPU paragraph 4.10 and Annex A). The Appellant claims now that her answer was misunderstood and that she had meant to explain that her Father supported the trade union movement whose leaders went on to form the MDC. If that is the case, I find it incredible that the Appellant did not simply give that account in her interview. She is a clearly intelligent woman with an exceptional command of English. It was a simple matter for her to say in interview that her father supported the trade unionists that were opposing the government and that when they helped to form the MDC he followed them. However her answers in interview were clear and unambiguous statements that in 1998 the MDC had already been formed. That is, I find, the only logical way to interpret her reference to her own interest in 1998 in "*the new party that promised to effect change"* (Q17).

b) In oral evidence the Appellant stated that prior to the formation of the MDC her father had been an active trade unionist. That was also the account in her rebuttal statement of 8th March 2006 (Appellant bundle page 9, paragraph 8). However the Appellant made no reference to those activities in her first statement or in her interview. I find that if the Appellant 's father had genuinely been involved as an active trade unionist the Appellant it is not credible that the Appellant failed to mention those activities earlier in her asylum claim.

c) The Appellant claimed that she participated in a strike in August 1999 and that in November 1999 she found that a snake had been placed at her door. She assumed that the CIO had placed the snake there to frighten her as she had participated in the strike. I find that, whilst it is credible that the Appellant found a snake at her door, it is not credible that it was deliberately placed there by the CIO because of her strike action. I find that the objective evidence shows that the CIO acts in swift and, at times, brutal fashion therefore it would be highly unlikely to be so reticent as to wait 3 months before taking any action against a government employee that it disfavoured. Furthermore, the Appellant has not claimed that any arrests were made at the strike, or thereafter, and no other participants appear to have received the same treatment as the Appellant. I therefore find it incredible that the snake was connected to the CIO as the Appellant claims;

d) the Appellant claims that the last event that triggered her flight from Zimbabwe was when she took photographs of a beaten patient and the youth militiamen confiscated the camera and threatened her. In her first statement the Appellant clearly stated that her sole intention was to document the patient's injuries for his medical file (Respondent bundle page B6, paragraph 19). However in interview the Appellant changed her account markedly to claim that she intended to send the photographs to the Amani Trust Respondent bundle page C20, Q 107). I find that the Amani Trust is a human rights organisation in Zimbabwe. It is quite incredible that the Appellant ever intended to send photographs of a beaten patient to the Amani Trust when she would not even join the MDC because to be found with a membership card would jeopardise her career (Respondent bundle page B2, paragraph 6). It is yet more incredible when compared with her first account, which stated plainly that the Appellant took the photographs "purely to document it in the patient's file," (Respondent bundle page B6, paragraph 19). I find that these important inconsistencies are a clear indication of the incredible nature of the Appellant 's claim;

e) if, as the Appellant claims, she left Zimbabwe in fear of her life, it is incredible that she did not claim asylum on arrival here. Instead she stated that she was a genuine visitor. The Appellant must, therefore, have indicated that she intended to leave the UK within 6 months of her arrival, when she did not have that intention. At best, the Appellant had a vague hope that the political situation in Zimbabwe might change at some time in the future; that is not consistent with a settled intention to leave the UK within 6 months. Furthermore, the

Appellant made two further applications to remain in the UK, neither of which revealed that she had an asylum claim. It was not until the all the Appellant's application to remain for professional purposes failed, and after a period of living in the UK without any leave, that she finally claimed asylum. I find that those are not the actions of a genuine refugee and add considerable evidence to the asylum claim being an incredible one;

f) the delay that the Appellant made in claiming asylum is even more incredible when one considers that she was in close contact with her brother, whose own asylum claim was granted in March 2004. In oral evidence the Appellant actually stated that her brother suggested that she claim asylum when he did but she did not do so as she was reluctant to accept that she could not return to Zimbabwe. I do not find it at all credible that an intelligent woman with the fears the Appellant claims she had would delay as long as this Appellant did in making her asylum claim.

5. Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 requires me to take account of certain behaviour as damaging the credibility of the Appellant. In accordance with section 8 I have taken into account as damaging to the Appellant's credibility the following behaviour of the Appellant :
(a) entering the UK as a visitor as behaviour designed or likely to conceal information;

(b) failing in her previous immigration applications to reveal that she was in need of international protection as behaviour designed or likely to mislead;

(c) The gross delay in making her asylum claim as behaviour designed or likely to obstruct or delay the handling or resolution of his claim or the taking of a decision in relation to the claimant.

Furthermore, in respect of those behaviours set out at (a), (b) and (c) above, I find that the Appellant has failed to provide a reasonable explanation for the behaviour.

6. Given my findings, the issue of internal relocation is redundant.

ANNEX 3

Schedule of documentary evidence submitted

All material in the public domain is identified in the form in which it is publicly available. No conclusion should be drawn from the presence of or absence from the list of material in this schedule as to the identity of any source mentioned to in the determination

Appellant's Volume A

Document	Date
NCA members arrested again! - Zimbabwe Peace Project	14/7/07
Zimbabwe: Abusive policies disrupt progress on HIV/AIDS Human Rights Watch (HRW)	28/7/07
No help for Zimbabwe's homeless, BBC News	30/8/06

Outrage at Zimbabwe bugging plan, BBC News	31/8/06
Food Aid Report: September 2006 - Zimbabwe Peace Project	Sep 2006
Commission blames state agents for MP's assault, ZimOnline	21/9/06
Zim union men 'deserved beating', BBC News	25/9/06
Police Brutality Victim Speaks Out, Dzikamai Chidyausike in Harare, Institute for War and Peace Reporting (AR No.77, 27-Sep-06)	27/9/06
Zim says unionists injured themselves, Mail & Guardian (SA)	6/10/06
Shock secret DVD captures brutal torture of unionists, Zimbabwe Online	11/10/06
Zimbabwe prisons 'embarrassing', BBC News	16/10/06
Mugabe's CIOs infiltrate church and donor organizations in S.A. By Tererai Karimakwenda, SW Radio Africa	17/11/06
Hunger will finish us off, say elderly and handicapped, Zimbabwe Peace Project	22/11/06
Don't cry when state responds, Harare warns protesters, Zimbabwe Online,	23/11/06
"Who guards the guards?" Violations by Law Enforcement Agencies in Zimbabwe, 2000-2006 Zimbabwe Human Rights NGO Forum	Dec 2006
Images of injuries sustained during beatings by the Police, Women of Zimbabwe Arise (WOZA)	4/12/06
Zanu thugs attack MDC members in UK, Movement for Democratic Change	4/12/06
Politically motivated violence against women escalates in Zimbabwe, Zimbabwe Human Rights NGO Forum	8/12/06
Prisoners fume over toil on govt officials' farms Lucia Makamure, The Zimbabwe Independent	8/12/06
Zimbabwe police 'brutality rises', BBC News	14/12/06
Statement on the attempted assassination of NCA National Chairperson, Dr Lovemore Madhuku National Constitutional Assembly (NCA)	2/1/07
Police brutality at Mabvuku police station, Zimbabwe Lawyers for Human Rights (ZLHR)	2/1/07
Worst agricultural year since Independence, Augustine Mukaro, The Independent (Zimbabwe)	5/1/07
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Zimbabwe cartoon's bullet warning, BBC News	1/2/07
Army forces research institutions to grow maize, ZimOnline	5/2/07
ZESN condemns politicisation of food aid, Zimbabwe Election Support Network (ZESN)	9/2/07
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Happy Birthday, Robert Mugabe, Wilf Mbanga, Open Democracy	21.2.07
"Arnold Tsunga detained at airport", OSISA (Open Society Initiative for Southern Africa),	Mar 2007
Aid halted over 'Zanusation' of food, Herbert Dapi, The Zimbabwean	1/3/07
Mujuru has destroyed own succession bid – Mugabe, Zimbabwe Independent, Dumisani Muleya	2/3/07
Mugabe purges security forces, Zimbabwe online	9/3/07
SCMZ leadership arrested by armed police at a female capacity building workshop in Harare, Student Christian Movement of Zimbabwe (SCMZ)	11/3/07
ZESN condemns politicisation of food in Harare, Zimbabwe Election Support Network (ZESN)	12/3/07
State warns MDC against lawlessness, The Herald (Zimbabwe)	13.3.07
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Opposition forces in Zimbabwe, A trail of Violence, 1 January to 15 March 2007, Zimbabwe Republic Police	Undated (Mar)
Opposition forces in Zimbabwe, The naked truth, Volume 2, Zimbabwe Republic Police	Undated (Mar)
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Reporters without Borders, "Intelligence agency and media commission help torpedo remaining independent news media",	19/3/07
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International Bar Association, "Zimbabwe: Violence and Threats against Lawyers Condemned by the IBA", Press Release	21/3/07

Zimbabwe's crisis 'like Titanic', BBC News	21/3/07
My wife, Sekai Holland, battered by Mugabe's thugs, Save Zimbabwe Campaign	21/3/07
Mourners assaulted and ZUPCO bus vandalized - The true story, Peter Bhokosi, Combined Harare Residents Association (CHRA)	22/3/07
"Mugabe seizes passports from opposition activists", The Independent,	26/3/07
Angola sends 2500 'ninjas' to Zimbabwe", Sydney Morning Herald	22/3/07
Trainee journalist arrested for asking pesky questions, Zim Online	23/3/07
A Criminal State, A statement and brief chronicle of events in Zimbabwe 18 February- 22 March, Solidarity Peace Trust	24/3/07
Amnesty International, "Zimbabwe: Calls for investigation into killing of activist and release of peaceful protestors", Press Release	12/3/07
More violence possible, analysts warn IRIN News	26/3/07
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Human Rights Watch, "Zimbabwe: Security Forces Extend Crackdown to Public", Press Release,	28/3/07
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