Asylum and Immigration Tribunal

OM (AA(1) wrong in law) Zimbabwe CG [2006] UKAIT 00077

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 October 2006	**03 November 2006**

Before

Senior Immigration Judge Mather
Senior Immigration Judge Perkins

Between

OM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Dassa, Counsel instructed by Chipatiso & Co. Solicitors
For the Respondent: Mr M Blundell, Home Office Presenting Officer

Country guidance stands until it is replaced or found to be wrong in law. It will not be appropriate to grant an adjournment on the grounds that a party is seeking to challenge a relevant country guidance case in the higher courts.

Where a country guidance case is replaced because of changed country conditions or because further evidence has emerged, that will not mean that it was an error of law for an immigration judge to have followed it up to that point. Where, however, a country guidance case is found to be legally flawed the reasons for so finding will have existed both before and after its notification. It is a determination inconsistent with other authority that is binding on the Tribunal (see AIT Practice Directions 18.2) In those circumstances, which will be encountered only rarely, any determination of an appeal decided substantially on the basis of that country guidance will be legally flawed also and cannot stand.

AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 CG ("AA(1)") was found by the Court of Appeal in AA & LK [2006] EWCA Civ 401 to be legally flawed in its approach to the assessment of the evidence. Accordingly it must now be seen as never having been correct country guidance.

Although in AA & LK there was no challenge by the respondent to the Article 3 assessment reached in AA(1), that assessment was based on the same body of evidence considered in respect of the asylum grounds of appeal. AA(1)'s assessment of that evidence having been

found legally flawed, it was no longer possible to support a finding of an Article 3 violation by reference to that assessment.

DETERMINATION AND REASONS

1 The appellant is a citizen of Zimbabwe. He is now in his early twenties. He appeals a decision of the respondent on 11 March 2006 to refuse him asylum and a decision on 23 March 2006 to remove him as an illegal immigrant. It is the appellant's case that he is a refugee and that removing him is contrary to his protected human rights. His appeal was dismissed by Immigration Judge Timpson in a determination promulgated on, or about, 22 May 2006. Reconsideration was ordered by Senior Immigration Judge Warr in the following terms:

> "The appellant was not found to be a credible witness.
> The Tribunal is to give further consideration to returnability issues in the light of AA and LK [2006] EWCA Civ 401. The grounds of application are arguable."

2 None of the grounds criticise the Immigration Judge's adverse credibility finding.

3 On 12th April 2006 the Court of Appeal held in AA & LK v SSHD [2006] EWCA Civ 401 that the Tribunal's decision in AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 CG ("AA(1)") was wrongly decided and remitted it to be reheard by the Tribunal. Over five days commencing on 3rd July 2006 the Tribunal duly reheard the appeal of the appellant in AA(1). The Tribunal received and considered a good deal of further evidence. By its decision in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061 ("AA(2)") the Tribunal held, inter alia, that a failed asylum seeker returned involuntarily to Zimbabwe does not face on return a real risk of being subjected to persecution or ill-treatment contrary to article 3 on that account alone. In so doing it reaffirmed the decision in SM and Others (MDC - Internal Flight - Risk Categories) Zimbabwe CG [2005] UKAIT 00100.

4 The Tribunal has refused an application for permission to appeal to the Court of Appeal against AA(2). The application has been renewed to the Court of Appeal.

5 The appellant asked that we adjourn the hearing of this appeal lest anything of significance to it should be decided by the Court of Appeal if it gave permission to appeal the decision in AA(2).

6 We reminded ourselves that the overriding objective of the Tribunal, set out in paragraph 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 is stated as follows:

> "The overriding objective of these Rules is to secure the proceedings before the tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest."

7 Our power to adjourn the hearing of an appeal is very limited. Rule 21(2) of the Rules demands that:

> "The Tribunal must not adjourn a hearing of an appeal on the application of a party, unless satisfied that the appeal cannot otherwise be justly determined."

8 We refused this application for an adjournment. We must apply the law, including Tribunal country guidance, as it is, not as it might be on some future occasion that cannot be determined. If there ever are circumstances where it is necessary for the

just disposal of an appeal to await a decision of the Court of Appeal, they are not present here. The fact that a party to an appeal that has resulted in a country guidance decision is seeking permission to appeal does not justify an adjournment of another appeal in which the country guidance decision is relevant to the issues.

9 It will be apparent from the above that Immigration Judge Timson promulgated his decision after the Court of Appeal had given judgement in AA and LK but before the Tribunal had given its determination in AA(2). Accordingly this reconsideration is not concerned with the application of AA(2).

10 In AA and LK the Court of Appeal overturned the decision in AA(1) and the Immigration Judge should have asked himself what relevant country guidance there remained for him to consider.

11 The requirement to follow and apply country guidance cases was made clear recently in HGMO (Relocation to Khartoum) Sudan CG [2006] UKAIT 00062. At paragraphs 141 and 142 the Tribunal said this:

> "Country Guidance cases
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> 141 As the concept of Country Guidance cases was mentioned in the opinions in *Januzi*, (see esp. paragraph 50 (Lord Hope)), it is necessary to remind ourselves of the legal basis underlying that concept. Until the advent of the Asylum and Immigration Tribunal, a case styled by the Immigration Appeal Tribunal as Country Guidance carried persuasive force but had no statutory authority. Since 4 April 2005, however, the position has changed. On that day, paragraph 22(1) of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 inserted into section 107 (practice directions) of the Nationality, Immigration and Asylum Act 2002 a new subsection (3), in the following terms:-
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> > "(3) A practice direction may, in particular, require the Tribunal to treat a specified decision of the Tribunal as authoritative in respect of a particular matter."
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> The President's Practice Direction 18.2, made on 4 April 2005, provides as follows:-
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> > "18.2 A reported determination of the Tribunal or of the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. As a result, unless it has been superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
> >
> > (a) relates to the country guidance issue in question; and
> >
> > (b) depends upon the same or similar evidence."
>
> 142 There is thus a statutory basis that underpins the CG system and which requires Country Guidance issues to be treated by all divisions of the Tribunal as authoritative. Practice Direction 18.2 ensures that, as Lord Hope makes plain in paragraph 50 of *Januzi*, each case is dependent on its own facts but, as PD 18.4 emphasises (and as was noted with approval by the Court of Appeal in *R and others v Secretary of State for Home Department* [2005] EWCA Civ 982), legal error will attend a failure to follow extant, relevant Country Guidance. Given that the AIT is a "single tier" Tribunal, it is particularly important that everyone concerned appreciates the underlying legal framework."

12 Country guidance stands, in accordance with the Practice Directions, unless and until it becomes unreliable. Broadly, this can happen for one of two reasons. Firstly, fresh evidence can emerge that casts new light on circumstances in the country considered. This can be the result, for example, of a change of regime or of a new report from a respected non governmental organisation. In such an event the Practice Directions permit a different conclusion from that required by the existing country guidance. Secondly, country guidance can be overturned because the case

was decided wrongly in law. In this situation such country guidance would have been wrong in law when it was promulgated, as would be any decisions that followed it. This latter situation is likely to be encountered only rarely. The decision in AA(1) is an example of country guidance that was wrong in law. It was overturned by the Court of Appeal. Any decision that followed it was, as a consequence, wrong in law too.

13 In this appeal the Immigration Judge, rightly, did not rely on AA(1). As a consequence of the criticism of AA(1) by the Court of Appeal in AA and LK, the case of SM and Others (MDC - Internal Flight - Risk Categories) Zimbabwe [2005] UKAIT 00100 was again the most relevant country guidance case on Zimbabwe and the Immigration Judge really should have relied on it expressly unless he considered there was fresh evidence pointing to different conclusions.

14 In SM the Tribunal identified various categories of people who risked persecution or other ill treatment in Zimbabwe. The appellant is not in any such category. He was not believed and he was not at risk of persecution or ill treatment for some other reason merely by reason of being a returned asylum seeker. Paragraphs 51(e) and (i) of SM are particularly clear. They state:

> "e) The current atmosphere of hostility to the return of failed asylum seekers does not of itself put at risk those who would otherwise not be at real risk but does serve to reinforce the fact that asylum claims must be considered with care and where there is any uncertainty, any doubts must be resolved in the applicant's favour.
> i) 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."

15 The Immigration Judge's determination would have been better if it had been reasoned more fully but his decision to dismiss the appeal under the Refugee Convention was plainly open to him on the evidence before him and his skimpy analysis and explanation did not amount to a material error of law. Ms Dassa, rightly, accepted as much in her submissions.

16 However this case had been argued on the basis that the appellant's claim to be a refugee and his claim that his removal would contravene his rights under the European Convention on Human Rights did not necessarily stand or fall together. Ms Dassa submitted that on the Article 3 issue the Immigration Judge should have followed AA(1), not SM.

17 Miss Dassa relied on the grounds supporting the application. Point 11 is in the following terms:

> "The Court of Appeal on 12 April 2006 pronounced its deliberations in the appeal of AA and LK [2006] EWCA Civ 401 to the effect that generally an individual who can voluntarily return safely to his country of nationality is not a refugee, notwithstanding that on a forced return he would be at risk (para.99) but it is necessary to consider whether such an individual would in fact be at risk if he did return voluntarily."

18 We would accept that point 11 accurately describes what the Court of Appeal in AA and LK said about the need to consider risk if return is voluntary, but that point does not determine anything about whether there is risk.

19 Points 12 and 13 of the grounds state:

> "12. It is respectfully submitted that this leaves the question of the appellant's position under Article 3 of ECHR to be considered because she has quite clearly indicated that she will not voluntarily return to Zimbabwe.
> 13 The Court of Appeal (for the reasons it set out in para.107) of AA and LK made no findings on this situation. Against that background therefore we submit that if this appellant were to be involuntarily returned to Zimbabwe then she falls into the situation identified in the AIT decision of [AA(1)] (which remains effective for this purpose) whereby her documents would be in the possession of the airline pilot and her details would become known to the Zimbabwean authorities on her arrival at Harare Airport. In this circumstance we submit that the learned judge was bound by the law (despite any findings on the credibility of the appellant generally) as it currently stands and which is set out in the AIT decision of [AA(1)], i.e. he would be at real risk of Article 3 ill-treatment under the 1950 Convention if returned to Zimbabwe involuntarily. Therefore, the learned judge erred in law by inadequately applying country guidance cases."

20 We agree that in AA and LK the Court of Appeal expressed its dissatisfaction with the Respondent's refusal to deal with issues linked to Article 3 (see paragraph 108), but the Court in that case did not decide that returning someone to Zimbabwe contravenes his protected human rights.

21 Furthermore, these grounds wrongly assume that the judgement of the Court of Appeal in AA and LK had no impact on the decision of the Tribunal in AA(1) insofar as the latter held that removal to Zimbabwe would contravene a person's protected human rights. In AA and LK the Court of Appeal was very critical of the Tribunal's analysis of the facts in AA(1). Paragraph 72 of the judgment is particularly apt. The court said:

> "At all events, in a case which was said to be finely balanced, the AIT was wrong to say that the body of evidence from a source of separate people went all one way, and that the Secretary of State had not relied on any evidence indicating that individual Zimbabwean returned failed asylum seekers had not been ill treated, even if he did not adduce any evidence of his own. Indeed, when the AIT referred to Mr Walsh's analysis of the fourteen cases notified by the Zimbabwe Association they only mentioned the three cases which could have given rise to a finding of serious mistreatment and said nothing about his evidence to the effect that none of the other eleven cases involved treatment reaching the Article 3 persecution threshold."

22 It must follow from this that anything the Tribunal said in AA(1) concerning the risk on return – whether as regards persecution or ill-treatment - was inadequate because the evidence had not been considered properly. It follows from this that the assertion in point 13 of the grounds before us - that the Tribunal's assessment of the evidence in AA(1) continued to be authoritative in certain respects - is wrong.

23 Accordingly the Immigration Judge did not err in law in failing to follow AA(1). Whilst he did not state that he was following the guidance given in SM instead, the decision he made was wholly consistent with SM as well as with the body of evidence which was before him.

24 Although of no direct relevance we note that the subsequent decision in AA(2), which was not available to the Immigration Judge who decided this appeal, generally upholds SM although identifying two additional factors of relevance.

Decision

The original Tribunal did not make a material error of law and the original determination of the appeal stands.

Signed Date 27 October 2006

Senior Immigration Judge Perkins