Case No: C5/2009/2216, C5/2009/2097, C5/2009/2242
Neutral Citation Number: [2010] EWCA Civ 916

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AA/09252/2008, AA/04224/2008 & AA/06966/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2010

Before :

LORD JUSTICE WARD
LORD JUSTICE RIX
and
LORD JUSTICE ELIAS

- -

Between :

TM (ZIMBABWE) **KM (ZIMBABWE)** **LZ (ZIMBABWE)**	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Ian Dove QC and Mr Abid Mahmood (instructed by **Messrs Blakemores**) for the **Appellants**
Mr Steven Kovats QC (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date: 15 July 2010

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Judgment

Lord Justice Elias :

1. This judgment relates to three joined appeals against decisions of the Asylum and Immigration Tribunal (AIT). In each the appellant is a national of Zimbabwe who unsuccessfully sought asylum from the Secretary of State and whose subsequent appeal to the AIT failed. In each the principal ground of appeal is whether on the facts accepted by the AIT it was open to them to reject that appeal, having regard to the Country Guidance authority of *RN* [2008] UKAIT 00083. These appeals also raise the question of the potential significance of *sur place* activity when assessing risk on return.

2. In fact in the case of *LZ* the Secretary of State has raised a jurisdictional point which I consider is correct and is a complete answer to this appeal. I will deal separately with that case at the end of this judgment. Suffice it to say that in view of that conclusion I have not gone into the merits of that appeal.

The relevant law.

3. These appeals have raised a number of legal issues whose scope and application have been the subject of some dispute. I will consider these before turning to the individual cases.

4. The basic legal principles are not controversial. First, the question the AIT has to ask is whether there is a real and substantial risk of persecution on return: see *R v Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 AC 958, 996 per Lord Keith of Kinkel. Second, the persecution must be for a Convention reason. This covers political opinions, including those imputed to the asylum seeker, even if he does not in fact hold them. It is not disputed in these cases that if there is a real risk and substantial risk of persecution, it will be by reason of political opinion. Third, the question for this court in these appeals is whether the AIT erred in law in concluding that there was no such risk. There is no appeal against findings of fact. Fourth, this court must approach with caution the decisions of an expert tribunal like the AIT and not readily assume that they have misdirected themselves in law: see the observations of Lord Hope, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood in *AH (Sudan) v Home Secretary* [2008] 1 AC 678 at paras 19, 30 and 43 respectively. Of particular relevance to the submissions in these cases are the following observations of Baroness Hale:

> "…[The specialist tribunals] and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

5. In general findings of fact in one case will not bind any subsequent tribunal. However, this principle is modified in one important respect. The AIT must treat as binding any country guidance authority relevant to the issues in dispute unless there is

good reason for not doing so, such as fresh evidence which casts doubt upon its conclusions, and a failure to follow the country guidance without good reason is likely to involve an error of law. This is made plain by the following paragraphs of the Practice Direction: Immigration and Asylum Chambers of the First-tier and Upper Tribunal 2010 (which replace materially identical provisions in the earlier PD issued in 2007):

> "12.2. A reported determination of the Tribunal, the AIT or 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, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly 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.
>
> 12.4. Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

6. The Court of Appeal has endorsed this approach, having approved the earlier version of these paragraphs in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 per Brooke LJ at paragraph 27.

7. The most up to date country guidance for Zimbabwe in place when *TM* and *KM* were determined was *RN*. This guidance did not, however, entirely supersede earlier guidance and to the extent that it did not, those earlier decisions remain authoritative. They are *HS* [2007] UKAIT 00094 and, although of lesser significance now, *SM* [2005] UKIAT 00100. The appeal in *LZ* was decided before *RN* had been decided. Accordingly, the AIT in that case was bound by the earlier guidance.

The guidance in RN.

8. This guidance was given in October 2008 and was necessarily based on evidence of events before that date. It is unsatisfactory that in such a rapidly changing political landscape we must assume that the guidance still holds good; but that we are required to do.

9. The guidance in *RN* differs from the earlier guidance given in *HS* in two interconnected respects.

10. First, the AIT in *HS* had concluded that persons were at risk on return to Zimbabwe if they had displayed positive allegiance to, or support for, the opposition party in Zimbabwe, the Movement for Democratic Change ("MDC"). *RN* found that the risk category had expanded to anyone who was not able to demonstrate support or loyalty to the ruling Zanu PF party.

11. Second, that additional risk resulted from the activities of ill disciplined militia gangs. It did not stem from any enhancement in the risks of detection at the airport on return and subsequent persecution. Although the Central Intelligence Organisation ("CIO") had taken over responsibility for monitoring returnees at Harare airport, the AIT found that the conclusion in *HS* remained valid; the CIO were only concerned to detect those who were adverse to the regime, principally those perceived to be politically active in the MDC, although the AIT in *HS* accepted that critics of the regime would also be of interest. However, the change since *HS* was that the formal authorities had deployed various groups, sometimes described as "War Veterans" or youth militias or "green bombers" whose aim was to instil fear into MDC supporters or potential supporters. The AIT described their activities as follows (para 215):

> "..a vicious campaign of violence, murder, destruction, rape and displacement designed to ensure that there remains of the MDC nothing capable of mounting a challenge to the continued authority of the ruling party."

12. The AIT found that although they were established in camps in rural areas and bases in urban areas by the formal agents of the state, thereafter they were left very much to their own devices. These gangs would use their brutal tactics against anyone who was unable positively to demonstrate their loyalty to Zanu PF. So there is a distinction between the nature of the risk at the airport itself, which results from attempts by the CIO to detect MDC activists and other outspoken critics of the regime, and the risk en route home once the airport has been successfully navigated, which results from the random acts of gangs of militia against those unable to show loyalty to Zanu PF.

13. The AIT's conclusions are encapsulated in the following summary (paras 258-262):

> "The evidence establishes clearly that those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the country guidance in HS is no longer to be followed.
>
> The fact of having lived in the United Kingdom for a significant period of time and of having made an unsuccessful asylum claim are both matters capable of giving rise to an enhanced risk because, subject to what we have said at paragraph 242 to 246 above, such a person is in general reasonably likely to be assumed to be a supporter of the MDC and so, therefore, someone who is unlikely to vote for or support the ruling party, unless he is able to demonstrate the

> loyalty to Zanu-PF or other alignment with the regime that would negate such an assumption.
>
> The attempt by the regime to identify and suppress its opponents has moved from the individual to the collective. Thus, a person who returns to a home in an area where the MDC made inroads into the Zanu-PF vote at this year's elections faces an enhanced risk as whole communities are being punished for the outcome in an attempt to change the political landscape for the future and to eliminate the MDC support base.
>
> There is clear evidence also that teachers in Zimbabwe have, once again, become targets for persecution in Zimbabwe. This is confirmed by the evidence of Professor Ranger considered at paragraph 96 of this determination and reinforced by the news reports, examples of which are given at paragraphs 130 and 148. As many teachers have fled to avoid retribution, the fact of being a teacher or having been a teacher in the past again is capable of raising an enhanced risk, whether or not a person was a polling officer, because when encountered it will not be known what a particular teacher did or did not do in another area.
>
> It is the CIO, and not the undisciplined militias, that remain responsible for monitoring returns to Harare airport. In respect of those returning to the airport there is no evidence that the state authorities have abandoned any attempt to distinguish between those actively involved in support of the MDC or otherwise of adverse interest and those who simply have not demonstrated positive support for or loyalty to Zanu-PF. There is no reason to depart from the assessment made in HS of those who would be identified at the airport of being of sufficient interest to merit further interrogation and so to be at real risk of harm such as to infringe either Convention."

14. The AIT in *RN* heard an extensive amount of unchallenged expert evidence which provided the factual substratum for these conclusions. The parties have focused on certain observations of the AIT with regard to this evidence. The appellants have drawn attention to paragraph 81 which is as follows:

> "We observe here that there can be found within the extensive documentary evidence put before us other accounts of the means used by those manning road blocks to establish whether a person is loyal to the ruling party. For example, a person who was unable to produce a Zanu-PF card might be asked to sing the latest Zanu-PF campaign songs. An inability to do so would be taken as evidence of disloyalty to the party and so of support for the opposition. Clearly, a person returning to Zimbabwe after some years living in the United Kingdom would be unlikely to be able to pass such a test."

15. The Secretary of State has in turn relied on the conclusion in paragraph 230 which is as follows:

> "It remains the position, in our judgement, that a person returning to his home area from the United Kingdom as a failed asylum seeker will not generally be at risk on that account alone, although in some cases that may in fact be sufficient to give rise to a real risk. Each case will turn on its own facts and the particular circumstances of the individual are to be assessed as a whole. If such a person (and as we explain below there may be a not insignificant number) is in fact associated with the regime or is otherwise a person who would be returning to a *milieu* where loyalty to the regime is assumed, he will not be at any real risk simply because he has spent time in the United Kingdom and sought to extend his stay by making a false asylum claim."

16. A question that arises from the guidance is this: what exactly is the significance of the fact that certain categories of asylum seekers will be in the heightened risk category? The fact that an asylum seeker falls into one or more of the enhanced risk categories is not of itself sufficient to justify the grant of asylum as paragraph 230 of the decision in *RN*, reproduced above, makes clear. The question is whether he faces a real risk of persecution on return; he will do so from the militia gangs unless he is able to show loyalty to the governing party.

17. So the onus is on the applicant to show that there is a real risk that he will not be able to demonstrate the required loyalty. Falling into a heightened risk category does not of itself constitute such evidence. Being a teacher or a failed asylum seeker is plainly not incompatible with being a Zanu PF supporter or activist. It does, however, mean that the applicant will on return be likely to be subject to heightened scrutiny. If, for example, the authorities in Zimbabwe know that an asylum seeker was previously a teacher, they are more likely to start from the premise that he is likely to be hostile to the regime.

The significance of an adverse credibility finding.

18. In the appeals in both *KM* and *TM* the appellant made allegations of persecutory treatment when in Zimbabwe which were not believed. In most cases an appellant who is disbelieved will find it very difficult to establish an asylum claim. Where the risk of persecution results from alleged experiences which the judge is not satisfied occurred at all, even to the lower standard of proof identified in *Sivakumaran*, there will usually be no evidential basis for inferring the necessary risk. But this is not inevitably the position. The Tribunal must take account of all the evidence and in some cases a real risk of persecution will be established notwithstanding that the applicant's account was largely or even – exceptionally, no doubt - wholly disbelieved.

19. In *GM (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 833, Buxton LJ described the position thus (para 31):

> "Third, the observation in *Ariaya and Sammy* and in *MA* that a person who has not given a credible account of his own history cannot easily show that he would be at risk as a draft evader or because of illegal exit is, with respect, a robust assessment of practical likelihood, but it is not expressed as, and cannot be, any sort of rule of law or even rule of thumb. In every case it is still necessary to consider, despite the failure of the applicant to help himself by giving a true or any account of his own experiences, whether there is a reasonable likelihood of persecution on return"

20. However, there must be some material which justifies the inference that the applicant for asylum faces a real risk of persecution, as the *GM* decision itself shows. In that case the appellant, a seventeen year old girl, had given an account of how she had left Eritrea but it was disbelieved. It was accepted that if she had left illegally she would be at risk of persecution on return. It was also accepted that it was more probable than not that she would have left that way since statistically that was the most likely route by which girls her age would have managed to leave the country. But some students her age could also leave legally.

21. The Court of Appeal held that the fact that it was likely that a seventeen year old girl would have left illegally did not show that this particular girl had done so, and once her evidence was rejected, there was no other evidence available to the court to show that she may in fact have fallen into that general category. The only established facts were her sex and age, but they merely identified her as falling into the category of those who would be likely to have left illegally; they gave no clue one way or the other as to whether she had done so.

22. Laws LJ, with whose judgment Dyson LJ agreed, said this (para 49):

> "I accept that there may be cases where the appellant's testimony is disbelieved but other evidence proves his/her asylum claim; and Buxton LJ has cited authority (paragraph 29) to show that the court's duty is to vindicate a good asylum claim even though the appellant may have lied or otherwise acted in bad faith: see *Mbanga* [1996] Imm AR 136, 142 and *Danian v SSHD* [2000] Imm AR 96. But here, the consequence of MY having been disbelieved is that there is no material on which the immigration judge or this court can make any finding as to how MY left Eritrea."

23. An applicant for asylum is not, therefore, to be punished for giving false testimony. He is not to be denied asylum if he otherwise has a good asylum claim on the facts which are accepted to be true or likely to be true. But the absence of credible evidence from the applicant may result in a situation where the Secretary of State, or on appeal the AIT, has insufficient material from which to infer that there is a real risk of persecution. Since the onus is on the applicant to make good the claim, it perforce must fail.

Sur place activity.

24. One of the issues in this case is what significance should be given to the *sur place* activities of an asylum seeker. Rule 339P of the Immigration Rules, which gives effect to Article 5 of the Qualification Directive 2004/83/EC, makes it plain that *sur place* activity is of itself capable of giving rise to a real risk of harm:

> "A person may have a well-founded fear of being persecuted or a real risk of suffering serious harm based on events which have taken place since the person left the country of origin or country of return and/or activities which have been engaged in by a person since he left the country of origin or country of return, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin or country of return."

25. The fact that someone may have deliberately and without any conviction (or, indeed, in bad faith) engaged in political activity in order to bolster his or her case for asylum is not of itself a bar to that activity founding a *sur place* claim, although it is likely to prove harder for such persons to make good their claim. This is made clear in the following passage from the judgment of Brooke LJ, with the concurrence of Nourse and Buxton LJJ, in *Danian v Secretary of State for the Home Department* [1999] INLR 533,556:

> "UNHCR is of the view that an asylum-seeker who can establish that he/she has a well-founded fear of persecution on Convention grounds should fall under the scope of the inclusion clauses, irrespective of whether the actions giving risk to such fear have been carried out in good or in bad faith. Accordingly, even if the applicant has created a claim to refugee status by resorting to opportunistic post-flight activities, it would not be right to deprive him of international protections and return him/her to his/her country of origin if it is established that the consequences of such return may result in persecution for one of the reasons enumerated in the 1951 Convention.
>
> We realise that this may encourage the misuse of the asylum system by persons who, without having real protection needs, want to create a refugee claim for themselves through irresponsible/opportunistic actions. This consideration is, no doubt, an important one, as the misuse of the asylum system may eventually be detrimental to the interests of bona fide asylum-seekers and genuine refugees. For this reason, UNHCR would not object to a more stringent evaluation of the well-foundedness of a person's fear of persecution in cases involving opportunistic claims.

> In this connection, it should be borne in mind that opportunistic post-flight activities will not necessarily create a real risk of persecution in the claimant's home country, either because they will not come to the attention of the authorities of that country or because the opportunistic nature of such activities will be apparent to all, including to those authorities."

26. This decision was followed by the Court of Appeal in *YB (Eritrea)* [2008] EWCA Civ 360. Sedley LJ, with whose judgment Tuckey and Wilson LJJ agreed, pointed out that Article 5(3) of the Qualification Directive provides in terms that an assessment of risk of persecution includes taking into account whether the sole or main purpose of *sur place* activities was to create the conditions for international protection. However, he observed that even if it was the sole or main purpose, the asylum claim should nonetheless succeed unless the authorities in the home state are likely to treat the activities as insincere and opportunistic.

27. A further issue with respect to *sur place* activities is whether they are likely to be known to the authorities in the home state. It is not necessary, and indeed would usually be impossible, for the claimant to produce direct evidence that the authorities have such knowledge. It may depend upon the rigour with which the state seeks to police and stamp out dissident or opposition conduct. In *YB (Eritrea)*, Sedley LJ observed (para 18):

> "As has been seen, the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged."

28. In *HS*, still extant country guidance case relating to Zimbabwe, the AIT recognised that the CIO send infiltrators into the UK to discover who is opposing the regime, and spent considerable resources on that objective (para 104).

29. That is not to say, however, that relatively minor *sur place* activities will necessarily be known to the Zimbabwe authorities. In *EM (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 1294 one of the issues considered by the Court of Appeal was whether the authorities in Zimbabwe would necessarily become aware of low level *sur place* activities. This court held that notwithstanding the guidance given in *HS* that there was careful scrutiny of opposition activities in the UK, it did not follow that the only reasonable inference was that such low level activities would be likely to be known to the authorities. Patten LJ, with whose judgment Waller and Carnwath LJJ concurred, observed (paras 28-29):

> "The guidance in *HS* requires the Tribunal to take into account that there is active scrutiny by the CIO of MDC activities in the UK. But it goes too far to say that that creates a presumption that the system of monitoring is somehow foolproof. In most cases (and this, I think, is one of them) the issue of disclosure will be a matter of inference and degree. There will rarely, if ever, be case-specific evidence as to whether the appellant's activities are known to the CIO and it will therefore normally be unrealistic to attempt to divorce the issue of whether those activities have become known to the regime from the question of whether they would be of any real concern to it. The more significant the political activity, the more likely that it will become apparent and therefore be of interest to those monitoring it.
>
> This assessment is one for the Tribunal to carry out, having regard to all the relevant material. An appeal against its decision lies to this court only if it discloses an error of law. The Court of Appeal cannot and will not interfere with the decision arrived at unless it can be shown either that the Tribunal failed to take relevant material into account; or that conversely it took account of material that was immaterial to the inquiry it was embarked upon; or that its decision was perverse or irrational in the *Wednesbury* sense. If no challenge can be mounted on those grounds then the decision will stand unless the Tribunal has failed to give proper reasons for it."

30. This is the principle which we must apply when reviewing these AIT decisions. It means that a conclusion by an AIT that low level *sur place* political activity is likely to be not known to the authorities in Zimbabwe will be difficult to challenge.

Risk of persecution for volunteering political views.

31. Mr Dove QC, counsel for the appellants, made a submission which, if correct, would have potentially very far reaching consequences. It would, he submits, be decisive of the appeals in both *KM* and *TM*. It was not an argument advanced below; indeed, it was raised for the first time in oral argument. The submission is based on the

reasoning of the Supreme Court in the very recent case of *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31. The proposition Mr Dove advances is that when determining whether or not to grant asylum, the AIT should assume that an asylum seeker will tell the truth about his political views when questioned in his home country about them, as he almost undoubtedly will be. If in fact he is not loyal to the regime, he will have to reveal that fact and that will necessarily render him liable to persecution. Accordingly, his asylum claim must succeed. He cannot be expected to lie in order to avoid persecution. This is so even in cases where he is not politically active and indeed even if he is relatively uninterested in politics. It is enough that in fact he cannot honestly say that he does not support Zanu PF. So everyone who can satisfy the Secretary of State (or if unsuccessful, the AIT) that he or she is in fact not a supporter of Zanu PF will be entitled to asylum.

32. In *HJ* the issue for the court was whether a gay person who would be persecuted if his or her sexual orientation became known to the authorities in the home state could be required voluntarily to conceal that orientation, behave discreetly, and thereby avoid persecution. The Supreme Court Justices (Lords Hope, Rodger, Walker, Collins and Sir John Dyson SCJ) unanimously held that he could not be required to act in that way.

33. Mr Dove relied in particular on the following passage from the judgment of Lord Rodger (para 82). Lord Rodger posited a situation where the asylum seeker was a gay man who would be persecuted for that reason if known to the authorities and continued:

> "If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-

> founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

34. Mr Dove submitted that the same principle applies here; the tribunal could not require these appellants to dissemble about their political opinions to the authorities in Zimbabwe in order to avoid persecution. If fear of persecution was the only reason they would deny their opposition to the regime, they should be granted asylum status.

35. Mr Kovats submits that the relevant question is what in fact the appellant would do when asked about his politics. If in fact he would feign support for the governing party in order to avoid persecution, there was no real risk of persecution.

36. I do not accept that submission. A similar argument was advanced by the Secretary of State in *HJ* and was rejected. He sought to distinguish between a tribunal making an assumption that a person would act discreetly and making a finding that he would do so. Lord Rodger rejected the submission in these terms:

> "…the distinction is pretty unrealistic. Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution."

37. As we have seen, Lord Rodger accepted that in the case of gay men, there may be reasons other than the fear of persecution that would lead them to behave discreetly. That could also in theory be the case with someone's political views, but in practice it will rarely occur. There is not in general the same reluctance to reveal political opinions as there is sexual orientation.

38. I see the force in Mr Dove's submissions. Plainly the ratio of *HJ* is not limited just to sexual orientation cases but will apply to all grounds covered by the Convention. The reason is summarised in the following passage from the judgment of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, para 41, which was approved by the judges in the Supreme Court:

> "History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."

39. However, I doubt whether the principle enunciated in *HJ* is as far reaching as Mr Dove submits. I suspect that whether or not an asylum seeker may reasonably be expected to dissemble will depend upon the nature and strength of his political beliefs. Both Lord Rodger and Sir John Dyson found merit in the approach of the New Zealand Refugee Status Appeals Authority which in *Refugee Appeal NO. 74665/03*, [2005] INLR 68, para 124, held that "refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right."

40. As Sir John Dyson pointed out at paragraph 114 (quoting from a passage in the New Zealand judgment) on this analysis, if the proposed action giving rise to the persecution is at the core of a human right, the individual is entitled to persist in it notwithstanding the consequences; he is not required to be discreet. However, if the proposed action is at the margins, persistence in the activity in the face of the threatened harm is not a situation of being persecuted and does not attract protection.

41. On that analysis, there is a good case for saying that where the activity which would create the risk of persecution is the need to deny disloyalty to a political party by someone whose political interests or activities are of marginal interest to their lives, this engages only the margins of their human rights and the AIT would be entitled to conclude that they would in fact be, and could be expected to be, less than frank with the Zimbabwean authorities. They would not be required to modify their beliefs or opinions in any real way. It is one thing for a person to be compelled to deny a crucial aspect of his identity affecting his whole way of life, as in *HJ*. Furthermore, the individual is then forced into a permanent state of denial. The Supreme Court found it unacceptable that someone should have to live a lie in order to avoid persecution. It does not necessarily follow that in no circumstances can someone be expected to tell a lie to avoid that consequence.

42. However, a determination of this important question will have to await another day. We heard very limited argument on this point, and for reasons I give below, I do not think it is necessary to engage with this submission in order to resolve these appeals.

The individual cases.

43. I will deal with the facts and arguments with respect to each of the appeals separately, although the appeals in *KM* and *TM* raise certain common issues.

44. The Appellant was born on 18 March 1966 and is a national of Zimbabwe. She arrived in the UK on 26 November 2001 and obtained a six-month visit visa on arrival. Subsequently she successfully applied for a succession of student visas and was allowed to remain in the UK until February 2008. When her last student visa application was refused, she applied for asylum.

45. That application was refused on 18 August 2008 by the Respondent, and she appealed against that decision. Her appeal was heard on 30 September 2008 by IJ Coker, who dismissed her appeal. Reconsideration of that determination was ordered on 21 October 2008 and, at the first-stage reconsideration hearing held on 29 January 2009, SIJ McKee decided that there had been an error of law in the decision, and that the case should proceed to a second-stage reconsideration on a *de novo* basis. It is that second-stage reconsideration, which was undertaken by DIJ Garratt, which is the subject of her appeal.

46. Her claim for asylum was based primarily on her experiences when in Zimbabwe. She contended that she had been active in opposition and human rights activities in Zimbabwe; that she had been active as a Christian and human rights defender; and that she had been detained by CIO officials and raped and kept in poor conditions. DIJ Garratt did not find any of this evidence credible, and in that context he took into account the fact that she had not claimed asylum on first arrival. The judge gave detailed reasons for that conclusion, and those findings are not the subject of appeal.

47. The judge did accept that the appellant had been involved in low level political activities in the UK, and it was conceded that she was a qualified teacher. The judge did not consider that these factors justified her application for asylum. A particular factor - he described it as a "major factor" - which led him to conclude that she would not be of interest to the authorities was the fact that she had on three occasions returned to visit her family in Zimbabwe (para 52):

> "A major factor which assists me to decide that the appellant has neither been politically active in Zimbabwe or politically involved to any significant degree in the United Kingdom is the fact that she returned to Zimbabwe without any apparent difficulty in 2003, 2005 and 2007 spending some weeks there. Although the appellant claims that she thought it was dangerous to return and took precautions by travelling at night, staying in hotels and not going to her home that does not, in my view, negative the conclusions I can draw from such visits. That is because the appellant travelled through Harare on each occasion at a time when, if her claims are to be believed, she was a person who had been arrested by the authorities for opposition activity, had been involved in such activity in the United Kingdom and photographs of her circulated. *HS (Returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094, which was the country guidance available at the time of the respondent's return, makes it clear that there is a process of screening returning passengers particularly those whom the

> CIO will have identified as of interest. The appellant's claimed political activity would, I find, be likely to draw the attention of the authorities on each return and I do not conclude that the student visa stamp in the appellant's passport would stop the appellant being identified as of interest during the screening process. I conclude that the appellant's return to Zimbabwe is a clear indication that she had not been involved in any political activity either in Zimbabwe or in the United Kingdom which might have drawn the attention of the Zimbabwean authorities."

48. The DIJ then summarised his reasons for rejecting the appeal as follows (paras 53-55):

> 53. In summary, I am unable to conclude that the appellant was a refugee when she came to the United Kingdom and find that she has only been involved in low level MDC activity in the United Kingdom which would not, to observers, show her to be conscientiously involved against the Zibmabwean regime. Against this background I have considered whether the appellant will be at risk on return to Zimbabwe on account of her status as a former teacher there, and because of her limited opposition activity in the United Kingdom. To reach my conclusions in this respect I take into consideration the guidance set out in RN and such guidance as remains in HS.
>
> 54. RN specifies that teachers in Zimbabwe have become, again, targets of persecution and that there is also risk for anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. As far as the appellant's status as a teacher is concerned, I am not satisfied that such status will create a risk for her. The appellant's return visits to Zimbabwe show that, up to 2007, she was certainly not viewed by the authorities with any suspicion. Further, RN does not find that all returning teachers are at risk; it maybe puts them in a risk category subject to the circumstances of each individual case. As I am not satisfied the appellant was not targeted as a teacher in the past and because of her safe return to Zimbabwe, I do not conclude that she would be at risk if returned now.
>
> 55. As to the second issue involving demonstration of support for or loyalty to the Zanu-PF regime, my finding that the appellant has not been involved in political activity in Zimbabwe or, to any significant degree, in the United Kingdom is relevant. She will, I conclude, be seen as a former teacher who had not been involved in opposition activity. I also find that the appellant's *sur place* activities in the United Kingdom are not those of the conscientious opposition human rights activist she claims to be but are activities in which she became

> involved simply to enhance her late asylum claim. Although I take into consideration the decisions of the Court of Appeal in relation to *sur place* claims, notably that in YB (Eritrea) [2008] EWCA Civ 360, I conclude that the appellant's activities, even if they had been noted by the Zimbabwean authorities, would be seen as nothing more than an attempt to enhance an asylum claim by someone who had no record of opposition activity prior to leaving Zimbabwe."

49. There are three grounds of appeal. First, it is alleged that the Tribunal did not have regard to a material factor, namely that the appellant was a failed asylum seeker who had already been in England for almost eight years. It is submitted that for that reason alone she would find it difficult to demonstrate her loyalty to the current regime. She would not, for example, be able to sing the current Zanu PF songs if stopped by one of the militia gangs which roam the country seeking by force to eliminate opposition.

50. Second, Mr Dove submits that given the positive factual findings made by the judge, the only permissible conclusion in the light of *RN* is that the claim for asylum should succeed. Mr Dove submits that it is not disputed that the appellant fell into a number of the high risk factors - a teacher, a failed asylum seeker from the UK who had spent many years here, and someone with some, albeit limited, anti-government activity *sur place*. The only factor identified and relied upon to obviate the risks that would otherwise apply to someone marked by her characteristics is the three visits to Zimbabwe in 2003, 2005 and 2007. Mr Dove points out that these were all prior to the elections in March 2008 when the situation deteriorated in the way identified in *RN*. The real risk was from the militia gangs. The earlier visits were of no real moment in the new circumstances; they might justify a finding that she would not be stopped at the airport, but they revealed nothing about the risks thereafter. Apart from the visits there was no evidence of any other counterveiling factor which could justify the conclusion that there was no real risk of persecution on return.

51. Third, he relies upon the argument I have already considered, namely that this appellant will almost inevitably be asked about her political activities and interests in Zimbabwe and will have to reveal her opposition to the regime.

52. Mr Kovats submits that the decision displays no error of law. The judge must have had in mind her time in the UK since it was one of the factors at the forefront of her case. As to the judge's conclusions, he was entitled to treat the *sur place* activity as of no consequence given that she had been involved in those activities before 2008 and yet had been of no interest to the authorities as a result. Her later activities did not demonstrate any qualitative change. She did fall into certain risk categories but they do not of themselves demonstrate that she is personally at risk. Furthermore, it was not alleged that her family had been subject to any particular difficulties in Zimbabwe. Finally, it was material that she had waited so long before claiming asylum. Whilst a change in the situation in Zimbabwe could in principle create risks that did not formerly exist, the judge was entitled to conclude that they had not done so in this case. All cases are ultimately fact specific and the facts here were capable of supporting the inferences which the judge had reached.

53. I reject all the grounds of appeal, essentially for the reasons given by Mr Kovats. In so doing, I bear firmly in mind the injunction of the House of Lords in *AH (Sudan)*

that this court should assume that the AIT has properly directed itself and should only interfere where a clear misdirection has been established. Whilst I recognise some force in Mr Dove's attractive submissions, I do not find them sufficiently persuasive to justify interfering with the AIT's decision.

54. As to the first ground, it is true that DIJ Garratt did not in terms mention in his conclusions that heightened risk factors included the fact that the appellant was returning as a failed asylum seeker who had spent some years in the UK. But these facts were obvious, being part of the essential factual matrix before the judge. I do not accept that the failure specifically to mention these features shows that no consideration was given to them. It may be that they were not given much weight, but that is hardly surprising given that they do not appear to have figured at all in the submissions advanced by the appellant; they are not mentioned by the judge as factors relied upon in those submissions. In any event the appellant's ability to visit Zimbabwe on three occasions without difficulty, even after she had been here for some years, carries weight here also. It suggests that her lengthy stay here would not enhance the risk in her case.

55. As to the second ground, in my judgment, there was a proper evidential basis for the AIT's conclusions. Each case turns on its own facts, as *RN* emphasises, and the judge was entitled to conclude that she did not personally cross the risk threshold. The three visits to Zimbabwe without any difficulty were sufficient to suggest that her *sur place* political activities were either unknown to the authorities or, even if known, were too slight to be of interest to them and would be perceived as an attempt to bolster an asylum claim displaying no real commitment to the opposition cause. That was a conclusion open to the judge, and substantially diminishes the significance of these acts. It is true that the three visits were before the elections and the more hostile climate generated by them as recounted in *RN*, but the increased risks identified in *RN* were from the ill-disciplined militia gangs outside the airport, and there is no reason why it should be assumed that they would know of *sur place* activities in any event. Similarly as regards the risk to her as a teacher, there was already by the time of her visits home hostility towards teachers, as the country guidance cases in both *SH* and *SM* stated. Yet the appellant was able to get through the airport without being apprehended. The militia may have been more hostile towards her, had they discovered the fact, but this factor merely increased the risk of persecution; it did not establish that risk in her case. The judge was entitled to conclude that her status as a teacher had not in fact caused her problems and was unlikely to do so. Moreover, the fact that the appellant had family in Zimbabwe who were apparently of no concern to the authorities lent support to the judge's conclusion that she was not at risk.

56. The third ground can be shortly dealt with. It was not an argument advanced before the AIT and cannot for that reason constitute a ground of appeal; it is not a pure point of law. In any event, the premise of this part of her claim must be that if asked about her political activities, she would have to reveal a lack of loyalty to the regime. The evidence does not sustain the premise. It suggests that she manufactured hostility to the regime to bolster her asylum application. So it cannot be assumed that she would face the dilemma of having to conceal her true political opinions in order to avoid persecution. In the circumstances it is not necessary to decide whether if she were sufficiently indifferent to the Zanu PF party that she could not genuinely state that she

was a loyal supporter, that would of itself constitute a sufficient basis for granting asylum.

TM.

57. The Appellant, TM, was born on 3 August 1973. She arrived in the UK as a visitor on 26 October 2001, and her leave was extended until 28 February 2004 on the basis that she was a student. On 15 September 2008 she applied for asylum. That application was rejected and an order was made refusing her leave to enter the UK. She appealed against that refusal.

58. Her appeal was heard by IJ Sharp on 5 December 2008 and the appeal was refused in a determination dated 14 January 2009.

59. The essence of the Appellant's claim was that she had qualified as a nursing aide and used to undertake nursing predominantly for white people. In particular, her last job was for a family of white farmers. She said that whilst she was working for them, on 16 June 2001 she was raped by war veterans and then taken by the son of the farmer to the local police station, but the police were not prepared to take any interest in the incident. She then stayed with this family when they moved to Avondale until the older farmer in the family died. At that point, in October 2001, she decided that she could no longer live safely in Zimbabwe and left. Whilst in the UK she joined the MDC and attended vigils outside the Zimbabwean Embassy.

60. IJ Sharp rejected most of her account. He found that she was totally lacking in credibility and could not be believed in relation to anything other than the bare features of her story. These limited findings in her favour were as follows:

> "58. There are limited matters that I can accept in relation to the appellant. I accept that she is a nursing aide and worked for a nursing agency between 1996 and 2001. I accept that she may well have worked for white farmers. I accept that persons working for white families may not have been popular with Zanu-PF followers. I accept that at or about the time that she left many hundreds if not thousands of Zimbabweans were reassessing their position and were leaving the country. I accept that the conditions in that country were far from perfect and that it would be desirable for persons of whatever persuasion unless they were part of a favoured elite to seek lives elsewhere.
>
> .....
>
> 62. I must therefore consider her as someone who has certain nursing qualifications who fled the country in 2001 and has no profile of any political nature at all in Zimbabwe. She has given different accounts as to whether she is an actual member of the

> MDC in the UK and in any event has demonstrated a lack of knowledge of MDC personalities in her interview. The most that she is able to say is that she has attended the Zimbabwe Vigil on Saturday nights.

He went on to find that hundreds if not thousands of persons would have attended the vigils, and he did not consider that she would come to the notice of the authorities in Zimbabwe on that account.

61. An application for reconsideration was made and, on 3 February 2009, SIJ Taylor decided that there was an arguable error of law and ordered that a first-stage reconsideration occur. That first-stage reconsideration was conducted by SIJ Gill. She found that there were a number of errors of law. These included a failure by IJ Sharp to give proper consideration to the question whether the appellant's sur place activities would come to the attention of the authorities; and the significance of her long stay in the UK. She ordered a second stage reconsideration but "limited to consideration of the future risk of persecution" and she directed that Sharp IJ's findings of fact as to the Appellant's experiences and those of her family in Zimbabwe and his findings as to her *sur place* activities should stand.

62. A second-stage reconsideration hearing was held before SIJ Jordan and IJ Baker on 21 July 2009. Their determination was promulgated on 20 August 2009, and they dismissed the appeal. They first considered a ground of appeal that IJ Sharp had failed to give proper weight to the *sur place* activities and to the findings of the AIT in *HS* that the Zimbabwe authorities put significant effort into discovering the activists in the UK. In this context the AIT also made express reference to Lord Justice Sedley's observation in paragraph 18 of *YB*, reproduced in paragraph 27 above. Their findings in relation to the *sur place* activities were as follows (paras 26-27):

> "26. It is likely that there is a sizeable Zimbabwean community in the United Kingdom. It is simply inconceivable that the Zimbabwean High Commission has the resources to monitor every one of them. Any rational surveillance organisation must have to distinguish between those who are of significant interest to the authorities and those who are not. Were the CIO able to gather the names of all those involved, past and present, this would create its own difficulties. The proliferation of hundreds or perhaps thousands of names might well lead to a workload under which even the most sophisticated information-gathering network would buckle.
>
> 27. We are satisfied that the CIO maintains an active interest in opposition activities in the United Kingdom and that this may include infiltration into United Kingdom groups. Notwithstanding this material, there are both logistical and financial hurdles in maintaining a surveillance gathering network which covers every meeting however long ago and maintains records of those present and is able to identify those present either by name or by identified photographic records. There is no mechanism identified in the evidence which demonstrates any real likelihood of the information coming to

> the attention of the authorities were the appellant to return to Zimbabwe. There are formidable obstacles in identifying an individual from a photograph or mere attendance at a meeting or rally. Even if the authorities are able to obtain a list of names, the task of distinguishing between activists and mere attendees and then transferring that information back to the authorities in Zimbabwe and then to use it to identify returnees raises almost overwhelming practical difficulties. The grounds of application fail to identify the practical mechanism that might result in harm."

63. Having concluded that her *sur place* activities would not place her at risk, the Tribunal went on to find that there were what they described as "formidable difficulties" in the way of this appellant establishing that she would be at risk, given the rejection of the core of her evidence by IJ Sharp. They pointed out that the appellant had made "no freestanding claim to be at risk, freestanding in the sense that it arose independently of her account of past events". In the absence of any credible evidence as to her situation in Zimbabwe, they stated that they could not properly infer that she would be unable to show the relevant loyalty to the regime so as to avoid the risk of persecution (paras 41-42):

> "41. It is for the appellant to establish her claim, albeit to the lower standard of proof. The Immigration Judge did not find her credible in relation to the core of her account of past persecution but, in accordance with what Buxton LJ said in GM & YT (Eritrea) v SSHD, it remains necessary for us to consider whether, notwithstanding her failure to give a true account of her experiences, that there is a reasonable likelihood of persecution on return. In our judgment, there are formidable difficulties in the way of this appellant establishing that, notwithstanding her advancing a claim of past persecution that has been substantially rejected, she is nevertheless able to show an inability to demonstrate loyalty to the regime in circumstances that will put her at risk either at the airport or on return to her home area. The reason for this is, of course, the result of the appellant's own actions in advancing this claim.
>
> 42. There is no credible finding that she or any of the members of her family have been involved in activities in support of the MDC which will be treated as likely to cause the disapproval of Zanu PF, the regime, the militiamen or anyone else. There is no credible evidence of the family's political activities or harassment following her departure from Zimbabwe. We are left to speculate as to the appellant's political allegiances or those of her family members. She has not, for example, even managed to exclude the possibility that she was a Zanu PF supporter whilst in Zimbabwe. Into this evidential vacuum, there is no room to create a positive case that the appellant will find it difficult to demonstrate loyalty to the regime. This is not

> a matter for inference. Inferences where possible and necessary arise from a firmly established springboard in the form of a factual matrix made out by credible evidence."

64. They went on to consider a submission to the effect that such findings as were established were enough to constitute the basis for an asylum claim. They rejected this submission also:

> "46. Ms Birring submitted that, notwithstanding the Immigration Judge's credibility findings, the fact that the appellant has been absent from Zimbabwe for a number of years, has attended vigils before the embassy and cannot show that she voted for Zanu-PF in the elections of 2008 because she was in the United Kingdom has demonstrated to the lower standard of proof that she falls within the category of persons identified in paragraph 79 of RN as being someone who does not sympathise with the regime. Whilst we accept the period the appellant has spent away from Zimbabwe and the fact that she was absent during the 2008 elections are factors that we must, and do, take into account in the overall risk assessment, we are not satisfied that those elements of the claim which the appellant is able to establish are sufficient given the evidential lacuna in the appellant's case which we have already identified.
>
> 47. Ms Birring argued that the appellant should be believed in her claim to have been a supporter of the MDC because her presence at vigils does not fit with the profile of a Zanu-PF supporter or one who has an ability to demonstrate loyalty to the regime. We do not agree that the overt support that the appellant now provides for the MDC can only reasonably be attributed to opposition to the regime. The presence of individuals at rallies is, regrettably, equivocal; being as easily referable to a wish to enhance an asylum claim as to political activism. In the appellant's case there is no evidence of political activism in Zimbabwe and the appellant's late application for asylum in 2008 coincides with the Immigration Judge's findings of attendants [sic] at vigils beginning in 2007. There remains a long period from a long arrival [sic] in 2001 and her involvement with the MDC in the United Kingdom."

65. On this basis, the Appellant's asylum application was dismissed.

66. There are three grounds of appeal. The first and principal ground is that in the light of *RN*, the AIT's conclusion was not open to them. A failed asylum seeker, having been in the UK for some eight years, who had worked for white farmers in Zimbabwe and

had attended protest meetings and vigils outside the Zimbabwean Embassy in the UK supporting the opposition, was bound to be at risk on return, having regard to the lower standard of proof.

67. Second, Mr Dove submits that an error of law is identified in the last part of the last sentence in paragraph 46 reproduced above, namely the phrase "given the evidential lacuna in the appellant's evidence". He submitted that read fairly, it suggests that the lack of credibility can positively count against an applicant for asylum. That, he says reveals an error of law. The AIT was entitled to find that the evidential lacuna meant that evidence which might have supported the claim was not available and to that extent the lack of credibility disadvantaged the appellant. But the fact that she gave a false testimony could not be relied upon so as to minimise or render less significant evidence which was accepted and pointed towards a risk of persecution. That was what the AIT was saying.

68. Third, Mr Dove relies upon the fact that the decision in this case is cast in very similar language to that given a few weeks earlier by the same judge in the *LZ* case. This demonstrates, it is submitted, that the careful scrutiny which must be applied in cases of this kind was simply lacking.

69. Finally, it is alleged that given that the appellant might on return be asked about her activities in the UK, it must be assumed that she would answer honestly in which case she would inevitably be at risk.

70. Again, essentially for the reasons advanced by Mr Kovats I think that the conclusion reached by the AIT was open to it on the findings it made, and that there is no material error of law in this decision.

71. As to the first ground, the Tribunal properly directed themselves in the light of *RN*. For example, they recognised that there was an enhanced risk for failed asylum seekers who have been in the UK for some years. However, they also recognised that ultimately these cases are fact sensitive and the right to asylum is not established merely because someone falls into the general enhanced risk category.

72. The AIT were not satisfied to the requisite standard of proof that the appellant would be unable to show the necessary loyalty link to the regime. As the AIT pointed out in *RN*, many returned asylum seekers can do so. In my judgment the AIT were justified in concluding, following *GM*, that in the absence of any factual material to justify the conclusion that the appellant may not be able to establish the requisite loyalty link with the regime, that was not an inference open to them. As the AIT pointed out, it may well have been the case that the appellant was an active Zanu PF supporter or activist.

73. Plainly *sur place* activity, if known to and of interest to the authorities, would in an appropriate case be capable of constituting independent evidence justifying an inference of risk. It would not simply have left her in a generalised risk category but would have been capable of constituting evidence of actual hostility to the regime. But the AIT found that the low level of political activity carried on in the UK would not come to the attention of the authorities in Zimbabwe. That was a finding open to them which, following in particular this court's ruling in *EM*, cannot be said to constitute an error of law.

74. It must follow that the second ground of appeal also fails. In my judgment, the AIT was simply saying that the factors which locate her in the enhanced risk categories are not sufficient of themselves to constitute evidence that she personally will be at risk. I read paragraph 46 simply as reaffirming that the *GM* principles apply. The accepted features of her case statistically put her in an enhanced risk category, but there was no evidence from which the AIT could infer that she personally fell into that category, just as in *GM* the fact that the appellant was a seventeen year old put her statistically in the category of someone who would be likely to have left Eritrea illegally and therefore be at risk, but there was no evidence to place her personally into that category. I do not therefore accept that the AIT is in paragraph 46 suggesting that the lack of credibility will be capable of defeating a claim to asylum which has otherwise been made good on evidence which the Tribunal accepts.

75. I also reject the submission that the similarity of language between this case and *LZ* demonstrates that SIJ Jordan, who appears to have written the judgment in this case, simply adopted a generalised approach to the asylum claim and failed to give it the anxious scrutiny which these cases require. I accept that there are two sets of passages in the judgments that are almost identically worded to similar passages in *LZ*. But they do not sustain the complaint. The passages are dealing with issues common to both cases. One passage concerns the way in which the authorities in Zimbabwe monitor *sur place* activity; the other concerns the implications of the finding that the appellant was not a credible witness. There was no need for a judge to reinvent the wheel. Having adopted what he considered to be an appropriate expression of the principles applicable in these contexts, SIJ Jordan was fully entitled to express them in the same way again. The passages of which complaint is made are not fact sensitive. I am satisfied that the AIT considered this case on its merits and gave reasons which are in fact specific to the particular facts.

76. Finally, I reject the submission that it must be assumed that the appellant will, if asked, reveal to the CIO or the militia gangs her lack of loyalty to Zanu PF, for the same reasons as I have given with respect to KM. Essentially, this was not a submission advanced below, and in any event there is no evidence that she is disloyal to the regime.

77. For these reasons, I would dismiss the appeal in this case.

LZ.

78. The Appellant, LZ, was born on 29 May 1968. She left Zimbabwe on 31 July 2002. She claimed asylum on 18 January 2008, and the Secretary of State refused that claim and gave directions for her removal under Section 10 of the Immigration and Asylum Act 1999 on 9 May 2008.

79. The Appellant appealed on 16 June 2008, and her appeal was heard by IJ Thomas on 11 July 2008

80. The essence of the Appellant's evidence at that hearing was that her father was a head teacher and local MDC councillor for the area of Sihlengeni in Zimbabwe who had been beaten up by a Zanu PF supporter for his views, and that she lived with her husband and two children in Bulawayo. She was a teacher and later became employed by a bank. She claimed to be a member and supporter of the MDC, and alleged that

she had been raped by an official of the Central Intelligence Organisation (CIO) whilst on a training trip to Harare because she supported the MDC. She claimed it was this incident which led to her leaving Zimbabwe. She said that whilst in the UK she had become a member of the Wolverhampton branch of the MDC and attended vigils in London outside the Zimbabwean Embassy.

81. IJ Thomas rejected the bulk of her evidence. He did not accept that her father was an MDC councillor who he had been attacked by a Zanu PF supporter; nor that she herself, was active in the MDC. He gave cogent reasons for these factual conclusions which it is not necessary to recount. As a consequence of those findings, he also rejected her claim that she had been raped because of her MDC connections, and indeed concluded that he could not be satisfied that she had been raped at all, not least since she had not given details of the rape at her initial interview.

82. As to her involvement in political activities *sur place*, the judge found that she had joined the Wolverhampton branch of the Zimbabwe Association in order to enhance her chance of gaining asylum, and he concluded that it was unlikely that she would be identified or would be of interest to the authorities.

83. An application for reconsideration was refused by the Tribunal on 6 August 2008 but was subsequently ordered by Blake J on 11 March 2009. The precise terms of his order are material to this appeal. They were as follows:

> "there are arguable grounds for concluding that the IJ has failed lawfully to consider the evidence of support of the MDC in Zimbabwe and your claim should be re-examined in the light of the re-assessment of risk in the recent country guidance case of *RN (Returnees) Zimbabwe CG*… "

84. That reconsideration hearing came before SIJ Jordan on 13 July 2009 and was refused. The first stage of the reconsideration required the judge to consider whether IJ Thomas had erred in law. The SIJ pointed out that a failure to have regard to the guidance in *RN* could not constitute an error of law since *RN* had not been decided by then, and he concluded in terms that there was no other error of law. Notwithstanding that, he loyally sought to give effect to what he understood to be the order of Blake J by considering the position of the applicant in the light of the up to date guidance given in *RN*. He concluded that it did not change the conclusion of IJ Thomas that the asylum application should be refused.

85. The appellant has sought to appeal that conclusion. The basis of that appeal is not that SIJ Jordan was wrong to find that there was no error of law in IJ Thomas' decision. It is that SIJ Jordan himself erred in law in concluding that even under the *RN* principles the asylum claim failed. Permission to appeal that decision to the Court of Appeal was subsequently refused by SIJ Jordan on 11 September 2009 but was granted by Carnwath LJ following an oral hearing.

86. In my view, it is not necessary to consider the merits of the detailed grounds of appeal. The reason is that as in my judgment Mr Kovats rightly submits, the appeal is bound to fail for jurisdictional reasons. The basis of his submission was as follows.

When the judge carried out the second stage re-determination he had already stated in terms that IJ Thomas has not erred law in reaching the conclusion he had on the basis of the country guidance then in force. That conclusion is not challenged. Thereafter the Tribunal's observations about the strength of the claim under the *RN* guidance were made without jurisdiction and cannot constitute a relevant ruling against which an appeal can be lodged. Even if Blake J's order, properly construed, did require SIJ Jordan to consider the case again in the light of *RN* whether or not there was an error of law, that order itself would then be invalid since Blake J had no jurisdiction to require this. His powers are conferred by section 103A to ordering a reconsideration if there may have been an error of law and there is a real prospect that the appeal would be decided differently on reconsideration. He does not determine that there was an error of law. Whether there was or not had to be determined at the first stage of the reconsideration hearing. Once SIJ Jordan had determined that was no error, there was no further action to be taken.

87. Mr Dove contends that this analysis cannot be correct. He accepts that in law SIJ Jordan could have simply refused to consider the position under *RN* given that he had found no error of law in the determination of IJ Thomas. However, since SIJ Jordan chose to go further, without any objection at the time from counsel representing the Secretary of State, his decision was valid and was appealable. This was a sensible and pragmatic option for SIJ Jordan. *RN* recognised that the situation in Zimbabwe had become markedly worse after the 2008 elections; at some point *LZ*'s claim would have to be considered in the light of those changed circumstances, and SIJ Jordan had adopted a sensible way of achieving that.

88. In my judgment, Mr Kovats' submission is correct. Having found that the judgment of IJ Thomas displayed no error of law, SIJ Jordan had no jurisdiction to hold a second stage reconsideration. He could not confer jurisdiction upon himself. Accordingly, any conclusion he reached as to the merits of the claim under *RN* has no legal standing and thus even if his decision would, if valid, display errors of law, they are of no consequence. Even if Blake J's order, objectively construed, required SIJ Jordan to take that step - and I can see why the judge thought that it did - that order itself would not have been lawful. Either way, the Secretary of State is entitled to take the point that there is no valid second stage reconsideration for the appellant to appeal.

89. Indeed, I think that the court would have had to take the point of its own motion in any event since it goes to jurisdiction. If the situation in Zimbabwe has changed, and *RN* suggests that it has (although that guidance is, I suspect itself probably now out of date) that may justify a fresh application to the Secretary of State, as Mr Kovats accepts. But it does not entitle the judge to exercise a jurisdiction he does not have, however convenient that course might be. It follows that the appeal must fail.

90. I should add that issues were also raised in these three appeals under Articles 2 and 3 of the European Convention, but it was conceded that they stand or fall with the determination of the asylum appeal and merit no separate consideration.

Disposal.

91. For the reasons set out in this judgment, I would dismiss each of these three appeals.

Lord Justice Rix:

92. I agree.

Lord Justice Ward:

93. I also agree.