Upper Tribunal
(Immigration and Asylum Chamber)

CM (Article 1F(a) - superior orders) Zimbabwe [2012] UKUT 00236(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 April 2012	
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Before
UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE KING

Between

CM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr D Phillips, Legal Representative, Global House Solicitors
For the respondent: Mr S Ouseley, Home Office Presenting Officer

In the context of deciding whether a person is excluded from Refugee Convention protection by virtue of having committed acts contrary to Article 1F(a), the effect of Article 33(1) of the Statute of the International Criminal Court ("the Rome Statute") is that whilst obedience to superior orders can be a defence if each of its three requirements – as set out at (a), (b) and (c) - are met, by virtue of Article 33(2) the Article 33(1)(c) requirement can never be met in cases where the order was to commit genocide or a crime against humanity. Such cases are always "manifestly unlawful". For a

person alleged to be criminally responsible for crimes against humanity the defence of obedience to superior orders is unavailable.

DETERMINATION AND REASONS

1. The appellant is a national of Zimbabwe. He arrived in the UK on 16 October 2002 as a business visitor. He obtained further leave to remain as a student until 30 November 2006. His application for further student leave was refused and his appeal against that refusal was unsuccessful. On 20 April 2009 he claimed asylum in Croydon. On 16 October 2009 the respondent rejected that claim and decided to issue a certificate under s. 55 of the Immigration, Asylum and Nationality Act 2006 on the basis that there were serious reasons for considering that he had committed excludable crimes under Article 1F(a) of the 1951 Refugee Convention. The respondent accepted the appellant's claim to have been in the Zimbabwe army between 1987 – 1990 as a full-time soldier and then from late 1989 as a reservist. The respondent accepted that as a reservist he was recruited in 2000 to be a member of the "people's militia". The respondent noted the evidence in his asylum interview that in 2001-2002 he had been involved in beatings which he had been ordered to carry out by his superiors. His involvement in two beatings in April 2002 was a particular focus. The respondent did not accept his claim that he had sought to dissociate himself from such activities as soon as he could nor his claim that he had carried out orders to beat people in order to save his own life. It was not accepted that in April 2002 he had been ordered to kill his uncle or that it was his refusal to carry out such an order that caused him to leave Zimbabwe. The respondent also rejected the appellant's asylum-related grounds of appeal on the basis that due to his military service in support of the authorities he would be considered loyal. The respondent found there were no Article 8 ECHR circumstances of significance.

2. In a determination notified on 14 December 2009, Designated Immigration Judge (DIJ) A A Wilson dismissed his appeal against the respondent's decision. The DIJ agreed with the respondent that the appellant fell to be excluded from Refugee Convention protection by operation of Article 1F(a) considerations and that he had not shown that he would be at risk on return to Zimbabwe for the purposes of Article 3 ECHR. The DIJ also found that his appeal failed on Article 8 ECHR grounds. We should mention that when the appellant had previously appealed unsuccessfully against a decision dated 16 February 2007 refusing him leave to remain as a student (on 20 May 2007 Immigration Judge Pitt having dismissed that appeal), no asylum or human rights grounds were raised in that appeal.

3. The grounds of appeal did not challenge the DIJ's primary findings of fact, only his application to those findings of the correct legal criteria. On 26 May 2011 the Upper Tribunal decided that the DIJ had materially erred in law and that his decision was to be set aside. The errors identified were the DIJ's failure to give any reasoning for his finding that the acts in which the appellant had been involved were committed as part of a widespread or systematic attack directed against the civilian population and the failure to make any specific findings as to why he rejected the appellant's reasons for carrying out the alleged crimes (which potentially went to the issue of duress). It was also noted that

there was also evidence before the DIJ of mitigating circumstances which may have been relevant for assessment under Article 8 of the 1950 Convention. The case was then set down for a resumed hearing with directions that the parties address certain issues, in particular the defences of duress and superior orders under international criminal law and their interconnection with refugee and humanitarian protection law in the context of Article 1F(a) of the Refugee Convention and Article 12 of the Qualification Directive. Also mentioned was the recent Court of Justice of the European Union (CJEU) judgment dealing with the exclusion clauses in Article 12 of the Qualification Directive in the Joined Cases C-57/09 and C-101/09, B and D. At the end of the decision the Upper Tribunal stated that:

> "the hearing to decide what decision to remake in the appellant's case will not be an occasion for any revisiting of the facts as found by the DIJ. To repeat, they were not challenged in the grounds seeking permission to appeal, and hence the only relevant issues for decision are whether the appellant falls foul of Article 1F(a) or succeeds under Article 3 ECHR on the basis of the DIJ's findings of fact. The only proviso is that the appellant is entitled to submit a further written statement updating his personal particulars since the date of the hearing before DIJ Wilson; these may be relevant to the Article 8 issue. Both parties are also at liberty to adduce any further evidence they wish relating to background country conditions in Zimbabwe (the respondent has already intimated she will seek to rely on the recent Tribunal Country Guidance case of EM and others (Returnees) [2011] UKUT 96 (IAC))."

4. The DIJ's principal findings of fact were that at the time of the acts on the basis of which the respondent considered he stood to be excluded, the appellant was in a position of authority in the Zimbabwean military, holding the rank of sergeant (paras 19, see also para 18); that in April 2002 he had been involved in the beating of two persons in his village who had been ordered to attend a night rally to denounce the opposition party; that he had also been involved in giving orders for other soldiers to participate in similar beatings (para 22); that he was not a deserter (para 22, 31, see also para 25) and that he had not ceased to support ZANU-PF (paras 31, 33). The DIJ also made findings relating to the appellant's claim to have acted under duress but, since his reasoning on this matter was found to be vitiated by legal error, his findings on it clearly cannot stand. As regards Article 3 ECHR, the judge found that the appellant had not shown that he was a deserter or that he would not continue to be perceived as a ZANU PF supporter on return. As regards Article 8 ECHR, the judge did not consider that his relationship with his girlfriend amounted to family life as it was "only a girlfriend/boyfriend situation". Considered as private life this relationship lacked strength as they were not living together and had not been involved with each other for very long.

5. At the hearing Mr Philips confirmed that although the DIJ had erred in his treatment of crimes against humanity, it was accepted by the appellant that during the dates in Zimbabwe relevant to the appellant the Zimbabwean authorities were involved in the commission of crimes against humanity so as to satisfy the "chapeau" requirements of Article 7 of the International Criminal Court Statute. In relation to the issue of criminal responsibility it was relevant to take into consideration (i) that the general situation in Zimbabwe at that time was one of lawlessness in which those in power gave orders and punished anyone who disobeyed; the appellant had no alternative but to obey orders; he

had to be seen to be loyal; (ii) his participation was confined to one beating of two people; he played a very small part; (iii) that the appellant acted to save not only his own life but also that of his family (he was caring for his brother and sister-in-law who were AIDS victims) as his superiors would have punished them as well as him had he not carried out their orders; (iv) he was already on thin ice as they had suspected him of disloyalty because of his involvement in AIDS awareness campaigning (which those in power believed was used by anti-Mugabe supporters as a way of raising funds); (v) he had drawn the line at endangering loss of life and had also acted promptly to avoid being put on the spot to commit the serious crime which they had ordered him to carry out (killing his uncle); and (vi) he did not hold a prominent office or position of responsibility; what he was doing was not his normal job; he was simply a part-time reservist. The upshot of these considerations was that the appellant could not be said to have made a "significant contribution" as was required by case law and in any event, even if the Tribunal found he had, he had acted under duress. Accordingly, it was submitted, the respondent had failed to show that the appellant had committed excludable acts.

6. As regards Article 3 ECHR, Mr Phillips submitted that the appellant was a deserter who was and would be perceived on return as an enemy of the state. In addition he was an ex-teacher and someone who was involved in AIDS Awareness campaigning which had attracted the ire of the regime. In relation to Article 8 ECHR, it was true that the focus of his Article 8 claim before DIJ Wilson had been his relationship with Chipo Maposa and that this relationship had lasted 2 and half years, but he now relied on his relationship with Ms Gomo, a relationship which had in fact subsisted since 2004. The appellant and Miss Gomo had lived together at the same premises throughout most of the time since then and she had stood by him. He now intended to marry her and put the past behind him. There were recent statements from himself and Ms Gomo affirming this.

7. Mr Ouseley for the respondent maintained that the circumstances of the appellant's involvement in beatings showed that he had committed excludable acts that were either torture or inhuman acts or both: they had involved beating with whips and sticks. He had also given orders for others to commit similar acts. He could not himself rely on a defence of superior orders. In relation to the attempt to rely on the defence of duress, there was no evidence that anyone had threatened to kill or harm the appellant. His claim that he had fled Zimbabwe as a deserter had been rejected by the DIJ and was belied in any event by the circumstances in which he came to the UK and failed to claim asylum for seven years. If he had truly been a deserter he would not have gone to the Zimbabwe Embassy in November 2006 to get his passport renewed. His claim that he had been previously suspected of disloyalty because of involvement with AIDS campaigning had not been accepted by the DIJ and was in any event against the weight of the evidence. As regards his claim that the authorities had taken an adverse interest in his family members since he fled, he had not raised that in previous hearings and there was no basis for accepting it as credible now. It was accepted that the appellant had been a teacher but that was a very long time ago and the Zimbabwean authorities had subsequently been happy to appoint him first as a full time soldier and then as a reservist. These considerations meant that he had failed to show he was not a knowing participant in excludable acts, that he could not rely on a defence of superior orders and that he had failed to show he acted under duress.

He had also failed, in relation to Article 3 ECHR, to show that he would be perceived adversely by the Zimbabwean authorities on return. His attempt to rely on his ties to Miss Gomo should be roundly rejected as he had a wife in Zimbabwe and his claim as submitted today (based on recent witness statements and as confirmed by Mr Philips on instructions) that he had been in a continuing relationship with Ms Gomo since 2004 was belied by the evidence he had given previously about his relationship with a different girlfriend.

Legal framework

8. In MT (Article 1F(a) – aiding and abetting) Zimbabwe [2012] UKUT 00015 (IAC) the Tribunal observed that in R (JS) (Sri Lanka) [2010] UKSC 15 Lord Brown said that when considering whether an applicant is disqualified from asylum by virtue of Article 1F(a) the starting point should be the Rome Statute of the International Criminal Court ("the ICC Statute"); see also SK (Zimbabwe) [2012] EWCA Civ 80.

9. Article 7(1) of the Statute defines crimes against humanity as follows:

> "1. For the purpose of this Statute 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, on other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

10. Article 25 sets out the circumstances in which an individual may be "criminally responsible" for a crime against humanity falling within Art 7. It provides as follows:

> **"Article 25**
>
> **Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute:

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime ..."

11. Article 30 deals with the mental element:

"Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly."

12. Article 31 of the ICC Statute deals with grounds for excluding criminal responsibility and Article 33 deals with superior orders and prescription of law:

"**Article 31**
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
(i) Made by other persons; or
(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence."

…

Article 33
Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful."

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

Our assessment

Crimes against humanity

13. At the start of Article 7 of the Rome Statute is the chapeau requirement ("chapeau" is used in this context to mean "hat"/"covering" or text that prefaces the particular definitions of the listed acts and applies to each of them; see further SK (Zimbabwe) [2012] EWCA Civ 807, para 5).As the Tribunal stated in MT (Zimbabwe), this requirement:

> "…the chapeau requirement is an essential element in the definition of a crime against humanity and if not met the acts specified in Article 7(1)(a)-(k) do not constitute such a crime, no matter how reprehensible they may be. As stated in Triffterer, p.168, the chapeau of paragraph 1 establishes the jurisdictional threshold of the Court over crimes against

humanity under the Statute. Article 7(1) has to be read together with the Elements of Crimes document which the ICC adopted in September 2002 and which under Article 21 of the Statute is part of the first rank of legal sources to which that court shall have regard."

14. As already noted, it is not in dispute that at the relevant time during which the respondent alleges that the appellant engaged in acts falling within Article 7 of the ICC Statue – 2002 - the Mugabe regime in Zimbabwe was committing criminal acts as part of a widespread or systematic attack directed against the civilian population with knowledge of those attacks. Both parties accepted as much and it is our finding also that the cases of MT (and SK (Zimbabwe) [2012] EWCA Civ 807, paras 73-81) correctly identify that such facts were established by background country information relating to the situation in Zimbabwe in 2002 and the years leading up to that date. The evidence identified by the respondent in the Reasons for Refusal letter separately establishes that in any event. Mr Philips also does not dispute that if the appellant is found to have committed acts failing within Article 7, they are to be accepted as acts forming part of the regime's campaign of attacks against the civilian population; indeed it was central to his case that the regime at that time was orchestrating such a campaign from the top down. It is not in dispute that unless the defences of duress and superior orders are found to apply, the *mens rea* element of the chapeau requirement has also been sufficiently proved.

Excludable acts

15. Mr Ouseley contended that there were three possible types of acts capable of constituting a crime against humanity engaged by the facts of the appellant's case: Article 7(1)(f) (torture); Article 7(1)(b) (persecution) and Article 7(1)(k) (other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health), albeit he did not press the Article 7(1)(b) head with any particularity. Mr Philips has argued that even assuming that the appellant was found to have committed beatings in 2002, they were not severe and were committed half-heartedly and so they did not qualify under any sub-head of Article 7(1). He asked us to attach weight to the appellant's witness statement of 5 November 2010 in which he sought to resile from a number of aspects of the evidence he had given at his asylum interview.

16. In relation to this statement we would first of all reiterate that the Upper Tribunal made clear in its decision finding a material error of law that the principal findings of fact made by DIJ Wilson were to stand and before us Mr Philips has not advanced any argument as to why we should seek now to revisit those findings. Despite the appellant's attempt in the November 2010 witness statement to resile from what he had said in his asylum interview, we consider the latter to be a far more accurate reflection of his involvement in beatings in his village over the relevant period. The appellant signed his asylum interview record as true and correct and confirmed that he stood by it when he gave evidence before DIJ Wilson. He took no steps to cast doubt on his answers in this interview until he was notified of the DIJ's findings on his appeal. The new witness statement contains no explanation for why the appellant should have said what he did in his asylum interview. His asylum interview was much closer in time to the events which he described.

17. We find no merit in the contention that the appellant was not involved in acts falling within the material scope of Article 7. It is clear from his interview (even leaving aside his references to being involved in beatings in 2001-March 2002 and concentrating solely on his account of events in April 2002) that: (1) he had been ordered to beat people and had proceeded to carry out beatings; (2) that in carrying out these beatings sticks and whips were used and the violence they inflicted on his victims caused tears to the skin and bleeding; (3) that these beatings would take five hours, shared between him and others present; and (4) that he had ordered other beatings. We concur with Mr Ouseley that on the basis of this evidence the appellant had engaged in acts which fell within the Rome Statute in two separate respects: first he was involved in acts of torture or, failing that, inhumane acts within the meaning of Article 7 and Article 25(3)(a); and secondly, he was involved in ordering others to carry out such acts, so as to bring him within the ambit of Article 25(3)(b) ("Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted"). (In relation to the definition of "inhumane acts" there is now to hand the guidance given by the Court of Appeal in SK (Zimbabwe) at paras 45-63).

Level of participation

18. In MT, drawing on previous case law, the Tribunal case of Azimi-Rad (Art.1F(a) – complicity – Arts 7 and 25 ICC Statute) Iran [2011] UKUT 339 (IAC) in particular, the Tribunal had this to say about levels of participation and joint criminal responsibility:

> "119. Art 12(3) of the Qualification Directive provides that, inter alia, Article 1F (a) applies not only to those who personally commit crimes against humanity but also those "who instigate or otherwise participate in the commission of [crimes against humanity]". This is consistent with the approach adopted in the ICC Statute. Art 25(3)(a)-(d) of this Statute lay down, in effect, in descending order the level of involvement that an individual must have to be criminally responsible. Article 25(3) (b) sets out the different forms of participation and Article 25(3) (c) establishes individual criminal responsibility if a person "aids, abets or otherwise assists…" as a subsidiary form of participation. (It is not necessary in the context of this case to seek to address the meaning of "or otherwise assists" as a form of participation.)."

19. In the same paragraph the Tribunal in MT had this to say about aiding and abetting:

> "Aiding and abetting differs from joint criminal responsibility (jce) in that whilst the former generally only requires the knowledge that the assistance contributes to the main crime, participation in jce requires both a common purpose and an intentional contribution of the participant (Triffterer, pp. 756-758) to a group crime. Aiding and abetting encompasses any assistance, physical or psychological, that has a substantial effect on the commission of the crime. Article 2 para 3(d) of the 1996 Draft Code requires that aiding and abetting should be "direct and substantial", i.e. the contribution should facilitate the commission of a crime in "some significant way". The Trial Chamber in Tadic II, the Trial Chamber in the Prosecutor v Naletilic and Martinovic (IT-98-34) cases and the Appeal Chamber in Prosecutor v Akeyesu (Case No. IT-95-14/l-T), paras 484, 706) interpreted "substantial" to mean that the contribution has an effect on the commission, that is have a causal relationship with the result and it included within the concept "all acts of assistance by words or acts that lend encouragement or support". In Prosecutor v Furundzija (IT-95-17/1-T, 10 December 1998), paras 199, 232, 273-4, the Trial Chamber said that assistance need not be tangible: "moral

support and encouragement" can suffice, albeit it must "make a significant difference to the commission of the criminal act by the principal": see also Prosecutor v Brdanin (IT-99-36-A, Appeal Chamber, 3 April 2007) and Prosecutor v Perisic (IT-04-81-T, 6 September 2011). The requisite knowledge may be inferred from all relevant circumstances, i.e. it may be proven by circumstantial evidence (Prosecutor v Tadic, para 689; Prosecutor v Akeyesu para 498)."

20. Both parties asked us to take this summary of the relevant legal principles as being correct and this we do.

21. Applying these principles to the facts of this case, we consider that the appellant may well have been engaged in a "joint criminal enterprise", but given a lacuna in the evidence as to the nature of the involvement of other reservists/militia in a common intentional purpose with the appellant we shall leave the issue of this higher level of involvement to one side. We shall confine ourselves to asking whether the appellant was involved as an aider and abettor.

Aiding and abetting

22. In our emphatic view the appellant was an aider and abettor. Mr Philips submitted that the appellant's involvement in such beatings was only as an ordinary reservist and was half-hearted and did not amount to a substantial contribution. We cannot accept that submission. On the findings of the DIJ and on our own review of the state of the evidence today the appellant held the rank of sergeant and was a principal facilitating actor in the beatings in which he participated. He described himself in the asylum interview as being the officer in charge on the relevant occasion(s). Furthermore, by ordering others to engage in beatings it is demonstrated that he gave moral support and encouragement to the commission of criminal acts and made a significant contribution to their happening.

Superior orders

23. At several points in his submissions Mr Philips appeared to argue that the appellant's participation in beatings was excusable because he was acting in obedience to superior orders. As we made clear, he was perfectly entitled to ask us to treat the claimed context in which the appellant said he was ordered to carry out the beatings as relevant both to the issue of his participation and to the issue of duress. But he was not entitled to rely on superior orders as a defence. The reason why this is so requires some clarification because Article 33 does not fully reject what is known as the "conditional liability approach". In the context of deciding whether a person is excluded from Refugee Convention protection by virtue of having committed acts contrary to Article 1F(a), the effect of Article 33(1) of the Rome Statute is that whilst obedience to superior orders can be a defence if each of its three requirements – as set out at (a), (b) and (c) - are met, by virtue of Article 33(2) the Article 33(1)(c) requirement can never be met in cases where the order was to commit genocide or a crime against humanity. Such cases are always "manifestly unlawful".

24. Put simply, under the Rome Statute, in relation to criminal responsibility for commission of crimes against humanity, the defence of obedience to superior orders in unavailable by operation of law.

Duress

25. Mr Philips submitted that even if we found the appellant to have been involved in acts contrary to Article 7 as an aider and abettor, we should nevertheless find that he was not excluded by virtue of his having a valid defence of duress.

26. At para 104 of MT the Tribunal stated:

> "... Article 31(1) (d) of the ICC Statute makes clear that duress can be a defence to international criminal responsibility. In draft Article 9 (dealing with 'Exceptions to the principle of responsibility') the International Law Commission (ILC) UN GAOR Supp.No.10: UN doc. A/42/10/ (1987) at 18 noted that for 'coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed himself in grave imminent and irremediable peril if he had offered any resistance'. Whether it is a complete defence and whether it can apply in all types of cases remains unsettled: see the Trial Chamber discussions in Prosecutor v Endermovic (IT-96-22) 7 June 1997 (a case, like all the other overseas cases to which we refer elsewhere in this decision -unless otherwise specified- decided by the International Criminal Tribunal for the Former Yugoslavia or ICTFY). It appears uncontroversial, however, that such a defence is confined to situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice of counter activity available; and that it has four components: the threat must be of imminent death or continuing or imminent serious bodily harm; the threat must result in duress causing the crime; a threat results in duress only if it is otherwise unavoidable (i.e. if a reasonable person in comparable circumstances would have submitted and would have been driven to the relevant criminal conduct); and the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect. "

27. Once again both Mr Philips and Mr Ouseley asked us to treat this as a correct statement of the law. We do so but (i) note that this entails that we reject the respondent's contention in the Reasons for Refusal letter of 16 October 2009 at para 32 that duress is not a defence but only a plea in mitigation; (ii) note that we take also into account the additional legal materials which the appellant's representatives had submitted in the course of the earlier stages of this appeal and in particular: the Nuremberg Military Tribunal cases of U.S. v Freidrich Flick et al, Case 5 Vol VI and U.S. v Alfred Krupp Von Bohlen and Halbach (the Krupp case) Vol IX; the ICTY case of Prosecutor v Darko Mrda IT-02-59-S; the article by Jeremie Gilbert, "Justice not Revenge: The International Criminal Court and the 'grounds to exclude criminal responsibility': defences or negation of criminality?"; an article by Martyn Naylor, "Resistance is Futile: "Duress as a Defence to International Killing", Cambridge Student Law Review [2006]; and an unattributed piece *circa* 2004, "Superior Orders and Duress as Defences in International Law and the ICTY".

28. We unreservedly reject the appellant's claim to a defence of duress. Once again, taking his asylum interview evidence as the most reliable source of evidence we have, there are a number of factors that show he did not act under duress.

29. First, on his own account he had been complicit in beatings ordered by his superiors for some period of time before he was ordered to conduct the beatings in April 2002. On his own account even during an earlier period covering 2001 -March 2002 he was authorised to go and beat people in more than one village (Qs 15, 18). It is not credible, therefore, that when he was ordered to commit the beatings in April 2002 he was caught unawares and not in a position to have taken avoidance action beforehand. He had had ample opportunity to disassociate himself from such acts and had failed to avail himself of such opportunities. We note further that the appellant did not claim that he had sought to take any avoidance action immediately after the April beatings: the first order he disobeyed, for him to kill his uncle, was said to have been made "later the same month", not immediately.

30. Second, although the appellant claimed that if he had not obeyed he would have been at risk of imminent harm from his superiors for disobedience, he produced no evidence to support that claim. It is clear from the case of MT and the background evidence cited by the respondent in the Reasons for Refusal that the Zimbabwe authorities throughout the first decade of 2000 did not visit immediate punishment on the generality of soldiers or police who deserted or failed to carry out their orders. Whilst at para 107 the Tribunal in MT was concerned only with police officers, we are satisfied, from the background evidence before us, that what was said therein was equally true for soldiers and reservists. The reaction by the authorities to desertions was likely to vary from judicial measures which take time to instigate (prosecution followed by imprisonment), to other non-judicial measures such as quarantining and harassment about housing and/or debts, which again would not happen overnight. By and large such measures did not constitute acts of comparable severity to the beatings the appellant inflicted on others.

31. Third, we do not accept that the appellant has given a credible account of obeying orders to carry out beatings out of fear of reprisal actions against his family members in the village. Mr Philips in his submissions sought to highlight that the family members in his village of whom he had care included AIDS sufferers who were vulnerable. However, we consider that if he had in fact feared such reprisal action, the appellant would have said as much at his asylum interview; whereas in fact in this interview he only expressed concern for his own life (and later his uncle's). Concern about these family members was not mentioned until his oral evidence before the DIJ.

32. Mr Philips submitted that the appellant had also established that the appellant's fears of reprisals to his family members in the village were real, pointing out that in the November 2010 statement the appellant had mentioned problems his family had faced after he had fled the village. The relevant passage of that statement reads as follows:

> "After I ran away because I did not want to murder John Sagandira, members of the ZANU-PF went to my family home in the village. They questioned my mother and they searched

the house for everything that belonged to me and they took away some of my documents. They asked my mother where I was and she just said that I had run away".

33. This text does not bear the gloss Mr Philips seeks to place on it. Whilst there is a mention of a visit to the appellant's family home and a description of the authorities manifesting an adverse interest in the appellant, there is no mention of any threats or harm being made to the mother or other family members in 2002 or in subsequent years. Further, it is clear from the appellant's November 2010 statement that he had been in touch with his wife in 2006. If there had in fact been any adverse consequences visited on his wife, mother or other family members, we consider he would surely have heard about it from his wife and mentioned it in his asylum interview; yet he made no mention of any such consequences.

34. Fourth, even in the context of the further order which he said he refused to carry out – killing his uncle - his conduct was not consistent with someone taking immediate and effective steps to avoid having to carry out the orders. According to his witness statement of November 2010, although he fled his village and went to Mozambique on the same day that he was ordered to kill his uncle, he then returned to Zimbabwe within two weeks, staying in Harare and not leaving the country until 15 October 2002. We are satisfied that if his account were true, he would not have taken the risk of returning to Zimbabwe and remaining there for over 6 months, especially as by then he would on his own account have been classified as a deserter shortly after he fled the village.

Article 3

35. We have no doubt that prior to leaving Zimbabwe the appellant was never at a risk of serious harm from the Zimbabwe authorities. Nor do we have any doubt that he would not be at risk on return. For reasons already given, we entirely reject his claim to have deserted from the army. In relation to his claim to have been perceived as sympathetic with MDC whilst still in Zimbabwe, we consider that is refuted by the fact that during this period the authorities appointed him as a reservist, awarded him the rank of sergeant and entrusted him with the carrying out of orders aimed at coercing villagers to support ZANU-PF. These actions of the authorities were done in full knowledge of his AIDS awareness work and, whilst in relation to AIDS awareness groups in other parts of the country or at different periods the authorities may have suspected them of pro-MDC bias or activities, their actions in relation to the appellant made clear that they had no suspicion in his case. We entirely reject his claim that they had ordered him to carry out beatings because they suspected him of disloyalty and that this was a way of testing him. We note (once more) that despite having claimed to have fled to Mozambique in April 2002 he returned to Zimbabwe very soon after and remained living in Harare for a further six months. Whilst in the UK he saw fit in 2006 to visit the Zimbabwe embassy personally to renew his passport. His wife in Zimbabwe also contacted the authorities there to assist him in obtaining such a renewal. In our view, anyone who feared that he had been classified as a deserter in official records would not have taken the risk of seeking to renew his passport in person at the London embassy or of getting his wife to collect the new passport back in Zimbabwe. The appellant is an intelligent man and he would be well

aware from contact with others in the Zimbabwe community in the UK that the Zimbabwe CIO takes an active interest in Zimbabwe nationals in the UK and would hold records of any deserters.

36. In dealing with the appellant's position in relation to the exclusion clauses we have already dealt with the appellant's claims to have feared for his family members and in the context of Article 3 we reject them for much the same reasons: see above paras 28-33.

37. In our view the appellant would on return be seen as a loyal supporter of ZANU PF.

38. What we have said concerning Article 3 ECHR also stands to overset any claim the appellant might have to subsidiary (humanitarian) protection under Article 15 of the Refugee Qualification Directive (to which there is an exclusion provision at Article 17 broadly analogous to Article 1F(a)).

Article 8

39. In relation to Article 8 of the ECHR, we are in agreement with Mr Ouseley that the appellant's account of his history of personal relationships has been extremely equivocal if not contradictory. In his own evidence for this appeal he has a wife in Zimbabwe and has children by her and also by a previous wife. When IJ Pitt dealt with his student appeal in 2007 she had a letter from a Ms Gomo from his same address stating that she would continue to sponsor her "partner" financially through his education (see the Wilson determination, para 2). When he made his asylum claim in April 2009 and when he appeared before DIJ Wilson in November 2009 his Article 8 claim was made on the basis of his relationship with Miss Chipo Maposa. He said that he and Ms Maposa did not live together. There had been no mention of his relationship with Ms Gomo being ongoing. In his November 2010 statement there was no mention of any personal relationships in the UK. There has now been produced before us a witness statement from Ms Gomo dated 10 April 2012 stating that she has indefinite leave to remain and that she is an NHS nurse and that she has been in a relationship with the appellant since 2004 and that she and the appellant have a "tender, loving relationship" which is very important to her. There is also a witness statement from the appellant dated 5 April 2012 stating that he has been and is currently in a relationship with Ms Gomo and they are determined to put past difficulties behind them and get married in the not too distant future. "Our relationship has had its challenges during which I admit I was forced to go into another relationship however since we have since come back together again and are stronger for it". Ms Gomo was said to be the sole breadwinner, although he would work if given permission.

40. On instructions Mr Philips was further able to clarify that it was the appellant's position that he had been in a relationship with Miss Maposa for two and half years, but that he had had a continuous close relationship with Ms Gomo since 2004. Mr Philips urged us not to apply inappropriate moral and/or cultural standards to the evidence regarding the appellant's circumstances and we have no intention of doing so. The difficulty however is that despite the clear directions permitting the appellant to update his personal situation since the hearing before the DIJ, we have been given little evidence.

Although Ms Gomo attended before us Mr Philips did not seek to call her despite directions indicating that oral evidence might be given. There is a dearth of documentary evidence as to the strength of this relationship. There is a lack of any satisfactory explanation for why the appellant should have failed to mention Ms Gomo when making his asylum application or before the FTT judge or how his claim to want to marry her now is consistent with his claim to have a wife in Zimbabwe whom he has been in contact with since he came to the UK and with whom he has children. The claim now made that the appellant was "forced to go into another relationship" is wholly inconsistent with the evidence he gave about his relationship with Ms Maposa before the DIJ.

41. Even if it were accepted that the appellant and Ms Gomo have shared accommodation for significant periods of time, the evidence taken as a whole falls well short of establishing that there has been a close emotional relationship between them. There is a lack of evidence up until very recently to show the two have strong personal ties and the most we might be prepared to accept on the basis of these latest witness statements is that the two are now close. Accordingly we do not consider they have established a close emotional relationship of any significant duration such as to constitute either family life or significant private life within the meaning of Article 8(1). Even if we considered the appellant's relationship with Ms Gomo to amount to a protected right within Article 8(1), we do not consider it has been shown to have significant factual content or quality. Accordingly we see no difficulty with such a relationship being continued, once he is removed, by electronic means or correspondence.

42. For the above reasons we conclude:

The FTT judge materially erred in law and his decisions has been set aside.

The decisions we remake are:

To uphold the respondent's s.55 certificate on the basis that we are satisfied the respondent had shown that the appellant is excluded from status as a refugee by virtue of Article 1F(a);

To dismiss the appeal on asylum-related grounds as the appellant has failed to show that he has a well-founded for of persecution or faces a real risk of serious harm or treatment contrary to Article 3 ECHR on return;

To dismiss the appeal on Article 8 ECHR grounds.

Signed

Upper Tribunal Judge Storey