Upper Tribunal
(Immigration and Asylum Chamber)

CG (suspension of removals – lawfulness – proportionality) Zimbabwe
[2010] UKUT 272 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 23 December 2009

Before

SENIOR IMMIGRATION JUDGE LATTER

Between

CG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Akindele, solicitor of Chipatiso & Co, Solicitors
For the Respondent: Mrs T. Sharland, Home Office Presenting Officer

(1) *The fact that there is a policy to suspend enforced removals does not mean that a decision to remove is not in accordance with the law when there is no reason to believe that the respondent will not act in accordance with his policy.*

(2) *When assessing whether removal would be in breach of article 8 in such a case, the appellant's position in the country of removal must be considered on the hypothetical basis of him being present there but it does not mean that the Tribunal is required to assess lawfulness and proportionality on the basis of a hypothetical event, a compulsory removal contrary to a current policy, which does not and will not in fact take place.*

DETERMINATION AND REASONS

1. The appellant is a citizen of Zimbabwe born on 10 November 1945. On 11 November 1999 she travelled by air to the United Kingdom where she was granted leave to enter as a visitor for six months. There was no further contact between the appellant and the respondent until 19 June 2009 when the appellant applied for asylum.

2. She claimed that she feared members of ZANU-PF because of her late husband's involvement with the MDC. She had lived with him in the Makarare village of Harare and she had been a member of the UNC party. She said that in July 1999 her husband was killed by members of ZANU-PF because of his involvement with the MDC. In September 1999 her house was burnt down by ZANU-PF supporters and she left Zimbabwe on 11 November 1999.

3. The respondent did not find the appellant's account to be credible and did not consider that she had any reason to fear for her safety on return to Zimbabwe. He considered the country guidance in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 but it was his view that the situation had improved in Zimbabwe and that ordinary Zimbabweans who were not politically active or in sensitive occupations would not generally be at continuing risk of politically motivated mistreatment or be unable to demonstrate loyalty to ZANU-PF. The respondent was not satisfied that removing the appellant would lead to a real risk that she would face treatment contrary to Article 3 and that even if, which was not accepted, the interference with her private life engaged Article 8, removal would be proportionate and in accordance with the law.

The findings of the Immigration Judge

4. For the reasons the judge gave in paragraphs 14-17 of his determination, he was not satisfied that the appellant was a credible or reliable witness. He rejected the entire factual basis of her claim for asylum. However, the judge said that if he had to determine the appeal by reference to the guidance in RN, he would accept that the appellant would not be able to demonstrate loyalty to ZANU-PF. However, he was satisfied that circumstances in Zimbabwe had changed significantly since late October 2008 following the hearing in RN and that in any event there was further evidence not before the Tribunal which showed that the circumstances at that time were not as the Tribunal found them to be. The judge concluded that the appellant

would not find herself at risk because of an inability to demonstrate loyalty to ZANU-PF for the reasons set out in paragraph 21 of his determination.

5. The judge then went on to consider the position under Article 3 in the light of the dire circumstances in Zimbabwe but he was not satisfied that the appellant was someone who had no family members willing and able to help provide accommodation and food nor that there was a reasonable likelihood that she would face such poor conditions as a result of a lack of food or accommodation that her removal would lead to a breach of Article 3.

6. The judge then considered Article 8. He did not accept that removal would involve an interference with the appellant's rights to family life but in respect of private life he said:

> "31. Although the removal of Mrs C would not involve any interference with her rights to family life, her removal would, of necessity, involve an interference with her right to private life. I can see no escape from that conclusion. She would be compelled to board an aircraft and travel to Zimbabwe. That cannot be other than an interference with her right to private life."

The judge then referred the parties to a paper entitled "Asylum Seekers from Zimbabwe" prepared on 13 March 2009 for members of the House of Commons. This refers to a written answer in the House of Lords by Lord West, the Parliamentary Under Secretary of State at the Home Office stating that although returns to Zimbabwe were not currently being enforced, failed asylum seekers who were not in need of protection could expect to be returned.

7. The paper noted that UKBA had given an undertaking not to resume enforced removals until the case of HS was resolved which in turn was awaiting the outcome of a case pending before the House of Lords. The paper said that enforced returns of refused asylum seekers to Zimbabwe would continue to be deferred pending the outcome of the Zimbabwean test case. The judge concluded that what Lord West was reported to have stated remained the current practice even though UKBA had indicated that failed asylum seekers whose applications had been refused could expect to be removed at some future unspecified time. The judge went on to make it clear that but for the facts identified in paragraphs 39 and 40 of his determination, he would have found that removal was proportionate and in accordance with the law including the provisions of para 395C & D of HC 395.

8. However, the judge said that he was required to consider whether a hypothetical removal would involve breaches of the UK's obligations under the 1951 Refugee Convention and the 1950 Human Rights Convention. He had to consider the effect of a compulsory removal even though he might know that no such removal would in fact take place. He regarded the current practice of not enforcing removals as of crucial importance. It represented the current practice and there were no facts peculiar to the appellant rendering it appropriate to depart from the normal practice or to enforce her removal despite the practice.

9. In these circumstances her compulsory removal now when not in accordance with the current practice would not be in accordance with the law. For the same reasons the

appellant would fall within a category of persons in respect of whom it had been decided by the respondent that it was not necessary for the protection of any of the rights or freedoms identified in Article 8(2) that they should be compulsorily removed. It followed that the interference with her private life which a hypothetical removal would involve would not be necessary for the protection of all or any of those interests nor would it be proportionate. The judge was therefore satisfied that the hypothetical compulsory removal of the appellant at the present time would involve a breach of the UK in its obligations under Article 8 and would not be in accordance with the law. The appeal was allowed for these reasons.

10. The judge considered whether he should make a direction for the purpose of giving effect to his decision. He noted that he was given a discretion but he did not consider it appropriate to give a direction. He said that on the basis of his primary findings the appellant could safely return voluntarily to Zimbabwe and a direction that she be given leave to remain would be a significant discouragement to her from returning voluntarily.

The Grounds and Submissions

11. In the respondent's grounds it is argued that the judge erred in law by failing to give adequate reasons for his conclusion that Article 8 was engaged. The entirety of his reasoning was in paragraph 31. He had failed to consider the extent of the appellant's private life including the duration and richness of any social ties: see MM (Tier 1; Art 8; "private life") [2009] UKAIT 00037. Secondly, it is argued that the judge misdirected himself in the way he dealt with the fact that removals to Zimbabwe had been suspended. The suspension of removals was just that, whereas taking decisions on Zimbabwean asylum claims had not been suspended. The judge has misdirected himself so the grounds argue on the nature of the immigration decision under appeal. The respondent had not issued removal directions to Zimbabwe but had made a decision that she was to be removed by way of directions, a decision falling within s.82(2)(g) of the 2002 Act. The judge was not considering an appeal against removal directions which had not yet been set and in any event that would not be an appealable immigration decision. Whilst the appellant might have proper grounds for contending that an actual attempt by the respondent to remove her from the UK would be unlawful, the suspension provided no proper basis for the judge's conclusion that the immigration decision under appeal was not in accordance with the law.

12. The submissions before me were brief. Mrs Sharland was prepared to adopt the written grounds and she referred me to KF Iran [2005] UKIAT 00109 which was referred to in the grounds and also to MS (Palestinian Territories) [2009] EWCA Civ 17 and in particular paragraphs 27-30 on the distinction between a decision to remove and removal directions. Mr Akindele submitted that there was no error of law. The judge had been entitled to find that removal was unlawful in the light of the current policy and it would inevitably follow that it would not be proportionate to a legitimate aim. He did not accept that the judge was correct in finding that RN should not be regarded as current country guidance. He argued that if the issue turned on whether the appellant had a private life in this country, that issue should be reconsidered at the second stage.

The Material Error of Law

13. The issue for me at this stage of the reconsideration is whether the immigration judge materially erred in law. In his submissions Mr Akindele sought to challenge the judge's findings in respect of RN but the appellant did not apply for reconsideration on this issue nor has a Reply or a skeleton argument been filed to set out precisely what his challenges are and in these circumstances I am not prepared to permit that matter to be re-opened. I am not satisfied that it is arguable that the judge erred in law on this issue: he was entitled to find on the evidence before him for the reasons summarised in paragraph 21 of his determination that the appellant would not be at real risk of persecution on return. I now turn to the challenges made by the respondent.

14. The first relates to the judge's finding that Article 8 is engaged. The grounds rightly make the point that the judge's reasoning on this issue is set out in paragraph 31 and is based on a finding that removal by being compelled to board an aircraft and travel to Zimbabwe would of necessity involve an interference with her right to private life. Taken to its logical conclusion this finding would mean that any compulsory removal, regardless of the length of time that the person being removed had been in the UK, would inevitably involve an interference with the right to private life. However, there not only has to be an interference with private life but it must be of sufficient gravity to engage Article 8. I accept the submission that an assessment of whether the interference with private life engages Article 8 involves a more detailed assessment of the nature and extent of the private life as set out in the determination in MM. However, I am not satisfied that any error the judge may have made in this respect was material to his determination. In the light of the length of the appellant's residence and her activities in this country, it is clear that removal would be an interference with the appellant's private life such as to engage Article 8.

15. The second issue relates to whether the judge erred in law in finding that by reason of the current suspension of enforced removals it necessarily followed that the decision to remove the appellant was not in accordance with the law and would be a disproportionate interference with her private life. He referred to the cases on this issue, DS Abdi v Secretary of State [1996] IMM AR 148, AG and Others (Policies: executive discretions: Tribunals' powers) Kosovo [2007] UKAIT 00082, HH (criminal records deportation: "war zone") Iraq [2008] UKAIT 0051 and to the general principle that where the Secretary of State has declared a policy in relation to a category into which the claimant falls, a decision that on its face fails to apply the policy may found a successful appeal on the grounds that the decision "was not in accordance with the law". The judge said that he saw no difference in principle between a declared or public policy and a practice particularly where that practice had been published and stated publicly in one or other of the Houses of Parliament by the responsible minister.

16. This may be correct as a statement of principle as is the judge's comment that he was obliged to consider a hypothetical removal but he was not required to assume that there would in fact be a compulsory removal and that the appellant would be removed when neither she nor anyone else was being compulsorily removed. The consequences of the judge's reasoning was that a decision was found to be not in accordance with the law and disproportionate within Article 8(2) when the reality of

the position was that the judge was in fact satisfied that the appellant could safely return voluntarily to Zimbabwe, the reason he gave for not giving a direction was that this would be a significant discouragement to her from returning voluntarily when it was safe for her to do so.

17. I am satisfied that the judge was wrong to base his decision to allow the appeal on the assumption that there would be a compulsory removal. No such assumption is justified because the requirement to consider a hypothetical removal arises independently of actual practice. The decision to remove the appellant was not unlawful simply by reason of the fact that at the date of decision and hearing there was a current policy or practice of suspending removals. The appellant would have cause for complaint if removal directions were issued and enforced contrary to a current practice or policy but that has not happened nor was there any suggestion that there was any real likelihood of it happening. I am satisfied that the judge erred in law by equating the suspension of removals with a failure to follow a published policy.

18. In summary the fact that the consequences of a decision to remove must be assessed on the basis of what the appellant's position would be in the country of removal and to this extent assumes a hypothetical compulsory removal does not mean that the judge is required to assess lawfulness and proportionality on the basis of an event which does not in fact take place. By doing so and by basing his findings on that assumption, I am satisfied that the judge materially erred in law.

19. The judge made it clear that, but for his findings based on the hypothesis that removal would be compulsory, he would have found that the interference with the appellant's right to respect for her private and family life was for a legitimate purpose and not disproportionate. His findings on the substance of the Article 8 appeal were properly open to him not least in the light of his findings that the appellant could make a voluntary return in safety. The extent of the appellant's private life was clear and was taken into account by the judge. There is no basis for a successful challenge to these findings or any purpose in adjourning the hearing to a second stage. It follows that the proper course is to substitute a decision dismissing the appeal.

Decision

20. I am satisfied that the judge materially erred in law and I substitute a decision dismissing the appeal on asylum, humanitarian protection and human rights grounds.

Signed

Senior Immigration Judge Latter