ASYLUM AND IMMIGRATION TRIBUNAL

AA (Involuntary returns to Zimbabwe) Zimbabwe [2005] UKAIT 00144 CG

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 5, 6 & 7 October 2005

Before:

Mr C M G Ockelton (Deputy President)
Mr H J E Latter (Senior Immigration Judge)
Mr C P Mather (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

On the evidence available to this Tribunal and in the light of the Respondent's concession, failed asylum-seekers returned to Zimbabwe are at risk of persecution for a Convention reason and are accordingly refugees. The process of return and reception in Zimbabwe is different from that in other countries with which the Tribunal is familiar.

DETERMINATION AND REASONS

I

Introduction

1. The Appellant is a citizen of Zimbabwe. According to his passport he was born on 8 April 1975. He arrived in the United Kingdom on 6 November 2002. He failed to comply with conditions of temporary admission granted on that date. On 20 June 2005 he was arrested as an illegal entrant. He thereupon claimed

asylum. His claim was considered under the Fast Track procedure. It was refused on 27 June 2005 and on the same date the Respondent made his decision to remove the Appellant as an illegal entrant. The Appellant appealed. Following a hearing on 4 July 2005, the Immigration Judge allowed the Appellant's appeal on the grounds that his removal to Zimbabwe would breach both the Refugee Convention and Article 3 of the European Convention on Human Rights. The Respondent applied for review of that decision. Reconsideration was ordered on 14 July 2005. The reconsideration came before the Tribunal on 18 July 2005. The Tribunal heard argument on the issue of whether there was an error of law in the Immigration Judge's decision. Following consideration of that question, the reconsideration was adjourned for determination on the merits and the appeal was removed from the Fast Track system.

Background

2. The number of Zimbabwean nationals in this country claiming asylum or an entitlement to remain under a provision of the Human Rights Act is considerable. Their claims are determined by the Respondent and appeals against adverse decisions are heard by this Tribunal (before 4 April 2005 by Immigration Adjudicators and the Immigration Appeal Tribunal). Although the standard of proof is low, a very substantial proportion of the claims fail to meet even that standard, so that the consequence has been judicial affirmation of the Respondent's decision. At that point, the claimant has no entitlement to remain in the United Kingdom.

3. Removal, however, is a different matter. It appears that no unsuccessful claimants were removed to Zimbabwe during the period from January 2002 to 16 November 2004: the Respondent had suspended involuntary removals "because of the situation in Zimbabwe" as he has put it. We enquired at the hearing how many unsuccessful claimants were at that date awaiting removal to Zimbabwe. We have been told that the number cannot be disclosed.

4. Following the recommencement of removals in November 2004, there were suggestions that those removed from the United Kingdom as rejected asylum seekers were subject to ill-treatment on return. Two motives for ill-treatment were alleged. It was said that claimants' asylum claims themselves showed treachery to Zimbabwe; alternatively it was said that their compulsory removal from the United Kingdom was a cloak for attempts to infiltrate 'Blair's spies' into Zimbabwe.

5. This issue was one (but only one) of the matters considered by the Immigration Appeal Tribunal in a Country Guidance case, SM [2005] UKIAT 00100. Having considered the material before it, the Tribunal put the matter like this at paragraph 42 of its determination:

> "The Tribunal is satisfied in the light of the statements made by the Zimbabwean authorities that returnees are regarded with contempt and suspicion on return and do

face a very hostile atmosphere. This by itself does not indicate that all returnees are at real risk of persecution but that returnees are liable to have their background and circumstances carefully scrutinised by the authorities."

6. That determination was given on 11 May 2005. Rumours of ill-treatment of returned asylum seekers persisted. A number of individuals threatened with removal sought permission for Judicial Review of the arrangements made for their removal, on the basis that, given the allegations of ill-treatment, rejected asylum seekers could not lawfully be removed to Zimbabwe without a proper consideration of whether their status as failed asylum seekers gave rise to a claim under the Refugee Convention. A number of those applications were stayed pending directions to be given by Collins J on 4 August 2005. On that date, by arrangement, consent or order, it was decided that further proceedings in all the Judicial Review applications should await the determination of a suitable appeal by this Tribunal. The reason why that arrangement was so obviously right is that the Tribunal can and must consider and determine the underlying facts in a way that is not open to the High Court in Judicial Review proceedings.

7. The Appellant's appeal was immediately identified as suitable for the purpose. Although it is specifically the appeal of this Appellant that we determine, we have heard evidence and arguments directed to the wider issue of whether rejected asylum seekers are as such at risk of persecution on their return to Zimbabwe. This determination incorporates our findings on that issue, as well as our conclusions on the Appellant's own appeal.

8. We should say that, in the meantime, removals to Zimbabwe had again been suspended. The Respondent undertook on 27 July 2005 to suspend them, but we understand that there were in fact no removals after 6 July. Again, we sought figures at the hearing. After it concluded, we were told that the number of Zimbabwean claimants awaiting removal as at 6 July, after the failure of their claims, also cannot be disclosed. We are, however, aware from our own experience within the Tribunal that the number of appellants who, despite lack of success in their appeal, have not been removed, is large. Perhaps that is why the Respondent will not disclose the precise figure.

9. The number of involuntary removals in the period from 16 November 2004 to 6 July 2005 appears, from the figures given by Mr Walsh, to have been 210 at the most. Those unsuccessful claimants whom the Respondent actually removed must constitute a tiny proportion of the whole. It may be of interest to add that in this period there were six British Airways flights to Harare every week.

The Appellant's claim

10. The Appellant arrived in the United Kingdom, as we have said, on 6 November 2002. He had an apparently valid Zimbabwean passport issued some three months previously. We do not know the basis upon which he sought leave to enter. He was not granted leave to enter, but was granted temporary admission

and released on condition that he return to the airport for interview. His passport was retained at the airport. He did not return; he did not seek to recover his passport; he did not do anything to regularise his stay. He is believed to have been working in the United Kingdom in the ensuing period of two years and seven months.

11. He was encountered by police on 20 June 2005. In his dealings with the police, he initially gave the name and identity of his brother, apparently under the false impression that his brother had current leave to remain in the United Kingdom. Unfortunately for the Appellant, that turned out not to be the case, and he was originally arrested on the basis of the expiry of his brother's leave. He then, for the first time, admitted his true identity and claimed asylum. The substantive basis of his claim was that he was a member and supporter of the opposition MDC party for six years. He said that he was held as an opposition activist for six months following a clash between MDC and ZANU-PF supporters, apparently in June 2000. He claimed that following his release from detention, ZANU-PF youth supporters stoned his house and in August 2002 came to look for him and, not finding him, threatened his parents. He claimed that at that point he left Zimbabwe in fear of his life.

The Appellant's credibility

12. The factual basis of the Appellant's claim was analysed by the Respondent and again by the Immigration Judge in the light of the evidence the Appellant supplied to support it. The Appellant said that he had been a member of the MDC for some years and that he had voted in the 2000 elections. It is true that he was able to name the leader of the MDC, but he was wrong in the name that he provided for the vice president or deputy leader. He was not able to name accurately any members of the MDC's shadow cabinet. In respect of the 2000 elections, he gave the name of the constituency and the name of the candidate for whom he voted and who was, he said, elected. But the constituency he named does not exist; the person he named was elected, but in a different area; and the Appellant's own local candidate was a person he did not name. Most striking of all is perhaps the Appellant's ignorance of what the initials MDC stand for.

13. It may not be very surprising that at his interview on 26 June 2005 the Appellant knew very little about the MDC. When he originally made his claim on 20 June, he made no reference to having himself been politically active at all.

14. Although he claimed to have been fleeing for his life following the incident in August 2002, it is clear that he could have travelled much earlier than he did. He had sufficient money for the purpose in his bank account, and his claim that he had to delay while his father sold cattle to raise money is clearly false. He obtained a passport in August 2002, apparently, it must be said, without any difficulty from the Zimbabwean authorities. He obtained a visa to visit South Africa in mid-September. Yet he did not leave until November. It is, of course,

also highly unlikely that if he had been the object of searches by ZANU-PF groups or by the Zimbabwean authorities he would have been able, as he claimed, to visit family members' homes regularly during a three-month period in which he claimed he was avoiding attention.

15. According to his passport, the Appellant travelled to South Africa on 5 November 2002. He was granted temporary residence as a visitor until 12 November. The passport indicates clearly that he travelled by rail. At his screening interview, he said that he had travelled to South Africa by air; at his full interview he said that he had travelled by road. He did not claim asylum in South Africa. He left South Africa on the same day as he arrived and travelled to France. He did not claim asylum in France. As we have said, he also did not claim asylum in England until he was arrested, when he gave a false name, no doubt in the hope of evading attention. He claimed asylum immediately after he was arrested and then gave his own name. He claimed that, despite journeying so far in order to escape persecution, and despite having lived in the United Kingdom for many months, speaking English, being aware of the British media and having at least one relative here, he knew nothing about the possibility of claiming asylum.

16. The Respondent did not believe the Appellant. The Immigration Judge did not believe the Appellant and said so in his determination. He found solely that it was plausible that the Appellant had been held on remand for six months and then released (but not that there was any political motivation for his detention) and that his siblings' rented lodgings and part of his father's suburban house had been destroyed by the authorities (but that nevertheless his father and his father-in-law both had rural homes available to them and him). In all other respects, he rejected the account the Appellant had given him. It is not now suggested that in that respect the Immigration Judge was wrong. The Appellant did not give evidence before us.

17. There is no doubt in our mind that the Appellant's claim to asylum was, in all its substantive parts, fraudulent, and that the Appellant himself has been deliberately dishonest in almost all his dealings with the authorities in this country.

The Immigration Judge's determination

18. The basis of the Appellant's claim as he put it at his screening interview was this:

> "Right now I have no shelter in Zimbabwe and my life is in danger. I will starve if I go there as I have no way of getting money. Nowhere to sleep. And one of my parents might get arrested when I go back because they say that the Zimbabweans in the UK are the ones supporting the opposition. I could even be taken at the airport. I think that's all."

19. The concern expressed here, which, as we have already pointed out, depends not at all on any history of opposition activities, is one which the Immigration Judge

very properly considered as a separate issue following his finding that the Appellant's own account of his history was entitled to little credit. In his determination, he records that at the hearing before him the Appellant again expressed his fear of return on this basis, and wrote this:

> "I turn to address that which has been the subject of the Appellant's initially stated fear and of his keen emphasis at the hearing, namely whether he faces a risk of persecution and abuse on return solely as a failed asylum seeker. In this regard, I make the finding that the fear expressed by the Appellant is genuinely held. For all that he has, in my finding, manufactured that portion of his account alleging past persecution and political activity, I am satisfied that the fear he currently expresses is subjectively real to him and affects him to a not insubstantial degree. The question must be, however, whether there are objective grounds justifying the holding of such a fear such as show that the Appellant is to a reasonable degree of likelihood at risk of such persecution or abuse."

20. In determining that question, the Immigration Judge expressly took into account the following: first, his view that there was "no relevant country guidance decision on the point"; secondly, the fact that this issue was "strongly dependent on … recent developments and materials"; thirdly, the then current (April 2005) CIPU country assessment; and fourthly, a report added to the EIN website on 4 July 2005. Having considered those materials and matters, he concluded that there was indeed a general risk of persecution of refused asylum seekers returned to Zimbabwe and so allowed the Appellant's appeal on the basis that his return would breach the Refugee Convention and Article 3 of the European Convention on Human Rights.

The Respondent's application for review

21. In his application for review, the Respondent alleged that the Immigration Judge erred in law in two respects. First, contrary to his view, there was country guidance, which he was not entitled simply to ignore, although it might be that he could show that there were new facts since that guidance was given. This particular ground has not been pursued further. It is evidently regrettable that the Immigration Judge was not aware of SM, and that the Home Office Presenting Officer who appeared before him apparently did not draw his attention to it. It is, however, clear that the Immigration Judge regarded the situation as having recently changed, so it may well be that he would have read the country guidance in that light if it had been cited to him.

22. Of considerably more substance is the Respondent's second ground for review, which is that the report on the EIN website, which the Immigration Judge cites at length in his determination, and which appears to provide almost the entire evidential basis for his decision, was not before him at the hearing, but was the result of the Immigration Judge's own researches after the hearing. The Respondent complains that he had no opportunity to deal with the report, and alleges a breach of natural justice.

23. In his submissions on this issue before the Tribunal at an earlier hearing, Mr Symonds of the Refugee Legal Centre pointed out that the Appellant was unrepresented before the Immigration Judge and that it was the latter's duty to assist an unrepresented Appellant so far as he properly could do so. It was the Respondent who had chosen to use the Fast Track procedure, which prevented adequate preparation before the hearing. It was inevitable in the circumstances that a conscientious Immigration Judge would do research after the hearing. It was, he submitted, inconceivable that the Respondent could be taken by surprise by the Immigration Judge's use of material found on EIN, which was, he said, a well-known site provided for asylum and immigration practitioners. He said further that the material used by the Immigration Judge was properly sourced. He further submitted that the Fast Track Procedure Rules prevented there being an adjournment or delay in a Fast Track case on the basis of new evidence discovered by the Immigration Judge himself, because Rules 28(c)(i) and 30(1)(b) prevented any such course of action unless the evidence in question was "filed or given by or on behalf of a party". Mr Symonds also pointed out that in his grounds for review the Respondent had not referred to any material which might cast any doubt on the material on which the Immigration Judge had relied.

Error of law

24. We do not accept that the Immigration Judge was bound by the Fast Track Procedure Rules not to adjourn or take the case out of the Fast Track procedure. It is clear from his determination that he took the view, in the light of the material of which he became aware, that the evidence produced on behalf of the Respondent – that is to say the CIPU Report – was not sufficient for him to determine the appeal justly. This alone would have permitted him either to adjourn the hearing or to take the case out of the Fast Track procedure. In any event, the Fast Track Procedure Rules do not prevent the judge from re-listing an appeal for further argument. This is the course the judge should have taken having discovered the further evidence. It would not have been contrary to the Rules for the matter to be relisted at short notice for further submissions.

25. We are satisfied that the Immigration Judge was entitled to consider material obtained by himself after the hearing. We accept, as submitted by Mr Symonds, that the judge was under a duty to give every assistance that he properly could to an unrepresented Appellant. Normally judges of any sort are discouraged from doing research of their own after the conclusion of the hearing, but there may well be circumstances, particularly in Fast Track cases, where an Appellant is unrepresented, where the interests of justice justify such a course. We do not, however, say that it is likely that they would ever require a judge to take into account material which might have been available to him, but was not been presented to him at a hearing.

26. What is clear, from general principles, from Rule 51(7) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, from Macharia v IAT (Court of

Appeal, 11 November 1999) and KC [2005] UKIAT 00010, is that the parties must have an opportunity of commenting on all evidence which an Immigration Judge takes into account. It is not the process of post-hearing research which necessarily is wrong: it is the process of deciding an appeal on material of which the parties were given no proper notice. Rule 51(7) is expressly made to apply to Fast Track cases (see Rule 27 of the Fast Track Procedure Rules). We would regard it as beyond argument that this general principle of fairness is intended to apply to Fast Track cases despite any difficulty that would be caused by a narrow reading of Fast Track Rules 28 and 30.

27. It is clearly open to an Immigration Judge to give notice that, although he has not yet had an opportunity to read a particular document, he will take it into account when he has done so. But it does not follow from that that both parties ought to be prepared for him to take into account material that has not been mentioned or identified as relevant to the appeal in question. The fact that the report in question was on the EIN website advances the Appellant's case not at all. As is acknowledged, that is a website for the benefit of immigration and asylum practitioners. It does not aim to maintain any balance between the interests of claimants and those of the state. It is not known whether there is any independent check made on facts asserted in various reports, before those reports are themselves incorporated into the EIN website. In the present case it is notable that, contrary to what was asserted by Mr Symonds in his submissions, the report upon which the Immigration Judge relied is partly unsourced, and is partly a compilation of newspaper reports, themselves unsourced.

28. It is in our view entirely unreasonable to expect the Respondent to deploy evidence and arguments to counter material of this sort which it has never been suggested would form part of the basis for the decision in an individual appeal.

29. Mr Symonds also submitted that there had in fact been no breach of natural justice, because the appeal was in the Fast Track and the issue of the risk to failed asylum seekers was clear from the Appellant's own case and from the documents produced by the Respondent. Even that, however, could not justify the Immigration Judge placing reliance on documents without giving the parties an opportunity of commenting on them. There might be cases where in fact there was no prejudice because any further evidence was uncontroversial or related only to a peripheral issue in the appeal. In this case, however, the further evidence went to the heart of the appeal. The Respondent was clearly prejudiced by the fact that he did not have an opportunity of making representations about the material extracted from the EIN website by the Immigration Judge. It is important to ensure that informed decisions are made in asylum appeals, on evidence which has been properly tested, or at least that the parties have had an opportunity of properly testing it. Failure to give the parties an opportunity of making submissions on the evidence creates a real risk of injustice. Further, if decisions are based on evidence which cannot be tested they may themselves undermine the integrity of the system of refugee status determination.

30. For the foregoing reasons, we are satisfied that there was an error of law in the Immigration Judge's decision, and that the error was material, because it affected his decision by causing him to reach a conclusion on the basis of evidence which he should have either ignored or given the parties an opportunity to comment on.

31. We therefore proceed to decide whether the Appellant's appeal should be allowed or dismissed.

II

Procedural issues

32. When it became clear that this appeal was to form the basis of Country Guidance on the question of returning failed asylum seekers to Zimbabwe, both parties indicated their wish to submit additional evidence. The Tribunal considered that it was clearly appropriate to allow them to do so, because it had not been possible or practicable, within the confines of the Fast Track procedure and, given that the Appellant was then unrepresented, to assemble the parties' full case on this issue at that stage. In this reconsideration we have taken into account substantial documentary evidence from both sides, paying particular (but not exclusive) attention to the passages upon which either party specifically relied. We have heard oral evidence from (1) a representative of a human rights NGO operating in Zimbabwe and (2) Professor Ranger (who were called on behalf of the Appellant) and (3) Mr Mark Walker and (4) Mr Iain Walsh (who were called on behalf of the Respondent).

33. An Order made by the Tribunal under section 11 of the Contempt of Court Act 1981 applies to this case and prevents the disclosure of the identity of most of the sources of the material which we take into account and to which we refer in this determination. At the beginning of the hearing of the evidence, an application was made by Mr Kovats, supported by Mr Henderson, that the hearing should be partly or wholly in private. The reason given was that it would be difficult to conduct the hearing without revealing sources and identities which ought not to be revealed.

34. We take the view that asylum hearings, particularly in cases of general importance and more particularly still where the matter to be tried is essentially a general rather than a personal one, should be in public. In fact, our power to conduct hearings in private is limited by Rule 54. We have considerable doubts whether the convenience of the parties in presenting their appeal could comply with the "strictly necessary" requirement of Rule 54(4); and it was not suggested that Rule 54(3) could support the application that was being made. We accordingly decided that we would sit in public to hear this reconsideration, although the identity of the sources of some of the evidence we have heard would not be revealed. We made it clear to Mr Kovats and Mr Henderson that they

should draw our attention to any specific matter that might require us to revise our decision. In the result, we dealt very briefly with a few procedural matters in private. None of them had any impact on our decision on this appeal or on the material that we take into account in making it.

The legal context

35. The argument advanced on behalf of the Appellant is that he is now protected by the Refugee Convention and by Article 3 of the European Convention on Human Rights from being removed to Zimbabwe, because he would be persecuted on his return there. His claim is that the risk of his persecution arises solely from his being a person who is returned from the United Kingdom after having unsuccessfully claimed asylum here. He does not rely on any merit in his asylum claim: as we have pointed out, there is none. He relies instead solely on the consequences arising from the fact that the claim has been made and rejected.

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

37. In making our decision we are, however, constrained by a number of matters. The law which we are about to set out is binding on us. As a result, there were no submissions on these issues by either party before us.

38. First of all, it is clear that status under the Refugee Convention does not depend on having left one's own country under fear of persecution: the fear may arise from facts which occur after the claimant's departure. So, for example, a person may be a refugee not because his party was the opposition party when he left his country, but because since he left there has been a coup, so that members of his party are now for the first time in danger. A claimant's ability to found his claim to refugee status *sur place*, that is to say on circumstances developing since his departure from his own country, is universally recognised amongst countries that are signatories to the Refugee Convention.

39. Secondly, the possibility that a brutal regime may treat returning asylum seekers as traitors has been recognised in the courts of this country previously. The

leading case is Mbanza v SSHD [1996] Imm AR 136, where the Court of Appeal adopted dicta of Laws J in R v IAT ex parte Senga (unreported, 9 March 1994), following which the issue under consideration in this appeal has often been called the "Senga question". Those cases were decided before the coming into force of the Human Rights Act 1998. The Court of Appeal pointed out that a claimant would need to show that any ill-treatment could properly be characterised as inflicted for a "Convention reason". For the purposes of the present appeal, this particular issue is put beyond our consideration by Mr Kovats' concession on behalf of the Respondent that "if failed Zimbabwean asylum seekers do as such have a well-founded fear of persecution, this would be for a Convention reason, namely perceived or imputed political opinion" (Respondent's skeleton argument, paragraph 24). Thus the *sur place* principle, the decisions in Senga and Mbanza, and the Respondent's concession remove from us any task of deciding whether an argument like the Appellant's is in truth a valid claim to refugee status. We are bound by concession and by higher authority to say that it is.

40. What then of the entire absence of good faith in the conduct and in the claim of this particular Appellant? Mbanza draws attention to the difficulty faced in maintaining a claim of fear of persecution on return if the claimant himself has been found not to be credible. This issue was not raised before us, for the good reason that the danger in the present case, if it exists at all, is said to arise solely from the fact of being returned after making an asylum claim. As to whether a claimant is entitled to rely on a risk arising solely from conduct intended by him to create the risk, again we are bound by authority. In Danian v SSHD [1998] Imm AR 462, the Immigration Appeal Tribunal decided that the benefits of the Refugee Convention were not available to a person whose claim was based solely on his own conduct after leaving his own country, if that conduct was directed solely to erecting a *sur place* claim that he would not otherwise have. The Tribunal (constituted, it should be said, by the then President together with two of the members of the Tribunal as now constituted for this appeal) based its reasoning in part of a decision of the New Zealand Refugee Status Appeals Authority, Re HB (1995) IJRL 332. But the Tribunal's determination was decisively overruled on appeal to the Court of Appeal, [2000] Imm AR 96, which held that the benefits of the Refugee Convention were available to those who qualified for them regardless of any question of good or bad faith. In one or two decisions following the Tribunal's determination of Danian, but before it had been reversed on appeal, the Tribunal had alluded to an additional justification for decisions denying refugee status in these cases: that being a refugee under the Convention should be a matter of need rather than of choice, and that a person whose claim was in essence that he had indulged in certain conduct simply because he chose to be a refugee was not entitled to be regarded as one. That reasoning was not specifically examined by the Court of Appeal in Danian; but there is no doubt that the decision of the Court of Appeal in Danian is binding on us. It is therefore not open to us to decide that the conduct of the Appellant in this case deprives him of any benefits of Refugee status, if the facts show that he is at risk of persecution on return to Zimbabwe.

41. Constrained as we are by existing principles of law, we are accordingly in this appeal concerned entirely with findings of fact and assessment of risk. We direct ourselves to the specific question of determining what risk, if any, the Appellant would face if, having claimed asylum and failed, he is returned to Zimbabwe from the United Kingdom. We examine the evidence in order to determine that issue as a matter of fact. We are concerned with what the risk is, not primarily with what either of the parties think it is. As the Immigration Judge pointed out, although he had found that the Appellant himself feared return, it was still necessary to determine whether the fear was objectively justified. But we need to point out that similar considerations apply to the evidence adduced on behalf of the Respondent. Much of the oral evidence we heard appeared to be directed to establishing what the Respondent's view was. The process by which the Respondent forms a view, and his consistency in analysing and applying the evidence available to him, is a matter which may be of considerable importance in Judicial Review. But it is of little or no importance in an appeal such as this. The evidence taken into account by the Respondent is of interest to us only insofar as it enables us to understand what the risk actually is. In this context, the Respondent's own assessment of the risks or view of the facts is irrelevant.

42. In some types of case, for example deportation appeals and appeals raising issues of proportionality under the Human Rights Act, there is no doubt that the Respondent has a duty, which may or may not involve the exercise of a discretion, to consider and balance various interests before taking an immigration decision adverse to an individual. In such cases, the Respondent's view is entitled to considerable respect in any subsequent appeal. (See, for example, N (Kenya) v SSHD [2004] EWCA Civ 1094 at [64].) This is not such a case. The only issue is the existence or not of a risk to returned failed asylum seekers. That is a matter of fact, prediction and assessment, and the views of the Respondent are not of themselves relevant to the determination of the appeal.

Establishing a general risk

43. How then does the Appellant prove that there is a general risk to returned asylum seekers, independent of their individual circumstances or history? This is a matter on which there were submissions on the law.

44. The starting-point is Hariri v SSHD [2003] EWCA Civ 807. Laws LJ (with whom Arden and Mummery LJJ agreed) said this at [8]:

> "In those circumstances, as it seems to me, the 'real risk' … could not be established without its being shown that the general situation was one in which ill-treatment of the kind in question generally happened: hence the expression "gross and systematic". The point is one of logic. Absent evidence to show that the appellant was at risk because of his specific circumstances, there could be no real risk of relevant ill-treatment unless the situation to which the appellant would be returning was one in which such violence was generally or consistently happening. There is nothing else in the case that could generate a real risk. In this situation, then, a 'consistent pattern of gross and systematic violation of

fundamental human rights', far from being at variance with the real risk test is, in my judgment, a function or application of it."

45. This wording was examined (in the context of a claim based on Article 3 of the European Convention on Human Rights, but it is not suggested that the principle is any different) in Batayav v SSHD [2003] EWCA Civ 1489. Munby J gave the leading judgment. Sedley LJ concurred. In the course of his judgment Sedley LJ said this:

> "37. I want to add a word, however, about the evaluation of conditions which are alleged to create a real risk of inhuman treatment. The authority of this court has been lent, through the decision in *Hariri* , to the formulation that ill-treatment which is 'frequent' or even 'routine' does not present a real risk to the individual unless it is 'general' or 'systematic' or 'consistently happening' …
>
> 38. Great care needs to be taken with such epithets. They are intended to elucidate the jurisprudential concept of real risk, not to replace it. If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening. The exegetic language in *Hariri* suggests a higher threshold than the IAT's more cautious phrase in *Iqbal* [2002] UKIAT 02239, 'a consistent pattern', which the court in *Hariri* sought to endorse.
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> 39. There is a danger, if *Hariri* is taken too literally, of assimilating risk to probability. A real risk is in language and in law something distinctly less than a probability, and it cannot be evaluated by lexicographic stages into something more than it is."

46. Munby J alluded in his judgment to submissions made on behalf of the Respondent that evidence of frequent ill-treatment would not suffice to establish a real risk. He said, at [10]:

> "I have to say that I have some misgivings about this. Having had the opportunity of reading in draft what my Lord, Lord Justice Sedley, has to say on the point I respectfully agree with it."

47. Mummery LJ (who, it will be remembered, was a member of the Court in Hariri [2003] EWCA Civ 807) specifically agreed with both judgments.

48. In Batayav v SSHD (No 2) [2005] EWCA Civ 366, the judgment was given by Buxton LJ, with whom Ward LJ and Wilson J agreed. Buxton LJ referred to the dicta of Laws LJ in Hariri and at [5] went on to say this:

> "It is quite true that in Mr Batayav's own appeal Sedley LJ expressed some reserve about the particular language used in that statement of Laws LJ. That was not the view, as I understand it, of the other members of the court. However, be that as it may, it is clear that to establish an Article 3 case of the sort that Mr Batayav seeks to establish significant evidence must be given of conditions in the system that are universal, or very likely to be encountered by anyone who enters that system."

49. With the greatest respect, we have to say that the reference to Batayav's previous appeal appears to incorporate a misapprehension. As we have shown above, the other two members of the Court on that occasion agreed with Sedley LJ's reservations. The resulting uncertainty about the precise formulation of the test applied in the first Batayav v SSHD, together with the introduction of what may be a new formulation ("conditions that are universal or very likely to be encountered") in Batayav v SSHD (No 2) might provide ample opportunity for doubt about the proper test to be applied in this appeal.

50. We prefer to approach the matter from a slightly different angle. In our judgement the question is simply whether the evidence establishes that there is a real risk. The way in which a real risk is established will depend on the circumstances, the alleged risk and the availability of evidence. We doubt whether there is likely to be any rule that is appropriate in all cases. Any expression of a rule would be clearly wrong if it had the effect that, in order to establish the *risk* of harm to him, a claimant was required to show that the *actual* harm was universal or nearly so – that is, certain or nearly so.

51. Sometimes it will be necessary to show a generality of harm. This may be particularly so in cases where a claimant bases his case simply on the characteristics of the country to which he is being returned, without referring to the acts of any malevolent individual. If his case is simply based on the awfulness of his country, he will clearly need to show that the awfulness extends to the whole country, otherwise his claim lacks substance: he fails to establish the risk of harm because he can avoid it. If his claim (like Batayav's) is based on the conditions in Russian prisons, he needs to establish that he will be incarcerated and also that prisons in general pose the risk he fears. If they do not, he may be unable to show that there is a real risk that he will suffer the harm, as his dispatch to one of the worse (rather than one of the better) prisons would be a matter of pure speculation. Given that he showed that he was at risk of imprisonment in Russia, his case became stronger the more universal the conditions of which he complains. But that is not to say that there is an artificial barrier that his evidence has to pass. It all depends. It is a matter of logic; and the way the rules of logic work will differ from case to case.

52. It is for that reason that we do not think that the Court of Appeal intended to set down any general rule in any of the three decisions to which we have referred. In each case the Court was approaching the risk alleged in that case and testing the evidence by the rules of logic. It is not surprising that different words should be used each time; nor is it surprising that in the first Batayav v SSHD all the members of the Court associated themselves with the warning against changing the question by fixing it in a particular form of words.

53. In the present appeal, the Appellant needs to establish a real risk to returned asylum seekers. He does not need to show that all, or nearly all, returned asylum seekers are harmed. He needs only to show that all returned asylum seekers are

at real risk of harm. He can do that, as a matter of logic (and in our judgment as a matter of law) by any evidence that properly leads to the conclusion in question. We proceed to determine whether he has done so.

54. We have summarised the evidence at some length in this determination. There is a reason for this. Because of the sensitivity of the sources from which it derives, much of the evidence before us cannot be made public in its original form. By incorporating it, suitably anonymised, into this determination we can nevertheless make the substance of it generally available.

III

The evidence for the Appellant

55. The witnesses who gave oral evidence for the Appellant were witness 1 and Professor Ranger, who had prepared an expert report and a supplementary report. Because of the request for anonymity, the sources and witnesses are not all named. The sources are listed in the appendix for purposes of reference. The RLC offered to call those witnesses whose statements they had prepared, and who are in the United Kingdom, for cross-examination. The Respondent did not ask for any to be called.

The evidence of witness 1

56. This witness is a trustee of source F. In his statement, he confirms that this organisation works with others to document cases of torture. Its operations in Zimbabwe have brought it into conflict with the present regime which has sought to repress its activities through harassment and persecution. It is his view that the NGOs including his organisation are not in a position effectively to monitor removals to Zimbabwe. They are not given advance lists of returnees. Even if it were possible to meet with returnees at the airport, it would not follow that the presence of an NGO would ensure that those who may be detained airside would necessarily be produced or otherwise accounted for. Once a returnee left the airport, it was currently almost impossible for NGOs to maintain contact or to know his location. The widespread humanitarian crisis directly caused by Operation Murambatsvina has been and continues to be the main focus of the Zimbabwean NGO community and monitoring the treatment of returnees cannot be the priority at the present time.

57. It is his view that Zimbabweans ill-treated by the state would be extremely reluctant to contact NGOs for assistance as the act of making contact, if it came to light, would attract reprisals and NGOs themselves are under constant surveillance. There is also a risk that NGOs have been infiltrated by agents of the Central Intelligence Organisation (CIO). In his statement dated 3 October 2005, this witness refers to the field report. He considered as inaccurate the proposition that human rights NGOs in Zimbabwe are operating in a way that would

effectively identify evidence of human rights abuses of returned asylum seekers. He agrees with the witness statement of witness 2. He referred to paragraph 22 of Mr Walsh's statement referring to the case of a particular returnee and the view taken by organisation F. He confirmed that the hospital documentation was seen and a personal examination carried out by a medical director of the organisation who is an internationally respected figure in the treatment of torture.

58. In his oral evidence, witness 1 confirmed that he stood by his witness statement. He had spoken to the head of source J but had not been able to contact the spokesman identified in the field report for this organisation. The head of the organisation said that they could not investigate or monitor returnees unless they knew who they were. They were not informed. Those who were ill-treated were unlikely to approach an NGO. The exceptions were human rights workers who would know of the appropriate mechanisms. The majority of those ill-treated would go undetected and would not expect to get redress. Witness 1 said that he agreed with this analysis.

59. He was familiar with the spokesman for source K. This organisation was formed to address the needs of those who face intimidation because they were treating victims of torture and to represent those who did not agree with the stand taken by the Zimbabwe Medical Association. He would not expect it to be directly aware of ill-treatment of returnees. He would also not be expect ill-treatment to be reported to source B which was a regional organisation covering twelve countries and dealing primarily with issues of governance. He would be surprised if most victims were even aware of its existence. He was aware of source A and agreed with the statement of witness 3 at 871-2. He agreed with the comments reported at paragraph 25(d) of Mr Walsh's statement that anyone returning from the United Kingdom or the United States would be liable to the interrogation on return on suspicion of being a spy or an agent. It was his belief that this was likely to include ill-treatment: the interrogation would include more than being required to answer questions. He confirmed in cross-examination that he was aware that the RLC had been attempting to obtain clarification of some of the matters in the field report.

The evidence of Professor Ranger

60. Professor Ranger's expert report is dated 28 July 2005. He made a supplementary statement dated 2 August 2005 responding to the statement of Mr Walsh. His report sets out the basis of his expertise which was summarised by the Tribunal in paragraph 14 of SM. It is not necessary for us to repeat it. Nothing in the evidence at this hearing has cast any doubt on Professor Ranger's expertise. His evidence deals firstly with the issue of the view held by the Zimbabwe regime of those who have sought asylum in the United Kingdom and whether he agreed that it was safe to enforce the removal of rejected asylum seekers. He refers to ministerial statements and to comments in the state controlled press and in

particular to a quotation from the previous Minister of Information, Jonathan Moyo, published in the Herald newspaper of 17 December 2004. This refers to:

> "threats by the United Kingdom to deport about 10,000 Zimbabweans which could be a cover to deploy elements trained in sabotage, intimidation and violence and destabilise the country before and during next March's Parliament elections."

61. Professor Ranger then deals with the argument that this statement is in direct contradiction to a subsequent statement by the Zimbabwean Minister for Justice, Patrick Chinamasa, made to Parliament on 16 September 2004 that Zimbabwe would unconditionally take back all those returned from the United Kingdom. Jonathan Moyo was subsequently subjected to an attack by President Mugabe during a Central Committee meeting and removed from that committee. He was later removed from the Cabinet and stood as an independent in the March elections. Professor Ranger notes that the Minister of Justice was also disgraced at the same time as Jonathan Moyo. Professor Ranger refers to a number of newspaper reports indicating a power struggle in ZANU-PF between the old guard and a younger group resulting in Moyo and Chinamasa being ousted. He notes that President Mugabe kept Jonathan Moyo in post long after his statement on returned deportees and was very reluctant to lose him from the Information Ministry. In Professor Ranger's view, the sacking was far from being a repudiation of his statements as Minister of Information.

62. There has continued to be hostile comments in the Zimbabwean press in newspapers directly under the control of the President's office and the Ministry of Information. These include an article in the Sunday Mail on 19 December 2004 that deportees "are enough to cause mayhem in the country" and saying that some were being sent back "planted and paid by Britain to carry out subversive activities including possible killings". In assessing the views of the Zimbabwean regime, Professor Ranger takes the view that these allegations against asylum seekers must be set in the context of longer term assertions of British conspiracies. Over the previous five years, Britain has been accused of recruiting Zimbabweans for sabotage, espionage and destabilisation. There continue to be allegations of a hidden British hand in Zimbabwean affairs. The press in Zimbabwe has asserted that a recent South African church delegation led by Archbishop Ndungane was funded by British intelligence and that Anna Tibaijuka, the United Nations representative, who produced a very critical report on Operation Murambatsvina was an agent of the British Government.

63. Professor Ranger's report confirms that the man currently in charge of the CIO is Didymus Mutasa whom he describes as notorious for using violence against political opponents in Makoni district in the past, against the MDC and more recently against supporters of ZANU-PF challenges in the party primaries. The CIO under Mutasa has been invested with responsibility for food distribution and was involved in Operation Murambatsvina. Mutasa is notorious for his statement in November 2002 that "we will be better off with only six million people, with our own people who support the liberation struggle. We don't want all these

extra people". He has accused Britain of conspiratorial interference in Zimbabwean affairs and is said to believe that many British spies have been infiltrated into the country.

64. It is Professor Ranger's view that the violence used by the CIO cannot be attributed to a lack of discipline by "rotten apples" with those affected having a right of complaint to a higher authority. Beatings during interrogation are a fundamental part of CIO practice and will not be punished. Professor Ranger sets out the history of the CIO. It was founded during the UDI period and in the 1970s was involved in assassinations, dirty tricks and poisonings according to an account later published by its then director in "Serving secretly, Rhodesia into Zimbabwe 1964-1981". President Mugabe inherited the organisation and most of its senior white officers. It carried on the traditions of the 1970s during the Matabeleland violence of the 1980s. The repression in Matabeleland was aimed at the elimination of the structures of Nkomo's party, ZAPU and the destruction of what survived of his guerrilla army, SIPRA. The CIO used interrogation, torture and killings to achieve its aims. Professor Ranger refers to a March 2005 Redress report entitled "Zimbabwe: The Face of Torture and Organised Violence!". This asserts that the use of torture is deeply ingrained, particularly within the CIO. In 2004, the budget for the CIO was increased six fold. It is Professor Ranger's view that the nature and outlook of the organisation does not seem to have changed in thirty years. It has always hunted down opponents for the regime often using extreme violence.

65. It is Professor Ranger's view that given the regime's belief in Britain's infiltration of spies, the CIO would be tasked to root them out and given that it is widely believed that some at least of the asylum deportees are British agents they can expect to face interrogation. He confirms that the CIO detain asylum deportees at Harare Airport and interrogate them. He refers to the report of the interrogation of witness 8. It is his view that it is highly unlikely that a deportee would escape interrogation.

66. Professor Ranger is now aware of considerably more evidence concerning the fate of deportees than when he gave evidence to the Immigration Appeal Tribunal in SM. He refers to recent reports of cases of actual abuse in the British broadsheet press and in particular the Independent on Sunday on 3 July 2005 and The Times 4 July 2005 and 5 July 2005. These and similar articles appear in the joint bundle. He refers to reports of interrogation and ill-treatment of returnees and of other reported problems after their release from the airport. Professor Ranger commented that the Zimbabwe Government feels more than ever under threat, with calls from Britain, the US and the EU that it should be brought to the Security Council over the clean up operation, with demands from the IMF for repayments and the threat of suspension by the World Bank. The authoritarian character of the regime has been increasingly on display.

67. In summary, Professor Ranger comments on what conclusions he would currently draw as to how rejected asylum claimants would be treated if expelled to Zimbabwe. He described his response as a development from the evidence he gave to the Immigration Appeal Tribunal in February 2005. There he pointed to cause for considerable concern but was cautious given the very short period that had elapsed since the suspension on returns had been lifted. Since then there has been evidence of violence in several places and the objective situation has worsened in many ways. The effect of the clean up operation has been to make further accommodation scarce and expensive. The food shortage is worse than it was. People going to rural areas from the town have been excluded from food relief lists drawn up by the head-men. It is his opinion that there is a substantial risk that any one removed following an asylum claim in the United Kingdom will be dealt with violently and oppressively. Some will be detained and tortured whereas others will be released but remain under surveillance and threat. Their families may well be frightened to associate with them and the urban "clean up" and food shortages will make it difficult for them to return to their homes or to relocate.

68. In his oral evidence Professor Ranger confirmed that beating was a systemic feature of a CIO investigation. When he had given evidence in February 2005 in SM, at that stage was only one reported case of ill-treatment to a returnee. The pattern of the statements by the Zimbabwean media was that returnees would be regarded with suspicion. He would infer from this a likelihood of ill-treatment. By August 2005, there were a number of reported cases of ill-treatment. When he saw the field report he was struck by the fact that there was no evidence of the monitoring capacity of NGOs. He believed it was a fantasy to say that the NGOs would be in a position to monitor returns. He agreed with the comments made in the statement of witness 2. The evidence from the Home Office did not change his view as to whether the NGOs would be in a position to monitor returns. He had read the press reports of the visit by the delegation from the United Kingdom Government in September 2005 and took the view that it was damaging and in particular the references to the fact that the Government would now realise what "liars and frauds" the asylum seekers were.

69. In cross-examination, he took issue with the general conclusions in the field report. He would only expect the NGOs to know of matters which had been reported to them. The judgment of witness 2 was one reason why Professor Ranger did not credit the judgment of the field report. The NGOs would not have the capacity and would not know of the extent of abuse. The subsequent silence of those ill-treated was a key feature and arose from fear. It was his view that the risk had not increased but there was now more evidence to demonstrate the fact that the risk existed. When giving evidence in February 2005 he had not intended to give the impression that there was a monitoring of returns by the Zimbabwe Association (paragraph 41 of SM). There had been an attempt to trace asylum seekers who were returned but this did not amount to monitoring. It had not

been his intention to imply that returnees were monitored as the Zimbabwean Association and NGOs were unable to do this.

70. He confirmed in answer to questions from the Tribunal that the Zimbabwean press did attempt to have it both ways, arguing that returnees were spies but on the other hand liars and frauds. The further evidence about the treatment of returnees did not surprise him but had confirmed his views. It was his view that some returnees were likely to be mistreated but it was difficult to determine who. He did not believe that the CIO people at the airport acted randomly but neither did they act systematically. It was difficult to discern a system. There would be a grave risk to some people. It would be part of the CIO tactics to aim for activists but also to pick up either people. The CIO was becoming a huge organisation. At the airport, the likelihood was that they would use their fundamental techniques. It was his view that returning asylum seekers would be more at risk than the population at large and the risk to them arose because they would be funnelled into a moment of encounter with the CIO. At that point, they would face a particular danger. It was believed amongst asylum seekers that there were CIO operatives working under cover amongst them. When pressed as to the risk for a returned asylum seeker who was not an opponent of the regime, he said that his honest answer was that he did not know whether there was a risk but there would be in depth questioning by the CIO and there would be some risk of physical ill-treatment. We understood his answer not to mean that he did not know whether there was a risk but that it was difficult to assess risk for a particular returnee: some would be ill-treated, but it was difficult to predict who.

<u>The witness statement of witness 2</u>

71. Witness 2 is the founding director of source F. He has been actively monitoring human rights violations and torture in Zimbabwe since 1998. He has contributed to many reports on human rights observance and is the author of a number of reports. He met several members of the delegation from the British Government along with officials of the British Embassy on 7 September 2005. The delegates wanted to know about the present situation in Zimbabwe and about the NGOs ability to investigate the treatment of failed asylum seekers removed by the British authorities. It was explained that the situation in Zimbabwe was seriously destabilised and getting worse. It was significantly more chaotic since Operation Murambatsvina. Clients of the NGOs disappeared and NGOs work had been disrupted. For individual cases the human rights community relied on passive capture: they did not find the victims but the victims found them. It was his view that only a tiny minority of individual cases of torture and organised violence by the state were recorded by the NGO community. The vast majority of victims did not make a complaint to NGOs for obvious reasons. There was conclusive evidence of sustained and systematic human rights abuses amounting to a massive attack by the state on its citizens.

72. The major effort of the NGOs was seeking to report on the catastrophic humanitarian situation resulting from the regime's actions. There was an appreciable risk of ill-treatment for people who did not declare open affiliation to ZANU-PF and the government as well as a serious humanitarian situation in which ordinary Zimbabweans were likely to suffer persistent hunger and possible starvation. Many Zimbabweans were fleeing because of the humanitarian situation but it was important to note that many were also victims of political violence. The NGOs had not been asked about specific returnees by the delegation but whether they had obtained evidence about the treatment of individual returnees. For this evidence to be available either a person must go to the media or approach an NGO to lodge a complaint. The human rights NGOs had themselves been targets of the state since 2000. Repression increased as international pressure on the state increased. To approach an NGO would be a good reason for further harassment by the state. Most NGOs would advise someone who reported such ill-treatment to keep their head down and not take the risk of making a fuss for himself or the NGO. It would be fantasy to say that NGOs have a system in place that could be relied upon to produce specific evidence of mistreatment of individual asylum seekers either at the hands of the CIO or thereafter.

The statement of witness 3

73. This witness is a representative of source A. In her statement dated 4 October 2004, the meeting with representatives of the Home Office is confirmed. The witness also confirms the presence of witness 2 at the meetings. He is described as one of the most knowledgeable sources on the Zimbabwean NGO community. Organisation F is the main organisation in the Forum focussed on reporting on and supporting victims of torture. Information would have to reach the NGO community in the first place and as regards a person being returned to Zimbabwe such cases would not necessarily be known about unless the report was made to organisation A or was reported in the press. Most cases of violations in Zimbabwe went unreported and most victims chose not to make reports for fear of further intimidation or harassment. Witness 3 could not say categorically whether someone who had sought asylum from Britain would be discriminated against by ZANU-PF. She knew of no specific reports of persons who had been harassed by the Zimbabwean authorities following their removal from the United Kingdom, but could say that they were credible reports that the distribution of food was being used as a political tool by ZANU-PF.

The witness statement of witness 4

74. Witness 4 is an official of source D. The witness confirms the correctness of the field report when commenting on general conditions and Operation Murambatsvina. The report also correctly records the organisation's view that an asylum seeker removed from the United Kingdom was likely to be singled out and liable to suspicion as a spy and would be interrogated. Someone who had

sought asylum from the United Kingdom would be viewed as a traitor or enemy of the state. Torture during interrogation by the CIO was usual as was degrading treatment. There was evidence that MPs had been tortured by the CIO and witness 4 comments how much worse the position of an ordinary person under interrogation on suspicion as a traitor would be. A person who had been ill-treated was unlikely to reveal such treatment outside their families for fear of attracting the attention of the CIO. It was not the view of organisation D that they would expect to hear of systematic mistreatment. Although no cases had come to their attention, this was consistent with the fact that bringing a complaint would be regarded as both futile and dangerous to the claimant and his family. There was no reason why the CIO would not use its ordinary methods of interrogation against a returnee including ill-treatment. Someone who had sought asylum from the United Kingdom would be marked out as a traitor and watched over. There was a constant demonising of the United Kingdom and a returnee would probably be viewed as worse than an ordinary opposition supporter.

The witness statement of witness 5

75. This statement is made by a Zimbabwean citizen who has been recognised as a refugee and has made a statement in the Judicial Review proceedings on an undertaking that all steps necessary will be taken to secure his anonymity. He used to work for the Rhodesian Intelligence Corps as a military intelligence officer and subsequently, when Rhodesia became Zimbabwe, and the Intelligence Corps became part of the Zimbabwean Defence Force. He was a member of the unit responsible for military intelligence aspects of security at Harare Airport. Procedures were in place to ensure that the passenger manifest was copied to airport intelligence. The list was analysed and the name of anyone believed to be of interest to the three security agencies, military intelligence, police internal security intelligence and the CIO, would be highlighted. Once the flight landed, passengers who disembarked would file past the immigration desk and then past the CIO desk and at this stage the CIO would approach a passenger in whom there was interest and take him to the CIO office. There were other cases when the CIO would become involved after an immigration officer had established a passenger's identity and nationality or the person had been questioned by other security services at the airport. If the person was of interest to the CIO, they were taken to the CIO headquarters for questioning. Interrogation was done at the CIO headquarters away from the airport. At the airport itself, security procedures were kept discreet to avoid attention. During this witness's posting at the airport a number of people were deported to Harare, mainly from South Africa. The procedure adopted for these deportees were slightly different to the procedures previously described. The South African authorities would have given the deportee's passport to the pilot, rather the deportee. On landing, the pilot would hand the passport to the immigration officers. The deportees were taken to a room adjacent to the immigration section and when the other passengers had been cleared, they would be handed over to the CIO.

76. Witness 5 has kept in touch with former colleagues and has been told that all returned asylum seekers are questioned because they are considered to be a security risk. It is believed that they are being trained in military procedures and espionage in the United Kingdom and they are being sent to destabilise Zimbabwe. He has been told that they are all handed over to the CIO, who carry out questioning and then decide what should be done. Those returnees who are released are nevertheless kept under surveillance, made to attend ZANU-PF meetings in their area and denounce the MDC, and in some cases are required to report to a police station. As will be apparent below, we regard the evidence from this witness as crucial.

Statement of witness 6

77. This statement is provided by a citizen of Zimbabwe who has been granted refugee status and again makes his statement on an undertaking to secure his anonymity. He also was a member of the Zimbabwean Intelligence Corps. It is his evidence that the deportee's papers are handed to a senior immigration officer to whose office the deportee is taken. The officer team, comprising representatives of the military, the police and the CIO, would be in attendance. Once the senior immigration officer was satisfied of the deportee's identity and nationality, he would hand him over to the senior person in the team who would take the deportee into an interview room. Each agency would interview the deportee about any issues of concern they might have. The CIO would check for any political activities. Once it was decided which agency would have custody, the deportee would be taken by that agency for interrogation. The CIO have their own cells and safe houses. Witness 6 has been told that the CIO considers the deportation of asylum seekers to be a cover for the British authorities to fool the Zimbabwean authorities into thinking that Britain has no interest in Zimbabwe. The CIO believes that the deportees are being used to spy for the British in Zimbabwe. He said that within the Zimbabwean intelligence community the implication of a person having been interrogated is that the interrogated person will have been ill-treated. The fact the deportee is released after interrogation does not mean that he or she is out of danger. He knows of people who have been interrogated and detained in such circumstances but later becoming the object of interest from the CIO in their home areas.

The witness statement of witness 7

78. Witness 7 is a citizen of Zimbabwe who was returned following the suspension on removals in 2004. He asserts that he has been seriously mistreated. He gives an account of having joined the MDC in January 2000. He became an active member. He first suffered from violence around the time of the March 2002 Presidential elections. He was detained and ill-treated. He suffered further problems in August 2002 and then moved to stay with a relative. Following threats from ZANU-PF supporters, he left Zimbabwe arriving in the United Kingdom on 1 October 2002. He was given temporary admission. He did not report back to

Gatwick as required. He was frightened to get in touch with the Home Office and overstayed. Following the lifting of the suspension on removals, he tried to make a voluntary return and approached the Zimbabwe Embassy. They were unable to help him and he went to a police station where he was arrested and detained. He was removed on 2 December 2004.

79. He was escorted off the plane by one of the air crew and handed over to people in plainclothes. He was not taken through immigration control but to a different side of the airport. He was questioned by people who identified themselves as from the CIO. He was questioned about why he had been in the United Kingdom and accused of being a British agent and working for the MDC. He was kicked and punched. He was then taken by truck to another building where he was stripped naked and interrogated further. He was left naked without food or water for about four days. He was subjected to further humiliating treatment. He was given his clothes back and also given some food and water but continued to be the victim of ill-treatment and violence. After he was eventually released, his family were horrified at the state he was in. He hoped that his release indicated that the authorities had finished with him. He renewed some low level activities for the MDC. He was arrested again in March 2005. He was held for several weeks but not physically mistreated. In April 2005, he was released but told to report every Friday. As his family were frightened for him arrangements were made for him to leave Zimbabwe. He was eventually able to leave, travelling to South Africa and then returning to the United Kingdom.

80. There is a medical report relating to witness 7 dated 19 September 2005. This report confirms the presence of injuries to his front teeth described as highly consistent with forceful blows with a hard object such as a rifle butt. There are other injuries to his body described as consistent with his description given of their cause. He is described as having many of the features of post traumatic stress disorder as defined by ICD 10 criteria. The witness has a pending asylum application. He has not been cross-examined on his evidence. It records treatment of a returnee who had not in fact claimed asylum before being returned but nonetheless, assuming the account to be true, shows the interest of the CIO in returnees and the extent of the mistreatment when a full investigation is carried out.

The evidence of witness 8

81. The statement of this witness is part of the documentation relating to his claim for asylum. This witness was returned to Zimbabwe on 17 December 2001. He was questioned by the CIO who mocked him saying that they knew political activists were fleeing the country to report lies abroad. They had sources in the United Kingdom who informed them about the activities of people like him and the chaos they were causing. They said he would now be punished. They demanded to know everything he had done since arriving in the United Kingdom and what information he had given about Zimbabwe. He was beaten. He was called a sell-

out. At one point a chair with a rung between its legs was put over his neck and an officer sat on the chair pressing the rung down on his neck. He was told he would be transferred to prison. He was able to escape when he asked to go to the toilet. He saw a small window, climbed through and was able to get a lift into town. He contacted an aunt who told him that he was not to go to any of his relatives' homes as the CIO been looking for him. Arrangements were made for him to return to the United Kingdom. He claimed asylum on the basis that he would be perceived by the regime as a traitor. The Respondent granted him asylum in April 2003. This witness is the returnee referred to in paragraph 41 in SM where the Tribunal commented about the doubts it felt about this account but that comment must be seen in the context of the very limited evidence produced at that hearing as compared with the further evidence produced at this hearing. This evidence shows how one returnee is said to have been treated in 2002 and forms part of the background picture. It is worth noting that removals were suspended from January 2002 to November 2004. None of the evidence before us tends to show that the situation has improved since 2002. On the contrary, it appears to have deteriorated for anybody that is conceivably capable of being seen as a less than wholehearted supporter of the regime. The seriousness of the present situation is clear not only from the CIPU Report, the newspaper reports and the background information, particularly from the UNHCR.

IV

The Respondent's evidence

82. Most of the Respondent's evidence centred around a field trip to Zimbabwe that had been carried out on the Respondent's behalf between 4-10 September 2005. Because of the central position of this evidence, we start by setting out a summary of its findings here in order for the subsequent account of the evidence to be better understood. The methodology and other aspects of the report were dealt with in evidence by Mark Walker, who was part of the joint Home Office and Foreign and Commonwealth Office delegation. The delegation spent five days speaking to various sources. It was explained during the course of evidence that the Country Information and Policy Unit has recently been sub-divided so that the Policy Unit and the Country Information Unit have been separated. Interestingly, it was the Policy Unit that was represented on this delegation and Mr Henderson was to comment during submissions that it would have been better for the Country Information Unit to have played its part, rather than the Policy Unit. He queried whether there was a tendency for a policy-based delegation to try to look for evidence to justify the policy rather than the more neutral exercise of gathering information.

83. The sources interviewed were, in many cases, unwilling to have the identity of their organisation and/or their spokesmen identified. As we say elsewhere, we respected by the making of an order under the Contempt of Court Act 1981. We

have followed the wishes of the sources in the preparation of this determination but have chosen to err, if at all, on the side of anonymity.

The field report

84. The first source (A) is the Human Rights NGO Forum and Legal Resources Foundation. Its spokesman did not wish to be identified. The Forum was founded in 1998 following food riots in order to provide legal and psycho-social assistance to victims. It has now expanded its objectives to assist victims of organised violence, by which it means "the inter-human infliction of significant, avoidable pain and suffering by an organised group according to a declared or implied strategy and/or system of ideas and attitudes". The Forum has seventeen member organisations. The source explained that they believe some asylum seekers are seeking to exploit the plight of genuine asylum seekers in order to be able to go to the United Kingdom and remit money home. Although the Forum has an office in London and has put in place a service whereby a failed asylum seeker who is due to be removed can approach it, with a view to the Forum arranging for a lawyer to meet the returnee on arrival at Harare, nobody has yet taken advantage of the service. The Forum believes that its existence will be known through the close-knit Zimbabwean community in the United Kingdom.

85. One member of the Forum (source F) has an extensive network of safe houses and other facilities spread across Zimbabwe to which returnees with problems can apply for assistance. The spokesman for source A did not know the extent to which failed asylum seekers have sought to use those facilities. The spokesman accepted that it is impossible for anyone to be certain that isolated incidents do not occur but went on to say that the Forum would expect to have heard if there was systematic mistreatment of returnees. They have not heard that. He acknowledged that lack of evidence to substantiate the claims does not mean the claims may not be well-founded.

86. In the one case which they attempted to follow up, where a report was received that one person who had been returned through Bulawayo claimed to have been assaulted, when they found the person he was very evasive and the Forum did not believe the claim was genuine. Source A believed that if there were genuine cases of mistreatment to failed asylum seekers, it was not simply because they had sought asylum in the United Kingdom but because they had political opinions and had been involved in activities.

87. Source B was identified to us but was otherwise anonymous at the hearing. Its spokesman has been asked to be referred to as a "senior spokesman for a regional human rights NGO". The NGO is concerned with human rights in southern Africa and is involved in human rights and governance issues. The spokesman said the NGO had extensive contacts across the NGO sector. He said that prior to the 2000 elections, the Zimbabwe Government had been concerned only with high

profile critics and not in any significant way with those who are involved in opposition at the grass roots level. Around the 2000 elections, the Government increasingly targeted lower level political activists and particularly teachers (because of their perceived influence on young people and their standing in their communities). Since the 2000 election, he said that persecution has not been continual or systematic, but has occurred in reaction to particular events (for example, teachers around the periods of by-elections). Source B's view was that the majority of current asylum seekers are actually economic migrants who apply for asylum in order to find a better way of life but accept that part of the process is failure. The spokesman said that he has known many people who take leave from their jobs whilst claiming asylum in order to have a route back into life in Zimbabwe if the claim is unsuccessful. He said there are close links between Zimbabweans in the country and the diaspora whereby information is passed around about the asylum decision-making process. He felt that the main target at the moment for Government persecution is NGOs. NGO activists and others perceived as opponents of the Government are at risk of being arrested and beaten. There is a favourite police tactic used where there is no will or evidence to bring a prosecution, of arresting a suspect on Friday so that they can be detained over the weekend. He suggested the Zimbabwean prison conditions are so poor that this is a more serious deterrent than it sounds.

88. He said that he did not believe that returning failed asylum seekers would be targeted for mistreatment as it would suit the Government to hold such figures up as examples that the United Kingdom is not as wonderful as others tend to think. The spokesman said he thought the people who were deported for other immigration offences, such as being turned back at the airport in the United Kingdom, would be unlikely to face difficulties on return. His experience is that they usually get a new passport, save up and try again. However, he went on to say that the source's activities are such that they engage with a wide range of NGOs and others in the field of human rights. He believed that the source would have heard if there had been systematic mistreatment of returning failed asylum seekers and he has not. Having said that, he was concerned that the Zimbabwe Government is becoming more ruthless and vindictive. He described how mistreatment is becoming increasingly personal and the state is increasingly fragmented with different concentrations of power. These fragmented parts are operating less and less coherently and rationally and that those who are now most likely to be mistreated are those who personally aggravate someone in authority. He described this not as systematic targeting but an almost random lashing out at people who cause difficulties.

89. Source C was disclosed to us anonymously, as was its spokesman. The source believes that upwards of 90 percent of Zimbabwean asylum seekers in the United Kingdom are economic migrants. The source suggested that if failed asylum seekers who are returned from the United Kingdom are identified as such, they could expect to be questioned by Immigration and the CIO and perhaps even threatened and accused of betrayal before being released. They may be visited

subsequently at home but the source was not aware that any had suffered mistreatment at that stage. The source felt it would definitely know if there was systematic mistreatment of returning failed asylum seekers.

90. Source D was a church organisation in Zimbabwe. The source has extensive contacts with local clergy throughout Zimbabwe and its activities have not been curtailed by Government action against NGOs. The source believes that the violence and intimidation experienced by people in Zimbabwe is random with the intention of maintaining a generalised atmosphere of fear. The source has not heard of any reports of returning failed asylum seekers or others returning from the United Kingdom being mistreated. However, it noted that the chance of hearing about such things is restricted by the absence of an independent media and the source did not rule out the possibility that individual returnees may be persecuted.

91. The source said that there is no express duty, among the extensive networks which it has, to pass back to the centre individual allegations of mistreatment. The source, however, did think it would expect to hear of systematic mistreatment. Whilst the spokesman expressed an intention to encourage its networks to pass information to the centre so that it could subsequently be sent on to the British Embassy, he did say that part of the problem is that people tend to regard such mistreatment as a private matter to be kept in the family, for fear of attracting the attention of the CIO.

92. The spokesman said that if there were mistreatment of returnees, that could apply to anyone returning to Zimbabwe from the United Kingdom (or the USA). He went on to say that anyone returning from the United Kingdom would be liable to be interrogated on return on suspicion of being one of "Blair's spies". He felt that people visiting the United Kingdom as tourists or on business might face some interrogation about their motives and activities on return and that, as a result, some business people are reluctant to travel to the United Kingdom. He felt that problems do not occur for returnees from other countries.

93. The spokesman went on to briefly discuss Operation Murambatsvina saying that the operation had caught both MDC and ZANU-PF supporters, although it was targeted at MDC-dominated areas.

94. Source E was identified to us and obtains information from media sources. The spokesman said that the source has extensive connections in Zimbabwe and has not through those picked up any reports of ill-treatment of returnees from the United Kingdom. However, he stressed that Zimbabwe was a country where anything can happen and that it is a cruel and violent place. His view was that simply by going to the United Kingdom, a person could be considered disloyal and that the regime was quite capable of persecuting such people despite the source having no reports of such treatment.

95. Source F is one of the constituent parts of source A. The delegates on the field trip interviewed three people from source F whose names and positions were given to us. (We heard evidence from a fourth person working with the source, who is referred to as witness 1.) The delegation had two meetings with this source. The source has extensive links among the NGO community and despite having to operate underground to some extent has the ability to conduct individual investigations. There are restrictions on NGOs generally as a result of the introduction of an NGO Bill. (For more about this, see the October 2005 Country of Origin Information Report. A copy of a late draft of this report was supplied to us in the bundle and we were told that it was not anticipated the document would change materially prior to its publication. It should be noted that Country of Origin Information Reports replace CIPU Reports and has been renamed to reflect the split of responsibilities within the old CIPU.) The source said that it is now able to operate more or less as it did prior to the introduction of the Bill but that does not mean that they are free to operate as they would like. They would wish to have a more extensive support network but the current political climate precludes that. They have extensive contacts and so can gather information, but do not have sufficient people on the ground to respond to the information as quickly as they would like.

96. The report records that source F has investigated two cases of abuse which it considers to be genuine. It becomes aware of allegations of abuse from newspaper reports and has been able to use its contacts in the NGO community to attempt to verify the claims. However, it has been unable to locate those mentioned in reports, save in one instance where the person concerned refused to speak to the source. It considers that supports the view that returned failed asylum seekers are reluctant to come forward and that generally returnees are very secretive. The source told the delegation that it is not therefore possible to say that individual cases of mistreatment do not happen and the source is unwilling to state either way whether there has or has not been systematic abuse of returnees. Whilst the source has seen ten allegations of abuse that have been sent to it, the references to the individuals were by initials only and the source has been unable to proactively investigate the truth of the statements made. They have been unable to speak to anybody whose stories match the allegations. It felt that individuals, if they continued to feel threatened, are more likely to relocate to South Africa or Botswana rather than expose themselves to an NGO constantly under surveillance.

97. The source went on to say that if the authorities were interested in an individual it would be because of their political opinions, not because they had sought asylum in the United Kingdom. It also said that the fact of being a returned asylum seeker could result in aggressive questioning at the airport in order to ascertain whether they were opposition supporters, but the source felt that if they were found not to be they would no longer be of continued interest to the authorities. They were, however, unable to discount the possibility that they could remain of interest. It was the source's view that those who were described as "MDC foot

soldiers", namely those who distribute leaflets or put up posters and arrange meetings, are the ones most at risk of persecution because they are vulnerable, easily picked up and beaten, and such treatment is unlikely to attract adverse comment. In contrast, the higher profile activists are protected to a degree by their own profile and the outcry that could follow mistreatment, although there are exceptions to that.

98. Source G is an international human rights organisation. The spokesman dealt in part with Operation Murambatsvina and food shortages. Asked whether they were aware of mistreatment of persons returning from the United Kingdom, the source stated that they had not heard of any such cases either directly or through their contacts with other organisations. It went on to warn that because of the intricate cross-relationships based on family ties, tribal groups and totem membership, it is easy for the authorities to find out about such things as the political affiliation of any new arrival in an area.

99. Source H is content to be identified as the Zimbabwe Peace Project. Its vision is to be authoritative in documenting acts of political violence and human rights abuse and the promotion of conflict transformation initiatives. It operates a network of two hundred and forty human rights monitors (two for each constituency throughout Zimbabwe). Their task is to monitor human rights abuses and feed the information back through regional offices to the central organisation. The source has not received reports of any mistreatment of failed asylum seekers or other people returned from the United Kingdom but they are aware of allegations in the press and are quite able to imagine that such things might be happening. The source suggested that a reason that failed asylum seekers might be treated differently from other immigration offenders or others who have visited the United Kingdom is that it is assumed in pursuit of the asylum claims that they must have made disloyal statements about the situation and the Zimbabwe Government in particular. The field report says:

> "As a result, and based on the treatment that others who are of interest to the Government face, eg NGO activists, they could imagine that the treatment they might face would include having their luggage tampered with and extended questioning by immigration officials and the CIO. Once picked up by the CIO, it is likely that the line of questioning would extend well beyond the issue in hand to general views, connections, background. The source would imagine that the treatment for those who are returning from the UK could be worse for those from other countries because of the political climate between the two countries."

100. The source said that he thought that the Intelligence Services were sophisticated enough to know whether there were asylum seekers on any particular flight into Harare before it arrived. In any event, they would be able to identify them from their passports that they had been removed from the United Kingdom and this would serve to identify them as people of potential interest. He said that even though the Security Services have sophisticated intelligence that they also act on the basis of suspicion which may arise, for example because somebody has been

away for a while. This source did not think that failed asylum seekers were, on the whole, likely to face societal difficulties in the area to which they are returned.

101. Source I is the International Organisation for Migration who have fifty-two staff in Zimbabwe. Part of their responsibility is to help returnees from the United Kingdom to re-establish themselves in Zimbabwe. The organisation has facilitated the return of more than forty-four returnees, including some voluntary returning failed asylum seekers during the course of the year. The spokesman said their network of staff would expect to pick up any reports of mistreatment of returning failed asylum seekers (whether voluntary or enforced) but has not done so. The last problem they encountered was in March 2004, when the CIO harassed returnees in Bulawayo asking what they had been doing in the United Kingdom. The organisation protested to the Zimbabwean Government, who responded by saying the activity had been by the local CIO operatives acting without the approval of central Government. They promised to investigate further, but have not sent any response back to the organisation. The IOM said that it would immediately report any incidents of mistreatment or harassment of returnees to the British Embassy in Harare.

102. Source J is the Zimbabwe Lawyers for Human Rights. It describes its core objective as fostering a culture of human rights and encouraging the growth and strengthening of human rights at all levels in Zimbabwean society through the rule of law. The spokesman said that overall the organisation believes that the asylum system in the United Kingdom is being abused by those who are not deserving and are not under any real threat. They have said that although they are prepared to support asylum seekers in the United Kingdom through their UK lawyers, when they do so they investigate thoroughly. The organisation has one hundred and seventy-two lawyer members who, although aware of allegations contained in the media about the abuse of returning failed asylum seekers, none of their members have yet come across a genuine case of mistreatment of asylum seekers returning from the United Kingdom. The organisation believes that their members operate reasonably freely and would have expected to pick up any such cases but cannot rule out the possibility that someone so treated would choose to keep a low profile. It believes it would have picked up any systematic targeting of failed asylum seekers returning from the United Kingdom.

103. The organisation referred to one specific case where ill-treatment on return in December 2004 had been alleged. A man had apparently contacted a human rights NGO in Zimbabwe alleging that he was a failed asylum seeker returned from the United Kingdom who claimed to have been interrogated and beaten up by the CIO. The organisation was unable from his documentation to ascertain that he had ever been to the United Kingdom, and, after extensive enquiries, satisfied themselves that the man was in fact a CIO agent who was trying to infiltrate the human rights NGO community.

104. The organisation said that returnees from the United Kingdom face questioning at the airport on return to Harare and that the Government of Zimbabwe may regard leaving for some places, including the United Kingdom, as treachery. The spokesman was able to give an example of an enforced returnee (who was not in fact a failed asylum seeker) who was questioned about reports that Zimbabweans were being trained as spies and insurgents in the United Kingdom. He said that CIO are capable of beating people at the airport but did not identify any group particularly at risk. The spokesman himself said he had been harassed by CIO officers in the toilets at the airport, but had been freed when he explained he was a lawyer and was of the view that someone less articulate might not have got away so easily. He did not think that there would be any problems for returning failed asylum seekers at societal level.

105. Source K is the Zimbabwe Association of Doctors for Human Rights. Their professed aim is to advocate access to good quality health services for all and to bring the skills of the medical profession to the aid of victims of human rights abuses. It sees its role as defending the rights of health professionals who are persecuted because of their adherence to medical ethics. It has approximately one hundred and eighty members of the organisation spread throughout Zimbabwe. The spokesman said it does not get involved with individual cases, but would expect to hear about any incidents through its membership and their extensive contacts. The organisation has not heard of any cases of mistreatment of returnees from the United Kingdom.

106. Source L is British Airways. Their spokesman is not based in Zimbabwe. He said that flights from London attract a lot more attention from the CIO than flights from other destinations and described the airport as "crawling with them" for flights from the United Kingdom. He has not detected anti-BA or anti-United Kingdom feeling at the level at which he operates, but comments that Government agents do as instructed by the politicians. He believed that the CIO are very well informed and know exactly what is going on in what he described as a police state. He considered that problems faced by failed asylum seekers on return to Zimbabwe would be as a result of having been deported from the United Kingdom, rather than for any political activity that they might have been engaged in before they left Zimbabwe. We should say that there is no basis given for that last expressed belief.

107. Source M is an international humanitarian organisation, the identity of which, and the identity of whose spokesman, were revealed to us. The spokesman said he knows many people in the humanitarian community in Zimbabwe and has not heard any reports that returnees from the United Kingdom have been subjected to ill-treatment.

108. Source N was described as a diplomatic source. We do not know the identity, or even the nationality, of this source who is said to have told the Respondent that

he had not heard of any reports of returned failed asylum seekers being mistreated on return.

109. We mention source O for the sake of completeness. The Respondent says that the delegation met with the Director for Europe and the Americas at the Ministry of Foreign Affairs on a courtesy visit which was not part of the information gathering programme. They were told that there was no problem with Zimbabwean citizens travelling overseas and that there was a system for remitting money back to Zimbabwe from abroad, which included the United Kingdom. The Government is said to be disappointed at the way that emigration from Zimbabwe is portrayed and the stories which attach to it.

Oral evidence – Mark Walker

110. The first of the Respondent's oral witnesses was Mark Walker, a country policy officer in the country specific asylum policy team. He told us that he had been on the joint Home Office and Foreign and Commonwealth Office delegation to Zimbabwe and was present at all of the meetings from which the information in the field report was obtained.

111. His witness statement says that the contents of the report were, with the exception of one organisation that had not responded at the date of his statement, approved by the sources. He told us that in the main this was done by telephone contact with the Embassy. The late response was from source D which has now responded. That source has also made a witness statement and the statement was made by the person to whom the Mr Walker spoke. It was put to Mr Walker that the criticism in the spokesman's statement, that he did not recognise the assertion attributed to the source in the field report that "they would expect to hear of systematic mistreatment", did not support the field report. Mr Walker said he had no comment about that because what he had put in the field report reflects what he was told at the time. When he was cross-examined about this, he said that, otherwise, the statement from that source expanded on the field report. The spokesman had said to the Embassy that the field report was a good report of what had been said. Mr Walker acknowledged that the witness statement subsequently made seemed to have been made on the same day as the spokesman approved the field report to the Embassy. He acknowledged that parts of the statement do not sit comfortably with what is in the field report, but he was adamant that what he was told is what appears in that report.

112. In relation to source A, Mr Walker confirmed that the more recent statement seemed to expand on what was put in the field report. When it was put to him that it was in fact inconsistent with the field report in relation to the purpose of the source's London office, he again said that what was in the field report was what he was told at the time. He also said that, in this particular case, the source had confirmed the field report by sending back an amended copy and it was the amended copy that had been incorporated into the final document.

113. He was asked whether he had met with witness 2 whilst he was in Zimbabwe. He said that he had met him at a background dinner and he was somebody that he would have arranged to speak to had he had more time. He expressly denied that the reason for not interviewing this witness is that he had said unhelpful things at the dinner. Mr Walker said it was apparent at the dinner that he had a great deal to say, but they did discuss matters other than those which were directly involved in the visit. He accepted that the reference by witness 2 to human rights NGOs relying on "passive capture" was consistent with the delegation's findings and he said that it was true where NGOs do not go out to specifically track down individual failed asylum seekers. It was put to him that witness 2 had said in his statement that the British Government's officials were inconsistent because, on the one hand they take the lead internationally in condemning huge scale systematic abuse of the population by the regime, and on the other arguing to send people back. Mr Walker said that point had not been made to him when he was in Zimbabwe and perhaps it was made to the Foreign and Commonwealth Office delegates.

114. Witness 1, who gave evidence before us, was not a person that any member of the delegation had seen in Zimbabwe. Mr Walker said that the evidence he had given before us was not different from anything which had come from source F, although he put a different interpretation on it.

115. Mr Walker was asked why he had not gone to see the Zimbabwean Immigration Service. He agreed that there had been a visit to that department. It was not only a courtesy visit, as had been the visit to the Ministry of Foreign Affairs. When he was cross-examined about it, he said that this was a meeting about visas and other operational matters which were of particular interest to the Foreign Office. When he was pressed to say why he did not go himself, he declined to say in open court (and did not do so at all).

116. He said that during the course of their investigations, the delegation did not ask about specific allegations made by individuals, saying that the object of the exercise was to find out whether the general allegations about mistreatment are true. He was aware of some individual claims which had been set out in an article in The Times before they went. He said it was not the delegation's job to look into those individual claims, although the Embassy had been asked to see what it could find out. He would not be drawn in cross-examination on the details of the individual claims but he did say that he was not aware of any pro-active attempts to trace the individuals concerned. He was anxious to draw a distinction between saying that somebody had disappeared and that they could not be found. He also accepted that source F was the main organisation used by the Embassy to attempt to investigate claims. He was asked to explain how the delegation decided which organisations to visit and he said that the original suggestions came from him, based on sources used by the Respondent. He said that at that stage he did not know about witness 2 because, although he had

previously given help to the Respondent, Mr Walker was looking for organisations not individuals.

117. Mr Walker was asked about the different sources. He agreed that source B works with Governments and NGOs and the legal sector throughout southern Africa and was not a source which a victim would approach direct. However, he was anxious to point out that, as with a number of the sources, they have tentacles and contacts throughout a wide range of organisations. One of the reasons for visiting source B was to assure the delegation that they would receive such feedback as the source was able to give. He said that in general the discussions with the sources were about their networks and their connections to other organisations and he was not expecting that they would receive direct reports from failed asylum seekers. He was asked about his use of the word "systematic" and the fact that it appears throughout the field report. He said it was his word and he used it to distinguish a pattern of behaviour from individual and isolated incidents. All the sources said that although they were not confident they would know about any individual case of mistreatment, they would know about systematic mistreatment.

118. In reference to source E, he again agreed that this was not an organisation that a failed asylum seeker would approach direct, but he again said that it is an organisation with an extensive network.

119. When he was again asked about witness 2, he again confirmed that he did not disagree with the assertion in the recent statement from a member of source A that he was one of the most knowledgeable and fair-minded people. He agreed that the witness statement made by witness 2 was not inconsistent with the meeting which he had had with people at source F and was not surprised by anything said by witness 2. The final page of the witness statement from witness 2 says:

> "It is, however, fantasy to say that NGOs have a system in place that can be relied upon to produce specific evidence of the mistreatment of individual asylum seekers removed by the United Kingdom, either at the hands of the CIO on arrival or thereafter. There is no such tracking system."

120. This was put to Mr Walker as being different from his own conclusions, but he said that there is no claim in the field report that anyone monitors individual asylum seekers who are returned. He said that there is a capacity to monitor and investigate individuals who may be identified, but he acknowledged that no organisation is doing general monitoring "just in case". He said that whilst specific investigation is important, it is also very important not to overlook the networks which all these sources have and he again said that source F does have some resources to investigate through its own contacts, for example lawyers and doctors.

121. Mr Walker accepted that the latest statement from a member of source A differed from the field report in relation to the purpose of its office in London. However, he said that what he had put in the field report was the message that he received when he was in Zimbabwe. He said he did not know where the misunderstanding had arisen but he had given a clear account of what was said to him. He did accept that only one member of source A claimed to have any safe houses. He ventured to disagree with the statement where it said that source A can only act if someone complains to it. He was keen to emphasise that they can give feedback and include information in their report, even if help is not sought by an individual.

122. As to Operation Murambatsvina, he acknowledged that in general terms it had made it more difficult to trace people in Zimbabwe although he questioned whether this would make any difference to a returning failed asylum seeker who, because he had not been in Zimbabwe, would not have been moved.

123. Mr Walker acknowledged that the evidence is that the British who are involved in returning failed asylum seekers identify forced returnees to the Zimbabwean authorities. He said he did not know if they dealt with the CIO or other forms of authority, but he did acknowledge that documents were handed over to Zimbabwean officials at the airport. He did not know to which sort of authorities those documents were handed.

Oral evidence – Iain Walsh

124. The other witness for the Respondent was Iain Lawrence Stephen Walsh, who is a deputy director in the Asylum and Appeals Policy Directorate, which is part of the Immigration and Nationality Directorate. The statement which he prepared for this hearing was supplementary to the one that he made for Judicial Review proceedings and signed on 29 July 2005. That earlier statement contained information about the procedures that the British Government has, through its Embassy in Harare, for investigating allegations of mistreatment of returnees. His more recent statement is designed to update the position of HM Government on the issue of the treatment of returned failed asylum seekers based on the information in the field report and subsequent witness statements produced by the RLC. Insofar as his statement gives the Government's views on the safety of returned failed asylum seekers, that is not of particular concern to us. We have to decide this for ourselves in these proceedings. The statement and much of his evidence is also an analysis of the field report and other evidence which, again, is our task. We mention that, not in any way to disparage the evidence from Mr Walsh, but to explain why our summary of it is relatively short in relation to the length of his two statements and his oral evidence.

125. Mr Walsh summarised the field report and then went on to say that the majority of the organisations had stated they would expect to know about mistreatment of

returning failed asylum seekers if it in fact occurred. He also said that it was a clear conclusion from the field report that

> "A number of significant NGO bodies continue to consider that they are capable of operating in a way which would effectively identify evidence of human rights abuses of returned asylum seekers."

126. He drew comfort from the readiness of the NGOs to speak to the delegates on the field trip openly and argued that this was a reason not to accept the contrary arguments that NGOs in Zimbabwe would not be prepared to alert the Embassy if such abuses were occurring.

127. He dealt in his statement with fourteen anonymised cases which had been notified to the Respondent in a letter dated 28 July 2005 and gave the extent of what had been found out about them. Of those, there were three that he dealt with in more detail than the others and accepted there was evidence which, if substantiated, could show that there had been serious mistreatment which might breach the Article 3 persecution threshold. The first person gave an account of having passed through Harare Airport but being mistreated subsequently. The second travelled back on the same plane as a relative who saw him taken off the plane at Harare Airport under escort prior to going missing. He re-appeared several days later, having been beaten at the hands of the CIO. Mr Walsh gave reasons as to why he says there are doubts about this person's credibility. The third said that he had been handed over to the CIO on arrival at the airport and ill-treated so badly that on release he could hardly walk. Mr Walsh mentions that this man had been found not to be a credible witness by an Adjudicator during the course of his asylum appeal.

128. In his witness statement, Mr Walsh says that the position of HM Government is that immigration officials and the CIO will be aware of who is a returnee from the United Kingdom and that that person is more likely to be questioned that returnees from other countries. He said the Zimbabwean authorities would be looking to identify those people whom they considered might have political opinions or be undertaking political activities at odds with the position of the Zimbabwean Government and that they would not know when they began questioning somebody whether they were a failed asylum seeker or a returnee in another capacity, although that information may be revealed during questioning. The Government's view is that failed asylum seekers, if identified as such, might be likely to face more in-depth questioning than other returnees from the United Kingdom because their reasons for being in the United Kingdom for what may have been quite a lengthy period may not be as readily apparent as some other travellers, and the authorities would want to have an account of what the individual had done whilst in the United Kingdom. HM Government accepts that where extended questioning takes place, it might well cover wider issues than what the person has done in the United Kingdom and that if the Zimbabwean authorities were satisfied on the basis of the questioning that an individual's political opinions/activities were not adverse to the Zimbabwean

Government, the individual would normally be allowed to pass through the airport at that point. He said that HM Government's position is that the mere act of applying for asylum in the United Kingdom would not put an individual at real risk of being placed in the category of somebody whose political opinions or activities were determined by the authorities to be adverse to the Zimbabwean Government and would therefore not put an individual at risk of mistreatment or persecution on return to Zimbabwe. Mr Walsh was prepared to accept on behalf of the Government that there may be rogue cases.

129. Finally, he accepted that if the Zimbabwean authorities identify an individual as a political opponent, that individual would, depending on factors identified in SM, be at risk of serious treatment which could meet the Article 3 threshold. However, he made the point that failed asylum seekers would have been determined by the United Kingdom's asylum decision-making and appeal process as not being in this category.

130. When examined in chief, Mr Walsh had nothing to add to his statement following the receipt of the RLC witness statement.

131. When cross-examined, he acknowledged that certain parts of the population suffer gross and systematic abuse from the Zimbabwean regime and he acknowledged that there are a large number of human rights abuses occurring in Zimbabwe.

132. He agreed with Professor Ranger as to the identity of the person in charge of security in Zimbabwe and, in particular, the CIO, and his published attitudes. He was asked whether holding a political opinion adverse to the Zimbabwe Government's interest would include being a spy or a traitor, and he said that the crucial factor would be to see what a returnee believed and the question of the attitude of the CIO would depend on how the questioning of the returnee went. He did not agree that referring to the CIO questioning somebody in depth meant that would involve beatings or ill-treatment but he did accept that if the answers to the questions raise suspicion, then the way in which the CIO went about its conduct of an interrogation could be as highlighted by Professor Ranger. When pressed about the way in which people may be questioned by the CIO, and who may be suspected by them of disloyalty, treachery or spying, Mr Walsh relied on the statement of the Government's position as set out in paragraph 26 of his recent witness statement.

133. Throughout his cross-examination, Mr Walsh's line was that questioning by the CIO at the point when there was merely a suspicion carried no risk. He referred to that as the first stage of the process. He went on to say that if the CIO forms a view that the suspicion is made out, then that is the point at which a risk arises. It was put to him that that was an implausible stance but he said that it would depend on the CIO's suspicion. If the CIO officers had made up their mind, then there would be two stages to the interrogation. He maintained the stance that the

interrogation in the initial phase would not routinely involve torture. He said that the difference between him and Professor Ranger may be dependent on the meaning and context of "interrogation". He did not regard the distinction between in-depth questioning and interrogation as a material point.

134. Mr Walsh accepted that when a person is escorted back to Zimbabwe, the situation was not as Collins J had been told at the Judicial Review hearing. The escorts do get off the plane with the returnee and hand him or her over to the Zimbabwean authorities. He said that in relation to unescorted returnees, their papers would be handed to the air crew on the aircraft, but there is no direction as to when the papers must be handed over. He did, however, acknowledge that in most cases they are not handed to the returnee but to the authorities in the receiving country.

135. When he was taken through the difference in his position as between the recent witness statement for these proceedings and that prepared for the Judicial Review hearing, he said that HM Government accepts that there is a real prospect of lengthy questioning by people who were returned from the United Kingdom. He could not say with certainty that it would be the CIO but it could be by them. He was reminded that in his earlier statement he had described how the Embassy had developed its practices to investigate the issue of mistreatment of returnees, both to ascertain whether there is a general pattern and in individual cases. He there made reference to the Embassy routinely meeting with and calling NGOs and how it is said that the Embassy was confident it would rapidly be made aware of the pattern of mistreatment of returnees because the Zimbabwe political/NGO/diplomatic community is small and news travels fast. He stood by that section of his statement as a description of the way that the Embassy carries out its work and that its best course was to get a broad spectrum of advice from associations that are embedded in the community. He was satisfied the Embassy would know if a pattern of systematic mistreatment was emerging, but of course could not discount individual occurrences. He did not think it was right to rely on one particular organisation's view. He accepted that many people would not wish to formally report their treatment and he acknowledged that if NGOs did not find out about matters, then nor would the Embassy.

136. In relation to the cases that had been referred to the Respondent by the Zimbabwe Association, Mr Walsh said these cases had been referred on to an NGO but as the Respondent was unable to disclose the names or much other information because it was prevented by a court order, the NGO had not been able to achieve very much. He said that any case where there was an allegation that a particular person has been mistreated, that would be passed on to the Embassy with a view to investigating the claim.

137. It was put to Mr Walsh that Professor Ranger had said it was misleading of the field report to conclude that there are human rights bodies operating in such a way as to enable them to identify ill-treatment if it is occurring. Mr Walsh said

that the field report is a factual account of what the organisations had reported to the delegates. All their accounts had been checked with them and therefore the field report is no more than an agreed report of what was said to the delegates. Mr Walsh's conclusions from what was said is that they did say they would be aware if there was mistreatment occurring to returnees. That was the Government's view because that is what the NGOs said to the delegates. Only one retracted some of what it said. He acknowledged that not all the sources in the field report were of equal value. Although there is a difference in the view of source A as between the field report and the later statement, the later statement does not retract the view that the organisation would know if there was evidence of systematic abuse. He said that the subsequent statement was not a retraction but an expansion of what had been said earlier.

138. Mr Walsh accepted that source B was not one that would receive direct complaints or reports but he said that they would expect to be aware through their connections such as other NGOs and sources. Source C is not an NGO. As to source D, Mr Walsh accepted that the subsequent statement had been made and that was different from the original statement to the delegation. He accepted that they had changed their stance.

139. He accepted that source E was not one to which people would report their problems directly. He was taken through the various organisations and readily accepted that many were not such that people would complain directly to them, but he maintained his view that they were, in the main, organisations that would know if there was systematic mistreatment from their networks. He accepted that the organisation at source M was not there to look into torture and that source N was not "the main plank of the Government's position".

Country of origin information report

140. As we have said earlier, we had in our bundle the draft of the October 2005 Country of Origin Information Report. We have not considered that in any detail because, to a large extent, the evidence which we have been considering is effectively source material for the document and the document draws upon the same sources. It was not referred to expressly by either party during the course of the hearing.

V

Conclusions

141. This is a finely balanced case. Both parties rely on circumstantial evidence. Both parties rely to an extent on supposition. The Respondent relies in particular on the report produced by Mr Walker after his visit to Zimbabwe. He asks us to accept the argument that if returned asylum seekers were, as a category, at risk of ill-treatment, the NGOs with whom he had contact would have heard about it.

The Appellant points to reports and rumours of ill-treatment of returned asylum seekers going back over a considerable period of time. The Respondent says that none of them are to be believed, or that if a few of the reports that do represent the truth they do not show a general risk. But the Appellant submits that, sporadic though the reports are, they do demonstrate a general risk.

142. It is the Appellant who has the burden of proof. But we do not look at the Appellant's evidence in isolation. We look at the evidence as a whole. That task is made no easier by the fact that the Appellant's evidence is of an entirely different nature from the Respondent's.

143. The Appellant's evidence is partly particular and partly general, but it is all positive. The Appellant's general evidence is intended to show that ill-treatment of returned asylum seekers is exactly the sort of thing one would expect to happen, given what is known in general about the regime in Zimbabwe and the motivations and activities of the CIO. The particular instances which the Appellant brings forth are intended to demonstrate that what one would expect to happen in fact does happen. The Respondent adduces no specific evidence to support the contrary view. His evidence is entirely general, and it argues from silence. Whilst accepting much of what the Appellant says about activities within the regime, the Respondent asserts that returned asylum seekers are at no particular risk. He derives that proposition not principally from specific advice that the risk does not exist, but from sources who have informed him of what they might expect to have heard. The Respondent points to no individual cases of returned asylum seekers who have not been ill-treated. But perhaps he does not have to do so: the burden of proof is not his.

144. At one level, and in particular if one considers the Respondent's position first, his evidence appears quite persuasive. A delegation, consisting of Home Office and Foreign Office officials, went to Zimbabwe, charged in part with investigation of precisely the issue arising in this case. Their visit was the object of public comment, but they were able to have private meetings with a number of bodies who would be concerned. Sources and organisations were assured of anonymity. They were asked specifically whether they were aware of any regular or systematic ill-treatment of returned asylum seekers as such. None of them said that they were aware of any such general risk. The majority of them said that they would expect to be aware of any such risk if it existed. One of the organisations appears to be recognised as that which would have the task of alleviating any such specific ill-treatment if it were reported. Even that organisation could point only to a tiny number of specific cases that might conceivably support the Appellant's case. In these circumstances, the Respondent might well feel, as he evidently does, that the risk asserted by the Appellant is not one that exists in fact.

145. Several of the points made by the Appellant against the Respondent's evidence have in our view little or no force. We see no reason at all to doubt Mr Walker's

word or the record of his conversations, or the integrity of his process for ensuring that the contents of his report had been agreed by his sources. We find the subsequent comments of the sources to the Appellant's advisors to be of little effect in supporting the Appellant's case. Nor are we remotely persuaded by the Appellant's demonstration that very few of the organisations concerned are involved with human rights complaints by individuals. They are monitoring bodies, and many of them referred to their general knowledge of human rights abuses in Zimbabwe. But some of the other points made on behalf of the Appellant against the Respondent's evidence do, we think, have considerable impact. They are as follows.

146. First, although no doubt Home Office officials have a very wide competence, it is surprising that the investigation of facts and country circumstances was made by policy staff. It was not made by, or analysed by, members of the Country of Origin Information staff. The way in which the investigation was conducted, and the way in which the results were presented to us, gives rise to the possibility – we say no more than that – that the investigators may have had existing policy in mind rather more than the discovery of new facts. We emphasise that we do not suggest at all that the process of gathering information and reporting it to us was intended to mislead: but we have to recognise that, as Mr Walsh in particular made clear, the results of the investigation were being put to us very clearly in the context of Government policy and the Government's view.

147. Secondly, despite the facilities available to the investigation and the level at which it was conducted, it reveals nothing of the actual process which returned asylum seekers go through on their arrival at Harare Airport. This is particularly surprising in the light of evidence that another unit within the same delegation, not led by Mr Walker, had discussions with members of the Zimbabwean Immigration Service. Mr Walker declined to say why his part of the delegation had not had any similar discussions. It may well be that there would have been comprehensive denials of any ill-treatment of returned asylum seekers: but the point is that this particular fact-finding body did not investigate those facts, or did not report on them.

148. Thirdly, we are bound to take into account a point we have already enumerated – that the Respondent relies not at all upon individual cases. This is surprising from two points of view. The first is that, as the evidence before us makes clear, there had been a number of individual reports of ill-treatment. Although in the Judicial Review proceedings the Court was assured that they were being followed up with a view to investigating the facts, the evidence before us was of little progress, and the implication was that there would be no more progress. We do not accept the suggestion made by Mr Henderson's choice of words that that was because the individuals in question had all disappeared in suspicious circumstances. But, even if the word "disappeared" is not used, the situation apparently is that none of these individuals can be found. It might be even more accurate to say that none of them has been found. As a result, the Respondent is

unable to say in general that the individual cases have been the subject of further investigation in Zimbabwe, despite the presence of a High Commission, local contacts with NGOs, and the delegation.

149. The complementary point of view is that the Respondent had been returning refused asylum seekers to Zimbabwe for a period of some months, apparently (as we can only suppose from the small numbers returned) carefully selecting them from the much larger number of those liable to be returned. For much of the period during which the returns were taking place there were sporadic reports of ill-treatment, and the very fact that returns had been recommenced after a period of suspension must have drawn the attention of any decision-maker to the need for constant review of the safety of those being returned. Every individual being returned has to be expressly identified by the Government in this country: the individuals in question are not self-identified, as claimants and complainants are. Yet there is no evidence before us that the Respondent has monitored returns, or that the result of any investigations has been that the individuals, whose identities he knows, were (or were generally) able to pass through Harare Airport on their return without any appreciable difficulty.

150. We think it is right to say that we do not know why the Respondent did not rely on any individual cases. We consider, however, that, with all the information and powers of investigation at his disposal, his failure to trace individual complainants in Zimbabwe, and his failure to provide any evidence of monitored satisfactory returns to Zimbabwe are both, in the present context, exceedingly surprising.

151. The Respondent's argument is from silence: but silence can speak, and it does so when opportunities to rebut evidence are not taken. Evidence on behalf of the Appellant that is frail or apparently unsatisfactory may more easily discharge the burden of proof when it is shown that efforts to rebut it are more unsatisfactory still.

152. We turn then to the evidence provided on behalf of the Appellant. We accept the submission made on behalf of the Respondent that there are reasons for doubting the credibility of those who have made specific complaints about ill-treatment. That does not mean, of course, that what they say is not the truth: but it does not assist the Appellant in establishing that it is. We prefer, however, to begin our consideration of the Appellant's evidence with some generalities which do not appear to be subject to any reasonable dissent.

153. First, the CIO is the organ by which President Mugabe enforces a violent regime, intolerant of any shade of opposition, irrational in its motivation and indifferent to individual human rights. We do not need to dwell on the clear evidence of all that: we accept Professor Ranger's evidence on the general situation, derived from many years of experience and personal acquaintance with leading figures.

154. The CIO are not primarily responsible for immigration services at Harare Airport. They do, however, have a presence there. The evidence we have seen makes it clear that when planes from the United Kingdom arrive at Harare members of the CIO are present in great numbers. Although there was some suggestion in the evidence before us that the Zimbabwean authorities treated arrivals from other white Anglophone countries (the United States of America, Australia and New Zealand, for example) with similar suspicion, it is in our view clear that the CIO take a particular interest in arrivals from the United Kingdom. Nevertheless, it appears to be the case that ordinary travel to and from the United Kingdom, including voluntary departures by those who have had dealings with the immigration authorities of this country, are dealt with in the usual way by immigration officers (not the CIO) at the airport in Harare.

155. Involuntary departures are a different matter. The evidence from the Respondent in this appeal appears to demonstrate that the following process is adopted. The individual in question, if accompanied on the plane, is escorted from the plane and not handed over in Harare until the escort has a satisfactory assurance that the passenger will be permitted to enter Zimbabwe. The passenger's papers are handed by the United Kingdom authorities to the custody officers or the air crew of the plane. At that point, it appeared to us that the Respondent ceased to have any very clear interest in what happened. The evidence was that the Respondent's understanding was that the air crew retained the documents during the flight and, on arrival in Harare, handed them to Zimbabwe officials. The Respondent's witness indicated that, by retaining the documents for the whole of the flight, the airline could be assured that a passenger who is being involuntarily removed from the United Kingdom would not destroy his documents and so hinder his admission to Zimbabwe. That may be so, but we find the Respondent's lack of interest in the process by which individuals that he returns to Zimbabwe are received by the Zimbabwean authorities rather alarming.

156. What is clear is that, as a result of a combination of the CIO's interest in flights from the United Kingdom and the Respondent's and the airline's way of dealing with the documents of those removed involuntarily, such persons are not dealt with by the ordinary immigration service. They are drawn immediately to the attention of the CIO.

157. That seems to us to be the proper conclusion to draw from the written evidence of witnesses 5 and 6. They had first-hand knowledge of the mechanics of return, and their evidence accords also with that of Professor Ranger. Witness 5 sets out the procedure by which passenger manifests were faxed to the immigration office in Harare so that they could be analysed by local officials, including the CIO. In the case of returns from the United Kingdom, the position was that passengers had to collect their baggage from a point immediately opposite the CIO desk. Those in whom the CIO had an interest were at that point asked to attend for interview. But of particular interest also is this person's experience specifically of deportations, although the deportations of which he had experience were, as he

put it, "mainly from South Africa". He said that the South African authorities would have given the deportee's passport to the pilot rather than to the deportee. That parallels the process adopted by the United Kingdom authorities in securing involuntary removals from the United Kingdom. The witness goes on to say that when the plane landed, the pilot would hand the passport to the Zimbabwean immigration officers. Deportees were taken to a room adjacent to the immigration section, where they were required to wait until all the other passengers had been cleared. Deportees would then be handed over to the CIO. Writing as he did on 29 July 2005, this witness confirmed, on the basis of contact with former colleagues, that similar arrangements remained in place and that all asylum seekers returned from the United Kingdom were handed over to the CIO.

158. This process seems to us to distinguish returns to Zimbabwe from those of a number of other countries with which the Tribunal is familiar. In Zimbabwe, there does not appear to be any possibility that those disembarking from the plane will be treated initially all in the same way, screened by local immigration services, and only referred to police or intelligence services if reference to a database causes any concern. In the case of returns to Zimbabwe, the screening never takes place. The CIO have immediate access to all those who are the subject of involuntary return.

159. The Respondent's evidence suggested that in such circumstances, CIO officers will first themselves conduct an anodyne screening interview. There is, of course, no particular reason for supposing that happens: the Respondent's view appears to be based on his experience of reasonable civil servants throughout the world. We cannot say that his process of reasoning is applicable to Zimbabwe. On the contrary: it appears to us that the well-evidenced paranoia of the Zimbabwean regime is likely in the highest degree to be expressed against those who have already presented themselves as having unsuccessfully made allegations about their safety in Zimbabwe. It has to be a matter of inference: but we prefer the evidence of Professor Ranger on the likelihood of mistreatment of those who, whether at the airport or elsewhere, have an individual interview with a member of the CIO.

160. It is in this context that we consider the evidence of individual cases of alleged ill-treatment. It may be that none of the accounts individually carries an absolute assurance of credibility. Many of the complainants have, as the Respondent points out, been found by Adjudicators not to have been entitled to credit in the stories they told in an attempt to secure status in this country. They have, as individuals, no general credibility. They are not entitled, individually, to "the benefit of the doubt". But, when one takes into account those whose allegations have been the subject of detailed evidence before us, together with those who had made earlier allegations and are described summarily in Mr Walsh's evidence, they now constitute together a considerable body of witnesses. No doubt each of them has a vested interest in making the claim he does make (the phrase is Mr

Kovats') but for some at least of them it is no longer an interest in maintaining an asylum claim in the United Kingdom as they are now in fact abroad.

161. And the truth of the matter is that, whatever doubts one might have about the complainants individually, the body of evidence, from a score of separate people, all goes one way. Further, none of it seems itself to bear any marks of unreliability, and all of it accords with what one would generally expect of the CIO.

162. If the Appellant's case is right, the Respondent's argument from silence – his assertion that if returned asylum seekers were as such at risk the NGOs would know about it – is mistaken. How could this be so? We think that there is a ready explanation.

163. The Appellant's claim succeeds if he shows a real risk: he does not need to prove a certainty. As we have attempted to explain above, the claim that every person returned involuntarily is at *real risk* of ill-treatment is not a claim that every one will in fact suffer ill-treatment. Likewise, looking at the past, the Appellant does not need to show that all those who have been returned involuntarily did suffer ill-treatment. He is entitled to rely, as he does, on evidence pointing to a substantial number of cases in the context of general evidence showing the source or reason for the risk.

164. A substantial number, in the context of the few returns that have actually been undertaken, is obviously fewer still. Only those who claim to have in fact suffered ill-treatment could make a complaint, and not all of them will complain. So the number of complaints of which NGOs might possibly become aware is unlikely to be at all large.

165. The evidence before us was that NGOs in Zimbabwe are the subject of general disapproval by the regime and have been under threat of suppression or control. Further, Operation Murambatsvina has affected an enormous number of people - estimates in the evidence range from 750,000 to nearly double that number - all of whom may raise individual complaints about the way they are treated by their Government. There is plenty here to distract hard-working NGO officials from the possible plight of a small number of claimants returned by the United Kingdom Government during a few months. Of course the NGOs *might* have heard of a general risk, but it is not remotely surprising that they have not. For these reasons we find that the field report does little or nothing to counter or rebut the evidence adduced on behalf of the Appellant.

166. For the foregoing reasons we have reached the view, on the evidence before us, that the process by which the United Kingdom Government enforces the involuntary return of rejected asylum seekers to Zimbabwe exposes them to a risk of ill-treatment at the hands of the CIO.

167. We can deal more shortly with other issues. The question of whether such ill-treatment, if it did occur, would be of such a level as to amount to persecution, was not specifically addressed by either party. We have made it clear that, even if not every one of the individual complaints is credible, taken together and with Professor Ranger's evidence, they present a reliable general picture. We are not surprised that we were not asked to say that ill-treatment at the level reported would not be persecution. It clearly would be.

168. Our findings as to risk, taken together with the legal principles and the concession that we set out in part II of this determination, mean that the Appellant has made his case. He has a well-founded fear of persecution for a Convention reason if he is returned to Zimbabwe; he has also established that he is at risk of treatment contrary to Article 3 if he is so returned (Mr Kovats' concession makes it unnecessary to draw any distinction between the two claims). His claim is based on the consequences, and not the merits, of the claim itself. The fact that the Appellant made a false claim, so generating the risk which would otherwise not have existed, does not alter the fact that the real risk of serious harm exists now. In this case, we are not concerned with the Appellant's motives or intentions but with the risk he faces on return. He has become a refugee, entitled to all the benefits that that status carries, by making a false claim to be a refugee.

169. Nobody, least of all organisations concerned with the welfare of those who genuinely fear persecution (such as the Refugee Legal Centre, who represent the Appellant in this case) can take any comfort from a conclusion that can accurately be represented in that way. We fear that our decision, based as it is firmly on the evidence we have heard and legal principles that are binding on us, will seem to demonstrate or confirm that refugee law is inherently prone to abuse. For that reason we allow ourselves the following observations before parting from this case.

170. First, in relation to the evidence we have heard, it is possible that we might have taken a different view if the Government had made any arrangements to ensure so far as possible that those returned voluntarily and those returned involuntarily are not so readily distinguishable on arrival. A part of the risk we have identified arises from the Government's apparent disinterest in the precise way in which passengers documents are dealt with by airline staff. It is also possible that we might have taken a different view if there had been evidence – from the field report visit or otherwise – that substantial numbers of failed asylum seekers, returned involuntarily from the United Kingdom, had passed through Harare Airport without any problems. If the Government is concerned to avoid risk to individuals and in making policy decisions based on fact, it will no doubt carefully monitor returns to any country regarded as dangerous, and will present the resulting facts as evidence in asylum appeals.

171. We make these observations on the evidence not because we think that the Respondent bears any burden of proof in these appeals, but because we consider

the evidence as a whole. As we have said, we reached the conclusion we did because, looking at the evidence as a whole, we found that that adduced on behalf of the Appellant is a broadly reliable guide to the facts.

172. Secondly, if Mr Kovats had not conceded the issue of whether the ill-treatment would be for a "Convention reason", we should have wanted to examine that question with great care. It is asserted in the Appellant's evidence that any ill-treatment would be motivated by a perception of treachery. That may be right: given the concession we did not need to consider the matter further. But there seems also to be evidence of the regime's general distaste for its own citizens, an apparent wish to keep them on the move and a wish (expressed by Didymus Mutasa, who controls the CIO) of ridding the country of millions of "extra people". If the ill-treatment arose from attempts to encourage emigration, or discourage return, or even from *odium humani generis*, that would probably not be a Convention reason. Article 3 would nevertheless prevent the Appellant's return; but he would not have the status of a refugee.

173. Thirdly, we wonder whether Danian requires further examination. Ought the Refugee Convention to be confined to cases of what might be called "real" need? Does it genuinely require the status of refugee to be given to a person like the Appellant whose claim arises solely from his voluntary and dishonest acts in the safety of the United Kingdom, or to others who, on the strength of this decision, may make an asylum claim purely in order to get the benefit of it? Or are such persons adequately protected by the European Convention on Human Rights, which has been incorporated fully into English law since Danian was decided? That Convention would protect them from the risk of harm that they have voluntarily or cynically chosen to incur, without giving them the benefits of refugee status.

174. As we have indicated, these are matters that do not call for decision by us. For the reasons we have given, the Appellant's appeal is allowed.

C M G OCKELTON
DEPUTY PRESIDENT
Date:

APPENDIX

	Source
A	Human Rights NGO Forum
B	Regional HR NGO
C	Anonymous
D	A church organisation
E	Anonymous
F	Anonymous
G	An international human rights organisation
H	Zimbabwe Peace Project
I	International Organisation for Migration
J	Zimbabwe Lawyers for Human Rights
K	Zimbabwe Association of Doctors for Human Rights
L	British Airways
M	International humanitarian organisation
N	A diplomatic source