Upper Tribunal
(Immigration and Asylum Chamber)

Fernandez (Dissidents and defectors) Cuba CG [2011] UKUT 00343 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 June 2011	
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Before

SENIOR IMMIGRATION JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERIK IVAN VEITIA FERNANDEZ

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms V Easty, Counsel, instructed by Brighton Housing Trust

(i) The human rights situation in Cuba is dismal and the government continues to deny its citizens basic civil and political rights.

(ii) The authorities are intolerant of any form of unauthorised opposition to its political agenda and the law is used to criminalise dissent.

(iii) The term "dissident" in the context of Cuba does not refer to a homogenous group of people but can refer to anyone engaging in activities regarded by the authorities as contrary to its political agenda.

(iv) The "dangerousness" law is used as a political tool against those seen as dissidents or otherwise opposing the regime's political agenda

(v) Those regarded by the Cuban authorities as opponents, dissidents or defectors can be at risk of treatment of sufficient severity to amount to persecution. Whether a particular individual will be at such risk depends upon his background and profile but in general terms an active political opponent who has come to the attention of the authorities or someone who has been openly disloyal to the regime is likely to be at such risk.

(vi) This guidance replaces that given in OM (Cuba returning dissident) Cuba [2004] UKAIT 00120 which is no longer to be regarded as providing country guidance.

DETERMINATION AND REASONS

1. This is the resumed hearing of an appeal by the Secretary of State against the determination of an Immigration Judge who allowed the respondent's appeal against the decision made on 2 July 2010 to remove him from the UK following a decision that he was not entitled to asylum. In this determination I will refer to the parties as they were before the First-tier Tribunal, Mr Fernandez as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Cuba born on 14 February 1967. He left Cuba on 27 August 1995 and went to Botswana where he lived and worked until he came to the UK in January 2006 following the grant of entry clearance as a student. He was granted further leave to remain in this capacity until 31 December 2008. On 5 January 2009 he applied for further leave but this was refused on 11 August 2009 because of a failure to disclose a conviction. He did not attempt to regularise his immigration status until 20 April 2010 when he claimed asylum. His application was refused for the reasons set out in the respondent's decision letter dated 2 July 2010. His appeal against this decision was allowed following a hearing on 17 September 2010. The respondent was subsequently granted permission to appeal and in a determination issued on 18 January 2011 the Upper Tribunal (Irwin J and SIJ Eshun) found that the judge had erred in law such that the determination should be set aside for the following reasons:

> "1. The Secretary of State appeals the determination reached by Immigration Judge Abebrese following a hearing on 17 September 2010 promulgated on 13 October 2010. In the course of this judgment we will refer to the parties by name, since the description appellant and respondent might be confusing.
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> 2. Mr Fernandez was born on 14 February 1967 and is a citizen of Cuba. His personal history is well set out in the determination, but in very short summary

he moved to Russia in 1986 to study physics and mathematics. He returned to Cuba in 1991, remaining there until 1995, and in the course of that period his case is that he got into various difficulties with the Cuban authorities. He subsequently lived and worked in Botswana and there were complicated events and relationships between Mr Fernandez, the Botswana government, the Cuban authorities and Mr Fernandez's attempts to work in Russia or to achieve other changes in his life.

3. In 2006 Mr Fernandez left Botswana and came to the United Kingdom on the grounds that he had been accepted for a teaching post. He hit a difficulty with achieving a job as a teaching assistant, but in fact decided to enrol as a student in the United Kingdom, since he could by then not return to Botswana. He has renewed successfully his student visa on three occasions. As the Immigration Judge found, Mr Fernandez's wife joined him in the United Kingdom as his dependant. However, that relationship broke up in circumstances of some complexity. Mr Fernandez sought legal advice and was advised to claim asylum in 2010.

4. On 1 July 2010 the decision was made to refuse to grant asylum and indeed on 2 July a decision was made to remove Mr Fernandez from the United Kingdom. The decision letter recites the basis of the asylum claim and a good deal of Mr Fernandez's personal history as well as the immigration background. The letter also recites some of the objective information on the general policy regarding human rights and the treatment of detainees in Cuba. Then in passages beginning at paragraph 25 of the decision letter, the heart of the reasoning on the part of the Secretary of State is set out. The Secretary of State noted that Mr Fernandez has

> 'Generally provided a consistent account of your reasons for claiming asylum in the UK and, further, that your description of Cuban immigration policy as given … is consistent with the background information …'

5. However, the Secretary of State also noted that Mr Fernandez departed from Cuba originally with a two year contract from the Cuban authorities authorising his employment in Botswana, and that therefore the original departure from Cuba was with the indefinite or permanent exit permission of the authorities. The Secretary of State went on to note the rather complicated history of applications to renew Mr Fernandez's Cuban passport. The relevant text reads:

> 'It is further noted you claim a Cuban passport is valid for six years but must be renewed every two years … You state that you renewed your passport twice in 2000 and 2002. However you go on to claim that after your passport was withheld in 1998 and you demanded it be returned to you, your passport was returned with an issue date of 1999 and would therefore have expired in 2005. You then state that you only began renewing after this passport expired … Finally you claim you were issued with a new passport in 2004 or 2005 in Botswana … In your further representations … you add that you renewed your passport in the UK in 2007 and 2008 and at this point you were told that you could only return to Cuba for 21 days, after which you would have to leave … You further state that your family have advised you that nothing has changed and the

> authorities are waiting for your to return in order for them to "make an example out of you".'

6. Given that history, the Secretary of State took the view that it had not been necessary for Mr Fernandez to renew his passport in 2007 or 2008 and that, given the various irregularities present in the account, it was not accepted that Mr Fernandez's immigration status in Cuba is as he claimed. Moreover, the letter notes that when Mr Fernandez was asked if he had ever attempted to have a ban on his return to Cuba lifted:

> 'You stated that you had "never bothered" because of the way you were treated by the Cuban authorities.'

The Secretary of State therefore concluded that Mr Fernandez had not provided any evidence that he had tried and failed to obtain a permit to enter Cuba from the Cuban Embassy in the UK. Thus it was not accepted that he had taken adequate steps to ascertain whether or not he would be granted an entry permit to Cuba and hence he had not sufficiently established that he was banned from the country.

7. The decision letter went on to rely upon what was said to be the status of perceived dissidents in Cuba, as considered in the country guidance case OM (Cuba returning dissident) Cuba CG [2004] UKAIT 00120. The Secretary of State suggested that the thrust of the OM case was that even someone with the asserted past history of the claimant in OM might very well live reasonably in Cuba and obtain an exit permit.

8. There is no Record of Proceedings of the hearing before IJ Abebrese but it is clear from the determination that much the same position was adopted by the Secretary of State in the course of the hearing. In the course of his long paragraph 11, the IJ made a reference to the Human Rights Watch Report, stating that the Cuban government forbids its citizens from leaving or returning to Cuba without first obtaining official authorisation, concluding that the Human Rights Watch Report gives some support to the claims of Mr Fernandez in relation to the conduct of the Cuban authorities. The judge concluded that the incidents which Mr Fernandez relies upon

> 'are not challenge [sic] by the respondents adequately via the objective evidence to extent [sic] that it suggest [sic] that the Cuban authorities could not have behaved in the manner suggested by the appellant in his evidence.'

Later in the same paragraph the Immigration Judge concluded that the extracts from objective sources

> 'suggest [sic] that his evidence has an element of credibility and that individuals with a similar profile as himself who have sought to return have been arrested and dealt with severely by the authorities in Cuba.'

The IJ went on to conclude 'I found the evidence of the appellant credible and that the facts of this case can be distinguished from OM (Cuba returning

dissident) Cuba CG UKIAT 00120', concluded that the appellant "would be of interest to the authorities" [sic] and concluded it would be unreasonable and unduly harsh to expect the appellant 'to exercise internal flight option for reasons stated above'.

9. Senior Immigration Judge Waumsley granted permission to the Secretary of State to appeal on 1 November 2010. It is helpful to recite the reasons:

> 'In substance, the grounds on which the respondent has applied for permission to appeal may be summarised as follows:
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> 1. The Immigration Judge failed to give any, alternatively adequate, reasons for accepting the appellant's account;
>
> 2. He failed to give any reasons for distinguishing binding country guidance authority.'

10. Before us, Mr Norton for the Secretary of State argued that both these grounds were made out. There was no adequate analysis, he said, as to why the Immigration Judge found the credibility of Mr Fernandez established in the face of the points relied on by the Secretary of State, particularly the confusing facts surrounding a Botswana "defection", the confusing evidence about passport applications and the fact that Mr Fernandez had been present in the United Kingdom for four years on student visas before seeking to apply for asylum. Whilst that last point had not been drafted specifically as part of the grounds of appeal, in our view it properly forms part of the consideration of the question of credibility. The second complaint before us from the Secretary of State was that the Immigration Judge completely failed to set out any basis for distinguishing this case from the guidance given in OM.

11. In reply, Miss Easty submitted with energy and eloquence that credibility was in large measure a matter of assessment of the individual witness, that the Immigration Judge had given reasons, including linking his conclusions to the objective evidence submitted in the hearing and that the credibility point was not made out. She submitted that the Immigration Judge had of course been fully aware of the OM case and indeed had made direct reference to it. Moreover, the facts of the appellant in OM were widely different from those in the case of Fernandez and the Immigration Judge's conclusions sat well with the distinction between Mr Fernandez's position and that of the claimant in OM.

12. In our view the general finding as to credibility by this Immigration Judge was sufficient. It is not appropriate to require an essay from an Immigration Judge upon the general topic of credibility. We do observe that it would have been desirable to have been somewhat fuller in giving reasons but we would not have set aside the decision of the Immigration Judge on this basis alone.

13. There were, however, specific areas which did require to be dealt with by the IJ. These included the evidence concerning passport applications and the delay in applying for asylum, an issue which, even if not strictly arising under Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, was an important consideration in the case.

14. We also conclude that the Immigration Judge needed to consider more fully the implications of the OM country guidance case. The format of OM, reading as it does much as might an ordinary judgment, does not lend itself necessarily to the application of the case to other individuals. So far as anyone's researches have detected, this is the only country guidance case dealing with Cuba and it is now several years old. We note in passing it might be appropriate to consider whether there should be a more comprehensive and up-to-date country guidance in relation to Cuba. Be that as it may, the case was one to which the Immigration Judge was obliged to pay proper attention. There may well be a valid distinction to be made between the position of Mr Fernandez and OM, but the IJ had an obligation to set out clearly the reasons why he was able to do so. He did not do so. Once again, there is no need to write an essay on such a point, but a disapplication of a country case must be reasoned, so that all parties can understand the basis on which the conclusion has been reached. Perhaps the most pertinent point arising is that part of OM which deals with the likely treatment of OM on return to Cuba and observes that the prospects were of treatment which, whilst unacceptable in a liberal western democracy, could fairly be described as amounting to no more than "harassment". If such was indeed the prospect for Mr Fernandez, that would be unlikely to found a successful claim for asylum.

15. For these reasons we find that there were errors of law on the part of the Immigration Judge in handling this case. We therefore set aside the decision, allow the appeal and direct that there must be a continuation hearing to remake the decision.

16. After the substance of our decision was communicated to the parties, Miss Easty submitted that Mr Fernandez should retain the benefit of factual findings made by the Immigration Judge, including factual findings as to his credibility in the continued hearing. She has placed in writing the factual findings which it is submitted should be preserved:

> '1. The appellant has openly criticised the Cuban government and the exploitation of the Cuban people (determination para 11 line 4).
>
> 2. The appellant has experienced difficulties when attempting to express his views in Cuba as far back as 1992/1993 (determination para 11 line 5)
>
> 3. The appellant and his wife were banned from Cuba in 1997 (determination para 11 line 8/16)
>
> 4. The appellant suffered the treatment by the Cuban authorities as described in Botswana (determination para 11 line 4 up from the bottom of the page)
>
> 5. The appellant will be permitted entry for 21 days to Cuba and then will be arrested (determination para 11 page 5 lines 6 to 8).

6. The appellant assisted individuals to defect from Cuba for a number of years (determination para 11 page 4 lines 24/27).

7. The appellant would be of interest to the Cuban authorities (determination para 11 page 5 lines 27-29).

8. The appellant's ex-wife has been banned from returning to Cuba. The appellant encouraged his ex-wife to defect (determination para 11 page 5 line 10 from the bottom of the page).

9. The appellant has been downgraded since 1999 and he is now a Cuban citizen who is no longer under the Cuban government (determination para 11 page 5 line 7 from the bottom of the page).'

17. Miss Easty made reference to the general proposition that appellants should retain the benefit of favourable existing factual findings and conclusions. It is correct that the starting point for any reconsideration or remaking of a decision is that factual findings and conclusions arising from those findings which are unaffected by the error of law need not be revisited: see DK (Serbia) v Secretary of State for the Home Department [2006] EWCA Civ 1747. It would be wrong in principle to deprive a party of a finding in his or her favour and to dismantle an edifice of reasoning, when neither is necessary in order to remedy the legal error contained in the original decision: see Sedley LJ in Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045. It is equally correct that where a Tribunal has made a positive credibility finding in relation to a given appellant as to his account of past events, the reconsidering Tribunal's assessment on hearing the appellant about more recent events that he was not in fact credible witness, has been held not to amount to new evidence entitling the Tribunal to go behind the first Tribunal's conclusions as to credibility: MY (Turkey) v Secretary of State for the Home Department [2008] EWCA Civ 477.

18. However, in our judgment the situation here requires careful distinction. The errors of law identified in the Immigration Judge's decision are relevant to aspects of the case affecting the credibility of Mr Fernandez at the time. These are not new matters in the sense identified in MY (Turkey) and the relevant error of law does not stand separate entirely from the credibility of Mr Fernandez. The matter can be analysed in this way. The purpose of the obligation to give reasons in the course of a determination is so that all parties can follow how a given conclusion was reached. In this instance, the parties need to follow why the Immigration Judge was able to dismiss the Secretary of State's attack on the credibility based on the points we have identified. If IJ Abebrese had stated his reasons fully, and the Secretary of State had felt that they were inadequate, the appeal could have been mounted on the reasons given. In such circumstances as this, it would be wrong to preclude the judge on a continuation hearing from reaching adverse implications on credibility, if his or her findings on the specific issues which require further consideration mean that revisiting credibility is appropriate. The Secretary of State has made no concession on this issue even during consideration after argument and submissions in this case.

19. It follows that the appropriate course on the continuation hearing is to focus on those matters which we have identified as errors in the determination of IJ

Abebrese. If having reached conclusions on those matters, the judge in the continued hearing finds those conclusions must necessarily logically reflect on the conclusions of IJ Abebrese favourable to Mr Fernandez identified by Miss Easty, then those matters may be reopened.

20. For those reasons the determination of IJ Abebrese is set aside and a continuation hearing is ordered as set out above."

The Evidence

3. At the resumed hearing before me the appellant gave oral evidence. He relied on the documentary evidence produced at the hearing before the judge (1A 1-172), the additional evidence produced for this hearing in 2A 1-14, an expert report from Ms Joanne Prud'homme 3A, 1-12 and a report from Human Rights Watch dated 1 June 2011 3A, 13-14. The respondent relied on the appeal papers which include annexes A-J and a bundle R 1-52. A full list of the documentary evidence is set out in the annex.

The Appellant 's Witness Statement

4. The appellant set out the basis of his claim in his witness statement dated 24 August 2010 (1A 6-18). This is a more detailed version of the summary (Annex E) submitted to the respondent in support of his application. In light of the issues arising in this appeal, I need to summarise the appellant's evidence in some detail. He was born in February 1967 in Ciego de Avila but moved with his family (father, mother, two brothers and two sisters) at the age of 5 to Guantanamo where he went to school. He then studied Russian at the University of the Orient in Santiago de Cuba and as he finished his secondary studies with good grades he was given the opportunity of becoming a medical doctor in Cuba or a physics teacher in Russia. In 1984 his father who was the Provincial Director for a government enterprise in Cuba had been rewarded with a trip to the Soviet Union and came back saying how different Russia was from Cuba. This was the motivation for the appellant deciding to go to Russia.

5. He travelled there in 1986 to study physics and mathematics at the University of Lipetsk. In 1999 he married a Russian citizen and to do so he had to seek permission from the Cuban Embassy. He returned from Russia in 1993 and his wife was able to join him in Cuba. The appellant worked in Guantanamo teaching at secondary school and then at an adult college. He had been a member of the Youth Communist League when he was in senior secondary school but he gave up his membership because of his disappointment with the Cuban Communist Party having seen the changes that were taking place in Eastern Europe. When he had been in Russia he had been allowed to travel back every two years. He had hoped that the economic and political situation in Cuba would improve but every time he returned it was worse.

6. He became outspoken about the situation but did not get into any trouble until 1992 when he was with a group of fellow students discussing politics and criticising the

government. He said that Cuba was a dictatorship and that there was no freedom. Someone must have reported them because the group was surrounded by the police. The appellant and the other students were held overnight and then released with a warning not to discuss politics. In 1993 the appellant was selling off some of the items he had brought from Russia. This was reported. He was taken to the police station and detained for 24 hours. His property was confiscated and not returned. He was fined 60 Cuban pesos and told that it was forbidden to sell to anybody but the government.

7. The appellant said that this incident re-affirmed his resolve to leave Cuba but he kept a low profile in part because it would have been very difficult for his wife if he had been put into jail for a long period of time. However, he had a personal link with someone working in the Ministry of Education who found out about a recruitment drive for teachers to work in Botswana. He was recommended and in August 1994 interviewed by a representative from the Botswana Ministry of Education and selected for one of the posts. He travelled to Botswana in August 1995. Meanwhile his wife had returned to Russia because she was finding life in Cuba too difficult. The appellant had explored the possibility of returning to Russia with her but that was not possible and she returned on her own in May/June 1994.

8. In Botswana the appellant worked as a physics and chemistry teacher in Moeng College, Moeng. He had a two year employment contract with the Cuban government and a three year contract with the Botswana government. He said that this was a means of control by the Cuban authorities: if he behaved well for two years he would be rewarded with the extra third year even though he was entitled to it. His salary was paid by the Botswana government but he was required to contribute 75% of it to the Cuban government. He was prepared to do this for the first two years to honour his contract.

9. In July 1996 he asked for permission from the Cuban government to visit his wife in Russia not having seen her for two years but this was refused. He was told that he had to spend his holidays in Cuba. In late 1996 or 1997 the appellant attended the annual meeting of the members of the Cuban teaching community in Botswana and publicly asked the Cuban Ambassador to explain why he was not allowed to travel to Russia on holiday. The Ambassador replied that he did not have to explain decisions taken by the Cuban Embassy and that the appellant was being disrespectful to the authorities. On 10 June 1997 at Moeng College the appellant was visited by four Cuban officials including the Ambassador and they tried to persuade him that he should return to Cuba.

10. He said that he was not prepared to do so and they threatened him with forcible return and prosecution if he did not sign a letter of resignation to the Botswana government. The appellant refused to sign the letter or to resign. The Cuban authorities then wrote to the Ministry of Education in Botswana requiring the immediate termination of the appellant's contract but by this time he had instructed a solicitor in Gaborone who prevented the contract from being terminated. However,

in a meeting with the Director of the Teaching Service Management in Botswana he was told that his contract would not be renewed because of the implications it might have for relations between Botswana and Cuba but he was allowed to work until the end of the third year of his contract.

11. In July 1997 the appellant obtained a divorce from his wife in Russia having by that time formed a relationship with another Cuban national, Lena Velasquez, who was working as a nurse in Botswana. The Cuban authorities discovered about this relationship because he was visiting her regularly. As he was deemed to be a traitor, Lena was banned from Cuba and informed of this in writing. The appellant provided a copy of this letter in support of his application. In October 1999 the appellant asked for his account to be changed so that his salary could be paid into his own account, not into the general account for the Cuban government. He said that both his and Lena's relatives were harassed at times in Cuba and that this was standard practice when someone defected. His passport had been retained by the Cuban Embassy, this is also being standard practice as a form of insurance that Cuban citizens would not attempt to travel elsewhere. When he requested the return of his passport it was refused. The appellant again sought legal advice in Botswana and he was able to secure the return of his passport but was told by the Cuban authorities that he was banned from returning.

12. The appellant was able to continue working in Botswana and was employed by the University of Botswana as a demonstrator and tutor in the physics department. The returned passport identified him as a Cuban citizen who was no longer under the Cuban government. The appellant now became actively involved in campaigning and helping other Cubans to defect, assisting them with paperwork through his lawyer and finding accommodation and work for them. A community of about fifteen to twenty defectors was created; some are still living in Botswana but others have moved to Spain or the USA. The appellant claimed that the Cuban authorities were and are still doing everything in their power to stop them working and is trying to get them back to Cuba for punishment.

13. The appellant and Lena had a daughter, Mara, born on 28 March 2004. The Cuban authorities have refused to issue Mara with a passport despite her being born to Cuban parents. The appellant's relationship with Lena came to an end in 2005 when in his own words he met and became infatuated with another Cuban national, Amaryllis, who had also decided to defect from the Cuban authorities whilst in Botswana. She had been a member of the Communist Party and had been politically active and trusted to take on official duties for the Cuban government in Botswana and for her to defect was regarded as a serious loss for Cuba.

14. In May 2005 the appellant resigned from his post at the university because he decided that he wanted to teach abroad. He applied to an agency representing a UK education institution and was led to believe that he could apply to work as a teacher in the UK. He was told he should enter the UK on a student visa, then have an English assessment and he would be able to switch to a visa that allowed him to

work. On 27 January 2006 he arrived in the UK on a valid student visa but was told by the college where he was sent that he was not going to be employed but would be undergoing teaching practice. The appellant felt that he had been misled. He could not return to Botswana because he had given everything up to teach in the UK and certainly he could not return to Cuba because he was banned and afraid of being sent to prison. He then enrolled on two or three courses and worked part-time. In November 2006 Amaryllis joined him in the UK and they were married on 30 April 2007.

15. The appellant applied successfully for extensions of his leave to remain as a student but his last application was refused because of a failure to disclose a conviction for drink driving. The appellant said that he was unaware that it was classed as a criminal offence in the UK and he had not disclosed it when he had made a previous successful application. The appellant then sought legal advice and was advised to claim asylum. Initially he and Amaryllis, despite a breakdown in their relationship, decided that it would be better if they entered into the asylum process together but after they claimed Amaryllis told him that she was pregnant by another man and he then pursued his own claim.

16. The appellant says that he fears returning to Cuba because he believes his life would be in danger. He would be imprisoned as a result his defection and subsequent actions against the Cuban authorities. He fears being charged with "dangerousness" under the Cuban criminal code which allows the authorities to punish someone for dissent, disobedience and insubordination. He would not be able to go back and live a normal life in Cuba not having lived there since 1995. He would not and could not conform to the accepted Cuban way of life because of the lack of freedom that would necessarily involve.

<u>The Appellant's Oral Evidence</u>

17. In his oral evidence the appellant confirmed that his witness statement was true. He said that if he returned to Cuba, he would be persecuted and harassed by the authorities and he particularly feared being put in prison and beaten up. His family would be harassed and he had been subjected to such behaviour in the past.

18. In cross-examination he said that he had been in fear of returning to Cuba since 1997-8 after he defected. He confirmed that he had had a contract from the Cuban government for two years but with the Botswana government for three years and that they ran parallel. In the second year he had broken ties with the Cuban government. He explained that Botswana had had a lack of teachers and that there had been an agreement between the Botswana and Cuban governments to supply teachers. He said that although the Cuban authorities wanted to look as though they were behaving like good Samaritans, in reality they needed foreign currency and this was why the arrangement was that the salaries were paid into a general account for the Cuban government. As he had signed a contract for three years with the Botswana government, he had been able to resist the attempts by the Cuban

authorities to persuade the Botswana government to terminate his contract. He had engaged a solicitor in Botswana who had acted on his behalf. However, that contract had not been renewed when it came to an end after three years but he had been able to continue working in Botswana.

19. He had arrived in the UK in 2006. He accepted that he had only claimed asylum some four years later, saying that he did not know that he had to claim asylum within three days of arriving. He had also assumed that he would be able to teach in this country. At that stage he would not have been able to go to Cuba nor could he return to Botswana once he had left. He accepted that he had been granted a visa as a student but had been told by the representative of the college he applied to that he would be teaching and that the college would sort everything out. He said that he had had no experience of teaching in Europe and that was why he had come to the UK. He found himself in what he described as a no way out situation as he had no place to go. He was banned from Cuba and could not return to Botswana. Later when he sought legal advice, he was advised to claim asylum. He had not claimed financial support pending his asylum claim despite the fact that he was not allowed to work.

20. He explained that he genuinely did not realise that he should have declared his drink driving conviction when making his last application for an extension of leave as a student. He had come to the UK with the intention of teaching. His daughter Mara was undocumented and was still living with her mother who was working in Botswana. He had tried to seek assistance from human rights organisations in Botswana but they had not been willing to help. He confirmed that he had helped Cubans defect when he was in Botswana. People had wanted to defect but he had been the first one to do so and he had been watched to see what would happen to him. He had managed to secure a position at the University of Botswana and then started to help others to defect, giving them assistance and directing them to solicitors. He explained that when Cubans had contracts to work abroad they had to pay their salaries into a Cuban government account and that the authorities rented accommodation where they lived together. When he had defected he had had to leave and fend for himself. He had helped about fifteen people defect whilst in Botswana.

21. The Cuban authorities had their own agents and would be aware of everything that was being done. He accepted that some people had ostracised him and regarded him as a traitor. He accepted that the single photocopy page produced by Mr Tufan at the hearing was from his passport. Someone leaving Cuba had to have an official stamp to do so. He accepted that it was fortunate that after being arrested in Cuba he was able to leave but he had friends who helped him get his interview with the Botswana government. He said that when he was young he was a fanatical supporter of the system in Cuba but things began to change after his father went to Russia but then came back and told him how they had practically everything there in contrast to the situation in Cuba. He said that he had also been impressed with the situation in Russia when he had studied there. He confirmed that Amaryllis had had

a daughter, Dina, who was not his child as they were now divorced. Mr Tufan was able to confirm that Amaryllis had been granted discretionary leave to remain for three years.

The Respondent's Decision

22. The respondent has set out her reasons for refusing the appellant's application in the decision letter dated 2 July 2010. The respondent accepted that the appellant had generally provided a consistent account of his reasons for claiming asylum and that his description of Cuban immigration policy was consistent with the background information cited. It was therefore accepted that he may have experienced difficulties with the Cuban government as regards his residency arrangements and employment in Botswana after his contract with them ended (para 25). It was also noted that on his own admission he had left Cuba with a two year contract from the Cuban authorities and it was therefore considered that he was granted an indefinite or permanent exit permit to live and work abroad and this indicated that he might be permitted to re-enter Cuba in accordance with its immigration policy (para 26).

23. She also noted that the appellant said that he had renewed his passport twice in 2000 and 2002 but had claimed that after his passport was withheld in 1998 he had demanded its return and it was returned with an issue date of 1999 and would therefore have expired in 2005. The respondent's records indicated that he held a Cuban passport valid from 2003 to 2009 and that it would not have been necessary for him to renew his passport in 2007 or 2008 as he had claimed in further representations. The appellant had been asked at interview if he had ever attempted to have the ban on his return lifted and he said that he had never bothered because of the way he had been treated by the Cuban authorities (para 30). The respondent considered that the appellant had not provided any evidence that he had tried and failed to obtain a permit to enter Cuba from the Cuban Embassy in the UK although he had said in his further representations that he would in fact be permitted to enter Cuba albeit for only 21 days.

24. The respondent then referred to the position of perceived dissidents in Cuba as set out in the country guidance determination of OM (Cuban returning dissidents) Cuba CG [2004] UKAIT 00120. That guidance lent some support to the appellant's claim that whilst the Cuban government was no longer interested in him, they did not want him back. His circumstances were similar to the applicant in the sense that they both claimed to have expressed views that were critical of the authorities yet had never been seriously in trouble with those authorities. The letter noted that the determination had not found that Cubans expressing adverse political views or those who had overstayed their exit permits would face a real risk on return. (para 34)

25. She then considered whether there would be a potential risk of imprisonment on return for overstaying his exit permit or because he claimed asylum in the UK but in reliance on OM it was found that there was no such risk and that the appellant had failed to demonstrate that the Cuban authorities had refused him re-entry. The letter

also made the point that the appellant had failed to provide an adequate explanation for his failure to claim asylum on arrival in the UK: despite arriving in January 2006 he had chosen not to claim asylum until April 2010. Whilst it was accepted that the appellant's employment history in Botswana was not in dispute, that the account of his experiences with the Cuban government was consistent with background information and that he may have experienced some problems with the Cuban authorities as regards his immigration status, she was not satisfied that he would be at real risk of persecution or serious harm on return.

Background Information

26. The respondent's decision letter sets out background information taken from the US Department of State Human Rights Report 2009 dated 11 March 2010. This includes the following:

> "The government continued to deny its citizens their basic human rights, including the right to change their government and committed numerous and serious abuses. The following human rights problems were reported: beatings and abuse of prisoners and detainees, harsh and life threatening prison conditions, including denial of medical care; harassment, beatings, and threats against political opponents by government recruited mobs, police, and state security officials acting with impunity; arbitrary arrest and detention of human rights advocates and members of independent professional organisations; and denial of their trial, including for at least 194 political prisoners and as many as 5,000 persons who have been convicted of potential 'dangerousness' without being charged with any specific crime."
>
> "The government continued to subject opposition activists and their families to abuse by organising 'acts of repudiation' or stage public protests, often in front of their homes. Participants were drawn from the CP, the Union of Communist Youth (UJC), Committees for the Defence of the Revolution (CDRs), the Federation of Cuban Women, and the Association of Veterans of the Cuban Revolution or were brought in by the authorities from nearby work places or schools. More actions included shouting insults and obscenities, sometimes over loudspeakers, and throwing rocks, fruit, and other objects at their homes. In extreme cases mobs assaulted the victims or their relatives or damaged their homes or property as was the case in the 9 July arrest of Dr Darsi Ferer, when neighbours, apparently acting in coordination with the arresting officers, ransacked Ferer's home."

27. The letter also cites the COI key documents: Cuba, dated 29/10/2008 as follows:

> "In their Annual Report on Human Rights 2007, published March 2008, the SEO stated:
>
> > 'No opposition of the government is tolerated and citizens are denied basic civil, political and economic rights. The Cuban government claims that restrictions on individual liberties are necessary to counter internal complicity with the perceived threat of invasion by the US … On 10 December 2007 Foreign Minister Perez Roque announced that Cuba would sign the International Covenants on civil and political rights and on economic, social and cultural rights in early 2008."

28. This background information has been supplemented by further documents produced by the parties at the hearing. In the US Department of State Background Note for Cuba dated 25 March 2010 (R1-31) the following appears:

> "The government incarcerates people for their peaceful political beliefs or activities. The total number of political prisoners and detainees is unknown, because the government has not disclosed such information and keeps its prisons off limits to human rights organisations and international human rights monitors. One local human rights organisation lists more than 200 political prisoners currently detained in Cuba in addition to as many as 5,000 people sentenced for 'dangerousness'.
>
> and
>
> "Although the government has encouraged a controlled form of 'constructive criticism' the Cuban government continues to show little tolerance for unauthorised dissent. The Cuban government utilises short term detentions to break up peaceful marches and demonstrations, and routinely resorts to organised mobs of civilians to harass and physically attack the opposition, claiming that these are spontaneous citizen 'counter-demonstrations."

29. The Human Rights Watch, New Castro, Same Cuba: Political Prisoners in the Post-Fidel era dated 18 November 2009 at 1A 41 says in the Executive Summary:

> "Raul Castro's government has relied in particular on a provision of the Cuban criminal code that allows the state to imprison individuals before they have committed a crime, on the suspicion that they might commit an offence in the future. This 'dangerousness provision' is overtly political, defining as 'dangerous' any behaviour that contradicts socialist norms. The most Orwellian of Cuba's laws, it captures the essence of the Cuban government's repressive mindset, which views anyone who acts out of step with the government as a potential threat and thus worthy of imprisonment."
>
> "The Raul Castro government has applied the 'dangerousness law' not only to dissenters and critics of the government, but to a broad range of people who choose not to cooperate with the state. We found that failing to attend pro-government rallies, not belonging to official party organisations and being unemployed are all considered signs of 'antisocial' behaviour, and may lead to 'official warnings' and even incarceration in Raul Castro's Cuba. In a January 2009 campaign called 'operation victory' dozens of individuals based in eastern Cuba – most of them youth - were charged with 'dangerousness' and being unemployed. So was a man from Sancti Spiritus who could not find work because of health problems, and was sentenced to two years' imprisonment in August 2008 for being unemployed."
>
> "It is important to note that the term 'dissidents' in the Cuban context does not refer to a homogenous group of people who share a single ideology, affiliation or common objective. Rather it refers to anyone who … engages in activities the government deems contrary to its political agenda. Some dissidents may advocate the democratic change or reform of the social system from within; while others may be apolitical,

focusing instead on a single issue such as the right to practise their region or organise a trade union."

30. In a Human Rights Watch Report, Cuba: Stop Imprisoning Peaceful Dissidents" of 1 June 2011 the following is reported:

> "The conviction of six dissidents in summary trials for doing no more than exercising their fundamental rights highlights the continuing abuse of the criminal justice system to repress dissent in Cuba: Human Rights Watch said today Raul Castro's government should immediately release the prisoners who were given sentences ranging from two to five years in prison, and cease all politically motivated repression against Cubans who exercise their fundamental freedoms, says Human Rights Watch."
>
> "Cuba's laws empower the state to criminalise virtually all forms of dissent, and grant officials extraordinary authority to penalise people who try to exercise their basic rights. The Cuban criminal code penalises anyone who 'threatens, libels or slanders, defames, affronts or in any other way insults or offends, whether the spoken word or inviting, the dignity or decorum of an authority, public functionary, or his agents or auxiliaries'. The violations are punishable by one to three years in prison, if directed at high ranking officials. Such laws violate the right to freedom of expression recognised in Article 19 of the International Covenant on Civil and Political Rights – signed by Cuba in 2008."

The Expert Evidence

31. In support of the appeal before the judge the appellant relied on a report from Wilfredo Allen dated 8 June 2010. Mr Allen's background is set out in the report. He gives a history of involvement in issues relating to Cuba since 1978 primarily acting as an attorney for various dissident Cuban dissidents and activists and says that he has regularly represented government officials, athletes, ballet dancers, film makers, artists, doctors and other professionals who have defected from Cuba. He describes the appellant as a well-educated and as someone who must have been well thought of when he was sent to the former Soviet Union and well prepared and talented to have been permitted by the Cuban government to work in Botswana. His view is that the appellant would be persecuted in Cuba due to his political opinions. He commented that when he returned to Cuba and expressed opposition to the regime he was lucky that he was able to go to Botswana rather than being put in detention and isolation. The Cuban government obtained a great benefit from individuals such as the appellant, both economic and political. The appellant was able to receive nearly two-thirds of his salary in hard currency much needed by the authorities. It used highly trained professionals teaching and working abroad as examples of the victories of the revolution and the Cuban authorities' commitment to the Third World.

32. In his opinion the appellant's actions in Botswana viewed from the perspective of the Cuban government would be considered as treason. The fact that he abandoned the delegation, instituted a legal action to stop the delivery of his salary to the Cuban government and encouraged others to defect and break with the government were

examples of a political opinion which the government would seek to repress. He assumed that the Cuban government did not take direct action against him in Botswana to avoid a scandal but the position would be different if he was returned to Cuba. He says that the respondent has erred in the view it has taken of the appellant's passport. The Cuban government issues passports with no restrictions to individuals who work abroad for the Cuban government whereas individuals who leave the island through family petitions usually have a permanent departure date stamped on their passport. In such cases property in Cuba is surrendered and they can only return with a visa. Those whose passport is stamped with foreign residence are allowed to live in third countries and return as they wish. The appellant could only return to Cuba with the authorisation of the government and such return would subject him to persecution for his past actions.

33. At this hearing the appellant relied on a further report prepared by Ms J Prud'homme dated 22 June 2011. She holds an LLM from the University of Essex in national rights law and a BA in history and human rights from Bard College, New York. She has worked as an international human rights officer for the Jacob Blaustein Institute for the Advancement of Human Rights and with the US member of the UN Committee against Torture. She has carried out research projects into asylum and refugee cases and investigative research into risks faced by US detained Algerians if returned to Algeria. She has worked as an associate with the Asia Division of the Human Rights Watch. The purpose of her report is described as preparing an objective and neutral report on the likely treatment the appellant could expect to face if returned to Cuba particularly in the light of his defection and the fact that he has encouraged others to do so. She considers what laws he may be prosecuted under, what detention conditions are like in Cuba, the significance of the fact that he is no longer banned and has been told he may return for up to 21 days. She has consulted and interviewed a number of people with knowledge of the situation in Cuba as identified in her report.

34. She confirms the notoriously poor human rights record of the Cuban authorities noting in particular the annual report from the Organisation of the American States Inter-American Commission on Human Rights of 2010 (IACHR2010), commenting on the "persistence of structural situations that have a serious and grave impact on the enjoyment and perseverance of the fundamental human rights enshrined in the American Declaration." She also refers to the consensus of those she has interviewed that the human rights situation in Cuba is dismal with routine violations of the rights to freedom of expression, assembly, thought and freedom from arbitrary arrest and detention. Those she interviewed also agreed that the persecution of political dissidents by the Cuban government continued unabated and described the government as being highly repressive of its citizens.

35. So far as the treatment of defectors and political dissidents is concerned, she says:

> "The ongoing repression of political dissidents in Cuba has been well-documented by a number of credible international sources. Mr Allen referred to the 'revolving door of repression', describing the Cuban government's pattern of arresting groups of

> dissidents, subjecting them to unfair trials and arbitrary detention, releasing them on the condition that they leave that the country, and then arresting a new group of dissidents. This pattern has also been discussed by commentator Douglas Payne. The most recent example is the recent release of the 'Black Spring' prisoners, a group of 75 journalists, dissidents and activists who were arrested in 2003, the last of whom were released in March this year. The majority of those prisoners were exiled and emigrated to Spain. Some emigrated to the United States, and a small number remained in Cuba. Since their release, the government has arrested more dissidents, thus repeating the pattern. According to Ms Akerman, some such prisoners have been detained for up to 30 years."

She then refers to the law on "dangerousness" as follows:

> "The law on 'dangerousness', which many human rights groups have criticised for being overly vague can be found in article 72 of the Criminal Code. 'Dangerousness' is defined as: 'The special proclivity of a person to commit crimes, shown by the conduct observed in manifest contradiction to the norms of socialist morality'. Article 74 of the Criminal Code provides clarification for how 'dangerous' persons are identified: 'The dangerous state is noted when the subject displays one of the following indicia of 'dangerousness' (a) habitual drunkenness and alcoholism, (b) drug addiction; (c) antisocial conduct.' Article 74 further states that 'one who habitually breaks the rules of social coexistence through acts of violence or other proactive acts that violates the rights of all others, who by his or her conduct in general breaks the rules of coexistence or disturbs the order of the community or lives, as a social parasite, from the work for others, or exploits or practices socially reprehensible vices to be dangerous due to antisocial conduct."

From this definition it is clear that the law on 'dangerousness' is so vague and broad that it can be used to prosecute virtually any act. According to the IACHR 2010 report, the concept of "dangerousness" continues to be used by the Cuban government "as a tool of political persecution and repression".

36. She reports that those she interviewed explained that the appellant's risk of persecution by the government was increased by the particularities of his case. He was not simply a defector but he defected from an official mission in Botswana, has been gone from the country for a very long time and in addition he has helped others to defect. These facts make the situation significantly more dire and according to some interviewees put him at increased risk of being prosecuted for serious political crimes. Three of the interviewees described the heavy importance placed on official missions by the Cuban government as opportunities to display the "successes" of the revolution and the appellant's defection during his time as a teacher on an official mission in Botswana would be regarded as a serious political crime as would his assistance in assisting others to defect.

37. When asked about the likelihood of the Cuban authorities having any interest in the appellant, the interviewees all agreed that this was highly likely and all except for Mr Allen said that it was most likely to various degrees that the appellant would be imprisoned if returned to Cuba. All agreed that he would be made to pay for his

political crime but there was a difference in how he would be punished. One expressed the view that as the appellant had assisted others in defecting, this would put him at risk of being prosecuted as being a suspected CIA agent or for trying to undermine the Cuban mission in Botswana. Two said that there was a very strong likelihood that the appellant would face imprisonment and one that would it would be inevitable that he would be prosecuted and imprisoned. There was a common view that so far as charges were concerned, the Cuban government could essentially charge him with anything they pleased, as was often the case for political dissidents. It was another's view that the appellant would be considered a traitor and he felt it more like that he would face time in a labour brigade rather than in a prison although he was the only person interviewed who took this view; all others thought it was likely the appellant would be prosecuted either overtly for trying to undermine the revolution or for being a traitor or would be prosecuted for smaller offences on false charges as has been done to other political dissidents.

38. Ms Prud'homme sets out her conclusions as follows

> "Based on the information I have gathered and the information made available to me by the attorney in this case, it is my considered opinion that the appellant's long absence from Cuba, his defection from an official mission in Botswana and the fact that he has assisted others to defect puts him at serious risk of being prosecuted and imprisoned if he returns to Cuba. The charges against him could be for serious political crimes, or for petty charges. In addition, it is my opinion based on the information provided to me by the interviewees, that if the appellant is returned he and his family will in all likelihood face government harassment and intimidation in the form of public denunciation, demonstrations outside their homes and even physical assaults; that he will be unable to find employment; and that he will be under close government scrutiny. The appellant's account of his ostracisation from the Cuban community in Botswana and his fear of being arrested and imprisoned upon return to Cuba are consistent with the information provided to me by the interviewees about the treatment of defectors and those considered politically disloyal.
>
> All of the interviewees expressed their strong concern over the appellant's possible return to Cuba. It was their view that his defection from an official mission as a teacher, and he has assisted others in defecting, put him at increased risk for being targeted for harassment, intimidation, prosecution and either imprisonment or assignment to a labour brigade. [One] emphasised to me at the conclusion of my conversation with her that, 'This asylum applicant should not return to Cuba under any circumstances. He would be going into the lion's den."

The Submissions

39. Mr Tufan relied on the points made in the respondent's decision letter and submitted that there were a number of relevant matters undermining the credibility of the appellant's claim that he was in fear of persecution on return to Cuba. He had come to this country with entry clearance as a student but in fact said that he thought he was going to teach. He had been granted a number of extensions but his final application was refused because of a failure to declare a drink driving offence. He

had only claimed asylum in 2010 when he had no other way of remaining in this country. The appellant may well have sought to remain in Botswana contrary to the wishes of the Cuban authorities but there was no reason to believe that they would know that he had helped other people defect even if that was the case. He argued that the appellant would not now be perceived as someone who had worked against the Cuban regime. He held a Cuban passport issued in Paris which on its face was valid from 2003 to 2009. He relied on OM arguing that the appellant fell into the same category as the applicant in that case, someone who might run into some problems as a result of being away from Cuba but who would not be at real risk of persecution.

40. Ms Easty submitted that the appellant had explained why he had delayed claiming asylum and about the difficulties he had had in obtaining his passport from the Cuban authorities. There was no proper basis for departing from the general credibility findings made by the judge. If returned to Cuba the appellant would be at real risk of persecution as a defector and as someone who had helped others to defect. He would be regarded as a dissident or traitor by the Cuban authorities. She submitted that OM was an unsatisfactory country guidance case by current standards. In any event, its application should be limited to individuals who had limited exit permits but had failed to return in time. The fact that the appellant would be able to return to Cuba for 21 days illustrated the extent of the danger he was in. If he was returned it was unlikely that he would be able to obtain a visa to leave before the 21 day period was over and if has overstayed that period, there would be a risk of arrest and imprisonment. She submitted that the appellant's circumstances when set in the light of the background evidence including the expert evidence reports indicated that he would be at real risk of serious harm on return.

Assessment of the Appellant's Evidence

41. The judge found that the appellant was generally credible and at the error of law hearing the Tribunal found that although it would have been desirable for fuller reasons to have been given that would not without more have justified setting aside his decision but that there were specific areas which should have been dealt with including the evidence about the passport applications and the delay in applying for asylum. The Tribunal held that it would be wrong to preclude an adverse finding on credibility if the findings on the specific issues requiring further consideration meant that it was appropriate to revisit the issue of credibility.

42. Dealing firstly with the evidence about the passport, this is not entirely straightforward. In his witness statement the appellant explained that when he was in Botswana his passport was held by the Cuban authorities but with the intervention of his solicitor he was able to obtain its return on 2 February 1999. He says that it was a different type of passport, one identifying him as a Cuban citizen no longer under the Cuban government. In his statement he says that he has provided the respondent with copies of the correspondence between the solicitor and the Cuban Consulate. This is a reference to a letter from the appellant's Botswana

solicitors dated 22 June 1998 to the Cuban Consulate and its reply dated 8 June 1998. These letters cast little further light on this particular issue.

43. In his statement and in his oral evidence the appellant explained that the passport had to be renewed every two years largely so that the Cuban authorities could levy a charge. In para 39(ii) of his statement the appellant says that when he was interviewed he tried to remember when he had renewed his passport. He accepts that the Home Office letter refers to electronic records and disputes the fact that he renewed his passport in 2007 or 2008 because it expired in 2009. He says that regarding discrepancies in dates it is impossible for him to remember every single date because the Home Office has held his passport for more than a year. He cannot remember exactly when he last renewed his passport but he thinks it was around March 2008 in London. For a Cuban passport to be valid, regardless of the length of its validity, it needs to be endorsed every two years by the Cuban authorities. It was for this reason that he went to the Cuban embassy with Amaryllis to find to what would happen if they tried to go back. It was then he discovered that he would only be allowed to return for 21 days at a time and Amaryllis was told that she would not be allowed to return at all.

44. In his interview the appellant had been asked at Q151 why he thought he would not be allowed to go back to Cuba. He replied: "Because of all the problems we had before and as I have said before I never actually bothered to ask them and also because of my daughter's problems with her passport and the recognition of her citizenship." The appellant was then asked at Q152 that if the Cuban embassy renewed his passport twice then gave him a new one, that would indicate that they still considered him a Cuban national and entitled to travel to and from and live there. The appellant's reply was

> "No, what happened is yes, you are a Cuban national because you never relinquished your citizenship so what happens is you are still a Cuban national but you cannot go into your country. You cannot buy a ticket, go back and show up at the airport. You have to go to the Cuban Embassy to pay for permission to enter the country. Formally, you have to apply. Then they tell you 'Oh. We will come back to you' and after two to three weeks they tell you yes or no. If you ever show up at any airport without having that permission in your passport which is valid for one year only you are immediately returned to where you came from. This has never happened to me because I never bothered to go there, but there are cases that have happened to people before. Another thing is you have dual nationality, let's say British and Cuban citizenship, you cannot go to Cuba on British citizenship, you have to enter with a Cuban passport as you are originally from Cuba."

45. At the hearing a photocopy of one page of the appellant's passport was produced by Mr Tufan which the appellant accepted was his. This shows a Cuban passport issued in Paris and valid from 24 September 2003 to 23 September 2009. A question arose as to why it was issued in Paris but the appellant explained that he had never been to France and Paris was the place where new Cuban passports would be issued outside Cuba. However, the rest of the passport was not produced and on the basis of the

evidence before me it does seem reasonably likely that any errors about the date when the passport was renewed arose from a simple error from which no adverse inference on the appellant's credibility can be drawn.

46. The questions to which I have referred in the interview deal simply with whether the appellant is able to return to Cuba and what formal requirements will be required by the Cuban authorities. They do not deal with the issue of what might happen to him if he is returned. That is dealt with at Q230 when the appellant was asked why he could not simply apply for entry clearance for Cuba and it was put to him that he had not even tried to establish whether he would be allowed to return. The appellant replied that he had been in communication with his family and he knew that they were OK, at least in terms of health, but he added that he was afraid because of all the problems he had been through in Botswana and he knew how the Cuban government behaved and how they treated people with different opinions. He said that it did not make any sense to him to apply to see if he would be allowed to return to Cuba when he would be resigned to going straight to jail. He said the Cuban authorities always remembered even though ten or fifteen years had passed. As soon as they had a chance of messing someone around and making them pay, they would. When asked at Q232 what he feared would happened if he went back to Cuba he said that he would be imprisoned and when he came out he would not be able to carry out his normal life.

47. I now turn to the question of the delay in the appellant applying for asylum. It is common ground that he arrived in the UK in 2006 with entry clearance as a student but did not claim asylum until after his leave to remain had expired and he sought legal advice. When asked about his delay at interview he gave a variety of answers, saying that he had claimed asylum when he did because he had grown tired of all the silly jobs and courses (Q188), that he had been confused about the process and had submitted the claim to his lawyers shortly after his visa application was refused but then later discovered that he had to claim in person (Q189) and finally that if he had been granted further leave to remain he would still have claimed asylum (Q192). In his oral evidence he said that he had not realised that he should have claimed asylum within three days of arriving in this country but was unable to explain where the idea came from that there was a three day time limit on claims.

48. I find it difficult to believe, as the appellant also claimed, that he had not known about being able to claim asylum until he received advice from his solicitor. When questioned further he said that when he had leave to be in this country he did not see that there was any need to make a claim and it was only when his leave expired and his options were running out that he chose to do so. This seems to me to be nearer the truth of the matter. I must take into account when assessing the credibility of his evidence but when this factor is looked at in the light of the evidence as a whole I do not find that the core elements of his account are undermined to such an extent that it can be said that there is no reasonable degree of likelihood that they are correct.

49. The appellant has given a consistent account of events in Botswana which the respondent accepted was consistent with the way the Cuban authorities were likely to behave. The appellant supported his application with documentary evidence confirming his employment in Botswana and the fact that he instructed solicitors in Botswana to act on his behalf when dealing with firstly the government of Botswana and secondly the Cuban consulate. I accept that the appellant subsequently helped and encouraged other Cubans to defect. The fact that such defections took place in Botswana is also confirmed by documentary evidence. He has also produced evidence to show that Lena received documents from the Cuban authorities revoking her functions as a member of the Cuban Health Team and ordering her to return to Cuba because she had accepted into her house a collaborator who had broken all links with the Cuban mission. She remains in Botswana. There is also documentary evidence to confirm the appellant's attempts to obtain citizenship for his daughter Mara but apparently to no avail and that Amaryllis has been refused permission to return to Cuba.

50. I am therefore not satisfied that there is any basis for reaching any different view from that reached by the judge that the appellant's evidence judged by the standard of the reasonable degree of likelihood is generally credible.

Assessment of Risk on Return

51. I must now consider whether there is a real risk of serious harm for the appellant on return to Cuba. His case is that he would be regarded by the Cuban authorities as a defector and despite the passage of time would still be of adverse interest to them because it would be known that he had helped others defect. The risk must be assessed in the light of the background evidence which shows that the Cuban authorities criminalise and take action against those perceived as dissidents. A vaguely drafted law on dangerousness is used against individuals who oppose the Cuban authorities or who are seen to do so by trying to exercise basic rights of freedom of speech and belief or indeed indulging in any behaviour that is seen to contradict socialist norms. In her report Ms Prud'homme consulted a number of people with knowledge of Cuba. They were not in full agreement about what would happen to the appellant on return but all agreed that there was a real risk that he would be subjected to treatment which could properly be categorised as amounting to persecution or serious harm. The majority were of the view that there was a real risk of imprisonment whereas one interviewee's view was that he would be required to undergo forced labour.

52. In the decision letter the respondent appears to have approached the case on the basis that the risk to the appellant if any would arise from a lack of proper documentation for returning to Cuba or from overstaying the length of time he was permitted to leave Cuba. The respondent sought to rely on the country guidance determination in OM. As Ms Easty rightly points out, this determination would not meet the current requirements for country guidance but nonetheless as a country guidance case it must be followed unless there are proper grounds for distinguishing

it or taking a different view. That case involved an applicant who had made no secret of his dissident views when in Cuba and the Tribunal accepted that there was evidence backing up his account of being a political opponent of the Castro regime. At some point he came to the United Kingdom but did not register with the Cuban authorities and it was argued that with his history, if he were to go back to Cuba he would be at real risk of persecution.

53. The Tribunal looked at the provisions of Cuban law about people who left that country. It noted the provisions dealing with illegal entry and the fact that the relevant article of Cuban law was plainly dealing with people who arrived in Cuba either clandestinely or on false papers or otherwise illegally. In the applicant's case he would be returning perfectly legally on a proper Cuban passport with nothing in his documentation to suggest that he had done anything more than stay out of the country longer than his permit and Cuban domestic law allowed him to do. It was argued on the appellant's behalf in reliance on a letter from Mr Wilfredo Allen (who also submitted a report in this appeal) that the fact that the claimant had stayed in Britain without permission would lead the Cuban government to assume that he had claimed asylum and punish him accordingly.

54. The Tribunal said that it could not see how that could be the case in circumstances where a person did not have proper papers in the UK or had not conducted himself in such a way as to come to the attention of the Cuban authorities abroad. They could not see why the authorities in Cuba would assume otherwise than that the claimant was abroad perhaps seeking work and paying to find or that he simply overstayed taking an opportunity to travel which otherwise he might not have. They rejected the reasoning behind Mr Allen's suggestion.

55. The Tribunal then went on to deal with the argument that if the applicant were to return to Cuba he would have no employment or when his past was looked up it would be apparent that he was a dissident and the authorities might crack down on him. The Tribunal dealt with this issue as follows:

> "29. There was undoubtedly a crackdown by the authorities on 18 March 2003 and a number of dissidents were arrested, many of whom remain in custody, but this was not a widespread roundup of opposition elements, if only 90 people were arrested of whom 75 were tried, convicted and sent to prison. It is not easy to see how the claimant would be likely to be affected by a round up of that nature on his return.
>
> 30. We do not wish to underestimate the difficulties that the claimant would have if he were to return to Cuba, because plainly life would be difficult and perhaps unpleasant for a while. He might be under government surveillance. He might very well find it difficult if not almost impossible to obtain a job, but we have had no material placed before us that indicates that he would be likely to be arrested or persecuted. Mr Allen is of the view that the Cuban authorities would dismiss him from his employment as being politically unreliable and would assign him to a work battalion as a field hand, presumably for some particular period of time. They might place him in detention facility until he could obtain housing

and he would be monitored by the neighbour CDR once he returned to the community. Even if all this is true we cannot see that this amounts to persecution albeit it amounts to treatment by an oppressive state of the type that would be entirely unacceptable in Europe. The threshold for persecution is set very high and we cannot see that that threshold is passed by the claimant in this case, even if one takes what might happen to him as being what is likely to happen to him.

31. For all these reasons we have come to the conclusion that even if the adjudicator had come to the findings of fact which the claimant contended before him, he would have found that the claimant had never been persecuted in the past, albeit his life had been made difficult, that the most he was guilty of at present was staying out of the country longer than he should have been, nor might avail him on his return would be a closer enquire into his political past that might lead him at worse to being placed in a work battalion for a period of time after which he would be returned to his community and family area under supervision by the CDR."

56. I am satisfied that the guidance set out in OM does require reconsideration in the light of the further evidence submitted in support of the present appeal. The background evidence relied on in that case has not been identified. I agree with and adopt the comments made by Irwin J and SIJ Eshun when finding that the judge had erred in law that there should be more comprehensive and up-to-date country guidance in respect of Cuba.

57. The conclusions about the current situation in Cuba which I draw from the background and expert evidence produced at this hearing are as follows:

(i) The human rights situation in Cuba is dismal and the government continues to deny its citizens basic civil and political rights.

(ii) The authorities are intolerant of any form of unauthorised opposition to its political agenda and the law is used to criminalise dissent.

(iii) The term "dissident" in the context of Cuba does not refer to a homogenous group of people but can refer to anyone engaging in activities regarded by the authorities as contrary to its political agenda.

(iv) The "dangerousness" law is used as a political tool against those seen as dissidents or otherwise opposing the regime's political agenda

(v) Those regarded by the Cuban authorities as opponents, dissidents or defectors can be at risk of treatment of sufficient severity to amount to persecution. Whether a particular individual will be at such risk depends upon his background and profile but in general terms an active political opponent who has come to the attention of the authorities or someone who has been openly disloyal to the regime is likely to be at such risk.

(vi) This guidance replaces that given in OM which is no longer to be regarded as providing country guidance.

58. In the present appeal the appellant's situation is in any event clearly distinguishable from that of the applicant in OM. The appellant has done more than express dissent. He publicly challenged the Cuban Ambassador at a meeting about why he was not allowed to go to Russia to see his then wife. He defected from what would have been regarded as an official mission in Botswana. He encouraged others to defect whilst in Botswana, including his second wife. She has been banned from returning to Cuba. He then married another Cuban who defected from the Cuban authorities whilst in Botswana. Although the appellant continues to hold a Cuban passport he has been told that he can only return to Cuba for 21 days, but if he does in all likelihood he will be unable if leave not only because he will have nowhere to go but also by reason of the adverse interest the authorities will have in him.

59. The appellant has on a number on occasions come to the adverse notice of the Cuban authorities and I agree with the assessment in the expert report that there is at least a real likelihood that he would be prosecuted and imprisoned because he is and would be perceived as a dissident. I do not think that the passage of time since the appellant's defection will mean that he is no longer at risk. It is not simply a case of someone returning to Cuba after staying beyond the time he was permitted to leave or not having the correct permission to return but of someone who would be seen as a dissident and an active opponent of the current regime and for that reason he would be at real risk of persecution.

Decision

60. The Tribunal has found that the Immigration Judge erred in law. I substitute a decision allowing the appeal on asylum grounds.

Senior Immigration Judge Latter
Judge of the Upper Tribunal

Amended under Rule 42 by deletion of accidental slip in paragraph 56 on 29 September 2011

ANNEX

No.	Item	Date
1.	Africa On Line: Cuban spy defects to Botswana.	21 May 2000
2.	COI Information request on whether Cuban immigration officials can and do refuse entry to citizens who have previously opted to leave permanently.	26 April 2007
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