Neutral Citation Number: [2011] EWCA Civ 275

Case No: C5/2010/0175

IN THE COURT OF APPEAL (CIVIL DIVISION)
On appeal from the Upper Tribunal
(Immigration and Asylum Chamber)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2011

Before :

LORD JUSTICE PILL
LORD JUSTICE RIX
and
LORD JUSTICE LLOYD

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Between :

KM (Zimbabwe)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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Mr Ian Dove QC and Miss Nazmun Ismail (instructed by Blakemores) for the Appellant
Ms Kate Grange (instructed by **the Treasury Solicitor**) for the Respondent

Hearing date : 15 February 2011

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Judgment

Lord Justice Pill :

1. This is an appeal against a decision of the Asylum & Immigration Tribunal ("the Tribunal") of 22 October 2009 whereby it dismissed an appeal against the decision of the Secretary of State for the Home Department ("the Secretary of State") on 13 February 2009 to remove KM ("the appellant") from the United Kingdom following the refusal of his claim for asylum. The Tribunal heard the case by way of reconsideration of a decision of the Tribunal dated 1st April 2009. It was held that, on the earlier occasion, the Tribunal had not materially erred in law. As will appear, the Secretary of State will now consent to a remittal to the Tribunal; the appellant submits that the appeal should be allowed outright.

2. KM is a citizen of Zimbabwe and is 53 years old. He claims to have entered the United Kingdom in January 2003 on a false South African passport. He was granted 6 months leave to enter as a visitor. He claimed asylum on 20 August 2008.

3. It was given approaching 2½ years ago, but the relevant country guidance is that given by the Tribunal in *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083. The Tribunal cited the guidance at length and clearly accepted its applicability. Central to the guidance is that a person not able to demonstrate loyalty to Zanu-PF will be at real risk on return to Zimbabwe. At paragraph 234 of *RN* it is stated:

> "For these reasons, a person not able to demonstrate loyalty to Zanu-PF or with the regime in some form or other will be at real risk having returned to Zimbabwe from the United Kingdom having made an unsuccessful asylum claim. That will be regardless of the mechanics of his return. Those with whom he would have to deal in his home area or other place of relocation would be concerned, once he had failed to demonstrate any links with Zanu-PF, not with the method by which he had been returned from the United Kingdom but simply with the fact that his having made an asylum claim here demonstrated him to be a disloyal person who had not supported the party in the elections and as a potential supporter of the MDC."

4. At paragraph 238, the Tribunal stated:

> "We have, then, a very large body of compelling evidence of the risk to those returning from the United Kingdom after having made an unsuccessful asylum claim at the hands of the militias, War Veterans and Zanu-PF groups to be encountered in Zimbabwe, if such returnees are unable to demonstrate loyalty to Zanu-PF or to the regime. But there is no evidence at all that there has been any change of the approach taken at the airport by those monitoring arrivals from the United Kingdom."

The Tribunal added, at paragraph 258:

> "The evidence establishes clearly that those at risk on return to Zimbabwe on account of imputed political opinion are no

> longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF."

The Tribunal cited paragraph 258 and also paragraph 259 where it is stated that the fact of having lived in the United Kingdom for a significant period of time and having made an unsuccessful asylum claim are both matters capable of giving rise to an enhanced risk.

5. The Tribunal assessed the findings of the Tribunal on the earlier occasion and stated its own conclusions:

> "17. I am not satisfied that the judge erred in law in rejecting the account given, both by the appellant and his son. Each case must be determined on the evidence available at the hearing and the judge had more evidence before him than was before the judge who heard the son's appeal. The judge clearly took into account, and it was common ground, that the appellant's son had been granted refugee status. The judge has explained why, in relation to the issues before him, he did not find the appellant's son to be credible. I am not satisfied that it is arguable that the fact that the appellant's son has been granted refugee status would by itself mean that the appellant would be at real risk of finding himself in a situation when he could not demonstrate loyalty to the regime. It must be considered whether those he might come into contact with would know that his son had been granted refugee status and this would be very unlikely if the risk is from war veterans, militia or Zanu-PF supporters. There also needs to be an assessment of the circumstances in which it is said that there is a real risk of the appellant being called upon to demonstrate his loyalty.
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> 18. In the light of the judge's findings of fact I am not satisfied that the appellant established any adequate factual basis to support his claim that he would be at real risk of finding himself in a position where he was unable to demonstrate loyalty to the regime. The judge found that the appellant had no profile in Zimbabwe and had not been involved in MDC activities. There was no reasonable degree of likelihood that the grant of status to his son would be known to those who might call upon him to show loyalty and he also failed to establish any serious possibility of finding himself in a position that such a call would not be made on him. Finally, he failed to show that his background, his profile or his beliefs were such that he would not be able to demonstrate loyalty."

6. On behalf of the Secretary of State, it is accepted that the appeal should be allowed to the extent of the case being remitted to the Upper Tribunal. The Secretary of State's reason was that "it is arguable that the [Tribunal] failed to give adequate consideration to the assessment of risk on return in light of the country guidance case of *RN (Zimbabwe)* and *HS (Zimbabwe)* and any risk that may arise if the appellant were to

be questioned on return regarding his son's asylum grant". I would add that, in the light of the paragraphs from *RN* already cited, the absence of a 'profile' in Zimbabwe is insufficient protection. Support for or loyalty to the regime must be 'demonstrated'. At the hearing before this court, Miss Grange, for the Secretary of State, accepted that there is a real risk that the appellant's son having obtained asylum because of his MDC's sympathies would come out on the appellant's return.

7. In the earlier decision of 1 April 2009, the Tribunal placed reliance on the lack of credibility of the appellant and his son. It was stated, at paragraphs 49 and 50:

> "49. In summary I find that the Appellant and his son are not reliable witnesses with regard to events in Zimbabwe as their evidence is mutually and internally incompatible and cannot be reconciled with the objective material either. I do not believe that the Appellant has a profile in Zimbabwe. In the absence of credible and reliable evidence I do not accept that he has been in the UK for the time he claims.
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> 50. This is a case where the Appellant cannot demonstrate an inability to show loyalty to the regime in Zimbabwe. His evidence is such that he does not fall into any of the risk categories identified in the cases of SM or RN. His claim for asylum or Humanitarian Protection fail and he does not qualify under articles 2 or 3 of the ECHR."

That led to the Tribunal's conclusion that "the appellant cannot demonstrate an inability to show loyalty to the regime in Zimbabwe". If there was, in paragraph 50, a finding that the appellant did not come into a higher risk category, it was plainly wrong.

8. In the decision challenged, the Tribunal had regard to the finding of lack of credibility, as stated at paragraph 17, and also at paragraph 16 where it was stated that in the first decision the Tribunal was "entitled to take the view that these [discrepancies] fundamentally undermine the credibility of both the appellant and his son and neither could be regarded as reliable witnesses". In that paragraph, the Tribunal added:

> ". . . It is clear from RN that the fact simply of having made an unsuccessful asylum claim and having spent a period of time in the UK will not without more give rise to a real risk of persecution on return to Zimbabwe. The Tribunal accepted, however, that someone unable to demonstrate loyalty if called upon to do so might find themselves at risk. The only factor in the present case to support such a contention is the grant of refugee status to the appellant's son."

9. When granting permission to appeal to this court on a consideration of the papers, Longmore LJ stated:

> "It is arguable that on return the applicant is likely to be asked where his family is. Unless he lies, he will have to say that his

> son has been granted asylum in England. It will then be assumed that the son is hostile to the regime; that might arguably make it difficult for the applicant to demonstrate loyalty to the regime. Those asking questions in Zimbabwe will not be interested in the credibility of the way in which the son obtained asylum and it is arguable that the emphasis on the son's credibility may have been misplaced."

10. It is acknowledged by the Secretary of State that the son has been granted asylum by reason of his support for the MDC and requires protection as an MDC supporter. I agree with Longmore LJ that those asking questions in Zimbabwe will not be interested in the credibility of the way in which the son obtained asylum.

11. As to the appellant telling lies on return, in *RT (Zimbabwe) & Ors* [2010] EWCA Civ 1285 the Court considered the application of the principles in *HJ (Iran)* [2010] UKSC 31 in the present context. Giving the judgment of a court comprising himself, Lord Justice Lloyd and Lord Justice Sullivan, Carnwath LJ stated, at paragraph 36:

> "It may be said that there is marked difference in seriousness between the impact of having to lie on isolated occasions about political opinions which one does not have, and the "long-term deliberate concealment" of an 'immutable characteristic', involving denial to the members of the group their 'fundamental right to be what they are' (see per Lord Hope para 11, 21). We are not persuaded, however, that this is a material distinction in this context. The question is not the seriousness of the prospective maltreatment (which is not in issue) but the reason for it. If the reason is political opinion, or imputed political opinion, that is enough to bring it within the Convention. In this case, we are concerned with the "imputed" political opinions of those concerned, not their actual opinions . . . Accordingly, the degree of their political commitment in fact, and whether political activity is of central or marginal importance to their lives, are beside the point. The 'core' of the protected right is the right not to be persecuted for holding political views which they do not have. There is nothing 'marginal' about the risk of being stopped by militia and persecuted because of that. If they are forced to lie about their absence of political beliefs, solely in order to avoid persecution, that seems to us to be covered by the *HJ (Iran)* principle, and does not defeat their claims to asylum."

That decision post-dated the decision of the Tribunal challenged in this appeal. The court in *RT* did conclude:

> "However, conditions in Zimbabwe, as they are described in RN are exceptional. The legality of these decisions must be decided by reference to the guidance in that case."

12. For the respondent, Miss Grange accepts that the son having been granted asylum may place the appellant in an enhanced risk category by making it more difficult for

him to demonstrate his loyalty to the regime. Amongst the courses she advocates is that the case should be remitted so that the Tribunal has a further opportunity to assess risk on return, notwithstanding earlier opportunities to do so. It is stated in *RN*, at paragraph 244, that "each case will turn on its own facts". At paragraph 246, it is stated:

> "An appellant who has been found not to be a witness of truth in respect of the factual basis of his claim will not be assumed to be truthful about his inability to demonstrate loyalty to the regime simply because he asserts that. The burden remains on the appellant throughout to establish the facts upon which he seeks to rely."

13. Miss Grange submitted that the Secretary of State and the Tribunal should have a further opportunity to examine the circumstances of return, for example, the area to which the appellant would return and whether, for example, he is "a person who would be returning to a *milieu* where loyalty to the regime is assumed" (paragraph 230). In the alternative, Miss Grange submitted that final resolution of the present case should be deferred until fresh Zimbabwean guidance is available, a case having been heard in late 2010 with judgment reserved. She also submitted that the decision should await the outcome of *RT*, which it is proposed to take to the Supreme Court.

14. However lacking in credibility the appellant is, it is inescapable that he would return as a failed asylum seeker, having been in the United Kingdom for a substantial time (though not as long as he claimed). He would not be expected to lie about his loyalty or about his son having been granted asylum in the United Kingdom because of his MDC sympathies (*HJ*).

15. In the light of the evidence and the guidance in *RN*, the appellant's prospect of demonstrating loyalty to the regime appears bleak. Mr Dove QC, for the appellant, submits that, on a remittal, there could only be one answer, that is, to allow the appeal against the refusal of asylum. Remittal for what would be a third determination is redundant and disproportionate.

16. I have cited paragraph 234 of *RN* where it is stated that a person returning to Zimbabwe having made an unsuccessful asylum claim will be "at real risk". The contrary finding of the Tribunal at paragraph 16 was erroneous. As part of the summary of conclusions in *RN*, at paragraph 259, it is stated:

> "The fact of having lived in the United Kingdom for a significant period of time and of having made an unsuccessful asylum claim are both matters capable of giving rise to an enhanced risk."

17. It is necessary to refer to other paragraphs in *RN*, as did Mr Dove. In paragraph 81 it is stated:

> "We observe here that there can be found within the extensive documentary evidence put before us other accounts of the means used by those manning road blocks to establish whether a person is loyal to the ruling party. For example, a person who

> was unable to produce a Zanu-PF card might be asked to sing the latest Zanu-PF campaign songs. An inability to do so would be taken as evidence of disloyalty to the party and so of support for the opposition. Clearly, a person returning to Zimbabwe after some years living in the United Kingdom would be unlikely to be able to pass such a test."

18. Later in the determination it is stated:

> "215. What is clear, however, is that it has been established by overwhelming evidence that in deploying these militias the regime unleashed against its own citizens a vicious campaign of violence, murder, destruction, rape and displacement designed to ensure that there remains of the MDC nothing capable of mounting a challenge to the continued authority of the ruling party.
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> 216. This campaign has been rolled out across the country not by disciplined state forces but by the loose collection of undisciplined militias who have delivered a quite astonishingly brutal wave of violence to whole communities thought to bear responsibility for the "wrong" outcome of the March 2008 poll. It is precisely because of that that any attempt to target specifically those who have chosen to involve themselves with the MDC has been abandoned. In our view there can be no doubt at all from the evidence now before the Tribunal that those at risk are not simply those who are seen to be supporters of the MDC but anyone who cannot demonstrate positive support for Zanu-PF or alignment with the regime.
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> 226. That risk arises throughout the country, in both urban and rural areas. A person may be faced with the need to demonstrate such loyalty to the ruling party in varying circumstances. The youth militias, "War Veterans" and other groups put together under the direction of the state authorities have established camps or bases throughout the country from which they operate. Although the evidence suggests that some of those camps or bases have closed down after the run off vote in July of this year it is plain that many remain and that they are to be found throughout the country in both rural and urban areas. Ordinary Zimbabwean citizens may encounter these groups at road blocks set up to establish no go areas or simply when at home as the militias move into areas thought to harbour MDC support."

That is elaborated in paragraphs 227 and 288. As his reason for agreeing that the appeal should be allowed to the extent of a remittal, the Secretary of State has acknowledged the risk that may arise "regarding his son's asylum grant".

19. I have referred to Miss Grange's acceptance, inevitable in my view, that there is a real risk that the appellant's son having obtained asylum because of his MDC sympathies

would come out on the appellant's return. Miss Grange relied on the decision of this court in *TM (Zimbabwe) v Secretary of State for the Home* Department [2010] EWCA Civ 916. In a judgment with which Rix LJ and Ward LJ agreed, Elias LJ stated:

> "16. A question that arises from the guidance is this: what exactly is the significance of the fact that certain categories of asylum seekers will be in the heightened risk category? The fact that an asylum seeker falls into one or more of the enhanced risk categories is not of itself sufficient to justify the grant of asylum as paragraph 230 of the decision in *RN*, reproduced above, makes clear. The question is whether he faces a real risk of persecution on return; he will do so from the militia gangs unless he is able to show loyalty to the governing party.
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> 17. So the onus is on the applicant to show that there is a real risk that he will not be able to demonstrate the required loyalty. Falling into a heightened risk category does not of itself constitute such evidence."

20. Further guidance in *RN* provides:

> "229. The evidence suggests that those living in the more affluent low density urban areas or suburbs are likely to avoid such difficulties, the relative security of their homes and their personal security arrangements being sufficient to keep out speculative visits. Many of those with the means to occupy such residences are in general likely to be associated with the regime and so not a target on the basis of doubted loyalty. Others may enjoy such a lifestyle as a result of a more circumspect relationship with the regime falling short of actual association, but which is, nevertheless, such as to give the appearance of loyalty.
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> 230. It remains the position, in our judgement, that a person returning to his home area from the United Kingdom as a failed asylum seeker will not generally be at risk on that account alone, although in some cases that may in fact be sufficient to give rise to a real risk. Each case will turn on its own facts and the particular circumstances of the individual are to be assessed as a whole. If such a person (and as we explain below there may be a not insignificant number) is in fact associated with the regime or is otherwise a person who would be returning to a milieu where loyalty to the regime is assumed, he will not be at any real risk simply because he has spent time in the United Kingdom and sought to extend his stay by making a false asylum claim."

21. In the present case, there was no evidence before the Tribunal as to the *milieu* to which the appellant would be returning. Moreover, it is necessary to consider other

paragraphs in *RN*, including paragraph 231 which, immediately following the reference to a *milieu* begins with “apart from in those circumstances”.

> “231. But, apart from in those circumstances, having made an unsuccessful asylum claim in the United Kingdom will make it very difficult for the returnee to demonstrate the loyalty to the regime and the ruling party necessary to avoid the risk of serious harm at the hands of the War Veterans or militias that are likely to be encountered either on the way to the home area or after having returned there. This is because, even if such a person is not returning to one of the areas where risk arises simply from being resident there, he will be unable to demonstrate that he voted for Zanu-PF and so he may be assumed to be a supporter of the opposition, that being sufficient to give rise to a real risk of being subjected to ill-treatment such as to infringe article 3.
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> 232. And, regardless of the political opinion or associations of the individual, or the absence of any at all, the persecution involved in the infliction of such ill-treatment will be for a reason recognised by the Convention. This is because it is inflicted on the basis of imputed political opinion.”

22. Reference was made to *RT*. Carnwath LJ quoted paragraphs 16 and 17 in *TM* and stated that “the decisions on the individual cases are helpful as illustrations of the court’s approach, but they remain decisions on the facts rather than separate statements of principle”. Carnwath LJ stated, at paragraph 24:

> “The burden remains on him to make good the claim, and, in the absence of credible evidence to make that link, the tribunal is entitled to conclude that the inference is not made out.”

The link is, it appears, to show that he is at risk, Elias LJ having accepted in *TM* that someone returning will face a real risk of persecution from the militia gangs on return “unless he is able to show loyalty to the governing party”.

23. Miss Grange also relied on the decision reached in *RT* in one of the cases, *SM*, considered there. The facts are summarised at paragraph 44 of *RT*:

> “The judge did not find her a credible witness. She had been out of Zimbabwe for some 17 months as at the date of hearing. She had no connections to the MDC, whether in Zimbabwe or the UK. Her mother was recognised as a refugee in the UK in or around 2003. She had lived in Zimbabwe without problems between 2002, when her mother left, and 2008. It was unclear where she had resided prior to her departure from Zimbabwe.”

The judge had concluded, as summarised by the court at paragraph 45:

> “As previously stated she appears to have been able to live in Zimbabwe without problems since her mother left the country

> in 2002 and quite frankly, given this individual's complete lack of credibility and indeed her inclination to lie as and when required, as the original Immigration Judge pointed out, no doubt she would be prepared to lie again in the future to the authorities on return to Zimbabwe about any political affiliation she might have." (para 23)

24. The court allowed the appeal to the extent of a remittal and Miss Grange submitted that the circumstances are identical to those in the present case and that remittal is appropriate. While the two cases do have the similarity of a close relative obtaining asylum, the other circumstances are distinguishable. The court does not know whether there was evidence as to the *milieu* to which *SM* would return and there does not appear to have been the acknowledgement made in the present case of the risk of questioning about the relative's asylum. In any event, it is the duty of the court to make its own appraisal and the court is not bound by a decision, on facts incompletely known to us, in another case.

25. Material errors of law by the Tribunal have been established. The need for an unsuccessful asylum seeker to demonstrate loyalty to the regime or to Zanu-PF to avoid persecution on return to Zimbabwe is strongly expressed in *RN* (for example, paragraphs 231, 234, 238 and 258). The hazards faced by those returning are spelt out (for example, paragraphs 81, 215, 216, 226, 231 and 232). Moreover, it is acknowledged that the appellant is also in an enhanced risk category by reason of his son having been granted asylum in the United Kingdom. Those features point towards a grant of asylum.

26. Notwithstanding those features, and the persuasive submissions of Mr Dove, I have come to the conclusion that remittal to the Tribunal is the appropriate course. I do so by considering the finding that the appellant lacks credibility in the context of paragraphs 229, 230 and 246 of *RN*. I have concluded that this is not a case in which the undisputed facts, that is return as an unsuccessful asylum seeker after a substantial time in the United Kingdom, and as the father of a man who has been granted asylum in the United Kingdom, necessarily establish a risk of persecution on return.

27. First, an applicant found not to have been a witness of truth will not be assumed to be truthful about his inability to demonstrate loyalty (paragraph 246). Secondly, there is recognition, in paragraphs 229 and 230, of categories of people, for example, those returning to more affluent areas and likely to be associated with the regime, who may be returning to a *milieu* where loyalty to the regime may be assumed and the risk of persecution does not arise.

28. It is for the appellant to establish the risk of persecution which involves satisfying the Tribunal that he does not come within such categories, though the standard of proof is not a demanding one (paragraph 247 of *RN*). He has not hitherto done so. The lack of focus on that issue, as distinct from the issue of credibility, does not end the matter because the burden of establishing risk is on the appellant.

29. I regard the appellant's case as a strong one and it is acknowledged that there is a risk of the son's status becoming known. My conclusion is certainly not an indication to the Tribunal to find against him at the remittal, but this is not a case which this court can decide on the basis that there could only be one result before the Tribunal.

30. The Tribunal, as the fact finding tribunal, should have the opportunity to consider whether, while there is an enhanced risk, that risk will not lead to persecution because of the *milieu* to which the appellant will be returning. That appears to have been the approach which Elias LJ, who cited paragraph 230 of *RN*, followed in *TN* at paragraphs 16 and 17. Evidence of the circumstances in which the appellant would return may be received and, on that issue, a reassessment of credibility will be required.

31. I would allow the appeal to the extent of remitting the case to the Tribunal.

Lord Justice Rix :

32. I agree.

Lord Justice Lloyd :

33. I also agree.