OUTER HOUSE, COURT OF SESSION

[2019] CSOH 67

P208/19

OPINION OF LORD BANNATYNE

In the cause

GC

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Gardiner; Office of the Advocate General

6 September 2019

Introduction

[1] In the present case the petitioner sought judicial review of a decision of the respondent dated 7 February 2019 that the petitioner had not made a fresh claim to remain in the UK.

Background

[2] The petitioner's immigration history is as follows: he is Zimbabwean. He entered the UK on 18 April 2016, and subsequently made an asylum claim. This claim was refused by the respondent on 12 September 2017. The appeal was refused by the First-tier Tribunal

on 30 May 2018. The First-tier Tribunal and the Upper Tribunal refused permission to appeal. On 4 February 2019, the petitioner made further submissions.

[3] The respondent determined that the petitioner's further submissions did not constitute a fresh claim. As above set out this is the decision under challenge.

The legal test

[4] The legal test in respect to the issue under review is as set out in Immigration Rule 353 which provides:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered.
>
> The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas."

The approach of the court

[5] It was not contentious that the correct approach when applying Immigration Rule 353 is set out in *WM (Democratic Republic of Congo)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495:

> "[10] … Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

> [11] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return… The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of these questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

The submissions on behalf of the petitioner

[6] Mr Caskie commenced his submissions by looking at the question: is there a realistic prospect of an immigration judge, applying the rule of anxious scrutiny, thinking that the petitioner will be exposed to a real risk of persecution on return to Zimbabwe?

[7] Mr Caskie accepted that the petitioner would not necessarily succeed in an appeal against the challenged decision but there was a realistic prospect that he would succeed.

[8] It was Mr Caskie's position that the starting point for the immigration judge would be the findings in fact of the First-tier Tribunal and in particular these finding in facts included the following:

- Paragraph 128 where it is accepted that the petitioner is a gay man.
- Paragraph 129 where it is accepted that the petitioner wishes to live in Zimbabwe as an openly gay man.
- Paragraph 131 where it says this:

  > "The question is how each applicant, looked at individually, will conduct themself if returned and how others will react to what he does. Whether this will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another with varying degrees of risk. But he cannot and must not be expected to

> conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result then that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this enquiry."

[9] Mr Caskie then directed the court's intention to the Country Guidance in respect of gay men in Zimbabwe. This case is *LZ (Homosexuals) Zimbabwe* CG [2011] UKUT 00487 [IAC]. In respect of the present case the critical finding was at paragraph (vii) in the headnote which stated:

> "Applying *HJ and HT* [2010] UKSC 31, [2010] Imm AR 729, there is no general risk to gays or lesbians. Personal circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk."

[10] Mr Caskie then turned to paragraph 111 of the decision where the tribunal observes:

> "This case does not concern an openly gay person. Such a case would have to be assessed on its own facts. *HJ and HT* make it clear that the test is not whether persecution may be avoided by behaving more discreetly. A case might be based partly on habits acquired under the greater freedom of life abroad. On our findings being openly gay does not translate into a real risk, but it might well be a significant factor."

[11] Mr Caskie took from the above passage that *LZ* was of less significance in the present case in that here the petitioner is an openly gay man. He noted that in the said paragraph there was no guidance given as to what might be the extra factor which would mean that an openly gay man was at real risk of persecution in Zimbabwe. His position was in the present case that what he would come to describe as the spike in violence in Zimbabwe at the time of the challenged decision provided this extra factor which caused the petitioner as an openly gay man to be at real risk of persecution if returned to Zimbabwe.

[12] Counsel then directed the court's attention to the guidance of Lord Dyson JSC in *RT (Zimbabwe)* v *The Secretary of State for the Home Department* [2012] UKSC 38 at paragraph 25 where he observes:

> "It is well established that there are no hierarchies of protection amongst the Convention reasons for persecution, and the well-founded fear of persecution test set out in the Convention does not change according to which Convention reason is engaged: see, for example, per Lord Hope of Craighead DPSC in the *HJ (Iran)* case at para 10, per Lord Hoffman in *R* v *Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 651B and per Lord Bingham of Cornhill in *Fornah* v *Secretary of State for the Home Department* [2007] 1 AC 412, paras 20-22 (approving the reasoning of Laws J in *R* v *Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49-50). Thus the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights."

[13] Lord Dyson then at paragraph 27 referred to certain observations he had made in *HJ (Iran)* [2011] 1 AC 596 at paragraph 110:

> "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country."

[14] Counsel submitted that the above is the legal landscape in which an immigration judge would require to consider his decision in respect of the petitioner. Counsel then went on to develop his argument as follows: an immigration judge looking at the present case would have to take as his starting point the decision of the First-tier Tribunal at paragraph 128 that the petitioner is a gay man and at paragraph 129 that the petitioner wishes to live in Zimbabwe as an openly gay man.

[15] An immigration judge would then have to consider the further submissions. The new matters were the material produced regarding the spike in violence in Zimbabwe at the time of the decision of the respondent which is challenged.

[16] Mr Caskie's position was that he accepted that in light of *LZ* being gay was not enough for the petitioner to be successful. However, he submitted that when the petitioner being gay and wishing to be openly gay was taken together with the new material showing the increase in violence in Zimbabwe there was sufficient to show that he would be at a real risk if returned to Zimbabwe.

[17] Mr Caskie then turned to look at the new material in detail and to submit first that having regard to the new material although the respondent had asked the correct question (is there a realistic prospect of success before an immigration judge?) there had been a failure to apply anxious scrutiny to the new material before the respondent and secondly the new material when properly analysed showed a realistic prospect of success before an immigration judge.

[18] Mr Caskie then turned to the Home Office Country Policy and Information Note (Zimbabwe) sexual orientation and gender identity and expression version 4.0, dated January 2019 upon which he submitted the respondent had placed some reliance in her decision. He in particular drew attention to the following:

> "2.4.18 The situation has not significantly changed since *LZ* was promulgated. In general, the societal treatment of LGBTI people in Zimbabwe, even when taken cumulatively, is not sufficiently serious by its nature and repetition as to amount to persecution or serious harm.
>
> 2.4.19 However personal circumstances may place some persons at risk; each case must, however, be considered on its facts. The onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk from non-state actors."

[19] Counsel noted in respect to the above conclusions that only one report referred to in this document was published in 2019 and it related to 2018 and everything else predated 2019. Mr Caskie's contention in short regarding this report was that it had been overtaken by the events as set out in the new material provided by the petitioner to the respondent. This new material related precisely to the time at which the representations were put in on behalf of the petitioner, namely: 4 February 2019 and the date of decision itself.

[20] The new material relied on in summary was as follows:

- 6/3 page 3 was a press release from Amnesty International UK dated 15 January 2019 headed: "Zimbabwe: 8 killed and 200 detained in crack down on fuel price protests".
- At page 4 of 6/3 the following was stated:

  > "The Zimbabwean authorities must ensure that the security forces exercise restraint and respect the rights of people protesting massive fuel price hikes, Amnesty International said, on the second day of the national 'shutdown'.
  >
  > At least eight people have reportedly been killed by the security forces and 200 arbitrarily detained.
  >
  > Reports of security forces using firearms and teargas against people protesting the 150% increase in fuel prices have surfaced in Harare and Bulawayo. In Epworth, one woman was badly injured after she was shot near a police station on her way to work, according to media reports. A boy was also shot in the stomach in Mbare.
  >
  > Yesterday, The Zimbabwe Congress of Trade Unions (ZCTU), a local labour organisation, called for a national shutdown, saying the fuel price increases were 'insensitive and provocative'."

- Further, at page 4 of 6/3 the following was said:

  > "Amnesty is alarmed by the repressive measures the government has taken in response to the protests, including shutting down the internet to prevent people from supporting or organising protests. The police and military have also reportedly subjected people who were protesting to beatings and other forms of ill treatment."

- Lastly at page 5 of 6/3 the following was said:

> "On 12 January, President Emerson Mnangagwa announced the fuel price hikes, which took effect on 13 January. The prices of both diesel and petrol, the main means for the transportation of people and consumer goods in Zimbabwe, have increased by 150%.
>
> Zimbabwe has been suffering chronic shortages of US dollars which were adopted as the official currency after the country abandoned the Zimbabwean dollar in 2009 due to hyperinflation. The country has suffered shortages of consumer goods in recent months with some shops shutting their doors due to the shortage in US dollars."

[21] Mr Caskie then referred to a UK Immigration Justice Watch Blog dated January 28 2019, (see: 6/3 p7) which stated:

> "The Upper Tribunal did this afternoon, on an urgent basis, grant a stay of removal to a Zimbabwean failed asylum seeker.
>
> The grant was on no basis other than that the applicant, a Zimbabwean national on seeking an injunction against removal, relied on the argument that it was too soon to return a failed asylum seeker to Zimbabwe due to the volatile country conditions prevailing in that country."

[22] Mr Caskie then turned to page 13 of 6/3 which was a report from the Evening Standard dated 30 January 2019, this referred to:

> "… a calculated plan to subdue the entire urban population of Zimbabwe which voted against Mnangagwa at the 2018 elections."
>
> "The systematic persecution of civilians by the military is a crime against humanity in terms of the Treaty of Rome. The offences committed in Zimbabwe in the past fortnight are being directed by the same leaders who were responsible for the Gukurahundi massacres of the 80s…"

- Mr Caskie then referred to an article dated 30 January 2019 at page 21 of 6/3 which referred to maize meal prices being about to go up. He advised the court that maize was the staple diet in Zimbabwe.

- He then turned to a report from the Guardian dated 30 January 2019 at page 25 of 6/3 and in particular drew the court's attention to the following in that report:

> "Internal Zimbabwean police documents passed to the Guardian suggest the army has been responsible for murder, rape and armed robbery during the ongoing brutal crackdown in the southern African country."

- At page 26 the following was said:

  > "The violence is the worst in Zimbabwe for at least a decade and has dashed any remaining hopes that the end of the 37 year rule of the autocratic leader Robert Mugabe 14 months ago would lead to significant political reform."

- Mr Caskie then looked at page 29 of 6/3 which was a Sky News report headed: "Zimbabwe: Daylight beatings instil public fear in 'lawless' country". This was dated 28 January 2019.

- Mr Caskie referred the court to various other passages within this report, however, the points made in these passages in substance repeated the type of comments to which he had earlier referred in other reports.

[23] Mr Caskie referred in the new material to passages which noted that the internet was down in Zimbabwe.

[24] The next matter to which Mr Caskie directed the court's attention was an article dated 28 September 2018 in which reference was made to:

> "A gay deputy headmaster of a boy's school in Zimbabwe has resigned after death threats and pressure from parents." (see: page 41 of 6/3)

- Mr Caskie also directed the court's attention to an article at page 45 dated 3 October 2018 which also referred to the incident regarding the deputy head master.

[25] Mr Caskie took the following from the above material: It evidences that what was happening in general in Zimbabwe in late January and early February 2019 is that there was a crisis, there was a spike in violence; it followed from this spike in violence that the situation for any vulnerable group such as gay people and in particular openly gay people must have

been made more difficult because of the general level of violence and the impunity with which non-state actors could act at this particular time.

[26] He further developed the argument in this way: the spike in violence is an opportunity for homophobes generally and for those who wish to attack homosexuals to attack them with impunity as the police are dealing with other matters, namely: the spike in violence.

[27] As I understood his position Mr Caskie was saying this: the spike in violence and what flowed from it namely: the lack of police protection of gay people was the additional factor, referred to in *LZ*, in respect of someone who was openly gay and which caused such a person to be at real risk of persecution in Zimbabwe.

[28] Against the background of the new material Mr Caskie submitted that there was a realistic prospect of an immigration judge thinking that the petitioner would be exposed to a real risk of persecution on return to Zimbabwe.

[29] Mr Caskie then moved on to address the issue of how the respondent had dealt with this new material and to make further submissions as to how an immigration judge could look at it.

[30] In the decision letter Mr Caskie accepted that at paragraph 13 the correct test was set out. The decision letter then went on at paragraph 17 to set out the findings in fact of the First-tier Tribunal. He then said that the meat of the decision was from paragraph 24 onwards. It was his position that from this point onwards the reasons given by the respondent to the effect that the petitioner had not fulfilled the relevant test were wholly inadequate.

[31] At paragraph 24 the respondent looked at the UK Immigration Justice Watch Blog and in essence rejected out of hand this report as it referred to a third party. His position was

that by its very nature the report would relate to a third party, however, what the respondent had failed to do was consider what inferences could properly be taken from the Upper Tribunal granting a stay in this type of case.

[32] As regards paragraph 25 of the decision letter he made a very short point: "This showed the respondent to be pulling herself up by her own bootstraps". He said that the response of the respondent in no way answered the issue in respect of the internet being down in Zimbabwe. It was his position that an immigration judge could easily take an inference from the internet being down, when looked at against the background of the increased violence in Zimbabwe, that there was an effort by the Zimbabwean authorities to conceal the conduct of its police and armed forces because it had something to hide.

[33] In respect of what was said at paragraph 26 by the respondent it was Mr Caskie's position that anyone producing background information of the type that had formed the new material was by definition not able to provide information which referred to themselves. One cannot produce information of such a type which refers to oneself. In every case background information of the type which formed the new material relates to the situation in the country concerned rather than the individual himself. What was said in article 26 did not amount to adequate reasons for rejecting the further information supplied.

[34] Turning to paragraph 27 Mr Caskie's position was that the respondent had left out of account in this paragraph that the petitioner was a gay man. In addition paragraph 27 did not contain reasons rather it was a conclusion. His comments relative to paragraph 27 equally applied to paragraph 28.

[35] Looking to the reasons as a whole he described them as being inadequate and showing a lack of anxious scrutiny when considering the further material presented by the petitioner.

[36] Lastly, Mr Caskie referred to 6/4 of process. This was a report in respect to a Zimbabwean being outed as gay in Zimbabwe, who had been blackmailed in his homeland and had been granted asylum in the UK. Mr Caskie said that this report had been before the respondent but had been given no consideration.

[37] In conclusion Mr Caskie said this: the decision letter is not lawful; the respondent had not had regard to all relevant matters; she had not produced adequate reasons; and finally had not applied anxious scrutiny. It was, he submitted, clear that an immigration judge could properly take a different view from the respondent in respect of this matter. It was his position that there were clearly realistic prospects of success before an immigration judge. Accordingly the petition should be granted.

Reply on behalf of the respondent

[38] Mr Gardiner began by making a short and sharp point. The core of the petitioner's argument is that because of the spike of violence homophobes would be able to take advantage of police resources having to deal with the spike in violence to attack openly gay people such as the petitioner. His response to that contention was to refer to *LZ* at paragraph 116 where the tribunal observes:

> "The police and other state agents do not provide protection" to gay people.

[39] The above observation he submitted broke the link between the new material regarding the spike in violence in Zimbabwe and any decline in protection of the gay community. He accepted that the gay community was not protected by the police in Zimbabwe at the point of the challenged decision, however, before the spike in violence they were not getting protection from the police. The spike in violence had accordingly not produced any change in respect to the level of risk for an openly gay person.

[40] In addition, Mr Gardiner submitted this: the petitioner appeared to found on the spike in violence as adding the necessary element in terms of the Country Guidance to show there was a real risk of persecution if the petitioner were he to be returned to Zimbabwe. Mr Gardiner said this: for the spike in violence to be of any relevance to the above issue there has to be an effect on the personal circumstances of the petitioner. There is in terms of the new material nothing relevant to the personal circumstances of the petitioner for the following reasons:

- There is no direct link between the spike in violence and the petitioner who is an openly gay man.
- There is no direct link between the spike in violence and gay people.

[41] Turning to the Country Guidance Mr Gardiner made this point: Country Guidance is to be applied unless there are very strong grounds supported by cogent evidence justifying not doing so: *YC* v *Secretary of State for the Home Department* 2019 CSIH 5 at paragraph 17. This is for reasons of consistency and accuracy.

[42] As regards the relevant Country Guidance at the time the First-tier Tribunal refused the petitioner's appeal in May 2018 it was contained in *LZ* and in particular paragraph 116 thereof. Where the following is stated:

> "116 We draw together our conclusions, as follows. There has been much public expression of extreme homophobia at the highest levels in recent years. Male homosexual behaviour is criminalised, but prosecutions are very rare. Lesbianism is not criminalised. Some homosexuals suffer discrimination, harassment and blackmail from the general public and the police. Attempted extortion, false complaints and unjustified detentions are not so prevalent as to pose a general risk. There are no records of any murders with a homophobic element. 'Corrective rape' is rare, and does not represent a general risk. There is a 'gay scene,' within limitations. Lesbians, living on their own or together, may face greater difficulties than gay men. GALZ (Gays and Lesbians of Zimbabwe) takes a realistic view: Zimbabwe is 'not the worst place in the world to be gay or lesbian even though the President, government officials and church leaders have whipped up a climate of hysterical homophobia.' Applying *HJ & HT*, there is no general risk to gays or lesbians. Personal

> circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk. The police and other state agents do not provide protection. A homosexual at risk in his or her community can move elsewhere, either in the same city or to another part of the country. He or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances present risk throughout the country."

[43] Mr Gardiner took the following points from the above passage:

- There was homophobia in Zimbabwe, but
- It did not present a general risk to homosexuals, and in any event
- It was open to people to internally locate.

For there to be a real risk, there would have to be relevant personal circumstances going beyond the fact of homosexuality.

[44] As to the position at the point at which the respondent's decision was made he contended that new Country Guidance on sexual orientation in Zimbabwe to which Mr Caskie had made reference was cleared on 29 January 2019. This was the current Country Guidance at the time of the petitioner's new submissions and the respondent's decision, and remains current. He referred in particular to paragraph 2.4.18 which has been quoted in full earlier and relied in particular on the finding that the situation in Zimbabwe had not significantly changed since *LZ* was promulgated.

[45] It was thus his position that the observations taken from the 2011 Country Guidance case are therefore unaffected.

[46] Moving on, Mr Gardiner accepted Mr Caskie was correct in saying that a subsequent appeal would take the First-tier Tribunal's findings as a starting point.

[47] He then drew the court's attention to the following in the First-tier tribunal's decision: it found that there was no real risk to the petitioner on account of his homosexuality (see:

paragraph 135). It found that, even if there is a risk at local level, he can internally relocate "without much difficulty" (see: paragraph 137).

[48] Mr Gardiner then moved to the further submissions made on behalf of the petitioner and described them thus: 13 articles which were said to show a breakdown in law and order together with widespread violence by the authorities, a Sky Sports article 6/4 and a comment that the internet in Zimbabwe has been shut down.

[49] He made these short submissions in respect of the further submissions:

- They are not cogent evidence of a general risk to homosexuals in Zimbabwe.
- They do not contradict the Country Guidance, which at paragraph 116 acknowledged extreme homophobia, discrimination, harassment and blackmail of homosexuals. The further submissions merely identify examples of these issues.
- Even if the further submissions do contradict the Country Guidance, which he denied, they are not to be preferred to Country Guidance in that:
- No expert evidence has been provided assessing the accuracy of the articles and the conclusions that can be drawn from them.
- Article 2 and the Sky Sports article concerned other immigration cases, but the actual case reports have not been identified.
- Articles 1, 8, 9, 10, 11, 12, 13 and the Sky Sports article predated the current Country Guidance being cleared.
- Articles 1, 2, 3, 4, 5, 6, 7 and 8 do not concern homosexuals.

[50] Lastly he submitted that given the nature of the material as above described adequate reasons had been given in the decision letter and anxious scrutiny had been applied to the new material.

[51] For the above reasons he submitted that the petition should be refused.

Discussion

[52] I do not agree with Mr Caskie's submission that the spike in violence in Zimbabwe at the time of the challenged decision provides the additional necessary factor to cause an openly gay man, such as the petitioner, to be at a real risk of persecution upon his return to Zimbabwe.

[53] I am satisfied that the core of the petitioner's case is wholly undermined by the short passage in *LZ* dealing with Country Guidance at paragraph 116 to which I was referred by Mr Gardiner, namely:

"The police and other state authorities do not provide protection" to gay people.

I also observe that this conclusion is repeated in the headnote to the decision at paragraph (viii).

[54] Mr Caskie's argument in short was this: the spike in violence would allow homophobic elements within Zimbabwe to persecute gay people without fear of the police intervening. The attention of the police would be directed towards dealing with the spike in violence. Such persons would because of the spike in violence be able to act with impunity.

[55] I believe, however, that argument is misconceived for this reason: even if the police attention were not diverted to dealing with the spike in violence they would not provide protection to the gay community and to persons such as the petitioner. Thus the spike in violence adds nothing to the risk to an openly gay person in Zimbabwe. As stated in the Country Guidance the police do not provide protection to gay people. Accordingly there is a complete absence of linkage between the spike in violence and any increase in risk to the gay community and thus to an openly gay person such as the petitioner. The position remains as

is set out in the Country Guidance so far as gay persons in Zimbabwe are concerned. Accordingly, I conclude that the new material could not result in there being a realistic prospect of an immigration judge concluding that the petitioner would be exposed to a real risk on his being returned to Zimbabwe.

[56] There is, I believe, a further fundamental difficulty with the position advanced on behalf of the petitioner. The new material has no relationship to the personal circumstances of the petitioner. The articles which refer to a spike in violence in Zimbabwe make no express reference to any violence or increase in violence towards gay people in Zimbabwe. Only two of the articles refer to incidents involving gay people. However, they do not relate to incidents which took place during the spike in violence. They are in no way related to the spike in violence. Rather they speak to incidents of the type referred to in *LZ* and therefore add nothing to the picture as described in *LZ*. They cannot accordingly add anything in respect to the issue of the risk to an openly gay person in Zimbabwe.

[57] Mr Caskie said in the course of his submissions it was a "small step" from the new material to an immigration judge taking a different view as to the risk for openly gay people in Zimbabwe than that taken by the respondent. I do not agree with this submission. First, there is the difficulty I have already set out regarding the known behaviour of the police in Zimbabwe. Beyond that the new material on no view supports the contention that gay people are at a real risk of persecution because of the spike in violence. There is nothing explicit in the new material that supports this contention and nothing from which such an inference could properly be drawn.

[58] I believe that Mr Gardiner is correct when he contends that the further material at its highest is not cogent evidence of a general risk to gay people in Zimbabwe. At its highest the new material does no more than show a general rise in violence, not referable to the

circumstances of the petitioner, and the two examples of the issues faced by gay people in Zimbabwe shows nothing different from what is identified within the Country Guidance and accordingly does not add anything to the Country Guidance. They are no more than examples of behaviour toward gay people in Zimbabwe of a type recognised in the Country Guidance. I am satisfied that there is nothing in the new material which would cause an immigration judge not to follow the Country Guidance.

[59] Even assuming that this new material does contradict the Country Guidance, which for reasons I have already set out, I do not accept, then for the reasons advanced by Mr Gardiner it is not to be preferred to the Country Guidance.

[60] On the above analysis the immigration judge would be bound to follow the Country Guidance and the petitioner would be bound to fail. There is nothing in the new material which would entitle an immigration judge to take a different view from that of the respondent. Accordingly, there is no realistic prospect of success before an immigration judge.

[61] I turn now to the issue of error of law in the challenged decision. So far as the adequacy of the reasons provided by the respondent, Mr Caskie criticised the reasoning at paragraph 24 regarding the UK Immigration Justice Watch blog. In this blog there is reference to a grant of a stay of removal to a Zimbabwean asylum seeker during the spike of violence. However, there was no detail as to the circumstances of the person granted asylum. There was nothing in the article as regards the precise reasoning of the Upper Tribunal in granting a stay. Accordingly I believe that nothing can be taken from this article in respect of the petitioner. Every case turns on its own facts and circumstances. There was nothing in the blog in respect of the person granted the stay which related to the particular circumstances of the petitioner, namely: an openly gay man. The reasons given by the respondent for not

taking anything from this article was that: it "is not specific to the circumstance of your case". For the reasons I have just given in respect to this blog, I believe that the reasons given by the respondent are adequate.

[62] In respect of paragraph 25 Mr Caskie described this as the respondent "pulling herself up by her own boot straps" and he submitted an immigration judge could take inferences from the internet being down. The reasons given by the respondent in this paragraph are somewhat circular in nature. However, again the fact of the internet being down does not I believe give rise to an inference that there are unreported human rights incidents in Zimbabwe which are relevant to the circumstances of the petitioner as an openly gay person. This is the theme which runs through the reasoning in the decision letter and I think on a fair reading that is the point that the respondent is seeking to make in this paragraph.

[63] Further, and in any event as is pointed out in the first sentence of paragraph 26 of the decision letter, the petitioner has been able to produce various internet articles.

[64] In respect to paragraph 26 I accept the point made by Mr Caskie that reports of the situation in Zimbabwe are bound to be generic in nature and will not refer specifically to the petitioner. However, on a fair reading, of this paragraph the respondent is saying that there is nothing in the new material which is produced which relates specifically to the petitioner's position as an openly gay man. That, I believe, is what is meant when the respondent says in this paragraph: the new material is "not specific to you and your circumstances, and that you personally are at individual risk of harm." I believe that the reasons provided in this paragraph are once more adequate.

[65] In respect to paragraph 27 the criticism of Mr Caskie was that the respondent had left out of account that the petitioner was an openly gay man. I do not believe that this criticism is

well founded. At paragraphs 16 and 17 of the decision letter the respondent specifically refers to the fact that the petitioner is a gay man. So the respondent clearly understands that that is the fundamental point within the factual matrix. In addition at paragraph 20 the respondent sets out in detail the petitioner's argument based on his being openly gay. Lastly the respondent's approach in the paragraphs leading up to paragraph 27 clearly show that the respondent is considering this particular factual matrix, namely the petitioner's open homosexuality. Merely because it is not expressly mentioned in paragraph 27 does not mean that the respondent has left this factor out of account.

[66] So far as the criticism that the respondent did not have regard to the articles which specifically relate to gay people in Zimbabwe, I have already referred to the fact that these are not related to the period when there was a spike in violence and secondly, do no more than give examples of what gay people suffer in Zimbabwe as recognised in the Country Guidance. For these reasons I do not think that the respondent who was founding on the Country Guidance can be criticised in respect to her approach to these matters.

[67] For the above reasons, I believe that the respondent has applied anxious scrutiny to the whole of the new material presented by the petitioner. When the reasoning of the respondent is looked at as a whole, it is adequate to entitle her to reach the conclusion arrived at in the last sentence of paragraph 28.

[68] The respondent looking to the whole terms of the decision letter is aware that what is to be carried out by her is a two-stage process as set out in *WM*, namely: that she can take her own views on the merits as a starting point, however there is a second and distinct question namely; whether there is a realistic prospect before an immigration judge. The respondent it appears to me follows this two-step process in the decision letter. The respondent gives the same reasons in respect to both questions, however, given the nature of that reasoning it

seems entirely appropriate that the same material is relied on in relation to both matters. It does not flow from the fact the same material has been relied upon that the respondent has not followed the appropriate procedure.

Decision

[69] For the foregoing reasons I refuse the prayer of the petition.