Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00062/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 November 2019	**On 21 January 2020**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MMB
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Philips of Counsel, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Ms I Vijiwala, Home Officer Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Sullivan promulgated on 12 August 2019, in which the Appellant's appeal against the decision to cease his refugee status and deportation was dismissed on asylum and human rights grounds.

2. The Appellant is a national of Zimbabwe, who arrived in the United Kingdom with valid entry clearance as a student in 2003. He sought further leave to remain as a student nurse on 5 January 2005 which was refused and he was served with a notice

for administrative removal on 26 January 2008. The Appellant claimed asylum on 7 August 2009, which was initially refused by the Respondent, but his appeal was allowed by the First-tier Tribunal on 3 November 2009, following which he was granted limited leave to remain and then indefinite leave to remain on 12 February 2015.

3. The Appellant was convicted of separate motoring offences on 20 May 2015 and 9 July 2015. He was convicted of sexual assault on 27 March 2017, for which he was sentenced to a period of imprisonment of five years three months and placed on the sex offenders register for life. Following this conviction, the Respondent notified the Appellant of her intention to cease his refugee status and to deport him from the United Kingdom.

4. The Respondent revoked the Appellant's refugee status on 9 May 2019 and made a decision to deport the Appellant on 12 June 2019. In relation to the revocation, the Respondent set out the basis of the Appellant's asylum claim which was due to his mother's political activities for the MDC in and around 2002, which resulted in her death. The Respondent found that the Appellant did not have a political profile himself and that he would no longer be at risk on return to Zimbabwe, where conditions have changed since the events upon which the asylum claim was originally based. The Appellant would be able to return to his home area of Harare without risk and without any breach of Articles 2 and/or 3 of the European Convention on Human Rights.

5. In relation to deportation, the Respondent applied the presumption in section 72 of the Nationality, Immigration and Asylum Act 2002 that the Appellant had been convicted of a particularly serious crime and constituted a danger to the community of the United Kingdom, without the presumption having been rebutted by the Appellant. As such the Appellant was not entitled to the protection of the Refugee Convention and was also excluded from humanitarian protection and under paragraph 339D of the Immigration Rules. The Respondent also considered the Appellant's family and private life, the claim being based on the Appellant having a partner and two children in the United Kingdom and a brother who was a British citizen. There was however no evidence of family relationships before the Respondent such that neither the family nor the private life exceptions to deportation were met.

6. Judge Sullivan dismissed the appeal in a decision promulgated on 12 August 2019 on all grounds. The First-tier Tribunal found that the Appellant had not rebutted the presumption in section 72 of the Nationality, Immigration and Asylum Act 2002 and in any event the Appellant would not be at risk on return to Zimbabwe. In particular, the Appellant was not an MDC supporter; there was no evidence of any risk to him due to family relationships 17 years after the events in 2002 and there was no reason not to apply the country guidance case of CM (EM country guidance; disclosure) Zimbabwe CG p2013] UKUT 00059 (IAC) which remained applicable and which the Appellant did not fall within the risk categories of. Finally, the First-tier Tribunal considered the Appellant's family life in the United Kingdom, found his

evidence in relation to his relationships not to be truthful and that he had no subsisting parental relationship with either of his children. The exceptions to deportation on the basis of family life were not met and there were no very compelling circumstances to outweigh the public interest in the Appellant's deportation.

The appeal

7. The Appellant appeals on three grounds. First, that the First-tier Tribunal erred in law in refusing to depart from country guidance in CM for two main reasons. First, that the First-tier Tribunal wrongly relied on the Court of Appeal's decision in Harveye v Secretary of State for the Home Department [2018] EWCA Civ 2848, misunderstanding the nature of that appeal and secondly, by failing to have regard to the whole of the most recent CPIN and making factual errors in the summary given of the part of that report which was available before the First-tier Tribunal. The second ground of appeal is that the First-tier Tribunal erred in finding that there had been a significant and durable change in circumstances in Zimbabwe, also by failing to consider the whole of the most recent CPIN and failing to give reasons for the conclusion despite the recent spikes in violence in Zimbabwe which were themselves inconsistent with a permanent eradication of risk to this Appellant. Further, that in this regard the First-tier Tribunal failed have regard to the UNHCR guidelines or views as to the current situation in Zimbabwe. The third ground of appeal is that the First-tier Tribunal failed to give reasons for finding that the Appellant was not at risk in accordance with the country guidance in paragraph 5 of CM, with a failure to make any findings as to why the Appellant would not engage in political activities on return to Zimbabwe when it was accepted that his mother had been murdered by Zanu PF supporters and that he had refused to join the Zanu PF youth.

8. At the oral hearing, the written grounds of appeal were relied upon and expanded in oral submissions. In relation to the country guidance, it was submitted that the First-tier Tribunal had relied on CM and misunderstood that the decision in Harveye was not a review of the then current circumstances in Zimbabwe but only a review of the lawfulness of the Upper Tribunal's decision in 2016, which itself refers back to evidence from around 2014. This was submitted to be a material error as it formed the basis of what was said to be only a limited assessment of whether it was appropriate to continue to apply the country guidance in CM or whether there was cogent evidence to depart from it. In relation to the CPIN, it was submitted that there was a duty on the Respondent to produce all relevant material to the First-tier Tribunal, which included a responsibility in the present appeal to provide a complete copy of the CPIN which in this case contained information relevant to the issue of whether there should be a departure from the country guidance.

9. There was a factual error in paragraph 35(d) of the decision of the First-tier Tribunal, in that information in the extract of the CPIN which was before the Tribunal, confirmed that there had been at least eight deaths and that the violence had involved not only leaders of organisations, but also those without strong political

views. Further, paragraph 7.4.7 of the CPIN referred to victims of violence being random people and not just those with a significant MDC profile. That was confirmed by other materials submitted by the Appellant before the First-tier Tribunal. It was submitted that even on the information that was available before the Tribunal, there was a failure to recognise the deaths which had occurred and that not only MDC members had been targeted. For example, the fuel protests involved ordinary people and were not politically motivated attacks on those involved. Further there was evidence that violence in Zimbabwe has in fact gone up, with the evidence from the UNHCR that the level of violence comes close to that in 2008, with a similar number of attacks (albeit not resulting in the same level of deaths as happened in 2008).

10. As to the second ground of challenge, the same errors of law as to the consideration of the evidence were relied upon, with a failure by the First-tier Tribunal to consider all of the evidence and to give adequate reasons for finding significant and durable changes since the grant of refugee status in this case. There was no express application of the correct test nor any finding of a permanent eradication of risk to the Appellant. The First-tier Tribunal also failed to consider the recent spikes in violence which were at least in part politically motivated and do not support a finding of permanent eradication of risk. The First-tier Tribunal failed to refer to or give any weight to the representations from the UNHCR. Overall, the evidence did not support a finding that there had been fundamental or durable change in Zimbabwe.

11. As to the third ground of challenge, it was submitted that even if it is still appropriate to apply the country guidance in CM, a better analysis of why the Appellant does not fall within the risk categories was required by the First-tier Tribunal given his history and grievance against the ruling political party because of the death of his mother. However, it was accepted on behalf of the Appellant that he had never made a claim to be politically active in the United Kingdom, nor had he ever stated any intention to do so on return to Zimbabwe.

12. On behalf of the respondent, it was submitted that the First-tier Tribunal did not refuse to depart from country guidance in CM because of the decision in Harveye, but that the passage of time did not require a departure from the country guidance and the First-tier Tribunal in any event went on to consider recent events and concluded that they did not provide cogent evidence for a departure from country guidance. Any reference to the Court of Appeal's decision in Harveye was not in the circumstances a material error.

13. In this appeal it was the Appellant who had provided extracts of the CPIN to the First-tier Tribunal, which were not relied upon by him to depart from the country guidance or otherwise. It was submitted that it was unclear how the full and complete document assisted the Appellant in any event. Although accepted that a number of deaths had been reported in relation to the election violence, overall the evidence still pointed to a decline from the levels of violence that were recorded in CM and more importantly at the time of the previous country guidance and from the

date of Appellant's grant of refugee status. The evidence supports the finding of the First-tier Tribunal that there has been a fall in politically motivated human rights violations and there was at least some evidence of improved practice in the new government.

14. Although the information contained in the CPIN does reference risk in relation to random attacks on those without MDC profile, it is not the Appellant's claim that he would be at risk merely by his presence in Zimbabwe or from any Article 15(c) risk but that he would be targeted by politically motivated violence. The two spikes in violence around the elections and fuel protests in 2018 and 2019 respectively, were both expressly referred to by the First-tier Tribunal, but overall there was sufficient evidence to support the conclusion that there had been a decline in the overall levels of violence.

15. The Respondent relied on the Court of Appeal's decision in Secretary of State for the Home Department v MM (Zimbabwe) [2017] EWCA Civ 797 to the effect that whether there is a durable change includes consideration of changes within the country and changes within the person and their individual personal characteristics as well. The First-tier Tribunal expressly took this into account in paragraph 31 of the decision, finding that there was no reason to consider that there would be any interest in the Appellant from the authorities 17 years after his mother's involvement with the MDC in 2002 and there was no evidence of any risk to connected family members. The Appellant's individual circumstances were considered, as were the improvements in the situation in Zimbabwe.

Findings and reasons

16. In relation to the first ground of appeal as it is important to look both that the Appellant's claim and evidence before the First-tier Tribunal and detail of the decision in relation to the application of CM. Before the First-tier Tribunal, as confirmed in paragraphs 15 and 20(c) of the decision, the Appellant's claim was that the country guidance in CM should no longer be applied due to its age. There is nothing to suggest any more detailed assessment of the country guidance, nor reliance on any specific credible fresh evidence before the First-tier Tribunal relevant to the issue which was considered in the country guidance case to justify a departure from the country guidance in CM. The skeleton argument on behalf of the Appellant refers to background evidence about the change of government in Zimbabwe and suggests that this has only cemented the position of Zanu PF as the ruling party in Zimbabwe, as opposed to an event which could lead to positive change in the country. The continuing applicability or otherwise of the country guidance was not covered at all in the skeleton argument prepared for the Appellant before the First-tier Tribunal, which fails to make it any reference to the case of CM and instead relies on the country guidance case of SM & Ors (MDC – Internal flight – risk categories) [2005] UKAIT 00100 CG and asserts that although this may have been superseded (it was in fact removed from the country guidance list on 2 August 2006) it is still good law as a basis for reviewing the political situation in Zimbabwe.

17. The difficulty for the Appellant in the first ground of appeal is that what has been argued before the Upper Tribunal was, aside from the point about misplaced reliance on the decision in Harveye, in essence new submissions as to why there should be a departure from CM primarily on the basis of a full copy of the CPIN which bore no resemblance to the way that the case was put to the First-tier Tribunal. The First-tier Tribunal can not be criticised for not considering matters not expressly put to it, nor evidence that was not before it.

18. In paragraph 15 of the decision, the First-tier Tribunal first notes the issue of whether the guidance in CM should still be followed by saying:

> *"15. My attention has been drawn to the country guidance case of CM … I was asked by the Appellant's representative not to apply it in part by reason of its age; I take into account that it was applied without criticism in Harveye …"*

19. Although there is some force in the Appellant's challenge to the First-tier Tribunal's reliance on the Court of Appeal's decision in Harveye, it being a decision on appeal looking whether there was an error of law in the earlier decision and did not include any assessment of more up to date or current evidence about the situation in Zimbabwe, I do not find that the reference to it is a material error of law by the First-tier Tribunal. This is because in any event, the Appellant's case before the First-tier Tribunal was only on the basis that CM should not be applied due to the passage of time since its promulgation and further, the Judge went on in any event to consider as a matter of substance whether there was fresh credible evidence to depart from the country guidance.

20. A Judge may depart from existing country guidance in the circumstances described in paragraphs 11 and 12 of the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2. This confirms that unless expressly superseded or replaced by any later country guidance determination, or is inconsistent with other authority that is binding on the Tribunal, a country guidance case is authoritative in any subsequent appeal so far as it relates to the country guidance issue in question and depends on the same or similar evidence. If there is credible fresh evidence relevant to the issue that has not been considered in the country guidance case, or, if a subsequent case includes further issues that have not been considered in the country guidance case, a Judge will reach the appropriate conclusion on the evidence, taking into account the conclusion in the country guidance case so far as it remains relevant.

21. The decision of the First-tier Tribunal considers the country guidance and further evidence before it when assessing the Appellant's claim in paragraphs 29 to 35, which state as follows:

> *"29. I turn now to the several human rights aspects of this claim. I am satisfied that there have been significant changes in country conditions since the previous determination. This is illustrated by the fact that the country guidance case RN, on which the previous determination was based, was removed from the list of country guidance cases on 14 March 2011, replaced initially by EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) (subsequently quashed by the*

Court of Appeal and referred to in RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant) [2012] UKSC 38 and CM.

30. It remains the position that the Appellant has not been politically active himself; he has never been an MDC member. The risk identified in November 2009 was on the basis that his mother, who had died in 2002, had been a known MDC organiser and on the basis that he neither wanted to join or declare loyalty to ZP youth but was being harassed to do so.

31. I am not satisfied that, 17 years later, anyone would have any particular memory of or interest in the Appellant by reason of his relationship with his late mother. My attention has not been drawn to any recent evidence of a ZP purge on the families of earlier members of the MDC. Much of the ZP violence is factional.

32. In my view it is not appropriate me to depart from CM simply because it is 6 ½ years old; as I have indicated it has been considered by the Court of Appeal within the last eight months. I have however considered to what extent evidence of more recent events would justify a departure from those of the findings in CM that are relevant to the issues in this appeal.

33. The Tribunal in CM found that the level of politically motivated violence in Zimbabwe had fallen in comparison to the levels referred to in RN. As an indication of the situation prevailing when CM was being considered:

a) The number of reported politically motivated human rights violations had fallen from 3,758 in June 2008 to 42 in June 2012; MDC supporters remained the main victims of those violations.

b) Despite that reduction "Zimbabwe remains a society where great brutality and human rights abuses have taken place and both the political instigators of those abuses and the personnel who inflicted them remain in existence" (as at 2012).

c) In Harare there were particular problems with one militia having links to ZP. It operated mainly in the Mbare area of Harare and practised extortion. There was no army operation against that extortion.

34. The extract from the Country Policy and Information Note "Zimbabwe: Opposition to the government" dated February 2019 which has been included in the Appellant's bundle does not include the precise data, as to numbers of human rights violations annually, of the type considered in CM. Since CM was reported:

a) The MDC has broken into factions.

b) In November 2017 former President Mugabe left power being replaced by President Mnangagwa. ZP remained (and remains) and power following elections in July 2018.

c) There was a spike in violence around the times of the elections. This included increased violence in Harare. In turn this resulted in a crackdown on opposition leaders.

d) There is no evidence that the decline in violence reported in CM has reversed in the last six years.

35. The Appellant's supplementary bundle includes a 2017/2018 Amnesty International ("AI") report and three news articles:

a) The 2017/2018 Amnesty International report was published on 22 February 2018. It is more than one year old. It pre-dates the most recent elections.

b) The economic situation in Zimbabwe had worsened (the AI report does not say which year was taken as a point of comparison); protests were forcibly dispersed and freedom of expression was restricted. There were examples of arbitrary arrest, including of members a ZP faction. Sad to say, there is nothing new in this. I am not satisfied that this represents a deterioration in the circumstances examined and found in CM.

c) In January 2019 there were protests in Harare (and elsewhere) about fuel prices. The MDC headquarters were attacked but the reason for the attack was unclear. Confidence in the currency had diminished, wages had stagnated and there was low productivity, contributing to an import export balance. The report refers to "years of economic hardship". I note that there are several references in CM to the challenging economic circumstances in Zimbabwe in 2012. I have not been given the data, for example, to compare petrol prices now with those in 2012 but I am satisfied that Zimbabwe was also suffering poor economic conditions then. It is not a new development.

d) It is reported that in the crackdown which followed the January 2019 fuel protests an unspecified number of MDC members, including 4 MPs, were detained by the authorities. Reports of killings were not confirmed. What is striking about this report is that it focuses on the leaders of organisations and I note the distinction in CM between those with and without, for example, a significant MDC profile. I am not satisfied that the situation had changed materially since CM and given the time that has elapsed since CM it appears to me that the improvements reported that may fairly be described as durable and significant."

22. The Appellant relies on a factual error in paragraph 35(d) of the decision in that even the extracts of the CPIN before the First-tier Tribunal, without having to refer to the full report (which was not available), deaths had been confirmed during demonstrations against the government and that the government crackdown included many ordinary people caught up in the operation and not just political opponents, trade unionists or organisers. However, paragraph 35(d) gives specific consideration only to those documents contained in the Appellant's supplementary bundle, including the Amnesty International report and three news articles and is not a finding of fact on the evidence as a whole. It is an accurate summary of the information contained in particular in the BBC News article of 21 January 2019 as to the crackdown following the fuel protests and in general it is a fair summary to say that these particular documents relied upon continue to refer to leaders of the political opposition and their families. I do not therefore find that there is a factual

error in paragraph 35(d) as claimed. At its highest, the point can only be that the First-tier Tribunal did not go further in the assessment of the evidence to note other background material contained in the CPIN went further in terms of confirmed casualties and wider targeting by the authorities than these specific reports. Given that the First-tier Tribunal had expressly considered the contents of the CPIN before it in the broader context, I do not find that there is an error of law in not referring in detail to each and every piece of evidence, particularly when there is nothing to suggest any specific reliance by the Appellant on these particular points.

23. The Appellant's final point in relation to the first ground of appeal is that the Respondent was under a duty to provide the First-tier Tribunal with a full copy of the CPIN which included more detail about post-election violence and the fuel protests in 2018 and 2019 respectively which, by implication, must be said to provide sufficient fresh credible evidence to depart from the country guidance in CM to be material. It is of note that in this case, it was the Appellant who chose only to rely on an extract of the CPIN and not the full document, which only highlights further the nature and way that his claim was put to the First-tier Tribunal, which was on a different basis to the detailed arguments made before the Upper Tribunal. In these circumstances, there was no failure by the Respondent to comply with its duties to the First-tier Tribunal.

24. The question then remains as to whether overall, the First-tier Tribunal erred in law in its assessment of whether there should be a departure from the country guidance in CM. I find that the First-tier Tribunal made a sufficiently detailed assessment of the evidence before it as to whether there was a reason to depart from country guidance in CM, either because of the passage of time or because there was fresh credible up-to-date evidence not previously considered. The broad circumstances and findings at the time of CM were set out and compared to up-to-date background evidence. The conclusion of the First-tier Tribunal that the situation had not changed materially since CM was one which was open to it on the evidence available and adequately reasoned. I have separately considered the CPIN in full and would find that even had the whole of this document been before the First-tier Tribunal, it would have still rationally have been open to the Judge to conclude that there was no basis for a departure from the country guidance in CM. For these reasons, there is no error of law on the first ground of appeal.

25. The second ground of appeal relies in part on the same claimed factual errors and errors in the assessment of the evidence by the First-tier Tribunal as in the first ground of appeal and to that extent have already been dealt with above. The additional points in the second ground of challenge were a failure by the First-tier Tribunal to give sufficient weight to the representations from the UNHCR; a failure to expressly apply the correct test of permanent eradication of risk to the Appellant and a failure to give adequate reasons for finding a significant and durable change in country conditions.

26. The First-tier Tribunal specifically references the change in country guidance from RN promulgated in 2008 to CM, promulgated in 2013, which of itself demonstrates a

significant change in country conditions and a significant reduction in those who would be at risk on return to Zimbabwe in the passage of around five years. The First-tier Tribunal has considered evidence postdating CM and found, inter-alia, that there was no evidence that the decline in violence reported in CM had been reversed in the intervening six years to 2019 and that other matters, such as poor economic conditions were not a new development. I would further note that spikes in violence around election times are also nothing new in Zimbabwe and do not necessarily affect the sustained downward trend nor with themselves be inconsistent with a finding of significant and durable change in Zimbabwe.

27. There is no express reference in the decision of the First-tier Tribunal to the representations from the UNHCR dated 25 September 2018, nor is there any indication that the Appellant placed any specific reliance on this document in support of his appeal. This did not feature at all in his skeleton argument. It is further noteworthy in this case there is no comment on or assessment by the UNHCR of the development in country guidance or the wealth of background information considered therein by the Upper Tribunal, although there is reference to the CPIN, the Human Rights Watch Report 2018 and the Amnesty International Report 2016/17, the conclusion is that the CPIN indicates a lack of fundamental and durable change in Zimbabwe and a recommendation is made for a fuller assessment to be made of improvements in Zimbabwe and the personal circumstances of the Appellant. It cannot be argued that the First-tier Tribunal has failed to make such a full assessment of the evidence before it, both as to country conditions and as to the Appellant's personal circumstances. In these circumstances and considering that it is not necessary for a Tribunal to refer to each and every piece of evidence before it in the decision and that the weight to be attached to evidences a matter for the particular Judge; I find no error of law by the First-tier Tribunal in its assessment of the UNHCR evidence.

28. Overall, the First-tier Tribunal has identified the need for there to be durable and significant improvements in country conditions for a cessation of refugee status and has considered both country conditions and the Appellant's personal circumstances in detail in the decision. There is nothing on the face of the decision or otherwise to suggest that the proper test has not been applied by the First-tier Tribunal and the conclusions reached are sustainable on the basis of the evidence before it, and in particular apply the country guidance in CM and the improvements in country conditions reported therein. For these reasons I find no error of law in the second ground of appeal.

29. The third ground of challenge lacks any arguable merit whatsoever. The Appellant has never claimed to be politically active, either in Zimbabwe or in the United Kingdom and has never indicated any intention to be politically active on return to Zimbabwe in the future. Further, the latter cannot be implied from the Appellant's history or family circumstances. The Appellant was previously granted asylum on the basis of his mother's MDC connections up to 2002 and on the basis that also at that time, he was unwilling and unable to demonstrate support for Zanu PF. That was the basis upon which his appeal was successful in 2009, in accordance with the

country guidance at that time which was that a person was at real risk on return to Zimbabwe if they were unable to demonstrate loyalty to Zanu PF. The Appellant's written statement for his appeal before the First-tier Tribunal identified his risk on return as being from his inability to demonstrate loyalty to Zanu PF; the general situation of human rights violations in Zimbabwe and his mother's prior involvement with the MDC. However, none of those matters fall within the country guidance of CM and no further reasons were required given the way the case was put to the First-tier Tribunal as to why the Appellant would not be at risk on return. The reasons given in paragraph 36 and 37 of the decision are lawful and adequate.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 17th January 2020

Upper Tribunal Judge Jackson