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Judgment: approved by the Court for handing down | *Delivered:* **6/06/11**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MT's (Zimbabwe) Application [2011] NICA 16

IN A MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY MT (ZIMBABWE)

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The appellant is a Zimbabwean national. He claimed that he arrived in Northern Ireland around 22 February 2007. He said that he had travelled by air from South Africa to Dublin arriving in early 2007 using a fake South African passport in a false name and then travelled from Dublin to Belfast three days later. He was arrested by police around a month later and said that he was employed at an engineering plant in Mallusk. He had a payslip dated a few days prior to that. At that stage he was still using the false name and claimed to be South African. He was interviewed by an immigration officer. He was informed that it was intended to return him to South Africa and that he should provide any reasons as to why he should not return. He said that on legal advice he was not prepared to say anything until he had spoken to his solicitor in person. He was issued with a notice to a person liable to removal.

[2] The appellant was re - detained by Immigration Officials in June 2007 and applied for asylum in his actual name and nationality. In July 2007 he was refused asylum on the basis that he had not established a well founded fear of persecution, nor had he shown substantial grounds for believing that he faced a real risk of suffering serious harm if returned from the UK and

therefore did not qualify for humanitarian protection. His removal from the UK would not be contrary to the ECHR. The appellant appealed this decision to the Asylum and Immigration Tribunal. His appeal was heard in October 2007 and was dismissed. He sought a reconsideration hearing heard also in October 2008. Senior Immigration Judge Deans held that there had been an error of law in the first determination and ordered a second reconsideration heard by Designated Immigration Judge Murray in February 2009 who dismissed the appeal. The appellant sought permission from the Tribunal to appeal this decision which was refused in April 2009. The applicant was then granted leave by this Court on 26 October 2009 under S103B (3) of the Nationality Immigration and Asylum Act 2002 to appeal the decision of DI Judge Murray.

[3] The appeal is by case stated and there is no appeal against findings of fact. The appellant must demonstrate that the AIT has erred in law. By his case stated the appellant raises three issues.

(i) Did the Designated Immigration Judge (DIJ) err in law in relying on a misapprehension of a material fact, namely whether the appellant would be distinguishable from any ordinary traveller on his return to Zimbabwe?

(ii) Did the DIJ apply the correct test in deciding whether or not there was a real risk to the appellant upon his return?

(iii) Did the DIJ err in law in concluding that, not having believed that the appellant has suffered past persecution, there is no real risk upon his return that he would suffer persecution in the future?

[4] The legal principles governing the appellant's entitlement to claim asylum are not in dispute. The burden of proof is on the appellant but the standard of proof is low. Under the Geneva Convention to claim asylum he must show a real risk on return of persecution because of race, religion, nationality, membership of a particular social group or political opinion (including imputed political opinion) or to claim humanitarian protection must show substantial grounds for believing that if returned he would face a real risk of suffering serious harm. It is agreed in this case that the humanitarian issue and the claims under Articles 2 and 3 ECHR stand or fall with the asylum claim. We also bear in mind the observations of Baroness Hale in AH (Sudan) v Home Secretary [2008] 1 AC 678 about the approach we should take to expert tribunals like the AIT:

> "This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed

> about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

The findings of fact

[5] The appellant claimed that in June 2005 a relation died after the relation had been beaten up by Zanu PF. This relation was involved in an association and the men who attacked the relation wanted the association's files and papers. The appellant claimed that he was also beaten and raped on the same night by these men. Two months later Zanu PF again came to his house looking for the documents. They took him away and detained him for a week. He was beaten and sexually assaulted. After a week one of the guards said he would help him to escape otherwise he would be killed. The applicant did escape and returned to his home. Three months later Zanu PF again came to his home and told him he would have to join Zanu PF youth, "the green bombers". He went to the training but was allowed to return home one night due to the heavy rain. He found that his home had been destroyed. This was in October 2005.

[6] The appellant contacted a friend who had escaped to South Africa. She said she would help him and he went to live with the friend's relation in Zimbabwe until June 2006. He was found by Zanu PF and beaten and told he would need to go back to the green bombers in Harare but they did not actually take him there. He ran away and went to live with relatives of the friend's relation in another region. He stayed there for two months but he was then taken by Zanu PF and put into a camp and beaten again. He was detained for 1 ½ months, beaten and raped. His captors then let him go and told him to get his relation's file of documents and bring it to them. The friend got him a South Africa visa for his passport and he went to South Africa for two days in November 2006.

[7] He returned to Zimbabwe on his own passport and stayed there until February 2007. The local Criminal Intelligence Organisation (CIO) asked him

for his relation's papers. Zanu PF told him they were not interested in him at that point but would come back for him. The friend arranged a South African passport and gave him money. He went to South Africa in February 2007, travelled to Botswana and then caught a plane in South Africa and flew to Dublin. He did not claim asylum in South Africa or the Republic of Ireland. The appellant had a visa for Mozambique and was able to travel back and forward to Mozambique to buy goods which he then sold in Zimbabwe.

[8] The Judge found that the applicant's account was not credible. He had no supporting evidence relating to his relation, the relation's position in the association and no evidence about the relation's death or how the relation died. The Judge found that had his relation been the chairperson of the association there would have been some media coverage regarding the relation's death particularly as to how it is alleged the relation was killed.

[9] The appellant claimed that he had been beaten and raped at the same time that his relation was killed but then he was able to stay at his home and nothing happened to him for two months when he states he was asked for his relation's papers. His account of being taken away and tortured for a week but then allowed by one of the guards to escape was not credible. He again returned to his own house. This would not be the case if he thought he was going to be killed. Nothing happened to the applicant for some three months when again he states the CIO came looking for his relation's papers. He stated that he stayed with the friend's relation for more than six months and then more people came from the CIO and told him to go back to join the green bombers. It was not credible that even if the CIO had found him at the friend's relation's house they would just leave him there if he was of any interest to them. He was not taken back to join the green bombers he was just told he had to go back.

[10] DIJ Murray concluded that it was not credible that if he was of any interest to the authorities he was allowed to travel freely between Mozambique and Zimbabwe and carry on his business of selling goods. Had he been in fear of his life in Zimbabwe he could easily have stayed in Mozambique as he was there on a regular basis. There is no particular reason why he decided to leave Zimbabwe when he claimed he did.

[11] It was not credible that he was again being asked for his relation's documents a year after the relation died. If the CIO was interested in him they would not have left him alone for the long periods he stated particularly when he had been at home for much of this time and he would not have been able to travel in and out of the country on his own passport. He was able to go to South Africa because he got a South African visa but only stayed for two days and returned to Zimbabwe on his own passport. Had he been in fear of his life as he claimed at this time he would not have returned to Zimbabwe.

[12] He stated that his reason for not wanting to stay in South Africa was its proximity to Zimbabwe and that he was afraid that he would be returned. It was not credible that if the friend had managed to claim refugee status in South Africa and was safe there, he too would not have tried to claim asylum there. When he travelled to Dublin on a false South African passport he did not claim asylum. He stated that was because he was afraid he would be returned to South Africa due to the false passport. He lied to immigration officers in the Republic of Ireland. He decided to come to the UK and claim asylum here. However on arrival in the UK he did not claim asylum. He only claimed asylum in June 2007. By this time he had already been detained in March 2007 and then re-detained in June. He stated that he had been trying to get his Zimbabwean papers in order and also that he had not known how to claim asylum in the UK and no one could help him. This was not credible. He was also working illegally.

[13] When detained he had completed an application form for a job at South East Belfast HSS Trust stating that he had worked in a mental health hospice in London from December 2006 to February 2007. He stated he made this up but this was probably true and his story of going to Dublin was probably not true. It was likely he was working illegally in the UK before February 2007. His credibility is seriously flawed. If the applicant was a genuine asylum seeker and his story was true he would have claimed asylum if not in South Africa then in the Republic of Ireland and certainly if not in the Republic of Ireland as soon as he came to the UK.

[14] The effect of a failure to give a credible account was described by Buxton LJ in GM (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 833.

> "…a person who has not given a credible account of his own history cannot easily show that he would be at risk as a draft evader or because of illegal exit is, with respect, a robust assessment of practical likelihood, but it is not expressed as, and cannot be, any sort of rule of law or even rule of thumb. In every case it is still necessary to consider, despite the failure of the applicant to help himself by giving a true or any account of his own experiences, whether there is a reasonable likelihood of persecution on return."

There must, however, be some material which justifies the inference that the appellant faces a real risk of persecution. The absence of credible evidence from the appellant may mean that there is insufficient material from which to infer that there is a real risk (See TM (Zimbabwe) and others v Secretary of State [2010] EWCA Civ 916. This proposition is also supported by paragraph 246 of RN:

> "..this will be a question of fact to be resolved in each case. This may come down to a simple assessment of credibility. But immigration judges are well accustomed to making such judgements. 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."

The Country Guidance cases

[15] A country guidance case is authoritative in respect of an appeal relating to the country guidance issue in question and which depends upon the same or similar evidence. In this case there are three material country guidance cases. The first is AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061, the second is HS (returning asylum seekers) Zimbabwe CG [2007} UKAIT 00094 and the third is RN (Zimbabwe) CG [2008] UKAIT 0083. HS for all practical purposes in this appeal affirms the guidance in AA. The distinction between HS and RN is helpfully set out in the judgment of Elias LJ in TM (Zimbabwe).

> "9. The guidance in RN differs from the earlier guidance given in HS in two interconnected respects.
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> 10. First, the AIT in HS had concluded that persons were at risk on return to Zimbabwe if they had displayed positive allegiance to, or support for, the opposition party in Zimbabwe, the Movement for Democratic Change ("MDC"). RN found that the risk category had expanded to anyone who was not able to demonstrate support or loyalty to the ruling Zanu PF party.
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> 11. Second, that additional risk resulted from the activities of ill disciplined militia gangs. It did not stem from any enhancement in the risks of detection at the airport on return and subsequent persecution. Although the Central Intelligence Organisation ("CIO") had taken over responsibility for monitoring returnees at Harare airport, the AIT found that the conclusion in HS remained valid; the CIO were only concerned to detect those who were adverse to the

> regime, principally those perceived to be politically active in the MDC, although the AIT in HS accepted that critics of the regime would also be of interest. However, the change since HS was that the formal authorities had deployed various groups, sometimes described as "War Veterans" or youth militias or "green bombers" whose aim was to instil fear into MDC supporters or potential supporters…
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> 12. The AIT found that although they were established in camps in rural areas and bases in urban areas by the formal agents of the state, thereafter they were left very much to their own devices. These gangs would use their brutal tactics against anyone who was unable positively to demonstrate their loyalty to Zanu PF. So there is a distinction between the nature of the risk at the airport itself, which results from attempts by the CIO to detect MDC activists and other outspoken critics of the regime, and the risk en route home once the airport has been successfully navigated, which results from the random acts of gangs of militia against those unable to show loyalty to Zanu PF."

[16] The position of a failed asylum seeker returning from the United Kingdom was set out at paragraph 230 of RN.

> "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."

This paragraph makes it clear that the fact that an asylum seeker falls into one or more of the enhanced categories is not of itself sufficient to justify the grant of asylum. The question is whether he will face persecution on return. The

onus is on the appellant to show that there is a real risk that he will not be able to demonstrate the required loyalty to the regime which would expose him to risk from the gangs on the basis of an imputed political opinion. That approach was approved in RT (Zimbabwe) and others v Secretary of State [2010] EWCA 1285.

The Judge's findings

[17] The judge took into account the Country of Origin report which informed the guidance given in the relevant cases. She correctly recognised that the Central Intelligence Organisation had records at the airport and at paragraph 60 of her determination stated that it was likely that the appellant would face an initial screening interview. As she did not accept the appellant's evidence she did not believe that he would be found to have an adverse political profile and that he would, therefore, be sent on his way. She then referred to voluntary returnees and stated as a voluntary returnee the appellant would be indistinguishable from any ordinary traveller.

[18] She noted that the appellant was someone who returned to Zimbabwe even though he had managed to get to South Africa. He was also able to travel on his own passport to trade between Zimbabwe and Mozambique. She concluded that this was a person who had not suffered persecution and that there was not a reasonable likelihood of him being persecuted on his return. She concluded that he was an economic migrant. She expressly referred to paragraph 246 of RN. She said that the appellant was not a witness of truth and so she did not believe that he was truthful re his inability to demonstrate loyalty to the regime. She dismissed the appeal.

[19] The appellant relies on three criticisms of the decision. First it was submitted that judge erred in concluding that the appellant would be a voluntary traveller. Paragraph 236 of RN states that it must be assumed that failed asylum seekers would be identifiable as such by the CIO at the airport as they would be identified as deportees on the passenger manifold. Secondly it was contended that at paragraph 65 of her decision the judge concluded that because the appellant was not a witness of truth it followed that he had not been truthful about his inability to demonstrate loyalty to the regime. The appellant submitted that this contravened the principles set out at paragraph 14 above. Thirdly the appellant took issue with paragraph 63 of the decision where the judge stated that because she did not believe that he had suffered past persecution she did not believe that he would suffer future persecution.

Consideration

[20] In examining the judge's written decision it is important to identify the context within which the comments criticised are found. That is important in any case but particularly in a decision from a specialist tribunal for the

reasons set out by Baroness Hale in AH (Sudan). The country guidance makes clear that a returning failed asylum seeker who had been in the United Kingdom for any significant period of time is likely to be at enhanced risk. Such a person is likely to face an initial screening at the airport. The guidance also makes clear, however, that the persons at risk at this stage were those who had displayed positive allegiance to the MDC.

[21] The judge concluded that the appellant would be likely to face initial screening and that conclusion shows that she was properly following the country guidance. She also concluded that because she did not accept that the appellant had a political profile he would be sent on his way. None of these conclusions can be criticised. She then went on to discuss the position of voluntary returnees. In this passage she was examining the position of someone not identified as a deportee. That consideration did not undermine the conclusions in the earlier part of her decision. The fact that the country guidance recognises that voluntary returnees are likely to be identified as deportees simply brings the appellant into the initial screening interview which the judge had already considered. We do not, therefore, find any error of law in this complaint.

[22] The second complaint relates to the judge's statement at paragraph 65 of her decision.

> "I find that as I do not believe the appellant's account paragraph 246 of the said case of RN applies. This appellant is not a witness of truth and so I do not believe he has been truthful re his inability to demonstrate loyalty to the regime."

There are a number of features of this paragraph that need to be noted. The judge identified the relevant passage in RN which directs the decision maker to examine each case on its facts. A fair reading of the paragraph which comes right at the end of the decision requires consideration of the earlier facts found. These include the fact that the appellant is an economic migrant with no political profile. He was able to travel across the border under his own passport between Zimbabwe and Mozambique without difficulty and indeed to travel to South Africa and back. All of the cases and country guidance make it clear that it is for the appellant to produce the evidence of risk. That may be established by other evidence where the appellant is not credible but in this case the judge had available the facts set out above to enable her to conclude that this appellant would be able to demonstrate loyalty. The judge asked the right question and reached a conclusion which was open to her on the facts. It is not a fair reading of the decision as a whole to confine the reasoning to the terms of paragraph 65.

[23] The last issue raises the same broad issue as in paragraph 22. The criticism is made of the statement in paragraph 63 that the judge did not believe that the appellant had suffered past persecution and so did not believe that he would suffer future persecution. It is however, necessary to take into account the facts which the judge had earlier found as set out in paragraph 22. Those facts were a proper basis for concluding that the appellant would not suffer future persecution. The evidence of the appellant lacked credibility so that it could not provide a basis for the argument that he was at risk of future persecution.

[24] We therefore conclude that the questions in the case stated should be answered (i) No and (ii) Yes. We decline to answer the third question as we do not accept the premise that the assessment of the risk of future persecution was based solely on the absence of past persecution.