Case No: C5/2005/2901 AND C5/2006/0077

Neutral Citation Number: [2006] EWCA Civ 401
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[2005] UKAIT 001144 CG
[2005] UKAIT 00159

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 12th April 2006

Before :

LORD JUSTICE BROOKE
Vice-President, Court of Appeal (Civil Division)
LORD JUSTICE LAWS
and
SIR CHRISTOPHER STAUGHTON

- -

Between :

	AA **- and -** **Secretary of State for the Home Department**	**Respondent** **Appellant**
	- and between-	
	LK **- and -** **Secretary of State for the Home Department**	**Respondent** **Appellant**

- -

(Transcript of the Handed Down Judgment of
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Ian Burnett QC and Steven Kovats (instructed by the **Treasury Solicitor**) for the **Appellant**
Andrew Nicol QC and Mark Henderson (instructed by **the Refugee Legal Centre**) for the **Respondents AA and LK**

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Judgment INDEX

Lord Justice Brooke: This is the judgment of the court, to which Laws LJ has made a significant contribution.

1. Introduction

1. 1. These two appeals, which were heard together, are brought by the Secretary of State against the determinations of differently composed panels of the Asylum and Immigration Tribunal ("AIT") on 14th October and 17th November 2005. The main issues to be decided arise in the case of AA. So far as LK is concerned, the Secretary of State does not challenge the AIT's decision to refuse reconsideration on the grounds that she has a well-founded fear of persecution for a Geneva Convention reason and on human rights grounds, but he does challenge their decision that they would have dismissed his application for reconsideration in any event on the grounds set out in their determination in AA.

2. The issues and the facts in the case of AA

1. 2. The case of AA was listed for hearing before a full panel of the AIT because it afforded a suitable vehicle for determining whether or not the Secretary of State ought to refrain from sending any failed asylum-seekers back to Zimbabwe both on Refugee Convention and on human rights grounds by reason of risks arising from the ill-treatment they would be likely to receive on their return because they had sought and been refused asylum by this country. From January 2002 onwards the Secretary of State had imposed a moratorium on compulsory removals to Zimbabwe (whether of failed asylum-seekers or of others who had no legal entitlement to remain in this country), but he ended this moratorium on 16th November 2004, and this case turns on an analysis of the treatment accorded in Zimbabwe to failed asylum-seekers who were removed involuntarily between 16th November 2004 and 7th July 2005 when compulsory removals were again suspended, pending the resolution of the litigation to which we refer below.

2. 3. This was the only live issue on AA's appeal. He is now 30 years old, and he arrived in this country via South Africa and France on 6th November 2002. He was granted temporary admission, but nothing further was heard of him until the police arrested him two and half years later. He then applied for asylum for the first time. His application was refused a week later. On 5th July 2005 an immigration judge dismissed his appeal in so far as it was based on his story about his experiences before he left Zimbabwe, but he allowed it, on both Geneva Convention and human rights grounds, because of the treatment he would be likely to receive if he was sent back. The immigration judge was influenced in this regard by a very recent report on conditions in Zimbabwe on which neither party had had the opportunity to comment at the hearing before him.

3. 4. A reconsideration of his decision was directed, and at the new hearing a legal panel of the AIT, chaired by its Deputy President, held that the immigration judge had committed an error of law in relying on material evidence which was not adduced at the hearing of the appeal. The appellant did not give evidence before the panel, and it was not suggested that the immigration judge's rejection of his story could be faulted on the grounds of error of law. The panel said:

> "[T]here is no doubt in our mind that the Appellant's claim to asylum was, in all its substantive parts, fraudulent, and that the Appellant himself has been deliberately dishonest in almost all his dealings with the authorities in this country."

1. 5. In his screening interview the appellant had said that he had no shelter in Zimbabwe, and he had no way of getting money and nowhere to sleep. He feared that one of his parents might get arrested when he went back because "they say" that the Zimbabweans in the United Kingdom support the opposition. He averred that his life was in danger and that he would starve if he went there: he could even be taken at the airport. He did not say in terms that he would prefer to go back to Zimbabwe voluntarily rather than under compulsion if this would reduce any risk of ill-treatment at the airport.

3. The country guidance case of SM

1. 6. On 11th May 2005 the Immigration Appeal Tribunal ("IAT") had considered issues relating to risks on return to Zimbabwe in the country guideline case of *SM and Others (MDC – internal flight – risk categories) Zimbabwe CG* [2005] UKIAT 00100. The hearing in that case had taken place on 15th February 2005, although the tribunal also admitted some later evidence in the form of a March 2005 news report. That tribunal was impressed by the evidence of Professor Terence Ranger, whose expertise arose from more than 45 years' familiarity with Zimbabwe. He had known Robert Mugabe and other senior leaders of ZANU-PF throughout that period. They accepted from his evidence and from the news reports in Zimbabwe that it seemed inevitable that those deported to Zimbabwe from this country would be subject to interrogation on return. Their conclusions were expressed in these terms:

> "… We … approach with caution the reports that a number of recent returnees have never re-appeared once they were taken from the plane by CIO agents and that others have disappeared. No names or details have been provided and if, as Professor Ranger says, the returns have been carefully monitored, we would have thought such details would be available.

Nonetheless the Tribunal is satisfied in the light of the statements made by the Zimbabwean authorities that returnees are regarded with contempt and suspicion on return and do face a very hostile atmosphere. This by itself does not indicate that all returnees are at real risk of persecution, but that returnees are liable to have their background and circumstances carefully scrutinised by the authorities. We are satisfied that those who are suspected of being politically active with the MDC would be at real risk. We agree with Professor Ranger that if the authorities have any reason to believe that someone is politically active the interrogation will be followed up. There is a reasonable degree of likelihood that this will include treatment sufficiently serious to amount to persecution."

1. 7. Professor Ranger told that tribunal that since forced returns to Zimbabwe had started again it was hard to collect confirmed data on what had happened to returnees. There were abundant rumours. It seemed to be clear that deportees were being held at the airport for prolonged interrogation, and that in some cases the families of detainees were being charged considerable sums of money to obtain their release. There was evidence of Central Intelligence Organisation ("CIO") interrogation of returnees prior to the suspension of returns in 2002, and since then the risks of interrogation at Harare Airport had increased. More recently, since the announcement that the UK had resumed deportations, there had been speculation in the state press that the British government would use these deportations to infiltrate a third force into Zimbabwe to commit acts of violence which would be attributed to ZANU-PF so as to discredit the regime.

2. 8. Professor Ranger also told that tribunal that there had been scare stories that the British government was training hundreds of Zimbabwean recruits to the army, holding them in readiness to use in an invasion. There was a press report on 17th December 2004 to the effect that the Minister of Information, Jonathan Moyo, had referred to threats by the UK to deport about 10,000 Zimbabweans as a cover to deploy elements trained in sabotage and intimidation to destabilise the country before and during the Parliamentary elections in March 2005. There had also been attacks in the Zimbabwean press on those who claimed asylum abroad on the grounds that they were unpatriotic and were denigrating their own country and government. Professor Ranger's view was that this material was designed to ensure and justify a permanent large scale CIO presence at the airport searching for British agents, and the CIO was generally unsympathetic to any asylum seekers.

3. 9. At the time of the hearing in *SM* there was very little concrete evidence of what had actually happened to those who had been returned. There had been a report in *The Observer* three years earlier of a man who had strenuously resisted his compulsory return. He alleged that when he was eventually loaded onto an aircraft, his escorts "dragged him off to the Zimbabwe authorities", and the CIO people told him they had been looking for him. They said that he had sold out his country, and that he was going to prison for a long time. He managed to escape through a toilet window and made his way to South Africa. At the AIT hearing in October 2005 he was called "Witness 8".

4. 10. Professor Ranger had also referred to the testimony of someone who was held for five hours, questioned and threatened about being involved in political activities. This man had been asked about political activists and human rights organisers who had fled to Britain, and was told that if he had applied for asylum, he would have been imprisoned as a British secret agent. This source referred to several other people who had never reappeared once they were taken from the plane by CIO agents. Another source said that it feared for the fate of several who had disappeared, but there were no names or details available, and Professor Ranger's attitude at that time was simply to say that such assertions were plausible in the present context.

5. 11. On 2nd March 2005 *New Zimbabwe* carried a report about a woman (known as "Ratidzo") who had been compelled to return home after the Home Office had refused to extend her student visa. She described how on arrival at Harare Airport compulsory returnees were diverted into interview rooms where they were interrogated by CIO officers. She set out the questions they asked, which related to the reasons why she left Zimbabwe; why she claimed asylum; why she had been sent back; whether she had been trained as a mercenary by the British army; how she intended to vote in the prospective elections; and what was to be her role in the main opposition party. She was also asked about the method of communication she would use to link with the British spies, and to name all her contacts in UK. The two CIO officers shouted abuse at her and threatened her with incarceration in their notorious torture chambers. On one occasion she was hit across the mouth when she asked him why they did not believe she was just a student who had been wrongly deported. She secured her release after three hours when an uncle serving in the Zimbabwean national army confirmed her *bona fides*. Professor Ranger commented that the questions she reported were predictable questions.

4. New evidence following SM: why AA came to be heard

1. 12. We have recorded the IAT's conclusions on this evidence in para 6 above. Between 24th June and 10th July 2005 there were three reports in *The Times* and one report in *The Observer* of the ill-treatment of compulsory returnees at Harare Airport. The first report, which coincided with a hunger strike by Zimbabweans in Home Office detention centres, told of a woman (known as "Setimbile") who had been taken away from a London register office in handcuffs. Her family did not know what had happened to her since. The second report related to a man called "Usher", who told a story of brutal treatment both by CIO officers at Harare Airport and in the central prison at Harare. The following day *The Times* carried a further report, this time of a man called "Vincent", who was arrested on his arrival at Harare airport and beaten during three days of interrogation. He then went to Bulawayo where he suffered two periods of brutal detention at the hands of the police before he escaped to South Africa. On 10th July *The Observer* carried a story about an involuntary returnee called "Kalinga" who was interrogated at Harare airport, released, and then subjected

to a series of very tough interviews by the local police in Bulawayo, where he had been told to report to the police station. The last of these visits was said to have left him in doubt about his likely fate if he did not flee Zimbabwe. Instead of returning to the police station as requested, he fled to South Africa.

2. 13. The evidence before the AIT disclosed the effect of the publicity which was generated by these and other, more general, reports. The Archbishop of Canterbury voiced his concerns at the end of June, when *The Times* devoted a leading article to the topic. It was some of these reports which led the immigration judge in *AA* to decide the appeal as he did (although he should have allowed the parties to comment on those reports). There was clearly a need for an up to date, dispassionate review of all the evidence about the attendant risks if failed asylum-seekers were involuntarily returned to Zimbabwe. These questions erupted during a hearing before Collins J in the Administrative Court on 14th July 2005 in a different group of cases. On that occasion counsel for the Secretary of State, on instructions, told the judge that since January 2002 quite a significant number of people had chosen to return voluntarily, and that it ought not to be evident to the authorities at Harare Airport whether they were dealing with a voluntary or an involuntary returnee.

3. 14. That hearing was adjourned on an undertaking by the Secretary of State that he would not enforce the removal of Zimbabwean failed asylum-seekers to Zimbabwe before 4th August 2005. When the matter came back before Collins J on that day, he was told that the Refugee Legal Centre ("RLC"), who had been supporting some of these cases, had been sending relevant documentary material to the Home Office, both on 12th July and more recently, and that the Home Office needed time in which to consider it and respond to it. During the course of that hearing, a solution emerged whereby the AIT undertook to consider all this material on a suitable occasion in the near future, and a stay was placed on removal in the High Court cases until after the AIT had had the opportunity of giving a fresh country guidance determination. This is how the appeal in *AA* came to be heard in the manner we have described. The AIT described the issue before them in these terms:

> "In the present appeal, the Appellant needs to establish a real risk to returned asylum seekers. He does not need to show that all, or nearly all, returned asylum seekers are harmed. He needs only to show that all returned asylum seekers are at real risk of harm. He can do that, as a matter of logic (and in our judgment as a matter of law) by any evidence that properly leads to the conclusion in question."

5. The evidential material in AA and the Home Office's stance

1. 15. By 4th August 2005 the following evidential material had been filed in the High Court in the cases to which we have referred in para 13 above:

(a) <u>For the claimants</u>

(i) Two statements by Sarah Harland of the Zimbabwe Association;

(ii) Three statements by Zimbabwean refugees (two of whom were called "Witness 5" and "Witness 6") who had worked at Harare Airport;

(iii) Statements by a man we will call "Witness 1", by a local MP, and by the wife of an involuntary returnee describing what she had been told about his treatment at Harare Airport;

(iv) Two expert reports by Professor Ranger, and a report by a different expert, Joanna McGregor, on conditions in Zimbabwe;

(b) <u>For the Home Office</u>

(v) A long statement by Mr Walsh, a senior civil servant, responding in particular to the 189-page bundle of material submitted by the RLC on 12th July.

This material was all treated as having being filed at the AIT in the *AA* case. By 7th October 2005, when the hearing in that case commenced, the following further evidence had been filed:

(a) <u>For the Home Office</u>

(i) A second statement by Mr Walsh, and a statement by Mr Walker, exhibiting a report on a visit paid to Harare in early September ("the field report").

(b) <u>For AA</u>

(ii) Four statements made on 3rd October and one statement made on 4th October by senior representatives of three of the organisations whose views were recorded in the field report;

(iii) An undated statement by Witness 7, supported by a recent medical report, and an undated statement by Witness 8, made in support of his application for asylum which was granted in April 2003, about their treatment as involuntary returnees to Zimbabwe.

1. 16. This evidence can be divided into six main categories:

i. i) The evidence about the procedures at Harare Airport, and the numbers of passengers arriving at that airport from the UK in 2004-5;

ii. ii) The evidence about the CIO;

iii. iii) The evidence about the treatment of identifiable involuntary returnees;

iv. iv) The evidence about the political situation in Zimbabwe in 2005;

v. v) Professor Ranger's evidence about the risks to involuntary returnees;

vi. vi) The evidence of the Zimbabwe-based NGOs.

We have referred to "involuntary returnees" as a term embracing both failed asylum-seekers who are unwilling to return to Zimbabwe voluntarily and others, such as over-stayers, who have outstayed the period when they were permitted to remain in the UK, and are similarly unwilling to return voluntarily, although they have never claimed asylum. On this appeal Mr Burnett QC, who appeared for the Secretary of State, complained that the AIT had not been careful to distinguish between these two categories of involuntary returnees and had thereby made a material error of law.

i. 17. The stance taken by the Home Office in these matters is reflected in Mr Walsh's evidence that the percentage of Zimbabwean asylum applications that were rejected at the initial decision stage increased from 62% in 2002 to 78% in 2003 and 89% in the first nine months of 2004, while the percentage of claims that were dismissed at appeal during the same period also increased, all this during a period when there was no significant improvement in the country situation which might have affected the results. These figures suggested to Mr Walsh that there was an increasing proportion of people claiming asylum from Zimbabwe who did not in fact need to be protected from persecution on Convention grounds but who were confident that even when unsuccessful in their claims they would not be removed.

ii. 18. He commented that the blanket ending of returns of failed asylum seekers to Zimbabwe could be justified only if it could be established that every failed asylum seeker faced a real risk of persecution or treatment contrary to Article 3 of the European Convention on Human Rights ("ECHR") simply by virtue of being a failed asylum seeker. The notion that many Zimbabwe asylum seekers are in reality would-be economic migrants was shared by the representatives of Source B and C whose views are reflected in the field report and to a lesser extent by the representatives of Sources A and J.

iii. 19. We turn now to the evidence to which we have referred.

6. *The evidence about the procedures at Harare Airport and the numbers of passengers arriving at that airport from the UK in 2004-5*

i. 20. Mr Walsh said that roughly 50,000 passengers from Zimbabwe were admitted to the UK in 2004, that six flights per week operated each way between Harare and the UK, and added that the flights to Harare were generally full. Other airlines carried passengers from the UK to Harare via South Africa. Among this very large number of passengers going to Harare there were 60 failed asylum-seekers who returned to Harare voluntarily in the January-October 2004 period, and 235 failed asylum-seekers who went back to Harare in the period between November 2004 and June 2005 (when involuntary returns were recommenced). In the April-June 2005 period 105 failed asylum seekers returned, of whom 25 were voluntary returnees. No similar breakdown was provided of the 130 who returned in the previous four months: this figure also included voluntary returnees. The AIT were not told, and did not ask for, the numbers of involuntary returnees who were not failed asylum-seekers (like Ratidzo, who featured in the March 2005 report). Mr Walsh merely said that removals of non asylum-seekers – both enforced and voluntary – had continued throughout the period between November 2004 and June 2005.

ii. 21. Between 1st July 2004 and 28th July 2005 106 Zimbabwe nationals returned voluntarily to Zimbabwe under the auspices of the International Organization of Migration ("IOM")'s Assisted Voluntary Return ("AVR") Programme, and there were 66 more who were waiting to make use of this scheme. If these passengers do not hold a Zimbabwean passport, they can obtain an emergency travel document from the Zimbabwean embassy in the UK. Those in the latter category may attract the attention of immigration officials at Harare. In a few cases the friends or relatives of those returned under AVR have reported that returnees were detained at Harare Airport, but no further details are available. Other Zimbabwe nationals voluntarily returning to Zimbabwe (whether as ordinary passengers, detected overstayers, or failed asylum-seekers) travelled as normal paying passengers and carried their own travel documentation.

iii. 22. The situation was different for involuntary returnees, whether they were detected over-stayers or failed asylum-seekers. In 10% of these cases an escort would be required, and the escort would keep the travel documentation and hand it, with the escorted person, to the immigration officials at Harare. The travel documentation of "unescorted removals" would normally be placed with the captain of the aircraft, from whom it would be passed to the immigration officials at Harare. By this means, the immigration officials (and through them the security agencies) would readily be able to identify any involuntary returnee. In the absence

of questioning, however, they would not know whether the person concerned had sought and been refused asylum in the UK.

iv. 23. The AIT summarised the position by saying that the number of involuntary removals during this period must have been 210 at most, but they did not add that there were an unknown further number of involuntary removals who had never sought asylum.

v. 24. The Home Office did not seek to cross-examine Witnesses 5 and 6, whose evidence the AIT summarised at paras 75-77 of their determination. Neither witness had had any direct knowledge of the procedures at Harare International Airport for at least seven years, although they both said that they had been brought up to date by colleagues who were still there. They said that there were three agencies at the airport concerned with security issues: military intelligence (in which they were both involved), the police and the CIO. The passenger manifest for an incoming flight was copied to airport intelligence, and representatives of the three agencies would study the list and mark the name of any passenger in whom they had an interest. These passengers would then be stopped for questioning by officers of the relevant agency when they disembarked. If someone was of interest to the CIO, they would be taken first to the CIO office at the airport and then, if necessary, to CIO headquarters for interrogation.

vi. 25. Witness 5, however, added that while he was at the airport, a number of deportees arrived there, mainly from South Africa. Their passports would have been given to the pilot who would hand it in due course to the immigration officers. These deportees would be taken to a room adjacent to the immigration section, and when the other passengers had been cleared, they would be handed over to the CIO. Witness 5 added that he had spoken towards the end of July 2005 to one of his former colleagues in connection with the High Court litigation and was told this:

"[X] told me that all the returned asylum-seekers are questioned because they are all considered to be a security risk. It is believed by the security services that the returned asylum-seekers have been trained in military procedures and are now being sent back to destabilise the country. He told me that they are all handed over to the CIO who carry out thorough questioning and then decide what should be done. [X] went on to tell me that those asylum-seekers who are released are nevertheless kept under surveillance. They are made to attend the ZANU-PF meetings in their area, wear ZANU-PF T-shirts, denounce the MDC and, in some cases, are required to report to the police station."

i. 26. Witness 6 stopped working at the airport at least nine years ago. He, too, spoke of the standard longstanding procedures that we set out in para 24 above. He said that he was in regular contact with two former colleagues, who had told him that the CIO considers the deportation of asylum-seekers to be a cover for the British authorities to fool the Zimbabwean authorities into thinking that Britain has no interest in Zimbabwe, and that it believes the deportees are to be used to spy for the British in Zimbabwe.

ii. 27. Witness 6 made a clear distinction between an interview at the airport and an interrogation, for which the CIOs had their own cells and safe houses. Within the Zimbabwean intelligence community, the implication of a person having been interrogated (and hence of an interrogation report) was that the interrogated person would have been ill-treated. A former colleague had told him that he had seen reports on the interrogations of former Zimbabweans who had sought asylum in the UK. His two informants both told him that when they are released after interrogation deportees are required to report regularly to their local police station. Their details are also passed to the local ZANU-PF office, members of which will visit them to demand that they attend local ZANU-PF meetings, wear the party's T-shirts, and become assimilated into the party. Any unwillingness to participate in these activities was very likely to lead to violent ill-treatment.

iii. 28. The AIT did not refer to the evidence of the third witness who spoke about procedures at the airport. In so far as this witness did not rely on very general hearsay he added little to the evidence given by the other two.

iv. 29. After hearing all this evidence the witnesses for the Home Office accepted that involuntary returnees would be readily identified by the security agencies at Harare Airport, contrary to their understanding that was conveyed to Collins J in July (see para 13 above).

7. The evidence about the CIO

i. 30. Professor Ranger described the man who is currently in charge of the CIO as someone who was notorious for using violence against political opponents. The CIO was now invested with responsibility for food distribution. It was also currently involved in Operation Murambatsvina ("the clean-up operation") which started in May 2005 and was concerned with the destruction of thousands of homes in urban areas. In November 2002 this man said: "We will be better off with only six million people, with our own people who support the liberation struggle. We don't want all these extra people". He has accused Britain of conspiratorial interference in Zimbabwean affairs and is said to believe that many British spies have been infiltrated into the country.

ii. 31. The professor considered that the violence used by the CIO could not be attributed to a lack of discipline by "rotten apples", with those affected having a right of complaint to a higher authority. Beatings during interrogation were a fundamental part of CIO practice and would not be punished. The CIO used interrogation, torture and killings to achieve its aims. Professor Ranger referred to a recent report entitled "Zimbabwe: The Face of Torture and Organised Violence!" (*Redress*, March 2005). The author of this report asserted that the use of torture was deeply ingrained, particularly within the CIO, whose budget was increased sixfold in 2004. Professor Ranger believed that the nature and outlook of the CIO did not appear to have changed in the thirty years he had known it. He said it has always hunted down opponents of the regime, often using extreme violence.

iii. 32. There was no real dispute about this part of the professor's evidence.

8. The evidence about the treatment of identifiable involuntary returnees

i. 33. Most of this evidence came from the Zimbabwe Association, which is a London-based support group for Zimbabwe asylum-seekers and refugees in the UK. Its activities are co-ordinated by Sarah Harland, who is a freelance editor. It has no paid staff. In her first statement she described the difficulties the Association experienced in obtaining information from Zimbabwe, and how they ask "removees" to contact their families in the UK on their arrival in Zimbabwe, so that the families can let the Association know what has happened.

ii. 34. The Association was only able to make arrangements to monitor the "removee" in 28 cases since the beginning of January 2005. In ten of these cases they received no post-removal information, but they did not know enough about these cases to have any informed opinion as to whether they ought to be alarmed. The remaining 18 cases fall into three categories:

i. i) four cases where the individual had shown a high degree of commitment to contacting the Association prior to removal, and where they had established lines of communication through relatives or friends which they had expected to function. The absence of any news led the Association to believe that the removees had been detained or had come to harm, and that this was the reason why they had been unable to contact them;

ii. ii) three cases (described as Cases A, C and E) in which violence was alleged;

iii. iii) eleven cases (described as B, D and F, G, H, J, K, L, M, N and O) in which violence was not alleged.

i. 35. The British Embassy in Harare tried to make inquiries in Zimbabwe about the fate of these people, through their NGO contacts or otherwise, but was not able to get very far. Of those in category (ii) above, the local non-governmental organisation ("NGO") described as Source F was satisfied on medical evidence or otherwise that the story of ill-treatment was genuine. Mr Walsh, however, explained in his witness statement why the Home Office had reservations in relation to all three cases, whether because an adjudicator had rejected their asylum appeal on credibility grounds or (in one case) because there was a hearsay account of manhandling by an escort in a case which did not involve an escort.

ii. 36. He said of the other 11 cases that they involved allegations which even if substantiated would not in the Government's view amount to Article 3 ill-treatment or persecution. Mr Nicol QC, who appeared for AA, did not dispute this general statement, although he observed that Case B was interviewed by five different CIO operatives before being released on payment of a bribe of the equivalent of £1,000, which was a huge amount in the context of a collapsing economy. Some of the other cases, he said, also gave rise to unease, though they included no direct evidence of actual ill-treatment. These were:

i. i) Case F. Although questioned and released at the airport, he was later interrogated aggressively at the police station at which he was required to report. When ordered to return for interrogation by the CIO, he fled to South Africa instead.

ii. ii) Case H. Went missing for several days after his removal. His sister did not want to talk to the Zimbabwe Association about the missing days.

iii. iii) Case N. Was released from the airport after questioning, but was now in hiding, moving very frequently from address to address to sleep.

iv. iv) Case O. Was released from questioning at the airport when a relative who worked there intervened on her behalf. She went into hiding, and people came looking for her at her old address which she had supplied to the authorities.

i. 37. Mr Walsh said that in all these cases (apart from Cases J and K) an adjudicator had made adverse findings on credibility on the asylum appeal. He also told the court that all 18 cases were enforced removals, that all but one of these individuals possessed their own passport, that most of them travelled without an escort, and that the removals took place on a number of different airlines.

ii. 38. The other evidence in this category came in part from the newspaper reports, and in part from Witnesses 7 and 8. Of the newspaper reports there were allegations of violence by the men known as Usher and Vincent, but it proved impossible to investigate their accounts. "Ratidzo" alleged unpleasant threats, and "Kalinga", while not alleging violence, eventually fled after threats were made to him. Nothing was known about "Setimbile" except that her family did not know where she was. There was one further person (who was named in connection with an application for judicial review) who had also alleged abuse, but it had proved impossible to follow up his story.

iii. 39. Witness 7 was an involuntary returnee: an overstayer rather than a failed asylum-seeker. His story falls into the pattern described by Witness 6 (see para 27 above). On arrival he was taken to a place where he was questioned by CIO officials. He was asked why he had been in the UK, and was accused of being a British agent working for the MDC. He was kicked and punched, and was then taken by truck to another building where he was further interrogated and badly ill-treated. After he was released his family was horrified by his condition. He was later detained for several weeks after he had renewed some low level activities for the MDC. In due course he left Zimbabwe again rather than report to the authorities every week as he was required to do. A medical report recorded that there were injuries to his front teeth and other parts of his body which were consistent with his story. The AIT commented:

"He has not been cross-examined on his evidence. It records treatment of a returnee who had not in fact claimed asylum before being returned but nonetheless, assuming the account to be true, shows the interest of the CIO in returnees and the extent of the mistreatment when a full investigation is carried out."

i. 40. Witness 8 was involved in the December 2001 incident which had received publicity at that time. In his statement made in 2003 he described how CIO officials had mocked him and told him that he would now be punished because he was one of those political activists who had fled the country in order to tell lies abroad. He was then beaten. Before he escaped through the toilet window there was an incident in which a chair with a rung between its legs was put over his neck, and an officer sat on the chair pressing the rung down on his neck. The AIT commented:

"This witness is the returnee referred to in paragraph 41 in *SM* where the Tribunal commented about the doubts it felt about this account, but that comment must be seen in the context of the very limited evidence produced at that hearing as compared with the further evidence produced at this hearing. This evidence shows how one returnee is said to have been treated in 2002 and forms part of the background picture... [The situation] appears to have deteriorated [since 2002] for anybody that is conceivably capable of being seen as a less than wholehearted supporter of the regime. The seriousness of the present situation is clear not only from the CIPU Report, the newspaper reports and the background information, particularly from the UNHCR."

9. The evidence about the political situation in Zimbabwe in 2005

i. 41. This part of the evidence can be dealt with quite briefly. After paying tribute to his undoubted expertise in these matters the AIT summarised the effect of Prof Ranger's evidence along the following lines. The professor thought that reliance could be placed on the quotation from the previous Minister of Information, Jonathan Moyo, published in the *Herald* newspaper of 17th December 2004, which referred to:

"threats by the United Kingdom to deport about 10,000 Zimbabweans which could be a cover to deploy elements trained in sabotage, intimidation and violence and destabilise the country before and during next March's Parliament elections."

i. 42. He then explained why this statement should be taken as having overtaken a statement by the former Minister for Justice on 16th September 2004 to the effect that Zimbabwe would unconditionally take back all those returned from the United Kingdom. Although both these ministers were later ousted as a result of a power struggle in ZANU-PF between the old guard and a younger group of politicians, President Mugabe had kept Mr Moyo in post long after he made his statement on returned deportees, and he had been very reluctant to lose him from the Information Ministry. In the professor's view, the sacking was far from being a repudiation of his statements as Minister of Information.

ii. 43. He said that there continued to be hostile comments in Zimbabwean newspapers that were directly under the control of the President's office and the Ministry of Information. These included an article in the *Sunday Mail* on 19th December 2004 to the effect that deportees "are enough to cause mayhem in the country", and that some were being sent back "planted and paid by Britain to carry out subversive activities, including possible killings". The professor was of the view that in assessing the views of the Zimbabwean regime, these allegations against asylum seekers had to be set in the context of longer term assertions of British conspiracies. Over the previous five years, Britain had been accused of recruiting Zimbabweans for sabotage, espionage and destabilisation. There continued to be allegations of a hidden British hand in Zimbabwean affairs. The press in Zimbabwe had asserted that a recent South African church delegation was funded by British intelligence, and that a UN representative who produced a very critical report on Operation Murambatsvina was an agent of the British Government.

iii. 44. In general, the professor said that the Zimbabwe Government felt more than ever under threat, with calls from Britain, the US and the EU that it should be brought to the Security Council over the clean up operation, with demands from the International Monetary Fund for repayments, and with the threat of suspension by the World Bank. The authoritarian character of the regime had been increasingly on display.

iv. 45. One of the sources to whom Mr Walker's delegation had spoken described its extensive contacts with local clergy throughout Zimbabwe and how its activities had not been curtailed by Government action against NGOs. This source believed that the violence and intimidation experienced by people in Zimbabwe was random, with the intention of maintaining a generalised atmosphere of fear.

v. 46. Mr Walsh, for his part, acknowledged that certain parts of the population suffered gross and systematic abuse from the Zimbabwean regime. He acknowledged that there were a large number of human rights abuses occurring in Zimbabwe.

10. Prof Ranger's evidence about the risk to involuntary deportees

i. 47. Prof Ranger said that given the regime's belief in Britain's infiltration of spies, the CIO would be tasked to root them out. Given that it was also widely believed that some at least of the asylum deportees were British agents they could expect to face interrogation. He confirmed that the CIO detained asylum deportees at Harare Airport and interrogated them, as Witness 8 had alleged. He believed that it was highly unlikely that a deportee would escape interrogation.

ii. 48. He was now aware of considerably more evidence concerning the fate of deportees than when he had given evidence in *SM*. He referred to the newspaper reports we have mentioned, and to the reports of interrogation and ill-treatment of returnees and of other problems following their release from the airport, such as have featured in the evidence we have summarised.

iii. 49. When asked how he believed that rejected asylum claimants would be treated if they were expelled to Zimbabwe, he described his response as a development from the evidence he had given in February 2005. He had then pointed to cause for considerable concern, but at that time he was cautious, given the very short period that had elapsed since the suspension on returns had been lifted. Since then there had been evidence of violence in several places, and the objective situation had worsened in many ways. The effect of the clean up operation had been to make further accommodation scarce and expensive. The food shortage had got worse. People going to rural areas from the town had been excluded from food relief lists drawn up by the head-men. He believed that there was a substantial risk that any one removed following an asylum claim in the UK would be dealt with violently and oppressively. Some would be detained and tortured, whereas others would be released but would remain under surveillance and threat. Their families might well be frightened to associate with them, and the urban "clean up" and food shortages would make it difficult for them to return to their homes or to relocate.

iv. 50. In his oral evidence the professor confirmed that beating was a systemic feature of a CIO investigation. In February 2005 there had been only one reported case of ill-treatment to a returnee. The pattern of the statements in the Zimbabwean media was to the effect that returnees would be regarded with suspicion. He would infer from this a likelihood of ill-treatment. By August 2005 there were a number of reported cases of ill-treatment. This further evidence did not surprise him: it merely confirmed his views. It was his view that some returnees were likely to be mistreated, but it was difficult to determine who. He did not believe that the CIO people at the airport acted randomly but neither did they act systematically. It was difficult to discern any system. There would be a grave risk to some people. It would be part of the CIO tactics to aim for activists but also to pick up other people. The CIO was becoming a huge organisation. The likelihood was that they would use their fundamental techniques at the airport.

v. 51. It was his view that returning asylum seekers would be more at risk than the population at large. The risk to them arose because they would be funnelled into a moment of encounter with the CIO. At that point, they would face a particular danger. Asylum-seekers believed that there were CIO operatives working under cover amongst them.

vi. 52. When he was pressed as to the risk for a returned asylum seeker who was not an opponent of the regime, the professor said that his honest answer was that he did not know whether there was a risk. There would certainly be in-depth questioning by the CIO and there would be some risk of physical ill-treatment. The AIT understood his answer not to mean that he did not know whether there was a risk, but that it was difficult to assess the risk for a particular returnee: some would be ill-treated, but it was difficult to predict who they would be.

11. The evidence of the Zimbabwe-based NGOs

i. 53. Evidence about the likely fate of those who were returned compulsorily from this country was also available from the sources mentioned in the field report and from four witnesses who gave evidence which supplemented the evidence that had been given by representatives of their organisation to the delegation of

which Mr Walker was a member. The evidence of seven of these sources requires particular attention: the evidence from the others was of marginal value.

ii. 54. Source F was a NGO to whom the British Embassy often turned for information about cases like these. Their representatives told Mr Walker that if the authorities were interested in an individual it would be because of their political opinions, and not because they had sought asylum in the United Kingdom. They also said that the fact of being a returned asylum seeker could result in aggressive questioning at the airport in order to ascertain whether they were opposition supporters, but they felt that if they were found not to be they would no longer be of any continued interest to the authorities. They were, however, unable to discount the possibility that they could remain of interest.

iii. 55. It was their view that those who distributed leaflets for the MDC or put up posters and arranged meetings for the MDC ("the MDC foot soldiers") were most at risk of persecution because they were vulnerable, easily picked up and beaten. Such treatment was unlikely to attract adverse comment. In contrast, the higher profile activists were protected to a degree by their own profile and the outcry that could follow mistreatment.

iv. 56. A witness from Source F told the AIT that he agreed with Source D's belief that anyone returning from the UK or the United States would be liable to interrogation on return on suspicion of being a spy or an agent. He believed that the interrogation would include more than being required to answer questions, and was likely to include ill-treatment.

v. 57. Source A was identified as the Human Rights NGO Forum. Their representative told Mr Walker that if there were genuine cases of mistreatment involving failed asylum seekers, this would not occur just because they had sought asylum in the UK but rather because they had political opinions and had been involved in political activities.

vi. 58. Zimbabwe Lawyers for Human Rights (Source J) told Mr Walker that returnees from the United Kingdom faced questioning at the airport on return to Harare and that the Government of Zimbabwe might regard the very act of leaving for certain overseas countries, including the UK, as constituting treachery. Their spokesman cited the example of an enforced returnee (who was not in fact a failed asylum seeker) who had been questioned about reports to the effect that Zimbabweans were being trained as spies and insurgents in the UK. He said that the CIO were capable of beating people at the airport, but he did not identify any group as being particularly at risk. He said that he had once been harassed by CIO officers in the toilets at the airport, but he had been freed when he said he was a lawyer. He believed that someone less articulate might not have got away so easily. He did not think that at societal level there would be any problems for returning failed asylum seekers.

vii. 59. Source D was a church organisation in Zimbabwe. Their spokesman had not heard of any reports of mistreatment being accorded to returning failed asylum seekers or others returning from the UK. He said that the likelihood that his organisation would hear about such things was restricted by the absence of an independent media. He would not rule out the possibility that individual returnees might be persecuted. On the other hand, he felt that if there were any mistreatment of returnees, that could apply to anyone returning to Zimbabwe from the UK or the USA. He went on to say that anyone returning from the UK would be liable to be interrogated on return on suspicion of being one of "Blair's spies". He felt that people visiting the UK as tourists or on business might face some interrogation about their motives and activities on return. Some business people were reluctant on this account to travel to the UK. He felt that returnees from other countries did not encounter these problems.

viii. 60. After he had read the field report, a spokesman for Source D made a witness statement in which he confirmed their view that an asylum seeker removed from the UK was likely to be singled out as liable to suspicion as a spy and he would be interrogated. Someone who had sought asylum from the UK would be viewed as a traitor or enemy of the state. Torture during interrogation by the CIO was usual, as was degrading treatment. There was evidence that MPs had been tortured by the CIO, and he observed how much worse the position of an ordinary person under interrogation on suspicion as a traitor would be.

ix. 61. A senior spokesman for a regional human rights NGO was referred to as Source B. He said that he did not believe that returning failed asylum seekers would be targeted for mistreatment since it would suit the Government to hold such figures up as examples that this country was not as wonderful as others tended to think. He believed that people who were deported for other immigration offences would be unlikely to face difficulties on return. In his experience they usually got a new passport, saved up, and tried again. He said that Source B's activities were such that they engaged with a wide range of NGOs and others in the field of human rights. He believed that they would have heard if there had been systematic mistreatment of returning failed asylum seekers, and he had not.

x. 62. Source H was identified as the Zimbabwe Peace Project. They had not received reports of any mistreatment of failed asylum seekers or other people returned from this country, but they were aware of such allegations in the press, and they were quite able to imagine that such things might be happening. Their

spokesman suggested that one reason why failed asylum seekers might be treated differently from other immigration offenders or others who had visited the UK was that it was assumed that they must have made disloyal statements in pursuit of their asylum claims about the situation in Zimbabwe and the Government in particular. As a result, and based on the treatment that others who were of interest to the Government faced (for example, NGO activists), they could imagine that the treatment they might face would include having their luggage tampered with as well as extended questioning by immigration officials and the CIO. Once picked up by the CIO, it was likely that the line of questioning would extend well beyond the issue in hand to general views, connections and background. He imagined that the treatment for those who were returning from the UK could be worse for those from other countries because of the political climate between the two countries. He said that even though the Security Services had access to sophisticated intelligence, they also acted on the basis of suspicion, for example because somebody had been away for a while. He did not believe that failed asylum seekers were, on the whole, likely to face societal difficulties in the area to which they are returned.

xi. 63. The spokesman for another organization (Source C) told Mr Walker that if failed asylum seekers who were returned from the UK were identified as such, they could expect to be questioned by Immigration and the CIO and perhaps even be threatened and accused of betrayal before being released. They might be visited subsequently at home but the source was not aware that any had suffered mistreatment at that stage. He felt that it would definitely know if there had been any systematic mistreatment of returning failed asylum seekers.

xii. 64. The AIT received a good deal of evidence on the question whether it was likely that any of these NGOs would be unaware of any systematic ill-treatment of returned asylum-seekers. It is unnecessary to refer to this evidence because the Secretary of State does not challenge on this appeal the tribunal's finding that it was not remotely surprising that they had not heard of there being any general risk. The tribunal based this finding on its belief that Operation Murambatsvina, which may have affected up to 1.5 million people, provided much to distract hard-working NGO officials from the possible plight of a small number of claimants returned by the UK Government during the course of a few months. A much respected representative of Source F said that he believed it was a fantasy that the NGOs would be in a position to monitor returns, and Professor Ranger said that this evidence persuaded him that he had been wrong at the time of the *SM* hearing to believe that the situation would be carefully monitored. One of the reasons why the NGOs would be unlikely to hear about these cases was because the vast majority of the victims of ill-treatment would not wish to approach an NGO for fear of further harassment by the state.

12 AA: The AIT's conclusions

i. 65. After summarising the evidence the AIT said that this was a finely-balanced case. They were surprised, however, that the Government had made little progress in investigating the truth (or otherwise) of the reports of individual ill-treatment and had taken no steps to monitor returns at Harare so that they might be able to speak of individual returnees who had passed through the airport without any appreciable difficulty. They were not impressed by the efforts that had been made to rebut the evidence adduced on the appellant's behalf.

ii. 66. They found that although the CIO took a particular interest in arrivals, ordinary travellers, including voluntary returnees, were processed through the airport in the usual way. The position with involuntary returnees, however, was different. Because of the methods used whereby the airline passed their documentation direct to the authorities the CIO's attention was drawn to them immediately, and they accepted Professor Ranger's evidence about the likelihood of ill-treatment for those who had an individual interview with a member of the CIO.

iii. 67. So far as the individual reports were concerned, the AIT acknowledged that there were problems over credibility, but they said that when one took into account those whose allegations were made the subject of detailed evidence and those who had made the earlier allegations which were summarised in Mr Walsh's evidence, they constituted, taken together, a considerable body of witnesses:

> "And the truth of the matter is that whatever doubts one might have about the complainants individually, the body of evidence, from a score of separate people, all goes one way. Further, none of it seems to bear any mark of unreliability, and all of it accords with what one would generally expect of the CIO."

The AIT said that the appellant's claim succeeded if he showed a real risk. He did not need to prove a certainty. They continued:

> "As we have attempted to explain above, the claim that every person returned involuntarily is at real risk of ill-treatment is not a claim that every one will in fact suffer ill-treatment. Likewise, looking at the past, the Appellant does not need to show that all those who have been returned involuntarily did suffer ill-treatment. He is entitled to rely, as he does, on evidence pointing to a substantial number of cases in the context of general evidence showing the source or reason for the risk."

i. 68. After directing themselves in this way they concluded that the process by which the UK Government enforced the involuntary return of rejected asylum-seekers to Zimbabwe exposed them to a risk of ill-treatment at the hands of the CIO, and that ill-treatment at the level reported would clearly be persecution. The appellant therefore had a well-founded fear of persecution for a Refugee Convention reason if he were returned to Zimbabwe. He had also established that he was at risk of treatment contrary to Article 3 of the European Convention on Human Rights if he were so returned.

ii. 69. They went on to say that it was possible that they might have taken a different view if the Government had made any arrangements to ensure so far as possible that those returned voluntarily and those returned involuntarily were not readily distinguishable on arrival, or if there had been evidence that substantial numbers of failed asylum-seekers, returned involuntarily from the UK, had passed through Harare Airport without any problems. They also said that if Mr Kovats, who appeared for the Secretary of State, had not conceded the issue of whether the ill-treatment would be for a Convention reason they should have wanted to exercise that question with great care. It might be correct that any ill-treatment would be motivated by a perception of treachery. If, however, the ill-treatment arose from attempts to encourage emigration, or discourage return, or even from *odium humani generis* that would probably not be for a Convention reason. Article 3 of the ECHR would nevertheless prevent the appellant's return, but he would not have the status of a refugee.

13 The first argument on the appeal: The AIT misunderstood some of the evidence

i. 70. Mr Burnett submitted as his first ground of challenge that the AIT had materially misunderstood the evidence in two related respects. He said that they were wrong to say that the body of evidence from a score of people all went one way. They were also wrong when they repeatedly indicated that the Secretary of State had not relied on any evidence indicating that individual Zimbabwean failed asylum-seekers had not been mistreated.

ii. 71. In our judgment both these complaints are well-founded. The AIT did not, as we have done, set out in their determination the details relating to individual returnees who featured in the evidence for the period after compulsory returns to Zimbabwe was reinstated. During that period there were reports of ill-treatment to seven returnees: Cases A, C and E, Witness 7, Usher and Vincent, and the unknown person who featured in a judicial review application. It was common ground that the credibility of some of these people was suspect. There were, of course, the four whose silence worried the Zimbabwe Association, the five of whom Mr Nicol said there was ground for concern, even if there was no evidence of ill-treatment, and the evidence of Witness 8 which referred to an earlier period. On the other hand there were the six of whom Mr Nicol could not point to any cause for concern in relation to their treatment at the airport. "Ratidzo" (like Witness 7) was not a failed asylum-seeker, and although she was hit across the mouth she was released on the intervention of her uncle before anything else untoward occurred, and there was no positive evidence of ill-treatment in the cases of Setimbile or Kalinga.

iii. 72. At all events, in a case which was said to be finely-balanced, the AIT was wrong to say that the body of evidence from a score of separate people all went one way, and that the Secretary of State had not relied on any evidence indicating that individual Zimbabwean returned failed asylum-seekers had not been ill-treated, even if he did not adduce any evidence of his own. Indeed, when the AIT referred to Mr Walsh's analysis of the 14 cases notified by the Zimbabwe Association they only mentioned the three cases which could have given rise to a finding of serious mistreatment and said nothing about his evidence to the effect that none of the other 11 cases involved treatment reaching the Article 3 persecution threshold.

14. The second argument on the appeal: the AIT misapplied a concession

i. 73. Mr Burnett submitted next that the AIT had misapplied a concession that Mr Kovats had made, and had taken insufficient care in categorising the different people about whom they heard evidence. There were five categories of passengers who arrived at Harare Airport from the UK: ordinary passengers, overstayers (or others who fell foul of our immigration laws) who returned voluntarily; failed asylum-seekers who returned voluntarily; overstayers (or others who fell foul of our immigration laws) who returned involuntarily; and failed asylum-seekers who returned involuntarily.

ii. 74. The AIT made an express finding that there was no identifiable risk to any of the first three classes of passenger, taken as a class (see para 66 above). On the other hand, they found that all the passengers in the last two classes were drawn immediately to the attention of the CIO and were exposed to a risk of ill-treatment at the hands of the CIO at such a level as to amount to persecution.

iii. 75. Mr Burnett submitted that by jumbling up involuntary returnees who were failed asylum-seekers with other involuntary returnees, and by jumbling up voluntary returnees who were failed asylum-seekers with other voluntary returnees, the AIT was not entitled to apply Mr Kovats' concession to all involuntary returnees. The concession was in these terms:

"If failed Zimbabwean asylum-seekers do *as such* have a well-founded fear of persecution, this would be for a Convention reason, namely perceived or imputed political opinion." (Emphasis added)

i. 76. The passage at the end of the AIT's determination (see para 69 above) reveals that if they had not thought that the concession embraced all involuntary returnees they would have devoted themselves to a careful consideration of the reasons why they concluded that they were all at risk. To CIO agents there would be no difference in the way they were presented themselves at the airport between an overstayer who had not claimed asylum, an overstayer who claimed asylum (like AA) as soon as they were detected, or someone who had claimed asylum as soon as he/she arrived in the UK, until their questions elicited something that was of interest to them. And if the AIT had not allowed themselves to be deflected from inquiring further, they might have paid greater attention to the reasons given by the Zimbabwe-based NGOs as to why some involuntary returnees might suffer ill-treatment (see paras 50-58 above). Source F thought opposition supporters might be at risk. Source A considered people might be at risk if they had political opinions and had been involved in political activities. Source J considered that the very act of going to the UK might be regarded as an act of treachery. Source D considered that any returnee from the UK was liable to be interrogated on return and a failed asylum-seeker would be viewed as a traitor or enemy of the state. Source B considered that people deported for other immigration offences would be unlikely to face difficulties on return.

ii. 77. In our judgment this complaint, too, is soundly based. The AIT was not told how many involuntary returnees had never claimed asylum at all (like Ratidzo and Witness 7). Mr Nicol complained that the Secretary of State was not entitled to adduce this evidence for the first time in this court on an appeal on a point of law. However, it is fair to say that the issue did not arise as a significant one during the hearing before the AIT. Moreover, Mr Kovats was entitled to assume that his concession would not be misinterpreted, and the burden lay on the appellant to show that an involuntary returnee fell into a special class by reason of the fact that he/she was a failed asylum-seeker and not some other species of involuntary returnee. Although Mr Burnett had the relevant statistics available for us, we were content to accept his assurance that the number of involuntary returnees who were not failed asylum-seekers was not minimal.

iii. 78. It follows that the AIT made a further material error of law when they misapplied Mr Kovats' concession and did not embark on the inquiry they canvassed at the end of their determination (see para 69 above).

iv. *15. The third argument on the appeal: AA is not a refugee*79. We turn now to the third argument advanced by Mr Burnett. It is to the effect that even if AA would suffer persecution for imputed political opinion were he returned to Zimbabwe by the Secretary of State against his will, he still has no claim to refugee status and his appeal should accordingly have been dismissed by the AIT. The reason is that if he were to return *voluntarily* he would be at no risk. That is because voluntary returnees keep their own travel documents (see para 21 above), unlike forced returnees whose documents are in the pilot's custody, and on arrival at Harare Airport are dealt with by ordinary immigration staff as opposed to the CIO.

16. The third argument: a Preliminary Objection

i. 80. Mr Nicol raises a preliminary objection to this point being taken at all. He says, correctly, that it was not taken before the AIT. There the argument was focussed upon failed asylum-seekers who were involuntarily returned. Logically this argument came to embrace *all* involuntary returnees, because there was no means at Harare Airport of distinguishing failed asylum-seekers from other such returnees. But there was no submission made on behalf of the Secretary of State to the effect that a person who would be safe if he returned voluntarily cannot claim refugee status on account only of the fact that if he refused to go, and was forcibly returned, he would then be at risk.

ii. 81. When Mr Nicol first deployed this objection, it appeared that the argument was one of jurisdiction. He cited *GH (Afghanistan)* [2005] EWCA Civ 1603, in which the Secretary of State sought in this court to take a point not taken before the Immigration Appeal Tribunal ("the IAT"). Delivering the judgment of the court, Brooke LJ said this:

"There are a number of recent decisions of this court which make it clear that as the IAT (prior to its abolition in April 2005) could only entertain an appeal on a point of law (see section 101(1) of the Nationality Immigration and Asylum Act 2002) it was necessary for a point of law to be discernible in the grounds of appeal when permission to appeal was given (see *Miftari v SSHD* [2005] EWCA Civ 982 at [55] to [58]…)…"

This passage was followed by a discussion of what appeared to be an exception to this discipline, arising where the IAT was confronted with the situation described by Lord Woolf MR in *R v Home Secretary ex p Robinson* [1998] QB 928, 946C:

"If when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal."

The court in *GH (Afghanistan)* concluded (at para 16) that "[t]he obligation identified in *Robinson* can therefore best be explained as an aspect of the duty of the court to give anxious scrutiny to the claim of an asylum-seeker". Moreover (see para 17) no extension of *Robinson* could avail the Secretary of State in the case then before the court.

i. 82. However as Mr Nicol developed his argument, he accepted (as we understood him) that it was a matter for the court's discretion whether or not to receive the Secretary of State's new point. In our judgment he was right to do so. The AIT in this case was conducting a "reconsideration" under transitional provisions inserted into the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. On such a reconsideration, depending on the terms on which it was ordered, the AIT may review the whole case. It is not exercising the confined jurisdiction of the IAT under s.101(1) of the 2002 Act. Accordingly the restricted approach required by *Miftari* and later cases does not apply. That is not to authorise a free-for-all in this court. All applicable procedural requirements must be respected, and if an appellant seeks to raise a new point here the court will be alert to see that the other side suffers no prejudice. So much is in truth elementary. That said, the court will entertain a new point if it thinks it just and right to do so; that is no less elementary.

ii. 83. Here, Mr Nicol does not accept on the facts that AA would be at no risk if he returned voluntarily. He says that if the court is now to adjudicate on the Secretary of State's fresh argument, the matter would have to be remitted to the AIT for proper findings to be made on the question whether AA would in truth be at no risk upon his voluntary return; there are no such findings in the determination under appeal. He submits it would be wrong, and unfair to his client, to take that course. The Secretary of State should not have the benefit of what in effect would be a re-trial in order to investigate facts for the purpose of a submission which he could and should have flagged up before the AIT at the proper time.

iii. 84. Mr Burnett submits that the AIT's determination contains findings of fact such that the court may confidently proceed on the basis that AA would in truth be at no risk if he returned to Zimbabwe voluntarily. In any event he seeks this court's ruling on the question of law, whether someone who would be at risk if he were forced to return is nevertheless not a refugee (nor a potential Article 3 victim) if upon his voluntary return he would face no risk. If (contrary to his primary submission) more facts need to be found in order to determine AA's case, then as we understood him Mr Burnett would seek an order remitting the matter to the AIT for that to be done.

iv. 85. We have reached the view that the factual question, whether AA would be safe on his voluntary return, is not concluded by the findings so far made by the AIT. There is in particular a potential issue as to what might befall AA within Zimbabwe after he gets through the airport. We have, however, also decided that we should confront and resolve the point of law which the Secretary of State seeks to advance. There is of course much well established learning to the effect that a party should bring forward his whole case at the first appropriate opportunity. But there is obviously no question here of the point having been kept back for tactical reasons or anything of the kind. And it is in the circumstances hardly matter for criticism that it was not exposed before the AIT, where as we have said the matter went off on the distinct question as to what would be the fate of failed asylum-seekers who were involuntarily returned. Moreover, the point is one of principle and there is a public interest in having it resolved. It touches the reach of the duty of international protection imposed by the 1951 Convention, and it is in the proper interest of the public at large, and of asylum claimants in particular, that the duty's reach should be ascertained and clarified wherever it is in doubt.

17. The third argument: substance

i. 86. We turn, then, to the substantive issue. The Secretary of State's argument is very simple. It invokes the definition of "refugee" given by Article 1A(2) of the Convention:

> "… the term 'refugee' shall apply to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country…"

Mr Burnett says that someone who can voluntarily return in safety is not outside the country of his nationality owing to a well-founded fear of persecution; he is outside it simply because he chooses not to return to it. The point requires little elaboration. It is critical to the definition of "refugee", and indeed to the scope of the international protection which the Convention requires to be afforded, that a well-founded fear of persecution should be the reason why the candidate refugee is outside the country of his nationality. So much is plain from the language of the definition. It is plain also from the very purpose of the Convention, which is to impose on States Parties a duty to protect persons within their borders who cannot return to their country of nationality for fear of being persecuted there. It is not to impose a duty of hospitality to persons who, if they chose, could return home with no risk whatever of being persecuted.

i. 87. Mr Burnett cited the recent decision of the House of Lords in *Januzi* [2006] UKHL 6, [2006] 2 WLR 397, a case on what is sometimes called internal flight or internal relocation. There is some discussion of the definition of refugee in Lord Bingham's opinion at para 5. He says it contains three qualifying conditions, of which "[t]he first is… a causative condition which governs all that follows: 'owing to well-founded fear of being persecuted…'". Thus the well-founded fear has to be the *cause* of the refugee's being

outside the country of his nationality. Mr Burnett also draws attention to this passage at para 7, which he submits describes an analogy with the state of affairs we are considering:

"[I]f a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to well-founded fear of being persecuted for a Convention reason."

See also para 19, which we need not cite.

i. 88. The issue on this part of the appeal as it was developed at the hearing was, however, not limited to consideration of the Refugee Convention's application to safe voluntary returnees. A question was also raised whether such a person is excluded from the protection of ECHR Article 3 albeit if he were returned under compulsion he might face ill-treatment in violation of Article 3 standards. On further consideration, however, the Secretary of State has indicated in written submissions supplied after the hearing that he does not wish to advance this argument on the appeal in *AA*. We shall have something to say about this after we have determined the issue as it relates to the Refugee Convention.

ii. 89. As to that, Mr Nicol submitted that the argument for the Secretary of State cannot sit with the terms of the statute conferring relevant rights of appeal, namely s 84 of the Act of 2002. Section 84(1)(g) provides:

"An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds –

…

(g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

Mr Nicol's argument is that "removal" must mean enforced removal; and therefore once it is shown that the appellant's enforced removal would lead to his being persecuted for a Convention reason (or ill-treated in breach of ECHR Article 3 standards), the statute gives him a good appeal against such removal whatever might be the position were he to return voluntarily.

i. 90. This is a bad argument, for it assumes what Mr Nicol has to demonstrate. Granted that the appellant's enforced removal would lead to such persecution or ill-treatment, it does not follow that such a state of affairs would constitute a violation of the United Kingdom's obligations under either Convention, and thus found a good appeal under s 84(1)(g): such a violation would only be made out if the possibility of a safe voluntary return made no difference to the question, violation or no. But that is the very proposition for which Mr Nicol must contend. The terms of s 84(1)(g) carry it no further forward.

ii. 91. We should notice Mr Burnett's submission that "removal" within the meaning of s 84(1)(g) contemplates voluntary return as well as enforced removal, a submission adverted to in Mr Burnett's second supplementary skeleton argument put in after the hearing on 14 March 2006. No such argument is required for the refutation of Mr Nicol's position, and in our judgment it is only apt to confuse. "Removal" within the subsection means enforced removal pursuant to directions issued by the Secretary of State.

iii. 92. Mr Nicol's next argument depends on the terms of the Refugee Convention itself. He cites the well-known authority of *Sivakumaran* [1988] AC 958, first at pp 994F-G where Lord Keith of Kinkel said:

"In my opinion the requirement [sc in the definition of 'refugee'] that an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country."

If Mr Nicol deployed this reasoning, as he appeared to do, as support for the proposition that the position of an asylum-seeker on his voluntary return is irrelevant to the definition's application to him, that is a misuse of authority. Lord Keith was not considering the position of voluntary returnees and the passage cited implies nothing, certainly nothing in Mr Nicol's favour, as to what his view would have been if he were.

i. 93. Mr Nicol also cited Lord Goff of Chieveley at pp 1000H-1001C. In order to understand the point made it is necessary to set out the terms of Article 33(1) of the Refugee Convention:

"No contracting state shall expel or return (*'refouler'*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."

In the Court of Appeal in *Sivakumaran* Lord Donaldson MR had suggested that a person accepted as falling within the refugee definition would not necessarily attract the protection against *refoulement* afforded by Article 33. Lord Goff rejected that approach. He said (1001B-C):

> "It is, I consider, plain… that the non-refoulement provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention."

i. 94. Mr Nicol submitted that the "core right" guaranteed by the Refugee Convention is the right not to be expelled ("non-*refoulement*"). He said this had to be "fed into" the Article 1A(2) definition. In our view that is an unintelligible proposition. But we understand the overall thrust of the argument to be that, once it is shown that an enforced removal will carry a risk of persecution for a Convention reason, then at once the Article 1A(2) definition bites and the Article 33 right applies. However this does not begin to show that a person who can return voluntarily without risk is within the definition or entitled to enjoy the right. That is, again, simply assumed. Neither the terms of Article 33 nor the reasoning in *Sivakumaran* assist Mr Nicol.

ii. 95. This part of the case is closely connected with Mr Burnett's last argument in the *AA* appeal, which engages the decision of this court in *Danian* [2000] Imm AR 96. We find it convenient to deal with *Danian* in this present context.

18. The third argument: the Danian case

i. 96. Danian was a Nigerian citizen who claimed to have become a refugee *sur place* by virtue of his involvement in a pro-democracy movement in the United Kingdom. The appellate authorities held (we summarise) that he had cynically undertaken or tailored his activities for the purpose of creating an asylum claim where otherwise he would have had none. With some qualifications this court proceeded on the same basis of fact. It held that even though an asylum seeker had acted solely out of a desire to generate a risk of persecution and thus a viable asylum claim, still if in fact he entertained a well-founded fear of persecution for a Convention reason, he would be refugee (see for example *per* Brooke LJ at p 120).

ii. 97. The AIT in *AA* referred to *Danian*. They said (para 173):

> "[W[e wonder whether *Danian* requires further examination. Ought the Refugee Convention to be confined to cases of what might be called *'real'* need? Does it genuinely require the status of refugee to be given to a person like the Appellant whose claim arises solely from his voluntary and dishonest acts in the safety of the United Kingdom, or to others who, on the strength of this decision, may make an asylum claim purely in order to get the benefit of it? Or are such persons adequately protected by the European Convention on Human Rights, which has been incorporated fully into English law since *Danian* was decided? That Convention would protect them from the risk of harm that they have voluntarily or cynically chosen to incur, without giving them the benefits of refugee status."

We should say that Mr Nicol acknowledged, as is certainly the case, that the Refugee Convention confers further substantive rights in addition to the right of non-*refoulement* under Article 33. Mr Burnett's argument is that the correctness or otherwise of *Danian* did not arise for consideration in the *AA* appeal, and if (as appears to be the case) the AIT thought otherwise they were wrong to do so.

i. 98. Mr Nicol's primary submission on *Danian* is that if Mr Burnett's argument on the requirement of causation in the Convention definition of "refugee" is right, it would also have disposed of *Danian* in the Secretary of State's favour. This is a bad submission. As a result of Danian's manipulative conduct he faced, or may have faced (this court remitted the case for further findings to be made) a risk of persecution on return to Nigeria: but the risk would have enured whether he returned voluntarily or involuntarily. Thus the point at issue in our case did not arise. The question in *Danian* was important, and we think not free of difficulty. But it has no bearing on anything we have to decide, and this is not the occasion to revisit it even assuming, granted our principles of binding precedent, that we were free to do so. For completeness we should add that some observations were made about *Danian* by Simon Brown LJ as he then was in *Iftikhar Ahmed* [2000] INLR 1, 7-8, but they do not advance Mr Nicol's case and with respect we need not set them out.

ii. 99. In the circumstances we conclude, upholding Mr Burnett's argument, that a person who can voluntarily return in safety to the country of his nationality is not a refugee, notwithstanding that on a forced return he would be at risk. Such a person is not outside his home State owing to a well-founded fear of persecution. Neither s 84(1)(g) of the Act of 2002 nor Article 33 of the Convention can begin to demonstrate the contrary, since neither enlarges the "refugee" definition; and a safe voluntary returnee is outside the definition.

iii. 100. There remain two issues on this part of the case, both of which we have foreshadowed. One is whether AA would in fact be safe if he returned voluntarily to Zimbabwe. The other was the argument concerning ECHR Article 3, whether by parity of reasoning with the position as we have held it to be under the Refugee Convention, a safe voluntary returnee has no claim to protection under Article 3 notwithstanding that on his forced return he would or might face ill-treatment in violation of Article 3 standards. This is the

argument which, as we have indicated, the Secretary of State does not now wish to pursue in the *AA* appeal. We shall first deal with the question of AA's safety if he returned voluntarily.

19. The third argument: safe voluntary return on the facts?

i. 101. We have already indicated that the factual question, whether AA would be safe on his voluntary return, is not concluded by the findings so far made by the AIT. There is in particular a potential issue as to what might befall AA within Zimbabwe after he gets through the airport. We should briefly indicate the basis on which we have arrived at this view.

ii. 102. Mr Burnett's submission that there was really no contention but that voluntary returnees would be at no risk on arrival at Harare Airport depends on paras 154 – 155 of the AIT's determination:

"The CIO are not primarily responsible for immigration services at Harare Airport. They do, however, have a presence there. The evidence we have seen makes it clear that when planes from the United Kingdom arrive at Harare members of the CIO are present in great numbers. Although there was some suggestion in the evidence before us that the Zimbabwean authorities treated arrivals from other white Anglophone countries… with similar suspicion, it is in our view clear that the CIO take a particular interest in arrivals from the United Kingdom. *Nevertheless, it appears to be the case that ordinary travel to and from the United Kingdom, including voluntary departures by those who have had dealings with the immigration authorities of this country, are dealt with in the usual way by immigration officers (not the CIO) at the airport in Harare.*

155. *Involuntary departures are a different matter…*" (our emphasis)

i. 103. Although the position relating to voluntary returnees was not the subject of rigorous investigation by the AIT, for the very reason that it was not exposed as raising a distinct issue, we incline to the view that if all that mattered was what might befall the voluntary returnee on arrival at the airport, we could properly conclude that such a returnee would be safe and there would be no need to remit the matter to the AIT. His entry would be processed by the ordinary immigration authorities. There would be nothing to show that, for instance, he was a failed asylum-seeker. It is true that Mr Walsh in his statement dated 29th July 2005 reports (at para 43) information from the IOM (see para 21 above) to the effect that "in a few cases friends or relatives of those returned under AVR have reported to them that returnees have been detained at Harare Airport". But given that voluntary returnees travel as ordinary paying passengers carrying their own documents, by itself this raises no sinister inference.

ii. 104. However that is not the end of the matter. In its decision in *LK* the AIT noted in terms (at para 9) that "there was no full investigation in *AA* of the risk to those returned after they have passed through the airport (if they are allowed to do so)". In his July 2005 statement Mr Walsh makes these observations:

"50. We are aware that some Government of Zimbabwe agents… have lists of suspected MDC sympathisers in various areas around Zimbabwe. Returnees could be added to such lists, though we have no reports that they have been. We are in any case not aware that such lists are routinely used to intimidate/find people, except around the time of elections. Such lists are most likely used to control food distribution…

51. In the rural areas, it is customary for the local chiefs or village headmen (who are frequently linked to the regime) to monitor new arrivals of any kind. There have been allegations that the recent Government of Zimbabwe crackdown, Operation Murambatsvina, has led to incidents of intimidation of new arrivals in specific areas, but there are no reports of any incidents specific to returnees."

Professor Ranger made a statement in reply on 2nd August 2005, in which he refers (at para 5) to

"numerous instances of people fleeing their home area but being followed up and targeted in their area of refuge… I do not agree that in general the evidence suggests either that lists have been used only at election times or in the distribution of food. The compilation of lists and files is a major pre-occupation of the CIO and there is evidence of people being identified and followed up in post-election periods. In any case the distribution of food is now of critical significance."

i. 105. This material is in general terms and, certainly, points no particular finger at any specific risk to voluntary returnees. But Mr Nicol submits, perfectly reasonably, that if the issue of the safety of voluntary returnees had been fair and square before the AIT, AA's representatives would have wished to have it properly gone into. In fact the issue was flagged in passing in the skeleton argument prepared by AA's counsel Mr Henderson before the AIT: he refers (at para 20) to Mr Walsh's observation in para 43 of his statement of 29th July 2005, which we have cited. Mr Burnett in reply very fairly accepted that what might befall him after leaving the airport was part of AA's case, but was not dealt with at all by the AIT.

ii. 106. In all these circumstances, and given the now elementary duty of anxious scrutiny owed within the confines of their proper legal remit by all courts and tribunals dealing with matters of this kind, we cannot conclude that if AA returned to Zimbabwe voluntarily he would necessarily be free from danger once he had passed through the airport.

20. A postscript to the third argument: ECHR Art 3

i. 107. At the close of the hearing the parties were invited to submit further argument in writing on the question whether, albeit there would be no violation of the Refugee Convention constituted by AA's enforced removal to Zimbabwe by virtue of the fact that he could return voluntarily without risk, nevertheless such an enforced removal would breach ECHR Article 3. Hence Mr Burnett's further submissions dated 14th March 2006 and Mr Nicol's submission in response of 16th March 2006. Here, we have encountered a difficulty. As we have said, the Secretary of State through Mr Burnett's further argument has made it clear that he does not wish to submit on this appeal that the possibility of AA's safe voluntary return disqualifies him from the protection of ECHR Article 3. He says (further skeleton 14th March 2006, para 5) that the reason is that in the context of the Zimbabwe asylum litigation this issue only touches the particular case of AA, because the Secretary of State suspended removals by the means considered by the AIT in *AA* immediately after the determination (see para 113 below). The Secretary of State accordingly accepts (para 6) for the purposes of this appeal "that, if the factual findings made by the AIT in *AA* stand, it would be a breach of article 3 ECHR for the United Kingdom to enforce the removal of Mr AA to Zimbabwe by the route and method that the AIT held to be unsafe, notwithstanding that Mr AA could previously have returned safely to Zimbabwe voluntarily". But it is then stated in para 7:

"However, this is without prejudice to the Secretary of State's ability to argue the point (ie as to whether Article 3 is intended to protect against forced removal a person who could safely return home voluntarily albeit that he could not be forcibly removed without a real risk of persecution) in a future case."

i. 108. We are bound to say we consider that the Secretary of State's position produces an unsatisfactory state of affairs. Since he declines to argue the Article 3 issue, we do not feel it would be appropriate for us to adjudicate upon it. Yet once the point is taken that the possibility of AA's safe voluntary return excludes him from refugee status, the question whether Article 3 protection is likewise excluded arises just as surely, and in the ordinary way it would be obviously convenient to deal with the two linked issues together. As we have indicated we propose to allow the Secretary of State's appeal in *AA* on other grounds which we have already discussed. There may be issues, connected with the Secretary of State's approach to this question on ECHR Article 3, as to what form of relief will be appropriate.

21. The appeal in LK

i. 109. We turn finally to the appeal in *LK*.

ii. 110. The AIT announced their decision in *AA* as soon as the hearing ended on 7th October 2005, and the Secretary of State immediately announced that he would not compel anyone to return to Zimbabwe against their will until he had devised a new way of returning people to Zimbabwe which would not subject them to the risks at Harare Airport which were identified by the AIT. It was against this background that a panel of the AIT, which included both the President and the Deputy President, heard the application of the Secretary of State in the case of LK on 8th November 2005.

iii. 111. This was an application for reconsideration of a decision of an adjudicator dated 15th November 2004 who had allowed LK's appeal against the refusal of her claim for asylum. The AIT refused reconsideration on the basis that they could see no error of law in the adjudicator's finding that LK was at such risk of ill-treatment for her sexual orientation as to bring her within the definition of a refugee and also to show that her removal would expose her to risk of ill-treatment proscribed by Article 3.

iv. 112. There is no appeal against that ruling, so that LK is entitled to refugee status on those grounds alone. However, the Secretary of State now appeals against the AIT's decision that LK was entitled to refugee status on other grounds, too, and it is the merits of this challenge that we now have to consider. Section 103B of the 2002 Act gives this court jurisdiction to hear this appeal on a point of law, for which Laws LJ has granted permission, notwithstanding that nothing we say can affect the refugee status of LK herself.

v. 113. In their determination the AIT stated:

"8. There is, of course, now a shorter route to the conclusion that the Appellant is entitled to refugee status in the United Kingdom. As the Secretary of State recognised, the decision of the Tribunal in *AA*…, which is a country guidance case, might be regarded as leading to the conclusion that the Appellant should in any event be regarded as a refugee… In this appeal as, we understand, in others, the Secretary of State now argues that the country guidance case of *AA* should not be followed. This appeal therefore provides an opportunity for the Tribunal as presently constituted to give an authoritative view on the arguments being adduced by the Secretary of State.

…

11. … The Secretary of State points out that on 14 October… he announced that returns to Zimbabwe had been suspended. He now submits that the suspension of returns to Zimbabwe is an event which took place after the judgment in *AA* and thus casts doubt on its continued force. That, in our judgment, is simply wrong…

12. In any event, reliance on the Secretary of State's suspension of returns on 14 October hardly tells the whole story. As we understand the position, returns to Zimbabwe were suspended in the summer of this year as part of the arrangements made for the adjournment of a number of Judicial Review cases before Collins J and the selecting of *AA* as a test case to be heard by this Tribunal. The fact that returns had for the moment been suspended was part of the context in which the Tribunal heard the case of *AA*. None of the Secretary of State's arguments before the Tribunal in *AA* suggested that the suspension of returns made any difference to the status of the appellant in that case as he stood before the Tribunal.

13. There is, however, a much more general difficulty in the Secretary of State's argument that a person who would otherwise be entitled to the status of a refugee is not entitled to that status if removal is not threatened. If that were a good argument, there would never be any refugees because the Convention requires (broadly speaking) that refugees are not removed, and the United Kingdom Government's policy is certainly not to remove them (except where *'safe third country'* arrangements of various sorts apply). A refugee's status as a refugee does not depend on the risk that he will be removed: it is a status that he has while he is in the country in which he has sought refuge. It is easy to lose sight of the fact, but almost the whole of the Refugee Convention is concerned precisely with the incidents of that status whilst he remains in the country which ex hypothesi is not the country of his nationality. Reinforcement of that view, if required, can be found throughout the decision of the Court of Appeal in *Saad*... [2002] INLR 34…"

The AIT then proceeded to discuss the case of *GH* [2005] EWCA Civ 1182, and concluded (at para 24) that that authority had

"no specific bearing on the question whether a particular individual is, as he stands before the Tribunal in the United Kingdom, entitled to status as a refugee. *AA*, on the other hand, is a case about refugee status. It decides that, because of the circumstances in Zimbabwe at the present time, a Zimbabwean citizen would not return there willingly has a well-founded fear of persecution for a Convention reason and is accordingly entitled to the status of refugee while he remains here. Although the reasoning depends, through the decisions of the Court of Appeal in *Danian*... and *Mbanza* on the projected removal, it is a decision about status, not about removeability…"

And so the AIT held that LK was a refugee on what might be called *AA* grounds, as well as by virtue of her homosexuality. This is the conclusion to which the Secretary of State takes objection on this appeal.

i. 114. It might be thought that since the Secretary of State does not challenge the AIT's finding that LK as a homosexual is a refugee, their further conclusion based on *AA* is no more than the fifth wheel of the coach and there is no good reason why this court should spend judicial time and energy in addressing it. But this overlooks the nature of the Secretary of State's concern. Here it is necessary to recall the precise basis on which the AIT in *AA* had held that involuntary returnees to Zimbabwe would be at risk. At para 166 they stated:

"… [W]e have reached the view, on the evidence before us, that the process by which the United Kingdom Government enforces the voluntary return of rejected asylum seekers to Zimbabwe exposes them to a risk of ill-treatment at the hands of the CIO."

i. 115. Thus the genesis of the risk of persecution, as found by the AIT, was no more nor less than the procedures which the Secretary of State adopted to process involuntary returns to Zimbabwe. But those procedures were cancelled by the Secretary of State after the decision in *AA* had been given, but before it was promulgated. The Secretary of State then indicated that he would not enforce returns to Zimbabwe while the Home Office worked to resolve the concerns identified by the AIT about the way in which such returns had been carried out. This was the suspension of returns announced on 14th October, referred to in paras 11 and 12 of the AIT's determination in *LK*.

ii. 116. In those circumstances it seems to us with respect that in the passages from their determination which we have cited the AIT misunderstood the Secretary of State's case. They did so in two respects. First, the Secretary of State did not submit (see para 8 in *LK*, compare para 11) that *AA* "should not be followed" if by that is meant that in its own terms it was wrongly decided. On the contrary it was a premise of the Secretary of State's suspension of involuntary returns after *AA*, and also of his position before the AIT in *LK*, that *AA* had been *correctly* decided (subject of course to the outcome of any appeal). His case was not that *AA* was wrong, but that the basis on which, pursuant to *AA*, a person would fall to be treated as a refugee – the procedures for involuntary returns – no longer existed.

iii. 117. This leads into the AIT's second error. It is to be found in para 13 in *LK*, though it infects the reasoning which follows relating to this court's decisions in *Saad* and *GH*. The AIT appear to have thought that the Secretary of State's argument was that if there was no present threat to remove a person who, if removed, might face a real risk of persecution, then he would not be a refugee. Had that been the submission, we agree with the AIT that it would have been wrong. The AIT were right to say (para 13), "[a] refugee's status as a refugee does not depend on the risk that he will be removed: it is a status that he has while he is in the country in which he has sought refuge". *Saad* shows as much. The first holding cited in the headnote in the report at [2002] Imm AR 471 is expressed thus:

"An appellant who has been refused recognition as a refugee but has been granted exceptional leave to remain may appeal under section 8 of the 1993 Act against the refusal to grant him refugee status."

i. 118. Thus a person not at risk of removal might nonetheless be a refugee, and is to have access to the appropriate judicial tribunal to determine whether he is so or not. But the Secretary of State does not, and did not, seek to contradict that position. He does not say *simpliciter* that because he has suspended removals, a person who might have been removed had he not done so cannot now be regarded as a refugee. That is how the AIT understood him; but the submission in fact relied on is quite different. It is that because the putative refugee status of a person like LK (her homosexuality apart) arose entirely from the removal procedures previously in place, their suspension has expunged the very basis of her asylum claim. In such a case, exceptionally no doubt, her status as a refugee *would* depend on the risk that she would be removed: at least, on the risk that she would be removed pursuant to the procedures held in *AA* to give rise to refugee status.

ii. 119. In these circumstances we consider that the AIT were wrong to uphold LK's claim to refugee status on what might be called the *AA* basis. We do not with respect find it necessary to go into the decision of this court in *GH*. It offers no impediment to the view we have reached, and no comfort to Mr Nicol.

iii. 120. Mr Nicol submitted that, given the acceptance of LK's status as a refugee as a homosexual, anything else was academic or hypothetical. We do not think that is right. Subject to our conclusions on the *AA* appeal, the AIT's decision in *LK* must have suggested that any person in the position of AA or LK would have been entitled to asylum notwithstanding the Secretary of State's cancellation of his removal procedures after the *AA* decision and the fact that, but for those procedures, such a person would have no claim to refugee status at all. For that reason the decision in *LK* is not in our judgment hypothetical. We were referred to *Saville & ors* [1999] EWCA Civ 1136, one of the cases arising out of the Bloody Sunday Inquiry. There is nothing there to preclude us from giving judgment as appropriate on the Secretary of State's arguments in *LK*.

iv. 121. In principle, then, we would allow the Secretary of State's appeal in *LK*. In both appeals we will hear further argument on the appropriate form or forms of relief.