Neutral Citation Number: [2011] EWCA Civ 428

Case No: C5/2008/0866/AITRF

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Asylum and Immigration Tribunal

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2011

Before :

LORD JUSTICE WARD
LORD JUSTICE LEVESON
and
LORD JUSTICE PITCHFORD

- -

Between :

RM (Zimbabwe)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Erum Waheed (instructed by **Freemans**) for the **Appellant**
Steven Kovats QC (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing date: 16 March 2011

- -

Judgment

Lord Justice Pitchford :

1. This is an appeal by the Secretary of State against a determination dated 24 January 2008 made by Immigration Judge (IJ) Sharp at a re-consideration of the respondent's asylum appeal by the Asylum and Immigration Tribunal (AIT). Permission to appeal was granted by AIT on 3 April 2008. Dr H H Storey, Senior Immigration Judge (SIJ), gave permission on the ground that IJ Sharp had misapplied the country guidance given in *HS (returning asylum seeker) Zimbabwe CG* [2007] UK AIT 00094 and thus made an error of law.

Background

2. The respondent RM is a national of Zimbabwe, born on 11 April 1983. She left Zimbabwe on 24 July 2001 and travelled directly to the UK using a valid passport issued in her name. She entered the UK on 25 July 2001 as a visitor and was granted leave to enter until 5 September 2001. She later submitted an application for further leave to remain as a student on 2 October 2001. That application was granted until 31 August 2002. She made a further application for indefinite leave to remain, this time as a dependent of her aunt on 9 March 2002. The application was refused since the appellant was then aged over 18 years. She appealed that decision but later withdrew her appeal and claimed asylum on 27 July 2005. The Secretary of State refused her application by letter on 19 December 2006. On 29 January 2007 notice of a decision to remove an illegal entrant was also served. RM appealed on asylum, humanitarian protection and human rights grounds.

First determination of appeal

3. The appeal was heard by IJ Montgomery on 12 March 2007. In a determination of 29 March 2007 she dismissed RM's appeal on each ground. The IJ heard evidence from RM and her aunt, to whom I shall refer as M. IJ Montgomery found both to be credible witnesses.

4. RM lived with her grandmother in Zimbabwe, her parents having separated when she was an infant. In 2000, RM had four aunts living in London, M and three others to whom I shall refer as A, B and C. All of them attended the funeral of RM's grandfather in Zimbabwe in that year. The organisation MDC (UK) was formed in April or May 2000 ahead of parliamentary elections in Zimbabwe. An inaugural interim committee of which M was a member managed MDC (UK)'s affairs. M was not elected to the executive committee in June 2001, but she did become vice-chair of the South London branch. Aunt A visited her mother and RM in Zimbabwe in the summer of 2001. She was concerned for RM's safety in the situation prevailing in Zimbabwe and brought her to London. On arrival on 25 July 2001 RM went to live with aunt M.

5. RM claimed asylum only when there was a risk of removal. She relied upon an imputed political belief, namely, through support for MDC, opposition to the ruling party in Zimbabwe, Zanu-PF. The imputation, she asserted, would be made in consequence of the activities of her aunt M with whom she was living. She held a well-founded fear, she said, of persecution resulting from that imputed political belief.

6. Shortly after 2001, however, M had ceased all involvement with MDC (UK). She had instead set up a women's charity which was incompatible with continuing political activity. RM accepted that she had no personal connection with the MDC and had attended none of its meetings. Her aunt B had returned to Zimbabwe 2 to 3 weeks before the hearing to visit RM's grandmother.

7. M gave evidence that she had arrived in the UK in 1992 and had trained as a nurse. She had acquired British citizenship in 2002. She would visit Zimbabwe twice a year, staying for up to two weeks. She had last visited in 2004 for her brother's funeral; so had her three sisters. They stayed in Harare for two weeks. At the time of the hearing before IJ Montgomery her mother was staying in the UK on a 6 month visa. Some time after the hearing her mother had returned to Zimbabwe. M said that she had appeared on television as an MDC activist in 2000. Nevertheless, no member of the family had attracted any adverse interest during visits to or, in the grandmother's case, return to Zimbabwe.

8. Mr D Morgan, counsel representing the appellant, submitted to IJ Montgomery that the appellant fell within the risk categories set out in paragraph 43 of the country guidance case *SM & Others (MDC – internal flight – risk categories) Zimbabwe CG* [2005] UK IAT 00100. RM was a family member of a person with an MDC profile. Mr Morgan submitted that the nature of the aunt's involvement brought RM into a category that put her at risk. He submitted that RM would be investigated on her return to Zimbabwe. That being the case she would be at risk on account of her aunt's activities. At paragraph 26 of her determination IJ Montgomery found that it had not been established "even to the low standard required that she [M] has a profile which the Zimbabwean authorities would be aware of. The fact that she was able to return to Zimbabwe safely and without difficulty, using her own name in 2004 makes it highly improbable that the Zimbabwean authorities regard her as a high profile MDC activist. I accept, however, that she genuinely fears for the safety and wellbeing of the appellant if she is returned to Zimbabwe at the present time". The IJ, having found that RM was a credible witness, also accepted that RM was genuinely afraid of being returned to Zimbabwe. She then proceeded to examine the risk categories identified in *SM & Others*. Reading from paragraph 51(a) of *SM* she extracted the following passage:

> "There does continue to be a real risk of persecution for those who are or are perceived to be politically active in opposition to, and for this reason of serious adverse interest to, the present regime. This can potentially include the categories listed in paragraph 43 – but none of these factors by itself is determinative. Each case must be looked at on its own individual facts. Some categories are more likely to be at risk than others such as MDC activists and campaigners rather than supporters but we do not exclude the possibility that in exceptional cases those with very limited political involvement could in their particular circumstances find themselves at real risk."

IJ Montgomery, quoting from paragraph 43 of *SM* listed those at risk:

> "... activists, campaigners, officials and election polling agents, MDC candidates for local and national government, MDC members, former MDC members, MDC supporters, those who have voted or are believed to have voted for the MDC and those belonging to the MDC, families of the foregoing, employees of the foregoing, those whose actions have given rise to suspicion of support for the opposition such as attending an MDC rally or wearing a T-shirt, attending a demonstration, teachers and other professionals, refusal to attend a Zanu-PF rally or chant a Zanu-PF slogan or not having a Zanu-PF membership card."

9. Dealing with Mr Morgan's submission that RM fell within the listed category IJ Montgomery concluded at paragraph 32 that "the fact that her aunt was herself able to return openly and without incident to Zimbabwe, and that no harm has come to the family members remaining in Zimbabwe, including the appellant's grandmother, does not support the appellant's claim that she will be persecuted on return on account of her aunt's activities". IJ Montgomery found that RM's genuine fears were not objectively well-founded. For this reason her appeal on asylum, Article 3 and humanitarian protection grounds was dismissed. The appeal under Article 8 was also dismissed.

First stage reconsideration

10. RM sought a re-consideration of her appeal. The first stage reconsideration was heard by SIJ Mrs D K Gill who concluded that an error of law was revealed in IJ Montgomery's determination in that she had failed to consider the risk to RM on her return to Zimbabwe as an involuntary returnee. The Court of Appeal in *AA and LK* [2006] EWCA Civ 401 had concluded that a person who has the option of returning safely and voluntarily is not outside the country of his nationality owing to a fear of persecution and that accordingly such a person is not a refugee (RM has, on the contrary, been issued with a decision to remove). However, the Court of Appeal considered that this did not settle the question as to whether a person who is *involuntarily* returned to Zimbabwe is at real risk of treatment in breach of her rights under Article 3. IJ Montgomery had not engaged with this issue. SIJ Gill noted that IJ Montgomery had applied *SM & Ors* but did not deal with the risk on return as an involuntary returnee, a subject upon which *SM & Ors* had not been concentrating. It was thus incumbent upon the judge to apply the country guidance issued in *AA (Risk for Involuntary Returnees) Zimbabwe CG* [2006] UK AIT 00061 (known as *AA(2)*). Accordingly, SIJ Gill adjourned the appeal part-heard for reconsideration of the risk on return "with regard to the appellant's Article 3 and humanitarian protection claims".

Second stage reconsideration

11. The second stage reconsideration took place before IJ Sharp at Hatton Cross on 7 January 2008. By this stage the AIT had issued its determination in *HS (returning asylum seekers) Zimbabwe CG* [2007] UK IT 00094. The Tribunal (Mr CMG Occleton, Deputy President of AIT, SIJ Dr Storey and SIJ Southern) recalled the history of the *AA* litigation. The Court of Appeal in *AA (Zimbabwe) v SSHD* [2007] EWCA Civ 149 had remitted the Tribunal decision in *AA(2)* for further, limited,

reconsideration because the Court considered that the Tribunal had not dealt adequately with the evidence of two important witnesses identified as W5 and W6. The determination in *HS* represents the Tribunal's reconsideration of the evidence of W5 and W6 together with a consideration of more recent evidence of conditions in Zimbabwe. In the Court of Appeal at paragraph 30 May LJ said:

> "...Now a failed asylum seeker returning from the United Kingdom would be regarded with suspicion and hostility and would probably be revealed to be a failed asylum seeker. In these circumstances interrogation by intelligence services whom W6 regarded as no longer professional for a period of several hours must constitute a real risk of serious ill-treatment in the light of the evidence as a whole.
>
> 31. We are not persuaded that this general case alone predicates an error of law sufficient to sustain this ground of appeal. We have carefully considered the written and oral evidence of W5 and W6. Their direct experience was not contemporary but they both had contacts in Zimbabwe. Their evidence did sustain a finding of a two-stage process. Apart from particular points about their evidence, which we consider below, and subject to possible further consideration of the evidence and information about the individual returnees in the light of the particular points and generally, we consider that it was open to the tribunal to make the factual evaluative judgment in this respect which they did.
>
> 32. The particular part of this ground of appeal is, however, more persuasive. Those advising AA consider that the tribunal's written determination had failed to take account of parts of the evidence of W5 and W6 which supported *the case that involuntarily returned failed asylum seekers faced a real risk of serious ill-treatment even at a first stage screening interview*. There was no transcript of the evidence of these witnesses but the notes of evidence taken by members of the tribunal have been provided to us. ...
>
> 38. ….the question whether failed asylum seekers with no adverse political profile or relevant military or criminal attributes returning involuntarily to Zimbabwe face a real risk of inhuman or degrading treatment is obviously a finely balanced one. We have indicated that, in our view, a re-consideration of the evidence of W5 and W6 might tip the balance. ..." [emphasis added]

12. The Tribunal in *HS*, having re-assessed the evidence, came to the following conclusions relevant to the current appeal (paragraphs 259 – 282):

    i) The evidence considered reinforced the finding that there is a two-stage process at the airport in Harare and that anyone identified during the initial questioning that

takes place as being of interest will be taken for interrogation. At that second stage there is "a real risk of serious harm, but not before".

ii) The CIO had taken over responsibility for the operation of immigration control at Harare airport. The main focus of the operation is to identify those who may be of adverse interest, who are perceived to be politically active in support of the opposition.

iii) The fact that the CIO had taken over responsibility for monitoring all returning passengers at Harare airport was not something that affected the level of risk. All deportees were handed over to the CIO for questioning in any event. Deportees will have been identified in advance from the passenger manifest.

iv) The Secretary of State accepted that the Tribunal could not be asked to assess the risk faced by returnees on the basis that they were expected to lie to immigration officials on their return. The Tribunal therefore proceeded on the basis that the fact of the failed asylum claim would be disclosed to anyone who asked.

v) Somewhere in the region of 50,000 people travelled in and out of Zimbabwe each year. The vast majority of them were regarded as ordinary passengers and, as such, passed through the airport unhindered.

vi) The Tribunal did not accept that all those seen as having claimed asylum in the United Kingdom would be thought to be supporters of the MDC. The evidence demonstrated no reason to reach a different view from that reached by the tribunal in *AA(2)* that "there may well be some form of post-airport monitoring of those returned involuntarily from the United Kingdom but that will not be persecutory and will cease if nothing of interest comes to light".

vii) The Tribunal adopted and re-affirmed the guidance given in *AA(2)* which the Tribunal had set out in its determination at paragraph 34. The tribunal identified a further risk category which is not material to the present appeal.

13. Those paragraphs of the determination in *AA(2)* (2 August 2006) which were specifically adopted by the Tribunal in *HS* were paragraphs 244 – 256. At paragraph 244 the tribunal in *AA(2)* accepted the categories identified in *SM & Others*. Any person who was indistinguishable from the ordinary traveller would have no difficulty passing through the airport "unless there is reason to believe that he will be identified on return as falling within one of the risk categories we have identified" (paragraph 245). At paragraph 247 the tribunal noted that all those returned involuntarily to Zimbabwe would be identified as deportees. All persons identified as deportees would be diverted for questioning by CIO officers. The purpose of the initial interview was to establish whether the deportee was of any interest to the CIO or the security services. The deportee would be of interest if questioning revealed that the deportee had a political profile considered adverse to the Zimbabwean regime. If a political profile was suspected the deportee would be taken away for second stage interrogation which carried with it the real risk of serious mistreatment sufficient to constitute a breach of Article 3 (paragraphs 247-251). At paragraph 251, as to the risk of persecution, the Tribunal continued:

> "If the reason for suspicion is that the deportee has a political profile considered to be adverse to the Zimbabwean regime that is likely to be sufficient to give rise to a real risk of persecutory ill-treatment for a reason that is recognised by the Refugee Convention. ... each case must be considered on its particular facts."

At paragraph 253 the Tribunal said:

> "The objective evidence does suggest that the police and the CIO are capable of acting in a seriously abusive manner towards those they perceive to be dissident or in some way an enemy of the state but the evidence does not support the assertion that there is a real risk of persecutory ill-treatment for those who are being monitored solely because of their return from the United Kingdom."

14. As to the appeal of HS herself, the Tribunal noted that she would if returned be a failed asylum seeker about whom the CIO would have no relevant information. The Tribunal found (at paragraph 284) that she would be identified as a deportee. An examination of her passport would reveal that she had entered the UK lawfully but that her leave had expired. It would also reveal that she had made an unsuccessful application for leave to remain in a different capacity. The Tribunal assumed that if interviewed HS would tell the truth. The fact that she had made an unsuccessful claim for asylum would be revealed. At paragraph 285 the Tribunal continued:

> "285. If she discloses the fact that having made an unsuccessful asylum claim while in the United Kingdom, in the absence of some other reason for the CIO to entertain interest in her, that fact alone will not give rise to any real risk that she would be taken for further more intensive questioning or interrogation. That may explain the accounts of the returnees who say they were not asked whether they have claimed asylum in the United Kingdom. A positive response would not in itself lead to any reason but further action in the absence of other intelligence, in which case the returnee would already have been identified as a candidate for interrogation.
>
> 286. The appellant would therefore be allowed to pass through the airport after, at most, a relatively short screening interview."

The factual basis for HS's asylum claim had been dismissed as not credible. It followed that nothing would emerge at the initial interview which would lead to a second stage interrogation. Accordingly the Tribunal dismissed *HS*'s appeal on asylum and other grounds. I have included the Tribunal's findings in relation to HS's personal position because her profile on arrival at Harare would be the same as that of RM save to the important extent that during the screening interview RM *would* have relevant information to impart to the CIO, if challenged.

15. The reconsideration hearing before IJ Sharp in RM's case proceeded upon the factual findings made by IJ Montgomery. The only additional evidence came from M whose evidence was received solely in relation to an Article 8 issue upon which IJ Sharp reached no conclusion. At paragraph 33 of his determination IJ Sharp noted the approval in *HS* of the categories of those at risk identified in *SM & Others.* He observed at paragraph 35 of his determination that although aunt M had attracted no scrutiny when she travelled to Zimbabwe in 2004 she was at the time a British citizen and would not have been subjected to the same scrutiny as would a returning Zimbabwean failed asylum seeker. In fact, as a visitor she would not, upon the *HS* analysis, have attracted any attention. IJ Montgomery's conclusion that M's early involvement with MDC had not come to the attention of the Zimbabwean authorities was plainly right. M would, therefore, have been one of the 50,000 visitors passing annually through the airport to whom no attention is paid. Applying, or purporting to apply, *HS's* re-affirmation of the country guidance in *AA(2)* IJ Sharp noted at paragraph 38 the Tribunal's comment in *HS* at paragraph 278 that rationality was not "a characteristic displayed by the Zimbabwean government and its agents". He continued:

> "…I must therefore consider the position of the appellant passing through the airport undergoing what might be an irrationally conducted first interview in which she must be assumed to tell the truth to any questions asked of her. This is in the context of someone who the immigration judge found to be genuinely concerned about her possible treatment upon return to Zimbabwe."

16. IJ Sharp reached the conclusion that RM (as the Tribunal had concluded of HS) would be identified as someone returning from the UK other than as a returning visitor. It was highly likely that an involuntary returnee would be selected for a screening interview. He continued at paragraph 40:

> "40. Were she to be a sophisticated liar she might be able to talk her way through the first interview and be allowed to carry on her way. The fact that she had applied for asylum but had been refused would not in itself, according to *HS*, cause her to be at any significant risk. However the moment it was revealed that she had an aunt who was involved in the founding process of the MDC in London the position in my view would be most likely to change. The fact that the aunt was not a high profile member of the committee would not necessarily assist the appellant. In this regard it does however appear that it was accepted that she did become the vice-chair once the inaugural committee had completed its functions. However whatever the position might be as to the exact role that the aunt did take and for whatever period, limited or otherwise, it is my view highly likely that such sophistications would be of limited interest as mitigation to the investigating officers of the CIO at Harare airport.
>
> 41. If it emerged that she was a close relative of a founder member of the MDC in London then whatever explanation

> might be put forward as to her, the appellant's, lack of involvement, or indeed the reality of the aunt's involvement, it is unlikely that such would be fully accepted that she would be allowed to continue on her way. She must be assumed to be going to tell the truth. She would in any event be in a nervous state due to her concerns which were found to be genuine by the immigration judge. In such circumstances there is a significant risk in my view that at an initial interview she would reveal that she was a family member of an MDC supporter in the UK and that that would be sufficient for her to move to the second stage of the interview during which it is accepted that there would be a real risk of ill-treatment.
>
> 42. I must consider the reality of the situation. I must consider the irrationality that is likely to exist in the office of the CIO at Harare airport. I must consider the general volatility of the political situation in Zimbabwe. This in itself would not entitle the appellant to international protection of any nature. *HS* and the other authorities make this clear. The position in Zimbabwe has not descended to such a situation that humanitarian or other international protection should be given to any citizen or even any young female by reason of that status alone.
>
> 44. My conclusions are limited to the all important issue of whether she is at a real risk of moving from the first stage enquiry to the second stage enquiry at Harare airport.
>
> 45. It is therefore my conclusion that applying the facts as found in the earlier determination and considering them in the context of the objective evidence and the legal principles as set out and summarised in the case of *HS* the appellant, whether as a voluntary or involuntary returnee, would be at real risk of receiving treatment that would entitle her to the protection of Article 3 of the ECHR. I put the ECHR first in light of the directions of the SIJ. However, I have already said that such a finding would also cause her to be entitled to refugee status. In such circumstances it is not necessary for me to consider the question of humanitarian protection. Equally it is not necessary for me to consider the appellant's position under Article 8 of the ECHR."

Secretary of State's grounds

17. In granting leave to the Secretary of State to appeal the decision of IJ Sharpe, SIJ Dr HH Storey wrote:

> "Manifestly the immigration judge failed to apply the entirety of tribunal country guidance on Zimbabwe. *HS* made clear that the slight modification of risk categories were limited to those identified in *SM*. The IJ effectively treated the risk categories

> specified by *HS* read together with *SM* as including relatives of persons who were MDC members. Particularly given that at paragraph 23 the IJ (correctly) noted that the facts of *HS* would have limited materiality, he plainly erred in proceeding to treat *HS* as authority for his assessment that the appellant would be viewed adversely during the interview procedures at Harare airport. His failure to apply tribunal country guidance amounted to a material error of law."

Mr Kovats has advanced two arguments on behalf of the Secretary of State:

(1) IJ Montgomery made no error of law which justified reconsideration of her determination; and

(2) IJ Sharp made an irrational finding that aunt M's political activity would put RM at risk on return to Zimbabwe.

18. Much water has passed under the bridge since IJ Montgomery and IJ Sharp heard this appeal. There have since been two leading country guidance decisions on Zimbabwe, *RN (Returnees) Zimbabwe CG* [2008] UK AIT 00083 and, within the last few days, *EM and Others (Returnees) Zimbabwe CG* [2011] UK UT 98 (IAC). We are, however, concerned only with the question whether IJ Montgomery and IJ Sharp correctly applied the law and country guidance as it stood in March 2007 and January 2008.

Discussion

19. Mr Kovats first submitted that IJ Montgomery had made no material error of law. He concedes, however, that the present appeal was not launched on this ground. There has been no application to amend the grounds. No such submission was advanced in his skeleton arguments of 7 May 2008 or 26 November 2009. It first appeared in his skeleton argument dated 14 March 2011.

20. In my judgment, the decision of SIJ Gill granting second stage re-consideration is unassailable. It had been expressly submitted on the appellant's behalf to IJ Montgomery that RM would be investigated upon arrival in Zimbabwe (see paragraph 8 above). IJ Montgomery did not address this submission. She concluded only that because M and her sisters had travelled without hindrance it was unlikely that M's political activity *had come* to the attention of the Zimbabwean authorities. I note, however, that in *SM & Others* (which the IJ expressly applied), at paragraph 42, it was said:

> "42. ... 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 of persecution."

In my view, Mr Morgan's argument that RM would be investigated upon return was fully justified by the country guidance and should have received specific consideration. IJ Montgomery found only that the Zimbabwean authorities would have no reason to identify her as someone of interest to the regime. Support for that proposition was abundant since other members of the family had passed through Harare airport without incident. However, the Tribunal in *AA(2)* and the Court of Appeal in *AA (Zimbabwe) v SHD* [2007] EWCA Civ 149 (decided 6 March 2007) had accepted that there was a two-stage screening process at Harare airport. Deportees *would* be selected for a screening interview. The outstanding issue which IJ Montgomery had not confronted was whether ill-treatment was a risk during the first or second stage interviews. No consideration was given by IJ Montgomery to the question whether RM was likely to be interviewed and, if so, with what consequences.

21. Mr Kovats' second submission is that IJ Sharp erred in law by irrationally finding that M's political activity would put RM at risk on return. In her grounds of appeal the Secretary of State sought to support the view of SIJ Storey that IJ Sharp (i) had wrongly regarded the risk categories in *SM and Others* "as including relatives of persons who were MDC members" and (ii) made "a plain error" in "treating *HS* as authority for his assessment that the appellant would be viewed adversely during the interview procedures at Harare airport". That position was maintained in Mr Kovat's skeleton argument of 7 May 2008.

22. In his latest skeleton argument of 14 March 2011, repeated in oral argument, Mr Kovats now argues that it was irrational of IJ Sharp to find that M's political activity would be revealed during interview and that, if it was, this would put RM at risk of ill-treatment or persecution. Mr Kovats relied on the need for exceptional circumstances (*SM and Others* para 43 – see paragraph 8 above) before a mere 'supporter' or similar category might be held at risk. As to the finding that RM would be at risk, Mr Kovats argued that it was inconsistent with the agreed evidence that none of the aunts, nor the grandmother, had suffered any interruption during her journeys to and from Zimbabwe.

23. It seems to me that the IJ's analysis, far from being irrational or perverse, was careful and considered. First, RM undoubtedly *was* in a risk category, being the family member of a former member of MDC (*SM and others,* para 43; *AA(2)* para 244; *HS* para 282). Second, he did not, simply by placing RM in an *SM and Others* risk category, assume a real risk of persecution or ill-treatment. He noted the necessity that each case should be considered according to its own particular circumstances. This was, in my view, recognition that a theoretical risk is not the same thing as an actual risk. Third, IJ Sharp, in evaluating whether RM would be at actual risk on return, considered the likely outcome of RM's arrival at Harare airport under a notice of removal. Fourth, applying *HS*, he correctly identified RM as a returnee who would be subjected to the first stage screening process, unlikely to be treated as a mere traveller. Once RM was subjected to the screening process IJ Sharp concluded that there was a real risk that her family association with a founding member of MDC (UK), living at the same address for several years, would be revealed. If and once the CIO became

aware of the connection it was, IJ Sharp concluded, likely that RM's protestation that she was herself unconnected with MDC would be treated with further suspicion. It is likely that she would be detained for a second stage interrogation. In my judgment, none of these findings is in any sense irrational or perverse.

24. However, IJ Sharp reached his conclusion (see paragraphs 38 and 42 of his Determination at paragraphs 15 and 16 above) that RM would be selected for a second stage interview because the CIO was not a rational organisation. Mr Kovats submitted that there was no evidential or other basis for such an assessment. The source of this observation was the comment made by the Tribunal in *HS* at paragraph 278 to the effect that the regime was not always rational in its public pronouncements about the motives of those returning to Zimbabwe from the United Kingdom. However, the Tribunal had continued:

> "…But even witness 66, who is said to be in a position to know, said in evidence that the purpose of the rhetoric was to demonstrate that people were foolish enough to go abroad to claim asylum. Those who do will be sent back. Thus, there is no benefit in leaving the country. He said, referring to the claim by Mr Mayo that thousands of asylum seekers were being trained in Britain, that this was, in his view, no more than a response to what was going on at that time. He added, "I do not think they believed it. Nor the CIO operators on the ground".

I accept that, in assuming RM's interview was likely to be conducted with *irrational* suspicion, the IJ went further than the evidence entitled him. Nevertheless, country guidance was to the effect that failed asylum seekers would be treated with suspicion and hostility (*AA (Zimbabwe) v SSHD* [2007] EWCA Civ 149, para 30; *SM and others* para 42). What the IJ was examining was the likelihood that RM's family association would be revealed and, if so, what consequences would follow.

25. Mr Erum Waheed, for the respondent, argued that the validity of the IJ's conclusion did not depend upon his view that the CIO was an irrational organisation. Faced with a returnee in RM's position it would be a perfectly rational suspicion that there was more to the returnee's association with the MDC than she was prepared to admit. That being the case she was immediately at real risk of passing from the first to the second stage interrogation. I have sympathy with this argument. However, the judge, at paragraphs 38 and 40-42 of his Determination, was explicit that the irrationality of CIO officers conducting the screening interview formed the basis for his conclusion that M would be selected for a second stage interview at which ill-treatment was a real risk. This was a misunderstanding of the effect of *HS* which caused IJ Sharp to take account of an irrelevant consideration. *HS* found that outlandish statements as to the motives of returning asylum seekers were just that: they were not statements of beliefs held by CIO. It is possible that had he applied the correct test the judge would have come to the same conclusion but I cannot say that such a conclusion was inevitable. For this reason I conclude with regret that the judge's decision is vitiated by an error of law.

26. Mr Kovats pointed out that although SIJ Gill had ordered reconsideration only of the Art 3 issue, IJ Sharp had proceeded to allow the appeal against the Secretary of State's refusal of RM's asylum claim. However, Mr Kovats informed the Court that if we were against him on the issue of the irrationality of IJ Sharp's Art 3 decision he

would not be arguing that IJ Sharp was not entitled to reconsider the refugee convention issue. The factual justification for IJ Sharp's decision was the real risk that political beliefs would be imputed to RM arising from her close association with her aunt M. Since the Tribunal in *HS* reaffirmed the country guidance given in *AA(2)* in which it was found that progression to a second stage interview on the basis of suspected political opposition to the ruling regime may well generate not just ill-treatment in breach of Article 3 but also persecution, it seems to me that assuming the IJ correctly decided the principal issue he was entitled to reach the decision that he did. In RM's case the real risk, he found, was of imputed political belief, imputed because the CIO would be unlikely to accept RM's denial of support for the MDC in view of her family connection. There is, it seems to me, a logical connection on the facts of the present case between the Art 3 and refugee convention grounds and, in view of Mr Kovats' concession, I would not have disturbed IJ Sharp's decision on this ground had I been persuaded that otherwise there had been no error of law. As it is, the judge's error of law permeated both findings which, therefore, cannot be upheld.

27. For the reasons given at paragraphs 24-26 I would allow the Secretary of State's appeal and remit the matter to the Tribunal for yet further consideration.

Lord Justice Leveson:

28. I gratefully adopt the detailed analysis of the facts and procedural history of this case which has been outlined by Pitchford LJ. I agree with the conclusions that he has reached both in respect of the recently formulated challenge to the decision of Senior Immigration Judge Gill which ordered reconsideration of the decision of Immigration Judge Montgomery and in respect of the decision of Immigration Judge Sharp at the second stage reconsideration. Because the result of this appeal is that this case falls to be considered yet again, it is worth setting out my reasons for reaching this conclusion.

29. At that hearing, Immigration Judge Sharp identified that the risk faced by RM was a consequence of being the niece of M who, for about a year (now some eleven years ago, but eight years prior to his decision), had been involved in the MDC movement in the UK. As I understand the facts, this involvement had ceased prior to RM leaving (or shortly after she left) Zimbabwe to come to the UK. Furthermore, not only had M and other members of her family visited Zimbabwe (particularly in 2004 but on other occasions as well), without attracting any interest on the part of the authorities, let alone ill-treatment, but also M's mother was living in Zimbabwe without problem.

30. Before considering the immigration judge's conclusion, it is necessary to analyse the position of the authorities up to that date (the country guidance having twice changed since the date of the decision). Thus, the first step in the process is to consider who might be the subject of persecution. In *AA (risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT 00061 ("*AA(2)*") at para 244, although the Tribunal accepted that an unsuccessful asylum claimant did not "on that account alone" face on return a real risk of being subjected to persecution or serious ill treatment, the country guidance in *SM (MDC – internal flight – risk categories) Zimbabwe CG* [2005] UKIAT 00100 ("*SM*") was affirmed with the result that those at risk "continue to fall into the risk categories identified and set out in *SM*".

31. The second step is to go back to paragraph 43 of *SM* and see to whom that guidance is referring. The list comes from a submission by counsel as including:

> "those suspected or perceived of being associated with the opposition have included activists, campaigners, officials and election polling agents, MDC candidates for local and national government, MDC members, former MDC members, MDC supporters, those who voted or believed to have voted for the MDC and those belonging to the MDC, families of the foregoing, employees of the foregoing, those whose actions have given rise to suspicion of support for the opposition such as attending an MDC rally or wearing a T-shirt, attending a demonstration, teachers and other professionals, refusal to attend a ZANU-PF rally or chant a ZANU-PF slogan or not having a ZANU-PF membership card."

32. The decision goes on, however, to make it clear that although the Tribunal accepted that the categories illustrated those who might be at risk, each case depended on its own circumstances and that "each case must be decided on its own facts" so that the factors mentioned by counsel were relevant to the assessment of risk but "cannot be regarded as by themselves determinative in any appeal". The position was summarised, at para 51(a), in these terms:

> *"*There does continue to be a real risk of persecution for those who are perceived to be politically active in opposition to and for this reason of serious adverse interest to the present regime. This can potentially include the categories identified in paragraph 43 but none of these factors by itself is determinative. Each case must be looked at on its own individual facts. Some categories are more likely to be at risk than others such as MDC activists and campaigners rather than supporters but we do not exclude the possibility that in exceptional cases those with very limited political involvement could in their particular circumstances find themselves at real risk."

33. Reverting to *AA (No 2)*, at para. 249, it was made clear that all persons identified as deportees would be diverted for questioning by CIO officers to establish "whether the deportee is of any interest to the CIO or the security services" which would only arise "if the questioning reveals that the deportee has a political [or relevant military] profile considered adverse to the Zimbabwean regime". The decision goes on (para. 250):

> " If such a political or relevant military profile is suspected, … the deportee will be taken away by the relevant branch of the CIO for interrogation. The evidence does not suggest that the CIO has any interest in manufacturing or fabricating evidence to create suspicion that is otherwise absent.*"*

34. It is then made clear that a second stage interrogation carries with it a real risk of serious mistreatment sufficient to constitute a breach of Article 3 of the ECHR although

the evidence did not suggest that there was a real risk of persecutory ill-treatment for those who are being monitored solely because of their return from the UK.

35. The issue was further considered in *HS (returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094 which adopted and reaffirmed both *SM* and *AA (No 2)*. The Tribunal goes on to analyse detailed evidence concerning the role of the CIO. It records (at para 264) that the CIO had taken over responsibility for the operation of immigration control at Harare Airport, and that the main focus of the operation "to identify those who may be of adverse interest remains those who are perceived to be politically active in support of the opposition". The decision goes on:

> "265. The fact that the CIO has taken over responsibility for monitoring all returning passengers at Harare airport is not something that affects the level of risk. …
>
> 266. Large numbers of passengers pass through the airport. The CIO continues to recognise that it cannot question everyone; and so there is a screening process to identify those who might merit closer examination. We see no reason to suppose that the heightened role of the CIO would change this. We have set out the evidence that indicates in whom the CIO has an interest. This will be those in respect of whom there is any reason to suspect an adverse political, criminal or military profile of the type identified in *AA(2)*. In addition, those perceived to be associated with what have come to be identified as civil society organisations may attract adverse interest as critics of the regime."

36. The suggestion that all those seen as having claimed asylum in the UK would be thought to be supporters of the MDC was rejected (para 279) as was the possibility that there would be a real risk such persons would be at real risk of second stage interrogation from that fact alone (para 285). The Tribunal went on:

> "That may explain the accounts of the returnees who say they were not asked whether they had claimed asylum in the United Kingdom. A positive response would not in itself lead to any reason for further action in the absence of other intelligence in which case the returnee would already have been identified as a candidate for interrogation."

37. That brings me to the approach of the Immigration Judge in this case. Picking up on the observation at para 278 of *HS*, that rationality was not a characteristic displayed by the Zimbabwean government and its agents, he proceeded on the basis that the appellant might undergo "what might be an irrationally conducted first interview in which she must be assumed to tell the truth". In that event, he concluded that there was a significant risk that HS would be identified as someone who would be subjected to an initial interview and "as an involuntary returnee it is highly likely that she would be selected for a screening interview". He went on:

> "40. ... [T]he moment that it was revealed that [RM] had an aunt who was involved in the founding process of the MDC in

> London the position in my view would be most likely to change. The fact that the aunt was not a high profile member of the committee would not necessarily assist the appellant. ... However whatever the position might be as to the exact role that the aunt did take and for whatever period limited or otherwise it is in my view highly likely that such sophistications would be of limited interest as mitigation to the investigating officers of the CIO at Harare Airport.
>
> 41. ... [T]here is a significant risk in my view that at an initial interview she would reveal that she was a family member of an MDC supporter in the UK and that that would be sufficient for her to move to the second stage of the interview during which it is accepted that there would be a real risk of ill-treatment.
>
> 42. I must consider the reality of the situation. I must consider the irrationality that is likely to exist in the office of the CIO at Harare Airport."

38. Mr Kovats argues that this analysis does not accurately reflect the authorities to which I have referred and reaches conclusions that are irrational. He prays in aid the fact the basis upon which Senior Immigration Judge Storey granted leave to appeal to this court; it is set out by Pitchford LJ but, bearing in mind that he was a member of the tribunal that decided *HS* is worth incorporating into this judgment. He observed:

> "Manifestly the immigration judge failed to apply the entirety of Tribunal country guidance on Zimbabwe. HS made clear that with slight modification the risk categories were limited to those identified in SM. The immigration judge effectively treated the risk categories specified by HS read together with SM as including relatives of persons who were MDC members. Particularly given that ... the immigration judge (correctly) noted that the facts of HS were of limited materiality, he plainly erred in proceeding to treat HS as authority for his assessment that [RM] would be viewed adversely during the interview procedures at Harare Airport."

39. Mr Erum Waheed, for RM, disagreed with that analysis. He argued that in the light of the categories identified in *SM*, it was "not competent" for the Secretary of State to argue that there was no evidence that the historic involvement of M put RM at risk. He submits that the AIT considered the fact that none of RM's family, including M and M's mother had experienced problems with the Zimbabwean authorities, explaining that M was a British citizen who would not be subject to the same scrutiny as a returning Zimbabwean citizen; in any event, the situation since 2004 had sharply deteriorated. Thus the conclusion reached by the AIT was open to it and could not properly be subject to legal challenge.

40. In my judgment, this argument fails properly to understand the approach of the country guidance in *SM* or the way in which it was considered in *HS*. Thus, the list provided in para. 43 of *SM* was obviously intended to be exhaustive of all those who might in any way potentially generate concern. These stretch from the obvious (activists) to the very

much more remote (families – presumably however distant – of those who had previously been a supporter of the MDC, teachers, other professionals or those who simply did not possess a ZANU-PF membership card). Para. 51(a) makes it clear that being on the list is not of itself determinative but that each case requires examination on its own facts. Exceptionally, those with limited political involvement could not be excluded: that is very different from saying that the potential irrationality of CIO means that everyone who is comprehended within the list, by that fact, is at risk.

41. Further, it is clear from *HS* that this country guidance was specifically not accepting that all those who were on the list would necessarily be at risk. Rather, it concluded that the interest of the CIO would focus on those "in respect of whom there is any reason to suspect an adverse political, criminal or military profile of the type identified in *AA(2)*". It was common ground that there was little evidence of M's involvement in MDC in this country but, at the time of the second stage reconsideration even that involvement was over 8 years old; her present profile could hardly be considered anything other than modest. For my part, absent irrational considerations, I do not understand why the CIO would focus on RM who had no political involvement or profile of any sort simply because of her aunt but what is relevant is that Immigration Judge Sharp did not focus on this question. He assumed that the link was sufficient simply because RM was within the list of those identified in para. 43 of *SM* and did not, in my judgment, sufficiently go on to consider whether the case was exceptional so as to bring RM within the at risk category.

42. As to the irrationality of the CIO, I agree with Pitchford LJ (at paragraph 24) that Immigration Judge Sharp went further than the evidence permitted. There was no basis for criticising the CIO as an irrational organisation (as opposed to making public pronouncements which, perhaps for understandable reasons, were not always rational), let alone that any interview would be conducted with irrational suspicion. I do not accept that Mr Kovats failed to demonstrate how the assumption of irrationality undermined the decision. Indeed, the Immigration Judge specifically approached the issue as to what might happen at the Airport with the words (at para 38):

> "I must … consider the position of the appellant passing through the airport undergoing what might be an irrationally conducted first interview."

43. Once the Immigration Judge dealt with the issue on that basis (which he emphasised at para. 42 cited above), whatever approach is taken is likely to give rise to risk because irrational behaviour will lead to irrational conclusions which, by definition, need not be grounded in justifiable reason. In my view, the irrationality of the CIO was of real importance in the Judge's analysis and, as Pitchford LJ has said, it was unjustified on the evidence.

44. Further, I do not accept that the fact that M had been permitted to move in and out of Zimbabwe without giving rise to problem of any sort can be dismissed simply because she was entering the country on British passports: if the authorities were concerned about the activities of RM, one would have thought that they might be concerned about what she (or her relations) would be doing in Zimbabwe during the course of any visit. This feature is not, of course, decisive but, for my part, I see no adequate identification of the exceptional circumstances that *SM* required to bring RM within the category likely to face a second stage interview.

45. In short, the issue which Immigration Judge Sharp had to address was approached on a basis that is not that to be found in the authorities to which I have referred and his conclusions are undermined by his (incorrect) views on the irrationality of the CIO. In the circumstances, I would allow the appeal and remit the matter for a further reconsideration to be conducted in the light of the more up to date country guidance on Zimbabwe. Having said that, however, it is a matter both of regret and real concern that, in this particular case, our system of adjudicating this area of the law has already resulted in three full hearings and two further determinations involving two Immigration Judges, two Senior Immigration Judges and this court and it is still not decided.

Lord Justice Ward:

46. I agree that I.J. Montgomery erred for the reasons given by S.I.J. Gill as Pitchford L.J. explained at [20] above. There is nothing I can usefully add. I also agree with my Lords that I.J. Sharp erred in his approach.

47. He began by noting that the case should be dealt with on the basis of the factual findings of I.J. Montgomery. He had to reconsider the matter having regard to the risk on return to be faced by the appellant as an involuntary returnee and thus he needed to have regard to the guidance provided by *AA*, *HS*, as well as *SM* to which my Lords have already referred. Thus he held:

> "36. However the immigration judge [Montgomery] did accept that the aunt was involved with the MDC UK in its early years and his comments that he did not accept that it had been established that she had a profile [of] which the Zimbabwe authorities should be aware is a conclusion which I am entitled to re-visit in the light of the current objective evidence and the review of the CIO's role set out in **HS**."

48. The role of the CIO was considered at [264] of *HS* which was summarised by IJ Sharp as being to identify those who may be of adverse interest and focus upon those who are perceived to be politically active in support of the opposition. But anyone perceived to be a threat to or a critic of the regime will also attract interest.

49. An important passage of his judgment is this:

> "38. At paragraph 278 [of] **HS** it is commented that rationality is not a characteristic displayed by the Zimbabwean government and its agents. I must therefore consider the position of the appellant passing through the airport undergoing what might be an irrationally conducted first interview in which she must be assumed to tell the truth of any questions asked of her. This is in the context of someone who the immigration judge has found to be genuinely concerned about her possible treatment upon return to Zimbabwe."

He is clearly postulating the possibility of the first interview being conducted irrationally and he assumes that because of what was said in paragraph 278 of *HS*. That paragraph reads as follows:

> "278. It is said, of course, that rationality is not a characteristic displayed by the Zimbabwean government and its agents. But even witness 66, who is said to be in a position to know, said in evidence that the main purpose of the rhetoric was to demonstrate that people were foolish to go abroad to claim asylum. Those who do so will be sent back. Thus, there is no benefit in fleeing from the country. He said, referring to the claim by Mr Mayo that thousands of asylum seekers were being trained in Britain, that this was, in his view, no more than a response to what was going on at the time. He added: "I do not think they believed it, nor the CIO operators on the ground.""

50. The analysis begins at [39], IJ Sharp stating that he was "taking the matter in stages". He found that there was a significant risk that the appellant would be identified as someone who would be subjected to an initial interview: as an involuntary returnee it is highly likely that she would be selected for a screening interview. Mr Kovats accepts that finding. He also accepts that the fact that she had applied for asylum but had been refused would not in itself according to *HS* cause her to be at any significant risk. IJ Sharp went on,

> "40. … However the moment it was revealed that she had an aunt who was involved in the funding process of the MDC in London the position in my view would be most likely to change. The fact that the aunt was not a high profile member of the committee would not necessarily assist the appellant. In this regard it does however appear that it was accepted that she did become the vice chair once the inaugural committee had completed its functions. However whatever the position might be as to the exact role that the aunt did take and for whatever limited period or otherwise it is my view highly likely that such sophistications would be of limited interest as mitigation to the investigating officers of the CIO at Harare airport."

51. The next step in the reasoning process was:

> "41. If it emerged that she was a close relative of a founder member of the MDC in London then whatever explanation might be put forward as to her, the appellant's lack of involvement or indeed the reality of the aunt's involvement, it is unlikely that she would be fully accepted and that she would be allowed to continue on her way. She must be assumed to be going to tell the truth. She would in any event be in a nervous state due to her concerns which were found to be genuine by the immigration judge. In such circumstances there is a significant risk in my view that at an initial interview she would reveal that she was a family member of an MDC supporter in the UK and that that would be sufficient for her to move to the second stage of the interview during which it is accepted that there would be a real risk of ill-treatment.

52. Finally,

> 42. I must consider the reality of the situation. I must consider the irrationality that is likely to exist in the office of the CIO at Harare airport. I must consider the general volatility of the political situation in Zimbabwe. This in itself would not entitle the appellant to international protection of any nature. …

53. Then to his conclusion:

> 44. It is therefore my conclusion that applying the facts as found in the early determination and considering them in the context of the objective evidence and the legal principles as set out and summarised in the case of **HS**, the appellant, whether as a voluntary or involuntary returnee would be at real risk of receiving treatment that would entitle her to the protection of article 3 of the ECHR. I put the ECHR first in light of the directions by the SIJ. However I have already said that such a finding would also cause her to be entitled to refugee status."

54. Having said he would take the matter in stages, those stages seem to me to be:

(1) as an involuntary returnee it was likely she would be selected for a screening interview (see [39]);

(2) there was a "significant risk" that she would reveal she was a family member of an MDC supporter in the UK (see [41]);

(3) to the CIO the exact role of her aunt would be of limited interest as mitigation (see [40]);

(4) therefore she would be taken for the ill-fated second stage interview.

55. Step (3) needs further analysis. Taken by itself and without reference to what went before and what follows it, it would be conclusion which in my judgment he was entitled to reach. It was open to him to conclude simpliciter that the bare truth would put her at risk. But the reasoning which compelled that conclusion cannot be ignored. He has approached the interviewing at Harare airport as one which would be "irrationally conducted" (see [38]). He concludes that the most adverse view of the aunt and therefore the appellant would be taken because the "sophistications" of the aunt's exact role would be of limited interest to the CIO officer (see [40]). The last step in his reasoning was to consider "the reality of the situation" and "the irrationality that is likely to exist in the office of the CIO at Harare airport" (see [42]). It is clear to me, therefore, that the adverse view of the appellant would be taken only because the CIO officer would be behaving irrationally. A rational officer would conclude the appellant was not of the political profile that would merit her being sent for the second interview. So the crucial question appears to me to be whether or not there was evidence which justified treating the CIO officer as irrational.

56. I conclude that there is no such evidence. As the source of his finding the immigration judge seems to have relied upon paragraph [278] of *HS* quoted above. Read in its context that paragraph was one of several dealing with the evidence given in *HS* of the political rhetoric which portrayed Britain as using asylum seekers as a cloak to conceal

spies and saboteurs being sent back to destabilise the situation in Zimbabwe. It is pointed out that as a matter of logic that claim is nonsensical but per [278], rationality is not a characteristic displayed by the Zimbabwean government. The country guidance seems to accept that the CIO operators do not themselves believe the rhetoric. Thus the country guidance conclusion at [279] was that it was not accepted that all those seen as having claimed asylum in the United Kingdom would be thought to be supporters of the MDC on that account alone. The evidence given there, as in *AA(2),* was that there might have been some form of post-airport monitoring of those returned involuntarily but that it would not be persecutory and would cease if nothing of interest came to light. None of that suggests that the interview as such would be conducted irrationally. In my judgment Immigration Judge Sharp was not entitled on the evidence to assume that it would be so conducted.

57. Regrettably that undermines his decision. I say regrettably because it means that the Secretary of State's appeal must be allowed and the matter remitted, yet again, for further reconsideration, now in the light of even more country guidance of the up to date state of affairs in Zimbabwe. This means another hearing, and more expenditure of public money on legal costs on both sides, probably with more appeals to follow and all of this in respect of a young woman who arrived in this country nearly ten years ago as a visitor, stayed as a student and some time in about 2002 was refused indefinite leave to remain as a dependant of her aunt because she was by then 18 years old. Now another nine years have passed. As far as I can tell she has no real family left in Zimbabwe; her aunts are all here and they wish for their mother, the appellant's grandmother, to join them in the United Kingdom. As a result of our decision, the appellant's future in this country is once more up in the air and still the merry-go-round goes round, and round, and round again. I shake my head in despair if not in disbelief at this extraordinary process which occupies so much court time.