

**THE HIGH COURT
JUDICIAL REVIEW**

[2014 No. 764 J.R.]

BETWEEN

T.M. (ZIMBABWE)

APPLICANT

AND

**REFUGEE APPEALS TRIBUNAL,
MINISTER FOR JUSTICE AND EQUALITY,
ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 17th day of December, 2015

1. This is a judgment in a judicial review hearing where the applicant seeks an order of certiorari of the decision of the Refugee Appeals Tribunal (hereinafter referred to as "the Tribunal"), notified to the applicant not earlier than 10th November, 2014, leave having been given by Mac Eochaidh J. on 12th January, 2015.

Relief Sought

- (i) An order of *certiorari* by way of an application for judicial review quashing the decision of the first named respondent affirming the recommendation of the Refugee Applications Commissioner.
- (ii) An order remitting the appeal of the applicant for fresh determination by a separate member of the Tribunal.
- (iii) An order of certiorari by way of application for judicial review quashing the decision of the respondent Minister refusing the applicant the declaration of refugee status.
- (iv) An order providing for an extension of time.

2. The grounds upon which the relief are sought are as follows:-

- (i) The Tribunal erred in law and, in fact, in finding that there is no objective basis for the applicant's fear of persecution by reason of his activities with the Movement for Democratic Change (MDC). Country reports provide clear objective support for the applicant's claim.
- (ii) The Tribunal erred in law in failing to assess the applicant's claim in the light of the country reports supportive of the said claim and in having selective regard to the country reports placed before it.
- (iii) The decision of the Tribunal is irrational in light of the country reports relied upon.
- (iv) In making a finding that the country conditions had improved in Zimbabwe, the Tribunal erred in law in failing to consider how such perceived changes affected the applicant in the light of his particular circumstances and history.
- (v) Insofar as it can be inferred that the Tribunal is making a finding with respect to the availability of internal flight operation, the Tribunal erred in law in failing to make any assessment in the course of its Regulation 7 of the EC (Eligibility for Protection) Regulations 2006 (hereinafter referred to as "the Regulations of 2006"), or the UNHCR Guidelines on Internal Protection: Internal Flight or Relocation Alternative.
- (vi) The decision of the Minister is wholly predicated on the decisions of the Commissioner and the Tribunal. The latter decision is impugned in these proceedings.

3. The first issue that was raised was in relation to the applicant's application for an order providing for an extension of time. The statement of opposition at para. 1 stated that the application for judicial review was not instituted within the time limit prescribed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, as amended.

4. Counsel for the applicant, Michael Lynn, S.C., (with Gary O'Halloran, B.L.) sought the application for an extension of time and referred to paras. 11, 13 and 14 of the applicant's affidavit grounding the statement of grounds. In para. 11, he stated:-

"I [the applicant] was notified by letter dated Thursday, 6th November, 2014, and received on or about Monday, 10th November, 2014, that the Tribunal rejected my appeal."

At para. 13, he stated:-

"I say that I immediately contacted my solicitor on receipt of the Tribunal decision with a view to challenging it by whatever means available to me. I am informed and believe that a brief was prepared for counsel. I am advised that a two week delay occurred due to the prior work commitments of counsel. Thereafter, it was noted that the notice of appeal

and the subsequent country reports and medical reports submitted in support of my appeal were not on my file. I say these documents were sought from my previous legal representatives, the Refugee Legal Service. By letter dated 4th December, 2014, a copy of my complete file was forwarded to my present solicitors. I beg to refer to a copy of the letter upon which pinned together marked with the letter 'I', I have signed my name prior to the swearing hereon."

At para. 14:-

"By letter dated 5th November, 2014, I was notified that the Minister refused me a grant of refugee status and this refusal was based on the decisions of the Commissioner and Tribunal. I beg to refer to a copy of the letter upon which pinned together marked with the letter 'J' I have signed my name prior to the swearing hereon."

5. Counsel also referred to the document described as "UK Home Office Operational Guidance Note" which was not with the papers received from the Refugee Legal Services. On 10th December, 2014, Messrs. Trayors & Co. Solicitors, the present solicitors for the applicant sought a copy of this document. Counsel argued that as this document was part of the key country of origin information documents relied upon by the first named respondent, it was essential that counsel obtained a copy of same.

6. The application for leave was entered into by this Court on 12th December, 2014 and an extension of time of two days was required on the basis that the documents, including the notice of motion, the statement of grounds and affidavit were lodged with the High Court on 12th December, 2014 and adjourned on that date to the next list before Mac Eochaidh J., on 12th January, 2015.

7. The decision of Mac Eochaidh J. states that:-

"Upon motion of counsel on behalf of the applicant made ex parte onto the court on Monday, 15th December, 2014, for leave to apply by way of an application for judicial review and notes that the statement of grounds signed by the solicitor on behalf of the applicant and filed on 12th December, 2014 and the court, therefore, on that date adjourning the further consideration of this matter to Monday, 12th January, 2015."

8. Counsel on behalf of the respondents, Mr. Conlan Smyth, S.C., (with Mark Finan, B.L.) stated that the grounds preferred for the delay at para. 13 of the ground affidavit were not adequate and amounted to hearsay and do not permit the court to even examine whether it is just inequitable for the court to exercise its jurisdiction to extend time. He pointed to the fact that the Act of 2000, was amended by substituting a period of time for an application for leave to apply for judicial review to be made within a period of 28 days commencing on the date on which the person was notified of the decision. Section 5(2) of the Act of 2000 states that unless the High Court considers that there is good and sufficient reasons for extending the period within which the application shall be made and such leave shall not be granted unless the High Court is satisfied that there is substantial grounds for contending that the decision, the determination, recommendation, refusal or order is invalid or ought to be quashed.

9. It is noted by this Court that no application was made to the Asylum List before Mac Eochaidh J. at any time between the service of the notice of motion and statement of grounds on affidavit and the hearing date. The asylum judges have made it clear that objections to extension of time should be made to the judge in charge of the Asylum List.

10. In view of the delay in this case of two days, and having regard to the contents of the decision of the first named respondent and the reasons offered by the applicant, this Court is satisfied that there is good and sufficient reason for extending the period within which the application shall be made. The Court is also satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed.

11. The applicant swore an affidavit for the purpose of verifying the facts relied upon the statement of grounds of 11th December, 2014; he states in the affidavit that he was born on 8th October, 1987, in Gwatemba, Insiza in Zimbabwe. He joined the Movement for Democratic Change (MDC) in 2007. He was badly beaten in Gwatemba as a result of his political activities during the election campaign in March 2008. He moved to Bulawayo and remained there until March 2013, during which time he abstained from political activity. He returned to Gwatemba in March 2013. The Court was told that there were elections on 31st July, 2013. He said he became immersed in the election campaign with the MDC. He said he fled Gwatemba again on 6th June, 2013, on receipt of a warning of imminent arrests. He headed for Bulawayo but upon being informed by his brother that the police had arrived at the family home, they were searching for him, he immediately went to South Africa and from there to Ireland. He said he arrived in Ireland on 10th June, 2013, and applied for asylum. He was interviewed by the Refugee Applications Commissioner on 2nd August, 2013, and again on 16th September, 2013. He was subsequently notified that the Commissioner had refused his application (due to a finding that internal relocation was available to him). The decision of the Commissioner was appealed to the Tribunal and his oral hearing took place on 29th May, 2014. On 20th June, 2014, a medical report was submitted to the Tribunal from Dr. Mary Clifford. As already mentioned by this Court, it was stated that he was notified by letter dated 6th November, 2014, and received by him around 10th November.

12. In his affidavit, he notes that the Tribunal accepted that veracity of his account of political activity and noted country conditions in Zimbabwe, found there was no objective basis for his claim.

13. He stated that the Tribunal had noted a downward trend in politically motivated violence since 2008, but failed to make any assessment how this generalised statement affected him in the light of his personal political background. He stated that the Tribunal appeared at times to accept that an element of risk of persecution exists but then concluded that these risks were localised. He states that a reasonable reading of the country report that political violence occurs throughout Zimbabwe and is not localised and that opposition political activists regularly attract the attention of the police and Zanu-PF militia and supporters. It subsequently deals with various country of origin information which form part of the decision of the Tribunal and counsel submissions, which I will deal with later in this judgment.

The decision of the first named respondent

14. The hearing of the appeal by the applicant, T.M., was on 29th May, 2014. The first named respondent noted that the applicant claims that as a member of the Movement for Democratic Change (MDC), he suffered persecution at the hands of people he suspects were members of the Zanu-PF before the 2008 elections. He said he was stabbed in the shoulder and back and burnt on the chest. He did not report that incident as he feared reprisals by the police. In advance of 9th June, 2013, he was warned not to carry out MDC door-to-door recruitment on that date as the recruiters would be the target of police attention. He fled Zimbabwe, destroying his membership card, he claims nineteen MDC members were arrested carrying out planned door-to-door recruitment on 9th June, 2013. He fears imprisonment and/or death if returned to Zimbabwe.

15. In relation to the case facts and documents, the first named respondent said that the applicant made the following allegations in support of his claim:-

(a) That he has had eleven years of formal education. He was self employed, as a DJ at functions in Zimbabwe. He states that his family homes both in Bulawayo and Gwatemba.

(b) The applicant joined MDC in 2007. He was an ordinary member, attending rallies and recruiting new members as his district was controlled by Zanu-PF.

(c) In March 2008, one week before the general election, he was captured by four men and taken to bushes in an area near his home village. (Gwatemba) The men forced him to lie down and stabbed him in the lower back and on the shoulder when he tried to stand up. The applicant was beaten and he was burnt on the chest and on the left hand. The men did not indicate who they were but the applicant suspected they were Zanu-PF supporters. Some villagers saw the smoke from the bushes and came over to investigate and it was at that point that the assailants ran away leaving the applicant behind.

(d) At hearing, the applicant stated that he would not go to the police as he feared his attackers worked for the government and he would be detained. He did not seek medical help because he needed a police report to go to the hospital. He went home and cleaned and dressed his wounds with the help of his brother. The wounds took about a month to heal. The applicant packed and left for the city of Bulawayo and the applicant lived in his father's house there until March 2013. He continued to act as a DJ and although he was scarred at first when he arrived in Bulawayo, he had no problems or fears for his safety during this period.

16. It is noted by this Court that the first named respondent does not state, at this point, that the applicant ceased to be an active member of the MDC as stated in his s. 11 interview dated 2nd August, 2013.

17. In March 2013, the applicant left Bulawayo and returned to Gwatemba which he states was a Zanu-PF constituency to help with the recruitment of new supporters. From March, he was involved in the MDC-T campaign playing music at events, selling t-shirts and membership cards. A door-to-door recruitment drive was planned for the upcoming elections. A friend in the police told him not to go to door-to-door on 9th June, 2013, and to leave Gwatemba, as there was a plan to arrest members of the MDC.

18. The applicant left for Bulawayo, however, when he was on his way there, his brother called him to tell him that the police were in the house looking for him. His brother said they had searched in Bulawayo and that they had the applicant's picture. The applicant then got the bus to South Africa. The first named respondent noted that the applicant reached South Africa on 7th June, 2013, and met a friend in South Africa who introduced him to a Nigerian who arranged for a passport for him and passage to Ireland. He left South Africa on 9th June, 2013, and tore up the passport before landing in Ireland on the instructions of this Nigerian.

19. The first named respondent noted that the applicant feared that if he was returned to Zimbabwe, he would be made an example of by the government. He believes that he would be arrested and sent to jail or killed. The applicant did not go to the authorities to seek help before leaving Zimbabwe as it is the police authorities that he feared.

20. The first named respondent noted that he had submitted his original identity card, two copies of his birth certificate, a letter purporting to be a testimonial for the applicant from the Youth of Secretary General for the MDC and the medical report of the what the Tribunal Member describes as Dr. Jim Fehily, but it from Dr. Mary Clifford who presumably is a member of the practice dated 18th June, 2014.

21. The first named respondent then referred to the documentation submitted and provided by the Office of the Refugee Applications Commissioner as country of origin information and I will deal with some of these matters in due course.

22. The first named respondent said all of the documentation and the country of origin information had been fully considered.

The findings

23. The first-named respondent accepted that the applicant is a national of Zimbabwe. She said that the applicant has put forward his evidence in a straightforward and credible manner. His account of the core facts behind his claim were entirely consistent and does not run contrary to generally known facts about Zimbabwe and in particular, the widespread orchestrated violence against MDC supporters that accompanied the run-up to the second round of voting in 2008. She stated that she refers to the medical report and said that she found the applicant had provided clear, consistent and detailed evidence and it his general credibility had been established.

24. She said she had a doubt as to the facts set out in relation to what he stated about his brother calling him to tell him that the police were in the house looking for him. She said no documentary or other corroborative evidence is available and that the facts do not fall within the sequence of events as otherwise described. She said that the applicant had described the attack of five years earlier and a harassment of campaigning in June 2013, is happening in Gwatemba. He spent in five years in Bulawayo without any problems or fears for his safety. (Again it is noted by this Court that the first-named respondent does not state, at this point, that the applicant ceased to be an active member of the MDC).

25. The Court notes that the Tribunal member did not say that he had disengaged from political activity with the MDC when he was in Bulawayo from 2008 to 2013 and this Court does not understand what the suggestion of the Tribunal member that the incident of the alleged police search of the family home in Bulawayo "did not fall within the sequence of events". It appeared to this Court that it does, in that he was leaving Gwatemba with a view to going to Bulawayo and he received this phone call which is clearly within sequence.

26. In fact, the first-named respondent says that the facts set out in relation to the incident in Bulawayo in June 2013, was accepted. She stated that it was further accepted that the applicant has a subjective fear of persecution should he be returned to Zimbabwe.

Analysis of the well founded fear

27. She stated that the applicant fears that he will be persecuted on political grounds as a result of his membership and recruitment activities on behalf of the MDC specifically, he fears Andrew Langa, the local Zanu-PF representative and the police. In addition, the applicant says he fears persecution by way of prosecution on a false, non-political charge by State apparatus.

28. The first named respondent said, and it was accepted, that the applicant suffered persecution in 2008 at the hands of individual he suspected were Zanu-PF supporters and she further accepted that given the time and place, it is likely that such persecution was politically motivated. However, the applicant did not know those individual personally. He gave no evidence of seeing them again after

the attack in 2008, either in Bulawayo or in Gwatemba. Following the said attack, the applicant travelled to Bulawayo where he stayed in his father's house from 2008 to 2013. The applicant gave oral evidence at the hearing that he had no difficulty during that five-year period.

29. It appears to this Court that, once again, the Tribunal Member failed to identify that the reason why the applicant had abstained from political activities. The first named respondent said the applicant did not have a significant political profile in the MDC but is an ordinary member. He was assisting with the recruitment drive and fled Gwatemba when he was told that those on a door-to-door recruitment drive would be targeted by the security forces. The first named respondent referred to newspaper clippings on file that show others on this door-to-door recruitment drive were arrested on 9th June, 2013, and brought to Filibusu Police Station and told to get police clearance for the campaign.

30. The first named respondent said the low level harassment of the particular MDC members did not amount to persecution for the purpose of the Convention. The applicant stated that he believed these people would disappear in the future but there is no evidence, either in the form of media clippings or in the form of oral evidence from the applicant, that those who were arrested have, in fact, suffered any further adverse detention of the security forces in Zimbabwe in the time that has elapsed since this incident in June 2013.

31. The first named respondent noted that the applicant gave oral evidence that he is in regular contact with his mother who lives in Bulawayo and that he communicates regularly to his brother on Facebook. He was asked whether they have told him that people have come looking for him.

32. The applicant replied that there were more difficulties for MDC supporters outside election time when the international media is not focused on the country and that people just disappear. He could not point to any incidents of those arrested on 9th June, 2013, suffering serious harm and gave no evidence of knowledge of anyone coming looking for him since that time and she held that she found that the applicant did not suffer any persecution in 2013.

33. She stated that country of origin information points to a reduction in politically motivated violence after the 2008 elections and the power-sharing agreement that followed. She noted that although the power-sharing agreement came to an end following the July 2013 elections. She stated that the UK Foreign and Commonwealth Offices, Human Rights and Democracy Report 2013 (published April 2014) states that the levels of politically motivated human rights violations continued in a downward trajectory in Zimbabwe in 2013. The reports states that the UK believes that the July 2013 elections were seriously flawed (this Court's emphasis) but that "the elections were largely peaceful and levels over the violence were lower than previous election periods".

34. The first named respondent further finds that mistreatment of MDC supporters continues in Zimbabwe but that country of origin information indicates that large majority of reports of mistreatment originate in Zanu-PF dominated areas. She referred to the UK Home Office Operational Guidance notes stating that there are few incidents or some other difficulties being faced by MDC supporters in Bulawayo and that the report goes on to state that:-

"Returnees to Bulawayo will, in general, not suffer the adverse attention of ZANU-PF including the security forces even if they have a significant political profile."

35. She also quoted the Department of State Country Reports on Human Rights Practice 2013 – Zimbabwe, which localises most reports of torture and other cruel inhuman or degrading treatment in the Harare and Mutare in the eastern province of Manicaland. Reports of abuse directed at MDC reporters from the BBC, BBC Africa and Amnesty International handed in at the hearing relate to Harare and its suburbs and Masvingo.

36. The first named respondent then referred to Regulation 5(2) of the Regulations of 2006 which provides:-

"The fact that a protection applicant has already been subject to persecution or serious harm...shall be regarded as a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated, but compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection."

37. The first named respondent then said that the past persecution suffered by the applicant, though likely politically motivated, and intended to terrify and intimidate him, during the most brutal period of political motivated violence in Zimbabwe's recent history. She said that since then there has been a marked reduction in the violence and, in particular, supporters of the MDC, such as the applicant, are unlikely to face any difficulties in Bulawayo where the applicant has lived for most of the last six years (and he has not been involved politically).

38. The first named respondent said that in addition, country of origin information indicates that returnees to Bulawayo with a significant political profile (which the applicant does not have and does not claim to have) is unlikely to face difficulties. In the circumstances, she finds that the incident in 2008, was a once off incident that happened during a period of widespread violence against MDC supporters and was not repeated. While she had considered the low level harassment of campaigners in Bulawayo in 2013, which the applicant was one, she found a number of reasons that the incident of serious harm in 2008, will not be repeated if the applicant returns to Bulawayo.

(i) None of the applicant's colleagues were a party to the door-to-door campaign in Insiza, suffered serious harm in June 2009 or since to the applicant's knowledge. (It was agreed by counsel that really referred to June 2013).

(ii) The applicant was not the target of State militia or any other actors of persecution for the purpose of causing him serious harm during the April 2008 to when he left for Zimbabwe. (Again the first named respondent fails to mention that the applicant had ceased to be involved politically until March 2013).

(iii) Beyond the incident described in relation to the brother's phone call, the applicant has no knowledge of State militia or other actors of persecution coming to look for him since leaving Zimbabwe although he is in contact with him family.

(iv) The applicant lived peacefully in Bulawayo for five years following the 2008 incident (once again, the Court notes that the first named respondent fails to make a finding that he had abstained from political activity).

(v) Country of origin information indicates a continuing downward trend of politically motivated violence since 2008.

(vi) Country of origin information indicates that most reports of torture and other cruel, inhuman or degrading treatment to occur in the eastern province of Zimbabwe dominated by Zanu-PF.

39. She found that the applicant's evidence of past persecution, which is accepted, is not a serious indication that such serious harm will be repeated in the circumstances in accordance with s. 5(2) of the Regulations of 2006.

40. She then stated that considering the applicant's experiences which had been accepted including the prior period of 2008 to 2013, during which the applicant lived safely and without fear or difficulties in Bulawayo and the country of origin information relative to the analysis referred to, she found there was no objective basis for the applicant's fear of persecution if he is returned to Zimbabwe. She found that his fear of persecution is not well founded.

41. Again, the Court notes that there is no mention or analysis of the abstention from political activity which the applicant shows when he was living in Bulawayo. She makes no finding of internal relocation but states that given the nature of the alleged persecution suffered in the past as documented in this decision. She is of the view that it does not reach the threshold of being atrocious or that returning the applicant to his country of nationality would be wrong and, therefore, she found that compelling reasons do not arise in this case and affirmed the recommendation of the Commissioner.

Submissions on behalf of the applicant

42. Michael Lynn S.C. (with Garry O'Halloran B.L.) made the following submissions in relation to the decision of the first names respondent. He stated that the first-named respondent made a number of errors. He noted that the finding of the Tribunal that "the incident of serious harm in 2008 will not be repeated if the Appellant returns to Bulawayo" was prefaced with the remarks "while I have considered the low-level harassment of campaigners in Bulawayo in 2013 of which the Appellant was one", this finding that the applicant campaigned in Bulawayo is an error as it was the applicant's consistent evidence that he deliberately abstained from any political activity in Bulawayo in an effort to avoid detection and the search for him there resulted from his activities in Gwatemba.

43. The first-named respondent proceeded to state that "none of the Appellant's colleagues were party to the door-to-door campaign in Insiza suffered serious harm in June of 2009 or since to the Appellant's knowledge. This is also an error. The serious assault occurred in 2008 and was unrelated to the door-to-door campaign. The arrest in June 2014 of colleagues of the applicant was politically motivated, was done by a police force under political control and the applicant stated that such persons were prone to subsequent beatings, arrests and disappearance.

44. The next finding of the Tribunal was that "the Appellant was not the target of state militia or any other actors of persecution for the purposes of causing him serious harm during the April 2008 [sic] to when he left Zimbabwe." Counsel stated that the reasons stated by the applicant for fleeing Zimbabwe were as a direct result of being targeted by Zanu-PF supporters, the police and Andrew Langa who was the local Zanu-PF representative for the area of Insiza.

45. Counsel also referred to the manner in which the first-named respondent arrived at findings based on a consideration of the evidence and particularly the country of origin information and the preferential regard to the reports relied upon, the failure to consider all the reports and making findings which are irrational in the light of the country of origin reports before the Tribunal.

46. The first-named respondent said that "all of the documentation and COI on file has been fully considered". This is, counsel said, wholly insufficient to fulfil the duty to assess and rationalise the country reports placed before it, and he referred to *I. v RAT & Ors.*, an unreported judgment of Murphy J. in the High Court on the 23rd of January 2007. He stated that the relevant country of origin information which was not properly considered by the first-named respondent related to the violent proclivities of Mr. Langa, the prevalence of abductions and killings by the Central Intelligence Organisation operatives, the intimidation of M.D.C. activists in Insiza North and including a death threat to an M.D.C. local representative, the routine intimidation, harassment and arbitrary criminal prosecutions of human rights defenders, lawyers and political activists, and political violence towards political opposition, journalists and judges. The control of the security forces by Zanu-PF, exposure to arbitrary arrest, detention and prison conditions and he referred to the well known judgment of Edwards J., *D.V.T.S. v the Minister for Justice Equality & Law Reform, Ireland and The Refugee Appeals Tribunal* [2008] 3 IR 476.

47. The next ground related to what was described as an imputed internal relocation finding. Counsel on behalf of the Respondent said that there had been no internal relocation finding and this was accepted by Mr. Lynn.

48. Mr. Lynn pointed to the quotation at para. 6.6 of the first-named Respondent's report in relation to quoting what he described as quoting only partially from the UK Foreign and Commonwealth Offices 'Human Rights and Democracy Report 2013' [published April 2014]. The first paragraph of the document reads

"the Human Rights situation remained relatively stable throughout 2013 with a slight improvement on previous years. Zimbabwe Peace Project reported fewer than 5,000 cases of politically motivated human rights violations between January to November 2013. This compared to 5,096 in 2012, to 10,188 in 2011, 10,703 in 2010, 14,725 in 2009, and a peak of 23,755 cases recorded for 2008. Levels of politically motivated human rights violations have continued on a downward trajectory throughout the country"

However the subsequent paragraph which was not quoted by the Tribunal member states "however serious concerns remain, including political violence, and harassment of political opposition [this Court's emphasis], journalists, judges and human rights defenders. Many international human rights indicators would rank Zimbabwe among the worst countries in the world in terms of civil liberties, political rights and press freedoms. Since the elections in July, the government of Zimbabwe has made little progress towards reforming the human rights environment. There appears to be a lack of political will from the ruling Zimbabwe African National Union – Patriotic Front (Zanu-PF) to implement key agreed reforms under the previous Global Political Agreement, which would allow for long-term legislative and institutional change. This document also continued to deal with access to justice and rule of law and states

"a culture of impunity is widespread in Zimbabwe. Victims of political violence are rarely able to rely on the police to pursue justice on their behalf."

49. The first-named respondent also referred to the operational guidance note issued by the Home Office on Zimbabwe which is for UK case workers and counsel pointed to the para. 1.2, which says "case workers must not base decisions on the country of origin information in this guidance; it is included to provide context only and does not purport to be comprehensive. The conclusions in this guidance are based on the totality of the available evidence, not just the brief abstracts contained herein and case workers must likely take into account all available evidence. It is therefore essential that this guide is read in conjunction with up-to-date country of origin information and any other relevant knowledge." Country of origin information is published by the Country of Origin Information

Services on Horizon and is available on the Home Office website. However counsel stated that in quoting from the UK Home Office Operational Guidance Note, at para. 3.9.22, which states:

"Following the elections in July she did not refer to the introductory warning to case workers."

50. The portion of para. 3.9.22 quoted by the first-named Respondent which was part of para. 3.9.22 "there are few incidents of similar difficulty being faced by MDC supporters or activists in MDC dominated areas – namely Matabeleland North, Matabeleland South, low density areas of Harare or in Bulawayo." The report goes on to state at para. 3.9.25 returning to Bulawayo will in general not suffer the adverse attention of Zanu-PF including the security forces, even if he or she does have a significant MDC profile. However this court notes at para. 3.9.26 which states

"MDC supporters, human rights defenders and other opponents of Zanu-PF, or those perceived to be such, were able to establish that their political opinions or perceived political activities (in Zimbabwe) and/or the UK mean they are at a real risk of coming to the attention of Zanu-PF or its supporters and who cannot avoid that risk by internally relocating will have a well-founded fear of persecution and should be granted asylum."

51. Similarly counsel pointed to the quotation from the US Department of State (Country Reports on Human Rights Practices 2013 – Zimbabwe) in its executive summary, part of which is quoted by the first-named Respondent. However the executive summary states at the second paragraph,

"The most important Human Rights problems remained the government's targeting for torture, abuse, arrest and harassment of non-Zanu-PF parties and civil society activists; partisan application of the rule of law by security forces and the judiciary; the government's compulsory acquisition of private property and restrictions on civil liberties."

Submissions on behalf of the respondent

52. Mr. Conlan Smyth S.C. (with Mark Finan B.L.) submitted that the Court had, in the words of *Meadows v. the Minister for Justice Equality & Law Reform* [2010] IESC 3:

"It is quite clear in all the authorities that this Court has no function to express any view as to whether, presented with the same evidence as the Tribunal was presented with and accepting as the Tribunal did the particular standards and legal propositions in accordance with which they should assess those claims, this Court would have come to the same view as the Tribunal has done. All this Court can or should do is to reach a conclusion as to whether the decision reached by the Tribunal was open to it on the evidence before it and having regard to the matters which it is bound to take into consideration."

He stated that it may appear to the court or to any person reading the first-named respondent's report that it is a hard and difficult report, but the Court's role is not to come to its own conclusions.

53. He stated that country reports provide clear objective support for the applicant's claim but the respondent submits that the applicant preferred documentation referring to general political unrest in Zimbabwe. Yet by his own account given during interview he had no real position of prominence within the MDC political party, holding merely ordinary membership. The applicant provided details of a single incident that occurred in 2008 and that he had subsequently lived and worked peaceably without fear for five years in Bulawayo.

54. In relation to the issue of the country reports relied upon, he argued that where a decision is being challenged, the onus lies on the Applicant to establish that the Respondents had no material before them to support their decision and quoted *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39.

Discussion

55. The role of the judicial review court where a challenge is made to a decision of the decision maker such as that of the position of the first-named respondent, is to ensure that the basis upon which the first-named respondent decided the case was in accordance with facts and was in accordance with law. It is quite clear that the jurisprudence in relation to country of origin information is that where there are two reports with a different emphasis, the first-named Respondent, in quoting one piece of information, should also give reasons for rejecting the other piece of information. In that regard the decision of Edwards J. in *D.V.T.S. v. the Minister for Justice* [2008] 3 IR 476 in which he reviewed some of the authorities at p. 494 of the judgment he states:

"The third ground on foot of which I would criticise the decision of the second named respondent is with respect to his assessment of the well foundedness or otherwise of the applicant's stated fear of persecution. Having read the entirety of the country of origin information that was before the Tribunal I regret to say that I agree with the applicant that the second named respondent appears to have been selective in the material that he relied upon in arriving at the conclusion that the objective element for a well founded fear as defined in the Geneva Convention as amended by the New York Protocol, and as further outlined in the Refugee Act 1996 (as amended) had not been established by the applicant. I cannot accept the respondent's submission that the Tribunal member was entitled to select the information that he did select on the basis that that was the most up to date country of origin information that was before him at the time of the decision."

He continued:

"However, the country of origin information before him contained conflicting information. He gives no indication as to how, or on what basis, he resolved the conflicts in the information before him. Moreover, he gives no indication as to the basis on which he elected to prefer the apparently anecdotal accounts of certain interviewees quoted in the US State Department Report on Cameroon, 2004 and the UK Fact Finding Mission report on Cameroon 2004. While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis."

In *S.J.L. v. the Refugee Appeals Tribunal & Ors.* [2014] IEHC 608, Barr J in a similar case stated:

"In the present case there was a large amount of country of origin information submitted on behalf of the applicant,

both to the RAC and on appeal to the RAT. The RAT appears only to have had regard to one piece of COI on the basis that it dealt with Fugian province. This was the UK Home Office Report of April 2002 which was attached to the s. 13 report. Where COI documentation is submitted, it must be looked at and incorporated into the decision of the Tribunal, even if it only rejects the documents, but the reasons for so rejecting the documentation should be clearly stated."

And in *S.A.B. v. the Refugee Appeals Tribunal & Ors.* [2014] IEHC 495, a decision of Barr J., he states:

"There must be a balanced and fair appraisal of all the COI submitted. Where the RAT wants to adopt or accept the COI it must state on what basis it is doing so."

In each of those cases the decision of the Refugee Appeals Tribunal was quashed.

56. Having regard to the history of Zimbabwe since it obtained independence, the levels of conflict between the state, the government with their political support in Zanu-PF are well known. Country of origin information taken as a whole suggests that the human rights regarding torture, abuse, arrest and harassment of members of non-Zanu-PF parties and civil society activists exists, and continue to exist. The first-named respondent found that the applicant joined the Movement for Democratic Change in 2007 and was an ordinary member. In 2008, she accepted that the applicant was captured and taken to the bush in an area near his home village and was stabbed, beaten and burnt on the chest and left hand and she found that the applicant had provided clear, persistent and detailed evidence and that his general credibility had been established, although she had doubts as to the information obtained by the first-named applicant which caused him to leave the country, she accepts these as facts having regard to the Regulations of 2006. She does say that the applicant travelled to Bulawayo where he stayed in his father's house from 2008 to 2013, and he gave oral evidence at the hearing that he had no difficulty during that 5 year period. However the first-named respondent has not at any point, as this Court has pointed out, indicated that the applicant had avoided being involved in politics. He was not actively involved in supporting the MDC from 2008 to 2013 but in 2015 he assisted the MDC with their recruitment drive in Gwatemba. The first-named respondent said of the persons who were brought to Filibusi Police Station and told to get police clearance for the campaign that this was low level harassment of the particular MDC members and does not amount to persecution for the purposes of the Convention.

57. This Court views the failure of the Tribunal to set out, record, or mention the fact that the reason why the applicant had avoided difficulties in Bulawayo by staying away from the MDC and politics was, in this Court's view, a key omission.

58. The Court of Justice of the European Union, in a decision of *Germany v. Y and Z* [2012] EU ECJ C-71 dealt with the right of Ahmadis in Pakistan to practice their religion. The Court of Justice held that it constituted a violation within the meaning of Article 9 (1) of the Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (2004/83/EC). In this case the applicant could be returned to Zimbabwe and exercise his authority to rejoin the MDC and take part in political activity on behalf of the MDC. Having regard to the past persecution which was accepted by the first-named respondent, this court believes that the first-named Respondent failed to properly apply Regulation 5 (2) of the Regulations of 2006.

Decision

59. This Court has made an order extending the time within which the application has been made.

60. This Court finds that the first-named respondent did not give reason why certain country of origin information was not relied upon and only relied upon such information which justified her finding that there was no well-founded fear of persecution and did not give reasons for rejecting other grounds of country of origin information which sought to suggest a very different picture in relation to members of Human Rights organisations, the MDC and other non-Zanu-PF groups.

61. The failure of the first-named Respondent to indicate in any part of her judgment that, when he went to Bulawayo, he ceased to be an active member of the MDC. This omission is, in this court's view, unreasonable. The very basis of the decision of the first-named Respondent was that the only issue which was foremost in her decision was the fact that it was in 2008 that he had suffered the assault by persons who the applicant believed were associated with Zanu-PF.

62. The Court finds that the first-named respondent failed to properly apply Regulation 5 (2) of the Regulations of 2006 having regard to the possibility that the applicant could, having been returned to Zimbabwe, rejoin the MDC and as a result of this be subject to persecution at the hands of Zanu-PF.

63. For these reasons, this Court will make an order of *certiorari* quashing the decision of the first-named Respondent and directs that the appeal of the Applicant be remitted for fresh determination by a separate member of the Refugee Appeals Tribunal.