

**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: PA/06326/2017**

**THE IMMIGRATION ACTS**

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| **Heard at Glasgow** | **Decision & Reasons Promulgated** | |
| **On 6 June 2018** | **On 11 June 2018** | |
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**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**dumisani tsepo mpofu**

(ANONYMITY DIRECTION not made)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Bradley, Peter G Farrell Solicitors

For the Respondent: Mr A Govan , Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant who is a citizen of Zimbabwe where he was born on 6 March 1990. He appeals the decision of First-tier Tribunal Judge Kempton who for reasons given in her decision dated 25 September 2017 dismissed the appellant’s appeal against the decision dated 18 June 2017 refusing his protection claim which he had made on 13 January 2017. As to the appellant’s immigration history, he left Zimbabwe in 2010 to live in South Africa where he studied and subsequently worked. He arrived in the United Kingdom on 6 June 2016 with a six month visit visa expiring 25 November 2016. He had come for his mother’s funeral.
2. The basis of the appellant’s claim as summarised in the respondent’s asylum decision dated 18 June 2017 refers to the appellant having started a group of likeminded young people who could meet to discuss current affairs in 2009 and how they could overcome the obstacles they faced. On the occasion of the third meeting on 13 May 2009, when the appellant was running late, the police were present on arrival and were arresting members of the group. The appellant managed to escape. He later heard that the police were looking for him and that a warrant of arrest had been issued. He hid with friends until he fled to South Africa in January 2010. In October 2016 whilst in the United Kingdom he became a member of the Zimbabwe African People’s Union (ZAPU). The appellant fears that on return that he would suffer harm and ill-treatment for his political activities in particular in the light of his membership of ZAPU. The appellant submitted an arrest warrant in support of his account. Having lost his passport on which he arrived the appellant obtained a replacement from the Zimbabwe Embassy in London. His ability to do so persuaded the respondent that the appellant was not wanted by the Zimbabwean authorities.
3. As to the warrant the respondent considered that there was no evidence of the existence of code 290 referred to in the relevant Zimbabwe legislation. Had the appellant been the subject of an arrest warrant in Zimbabwe he would not have been able to successfully obtain a visa to study and work in South Africa. Accordingly, the respondent rejected the appellant’s claim based on his pre-arrival activity. As to the appellant’s post arrival activity in the United Kingdom, the respondent was not satisfied that he had established he was a genuine member of ZAPU. It was noted that he had only been politically active since October 2016 and that he had attended two meetings. At interview that he had stated that he had not engaged in any political activities during the six years he had been in South Africa.
4. The respondent also drew an adverse inference under section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. This was in the context of the appellant having explained when asked why he had not claimed earlier that it was not something that he was thinking about. Reliance was also placed on the delay in the appellant making his claim until two months after expiry of his leave.
5. As to risk on return, the respondent considered that with the appellant having legal status in South Africa until 7 February 2020, he had the option of returning there to avoid any problems in Zimbabwe. As it was not accepted he was a genuine member of ZAPU and taking account of the appellant’s very limited political activity in the United Kingdom it was not considered the appellant had a significant anti-government profile in Zimbabwe and thus would not be at risk were he to go there in the alternative. The respondent did not consider article 8 was engaged.
6. The appellant gave evidence at the FtT hearing where he was represented. The judge reached a number of adverse credible findings on the account in paragraphs [33] to [38] of her decision which may be summarised as follows (using the language of the decision):
   * 1. The Zimbabwe police are clearly not very interested in the appellant and the arrest warrant produced was clearly not genuine.
     2. The Zimbabwe authorities do not see the appellant as an enemy in their midst.
     3. It may be that it suits the authorities for the appellant to become involved in ZAPU in order to find out what the party is doing.
     4. It was not credible that the appellant was able to study at university in South Africa as it was not clear where the funds had come from.
     5. It was not clear how the appellant’s photo being on ZAPU literature would be a difficulty given the legitimacy of his recent passport application and residency in South Africa.
     6. There is no indication that the form relied on by the appellant as indicative of his being an undesirable person in South Africa is genuine.
7. The judge recapitulated at [39]:

“39. I do not accept that the appellant will be perceived in Zimbabwe to have a political opinion contrary to the authorities. I do not accept that there is a warrant for his arrest or that the authorities are interested in pursuing him. If returned to South Africa, the appellant will have a newly issued Zimbabwean passport and he has residence until 2018 or 2020. I do not accept that it has been curtailed. He has been working on this was checked out as genuine at the time when he made the Visa application. I do not accept that there will be a risk of return for the appellant if he goes to Zimbabwe or if he goes from there to South Africa. I do not accept that he has a genuine interest in ZAPU or about the Zimbabwean authorities will impute a contrary political opinion to him on account of any ZAPU activities as I believe they are well aware of these activities and their most likely deliberately sanctioned by the Zimbabwean authorities. That is the only explanation for the appellant having no difficulty in attending the embassy in London to renew his passport. Perhaps he was even put up to joining ZAPU by the Zimbabwean authorities at that time.”

1. The grounds of challenge argue:

(i) There was no evidential support for the finding that the Zimbabwean government had most likely deliberately sanctioned the appellant’s political activities.

(ii) At no point was the appellant asked whether the Zimbabwean government had put him up to joining ZAPU and he had not been given any opportunity to respondent to the suggestion that he is a “mole or spy” for the Zimbabwean government.

(iii) The judge appeared to have applied the wrong standard of proof by reference to the phrase” most likely deliberately sanctioned by the Zimbabwean authorities”.

(iv) The judge had failed to consider the evidence before her by considering the appellant’s ability to renew his passport is something akin to being a spy for the Mugabe regime. The judge had erred on the basis of removal of the appellant to South Africa.

1. In granting permission, the First-tier Tribunal Judge considered that the application went beyond disagreeing with the conclusions of the judge and there was a paucity of reasoning as well as a dismissive tone evidence in paragraphs 33 and 34 of her decision.
2. Those paragraphs are as follows:

“33. The most bizarre part of the appellant’s claim is that the Zimbabwean authorities, hence Zanu-PF, officials are interested in the appellant on account, presumably for his name having been given to the authorities after the raid in 2009, when he managed to run away. Despite apparently being wanted and the authorities having gone to his home, which is where his father lives, his father only seems to have encountered the police looking for the appellant on one or two occasions. The appellant allegedly fled from the scene about eight years ago. That is a long time ago and it is a long time for there to be little interest in the appellant. The appellant is still in contact with his father who lives in the same place, but there is no reference to his father being constantly hounded for information on the appellant. The police are clearly not very interested in the appellant.

34. The so-called arrest warrant, in fact refers to the appellant being remanded on 2 June 2009 and then defaulted court on 16 June 2009. Clearly, the appellant was never remanded so the warrant makes little sense other than that in relation to defaulting court. There is a reference to C/5 290 of the code in relation to public violence, I see that at Annex K on K21 of the respondent’s bundle, that the code refers to paragraph 36, as relating to public violence, and at K88, the last paragraph numbered is 284, there being no paragraph of the code numbered 290. Clearly, the “Warrant of Arrest” is not genuine. The appellant was of the view that the police are not very careful and so that is why the paragraph is wrongly cited. However, it is not a difficult matter to get right. It suggests far more likely that the warrant is not genuine. “

1. At the outset of the hearing Mr Bradley referred to concerns that had been expressed to him by Mr Govan as to the judge’s decision. They had reached a consensus that the determination was not safe and could not stand having regard to the ground of challenge. This was confirmed by Mr Govan who added that the error by the judge in her finding that the appellant may have been an agent which has not been the respondent’s case potentially skewed her other findings even though those had not been challenged.
2. I observed that this remains an adversarial jurisdiction and directed that a consent order be drawn up to reflect the position of the parties. I reminded them however that the judge’s decision remained a record of what was said by the appellant in advancing his case on that occasion.
3. Discussion turned to disposal. Mr Bradley explained that he wanted to call Johnson Mkanbla and Arthur Molife. A witness statement had been filed earlier in the relation the former. Unsatisfactorily, neither party had provided any country information on the current situation in Zimbabwe with particular reference to the relationship between Zanu-PF and opposition parties including ZAPU. Were the issues to be confined to the country information there would be no reason why the appeal could not remain in the Upper Tribunal but, in the light of the conceded reach of the error, with considerable reluctance, I accept that the case needs to be remitted to the First tier Tribunal for findings of fact to be made as well as any risk assessment by reference to evidence of the current situation.
4. By consent the parties have agreed that the decision of the First-tier Tribunal contains an error of law and is set aside. The decision will be remade in the First-tier Tribunal to which the appeal is remitted.

Signed Date 8 June 2018

UTJ Dawson

Upper Tribunal Judge Dawson