Briefing Paper 8.66

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Recent Supreme Court Cases

1 In its judgment in the case of *RT (Zimbabwe) and others v. Secretary of State for the Home Department* [2012] UKSC 38 delivered on 25 July 2012 the Supreme Court gave an important ruling in relation to asylum appeals. The four parties from Zimbabwe were asylum seekers claiming that if they were returned to Zimbabwe there was a reasonable degree of likelihood that they would face persecution on account of their *lack of political views*.

2 Recent cases from Zimbabwe have established that there is a campaign of violence perpetrated by militias acting in support of President Mugabe's ruling ZANU-PF party against the opposition Movement for Democratic Change (MDC). It is a case of saying that "those who are not with us are against us". The militias target not merely supporters of MDC but also anyone who cannot demonstrate positive support for ZANU-PF. Persons may be required to produce a ZANU-PF membership card or sing the latest party campaign songs and failure may be treated as evidence of disloyalty and support for the opposition. Those unable to pass the tests are at risk of murder, violent beatings, rape and similar consequences.

3 The Supreme Court concluded that the right to hold political opinions includes the right not to hold political opinions. It is no answer to a claim for asylum on the ground of fearing persecution for political opinions that the asylum seekers concerned could avoid the persecution by lying about their allegiance in saying that they supported ZANU-PF. In reaching this conclusion the Supreme Court followed its own decision in the case of *H J (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31 (see Legal Paper MW 193 for a full discussion of this case). The rationale of that case was that in countries such as Iran, where homosexual relations are treated as a criminal offence and homosexuals are at risk of persecution by being of that inclination, it is no answer to a claim for asylum that they could reasonably be expected to lie and dissemble their true sexuality in order to avoid persecution.

4 The decision gives some cause for concern in the way it widens the scope for successful asylum claims from Zimbabwe and from any other countries with similarly brutal totalitarian regimes. Of the four appellants in the case three had been found by the immigration judges hearing their appeals earlier to be lying and lacking in credibility. In the normal way lack of credibility leads to the dismissal of an asylum appeal, but in these cases it was no bar to success. It is difficult to see at present how any asylum claim from Zimbabwe can be rejected so long as the militias continue their vicious attacks on persons who may be suspected of loyalty to the MDC opposition or who have no particular political allegiance but are unable to demonstrate in some way that they are ZANU-PF supporters.

5 In the Iranian case referred to the Supreme Court reversed a previous decision of the Court of Appeal which did not consider it entirely unreasonable to expect a homosexual to dissemble about his sexuality in order to avoid persecution. In the Zimbabwean case the Court of Appeal was obliged to follow the decision of the Supreme Court in the Iranian case and ruled in favour of the asylum seekers. Just as the homosexuals could not be expected to lie about their sexuality by e.g. pretending to be heterosexuals, so supporters of the MDC opposition or others totally indifferent to politics could not be expected to lie about their party membership. I quote below from paragraph 13 of Legal Paper MW 193

> *"In paragraph 33 of the judgment of the Court of Appeal,[in the Iranian case] the following quotation appears from the judgment of Lord Justice Laws, a highly respected authority on the law of immigration and asylum, in the case of Amare v. Secretary of State for the Home Department [2005] EWCA 1600:*
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> *"The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where purists' liberal values are less respected, even much less respected, than they are here. It is there to secure international protection to the extent agreed by the contracting states." "*

This important caveat as to the scope of the Convention and by implication as to the limitations of the protection it can afford has been ignored by the Supreme Court in both the Iranian and the Zimbabwean cases.

6 Apart from these two cases there have been two other recent Supreme Court decisions which, whatever their legal justification, have added materially to the difficulties faced by the Home Office and UK Border Agency in exercising proper immigration control. The first of these is *Quila v. Secretary of State for the Home Department* [2011] UKSC 45, discussed in Legal Paper MW 252. In that case the Supreme Court held that an amending Immigration Rule seeking to deter forced marriages by raising the qualifying age for marriage visas from 18 to 21 was incompatible with Article 8 of the European Human Rights Convention, which protects the right to marry. In Legal Paper MW 252 I noted a powerful dissenting judgment by Lord Brown who was clearly of the opinion that the Supreme Court was arrogating to itself decisions which ought to be left to the executive arm of government. In the light of the conviction on 3 August 2012 of both British Pakistani parents of murdering their 17 year old daughter for refusing to accept their society's traditional customs, including a forced marriage, this dissenting judgment has a horrific contemporary relevance.

7 The other very recent Supreme Court case which gives cause for concern is *Alvi v. Secretary of State for the Home Department* [2012] UKSC 33 in which judgment was delivered on 18 July 2012 and which is discussed in detail in Legal Paper MW 274. This case affirmed the earlier decision of the Court of Appeal in *Pankina v. Secretary of State for the Home Department* [2010] EWCA Civ.719 in holding that it was not lawful for the Home Secretary to refuse an extension of leave to remain as a Tier 2 (General Migrant) because the applicant's job title and salary level did not comply with relevant guidance notes; those notes were not specifically included in the Immigration Rules made under section 3(2) of the Immigration Act 1971 and had therefore not been approved by Parliament. The direct consequence of this decision has been that the Home Secretary has been obliged to lay amendments to the Rules running to almost 300 pages so as to incorporate the guidance notes and no doubt from now on will have to continue to produce amendments on a similar scale, making the Immigration Rules even more voluminous and chaotic than they are already.

8 It is worth pointing out that the four decisions commented on in this paper have all been delivered within the space of just over two years. Judgment was given in the Iranian case on 7 July 2010, *Quila* on 12 October 2011, *Alvi* on 18 July 2012 and the Zimbabwean case on 25 July 2012. I do not suggest that the learned justices of the Supreme Court harbour any animosity or distrust towards the Home Office, UKBA or any other organ of government, but there does seem at times to be a lack of sympathetic understanding of the very real problems faced by the government in exercising effective immigration control. Some sign of an incipient understanding of those problems may perhaps be derived from the dissenting judgment of Lord Brown in *Quila*, and from public comments in similar vein made by Lord Sumption at the time of his appointment as a justice of the Supreme Court. So far as the two asylum cases discussed are concerned, the Court's decisions seem to have been taken on a very unrealistic basis. There are very few countries, especially in the third world, where the rule of law and the rights of homosexuals and other minorities are respected to the degree that the Court seems to require. These recent decisions will have serious consequences not only for asylum cases but also for the ability of the government to remove foreign nationals who have overstayed their visas – and effective removal is essential to the credibility of any immigration system.

Harry Mitchell QC
Honorary Legal Adviser, Migration Watch
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