

WEDNESDAY 13TH JUNE 2012

**IN THE COURT OF APPEAL**

ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

AA115432009

**BEFORE** LORD JUSTICE MAURICE KAY Vice President of the Court of Appeal, Civil  
Division  
**And** LORD JUSTICE SULLIVAN

**B E T W E E N**

JG (ZIMBABWE) & CM (ZIMBABWE) (previously EM & Others (Returnees) Zimbabwe CG)  
APPELLANTS

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

**UPON** the Court having regard to the requirements of paragraph 13.1 of the Practice Direction to Part 52 of the Civil Procedure Rules;

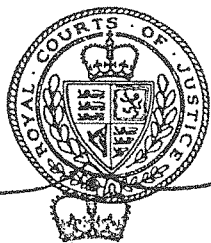
**AND UPON** the parties hereto confirming that none of parties to these proceedings is a child or a patient;

**AND UPON** all the parties hereto requesting that the Court allow this statutory appeal by consent and without determining the merits of the appeal for the reasons set out in the attached Statement of Reasons;

**AND UPON** the Court, having considered the Statement of Reasons, being satisfied that there are good and sufficient reasons to allow the appeal;

**IT IS ORDERED** that

- 1) the appeal be allowed;
- 2) the Upper Tribunal's determination of 14 March 2011 be quashed;
- 3) the matter be remitted to the Upper Tribunal (Immigration and Asylum Chamber) to be determined in light of the attached statement of reasons and such directions that the Court may give;
- 4) the Respondent pay the Appellants' costs of the appeal on the standard basis;



Her Majesty's  
Court of Appeal

13 JUN 2012

COURT 70  
Appeal No.

C5/2011/1181  
C5/2011/1183



5) there be a detailed assessment in relation to the Appellants' public funding certificate.



*By the Court*

WEDNESDAY 13TH JUNE 2012  
IN THE COURT OF APPEAL  
ON APPEAL FROM THE  
UPPER TRIBUNAL (IMMIGRATION AND ASYLUM  
CHAMBER)

JG & CM (ZIMBABWE)

- and -

SECRETARY OF STATE FOR THE HOME  
DEPARTMENT

ORDER

Copies to:

Upper Tribunal (Immigration and Asylum Chamber)  
Field House  
15 Breams Buildings  
London EC4A 1DZ

Lambeth Law Centre  
Dx 37053  
Kennington 3  
Ref: NC/460467

Treasury Solicitors  
Dx 123242  
Kingsway  
Ref: S104243A/MEW/B3

MESSRS TURPIN & MILLER  
DX 154780  
OXFORD 11

---

\* This order was drawn by Mr A Lee (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Mr A Lee, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7073 4828

## STATEMENT OF REASONS

### History of the Proceedings

1. The appellants brought this appeal against a determination of the Upper Tribunal providing updated country guidance in respect of Zimbabwe: [2011] UKUT 98 (IAC). After pre-hearing reviews, the last on 15 October 2010, the Upper Tribunal heard the appeal over six days from 18 to 25 October 2010.
2. The Respondent maintained in the Upper Tribunal that the Foreign Office “had always been clear that its concerns on enforced returns were related to foreign policy considerations ... and were not related to the security or safety of returnees”. On 20 October 2011, the Tribunal directed disclosure within 14 days of “any material emanating from the FCO regarding its assessment of the political situation in Zimbabwe from 1 August 2010”.
3. The Tribunal listed a hearing on 15 December 2010 due to the delay in complying with its disclosure order at which the President gave a judgment drawing attention to the Tribunal’s powers to enforce its orders.
4. Disclosure was first made on 22 December 2010 under cover of a letter to the Tribunal and the Appellants which stated that: “The search exercise in fact ranged far wider than the strict court order, and counsel considered a significant number of other documents for the 2009-2010 period, to ascertain whether these contained any assessments which were relevant and capable of assisting the Appellant’s case.” The documents contained redactions (some gisted, some not) pursuant to a public interest immunity certificate, signed by the Secretary of State for Foreign and Commonwealth Affairs on 21 December 2010.
5. Pursuant to its powers under section 25 of the Tribunals Courts and Enforcement Act 2007, the Tribunal considered the certificate, schedule and redacted and gisted material. On 7 January 2011 the President wrote to the Respondent providing a schedule of redactions that the Tribunal considered should be unredacted or gisted, and stating that Tribunal accepted the remainder of the Respondent’s redactions “on the grounds of relevance, material harm, overall assessment of the interests of justice in the light of the issues in the case”.

6. At a hearing on 14 January 2011, part of which was *ex parte*, the Respondent accepted the Tribunal's schedule and agreed to unredact or gist as required. The Respondent's final disclosure in the Upper Tribunal was made to the Appellants on 18 January 2011.
7. The Upper Tribunal's determination was circulated to the parties in draft on 4 March 2011 and published on 14 March 2011. The guidance given by it is summarised in the head-note.
8. The Appellants identified eight grounds in their application for permission to appeal. By a decision dated 22 July 2011, Sullivan LJ refused permission on the papers.
9. The Court was subsequently notified by the Respondent that documents had been identified for disclosure in another case which were considered relevant to the Appellants' disclosure request before the Tribunal and which, in accordance with her ongoing duty of candour, the Respondent intended to disclose in the present proceedings. The current proceedings were stayed while those documents were disclosed in these proceedings.
10. After they were disclosed, a hearing was listed on 20 December 2011 before Maurice Kay LJ and Sullivan LJ to consider disclosure and permission. In the judgment granting permission, [2011] EWCA Civ 1704, Sullivan LJ observed that it had "*emerged – for reasons which are not material for present purposes – that there had indeed been a failure to disclose certain documents*" in the Upper Tribunal" and that it was "*arguable that the additional material might have persuaded the Tribunal that the picture of when elections would be called and what was likely to happen when they were called, was not too equivocal or obscure.*" As to the use of anonymous evidence in the Respondent's Fact Finding Mission report (FFM), Sullivan LJ stated that "*It is arguable that the Tribunal's starting point in the light of the decision in Sufi should have been that substantial weight should not be attached to the FFM because it was based upon anonymous sources, that is to say not merely the individuals giving comments were anonymous but also the organisations that they represented were anonymous.*"

11. Permission was granted by on four grounds which were set out in amended Grounds of Appeal, which the Court indicated at the next hearing on 24 January 2011 properly set out the case on which permission had been granted:
  1. Ground 1: Whether the Respondent failed to comply with its disclosure obligations and whether the Respondent's statement that the Foreign Office "had always been clear that its concerns on enforced returns were related to foreign policy considerations ... and were not related to the security or safety of returnees" had been misleading;
  2. Ground 2: Whether the Tribunal's approach to evidence from anonymous sources was wrong in law , in particular in light of the ECtHR's judgment in *Sufi and Elmi*;
  3. Ground 3: Whether the Tribunal had been entitled to find a "well established evidentially and durable" material change since its previous Country Guidance in *RN*;
  4. Ground 4: Whether erroneous conclusions were reached on the Appellants' individual cases.
  
12. At a hearing in the Court of Appeal on 24 January 2012, the Court ordered that by March 16 2012:-
  - (a) The Respondent disclose those documents in the Respondent or the Foreign and Commonwealth Office's control, dating from 1 January 2010 until 10 March 2011, touching on the timing of elections in Zimbabwe and the risk of a return to violence in connection with those elections. The obligation extended to a manual search by the Respondent and a manual and electronic search by the Foreign and Commonwealth Office.
  - (b) No redactions should be made on public interest immunity grounds (and previously served redacted documents to be re-served in unredacted form) unless a public interest immunity exercise had been carried out and public interest immunity certificates pertaining to this appeal served by the Respondent, no later than 4pm on March 16.

(c) In the event that the Respondent invoked PII for those documents already served on 25 October 2011, the gist to be provided for the redacted passages listed in [an attached Annex] no later than 4pm on March 16.

13. A timetable was set down for dealing with the matter thereafter.
14. The substantive hearing was adjourned on the application of the Respondent due to its delays in providing disclosure. An amended timetable was ordered by the Court of Appeal by consent but the Respondent was unable to comply fully with it and the substantive hearing was adjourned again as a result. However, the Appellants are, as at the date of this Statement, in possession of numerous further documents served pursuant to the Court's Order of 24 January 2012, as well as those provided as indicated at paragraph 9 above. The Appellants have issued an application, seeking the Court's review of the Respondent's claims to withhold documents, or parts of them, on grounds of relevance or a claim for public interest immunity (PII). The hearing of that application, and the conduct of the review, are currently outstanding.

Grounds for Remittal

15. The Respondent accepts that there was a procedural irregularity affecting the Upper Tribunal's determination, amounting to a material error of law, by reason of the Respondent's failure to provide at least some part of the disclosure now made in the Court of Appeal to the Upper Tribunal. The Respondent accepts that it is appropriate and in the interests of justice that all of the material now disclosed to the Appellants and thus before the Court of Appeal should be considered by the Upper Tribunal. In those circumstances, the parties also agree that the outstanding review of the Respondent's claim to withhold disclosure (see paragraph 14 above) may most conveniently be addressed by the Upper Tribunal.
16. In granting permission, the Court of Appeal considered the approach taken to wholly anonymous evidence by the Upper Tribunal in the present case and also considered the decision of Upper Tribunal in *AMM* (in which the Upper Tribunal declined to follow the approach taken by the European Court of Human Rights in *Sufi and Elmi* to anonymous evidence). In its permission decision, the Court concluded that it was arguably unlawful for the Upper Tribunal to attach weight to evidence from wholly anonymous sources, for

which neither the individual nor his or her organisation had been identified. The Respondent accepts that the issue of whether weight may be attached to anonymous evidence, and if so in what circumstances, requires further consideration in light of these observations, and any submissions in respect of common law and ECHR/ EU law principles. This is to be done by the Upper Tribunal following remittal.

17. The parties are therefore in agreement that the matter should be remitted to the Upper Tribunal for a further determination. The Upper Tribunal is invited to give appropriate directions for the conduct of the remitted country guidance appeal, including the outstanding review of the Respondent's claim to withhold inspection on grounds of public interest immunity and relevance, at a pre-hearing review on notice to the parties.