Neutral Citation Number: [2010] EWCA Civ 1285
Case No: C5/2010/1220, C5/2010/0240, C5/2010/1535, C5/2010/1175

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
AND ASYLUM AND IMMIGRATION TRIBUNAL
DIJ MANUELL, IJ CHARLTON-BROWN, DIJ DIGNEY and IJ GERREY,
DIJ SHAERF
AA/03852/2009, AA/10471/2008, AA/09201/2008, AA/06786/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2010

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE LLOYD and
LORD JUSTICE SULLIVAN

- -

Between :

	RT(ZIMBABWE) **SM(ZIMBABWE)** **DM(ZIMBABWE)** **AM(ZIMBABWE)**	**1st Appellant** **2nd Appellant** **3rd Appellant** **4th Appellant**
	- and -	
	SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr Hugo Norton-Taylor (instructed by **Messrs Luqmani Thompson & Partners)** for the **1st, 2nd & 3rd Appellants**
Mr Hugo Norton-Taylor and Ms Sandra Akinbolu (instructed by **Messrs Wilson Solicitors LLP**) for the **4th Appellant**
Mr Alan Payne (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date : 20 October 2010

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Judgment

Lord Justice Carnwath :

Introduction

1.This is the judgment of the court to which all members have contributed.

2.The appellants are Zimbabwean nationals whose claims to asylum have been rejected by

the Asylum and Immigration Tribunal, by reference to the guidelines in *RN(Zimbabwe CG)* [2008] UKAIT 00083. The main issue in all the cases is whether those guidelines have been correctly applied. However, an additional issue of principle was identified by Sir Richard Buxton when granting permission, which he expressed in this way:

> "The jurisprudence in relation to return to Zimbabwe has to date assumed that it is legitimate to require applicants, in order to avoid persecution, to demonstrate loyalty to Zanu-PF, itself a persecutory regime. That assumption appears to conflict with the decision of the Supreme Court in *HJ(Iran) v SSHD* [2010] UKSC 31; [2010] 3 WLR 386."

3. In the event, neither side before us submitted that there was any conflict between the current tribunal guidance, as expressed in *RN(Zimbabwe)*, and the reasoning in *HJ(Iran)*. However, both seek to rely on that reasoning in support of their submissions as to how the guidance is to be applied to cases such as the present. That country guidance is itself now under review by the Upper Tribunal, in a case which began at the same time as the hearing of this appeal. We understand that the Government has indicated that there will be no forced removals to Zimbabwe until that case is decided. However, that has no direct relevance to the present decisions, whose legality must be tested by reference to the guidance applicable when they were decided.

4. The facts of the four cases, and the findings of the tribunal, are summarised later in this judgment. Although there are some factual differences between the four cases, they have much in common. It could be said that the claimants are not in any ordinary sense "political refugees". They have not been found to have any particular political commitments or to have suffered because of them; they left Zimbabwe for reasons which are unrelated to any political activities there; and they have not engaged in any significant political activities here. However, it is clear that even the politically indifferent may be persecuted for opinions "imputed" to them by the authorities in their home country (see *MacDonald's Immigration Law and Practice* para 12.75). Thus, these claimants argue that regardless of their actual political beliefs or activities, or lack of them, there is a risk, particularly having regard to their long absence from Zimbabwe, that if returned to Zimbabwe they will suffer persecution because of their unwillingness or inability positively to prove their loyalty to the Mugabe regime.

5. They have been jointly represented by Mr Norton-Taylor, for whose skilful submissions we are grateful. The case rests on three main submissions (in the words of his skeleton argument):

> "Firstly, the ratio of *HJ (Iran)* applies equally to cases concerning political opinion and *RN* is consistent with this. Thus, an individual found to hold genuine political beliefs cannot be required to modify their behaviour or deny their beliefs in order to avoid persecution. ("the pure *HJ(Iran)* issue")
>
> Secondly, it is impermissible to require an appellant to actively profess a loyalty to a regime which he does not possess or

> otherwise lie to the authorities of the home country or other potential persecutors in order to avoid a condition of persecution. Again, the Zimbabwean country guidance decisions are consistent with this proposition. ("the extended *HJ(Iran)* issue")
>
> Thirdly, the Tribunal in each of these linked appeals erred in their application of *RN*, irrespective of the first two submissions. This final submission may prove to be determinative of all four appeals." ("the *RN* issue")

6. Before considering the submissions in more detail, it is necessary to refer to the recent decision of this court in *TM(Zimbabwe) v SSHD* [2010] EWCA Civ 916, which covered much of the same ground, in relation to a group of cases on very similar facts.

TM(Zimbabwe)

The legal framework

7. The judgment of Elias LJ contains a full exposition of the legal framework, and of the guidance in *RN*, which we gratefully adopt. At the outset he emphasised the limited role of this court on an appeal from immigration judges, whose decisions "should be respected unless it is quite clear that they have misdirected themselves in law" (per Lady Hale, *AH(Sudan) v Home Secretary* [2008] 1 AC 678, para 30).

8. As he explained, the key point of the new guidance in *RN* was the risk now identified to those unable positively to demonstrate loyalty to the regime:

> "The evidence establishes clearly that those at risk on return to Zimbabwe on account of imputed political opinion are no longer restricted to those who are perceived to be members or supporters of the MDC but include anyone who is unable to demonstrate support for or loyalty to the regime or Zanu-PF. To that extent the country guidance in *HS* is no longer to be followed." (para 258)

9. In that context Elias LJ highlighted two contrasting passages in *RN*, relied on respectively by the applicants and the Secretary of State:

> "We observe here that there can be found within the extensive documentary evidence put before us other accounts of the means used by those manning road blocks to establish whether a person is loyal to the ruling party. For example, a person who was unable to produce a Zanu-PF card might be asked to sing the latest Zanu-PF campaign songs. An inability to do so would be taken as evidence of disloyalty to the party and so of support for the opposition. Clearly, a person returning to Zimbabwe after some years living in the United Kingdom would be unlikely to be able

to pass such a test." (para 81)

> "It remains the position, in our judgement, that a person returning to his home area from the United Kingdom as a failed asylum seeker will not generally be at risk on that account alone, although in some cases that may in fact be sufficient to give rise to a real risk. Each case will turn on its own facts and the particular circumstances of the individual are to be assessed as a whole. If such a person (and as we explain below there may be a not insignificant number) is in fact associated with the regime or is otherwise a person who would be returning to a milieu where loyalty to the regime is assumed, he will not be at any real risk simply because he has spent time in the United Kingdom and sought to extend his stay by making a false asylum claim." (para 230)

10. The tribunal in *RN* had identified certain categories of "enhanced risk", including –

> i) "the fact of having lived in the United Kingdom for significant period of time and of having made an unsuccessful asylum claim";
>
> ii) returning to a home "in an area where the MDC made inroads into the Zanu-PF vote" at the recent elections; and
>
> iii)"the fact of being a teacher or having been a teacher in the past".

11. As to these groups, Elias LJ summarised the effect of the guidance in this way:

> "16. A question that arises from the guidance is this: what exactly is the significance of the fact that certain categories of asylum seekers will be in the heightened risk category? The fact that an asylum seeker falls into one or more of the enhanced risk categories is not of itself sufficient to justify the grant of asylum as paragraph 230 of the decision in RN, reproduced above, makes clear. The question is whether he faces a real risk of persecution on return; he will do so from the militia gangs unless he is able to show loyalty to the governing party.
>
> 17. So the onus is on the applicant to show that there is a real risk that he will not be able to demonstrate the required loyalty. Falling into a heightened risk category does not of itself constitute such evidence. Being a teacher or a failed asylum seeker is plainly not incompatible with being a Zanu-PF supporter or activist. It does, however, mean that the applicant will on return be likely to be subject to heightened scrutiny. If, for example, the authorities in Zimbabwe know that an asylum seeker was previously a teacher, they are more likely to start from

the premise that he is likely to be hostile to the regime."

12. As in the present case, there had been adverse credibility findings. Elias LJ commented on the significance of such adverse findings, having regard in particular to the judgments of this court in *GM(Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 833. As he said, such a finding is not necessarily fatal to the case:

> "The Tribunal must take account of all the evidence and in some cases a real risk of persecution will be established notwithstanding that the applicant's account was largely or even – exceptionally, no doubt - wholly disbelieved." (para 18)

13. However, he emphasised the need for there to be "some material" which justifies the inference that the applicant faces persecution, as illustrated by *GM(Eritrea)* itself. We quote Elias LJ's summary of the majority decision:

> "20. In that case the appellant, a seventeen year old girl, had given an account of how she had left Eritrea but it was disbelieved. It was accepted that if she had left illegally she would be at risk of persecution on return. It was also accepted that it was more probable than not that she would have left that way since statistically that was the most likely route by which girls her age would have managed to leave the country. But some students her age could also leave legally.
>
> 21. The Court of Appeal held that the fact that it was likely that a seventeen year old girl would have left illegally did not show that this particular girl had done so, and once her evidence was rejected, there was no other evidence available to the court to show that she may in fact have fallen into that general category. The only established facts were her sex and age, but they merely identified her as falling into the category of those who would be likely to have left illegally; they gave no clue one way or the other as to whether she had done so. ..."

14. Elias LJ concluded on this aspect:

> "23. An applicant for asylum is not, therefore, to be punished for giving false testimony. He is not to be denied asylum if he otherwise has a good asylum claim on the facts which are accepted to be true or likely to be true. But the absence of credible evidence from the applicant may result in a situation where the Secretary of State, or on appeal the AIT, has insufficient material from which to infer that there is a real risk of persecution. Since the onus is on the applicant to make good the claim, it perforce must fail."

15. He considered in some detail the relevance of "*Sur place* activity", which was an issue

before him, but is of limited relevance in the present cases.

The HJ(Iran) point

16. Next, under the heading "Risk of persecution for volunteering political opinions", he considered a new submission, based on *HJ(Iran)*, on which in the event he did not find it necessary to reach a conclusion. He summarised the submission of Mr Dove, counsel for the appellants:

> "The proposition Mr Dove advances is that when determining whether or not to grant asylum, the AIT should assume that an asylum seeker will tell the truth about his political views when questioned in his home country about them, as he almost undoubtedly will be. If in fact he is not loyal to the regime, he will have to reveal that fact and that will necessarily render him liable to persecution. Accordingly, his asylum claim must succeed. *He cannot be expected to lie in order to avoid persecution.* This is so even in cases where he is not politically active and indeed even if he is relatively uninterested in politics…." (emphasis added)

The "far-reaching" consequence of this submission was that anyone who could show that he or she was not in fact not a supporter of Zanu-PF would be entitled to asylum (para 31).

17. As we understand the judgment, Elias LJ felt able to avoid ruling on the point, because it had not been raised before the tribunal, and because such evidence as there was did not establish that the claimants lacked loyalty to the regime. Thus in the first case:

> "The evidence… suggests that she manufactured hostility to the regime to bolster her asylum application. So it cannot be assumed that she would face the dilemma of having to conceal her true political opinions in order to avoid persecution…" (para 56)

In the other case, the tribunal found that the appellant had "not even managed to exclude the possibility that she was a Zanu-PF supporter".

TM – the facts

18. It is instructive to see how the principles were applied to two of the individual cases before the court. The first claimant (*KM*) was disbelieved for much of her evidence. However, it was found that she was a qualified teacher, that she had been involved in "low level political activities" in the UK, but "not to a significant degree", and that she had been able to return to Zimbabwe to visit her family in 2003, 2005 and 2007 without any apparent difficulty. The immigration judge rejected the claim, concluding that she

would "be seen as a former teacher who had not been involved in opposition activity", and that her activities in the United Kingdom, even if noted by the Zimbabwean authorities, would be seen as nothing more than an attempt to enhance an asylum claim.

19. In the Court of Appeal, it was submitted that the judge had failed to apply the guidance in *RN*. The argument was summarised by Elias LJ (para 50):

> "Mr Dove submits that given the positive factual findings made by the judge, the only permissible conclusion in the light of *RN* is that the claim for asylum should succeed. Mr Dove submits that it is not disputed that the appellant fell into a number of the high risk factors - a teacher, a failed asylum seeker from the UK who had spent many years here, and someone with some, albeit limited, anti-government activity *sur place*… Apart from the visits [which had taken place before the changes considered in RN] there was no evidence of any other counterveiling factor which could justify the conclusion that there was no real risk of persecution on return."

20. In this court it was held that the judge's conclusion had "a proper evidential basis" and that he was entitled to conclude that "she did not personally cross the risk threshold". As to the risk to her as a teacher, if stopped by the militia, Elias LJ said:

> "... this factor merely increased the risk of persecution; it did not establish that risk in her case. The judge was entitled to conclude that her status as a teacher had not in fact caused her problems and was unlikely to do so. Moreover, the fact that the appellant had family in Zimbabwe who were apparently of no concern to the authorities lent support to the judge's conclusion that she was not at risk." (para 55)

21. The second claimant, *TM*, was found to be "totally lacking in credibility", except as to "the bare features of her story". These were that she had been a nurse between 1996 and 2001, during which time she may have worked for white farmers, and that she had left in 2001 because she decided she could no longer live safely in Zimbabwe. The tribunal found that in the absence of any credible evidence as to her situation in Zimbabwe, they could not properly find that she would be unable to show loyalty to the regime:

> "There is no credible finding that she or any of the members of her family have been involved in activities in support of the MDC which will be treated as likely to cause the disapproval of Zanu-PF, the regime, the militiamen or anyone else. There is no credible evidence of the family's political activities or harassment following her departure from Zimbabwe. We are left to speculate as to the appellant's political allegiances or those of her family members. She has not, for example, even managed to exclude the possibility that she was a Zanu-PF supporter whilst in Zimbabwe. Into this evidential vacuum, there is no room to create a positive

> case that the appellant will find it difficult to demonstrate loyalty to the regime. This is not a matter for inference. Inferences where possible and necessary arise from a firmly established springboard in the form of a factual matrix made out by credible evidence." (para 42)

22. The tribunal held that her long period of absence from the UK and her absence during the 2008 elections were not sufficient to make up for this "evidential lacuna" (para 46).

23. Elias LJ interpreted this conclusion as a valid application of "*GM* principles":

> "The accepted features of her case statistically put her in an enhanced risk category, but there was no evidence from which the AIT could infer that she personally fell into that category, just as in *GM* the fact that the appellant was a seventeen year old put her statistically in the category of someone who would be likely to have left Eritrea illegally and therefore be at risk, but there was no evidence to place her personally into that category…." (para 74)

TM - summary

24. The ratio of *TM* is to be found in the passage quoted at paragraph 11 above. The decisions on the individual cases are helpful as illustrations of the court's approach, but they remain decisions on the facts rather than separate statements of principle. They show that, in the case of a person who has no significant record of political engagement or activity, application of one of the *RN* heightened risk categories (such as long absence from Zimbabwe, failure to vote in the last elections, or even being a teacher) may not be enough in itself to support the inference that the claimant is himself at risk. The burden remains on him to make good the claim, and, in the absence of credible evidence to make that link, the tribunal is entitled to conclude that the inference is not made out.

First submission - the "pure"* HJ(Iran) *point

25. We have set out Mr Norton-Taylor's summary of his three submissions at paragraph 5 above. The first submission is not, as we understand it, in issue: that is, that as a general proposition a person found to have genuine political beliefs cannot be refused refugee status merely because they have declined to hide those beliefs, or to act "discreetly", in order to avoid persecution. For these purposes, Mr Payne for the Secretary of State did not seek to distinguish between persecution on the grounds of membership of a social group (as in *HJ(Iran)*) and on the grounds of political opinion. Both have comparable status in the definition of "refugee" under the article 1A(2) of the Refugee Convention, and (relevant to this case) the prohibition of *refoulement* under article 33(1):

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his

> life or freedom would be threatened on account of his race, religion, nationality, *membership of a particular social group or political opinion*." (emphasis added)

26. The submission gains specific support from a passage, cited in *HJ(Iran)* by Lord Walker (para 94), from the judgment of Gummow and Haynes JJ in *Appellant S395/2002* (2003) 216 CLR 473:

> "80. If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question…"

27. However, that passage assumes that the claimant does have genuine political beliefs, which he could decide to hide. As Mr Norton-Taylor realistically accepts, this is of little assistance in cases such as the present, in which those concerned have been found neither to possess significant political beliefs nor to have been politically active. If "being discreet" is all that is required to avoid persecution, they have no problem, as they have no reason to be anything else.

Second submission - the extended* HJ(Iran) *point

28. Mr Norton-Taylor therefore relies principally on his second submission: that the same principle applies, even if a person has no genuine political opinions. He cannot be required to profess false loyalty, or dissemble views he does not possess. Even if he would in fact be prepared to lie in order to avoid persecution, that, under *HJ(Iran)* is no answer to his claim, because it would be in effect requiring him to modify his normal behaviour. This is similar to the point left open in *TM*. As presented by Mr Norton-Taylor, the submission seemed to raise two distinct questions:

> i) Apart from *HJ(Iran)*, is it ever relevant for the tribunal of fact to inquire whether a claimant would be willing to lie about his political beliefs in order to avoid threatened persecution?
>
> ii) How is the answer affected by the decision in *HJ(Iran)*?

29. On analysis, the former does not in our view arise as a separate question. Mr Norton-Taylor relied on a line of case-law in the tribunal and this court from well before *HJ(Iran)*, which, he said, supported the general proposition that returnees could not be expected to lie. Indeed, he suggested, it would be morally wrong for a tribunal to base a

decision on such an assumption. He referred as the starting-point to *IK(Turkey)* CG [2004] UKIAT 00312, leading to the so-called "*IK* point". The issue in that case arose in relation to possible questioning by airport police on return to Turkey. Counsel for the Home Office is recorded as stating:

> "The Secretary of State does not suggest (and has never suggested) that Adjudicators should simply proceed on the basis that [an] individual can lie about his background and circumstances. The right approach is to assess what questions are likely to be asked of the individual and what his responses are likely to be."

The tribunal agreed with this approach, but added:

> ".. it will be for an Adjudicator in each case to assess what questions are likely to be asked and how a returnee would respond without being required to lie…" (para 85-6)

Subsequent decisions in the tribunal (including *RN* itself, para 236) have repeated, without discussion, the formula that claimants "are not expected to lie" when questioned by the authorities. The "*IK* point" has also been referred to without criticism or discussion in this court. Thus, for example, in *BK(Congo) v Secretary of State* [2008] EWCA Civ 1322 para 12, the court referred to "the *IK* point", but held that there had been no departure on the facts of the case before it.

30. Although the tribunal in *IK* used the expression "required to lie", it seems to us unlikely that they intended to go beyond the Secretary of State's formulation, with which they had expressly agreed, and they gave no reason for doing so. As so formulated, the proposition does not amount to a distinct point of principle, still less of morality. The question is one of fact: how would the claimant in fact behave, and what would be the consequences? That approach is entirely consistent with the general principle clearly stated by Simon Brown LJ in *Ahmed v SSHD* [2000] INLR 1, at paras 7-8 (quoted with approval by Lord Hope in *HJ(Iran)* para 18):

> "…in all asylum claims there is ultimately a single question to be asked: is there a serious risk that on return the applicant will be persecuted for a Convention reason?...
>
> The critical question is: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."

Conversely, if the tribunal finds that, in spite of, or perhaps because of, his own political indifference, the claimant would find no difficulty in professing loyalty to the regime, and that this would in practice protect him, then (subject to *HJ(Iran)*) there seems no reason in principle why they should not give effect to that conclusion.

31. So the real question is whether the *HJ(Iran)* protection extends to a person who has no firm political views, but might, if stopped by the militia, be willing to express something more positive than political indifference if that were necessary in order to avoid maltreatment.

32. As we have said, Mr Payne accepts that there is no difference in principle between persecution on the grounds, on the one hand, of membership of a particular social group (as in *HJ(Iran)*), and, on the other, of political opinion. However, he relies on a distinction between "core" and "marginal" activities, articulated most clearly by Sir John Dyson JSC (para 113-4). His judgment was largely directed to the reasons for not accepting what he describes as "the prima facie interpretation" (following *Ahmed*), that is that -

> "… if a gay man *would* live discreetly on return and thereby avoid being harmed or persecuted on account of his sexual orientation, he *could not* have a well-founded fear of persecution…" (para 109, emphasis added)

Later he referred to the leading New Zealand case, *Refugee Appeal No 74665/03* [2005] INLR 68, which raised the question whether "the proposed action by the claimant is at the core of the right or at its margins":

> "If the proposed action is at the core of the right and the restriction unlawful, we would agree that the claimant has no duty to avoid the harm by being discreet or complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of 'being persecuted' for the purposes of the Refugee Convention."

Sir John Dyson JSC commented:

> "It is open to question how far the distinction between harmful action at the core of the right and harmful action at its margin is of relevance in cases of persecution on grounds of immutable characteristics such as race and sexual orientation. But it is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion." (para 116-7)

In the majority judgment, Lord Rodger also saw the attractions of such a "human rights framework" to determine the limits of what an individual "is entitled to do and not to do"; but he did not find it necessary to reach a conclusion on this aspect (para 72). We would add that his earlier comments on what was involved in the right of a gay man to live "freely and openly", make it hard to see where he would have drawn the line between "core" and "marginal" actions or activities (para 78).

33. In *TM(Zimbabwe)* Elias LJ referred to this discussion and said:

> "41. On that analysis, there is a good case for saying that where the activity which would create the risk of persecution is the need to deny disloyalty to a political party by someone whose political interests or activities are of marginal interest to their lives, this engages only the margins of their human rights and the AIT would be entitled to conclude that they would in fact be, and could be expected to be, less than frank with the Zimbabwean authorities. They would not be required to modify their beliefs or opinions in any real way. It is one thing for a person to be compelled to deny a crucial aspect of his identity affecting his whole way of life, as in *HJ*. Furthermore, the individual is then forced into a permanent state of denial. The Supreme Court found it unacceptable that someone should have to live a lie in order to avoid persecution. It does not necessarily follow that in no circumstances can someone be expected to tell a lie to avoid that consequence."

As already noted, Elias LJ did not feel it necessary to reach a conclusion, because the cases failed on the facts; the appellants had failed to show that they would in fact need to lie in order to profess loyalty to the regime.

34. Mr Payne, relying on these dicta, argues that in considering the consequences of any course of action adopted in response to a threat of persecution, it is relevant to consider whether it "goes to the core of an applicant's identity". On the one hand, to expect a fundamental change to behaviour in relation to the protected right is incompatible with the purposes of the Convention; but, he submits:

> "By contrast, the same considerations do not arise in relation to an applicant who has not established that the protected right is central to his identity. It cannot, for example, be said that an applicant who holds no political opinion, but who decides to profess support for a particular regime in order to avoid persecution, is either having to make a fundamental change to his behaviour, or having to renounce holding a protected right in order to avoid persecution. This is particularly so where, in contrast to the situation considered in *HJ(Iran)*, such an applicant only faces a real risk of occasionally having to provide such an assurance of loyalty (as opposed to living a life involving a complete denial of a fundamental protected right).
>
> … the degree of political involvement, and consequent impact of any restrictions of freedom of political expression, must be assessed specifically in the context of each individual appeal. There must be a difference between the human rights violation suffered by (eg) a committed political activist who cannot organise or join in a demonstration for fear of police brutality, and a person who takes steps to avoid that area because he has no

> wish to be caught up in violence and only has a mild interest in the demonstration. The "actions" of the two individuals are of a completely different order. On one level, the right which the Convention is being asked to uphold, in both cases, is the right to freedom of political expression. But for one person, it forms a core part of their identity; for another, it plays only a marginal role."

35. In the present cases, whether or not the point was properly raised at the earlier stages, we think we should grapple with it, since it is of considerable practical importance to many people in a similar position to that of the appellants. As we understand it, neither party objects to us doing so. Although we do not find the point an easy one, we have concluded that the distinction suggested by Elias LJ, and developed in Mr Payne's submissions, is not valid, nor supported by a proper reading of Sir John Dyson's comments.

36. It may be said that there is marked difference in seriousness between the impact of having to lie on isolated occasions about political opinions which one does not have, and the "long-term deliberate concealment" of an "immutable characteristic", involving denial to the members of the group their "fundamental right to be what they are" (see per Lord Hope para 11, 21). We are not persuaded, however, that this is a material distinction in this context. The question is not the seriousness of the prospective maltreatment (which is not in issue) but the reason for it. If the reason is political opinion, or imputed political opinion, that is enough to bring it within the Convention. In this case, we are concerned with the "imputed" political opinions of those concerned, not their actual opinions (see para 4 above). Accordingly, the degree of their political commitment in fact, and whether political activity is of central or marginal importance to their lives, are beside the point. The "core" of the protected right is the right not to be persecuted for holding political views which they do not have. There is nothing "marginal" about the risk of being stopped by militia and persecuted because of that. If they are forced to lie about their absence of political beliefs, solely in order to avoid persecution, that seems to us to be covered by the *HJ(Iran)* principle, and does not defeat their claims to asylum.

37. Accordingly we accept the thrust of Mr Norton-Taylor's second submission, if not the precise wording. It is not a question of what the claimant is "required" to do. However, if the tribunal finds that he or she would be willing to lie about political beliefs, or about the absence of political beliefs, but that the reason for lying is to avoid persecution, that does not defeat the claim.

38. We should add that, even if this is wrong, it does not necessarily provide a sufficient answer under the guidance in *RN*. Even if it is found that the appellants would be prepared to lie, the question then arises whether they can "prove" their loyalty to the regime. That is not an issue which arose for consideration in *HJ(Iran).* It is true that the onus is on them to satisfy the tribunal that they would be unable to prove their loyalty. As has been seen, failure to do so seems to have been the basis on which this court was able to dismiss the appeals in *TM*. However, that issue can only be addressed by reference to the findings in each case.

Third submission - incorrect application of* RN *to the facts

39. Finally we turn to Mr Norton-Taylor's case on the various judges' treatment of the facts, having regard to the guidance in *RN*. We will summarise the facts of the four cases, and the judges' conclusions on them, but in the light of the foregoing discussion, our own conclusions can be briefly stated.

RT

40. She was born in 1981. She left Zimbabwe legally in February 2002 and arrived in the UK shortly thereafter. She began work for a family as a nanny. In 2005 she was refused leave to remain as a student. In February 2009, she claimed asylum, which was refused. The appeal was eventually determined against her by DIJ Manuell on 2nd March 2010.

41. The judge found that she was a credible witness. She had never been politically active in Zimbabwe or the UK. Her family lived in an area described as an MDC stronghold, but had never suffered harm at the hands of Zanu-PF. Her claim was based on a subjective fear of return to Zimbabwe. Her brother had claimed asylum in South Africa and his claim remained unresolved. The judge concluded:

> "The mere fact of the Appellant's long absence from Zimbabwe is not likely to expose her to a real risk of persecution, as opposed to the possible nuisance of being pestered for small bribes as is said to happen sometimes to those who have returned from abroad. She is in a position to explain that she has never been politically involved at home or abroad, should anyone see fit to enquire. As to the suggestion that claiming asylum would of itself be seen as an act of disloyalty, she can explain that she claimed asylum simply in the hope of avoiding removal from the United Kingdom, which the Upper Tribunal considers a true statement. The Upper Tribunal finds that any risk of persecution which the Appellant faces on return to Zimbabwe is less than a real risk. The asylum appeal must be dismissed." (para 25)

42. Although this reasoning would be unimpeachable in most contexts, it does not address the critical issue raised by *RN*. It is not enough that she would be able to "explain" her lack of political activity abroad. The question is whether she would be forced to lie in order to profess loyalty to the regime, and whether she could prove it. Since she was found to be generally credible, there is no other reason to hold that she has failed to prove her case. We would allow her appeal, and hold that her claim should have been upheld.

SM

43. She was born in 1982. She left Zimbabwe for the UK in April 2008 using a passport

issued in another name, and claimed asylum on arrival. Following the refusal in November in November 2008, the appeal was eventually determined against her by IJ Charlton-Brown on 4th November 2009.

44. The judge did not find her a credible witness. She had been out of Zimbabwe for some 17 months as at the date of hearing. She had no connections to the MDC, whether in Zimbabwe or the UK. Her mother was recognised as a refugee in the UK in or around 2003. She had lived in Zimbabwe without problems between 2002, when her mother left, and 2008. It was unclear where she had resided prior to her departure from Zimbabwe.

45. On the issue of loyalty to the regime, the judge said:

> "Finally, in terms of whether or not this appellant can demonstrate positive support for/loyalty to ZANU-PF, it seems clear that she herself has not been linked with the MDC as she has claimed, given her lack of credibility throughout. As previously stated she appears to have been able to live in Zimbabwe without problems since her mother left the country in 2002 and quite frankly, given this individual's complete lack of credibility and indeed her inclination to lie as and when required, as the original Immigration Judge pointed out, no doubt she would be prepared to lie again in the future to the authorities on return to Zimbabwe about any political affiliation she might have." (para 23)

46. At first sight this is a much less meritorious case, and one can understand the judge's reaction to her failure to give credible evidence. However, it was not enough to hold that she would be willing to lie "as and when required", if the reason for doing so would be to avoid persecution. Nor is willingness to lie the same as ability to prove loyalty to the regime. On the other hand, in view of her lack of credibility overall, it remains open to question whether her case should fail for lack of proof as in *TM*. We will therefore allow the appeal and remit the case to the Upper Tribunal for redetermination.

DM

47. He was born in 1975, and his wife in 1977. They had a child, born in December 2008. The wife had arrived in the UK in 2002, with leave as a visitor and then as student. DM arrived a year later, initially as a visitor and then as a dependant of his wife. Both overstayed their period of leave. DM claimed asylum in July 2008. His appeal was initially successful, but following an order for reconsideration was determined against him by a panel of the AIT on 24th November 2009.

48. He was not found to be a credible witness. His father, who was still alive had worked for the Zimbabwean CIO for ten years, and both his parents were life-long Zanu-PF supporters. The authorities had not been looking for the Appellant whilst he was in

Zimbabwe. He had left the country on his own passport and without difficulties. He had joined the MDC in the UK in early 2008 but the tribunal found that his activities would not have brought him to the attention of the authorities.

> "In the circumstances, since we do not find that the Appellant's father was killed as claimed, or that he is dead, we note that both he and the Appellant's mother were members or supporters of Zanu-PF. We note that the other aspects of the Appellant's claim were rejected by Immigration Judge Price, and since we have found the Appellant not to be a credible witness, it follows that we agree with the conclusions reached by that Immigration Judge. We also bear in mind what was said by the Tribunal in RN, particularly Paragraph 246, where it was said that,
>
> > "An Appellant who has been found not to be a witness of truth in respect of the factual basis of his claim will not be assumed to be truthful about his inability to demonstrate loyalty to the regime simply because he asserts that. The burden remains on the Appellant throughout to establish the facts up which he seeks to rely".
>
> Since we find that the Appellant's father and mother were supporters of Zanu-PF, and had been over apparently many years, we can find nothing to indicate that the Appellant and his dependants would be unable to demonstrate loyalty to Zanu-PF if they were returned to Zimbabwe. In these circumstances, it follows that we dismiss the appeal on asylum grounds." (para 17)

49. In this case, the tribunal has in terms addressed the issue whether the appellant would be able to demonstrate loyalty to the regime. Given the finding that his father and mother were long-terms supporters of the regime, it cannot be said to be an irrational conclusion. The case was certainly no stronger than those rejected in *TM*. We see no grounds for overturning this decision.

AM

50. He was born in 1966. He left Zimbabwe for the UK in February 2001 with leave to enter as a visitor. He remained with leave as a student until November 2007. In April 2009 he claimed asylum. His appeal was eventually determined against him by DIJ Shaerf on 23rd March 2010.

51. He was not found to be a credible witness. He had no political profile prior to his departure from Zimbabwe. He had attended vigils outside the Zimbabwean Embassy in London and photographs of these attendances were placed on the internet. There was no evidence of persons in the photographs being identifiable. His engagement with the organisation ROHR was relatively limited. He could account for his absence from Zimbabwe by reference to his studies in the UK and the breakdown of his marriage whilst he was here. He had returned without difficulty to Zimbabwe in 2003.

> "On the Appellant's own evidence he was not politically engaged before he left Zimbabwe...
>
> Looking at the evidence in the round, I do not find the Appellant has shown even to the lower standard that he is likely to be at risk of persecution or ill-treatment on account of his political opinions or imputed political opinions whether on arrival at port or subsequently in his home area or elsewhere in Zimbabwe. He will be able to account for his absence by reference to the studies he has pursued and the break-down of his marriage…" (para 47, 49)

52. As in the first case, the issue was not simply whether the appellant could "account for" his absence in the UK. The judge failed to address the issue as to his ability to show his loyalty to the regime. Unlike *RT*, he has not been held to be a credible witness. Accordingly, as in the case of *SM*, we do not feel able to substitute our own conclusion on this issue. We will therefore allow the appeal and remit the case to the Upper Tribunal.

Conclusion

53. The problems posed by these cases are extreme. None of the appellants is a political refugee in the ordinary sense. In most contexts their claims to asylum would be hopeless. However, conditions in Zimbabwe, as they are described in *RN* are exceptional. The legality of these decisions must be decided by reference to the guidance in that case. Any changes since the period covered by that decision will be considered by the tribunal as part of its review of the country guidance. Applying *RN* we are satisfied that the appeals, except *DM*, should be allowed. Mr Norton-Taylor invited us to substitute our own decision in all or at least some of them. For the reasons given above, we agree in respect of *RT*, in which the claim to asylum will be allowed. We are not persuaded that course is open to us in the cases of *SM* and *AM*, where there were adverse findings of credibility. We shall accordingly remit those cases to the Upper Tribunal.