ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

14 April 2009

Jacqui Smith MP
Home Secretary
2 Marsham Street
London SW1P 4DF

Dear Home Secretary

Thank you for your letter of 3rd February 2009 responding to my letter of 5th December 2008 about reviewing cases in light of the new Country Guidance on Zimbabwe in *RN*.

You confirmed in that letter that you accepted the new Country Guidance. However, ILPA has received an undated letter addressed to stakeholders from the Chief Executive of UKBA, Lin Homer, circulated by email on 24th March 2009. It is accompanied by a new 'Operational Guidance Note' (OGN) and gives notice of your advice to officials no longer to comply with the new Country Guidance.

The justification offered is that "the *RN* determination took place against the backdrop of widespread and indiscriminate political violence that attended the Zimbabwean presidential elections last summer" which has not been repeated since then.

ILPA is deeply concerned that this displays either a cavalier approach to Country Guidance or a failure to understand the Country Guidance.

The Tribunal concluded in November 2008 that "there can be no doubt at all" as to the risk category they identified (see attached summary, para 3). Its consideration of the issues included an additional hearing on 30th October 2008 to enable you to present your argument that the general risk was restricted to summer 2008. Your argument was rejected.

It was open for you to appeal against the rejection of your case in this regard. You did not do so and expressly confirmed your acceptance of the Country Guidance in your letter of 3rd February 2009. The limited circumstances in which it is lawful to depart from Country Guidance are well established. Your officials have identified no change of circumstance since November 2008 which could provide a legal basis for failing to comply with *RN*.

You further represented to stakeholders and the Court of Appeal in January, February and March 2009 that you accepted the Country Guidance. Indeed, you persuaded the Court of Appeal to reject a challenge to the previous 2007 Country Guidance in March 2009 without consideration of the merits based on

a commitment given to the Court that you would reconsider cases in light of *RN*. That was less than a fortnight before you announced that you would not comply with *RN*. This leads to serious concern about whether the Court and the parties were misled - it is doubtful that any change of circumstance occurred in less than a fortnight which could justify your conduct.

Your new stance will lead to further delay and unnecessary appeals for claimants who have already been in limbo for an unacceptable period and who will have to appeal to the AIT in order to obtain a decision in accordance with the current Country Guidance. ILPA considers this unreasonable.

Statements in 2009 that you would comply with *RN*

In my letter to you of 5th December 2008, I said that:

> **We were informed yesterday that the Treasury Solicitor has confirmed that the Home Secretary will not appeal against the Asylum and Immigration Tribunal (AIT)'s new Zimbabwean Country Guidance determination, *RN (Returnees) Zimbabwe* CG [2008] UKAIT 83.**
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> **This effectively concludes three and a half years of continuous litigation about the risk of returning Zimbabwean asylum seekers. While the Home Office has undertaken to the courts to suspend returns since July 2005, very many Zimbabwean asylum seekers have been left in limbo as a result of their cases being stayed.**
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> **Whereas previously, the Home Office has argued that the issue is primarily about those who are deported and handed over to the security forces, the important change in the AIT's Country Guidance relates to the risk inside Zimbabwe, whether or not a someone returns voluntarily and whether they return to their home or seek refuge in a different part of Zimbabwe.**
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> **The AIT has held that:**
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> > **'258. 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.'**
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> **Those Zimbabweans who have been left in limbo in the UK will be in an especially difficult position. Unlike people travelling to the UK now, they have lived in the UK for many years. The AIT observed that "such a person is in general reasonably likely to be assumed to be a supporter of the MDC and so, therefore, someone who is unlikely to vote for or support the ruling party, unless he is able to demonstrate the loyalty to Zanu-PF or other alignment with the regime that would negate such an**

assumption." (para 259) See also para 231 where the Tribunal held that:

> **'having made an unsuccessful asylum claim in the United Kingdom will make it very difficult for the returnee to demonstrate the loyalty to the regime and the ruling party necessary to avoid the risk of serious harm at the hands of the War Veterans or militias that are likely to be encountered either on the way to the home area or after having returned there. This is because, even if such a person is not returning to one of the areas where risk arises simply from being resident there, he will be unable to demonstrate that he voted for Zanu-PF and so he may be assumed to be a supporter of the opposition, that being sufficient to give rise to a real risk of being subjected to ill-treatment such as to infringe article 3.'**

The AIT rejected submissions by the Home Office that now was not the right time to conclude the litigation and give 'Country Guidance'. On the contrary, it held that 'the events of 2008 demand an authoritative assessment from the Tribunal in the form of country guidance' (paragraph 33) It observed that while some international intervention or 'unforeseen upheaval', for example 'giving the MDC real control of the police' may occur in the future justifying departure from the Court Guidance, at present: 'we do not see that there can be said to be an end in sight to the real risk of violence being perpetrated on those identified as disloyal to the regime and therefore as potential supporters of the MDC.' (para. 220)

Given that you have decided to accept this decision, we call on you to respect it and to deal promptly with all those previously in limbo who are now confirmed as refugees. We remind you that the Immigration Rules require the issue of a residence permit as a refugee to those who qualify for asylum, a requirement reflecting the UK's obligations under the EU asylum Qualification Directive (Council Directive 2004/83/EC of 29 April 2004).

Those Zimbabwean asylum seekers who can nevertheless return safely because they can 'demonstrate allegiance to or association with the Zimbabwean regime' must be identified on an individual factual basis.

However, there are thousands of limbo cases where an individual factual assessment of the asylum seeker's history has already been carried out and from which it will be easy to check whether the facts found indicate that the person will be in a position to demonstrate allegiance/ association with the regime.

Investigations by our members reveal that an extraordinary 1000 or so cases are presently stacked up in the High Court and Court of Appeal alone. There are of course many more pending in the

AIT. It is regrettably common in this jurisdiction for the Home Office to litigate genuine asylum cases only to concede at the full hearing. Not does this pile more human misery on those already left in limbo for years, but it clogs up the courts and wastes public money which could be far better spent on the asylum system.

We therefore call on you to ensure that there is an immediate review of all Zimbabwean cases currently before the courts, starting with those who have already had a factual assessment by an immigration judge and to whom the *RN* guidance can easily be applied.

In your response of 3rd February 2009, you observed that "The Tribunal [in *RN*] have refined what they believe are the current risk factors [for Zimbabwean asylum seekers]." You confirmed that "We have accepted their findings and have issued new guidance to caseworkers." Similar assurances were given in other correspondence and other fora.

Four days prior to your letter, on 29th January 2009, Andrew Elliot, the Deputy Director of Operational Policy wrote to ILPA giving further details of how you would consider Zimbabwean cases following the Tribunal's country guidance in *RN* in response to ILPA's requests. He also observed that the Tribunal had "refined what they believe to be the current risk factors". He announced that:

Accepting the Tribunal's findings [in *RN*], we have now revised our guidance on how Zimbabwean claims are to be considered and have, exceptionally, started a review of all outstanding Zimbabwean asylum cases which have not yet been concluded.

... The review will be conducted across our business by case-owners and presenting officers, depending on where cases are currently held within the asylum system. Everyone reviewing cases will be doing so using exactly the same guidance... In cases where we believe that the applicant should benefit from the new guidance we will withdraw our original decision and grant leave to remain...

Due to the particular circumstances of the last few years there are many unresolved Zimbabwean cases which we need to process... Working our way through these cases will take some time though we are working to complete this as soon as possible.

Mr Elliot stated that "We recognise that at the point we changed our policy position in response to the Tribunal's findings in *RN* that many cases were in the appeals system." As to cases in the Court of Appeal and the Court of Session, he stated that you will be withdrawing the immigration decision so as to enable you to take a fresh decision in light of *RN.* He explained that this course was being adopted because the Court of Appeal "will not be able to look at the question of whether the decision remains valid in the light of the new country guidance case".

He said that you recognised that the review of the "several hundred" appeals before the AIT in light of *RN* may lead to cases being conceded shortly before the substantive hearing.
He explained that you have considered addressing this problem by withdrawing the immigration decisions in appeals before the AIT prior to reconsidering in light of *RN*. You concluded that this would be a slower and more expensive way of reviewing cases in light of *RN*.
All this confirms that developments since the determination in November 2008 were not thought in January or February 2009 to justify failing to comply with *RN*.

The policy set out in Mr Elliot's letter in relation to cases stayed in the Court of Appeal was considered at a hearing on 11th March 2009 in *HS*, the lead case in the Court of Appeal (and the previous Country Guidance from 2007).

HS rejected your request to withdraw her appeal on the basis that a fresh immigration decision would be made in light of *RN*. She argued this would delay reconsideration and that the best way to obtain a prompt reconsideration in light of *RN* would be to agree a remittal to the AIT.

You opposed this course and argued that permission should be refused without consideration of the merits on the basis that the withdrawal of the immigration decision permitted a more expeditious reconsideration in light of *RN*.

The Court of Appeal listed the matter for hearing on 11th March 2009. You stated that you would not begin to reconsider the case in light of *RN* until the appeal was disposed of and on 10th March 2009, the day before the hearing, you formally withdrew the immigration decision.

Your position as set out in the form of consent that you submitted to the Court of Appeal was that you undertook "to reconsider the Appellant's circumstances in light of the new country guidance determination".

The judgment of the Court of 11th March 2009 was explained by the Court of Appeal in a "standard letter" issued by the Court the following week in the many Zimbabwean appeals stayed behind *HS*.

The Court of Appeal explained in the letter that HS had refused to consent to your position that "the application should be withdrawn on the basis that the SSHD agreed to make a fresh decision in the light of the new country guidance in *RN*" and further objected to your request for six months to reach that decision. The Court accepted your offer. The standard letter states that

> **The Court held that there was no point now deciding whether there had been a material error of law given that the country guidance in HS had been superseded in RN. The renewed application in HS was refused not on the merits but to enable the fresh decision making process to take place, this being considered to be the most reasonable and practical of the courses proposed. The timetable of 6 months which the SSHD proposed did not militate against it.**

The Court indicated that cases stayed behind *HS* in which the appellant did not accept your proposal would be decided by the Court in light of its determination in *HS*.

The Court of Appeal was persuaded to dismiss the lead Zimbabwean appeal without consideration of the merits because it was persuaded that your undertaking to make a new decision "in the light of the new country guidance in RN" within six months was "the most reasonable and practical of the courses proposed". It was for that reason that it declined to reach a decision on the legal challenge to the previous Country Guidance given in 2007.
You gave no indication whatsoever to the Court of Appeal or the other side that instead, you would announce less than a fortnight thereafter that you would not in fact comply with the new Country Guidance in reaching your decision.

There was plainly nothing that occurred in the intervening days that could justify reneging on your agreement. Had you told the Court and the other side that you had no intention of reconsidering in accordance with the Country Guidance, this would have been at least highly relevant in consider whether the lead case should proceed.

<u>The law as to the authoritative status of Country Guidance</u>

The authoritative status of County Guidance is provided for in s.107(3) of the Nationality, Immigration and Asylum Act 2002 and the related Practice Direction to the effect that

> **unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, ... a country guidance case is authoritative in any subsequent appeal, so far as that appeal: (a) relates to the country guidance issue in question; and (b) depends upon the same or similar evidence.**

The authoritative nature of Country Guidance is now well known and has been confirmed repeatedly by the higher courts. The Court of Appeal has described it as an application of "the fundamental principle of justice which requires that people should be treated equally and like cases treated alike." It permits for an authoritative view to be taken on countries and issues upon which rational decision makers might otherwise reasonably disagree. In *SI (Ethiopia)* [2007] UKAIT 00012, the Tribunal summarised the position as follows:

> **21... [A] a country guidance case should continue to be treated as an authoritative finding on the country guidance issue(s) identified until it is removed from the AIT website list of CG cases. If a case remains on the website as a CG case, it continues to furnish country guidance unless a later case expressly supersedes or replaces it as CG. That does not, however, prevent that case not being followed on a relevant issue if, in the context of a particular case, there is fresh evidence compelling a different view, albeit "[t]he wider the risk category posited the greater the**

> **duty on an Immigration Judge to give careful reasons [for not following a CG case] based on an adequate body of evidence" (*MK (AB & DM confirmed)* Democratic Republic of Congo CG [2006] UKAIT 00001).**

In *MK*, the case referred to in the above passage, the Tribunal established that

> **Very clear and cogent reasons have to be given for departing from country guidance on an issue which, by its very nature, requires consideration in the context of comprehensive evidence and argument.**

While the immigration judge in that case had relied on fresh evidence on the basis of which he concluded he was entitled to regard the Country Guidance as out of date, the Tribunal emphasised that the fresh evidence must be 'dissimilar' from that which was available to the Tribunal whereas the fresh evidence relied on by the judge of reports of ill-treatment of returnees was not dissimilar to evidence which had been considered in the Country Guidance.

It warned against refusing to follow current Country Guidance which had been based on a comprehensive assessment including evidence from leading experts based simply on the basis that reports had been published since. It said that:

> **to approach the reversal of Country Guidance in so cavalier a fashion undermines the purpose and validity of Country Guidance as endorsed by the Court of Appeal in *R (Iran)* [2005] EWCA Civ 982. The AIT Practice Directions make clear what an Immigration Judge needs to do if he is minded to depart from existing country guidance. The wider the risk category posited the greater the duty on an Immigration Judge to give careful reasons based on an adequate body of evidence.**

The Court of Appeal has also emphasised that the AIT's authoritative role in issuing Country Guidance on the facts must be respected and has also warned judges against failing to comply with Country Guidance on the basis of limited evidence (*Madan* [2007] EWCA Civ 770).

Where the issue is covered by current authoritative Country Guidance, as published on the AIT's website, it must be followed unless it is shown not simply that some reports have been published since the Country Guidance but that that the fresh evidence is 'dissimilar' from the evidence available to the Tribunal and compels a different conclusion.

<u>Whether you have established a lawful basis to decline to comply with the Country Guidance</u>

As indicated, the letter from Ms Homer suggested that *RN* was concerned with risk in the summer of 2008. Your new guidance also argues that

> **3.6.14 In the period immediately before the AIT heard the country guidance case of RN, there was already evidence that the very**

high levels of political violence that were seen in the period between the first and second presidential polls had abated. This is still the case up to the present. Human rights abuses continue at levels broadly comparable to those which have existed in Zimbabwe for the past several years outside periods of heightened tension such as at election times.

Consistently with that, you relied at the first hearings of *RN* in September 2008 upon the proposition that violence had dropped since the summer. Mindful of the fact that it was giving guidance which would be authoritative for the future, the Tribunal arranged for further evidence to be considered on 30th October where you again relied on the fact that violence had not continued at the same level as in the summer to argue for restrictive risk categories to be identified.

I attach a summary of the relevant Country Guidance in *RN*. While the AIT considered that it should not be assumed that Zimbabwean asylum seekers were not aligned with Zanu-PF and this should be determined as a matter of fact in the individual case, where this was found as a fact, then the risk arose not from the formal organs of the state but local militia in respect of whom having sought asylum in the UK would be an aggravating factor.

The Tribunal was not reliant simply on publicly available reports but observed that it had available to it the evidence of experts and senior figures within Zimbabwe (many of whom the Tribunal protected by orders under the Contempt of Court Act prohibiting publication of their identity) both as to the factual position on the ground and expert and informed opinion which the Tribunal for the most part accepted (see eg paras 30-31, 88, 112, 118). It concluded that public reports were an unreliable guide to the level of risk from local militia.

It observed that some upheaval at the level of "giving the MDC real control of the police" may occur in the future justifying changing the Country Guidance but your officials have presented no evidence, nor have they even claimed that there has been any such significant change of circumstance since November 2008 or, a fortiori, since January, February and March 2009 when you presented to the Court of Appeal your agreement to reconsider cases in light of *RN*.

Your decision to accept *RN* appeared to reflect your acceptance that there was no arguable error of law in the determination and its comprehensive assessment on the facts was final notwithstanding that it rejected your repeated submissions that there was no future risk to returnees given that the election violence had not continued at the same level after summer 2008.

That your change of policy amounts to no more than disagreement with the Country Guidance rather than a significant change of circumstances in the country or origin is demonstrated by your failure to point to any dissimilar evidence.

Your OGN has been established as ‘certainly nothing more than ...

submissions and are the Respondent's view(s) on issues only' (*LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka* CG [2007] UKAIT 76, para 70).

Indeed, you have consistently opposed the OGNs being reviewed by the Advisory Panel on Country Information on the basis that they were not country of origin information but rather policy documents and the country of origin information in those documents was selected to support policy and did not purport to be a balanced factual assessment.

Members report that your presenting officers have presented nothing more to immigration judges since 24th March than the OGN and your latest Country of Origin Information Report which plainly does not constitute evidence dissimilar from that which was available when the Country Guidance was given in November and does not show a significant change of circumstances since November. It merely observes that actual violence dropped after the summer of 2008, the fact that formed the centrepiece of your submissions in *R*N which the Tribunal rejected.

You are entitled to disagree and you were entitled to appeal but you accepted the Country Guidance and persuaded the Court of Appeal last month to dismiss cases challenging the previous Country Guidance on the basis of your undertaking to reconsider on the basis of the current Country Guidance.

I hope you will reconsider your stance as a matter of urgency and comply with the Country Guidance.

Yours sincerely

Sophie Barrett-Brown
Chair, ILPA