Trinity Term
[2012] UKSC 38
On appeal from: [2010] EWCA Civ 1285; [2011] EWCA Civ 275

JUDGMENT

RT (Zimbabwe) and others (Respondents) *v* Secretary of State for the Home Department (Appellant)

KM (Zimbabwe) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lady Hale
Lord Kerr
Lord Clarke
Lord Dyson
Lord Wilson
Lord Reed

JUDGMENT GIVEN ON

25 July 2012

Heard on 18 and 19 June 2012

Appellant
Jonathan Swift QC
Charles Bourne
Paul Greatorex
(Instructed by Treasury Solicitors)

Respondents
Raza Husain QC
Hugo Norton-Taylor

(Instructed by Luqmani Thompson & Partners; Wilson Solicitors LLP)

Appellant
Ian Dove QC
Abid Mahmood
Nazmun Ismail
(Instructed by Blakemores Solicitors)

Respondent
Jonathan Swift QC
Charles Bourne
Paul Greatorex
(Instructed by Treasury Solicitors)

Intervener (United Nations High Commissioner for Refugees)
Michael Fordham QC
Naina Patel
(Instructed by Baker & McKenzie LLP)

LORD DYSON (WITH WHOM LORD HOPE, LADY HALE, LORD CLARKE, LORD WILSON AND LORD REED AGREE)

1. Is it an answer to a refugee claim by an individual who has no political views and who therefore does not support the persecutory regime in his home country to say that he would lie and feign loyalty to that regime in order to avoid the persecutory ill-treatment to which he would otherwise be subjected? This is the question of general importance that arises in these appeals which are a sequel to the decision of this court in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596. In that case, it was held that a gay man was entitled to live freely and openly in accordance with his sexual identity under the Refugee Convention ("the Convention") and it was no answer to the claim for asylum that he would conceal his sexual identity in order to avoid the persecution that would follow if he did not do so. I shall refer to this as "the *HJ (Iran)* principle".

2. These cases fall to be decided in the light of the latest country guidance for Zimbabwe which is to be found in the decision of the Asylum and Immigration Tribunal ("AIT") in *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083 to which I shall have to refer in more detail later. At this stage, it is sufficient to refer to para 216:

> "This campaign [of persecution] has been rolled out across the country not by disciplined state forces but by the loose collection of undisciplined militias who have delivered a quite astonishingly brutal wave of violence to whole communities thought to bear responsibility for the 'wrong' outcome of the March 2008 poll. It is precisely because of that that any attempt to target specifically those who have chosen to involve themselves with the [Movement for Democratic Change ('MDC')] has been abandoned. In our view, there can be no doubt at all from the evidence now before the Tribunal that those at risk are not simply those who are seen to be supporters of the MDC but anyone who cannot demonstrate positive support for Zanu-PF or alignment with the regime."

3. We were referred to the new country guidance issued by the Upper Tribunal in *EM and Others (Returnees) Zimbabwe CG* [2011] UKUT 98 (IAC) which states that the situation in Zimbabwe has significantly changed. But this decision was quashed by the Court of Appeal on 13 June 2012. It is common ground that it is not material to the present appeals.

The facts

4. RT was born on 28 May 1981. She left Zimbabwe legally in February 2002 and arrived in the United Kingdom on 2 March 2002. She was given leave to enter for six months and began to work for a family as a nanny. She overstayed her leave. In 2005, she was refused leave to remain as a student. On 16 February 2009, she claimed asylum. The claim was refused by the Secretary of State and her appeal to the AIT was dismissed on 1 July 2009. IJ Hussain found that she would be able to take any positive steps necessary to show her loyalty to the regime and that there was no real risk of her being subject to ill-treatment on return.

5. Reconsideration was ordered on 8 December 2009. On the reconsideration, RT's appeal was dismissed by the Upper Tribunal on 2 March 2010. DIJ Manuell found that she was a credible witness and that she had never been politically active in Zimbabwe or in the United Kingdom. At para 25 he gave his reasons for concluding that she did not have a well-founded fear of persecution on a Convention ground. Of particular relevance is the finding that she was "in a position to explain that she has never been politically involved at home or abroad, should anyone see fit to enquire".

6. SM was born on 26 September 1982. She left Zimbabwe in April 2008 using a passport issued in another name and claimed asylum in the United Kingdom on 1 May 2008. Following refusal of her claim in November 2008, she appealed to the AIT. Her appeal was dismissed on 29 January 2009. IJ Lawrence found that she was not a credible witness, had given inconsistent accounts of her involvement with the MDC and had lied in a number of other respects. On 17 June 2009, reconsideration was ordered on the single issue of whether SM would be at risk on return in view of the decision in *RN*. Her appeal was dismissed by IJ Charlton-Brown on 3 November 2009. She too found that SM was not a credible witness. She said that SM had no connections with the MDC and that, although her mother had left Zimbabwe in 2002 and had been recognised as a refugee in 2003, she had not had difficulties living in Zimbabwe between 2002 and 2008. On the issue of loyalty to the regime, she said at para 23:

> "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."

7. AM was born on 16 November 1966. He left Zimbabwe and arrived in the United Kingdom on 25 February 2001 with leave to enter as a visitor. He remained with leave as a student until 30 November 2007. He claimed asylum on 28 April 2009. This was refused. His appeal was dismissed by the AIT on 15 September 2009 and dismissed again (following reconsideration) on 23 March 2010. DIJ Shaerf did not find AM to be a credible witness. Although he was "in favour of the MDC" (para 46), AM had no political profile and was not "politically engaged" prior to his departure from Zimbabwe (para 47). He would be able to account for his absence from Zimbabwe by reference to his studies in the United Kingdom and the breakdown of his marriage whilst he was here. He had returned to Zimbabwe in 2003 without difficulty.

8. RT, SM and AM all appealed to the Court of Appeal. The judgment of the court was given by Carnwath LJ: [2010] EWCA Civ 1285; [2011] Imm AR 259. Their appeals were allowed. The court said at para 36 that if individuals 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". In the case of RT, the court said (para 42) that the Upper Tribunal did not address the critical issue raised by *RN* since:

> "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."

The court allowed RT's appeal and upheld RT's asylum claim.

9. As for SM, at para 46 the court said of para 23 of the decision of the AIT that:

> "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 (Zimbabwe) v Secretary of State for the Home Department* [2010] EWCA Civ 916]. We will

therefore allow the appeal and remit the case to the Upper Tribunal for redetermination."

10. In relation to AM, the court said at para 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."

11. The Secretary of State seeks an order that the decisions of the Tribunal should be restored in all three cases, alternatively that the claims should be remitted for further consideration of the sole issue of whether each claimant would be able to prove loyalty to the regime.

12. KM was born on 5 March 1957. He left Zimbabwe legally and claimed to have arrived in the United Kingdom in January 2003 on a false South African passport. He was given six months' leave to enter as a visitor. He claimed asylum on 20 August 2008 and his claim was refused by the Secretary of State. His appeal was dismissed by the AIT on 1 April 2009. A fact of central importance was that his son had been granted asylum in the United Kingdom because he had a well-founded fear of persecution in Zimbabwe on the grounds that he was a sympathiser of the MDC. IJ Parkes concluded that KM and his son (on whose evidence he relied) were not reliable witnesses with regard to events in Zimbabwe and that KM could not demonstrate an inability to show loyalty to the regime. On 11 August 2009, Hickinbottom J ordered reconsideration. The appeal was dismissed on reconsideration on 23 October 2009. SIJ Latter said at para 18:

> "In the light of the judge's findings of fact I am not satisfied that the appellant established any adequate factual basis to support his claim that he would be at real risk of finding himself in a position where he would be unable to demonstrate loyalty to the regime. The judge found that the appellant had no profile in Zimbabwe and had not been involved in MDC activities. There was no reasonable degree of likelihood that the grant of status to his son would be known to those who might call upon him to show loyalty and he also failed to establish any serious possibility of finding himself in a position that such a call would now be made on him. Finally, he failed to show

> that his background, his profile or his beliefs were such that he would not be able to demonstrate loyalty."

13. The Court of Appeal allowed his appeal and remitted the case to the Upper Tribunal. The leading judgment was given by Pill LJ: [2011] EWCA Civ 275. The Secretary of State accepted that the appeal should be allowed by the Court of Appeal because it was arguable that the Tribunal had failed to give adequate consideration to the assessment of risk in the light of the guidance in *RN*. The issue between the parties was whether there should be a remittal to the Tribunal (as the Secretary of State contended) or the appeal should be allowed outright (as the appellant contended). It was conceded by the Secretary of State that there was a real risk that "the appellant's son having obtained asylum because of his MDC's sympathies would come out on the appellant's return" (para 6 of Pill LJ's judgment); and that the fact that KM's son had been granted asylum "may place the appellant in an enhanced risk category by making it more difficult for him to demonstrate his loyalty to the regime" (para 12).

14. The primary submission of the Secretary of State to the Court of Appeal was that there should be a further opportunity to examine the circumstances of return, for example, the area to which KM would return and whether he was a person who would be returning to a *milieu* where loyalty to the regime would be assumed (para 13). At para 15, Pill LJ said that, in the light of the evidence and the guidance in *RN*, the appellant's prospect of demonstrating loyalty to the regime appeared "bleak". He concluded, however, that this was not a case which the court could decide on the basis that only one outcome was possible before the Tribunal, although he regarded the appellant's case as "strong" and it was acknowledged by the Secretary of State that there was a risk of his son's status becoming known (para 29). At para 27, he gave two reasons for his conclusion by reference to the decision in *RN*:

> "First, an applicant found not to have been a witness of truth will not be assumed to be truthful about his inability to demonstrate loyalty (paragraph 246). Secondly, there is recognition, in paragraphs 229 and 230, of categories of people, for example, those returning to more affluent areas and likely to be associated with the regime, who may be returning to a *milieu* where loyalty to the regime may be assumed and the risk of persecution does not arise."

The country guidance in RN

15. In *RN* the AIT summarised the position at para 258 as follows:

> "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 (Returning asylum seekers) Zimbabwe CG* [2007] UKAIT 00094 is no longer to be followed."

16. The following points of detail are relevant. The risk of persecution resulted in particular from the activities at road blocks of ill-disciplined militia gangs and War Veterans. It did not result from the risk of detection at the airport on return to Zimbabwe. The means used by those manning road blocks to establish whether a person was loyal to the ruling Zanu-PF party included requiring them to produce a Zanu-PF card or sing the latest Zanu-PF campaign songs. An inability to do these things would be taken as evidence of disloyalty to the party and therefore of support for the opposition (para 81). In deploying these militia gangs, the regime "unleashed against its own citizens a vicious campaign of violence, murder, destruction, rape and displacement designed to ensure that there remains of the MDC nothing capable of mounting a challenge to the continued authority of the ruling party" (para 215). Any attempt by the regime to target those who have chosen to involve themselves with the MDC has been abandoned. The risk of not being able to demonstrate loyalty to the regime exists throughout the country, in both urban and rural areas (para 226). The means by which loyalty may be demonstrated will vary depending on who is demanding it. Production of a Zanu-PF card is likely to suffice where an individual is confronted with such a demand, for example, at a road block. But even that may not protect the holder from serious harm in rural areas where the adverse interest is in the community as a whole, because the area is one in which the MDC made inroads in the Zanu-PF vote at the March 2008 elections (para 227). People living in high density urban areas will face the same risk from militias or War Veterans as those living in rural areas, save that the latter are possibly at greater risk if their area has been designated as a no go area by the militias (para 228). Finally, at paras 229 and 230, points are made about *milieu* which Pill LJ noted at para 27 of his judgment, to which I have referred above.

HJ (Iran)

17. There has been no challenge in these appeals to the correctness of the decision in *HJ (Iran)* or its essential reasoning. In the light of the submissions that have been advanced in the present appeals, it is necessary to refer to parts of the judgments in *HJ (Iran)* in a little detail. The court recognised as a refugee a gay man who, if he returned to his country of nationality and lived openly as a homosexual, would face a real risk of persecution on the ground of his sexual

orientation, and who, in order to avoid this risk, would carry on any homosexual relationships "discreetly".

18. I would accept the analysis of Mr Fordham QC that five principal reasons were given by the court for this conclusion. First, the treatment of those who lived openly as homosexuals in Iran and Cameroon constituted persecution (para 40-42). Secondly, sexual orientation was a protected characteristic within the category of membership of "a particular social group" (para 42). Thirdly, the underlying rationale of the Convention was that "people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay" (para 53): see also paras 52, 65, 67 and 78. Fourthly, the necessary modification in order to avoid persecution (carrying on any homosexual relationships "discreetly") ran contrary to this underlying rationale. It involved surrendering the person's right to live freely and openly in society as who they are, in terms of the protected characteristic, which was the Convention's basic underlying rationale: see per Lord Rodger at paras 75-76, Lord Hope at para 11 and myself at para 110. Fifthly, the modification was a response to the feared persecution "because of these dangers of living openly" (para 40). There was a difference between a case where the individual would live "discreetly" because of "social pressures" (para 61) and the situation where he would behave "discreetly" in order to avoid persecution because he is gay (para 62). Only the latter would be entitled to refugee protection, assuming, of course, that he would suffer persecution if he were to live openly as a homosexual.

19. In the course of its reasoning, the court rejected three arguments advanced on behalf of the Secretary of State. The first was that it was necessary for a refugee to be able to characterise living "discreetly" in order to avoid persecution as being itself "persecution". The second was that it was appropriate to see living "discreetly" in such circumstances as analogous to "internal relocation", so that the "unduly harsh" test applied in relation to internal relocation should be applied here too: see per Lord Hope at paras 20 and 21. The third was that the question was whether living "discreetly" was or was not "reasonably tolerable" to the asylum seeker. This was the test enunciated by the Court of Appeal in *HJ (Iran).*

20. In reaching his conclusion, Lord Rodger (para 69) followed the reasoning of the majority in the High Court of Australia in *Appellant S395/2002 v Minister of Immigration* (2003) 216 CLR 473. At para 72, he also referred to the approach adopted in New Zealand, particularly in *Refugee Appeal No 74665/03* [2005] INLR 68 where at para 124 the New Zealand Refugee Status Appeals Authority considered that its own approach and that expressed by the majority in *Appellant S395/2002* converged on the same point, "namely that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right". Lord Rodger continued:

> "The difference between the High Court and the authority—which the authority considered could be important in certain cases—was that it preferred to use a human rights framework in order to determine the limits of what an individual is entitled to do and not to do. That approach might, for instance, be relevant if an applicant were claiming asylum on the ground that he feared persecution if he took part in a gay rights march. I respectfully see the attractions of that approach. But no such issue arises in the present appeals and I prefer to leave the point for consideration in a case where it might be of practical effect. For present purposes I take the decision of the authority, based on a particularly full and impressive analysis of the relevant materials, as clear support for the High Court of Australia's approach that an applicant cannot be denied asylum on the basis that he would, in fact, take effective steps, by suppressing his sexual identity, to avoid the harm which would otherwise threaten him."

I shall return to the New Zealand case later in this judgment.

21. At para 113 of my judgment, I said that the emphasis in the New Zealand decision was on the fact that refugee status could not be denied to a person who on return "would forfeit a fundamental human right in order to avoid persecution". Like Lord Rodger, I saw the attractions of this approach. At para 114, I said that a particular attraction of the New Zealand approach was that it facilitated a determination of whether the proposed action by the claimant was "at the core of the right or at its margins". At para 115, I said:

> "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."

The principal issues that arise in these appeals

22. Two principal issues arise. The first is whether the *HJ (Iran)* principle can apply to an individual who has no political beliefs and who is obliged to pretend to support a political regime in order to avoid the persecution that he would suffer if his political neutrality were disclosed. Is the position of such a person analogous to that of a homosexual who is obliged to live a "discreet" life in order to avoid the persecution that he would suffer if he revealed his sexual orientation?

23. The second is whether, in the light of the country guidance given in *RN*, there is a real risk that such a person would face persecution on the grounds that he would be perceived to be a supporter of MDC. In other words, would he face a risk of persecution on the grounds of imputed political belief?

The first issue: can the HJ (Iran) principle apply to individuals who have no political beliefs?

The case of the Secretary of State in outline

24. The relevant factual premises for a consideration of these issues are that (i) the claimants do not hold any political beliefs and (ii) in practice, in order to avoid the imputation that they do not support the ruling regime (and consequently to avoid maltreatment), there is a real and substantial risk that they will be required to dissemble political loyalty to that regime. The Court of Appeal were wrong to say at para 36 of their judgment that, if the claimants are forced to lie about their political neutrality or indifference solely in order to avoid persecution, the concealment of their lack of political beliefs would not defeat their claims to asylum. *HJ (Iran)* does not establish any such rigid principle. Rather, what is required is a fact-sensitive analysis and consideration of whether interference with the claimants' freedom to hold or not hold political opinions is at the core or the margin of the protected right or requires them to forfeit a fundamental human right. There are two fundamental differences between *HJ (Iran)* and the present cases. First, the issue in these cases does not relate to a fundamental or immutable part of the individual's identity or a fundamental human right, since the claimants do not have any political views. The right in question is freedom of political thought and/or expression. Since the claimants do not have political views, having to express a particular view which they do not hold is at the margin of the right. They are not being required to forfeit a fundamental human right in order to avoid being persecuted. Secondly, the situation contemplated in *HJ (Iran)* was one in which a person had to conceal a fundamental and immutable part of his identity *at all times* (at least when not in private). In these cases, what is contemplated is a situation where a person may on *isolated* occasions be required to spend a very short amount of time professing a feigned opinion on a matter of politics.

Discussion

25. It is well established that there are no hierarchies of protection amongst the Convention reasons for persecution, and the well-founded fear of persecution test set out in the Convention does not change according to which Convention reason is engaged: see, for example, per Lord Hope in *HJ (Iran)* at para 10, per Lord Hoffmann in *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 651B

and per Lord Bingham in *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, paras 20-22 (approving the reasoning of Laws J in *R v Immigration Appeal Tribunal, Ex p De Melo* [1997] Imm AR 43, 49-50). Thus the Convention affords no less protection to the right to express political opinion openly than it does to the right to live openly as a homosexual. The Convention reasons reflect characteristics or statuses which either the individual cannot change or cannot be expected to change because they are so closely linked to his identity or are an expression of fundamental rights.

26. The *HJ (Iran)* principle applies to any person who *has* political beliefs and is obliged to conceal them in order to avoid the persecution that he would suffer if he were to reveal them. Mr Swift accepted that such a person would have a "strong" case for Convention protection, but he stopped short of an unqualified acceptance of the point. In my view, there is no basis for such reticence. The joint judgment of Gummow and Hayne JJ in *Appellant S395/2002* contains a passage under the heading "'Discretion' and 'being discreet'" which includes the following at para 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. And to say to an applicant that he or she should be 'discreet' about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences."

27. I made much the same point in *HJ (Iran)* at para 110:

> "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country."

28. In the context of religious belief, the United Nations High Commissioner for Refugees has said (in my view, rightly): "*Applying the same standard as for other Convention grounds*, religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution": *Guidelines on International Protection: Religion-Based Refugee Claims* (2004) para 13 (emphasis added).

29. But what about the person who has no political beliefs and who, in order to avoid persecution, is forced to pretend that he does? Does the right to hold no political beliefs (and say so) attract Convention protection as much as the right to hold and express political beliefs? A useful starting point is the preamble to the Convention, which includes the following:

> "CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms..."

30. This emphasis on the importance of human rights in the present context is also reflected in Council Directive 2004/83/EC (the Qualification Directive) whose tenth recital states:

> "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members."

31. As Lord Bingham said in *Fornah* at para 10, the Convention must be interpreted:

> "in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without

> discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms."

Lord Steyn made the same point in *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 638H to 639E.

32. Under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom *not* to hold and *not* to have to express opinions. The rights to freedom of thought, opinion and expression are proclaimed by articles 18 and 19 of the Universal Declaration of Human Rights 1948. As Lord Hope said in *HJ (Iran)* at para 15: "The guarantees in the Universal Declaration are fundamental to a proper understanding of the Convention". The relevance of that general statement is not diminished by the note of caution sounded by Lord Hope that the Convention has a more limited purpose than the Declaration, in that, for example, persecution is not the same as discrimination *simpliciter*.

33. Articles 18 and 19 of the Declaration are given effect internationally by articles 18 and 19 of the International Covenant on Civil and Political Rights 1966 ("ICCPR"). Article 18 of the ICCPR deals with the right to freedom of thought, conscience and religion. Article 19 deals with the right to freedom of opinion and expression. The United Nations Human Rights Committee has commented on these rights. In its General Comment No 22 on article 18 (30 July 1993), it said that the right to freedom of thought, conscience and religion in article 18.1 is "far-reaching and profound" (para 1); the terms "belief" and "religion" are to be "broadly construed" (para 2); and article 18 protects "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief" (para 2). In its General Comment No 34 on article 19 (12 September 2011), it said that freedom of opinion and freedom of expression are "indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society" (para 2). All forms of opinion are protected (para 9). At para 10, it said:

> "Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion."

34. There is case law in relation to the European Convention on Human Rights to the effect that the guarantee of freedom of thought, conscience and religion under article 9 protects the indifferent or unconcerned, and extends to the right *not* to hold thoughts or beliefs and *not* to give expression to them. In *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31, the European Court of Human Rights said:

> "As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."

35. In *Buscarini and others v San Marino* (1999) 30 EHRR 208, at para 34 a unanimous Grand Chamber of the ECtHR repeated this passage and added:

> "That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion."

In *Buscarini*, the applicants were required, contrary to their wishes, to swear an oath on the Holy Gospels in order to take their seats in the San Marino Parliament. It was held that this requirement was not compatible with article 9. No part of the Grand Chamber's reasoning concerned the strength of the applicants' convictions that they should not be required to swear the oath. The essential point is that the court held that article 9 protects the right of the non-believer as well as that of the believer.

36. I can see no basis in principle for treating the right to hold and not to hold political beliefs differently. Article 10 of the ECHR provides that everyone has the right to freedom of expression and that this right "shall include freedom to hold opinions". That must include the freedom not to hold opinions. As Professor Barendt puts it in *Freedom of Speech*, OUP, 2005 (2nd ed), p 94:

> "The right not to speak, or negative freedom of speech, is closely linked with freedom of belief and conscience and with underlying rights to human dignity, which would be seriously compromised by a legal requirement to enunciate opinions which are not in truth held by the individual."

37. Mr Husain QC has also drawn attention to some comparative jurisprudence. In his celebrated judgment in *West Virginia State Board of Education v Barnette* (1943) 319 US 624, 642 Justice Jackson said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in

> politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The Supreme Court upheld the challenge by Jehovah's Witnesses to the constitutionality of a state requirement that children in public schools salute and pledge loyalty to the US flag. The court held that the freedom not to speak was an integral part of the right to speak. At pp 634-635, Justice Jackson said:

> "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies the appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty..."

38. Similarly, Sachs J in the Constitutional Court of South Africa stated in *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051, para 36:

> "There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity."

39. It can therefore be seen that under both international and European human rights law, the right to freedom of thought, opinion and expression protects non-believers as well as believers and extends to the freedom not to hold and not to express opinions. It is true that much of the case-law and commentary is on freedom of belief in the context of religion, rather than other kinds of belief (whether political, philosophical or otherwise). But I see no basis for distinguishing between the freedom to hold and express different kinds of belief here. As Sachs J said, the right to believe or not to believe is a key ingredient of a person's dignity. The right to dignity is the foundation of all the freedoms protected by the Convention. I repeat what I said in *HJ (Iran)* at para 113:

> "The right to dignity underpins the protections afforded by the Refugee Convention: see *Canada (Attorney General) v Ward* [1993]

2 SCR 689, approving Professor Hathaway, *Law of Refugee Status* (1991), p 108:

> 'The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard.'"

40. Freedom to hold and express political beliefs is a core or fundamental right. As Mr Husain says, it would be anomalous, given that the purpose of the Convention inter alia is to ensure to refugees the widest possible exercise of their fundamental rights and freedoms, for the right of the "unconcerned" to be protected under human rights law, but not as a religious or political opinion under the Convention.

41. Mr Swift accepts that political neutrality is an important human right protected by the Convention, but, he submits, only if the individual is a "committed" political neutral and not one to whom his neutrality is a matter of indifference. This is because there is no entitlement to protection under the Convention where the interference involves matters which are only at the margins of an individual's right to hold or not hold political opinions, and not at the core of that right. There is no entitlement to protection where what is required of the applicant does not oblige him to forfeit a fundamental human right. Mr Swift, therefore, draws a distinction between a person who is a conscientious or committed political neutral (A) and a person who has given no thought to political matters because the subject simply is of no interest to him (B). He accepts that the Convention protects A from persecution, because his political neutrality is a core or fundamental human right. The *HJ (Iran)* principle is capable of applying to A. Refugee status may not be denied to him simply because he would pretend to support a regime in order to avoid persecution. But Mr Swift says that the *HJ (Iran)* principle cannot apply to B because, in his case, false support for the regime would cause interference at the margin, rather than the core, of the protected right and would not cause him to forfeit a fundamental human right. Mr Swift seeks support for the distinction, in particular, from paras 72 and 115 of *HJ (Iran)* to which I have referred at paras 20 and 21 above.

42. I would reject this distinction for a number of reasons. First, the right *not* to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a

person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution. A focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle. The argument advanced by Mr Swift bears a striking resemblance to the Secretary of State's contention in *HJ (Iran)* that the individuals in that case would only have a well-founded fear of persecution if the concealment of their sexual orientation would not be "reasonably tolerable" to them. This contention was rejected on the grounds that (i) it was unprincipled and unfair to determine refugee status by reference to the individual's strength of feeling about his protected characteristic (paras 29 and 121) and (ii) there was no yardstick by which the tolerability of the experience could be measured (paras 80 and 122).

43. As regards the point of principle, it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour. George Orwell captured the point brilliantly by his creation of the sinister "Thought Police" in his novel *1984.*

44. The idea "if you are not with us, you are against us" pervades the thinking of dictators. From their perspective, there is no real difference between neutrality and opposition. In *Gomez v Secretary of State for the Home Department* [2000] INLR 549, a "starred" decision of the Immigration Appeal Tribunal, Dr Storey put the point well at para 46:

> "It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country. This perception also explains why refugee law has come to recognise that in certain circumstances 'neutrality' can constitute a political opinion. In certain circumstances, for example where both sides operate simplistic ideas of political loyalty and political treachery, fence-sitting can be considered a highly political act."

45. There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention.

None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution.

46. Secondly, the distinction suggested by Mr Swift is unworkable in practice. On his approach, the question arises: how important to the individual does the right not to hold political beliefs have to be in order to qualify for protection? On a spectrum of political non-belief, at one end is the person who has carefully considered matters engaging "the machinery of State, government, and policy" (*Goodwin Gill and McAdam, The Refugee in International Law*, 3rd ed (2007) p 87) and conscientiously decided that he is not interested. He may, for example, have concluded that effective political governance is beyond the ability of man and that he cannot therefore support any political party or cause. At the other end is the person who has never given any thought to such matters and has no interest in the subject. There will also be those who lie somewhere between these two extremes. Where is the core/marginal line to be drawn? At what point on the spectrum of non-belief does the non-belief become a core or fundamental human right? The test suggested by Mr Swift would, to say the least, be difficult to apply. Unless compelled to do so, we should guard against introducing fine and difficult distinctions of this kind. In my view, there is no justification for calling on immigration judges to apply the distinction suggested by Mr Swift. It would be likely to be productive of much uncertainty and potentially inconsistent results.

47. Thirdly, Mr Swift's suggested distinction between core and marginal rights is based on a misunderstanding of what we said in *HJ (Iran).* In order to understand what Lord Rodger and I said on the issue, it is necessary first to see what was said by the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03.* At para 82, the Authority said that if the right sought to be exercised by the applicant is not a core human right, the "being persecuted" standard of the Convention is not engaged. But if the right is a fundamental human right, the next stage is to determine "the metes and bounds of that right". The Authority continued:

> "If the proposed action in the country of origin falls squarely within the ambit of that right the failure of the state of origin to protect the exercise of that right coupled with the infliction of serious harm should lead to the conclusion that the refugee claimant has established a risk of 'being persecuted.'"

48. The same point was made at para 90. For the purpose of refugee determination, the focus must be on "the minimum core entitlement conferred by the relevant right". Thus, where the risk of harmful action is only that "activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of 'being persecuted'". The point was repeated at para 120.

49. At paras 99, 101 and 102, the Authority gave examples of the kind of activity which were at the margin of a protected right. Prohibition on a homosexual from adopting a child on the grounds of his sexual orientation would not be persecution, because adoption of a child was "well on the margin" of the right enjoyed by homosexuals to live their lives as homosexuals openly and free from persecution. The same point was made in relation to (i) the denial to post-operative transsexuals of the right to marry, (ii) the denial to homosexuals of the right to marry and (iii) the prosecution of homosexuals for sado-masochistic acts. It was suggested that, whether or not any of these involved breaches of human rights, they could not be said to amount to persecution since the prohibited activities in each case were at the margin of the protected right.

50. In *HJ (Iran),* Lord Rodger gave as another possible example the applicant who claimed asylum on the ground that he feared persecution if he took part in a gay rights march. If a person would be able to live freely and openly as a gay man provided that he did not take part in gay rights marches, his claim for asylum might well fail. At paras 114 and 115 of my judgment too, I was saying no more than that a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution. I remain of that view. The distinction is valuable because it focuses attention on the important point that persecution is more than a breach of human rights.

51. What matters for present purposes is that nothing that was said in the Authority's decision or by us in *HJ (Iran)* supports the idea that it is relevant to determine how important the right is to the individual. There is no scope for the application of the core/marginal distinction (as explained above) in any of the appeals which are before this court. The situation in Zimbabwe as disclosed by *RN* is not that the right to hold political beliefs is generally accepted *subject only to some arguably peripheral or minor restrictions.* It is that anyone who is not thought to be a supporter of the regime is treated harshly. That is persecution.

52. For the reasons that I have given, I would reject the restrictive approach suggested by Mr Swift to the application of the *HJ (Iran)* principle to these cases and hold that it applies to applicants who claim asylum on the grounds of a fear of persecution on the grounds of lack of political belief regardless of how important their lack of belief is to them.

The second issue: imputed political belief

53. The principle is not in doubt that an individual may be at risk of persecution on the grounds of imputed opinion and that it is nothing to the point that he does

not in fact hold that opinion. Professor Hathaway, *The Law of Refugee Status* (1991), pp 155-156 states:

> "The focus is always to be the existence of a *de facto* political attribution by the state of origin, notwithstanding the objective unimportance of the claimant's political acts, her own inability to characterise her actions as flowing from a particular political ideology, or even an explicit disavowal of the views ascribed to her by the state."

54. In *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees,* April 2001, the UNHCR summarised the relevant law well at para 25:

> "It is now generally agreed that **imputed or perceived grounds,** or mere political neutrality, can form the basis of a refugee claim. For example, a person may not in fact hold any political opinion, or adhere to any particular religion, but may be perceived by the persecutor as holding such an opinion or being a member of a certain religion. In such cases, the imputation or perception which is enough to make the person liable to a risk of persecution is likewise, for that reason, enough to fulfil the Convention ground requirement, because it is the perspective of the persecutor which is determinative in this respect."

55. The application of this principle in any given case raises questions of fact. Persecution on the grounds of imputed opinion will occur if a *declared* political neutral is treated by the regime (or its agents) as a supporter of its opponents and persecuted on that account. But a claim may also succeed if it is shown that there is a real and substantial risk that, despite the fact that the asylum seeker would assert support for the regime, he would be disbelieved and his political neutrality (and therefore his actual lack of support for the regime) would be discovered. It is well established that the asylum seeker has to do no more than prove that he has a well-founded fear that there is a "real and substantial risk" or a "reasonable degree of likelihood" of persecution for a Convention reason: *R v Secretary of State for the Home Department, Ex p Sivakumaran* [1988] AC 958. I do not believe that any of this is controversial. How does it apply to the facts of these cases?

56. The issue that is common to all these cases as regards imputed belief is whether there is a real and substantial risk that the political neutrality of the claimants would be discovered by the militia gangs and War Veterans who man road blocks even if the claimants were to dissemble and say that they support the regime. This raises two questions namely (i) whether the claimants would be likely

to be stopped or face serious interrogation at road blocks at all; and (ii) if yes, whether their pretended support for the regime would be disbelieved.

57. As regards the first question, the best evidence as to the likelihood of being stopped and interrogated at a road block is provided by *RN*. The AIT's decision states that the militia groups and War Veterans operate in "rural areas" and "urban districts" (para 213) and "across the country" (para 216). The risk of persecution "arises throughout the country" (para 225) and people living in "high density urban areas" face the same risk from militias and War Veterans as those living in rural areas (para 228). But those living in more affluent low density urban areas or suburbs are likely to avoid such difficulties (para 229). If a failed asylum seeker is 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 risk simply because he spent time in the United Kingdom and sought to extend his stay by making a false asylum claim (para 230). In other words, it is only if an applicant returns to a *milieu* where loyalty to the regime is assumed that his claim is likely to fail at the first hurdle.

58. As for the second question, the immigration judge would have to consider the kind of questions that the applicant might be asked when interrogated at the road block; how effective a liar the applicant would be when asserting loyalty to the regime; how credulous the interrogators would be in the face of such lies; whether the interrogators might ask the applicant to produce a Zanu-PF card or sing the latest Zanu-PF campaign songs and whether the applicant would be able to produce a card and sing the songs. It is difficult to see how a judge could provide confident answers to these questions. He or she would almost certainly be unable to avoid concluding that there would be a real and substantial risk that, if a politically neutral claimant were untruthfully to assert loyalty to the regime, his political neutrality would be discovered.

59. To summarise, in the light of *RN*, it is difficult to see how an asylum claim advanced on the basis of imputed political opinion could be rejected, unless the judge was able to find that the claimant would return to a *milieu* where political loyalty would be assumed and where, if he was interrogated at all, he would not face the difficulties faced by those who were not loyal to the regime in other parts of the country. If the claimant would return to any other parts of the country, the judge would be likely to conclude that there was a real and substantial risk that a politically neutral person who pretended that he was loyal to the regime would be disbelieved.

Disposal

60. I can now turn to the disposal of all four appeals in the light of my conclusion on the two principal issues.

RT

61. The facts relating to RT's case are set out at paras 4 and 5 above. The Secretary of State submits that there is no basis for concluding that, if RT were required to profess loyalty to the regime, she would be forced to lie. There was no record of any evidence as to her political views. The Tribunal merely found that she had never been politically active. Mr Swift submits that she may have been a fervent (albeit inactive) supporter of the regime. But DIJ Manuell found RT to be a credible witness and that she was in a position to explain that "she has never been politically involved at home or abroad" (para 25). Her evidence before IJ Hussain (which was accepted) was that on her return she would be required to demonstrate loyalty to the regime, which she could not do "because she is not a political person and has not supported the party" (para 34). Unless she would return to a *milieu* where loyalty to the regime was assumed, the only way that she could avoid the risk of persecution would be to feign support for the regime. In that event, having regard to my conclusions on the application of the *HJ (Iran)* principle, the Court of Appeal were right to uphold her claim to asylum. It is not suggested by Mr Swift that RT would return to a *milieu* where support for the regime would be assumed and where she would therefore not face the risk of hostile interrogation. In these circumstances, there was no case for remitting the case to the Tribunal. I would also reach the same conclusion on the basis of imputed opinion.

SM

62. The facts relating to SM are set out at para 6 above. In addition to taking issue with the way in which the Court of Appeal dealt with the *HJ (Iran)* principle, Mr Swift submits that they appear to have ignored or misunderstood *RN* where it was made clear (para 241) that a "bare assertion" that a person will be unable to prove loyalty is not enough for a successful claim, adding that this is "especially so" where the applicant has been found to be incredible. At paras 23 and 24 of the decision of IJ Charlton-Brown, the judge concluded that, contrary to SM's claim, she had not been linked with the MDC, that she had been able to live in Zimbabwe without problems since 2002, and that she was unable to rely on any of the "risk factors" identified in *RN*.

63. As to this, the Court of Appeal said at para 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."

64. The Court of Appeal were correct. For all the reasons stated in *RN*, the fact that SM's claimed support for the MDC was rejected as being incredible was not decisive. The central question is whether there was a real and substantial risk that her loyalty to the regime could not be demonstrated. In view of her "lack of credibility throughout", she might have difficulty in demonstrating that she did not have loyalty to the regime. But the case should be remitted to the Tribunal for that issue to be determined in the light of *RN* and in the light of what I have said about the *HJ (Iran)* principle and the issue of imputed opinion. There is no cross appeal on behalf of SM that her claim for asylum should be recognised by this court. I would dismiss this appeal.

AM

65. I have set out the findings by the AIT at para 7 above. The Court of Appeal allowed AM's appeal on the ground that the immigration judge had "failed to address the issue as to his ability to show his loyalty to the regime" (para 52). Like SM, he had not been held to be a credible witness. For that reason, the Court of Appeal did not feel able to substitute their own conclusion for that of the judge and remitted the case to the Tribunal. The Secretary of State advances no reasons particular to AM's case (as distinct from the *HJ (Iran)* principle) for overturning the decision of the Court of Appeal. There is no cross appeal by AM. I would, therefore, dismiss this appeal too.

KM

66. The facts relating to the case of KM are set out at paras 12 to 14 above. Mr Dove QC submits that the Court of Appeal should have allowed the appeal outright and not remitted the case to the Upper Tribunal for a third hearing. I have referred at para 14 above to the two reasons given by Pill LJ for his conclusion that, although KM's case was "strong", it could not be said that it was bound to succeed before the Tribunal. The first was that an applicant who had been found to

be an untruthful witness would not be assumed to be truthful about his inability to demonstrate loyalty to the regime. But, as I have already said, the circumstances in Zimbabwe as described in *RN* mean that the fact that an applicant is lacking in credibility may be a matter of little relevance on the key question of whether he will be able to demonstrate loyalty. As for the second reason, the *milieu* to which KM would be returned is likely to be of marginal relevance in this case. That is because, as was conceded before the Court of Appeal, there was a real risk that the fact that KM's son had been granted asylum in the United Kingdom on account of his MDC sympathies would come out on his return to Zimbabwe (para 6 Pill LJ's judgment) and that this might place him "in an enhanced risk category by making it more difficult for him to demonstrate his loyalty to the regime" (para 12).

67. I can well understand why the Court of Appeal decided to remit this case to the Tribunal. But it seems to me that, in the light of the concessions to which I have referred and the fact that KM's case was therefore very strong, it would not be just to subject him to a third Tribunal hearing.

Overall conclusion

68. For the reasons that I have given, I would dismiss the appeals of the Secretary of State in the cases of RT, SM and AM and allow the appeal of KM.

LORD KERR

69. For the reasons given by Lord Dyson, with which I entirely agree, I too would dismiss the appeals of the Secretary of State in the cases of RT, SM and AM and allow the appeal of KM.

70. The starting point in consideration of these appeals must be that the purpose of the Refugee Convention is to protect people from persecution. In the extreme, repressive and anarchic conditions which obtain in Zimbabwe, the risk of being persecuted is all too real and predictable, albeit, on the evidence currently available, the incidence of that persecution is likely to be both random and arbitrary.

71. As a general proposition, the denial of refugee protection on the basis that the person who is liable to be the victim of persecution can avoid it by engaging in mendacity is one that this court should find deeply unattractive, if not indeed totally offensive. Even more unattractive and offensive is the suggestion that a person who would otherwise suffer persecution should be required to take steps to

evade it by fabricating a loyalty, which he or she did not hold, to a brutal and despotic regime.

72. As a matter of fundamental principle, refusal of refugee status should not be countenanced where the basis on which that otherwise undeniable status is not accorded is a requirement that the person who claims it should engage in dissimulation. This is especially so in the case of a pernicious and openly oppressive regime such as exists in Zimbabwe. But it is also entirely objectionable on purely practical grounds. The intellectual exercise (if it can be so described) of assessing whether (i) a person would - and could reasonably be expected to – lie; and (ii) whether that dissembling could be expected to succeed, is not only artificial, it is entirely unreal. To attempt to predict whether an individual on any given day, could convince a group of undisciplined and unpredictable militia of the fervour of his or her support for Zanu-PF is an impossible exercise.

73. But all of the foregoing is by way of incidental preamble. The truly critical question in this appeal is whether there is a right in Refugee Convention terms not to have a political opinion. Ultimately, Mr Swift was driven to accept that there is such a right but he suggested that this right can be attenuated according to the disposition of the person who espouses a strictly apolitical stance.

74. I consider that this central proposition is fundamentally flawed. The level of entitlement to protection cannot be calibrated according to the inclination of the individual who claims it. The essential character of the right is inherent to the nature of the right, not to the value that an individual places on it. And the need for a clear insight into that critical aspect of the right is well exemplified by the situation in Zimbabwe. If an apolitical individual fails to demonstrate plausibly that he or she is a sufficiently fervent supporter of Zanu-PF, he or she will be deemed to be a political opponent, irrespective of how greatly he or she cherishes the right not to hold a political view. The status of deemed political opponent, whether it is the product of imputation of political opposition or merely the arbitrary decision of those testing the degree of conviction or fervour with which support for Zanu-PF is expressed, is the gateway to persecution and that cannot be dependent on whether the lack of political opinion is due to a consciously held conviction or merely due to indifference. That is why the emphasis must be not on the disposition of the individual liable to be the victim of persecution but on the mind of the persecutor.

75. In the present appeals it is clear that the question whether the treatment that the individuals might face if returned to Zimbabwe would amount to persecution is not in issue. Quite clearly it would be. Nor is there any reason to doubt that the motivation for simulating support for the regime on their parts would be because of their desire to avoid that persecution. The only basis, therefore, on which denial

of their claim to refugee status can be sustained, is that their right not to hold a political opinion lies at the lower end of the core/marginal spectrum. As Mr Dove submitted, such an argument requires to be treated extremely circumspectly. Those instances where the right was found to lie at the marginal end of the continuum all involved a measure of voluntary control over the situation in which the individual who was claiming protection found himself. That is not the position here.

76. But, in any event, if the core/marginal dichotomy has any relevance whatever, it is in making an assessment as to whether the species of infringement strikes at the essence of the right or merely at a less important aspect of it. For the reasons that Lord Dyson has given, it appears to me that the infringement is quintessentially a violation of the central core of the right not to hold a political opinion.