Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04602/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons**
On 10th November 2014	**Promulgated**
	On 13th November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

MRS LOICE MUTANDWA
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Tettey, Counsel instructed by Parker Rhodes Hickmotts
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Zimbabwe who was born on the 25th May 1972. She appeals against the decision of First-tier Tribunal Judge Baker who, in a determination promulgated on the … , dismissed her appeal

against the respondent' s decision to refuse her application for asylum and to remove her from the United Kingdom.

Background

2. The background to the appeal may be summarised as follows.

3. The appellant entered the United Kingdom as long ago as the 21st January 1995, having been granted leave to enter and remain for a period of six months as a family visitor. She has thereafter remained in the UK unlawfully.

4. On the 8th October 2003, the appellant claimed asylum. That application was refused and her appeal was dismissed by Mr J H Bryan in a determination promulgated on the 14th October 2004. The appellant at that time claimed that she had been vocal in her criticism of the regime before leaving Zimbabwe, that her parents had joined the Movement for Democratic Change (MDC) in either 2000 or 2001, and that both her parents and her sister had been beaten up as a result of their association with that organisation. She did not however claim that she had ever been the victim of persecution prior to her departure from Zimbabwe. The appellant also claimed at that time to be a lesbian and argued that she would be unable to live an openly gay life in Zimbabwe.

5. Mr Bryan found that the appellant had not suffered persecution in Zimbabwe and had come to the United Kingdom in order to complete her education and to better her economic circumstances. He concluded that the appellant had only participated in political activities in the UK at an extremely low level. She did not therefore have a political profile and was not at risk of persecution on return by reason of her political opinion. Whilst (apparently) accepting that she was a lesbian, Mr Bryan found that the delay in mentioning this fact as an alternative basis for claiming asylum, coupled with her own account of having lived an openly gay life in Zimbabwe, meant that the appellant did not genuinely fear being persecuted by reason of her sexual orientation. He concluded that whilst societal discrimination against gays was rife in Zimbabwe, lesbianism was not illegal and the appellant's own conduct whilst she was residing there showed that she was not at risk of persecution. In considering the appellant's position under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Mr Bryan noted that altough the appellant had a brother in the United Kingdom, her relationship with him did not appear to extend beyond the mere fact of being siblings. He therefore concluded that the appellant had failed to prove the existence of private and family life in the United Kingdom and, accordingly, that the evidence did not establish an arguable case under Article 8.

6. The appellant renewed her application for asylum on the 2nd February 2009 and, on the 5th March 2010, also sought discretionary leave to remain on the basis of her long residence in the United Kingdom.

The appellant's case

7. The case that the appellant presented before Judge Baker may be summarised as follows.

8. The appellant's father, who was a retired police Chief Inspector, had been killed, along with her two brothers, since Mr Bryan had dismissed her previous appeal. She would thus no longer enjoy the protection that he provided her when she had last lived in Zimbabwe. The Zimbabwean authorities would impute her with her family's association with the MDC. Although not currently in a lesbian relationship, this is only because she lives with her sister and her sister would disapprove of such conduct. Although she would not be subject to any such restraints in Zimbabwe, she would nevertheless be forced to hide her sexuality due to the risk of persecution. The situation in Zimbabwe for openly gay people had worsened since Mr Bryan assessed her claim. Moreover, her long absence from Zimbabwe would present her with very considerable difficulties in re-integrating into her country of origin.

The decision of the First-tier Tribunal

9. Judge Baker's findings are contained within paragraphs 17 to 20 of his determination –

> 17. It seems to me, that despite Ms Patel's attempt to raise a chimera-like smokescreen to the contrary, very little has changed since Judge Bryan's unappealed determination, which can no aid the Appellant. The political situation in 'Zimbabwe is happily more tolerant and settled. The Appellant has not increased her own political profie and no evidence has been provided to establish the reason for the unfortunate death of her father being linked to his MDC support. CM remains good law and I cannot see, for the life of me, how the established facts of the Appellant's circumstances would put her now at risk on a return to Zimbabwe on the grounds of her imputed political opinion. The argument to the contrary has no merit whatsoever, in my view.
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> 18. As for the question of her being at risk due to her sexual orientation, LZ also remains good law and despite Ms Patel's urging, I am unable to find any disinterested and objective persuasive evidence that attitudes and circumstances have adversely changed since that case for the position of lesbians in Zimbabwe. The Appellant suffered no problems before she left home, despite her openness and family disapproval which still pertains. She has been discrete of late I the UK, she claims, on economic grounds in respect of her sister. It could be said that if she can do it here, the same would apply there, should there be a need to, but the caselaw suggest that there is none. Whilst I accept the freedom of Bulawayo urged may present certain difficulties she has coped without difficulty in Harare in the past and doubtless could do so again. All these comments are hypothesised on her actually being a lesbian, which was queried at a late stage on behalf of the Respondent. Since I find it to be irrelevant in fact, I nned to make no further findings thereupon.

19. Accordingly, in respect of both heads of the asylum claim as renewed, I have no difficulty in finding that they have little merit and should be dismissed. However, with regard to the human rights element, both parties agree that in relation to Articles 2 and 3 any claims do stand and fall with the asylum claim and so both fall too.

20. With regard to Article 8, however, there no argument raised re family life, exceptional and compassionate circumstances etc. but only as to whether the long residence period of 14 years or the July 2013 changes to 20 years, should apply. I find the claimed applicability of the Edgehill situation is untenable, as, unlike the facts therein, this is a case of the applicability of the law at the date of the decision, i.e. at June 2014. As such, 20 years applies and the Apop cannot attain any advantage therefrom, despite her long standing avoidance of engagement with the immigration authorities and law. I have also in my considerations, paid due regard to Section 9 of the Immigration Act 2014 and via it, to Section 117 of the 2002 Act in relation to the public interest. As such, in the round, I can find no justification for the application of Article 8 relief for the Appellant, whose claim thereon fails too.

The grounds of appeal

10. The grounds of appeal against Judge Baker's findings are sometimes difficult to follow. They use of improbably-long sentences, interspersed with a seemingly endless series of semi-colons (see especially paragraph 9). However, but for the failure to indicate whether permission has been granted to argue the grounds relating to the judge's treatment of Article 8, the appellant's grounds appear to be accurately summarised at paragraph 2 of the grant of permission to appeal –

> Having had regard to the grounds for permission to appeal and the determination, I am satisfied that in reaching his decision the judge arguably made an error of law for the following reasons: -
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> a. A central part of the Appellant's claim is that she is a lesbian and therefore at risk on return to Zimbabwe.
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> b. The Respondent put the Appellant's claimed sexuality in issue (paragraph 14), however the judge at paragraph 18 of the determination made no clear finding regarding the Appellant's claimed sexuality.
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> c. It is arguable that the judge failed to give adequate reasoning as to why the Appellant could "doubtless" live without difficulty in Harare (paragraph 18), a place where the Appellant has not lived since at least 1996 (paragraph 9).
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> d. It is arguable that the judge failed to engage with the background country information provided regarding current risks to the LGBT community in Zimbabwe (paragraph 18).

In addition to the above, the grounds argue that the judge was wrong to state that there was no evidence to link the death of the appellant's father with his support for the MDC. Such evidence, it is said, is contained within the appellant's witness statement, dated the 7th May 2013, and also in his death certificate. I will consider these grounds before I consider the challenge that is made to the judge's Article 8 assessment.

Analysis

11. It is true that the judge did not make a specific finding as to whether the appellant was gay. However, this was immaterial to outcome of the appeal. This is because, as with Mr Bryan before him, Judge Baker considered that the appellant's account of her sexuality and desired lifestyle, taken at its highest, would not put her at risk of persecution on return to Zimbabwe. The only issue that now arises is whether the judge was entitled to reach that conclusion upon the evidence that was before him.

12. The judge's finding that the appellant could "doubtless" return to and live in Harare was based not only upon the fact that she had lived there many years ago, but also upon the findings of the Tribunal in LZ (homosexuals) Zimbabwe CG [2011] UKUT 487 (IAC). In that case, it was held that whilst lesbians *may* face greater difficulties than gay men, there is no general risk to them in Zimbabwe and that being openly gay is not in itself a decisive risk factor. The somewhat bold proposition that is now being advanced on behalf of the appellant is that Judge Baker made an error of law by concluding that the background country information did not warrant a departure from the relevant Country Guidance case-law.

13. The judge did not provide an analysis of the background country information that had been placed before him. That does not in itself constitute a material error of law. To succeed in her appeal, the appellant would have to show that such information demonstrated that the situation for lesbians in Zimbabwe had deteriorated to such an extent that the findings of the Tribunal in LZ could no longer be said to hold good, Mr Tettey took me to various reports in the appellant's county information bundle, the majority of which were, as he aptly described them, "anecdotal" incidents of adverse treatment by both state and non-state actors of gay men and lesbians in Zimbabwe. However, these reports do not in my judgement begin to establish that incidents of this kind are more prevalent now than they were when the Tribunal made its findings in LZ. Neither do they establish that there is now a general risk of persecutory ill-treatment by reason of membership of this particular social group. Moreover, as Mrs Petersen correctly observed, the majority of the incidents involved high-profile individuals who were campaigning for the rights of LGBT members. There was no

suggestion that the appellant intended to involve herself in such campaigning.

14. The judge was correct in his assertion that there was no evidence that the death of the appellant's late father was connected to his membership of the MDC. To the extent that the death certificate could be considered a reliable document (it was produced by the appellant many years after the event) it established only that he had met a violent end. Whilst the appellant had indeed asserted that her father's death was associated with his MDC membership, she had not adduced any evidence to support that assertion [see paragraph 11 of her witness statement, dated the 7th May 2005]. As her father's death was said to have occurred in 2005, when the appellant was in the United Kingdom, she could not have had any direct knowledge of the persons responsible for it.

15. With regard to the claimed risk to the appellant by reason of her actual or imputed political opinion, the judge correctly applied the findings of the Tribunal in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 59 (IAC), in which it was held that there are many areas of the country, including areas within the capital Harare, where a person could live without being subjected to the ZANU-PF 'loyalty test'.

16. I therefore turn, finally, to the judge's treatment of the appellant's claim under Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The grounds complain, with some justification, that whilst the judge paid lip-service at paragraph 20 to the obligation to have regard to the public interest factors listed in Section 117B of the Nationality, Immigration and Asylum Act 2002, he nevertheless failed to demonstrate that he had applied them to the individual facts of this appeal. The grounds point out that the appellant is fluent in the English language and is unlikely to be a financial burden on the state in light of her qualifications as a nurse. Furthermore, the Section enjoins the decision-maker to consider these factors as being in the public interest. The grounds also argue that the appellant has been in the United Kingdom for some 18 years, during which time she has not committed any crimes and has fully integrated into the British way of life.

17. However, a person's human rights are not enhanced by the absence of criminality and financial dependence upon the state; such absence is merely one less potential reason for the Secretary of State to seek the removal of a person who is in the United Kingdom unlawfully. Furthermore, the Section enjoins the decision-maker to attach little weight to private life that has been established when that person's presence in the United Kingdom is unlawful. That principle applies to the overwhelming majority of the time that the appellant has spent in the United Kingdom.

18. The judge did not consider the extent to which the length of the appellant's absence from Zimbabwe might present significant obstacles to her re-integration in that country. This is a matter which is potentially decisive under paragraph 276 ADE of the Immigration Rules. Although that paragraph was not in force at the date of the appellant's application, difficulties of reintegration in the country of return are also relevant (if not decisive) when undertaking an holistic assessment of a person's claim under Article 8. The failure to have regard to such potential difficulties is not advanced as a ground of appeal. I nevertheless consider that it is an obvious point, which it would be unconscionable to overlook. However, I have concluded that this failure is ultimately immaterial to the outcome of the appeal. This is because, had he considered the matter, the judge would have been bound to note that the appellant had spent the entirety of her formative years in Zimbabwe, that she speaks both Shona and English, and that she claims to be a qualified nurse. In those circumstances, there is no obvious reason why she should struggle to find work or otherwise reintegrate into Zimbabwean society, notwithstanding her prolonged absence from and claimed lack of surviving family members in that country. When these matters are placed in the balance, together with the other factors that I considered in the previous paragraph, there is no reason to suppose that the judge's decision would have been any different, or that his decision was not reasonably open to him on the facts of this appeal. If I had re-made the decision of the First-tier Tribunal on Article 8 grounds, I would thus have come to precisely the same conclusion.

Notice of Decision

19. The appeal is dismissed.

Anonymity is not directed.

Signed Date **10th November 2014**

David Kelly
Deputy Judge of the Upper Tribunal