



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA048992015

THE IMMIGRATION ACTS

Heard at Field House
On 27 April 2017

Decision & Reasons Promulgated
On 19 May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

LB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss. M. Butler, Counsel instructed by Duncan Lewis & Co
Solicitors

For the Respondent: Mr. P. Nath, Home Office Presenting Officer

DECISION AND REASONS

1. Following the error of law decision promulgated on 22 November 2016, the hearing was resumed for the decision to be remade.
2. I make an anonymity direction, continuing that made at the previous hearing.

3. I heard brief oral evidence from the Appellant. Both representatives made oral submissions following which I reserved my decision.
4. I have taken into account the documents in the Appellant's Bundle A, Bundle B and the Supplementary bundle. A direction had been given that copies of the bundles be served on the Respondent. For some reason, a new bundle had been prepared and served instead, a copy of which had not been served on the Tribunal. It was agreed that, as the necessary documents were contained in the original bundles, referred to as Bundle A, Bundle B and the Supplementary bundle, it was to those bundles which I would refer.

Further evidence

5. An application had been made under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 27 October 2016. The new evidence which the Appellant wished to produce related to her ethnicity. It had been found at the First-tier Tribunal that the Appellant could relocate to Bulawayo. The Appellant submitted that she could not relocate there due to her Shona ethnicity. This issue had not been raised at the First-tier Tribunal as it was only seen to be an issue by the Appellant following Judge Easterman's finding that she could internally relocate.
6. I considered that it was the interests of justice to admit this further evidence given that the issue of relocation was relevant to the Appellant's appeal. The evidence had been with the Respondent since October 2016.

Findings and reasons

7. The Respondent rejected the Appellant's claim on the grounds that there were inconsistencies in her evidence. However, the Appellant was found to be credible by the First-tier Tribunal judge. "I am satisfied that the so-called inconsistencies, and discrepancies are merely different ways of saying similar things." [63] "I reiterate that I find nothing particularly implausible or inconsistent about the appellant's account of her sexuality." [66] The Respondent has not disputed the finding that the Appellant is a lesbian, and I adopt this finding.
8. In relation to the Appellant's claim to have been assaulted by the CIO, the First-tier Tribunal judge stated "Thus, in my view in relation to the assault, given that I found the appellant's account about her sexuality to be credible, I do accept to the lower standard that something took place, which involved herself and her father, which may have involved C.I.O. officers, although that is less than clear on the evidence" [73]. However, he did not reject any part of the Appellant's evidence.
9. I have considered the evidence relating to the assault. The Appellant gave oral evidence at the hearing before me. While this was not extensive, she answered all questions put to her and was not evasive. She was cross examined on aspects of the

incident, in particular how the men had identified themselves. Her evidence was consistent with her previous evidence, and with the documentary evidence. I find that her evidence can be relied on.

10. The Appellant said in her witness statement dated 31 March 2016 that the men identified themselves as CIO officers. "I opened the door and they said that they were CIO officers" [19]. She later repeated "They had stated that they were CIO" [20]. She said at the hearing before me that this is how she knew that they were CIO officers. They were not in uniform, but she stated that this was normal for CIO officers. I find that the Appellant has been consistent, and I find that it is reasonably likely that the men who assaulted her and her father were from the CIO.
11. I find that it is apparent from the nature of the assault, and the comments made by the CIO officers, they were assaulted due to the Appellant's sexuality. In her witness statement she said "they were saying the whole time: "why do you want to twist nature" [20]. She said in her witness statement that they had also referred to her ethnicity, stating "you coloureds think you can twist nature" [20]. This was consistent with the answers she had given at her asylum interview (Q269 and Q270).
12. I find that I can rely upon the Appellant's evidence regarding the claimed assault. I find there is a reasonable likelihood that the assault took place, as was found at the First-tier Tribunal hearing. I find it is reasonably likely that the men who assaulted the Appellant and her father were from the CIO. I find it is reasonably likely that the assault took place due to the Appellant's sexuality.
13. No clear finding had been made in the First-tier Tribunal as to whether or not the Appellant would want to live an openly gay lifestyle in Zimbabwe. Before me she was asked in examination whether she would want to, and she said that she would. In her witness statement dated 31 March 2016 she referred to the fact that in the United Kingdom she "can openly walk, talk, touch, kiss my partner openly. It is not something where we are afraid to be who we are as we can do it here. [...] I know that I can't go back there as I will not be allowed to be who I want to be. [...] I would have to hide who I am as a lesbian, as you cannot be a lesbian in Zimbabwe and survive" [15]. I find that the Appellant has been living an openly gay lifestyle in the United Kingdom and would want to live an openly gay lifestyle in Zimbabwe.
14. An issue which had not come at the First-tier Tribunal hearing, but which the Appellant had referred to at her asylum interview and in her witness statement, was her ethnicity. At Q269 and Q270 of her asylum interview she had referred to the fact that the CIO officers referred to her as "coloured". In her witness statement dated 27 October 2016 she stated that her father was a Zimbabwean citizen of coloured ethnicity, being a descendant of Scottish grandparents [6]. Her maternal family comes from Mozambique [7]. "As a person I identified as a coloured and Shona. I speak English and Shona. I was taught Shona in school. Most of my friends are Shona as that is the ethnicity of indigenous people from Harare. Majority of my family on both maternal and paternal are Shonas." [8]

15. I find that the Appellant identifies as a person of Shona ethnicity. I have accepted her account of the assault by the CIO officers and I find that she was then identified as being “coloured”. She has set out in her witness statement of 27 October 2016 her ethnic background and why she is regarded as “coloured”. I find that the Appellant is identified as coloured and Shona.
16. The Appellant gave evidence at the hearing that her family and close friends all live in Harare. She said that she did not have close friends or family outside Harare. She did not know anyone in Bulawayo and she had not been to Bulawayo before. I accept the Appellant’s evidence and find that her family and friends live in Harare, and that she does not have any friends or family in Bulawayo.
17. The Appellant was asked whether any of her family members in Harare were gay. She said that they were not. She was asked whether any of her friends in Harare were gay and she said she did not know if they were living openly. She had not been in touch with them for a long time. I find that the Appellant is not in contact with anyone in Harare who is living an openly gay lifestyle.

Risk on return

18. I have found above that it is reasonably likely that the Appellant’s account is true. I therefore need to consider risk on return to Zimbabwe for a lesbian who has been identified as such in Zimbabwe and has been assaulted as a result by the CIO, who wants to live an openly gay lifestyle, and who identifies as coloured and Shona.
19. I have carefully considered the country guidance of LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487 (IAC). The headnote states:

“(i) There has been much public expression of extreme homophobia at the highest levels in recent years.

(ii) Male homosexual behaviour is criminalised, but prosecutions are very rare. Lesbianism is not criminalised.

(iii) Some homosexuals suffer discrimination, harassment and blackmail from the general public and the police. Attempted extortion, false complaints and unjustified detentions are not so prevalent as to pose a general risk. There are no records of any murders with a homophobic element. “Corrective rape” is rare, and does not represent a general risk.

(iv) There is a “gay scene,” within limitations.

(v) Lesbians, living on their own or together, may face greater difficulties than gay men.

(vi) GALZ (Gays and Lesbians of Zimbabwe) takes a realistic view: Zimbabwe is “not the worst place in the world to be gay or lesbian even though the President, government

officials and church leaders have whipped up a climate of hysterical homophobia.”

(vii) Applying HJ & HT [2010] UKSC 31, [2010] Imm AR 729, there is no general risk to gays or lesbians. Personal circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk.

(viii) The police and other state agents do not provide protection.

(ix) A homosexual at risk in his or her community can move elsewhere, either in the same city or to another part of the country. He or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances present risk throughout the country.”

20. I find that the Appellant has already faced harassment and discrimination on account of her sexuality. Her evidence is that she was bullied and victimised at school on account of her sexuality (Q135 to Q139). This has not been disputed. I have found above that she and her father were assaulted by CIO officers on account of her sexuality. I find that she is known by her family, her school friends and the CIO to be gay. I find that the assault which took place in September 2013 amounts to an act of persecution on account of her sexuality.
21. While LZ found that there is no general risk to homosexuals returning to Zimbabwe, it states that “*Personal circumstances place some gays and lesbians at risk*”. I find that the Appellant’s personal circumstances do place her at risk. I make this finding primarily because the Appellant has previously been subject to persecution on account of her sexuality and because she would be an openly gay woman living on her own.
22. In relation to the increased risk to the Appellant on account of her wishing to live an openly gay lifestyle, paragraph 111 of LZ states:

“This case does not concern an openly gay person. Such a case would have to be assessed on its own facts. HJ & HT makes it clear that the test is not whether persecution may be avoided by behaving more discreetly. A case might be based partly on habits acquired under the greater freedom of life abroad. On our findings, being openly gay does not translate into a real risk, but it might well be a significant factor.”
23. Despite LZ finding that there was no general risk to gays or lesbians, I find that the case did not concern an openly gay individual. Further, it found that there had been much public expression of extreme homophobia (headnote (i)), that some homosexuals suffer discrimination, harassment and blackmail (headnote (iii)), and that there was no protection from the police or other state agents (headnote (viii)).
24. I find that since 2011, the situation has deteriorated for homosexuals. The public

expression of extreme homophobia has continued, right up to President Mugabe, and the attitude of those in power and authority towards GALZ has worsened. The Operational Guidance Note: Zimbabwe, November 2013, 3.11.4, which post-dates LZ, states: "In 2011 Mugabe publicly blamed the LGBT community for Africa's ills and declared its members to be worse than "pigs and dogs." In February Mugabe said that same-sex marriage was "insanity" and "satanic", while in May 2012 he was reported as stating that "homosexuality will lead to the extinction of the human race". Shortly before the July 2013 elections, Mugabe reportedly stated that if his ZANU PF party wins "he will make the country a "hell" for gays and lesbians"."

25. I find that this rhetoric continued, and in February 2014 Mugabe was quoted as saying that he would not allow homosexuality in Zimbabwe (B180). The US State Department Report 2014 states that in March 2014 Mugabe declared "gays have no human rights" (B31).
26. There is further evidence of the rhetoric used by Mugabe more recently in the Country Policy and Information Note Zimbabwe: Sexual orientation and gender identity, November 2016 (the "CPIN November 2016"), in particular paragraphs 5.3.1 to 5.3.3.
27. LZ took into account the evidence of GALZ. It was submitted that would GALZ would give different evidence now, given what has happened to them since 2011. This is speculation but, given the problems that GALZ have encountered since 2011 at the hands of the authorities, it is likely that they would not be so positive.
28. Paragraph 104 of LZ states:

"Dr Phillips described to us the ways in which GALZ is very careful to operate within the law. He accepted, however, that if President Mugabe wished to take stern action against the organisation, or even to close it down, legal niceties would not prevent him. GALZ leads an uncertain existence, but it carries on within a degree of tacit official and social tolerance. "
29. The background evidence provided indicated that such "official and social tolerance" did not last. Evidence was provided that its offices were raided and its members arrested, and that there are, or have been, efforts to close it down altogether. I was referred to an article from the Washington Blade which states that, in August 2012, 40 members of GALZ were arrested (A89). The Human Rights Watch World Report 2015 for Zimbabwe states that two GALZ officials were arrested in March 2014 on charges of organising a media training workshop without police clearance (B42). It states:

"These attacks on LGBT people, arbitrary arrests of LGBT activists by police, and the harassment by state agents of GALZ in previous years, continue to drive many LGBT people underground."
30. In March 2014 a news article stated "earlier this month, Zimbabwe's President Robert Mugabe vowed to continue with legal efforts to close down GALZ. He said: "I

understand we have a group of homosexuals in this country. I didn't know until I was told the day before yesterday. So we want to check on who is in that group" (A85).

31. I find that the evidence shows that the tolerance for GALZ as referred to in LZ did not continue. Members of GALZ were arrested in 2012, and by 2014 Mugabe was trying to close GALZ down. There is further evidence in relation to GALZ in the CPIN November 2016 at paragraphs 5.4.1 to 5.4.5.
32. I have taken into account the case of DSG & Others (Afghan Sikhs - departure from CG) Afghanistan [2013] UKUT 00148 (IAC) regarding departure from Country Guidance. I find that the situation has worsened for homosexuals and gay rights groups. I find as well that LZ was not dealing with an openly gay individual. I find it is reasonably likely that the situation has worsened for an openly gay person living in Zimbabwe.

Sufficiency of protection

33. LZ is clear that the police and other state agents do not provide protection (headnote viii). Paragraph 112 states: *"On this issue there is no difficulty. The sources agree, and the respondent accepts, that anyone who is at risk of persecution in Zimbabwe as a homosexual, male or female, will not receive legal sufficiency of protection from the police or other state agencies. Resort to such agencies may even make matters worse."*

Internal relocation

34. I find that the Appellant could not return to her home area of Harare. She has suffered persecution on account of her sexuality from the CIO in Harare. She is known to be gay by the CIO, her family and friends. It was submitted by Mr. Nath that the Appellant could relocate to Bulawayo. He did not suggest that the Appellant could relocate to any other area of Zimbabwe.
35. I find that while LZ states that relocation to Bulawayo, where there is greater tolerance, might be an option, this is not an option for the Appellant owing to her Shona ethnicity. I have taken into account headnote (7) of CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 00059 (IAC) which states: *"Relocation to Matabeleland (including Bulawayo) may be negated by discrimination, where the returnee is Shona."* I accept that this case covered political asylum, but this headnote is not limited, and is just as relevant to the Appellant seeking asylum on grounds of sexuality.
36. While it is not been suggested that she could relocate to anywhere else in Zimbabwe apart from Bulawayo, I have nevertheless considered whether she would be able to relocate elsewhere in Zimbabwe. I find that she would want to live as an openly gay woman in any part of Zimbabwe and therefore this would increase her risk on return where ever she went. Further, I find that she would be living alone given that all of

her friends and family are in Harare. I find that she would be identified as a lesbian, given that she would be open about her sexuality. She would not have any protection from the authorities.

37. I find that it would be unduly harsh to expect her to relocate to an area of Zimbabwe, where she had no support from any family or friends, where she would be a lesbian living alone, and would be identified as such. I find that she would struggle to support herself as an openly gay lesbian and would be likely to experience discrimination in her attempts to gain employment. The CPIN November 2016 states at 2.3.10:

“Government and religious rhetoric limits people’s ability to openly express their homosexuality or bisexuality. LGBT persons generally do not openly express their sexuality or gender identity in their workplaces, or within their families. Zimbabwe is deeply religious and traditional, and sexuality generally (homo- or hetero-sexual) is inhibited and unlikely to be publically expressed. LGBT persons experience a climate of intimidation, stigma and discrimination which may exclude them from society, public services and job opportunities.”

38. The Appellant was previously unemployed in Zimbabwe and has been unemployed in the United Kingdom. I find that she is likely to be economically inactive. Paragraph 79 of LZ states:

“An economically active lesbian is at less risk of perception as a lesbian because she is more likely to be able to afford to live in a low density housing area, and so to enjoy a measure of protection from public scrutiny of her lifestyle and circumstances, which a woman living in a high density housing area would not be able to enjoy.”

39. I find that the Appellant would be reasonably unlikely to be able to find safety low density housing. Taking all of the above into account, I find that it would be unduly harsh to expect the Appellant to relocate in Zimbabwe.
40. Considering all the above, given the Appellant’s personal circumstances, in particular the fact that she has been previously subject to persecution by the CIO on account of her sexuality, that she would live an openly gay lifestyle, and that she is Shona, I find that the Appellant has demonstrated that there is a real risk that she will suffer persecution on return to Zimbabwe and so her claim succeeds on asylum grounds. As I have allowed her claim on asylum grounds, I do not need to consider her claim to humanitarian protection. Following my finding in relation to her asylum claim, I find that she would also be at risk of treatment contrary to Articles 2 and 3 of the ECHR such as to put the United Kingdom in breach of its obligations. The appeal is therefore also allowed on human rights grounds.

Decision

41. The appeal is allowed on asylum grounds.
42. The appeal is allowed on human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 17 May 2017

Deputy Upper Tribunal Judge Chamberlain