



**Upper Tribunal  
(Immigration and Asylum Chamber)  
PA/01422/2015**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 6<sup>th</sup> February 2018**

**Decision & Reasons  
Promulgated**

**On 16<sup>th</sup> February 2018**

**Before**

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY  
DEPUTY UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**SND  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. B Hawkins, instructed by Fadiga & Co

For the Respondent: Mr. N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. The First-tier Tribunal (“FtT”) has made an anonymity order and for the avoidance of any doubt, that order continues. We emphasise at the outset that no report of these proceedings shall directly or indirectly identify the appellant.

2. This is an appeal against a decision of FtT Judge Obhi promulgated on 25<sup>th</sup> September 2017. The Judge of the FtT dismissed the appellant's appeal against the respondent's decision of 16<sup>th</sup> September 2015.
3. At the conclusion of the hearing before us, we announced that in our judgement, the decision of the FtT is infected by a material error of law and the decision of the FtT Judge is set aside. We directed that the matter is to be remitted to the FtT for hearing *de novo*. We said that we would give the reasons for our decision in writing. This we now do.
4. This matter has an unfortunate and lengthy history that is set out at paragraphs [1] to [3] of the decision of the FtT Judge and we do not set it out in this decision. For present purposes, it is sufficient to note that the appellant first arrived in the UK on 17<sup>th</sup> December 2005 when she was almost 15 years of age to join her mother who had settled status in the UK. In January 2011, she was convicted of robbery at St Albans Crown Court and sentenced to 2 years imprisonment. A deportation Order was made against her on 7<sup>th</sup> December 2013. An appeal against that decision was dismissed by the FtT on 8<sup>th</sup> April 2014. On 14<sup>th</sup> September 2014, the appellant applied to revoke the Deportation Order. On 16<sup>th</sup> October 2014 she was served with a decision refusing to revoke the Deportation Order and certifying her claim as clearly unfounded under s94 of the Nationality Immigration and Asylum Act 2002. The appellant made various further applications on the basis of fresh representations most recently, following removal directions issued on 28<sup>th</sup> March 2015. It was the respondent's decision of 16<sup>th</sup> September 2015 to refuse to revoke the deportation order that gave rise to the appeal before the FtT.
5. A summary of the appellant's asylum claim is set out at paragraphs [4] and [5] of the decision of the FtT Judge. We do not repeat the account of events relied upon by the appellant in this decision. The Judge heard evidence from the appellant and that evidence is set out at paragraphs [12] to [15] of the decision.

6. The findings and conclusions of the Judge are to be found at paragraphs [25] to [39] of the decision. The Judge noted that the FtT had previously considered the appellant's claim that she is a lesbian but had not found her to be credible in respect of her claimed relationship. However, at [27], the Judge notes that the respondent now accepts that the appellant is a lesbian and the judge of the FTT was satisfied that the appellant is in a relationship. At paragraph [28], the Judge notes the issues before her. At paragraph [30], the Judge records that there is now overwhelming evidence before her that the appellant is living openly as a gay person in the UK. In the same paragraph the Judge states "*.. The more difficult question is whether she would live openly in Zimbabwe. I do not believe that she would...*". The Judge went on to consider the country guidance decision of **LZ (homosexuals) Zimbabwe CG [2011] UKUT 00487**. At paragraph [34], the Judge concluded:

*"..If the appellant returned and lived with her partner, as two women living together, that would not in itself give rise to any assumptions on the part of the local community. The appellant would have to go out and publicly announce her sexuality. There is a difference about living openly, which equates to simply living your life without interference, and taking steps to hide it. I believe that the appellant belongs to the former. I also find that there would be support for her from organisations such as GALZ...."*

7. At paragraph [35], the Judge sets out her overall conclusions as to the international protection claim:

*"Therefore, in summary, I find that the appellant is gay. I find that she would live openly, but that for the reasons given by the Tribunal in LZ that does not necessarily mean that she will be at a real risk of persecution in Zimbabwe, but is a factor to be taken into account I find that the appellant will live as a homosexual but she is unlikely to make her sexuality a subject of open discussion because, as the Tribunal found in LZ, Zimbabweans tend not to discuss their sexuality. There is some evidence in the present case that the appellant will not do so, as*

*she spent many years not discussing it with her own family and her mother. Her reasons for not doing so were not to do with persecution but disapproval. For similar reasons I do not believe that she will openly discuss her sexuality, but I do find that she will continue to live as a lesbian. Even in the case of HJ and HT, Lord Hope accepted that “the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he is seeking is not the test.....the Convention was not directed to reforming the lede of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do it he were not returned....the focus ...must be on what will happen in the country of origin”.*

8. The Judge then went on to address the appeal against the decision to revoke the deportation order by reference to the relevant public interest considerations enshrined in paragraphs 390, 390A, 398, 399 and 399A of the immigration rules and Part 5 of the 2002 Act. At paragraphs [38] and [39] of her decision, the Judge notes that she was not satisfied that there is a real risk to the appellant of persecution based on her sexuality and that the appellant’s right to a private and family life with her partner over-rides the strong public interest in deportation.

#### The appeal before the Upper Tribunal

9. The Appellant advanced three grounds of appeal. The first two grounds relate to the ambiguity in the decision of the Judge as to whether the appellant would live openly as a lesbian in Zimbabwe, and if she would not live openly, the reasons for that. The final ground is that if the Judge had concluded that the appellant would ‘live openly’ upon return, the Judge failed to consider the relevant risk factors that the appellant may be exposed to, without a male partner or support from her family.
10. Permission to appeal was granted on 5<sup>th</sup> January 2018 by Upper Tribunal Judge Blum. The matter comes before us to determine whether the

decision of the FtT contains a material error of law, and if so, to remake the decision.

11. At the hearing before us, Mr Hawkins accepted that although there appears to be an inconsistency in the Judge's findings at paragraph [30] and [35] of the decision as to whether the appellant would live openly as a lesbian in Zimbabwe, in the final analysis at paragraph [35] of the decision, the Judge proceeds upon the premise that the appellant is gay and that she would live openly in Zimbabwe.
12. Mr Hawkins submits that in reaching her decision, the Judge failed to have regard to, or make findings upon material matters. He submits that in **LZ**, the Tribunal considered the position of women at paragraphs [75] to [92] of the decision. The Tribunal noted, at [79], that 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. The Tribunal recognised, at [80], that the perception that a woman is a lesbian may lead to discrimination or harassment from some individuals, but not generally to violence, and at [81], that where a real risk of persecution or serious harm is established, the police do not offer lesbians any sufficient protection.
13. At paragraph [24] of her decision, the FtT Judge noted the submissions made on behalf of the appellant. It was submitted that an organisation such as GALZ had no teeth, and would not assist the appellant in finding work or pay her bills. The difficulties that she would face were that she was likely to live in an area of high density, so she was more likely to suffer discrimination. She had no family there apart from a step mother with whom she had issues. She had no money. Living openly and living in hostility would create insurmountable obstacles, which she may be able to override if she had support and could find work, but

without that, she would be particularly vulnerable and would face persecution.

14. Mr Bramble submitted that there was no evidence that the appellant could not live in Bulawayo and that it was open to the Judge, on the evidence, to conclude that she should not depart from the Country Guidance set out in **LZ**. He submits that the Country Guidance and the background material establishes that there is a higher level of tolerance of homosexuality within Zimbabwean society than government rhetoric would suggest. He accepted, rightly in our judgement, that the Judge does not in her final analysis take into account the evidence of the appellant as to the obstacles that she would face.
15. We accept that the decision in **LZ** and the background material notes that GALZ is a long-established organisation, with nine affiliated organisations across Zimbabwe, whose existence is tolerated. If a lesbian is willing to join the organisation (which can be done on line without visiting Harare) GALZ is able to provide some support to her, including practical support in providing access to lawyers (through ZLHR), and to doctors and clinics which are not homophobic. We note however that where a real risk of persecution or serious harm is established, the police do not offer lesbians any sufficient protection.
16. In our judgement, the failure to consider the circumstances that the appellant would find herself in upon return to Zimbabwe is material, because we cannot be satisfied that there is only one possible outcome. The error of law identified in the decision of the FtT is that having found that the appellant is gay and that she would live openly in Zimbabwe, the Judge failed to fully consider all material factors when determining whether the appellant's personal circumstances would expose her to a real risk of persecution in Zimbabwe.
17. Acknowledging that the country guidance and background material may weigh heavily against the appellant and without wishing to give the appellant any false hope, we are satisfied that the Judge failed to fully

consider all material factors when determining whether the appellant's personal circumstances would expose her to a real risk of persecution in Zimbabwe, such that the decision of the FtT Judge should be set aside.

18. As to disposal, we have decided that it is appropriate to remit this appeal back to the FtT for hearing afresh, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25<sup>th</sup> September 2012. In light of the nature of the error of law, and extent of any judicial fact-finding necessary, the appropriate course is to remit the matter to the FtT for re-hearing. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

### **Notice of Decision**

19. The appeal is allowed. The decision of FtT Judge Obhi promulgated on 25<sup>th</sup> September 2017 is set aside, and we remit the matter for a de novo hearing in the First-tier Tribunal.
20. An anonymity direction is made.

Signed

Date 13 February 2018

Right Honourable Lord Boyd of Duncansby  
Deputy Upper Tribunal Judge Mandalia

### **FEE AWARD**

There was no fee award by the FtT since no fee is payable.

Signed

Date 13 February 2018

Right Honourable Lord Boyd of Duncansby  
Deputy Upper Tribunal Judge Mandalia

