



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003383

First-tier Tribunal Nos: PA/00851/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

UNAMI NCUBE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Lota of Derby Immigration Aid Consultants

For the Respondent: Ms S Lecoite Senior Home Office Presenting Officer

Heard at Field House on 24 November 2023

DECISION AND REASONS

1. On 18th January 2020 the Appellant, whose date of birth is recorded as 11th November 1979, made application for international protection as a refugee on the basis that she was an LGBT national of Botswana and the victim of domestic violence.
2. On 14th September 2022 a decision was made to refuse the application. Though there was an initial issue about whether the Appellant was entitled to citizenship in Zimbabwe the Respondent accepted that the Appellant was a national of Botswana and that members of the LGBT community there formed a particular social group within the meaning of the Refugee Convention.
3. Because of what the Respondent found to be inconsistencies in the Appellant's evidence it was not accepted that:
 - (i) the Appellant was forced into an arranged marriage with a man when she was just 16 years of age;

- (ii) even if she was married to this man or lived with him as husband or wife, she fled from him, he being violent and abusive, as she contended;
 - (iii) she was lesbian;
 - (iv) she was at risk on return to Botswana;
 - (v) there was insufficient protection in Botswana;
 - (vi) she could not relocate. It was contended by the Respondent that the Appellant could relocate to Gaborone which was accepting LGBT persons.
4. For the same reasons the Respondent did not accept that the Appellant was entitled to humanitarian protection nor human rights protection.
5. The Appellant appealed to the First-tier Tribunal. On 6th February 2023 her appeal was heard by Judge of the First-tier Tribunal Sweet sitting at Manchester. In a decision the following day Judge Sweet dismissed the appeal on all grounds.
6. Not content with that decision the Appellant applied for permission to appeal to the Upper Tribunal. In a decision dated 3rd August 2023 First-tier Tribunal Judge Komorowski refused permission on the basis that even though credibility findings were being challenged, because there was no challenge to the availability of internal relocation, the appeal to the Upper Tribunal would be dismissed even if based only on her sexual preference or domestic violence.
7. Not content with that decision a renewed application was made to the Upper Tribunal. That application was determined on 10th October 2023 by Upper Tribunal Judge Jackson who in granting permission and finding the grounds to be poorly drafted, helpfully distilled the grounds to be as follows.
8. The Grounds of Appeal are that the First-tier Tribunal erred in law in
- (i) its assessment of the Appellant's son's evidence, making no clear findings on whether it was accepted or rejected;
 - (ii) failing to give any reasons for finding that the Appellant could internally relocate;
 - (iii) failing to make any findings on the documentary evidence of physical assaults;
 - (iv) being confused about what happened in November–December 2019;
 - (v) failing to make findings as [to] the evidence that the Appellant's husband was charged with, and convicted of, assaulting her and as to the response of the courts in Botswana; and
 - (vi) failed to consider that the risk of serious harm for humanitarian protection grounds need not be for a Convention reason.
 - (vii) failing to provide any or any adequate reasons why the Appellant could internally relocate even if a lesbian or a victim of domestic violence; and

- (viii) failing to provide any or any adequate reasons why the Appellant would benefit from a sufficiency of protection even if a lesbian or a victim of domestic violence; the findings being arguably circular.
9. The humanitarian protection findings were found by Judge Jackson similarly to suffer from the same arguable circular reasoning and lack of substantive reasoning.
10. The factual matrix contended for by the Appellant is helpfully set out by Judge Sweet in his determination and reasons:
- "2. The background to the appellant's case is that, in 1995, she claims to have been forced into an arranged marriage when she was still a minor, with Keven Sibanda, a member of the Botswana Democratic Party. She was abused by her husband for three years, and as a result became a lesbian.*
 - 3. Her husband already had a wife and children, but his first wife had died in 2016. After her son was born, her relationship had improved with him. In 2013 she was beaten so much that she had to go to hospital, and the police were involved. Prior to this, she had asked the Chief for help.*
 - 4. In 2016, she said that she started an affair with a woman named Tsepiso Nyathi, which her husband found out about in 2017 and led to further abuse and harassment from him. She was disowned by her family and her husband threatened to kill her.*
 - 5. In November 2019, she fled to Zimbabwe to live with her uncle while she was pregnant, but her husband found her two weeks later and took her to a traditional healer in South Africa. She returned to Zimbabwe. She was then beaten further so that she miscarried on 21 December 2019 and the police were involved. Her husband was arrested and given a 6-month suspended sentence imposed by a magistrate Tinoshe Tashaya on 6 January 2020, and then she was arrested on return to Botswana where she was imprisoned until her husband came to bail her. She was able to escape then and took a bus to her cousin in South Africa.*
 - 6. She fears that on return she will be persecuted because her husband will kill her, and she fears her family because of her sexuality".*

The Hearing Before Me

11. At the outset I indicated to Ms Lecointe my preliminary view that the decision of Judge Sweet was inadequate. It was not at all clear whether Judge Sweet had taken into account any of the documentary evidence, the veracity of which had not been challenged by the Secretary of State. Much of the documentary evidence supports, or at least is capable of supporting, the Appellant's contention that she was assaulted.
12. It seems on the face of the decision, and I so find, that the judge having considered the inconsistencies raised by the Secretary of State went no further and found that those inconsistencies outweighed the rest of the evidence. The

trouble with that is that it is not clear whether the judge looked at “the rest of the evidence” at all.

13. In making findings of fact, of course, a judge needs to start somewhere but in this case it seems to me that the starting point ought to have been the documentary evidence which supported the Appellant’s case that she had sustained physical injuries. The next question for the judge would be how those injuries were sustained, and then by whom. Those questions were not asked. Once those questions are asked and answered it may lead the judge to the next question: if it is adjudged that these injuries were caused by her husband whether that of itself was sufficient, in other words, do women in Botswana, victims of domestic violence, form a social group, applying similar principles to those in ***Shah and Islam***, a point which does not appear to have been addressed, and whether she is lesbian.
14. Yet another point which was not considered by the judge on the issue of sufficiency of protection was that on her case she moved to Zimbabwe and was found not long afterwards. In those circumstances whilst the Secretary of State contends that the Appellant could relocate somewhere in Botswana that too was not properly considered by the judge.
15. In the circumstances this matter, with the consent of both parties Appellant, will be set aside.

Decision

16. The appeal to the Upper Tribunal is allowed and the matter will be re-determined in the First-tier Tribunal.



Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 December 2023