



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002126

First-tier Tribunal No: PA/50021/2022
IA/00086/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9th February 2024

Before

THE HONOURABLE MRS JUSTICE STEYN DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE FRANCES

Between

P Z D
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes, instructed by Greater Manchester Immigration Age Unit

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 24 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Brazil born in 1991. The appellant does not associate with the gender assigned to her at birth. She identifies as a woman. She appeals against the decision of First-tier Tribunal Judge Kelly dated 22 May 2023 dismissing her protection claim and allowing her appeal on human rights grounds.

Grounds of Appeal

2. The appellant appealed on the following five grounds. The judge erred in:
 - (i) conflating acts of persecution with the motivation of the persecutor;
 - (ii) failing to acknowledge the agreed position between the parties;
 - (iii) failing to recognise gender identity as an innate characteristic;
 - (iv) failing to apply authority on mixed motivations for persecution; and
 - (v) failing to apply the 2006 Regulations and/or give adequate reasons.
3. Permission was granted by First-tier Tribunal Judge Monaghan on 16 June 2023 for the following reasons:

“2. The Judge has arguably made a material error of law in failing to accept that the Appellant shares an immutable characteristic with other trans women but instead found that such self-identification is essentially one of choice by the person making it. The Judge has arguably erred as the Respondent accepted at paragraph 23 of the reasons for refusal letter that the particular social group which the Appellant claimed to be a member of, namely a transgender woman does exist in Brazil as the Appellant has an innate characteristic that is perceived as different by the surrounding society.

3. The Judge has arguably erred in failing to give any or any sufficient reasons as to why he was not prepared to accept the concession offered by the Respondent and reached a different conclusion thereon. The other grounds, whilst less cogent are arguable.”

Submissions

4. Mr Clarke conceded the judge had made an error of law as identified in the grant of permission. The respondent had conceded that the appellant was a member of a particular social group at paragraph 23 of the refusal letter, which states:

“After careful consideration it is accepted that the particular social group you claim to be a member of, namely as a transgender woman does exist in Brazil as you have an innate characteristic that is perceived as different by the surrounding society. Your claim to be a member of this group will be considered below.”

5. On that basis we proceeded to hear submissions on the remaking of the appeal. Mr Holmes submitted that the appellant was entitled to refugee status. There was no challenge to the judge’s credibility findings or to his finding that the appellant would face very significant obstacles to reintegration if returned to Brazil. The judge had made sufficient factual findings for the Upper Tribunal to remake the decision. The appellant’s narrative was accepted by the judge and is a fairly lengthy catalogue of mistreatment from a variety of sources. The appellant had been subject to verbal abuse from known and unknown persons. She had

experienced day-to-day discrimination. She had experienced targeted harassment, including death threats, she had endured emotional abuse and her family had kicked her out of the house when she was younger. In relation to physical abuse, she had been stabbed but the most severe incident was one of extreme sexual violence accompanied by extreme physical mistreatment.

6. Mr Holmes submitted the totality of the appellant's mistreatment was accepted by the judge who also identified other barriers which the appellant would face on return to Brazil. This was a truly horrendous history of acutely malicious treatment. The appellant clearly met the definition of a refugee.
7. Mr Clarke submitted that the judge's assessment of risk on return was void of any findings in relation to the appellant's asylum claim. He submitted there was only one specific finding on the particular facts of the appellant's case at [39]. It was necessary to look at past persecution, the appellant's profile and how she would act. Mr Clarke submitted the judge accepted the rape as a past persecutory act, but there was no analysis of the other acts and issues. Mr Clarke accepted the decision could be remade on the evidence before us. There was no challenge to the appellant's credibility and those findings could stand.

Error of law

8. We find the judge erred in law in finding at [34] that he was unable to accept Mr Holmes' submission that the appellant shared an 'immutable characteristic' because "such self-identification is essentially one of choice by the person making it. Moreover, the physical manifestations of the exercise of such choice may be changed by (amongst other things) dressing differently and/or reversing of effects of any hormone therapy undertaken by the person concerned. Thus, whilst a person's decision to identify as being of a different sex to that which was assigned to them at birth must be entirely respected, it is nevertheless the case that self-identification is a matter of choice rather than an immutable characteristic."
9. This finding is contrary to Mx M (gender identity - HJ (Iran) - terminology) El Salvador [2020] UKUT 00313 (IAC) in which the Upper Tribunal held:

"The principles in HJ (Iran) are concerned with the protection of innate characteristics. As such they are to be applied in claims relating to gender identity."
10. We find the judge erred in law in failing to apply relevant authority and in failing to give adequate reasons for why he did not accept the respondent's concession. The point was rightly conceded by Mr Clarke. We set aside the judge's findings at [30] to [38] and the decision to dismiss the appellant's appeal against the refusal of his protection claim at [40].
11. There was no challenge to the judge's decision to allow the appellant's appeal on human rights grounds and we preserve the judge's findings at [39] and [41]. We also preserve the findings at [26] to [29] which we summarise as follows. The appellant is a credible witness and her account of her experiences in Brazil were accepted save for the Brazilian police's involvement in the attack on her home.

Remaking the asylum appeal

12. The appellant has been verbally and physically abused by her father who threw her out of the family home. As an adult, she has been physically abused by the police and members of the public. Her house was vandalised in 2015. She was beaten and raped by two police officers and believes this is how she contracted HIV. She has been verbally and physically abused by a man who threw a bottle at her. Throughout 2016 and 2017 she received threatening and abusive telephone calls and messages. In 2019 she was verbally abused and stabbed in the arm. She was attacked by police officers and raped for a second time. In 2020 someone threw tear gas and a Molotov cocktail into her house.
13. We find these acts amount to past persecution and they are supported by the background country material. We are satisfied on the appellant's credible account that she has been persecuted for a Convention reason. It is not in dispute that the appellant is a member of a particular social group by virtue of her gender identity.
14. At paragraph 42 of the refusal letter, the respondent considered the appellant's account to be externally consistent with the 'Response to an information request Brazil: Transgender, 09 March 2021' which states:

"1.1.4 A Forbes article from November 2020 noted: Brazil is one of the deadliest places to be transgender. In 2019 alone at least 124 transgender people were murdered a report found. Mexico the next most dangerous nation had only half the number of reported killings in the same timeframe. A September study found that the number of reported murders of transgender people in 2020 has already surpassed 2019's total with 129 deaths. The number of suicides permitted by transgender individuals has also increased, the report found."
15. We have considered the expert country report of Dr Samantha Serrano who opines:

"It is my expert assessment that [the appellant] is at high risk of the following types of persecution: murder, social exclusion, emotional abuse, sexual abuse, and physical abuse throughout all of Brazil. My assessment is based on my review of her documented experiences, testimony, research, and direct observations from in-country research and observation."
16. At paragraphs 12.4 to 12.15, Dr Serrano refers to the background evidence which we have set out in Annex A. We are satisfied of her expertise and the respondent did not seek to challenge the conclusions in her report. We attach significant weight to her evidence. We find that trans women face persecution in Brazil notwithstanding the fact that trans women have been able to take positions in public office and that there have been changes in legislation to make transphobic behaviours or activities a crime.
17. Applying the principles in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31, we make the following findings. The appellant is a black trans woman who has been persecuted for a Convention reason. Trans women, and in particular black trans women, are liable to persecution in Brazil. We are satisfied that the appellant will live openly as a trans woman and is not able to conceal her gender identity on return to Brazil.

18. The appellant has been raped by the police on two occasions. Sufficiency of protection and internal relocation are not available to the appellant on return. We find the appellant's accepted ill-treatment in the past, when considered in the context of the background material and expert report, is sufficient to meet the threshold of a reasonable degree of likelihood.
19. Having considered all the evidence in the round, we find that the appellant has shown a reasonable degree of likelihood that she will be subject to persecution on account of her gender identity if returned to Brazil. We allow the appellant's appeal.

Notice of Decision

The appellant's appeal is allowed on asylum grounds

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 February 2024

ANNEX A Extracts from expert country report

- 12.4 According to the U.S. Department of State's 2020 Country Reports on Human Rights Practices: Brazil, "Violence against LGBTI individuals was a serious concern. The Federal Public Ministry is responsible for registering reports of crimes committed on the basis of gender or sexual orientation but reportedly was slow to respond. Transgender individuals were particularly at risk of being the victims of crime or committing suicide. According to the NGO Grupo Gay da Bahia, the risk for a transgender person of being killed was 17 times greater than for a gay person. According to the National Association of Transvestites and Transsexuals in Brazil, in partnership with the Brazilian Institute of Trans Education, 124 transgender men and women were killed in 2019, compared with 163 in 2018. Police arrested suspects in only 9 percent of the cases. According to some civil society leaders, underreporting of crimes was rampant, because many LGBTI persons were afraid they might experience discrimination or violence while seeking services from law enforcement authorities.
- 12.5 Since the release of the U.S. Department of State's 2020 Country Report on Human Rights Practices: Brazil, the year's murder count has risen significantly. In 2020, there were 175 murders of Transgender individuals in Brazil, and in 2021, there were 140 documented murders.
- 12.6 As highlighted by the U.S. Department of State, impunity in crimes against transgender people in Brazil is high, as suspects were arrested in only 9% of reported murders of transgender people in 2019. In the Brazilian state of Ceará, of four violent murders of transgender women between January and April of 2022, no suspects were arrested. These cases involved decapitation, beatings, stonings, and gunshots.
- 12.7 Violence against transgender women, particularly black transgender women, is well documented in the Brazilian media. In the state of Rio, the largest news media company in Brazil, Globo, noted that the first six months (January-June) of 2022 saw an explosion in reported violence against transgender women. While 159 cases of violence were documented in 2021, in 2022 by June, 146 cases had already been reported. 80% of the reports detailed beatings, 29% involved threats, 10% included choking, 8% involved rape, and 8% included attacks with blunt objects.
- 12.8 The experiences reported by [the appellant] regarding violence and harassment are in line with reports about violence faced by other transgender women in Brazil. In my conversations with trans women in Brazil, they have told me about being inappropriately

touched in public spaces, having their hair pulled, and being followed. I have heard multiple stories of police officers dismissing violence or attributing violence experienced to the women's job or "choice to dress as a woman."

12.9 While reported rates of violence are high against LGBTI+ people, as an article from Open Democracy attests, the actual case numbers are likely much higher than those documented. "The full dimensions of violence against LGBTQ people is still unclear. This is because official and non-governmental data on physical and digital violence targeting gay, lesbian, bisexual, queer and trans people is patchy and uneven. Where threats, attacks, injuries and killings are recorded at all by Brazilian authorities, they rarely register the underlying motive. To date, most available data involving violence against LGBTQ people is produced by non-government advocacy and research groups such as Transgender Europe, Grupo Gay da Bahia, Instituto Brasileiro Trans de Educação and others.

12.10 Paragraph 57 of the rejection cites that openly transgender women have been able to take positions of power in political office and this shows acceptance in society of the population. However, despite being in positions of influence, many elected transgender women report transphobic and sexist political violence towards them. In May of 2022, a black trans Council Woman acting in Niterói (Benny Briolly) in the state of Rio de Janeiro reported receiving death threats from a State Congressman from an opposing party. Ms. Briolly had previously had to flee the country after receiving validated death threats in 2018, soon after the murder of Marielle Franco, a lesbian black Council Woman in Rio de Janeiro from the same political party (PSOL, the Socialism and Liberty Party).

12.11 While laws are in place to protect transgender people, high-ranking members of the Brazilian government continue to publicly communicate LGBTI phobic opinions and advocate for transphobic policies. Brazil's president, Jair Bolsonaro, has said he is "proudly homophobic and transphobic." An article in the Conversation cites, "Bolsonaro has said some heinous things about LGBTI+ people and sex workers. He publicly declared (translated from Portuguese) "I'm not going to fight or discriminate, but if I spot

two men kissing in the street, I'll beat them up," and that "90 per cent of adopted boys are going to be gay and will be sex workers for the couple," He said in a TV interview on Participação Popular "[If] the kid begins to look gay-ish, you just beat him up really bad and this will fix him. Right?"

12.12 In January of 2022, President Bolsonaro said that LGBTI+ agendas are used against him as a way to take down the government and are part of a project to "destroy the family".

12.13 These comments, along with policies he has promoted foster a conservative culture of hatred towards LGBTI+ people, evidenced in rising violence rates since his election. The government of Jair Bolsonaro openly presents itself as against the existence of LGBTI+ people.

12.14 This discrimination is augmented because Brazil is a predominantly conservative society with a fast-growing fundamentalist Pentecostal population, to which President Bolsonaro's politics and speech appeal. In my expert opinion, President Bolsonaro's hate speech empowers individuals that hold these beliefs to enact violence against LGBTI+ individuals.

12.15 In São Paulo, Brazil, I witnessed two men wearing Brazilian flags as capes (a symbol currently associated with political support of Jair Bolsonaro) verbally assault a transgender woman during the day, in a public and crowded place, in the center of the city without interference from civil police officers who observed the event.