IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003952
First-tier Tribunal No:
PA/51895/2021
IA/04661/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE MANDALIA

Between

SD (Zimbabwe)
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr A. Beech, Counsel
For the Respondent: Mr A. Mullen, Senior Home Office Presenting Officer

Heard at Royal Courts of Justice (Belfast) on 17 May 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

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1. By a decision dated 16 August 2023, First-tier Tribunal Judge Rea ("the judge") dismissed an appeal against the decision of the Secretary of State dated 9 April 2021 to refuse the appellant's claim for asylum, and an associated human rights claim, made on 16 May 2019. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Austin.

Anonymity

3. The judge made an order for anonymity. We maintain that order in light of the nature of the appellant's protection claim.

Factual background

4. The appellant is a citizen of Zimbabwe and was born in 1988. He claimed asylum on the basis of his sexuality, claiming to be a gay or bisexual man at risk of being persecuted in Zimbabwe. He claimed to have been targeted for arrest and prosecution in Zimbabwe because of his sexuality, leading him to flee to South Africa, where he also faced mistreatment. While in South Africa he secured a false South African passport and obtained a visa to come to the UK, purporting to be a citizen of South Africa. He claims to have arrived in January 2019 and claimed asylum on 16 May 2019.

5. The Secretary of State rejected all aspects of the appellant's asylum claim, including his claim to be a citizen of Zimbabwe. The judge found that the appellant was (i) a citizen of Zimbabwe; and (ii) a gay or bi-sexual man. There has been no challenge points (i) or (ii) by the Secretary of State, and we need say no more about those findings.

6. The judge found that the appellant would not be at risk of being persecuted in Zimbabwe. The judge found that the appellant lacked credibility in some respects. He agreed with the Secretary of State's position in the refusal letter that the appellant's use of false documentation, and the delay in claiming asylum, caused the appellant to lack credibility. He also lacked credibility for not having given a true account of his time in South Africa, the judge found. While aspects of the appellant's account of mistreatment in Zimbabwe were plausible (see para. 29), (subject to Mr Beech's submissions: see below) the account itself lacked credibility.

7. Applying the criteria in *HJ (Iran)* [2010] UKSC 31 to those findings, the judge concluded that the appellant would not live an openly gay or bisexual lifestyle in Zimbabwe. See paras 35 and 36:

> "On his own account the appellant has been in the UK since around October 2018, a period of almost five years. During that time there has been no restriction upon the appellant living openly as a gay/bi-sexual man. In 2019 he availed of therapeutic counselling from the [LGBTQIA+ charity]. He does not claim to have engaged in any sexual activity during his time in the UK other than a heterosexual relationship which has resulted in the birth of a child. He claims that he is sexually attracted to men but there is only very limited evidence that he has given expression to this in any tangible way. The letter from the

[LGBTQIA+ charity] refers to his attendance at ad hoc social events prior to the Covid pandemic. The appellant claims that he attended the Belfast Pride event and that he is still engaging with the [LGBTQIA+ charity], although this is not borne out by the letter from the [LGBTQIA+ charity] of June 2022. I find that the evidence is not sufficient to demonstrate that he has lived openly as a gay/bi-sexual man while he has been in the UK. I consider that this can only have been a matter of choice for him.

36. I am satisfied that if the appellant returns to Zimbabwe he will not live openly as a gay/bisexual man but I am not satisfied that this is because he is afraid of persecution. I consider that this will be entirely consistent with his conduct while in the UK."

8. There was no separate human rights claim. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

9. The grounds of appeal are, in summary, that the judge erred in relation to his analysis of how the appellant would conduct himself, pursuant to the third and fourth questions to be considered under *HJ (Iran)*. In particular:

a. The judge failed to take into account, or failed to give sufficient reasons for rejecting, the appellant's evidence that he would act discretely due to the fear of being persecuted in Zimbabwe. Mr Beech submitted that the appellant's clear oral evidence was that he would live in fear of being persecuted in Zimbabwe, and that there was no way he would live openly as a bisexual man upon his return. The judge simply failed properly to address that aspect of the evidence before him.

b. It was contrary to the Secretary of State's *Asylum Policy Instruction – Sexual Orientation in Asylum Claims* (Version 6.0, 3 August 2016) ("the API") to use the appellant's UK-based conduct as the basis for finding that the appellant would live discretely in Zimbabwe. Page 38 states:

> "How the individual has acted until now in their country of origin or in the UK is immaterial. Case workers should not equate any historic absence on the part of the claimant in openly expressing their sexuality, for any reason, as evidence of voluntary discretion. The mere fact that someone may, in their past, have been discreet, even for non-protection reasons, does not mean that those reasons were either the sole reasons why they were discreet, nor do they indicate how the claimant will continue to behave on return."

In any event, the appellant *had* lived openly as a bisexual man in the UK;

c. The judge's reasoning was inconsistent with *HJ (Iran)*, which merely requires the prospect of being persecuted to be *a* reason for living discretely, not *the sole* reason for living discretely.

10. Expanding on the grounds of appeal, Mr Beech relied on his helpful skeleton argument dated 13 May 2024.

11. There was no rule 24 notice from the Secretary of State. Mr Mullen submitted that the judge reached findings of fact that were rationally open to him, which took all relevant considerations into account, and for which he gave sufficient reasons.

The law

12. Pursuant to paragraph 82 of Lord Rodger’s judgment in *HJ (Iran)*, the approach to be followed by tribunals when considering claims for asylum based on a well-founded fear of being persecuted on account of the claimant’s sexuality is as follows:

> “When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant

> a surrogate for the protection from persecution which his country of nationality should have afforded him."

13. The grounds of appeal challenge the judge's evaluation of the evidence and his application of the *HJ (Iran)* criteria. That is a challenge to the multifactorial evaluation of the evidence. To the extent the grounds of appeal target's the judge's findings of fact, we must approach those findings within the confines of the limits to which appellate courts and tribunals are subject. See the judgment of Treacy LJ in *In the matter of an application by JR87 for judicial review* [2024] NICA 34 at para. 74:

> "The principles to be applied when reviewing findings of fact as here are clearly set out in the unanimous decision of the Supreme Court in *DB v Chief Constable of the PSNI* [2017] UKSC 7. That decision reveals a principled reluctance to interfere with the findings of fact of a trial judge even in the judicial review context where the evidence is on affidavit."

14. Treacy LJ continued by quoting at length from the decision of the Supreme Court in *DB*. The quote cross-referred to the judgment of the Supreme Court in *Re B (a Child)* [2013] UKSC 33 at para. 53, which states:

> "As Lady Hale and Lord Kerr explain in para 200 and para 108 respectively, this [reluctance to interfere with the findings of fact of a trial judge] is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

Discussion

Ground (1): No failure to take appellant's evidence into account

15. Mr Beech's submissions challenge the factual evaluation of evidence reached by a first instance trial judge: the questions of how the appellant would conduct himself upon his return to Zimbabwe, and why, were questions of fact which lay at the heart of the judge's analysis. Bearing in mind the deference to first instance trial judges that must be extended by appellate courts and tribunals, we consider that we may only interfere with those findings if we are satisfied that they involved the making of an error of law, or fall into one of the three categories of findings summarised by Lady Hale and Lord Kerr in *Re B (a Child)* [2013] UKSC 33 at para. 53, quoted above.

16. The findings of fact the judge was required to make were, in words endorsed by Lord Walker in *HJ (Iran)* at para. 98, "essentially an individual and fact-specific enquiry." Moreover, as Lord Walker went on to observe, conducting that enquiry:

> "…will often be a difficult task since much of the relevant evidence will come from the claimant, who has a strong personal interest in its outcome."

17. The judge was plainly aware of the appellant's evidence concerning his prospective conduct upon return to Zimbabwe. He summarised it the following terms at para. 34:

> "The appellant is quite clear in his evidence that if he returns to Zimbabwe he will not live openly in terms of his sexuality because of fear of persecution. If I accept this as genuine the test for persecution in *HJ (Iran)* is met."

18. There can therefore be no suggestion that the judge was not aware of the appellant's evidence on this issue, nor that he did not consider it. The judge correctly identified that the central issue for his consideration on this pivotal point in the appeal was whether he accepted that aspect of the appellant's evidence as genuine. He plainly did not accept that aspect of the appellant's evidence, for the reasons the he went on to address. No doubt, sitting as an expert judge of a specialist tribunal, he had in mind Lord Walker's observations concerning the credibility of the appellant's evidence on that issue, as set out at para. 16, above.

19. In that connection, the judge plainly had a number of a general credibility concerns about the appellant's evidence, which informed the judge's rejection of the appellant's evidence concerning his prospective conduct upon his return. See, for example, paras 15 and 21 concerning the damage to the appellant's general credibility arising from the delay in his claim for asylum, and inconsistencies in the appellant's visa application, in which he had claimed to be South African. See also para. 26 in which the judge found that the appellant's general credibility had been damaged by his failure to give a true account of his time in South Africa. The judge also had concerns that the appellant's evidence that he had told his female partner about his bisexuality had been overstated, and that he was "sceptical about how candid the appellant has been with her" (para. 20). The appellant has not challenged those aspects of the judge's reasoning. They were all legitimate findings which the judge was entitled to feed into his overall credibility assessment, conducted in the round.

20. Mr Beech submitted that the judge's overall adverse credibility findings were inconsistent with the findings at para. 29 that the appellant had given a "plausible" account of what took place in Zimbabwe. We respectfully consider that there is no merit to this submission. An account may be plausible, in the sense that it was the sort of thing that may have happened, or that may have been likely to happen, yet still lack credibility for other reasons. Para. 29 records concerns of that nature by the judge; the appellant's account was plausible, but for the reasons given by the judge relating to the appellant's personal credibility, he did not accept that part of it. So much is clear from the judge's use of the word "however" in the second sentence, which preceded his summary of further credibility concerns. At para. 30, the judge said he did not accept the appellant's evidence on this issue to be credible. Properly understood, therefore, the judge's

findings on this issue were that the appellant had given a plausible yet ultimately incredible account of what took place in Zimbabwe.

21. It is against that background that the judge approached the appellant's evidence about how he would live upon his return to Zimbabwe. Far from failing to address or assess the appellant's evidence, it is plain that the judge both considered it – and rejected it.

22. The judge made extensive adverse credibility findings in relation to the appellant, as we have summarised above. Those factors fed into the judge's analysis of the appellant's evidence. See the reference at para. 34 to "*if I accept this as genuine* the test for protection set out in *HJ (Iran)* is met" (emphasis added). The judge plainly rejected that part of the appellant's evidence.

Ground (2): findings not unlawful in light of the *Asylum Policy Instruction*

23. Secondly, the judge was entitled to draw upon the appellant's UK-based outward expression of his sexuality when looking to how the appellant would conduct himself upon his return. That was a relevant consideration which the judge was entitled to take into account.

24. We reject Mr Beech's submission that the judge's findings concerning the appellant's UK-based outward expression of his sexuality were not open to him. They were. While the judge found that the appellant's expression of his sexuality to others had been consistent (see, e.g., para. 16), the judge also found that the appellant's involvement with an LGBTQIA+ support charity's "ad hoc social activities" had "fizzled out" following Covid, and that the appellant had had no contact with the charity since early 2020 (para. 17). At para. 20 the judge observed that the appellant appeared not to have been open with the charity about his bisexuality, since the support letter it provided said that he identified as a gay man, without mentioning his bisexuality. The judge also observed that he was sceptical about how candid the appellant had been with his current partner. There was little evidence before the judge to demonstrate that the appellant had lived openly in the sense that would lead to a risk of being persecuted in Zimbabwe, bearing in mind the judge had rejected the appellant's claimed pre-flight persecution narrative in Zimbabwe. The judge's findings of fact on this issue were rationally open to him.

25. Against that background, we do not consider that anything in the extract from page 38 of the API (see para. 9.b, above) calls the judge's analysis pursuant to those findings of fact into question.

26. First, the API is an instruction to the Secretary of State's officials. It is not, and could not, provide instruction or direction to independent judges of the First-tier Tribunal.

27. Secondly, the API cautions the Secretary of State's caseworkers from "equating" historic absences of expression with evidence of discretion, and instead requires caseworkers to treat the claimant's evidence as the primary evidence for a prospective assessment of the claimant's behaviour. The judge's decision was entirely consistent with this approach (see bullet point three, page 39). He did not "equate" the appellant's in-country conduct with his prospective Zimbabwe-based conduct as though it were some automatic calculation, but rather conducted a careful credibility assessment of all aspects of the appellant's case –

including the evidence from the appellant himself – in the round. The judge had the benefit of considering the appellant's oral evidence in the context of all other evidence (see para. 7), which was a forum for analysis far removed from the Secretary of State's caseworkers taking decisions on the papers. The judge heard the appellant's evidence on this issue and rejected it, as he was entitled to.

28. Thirdly, if we are wrong about the API and if, properly understood, the API *did* eschew precisely the well-reasoned, holistic credibility analysis of the sort conducted by the judge, we respectfully consider that the judge was right to take the appellant's in-country conduct into account when assessing this issue, notwithstanding the approach of the API. In our judgment, any assessment of how an individual would conduct him or herself in the future – on any issue – may rationally take into account past conduct on that issue, as part of an overall assessment of the evidence in the case in the round. That is a rational, common sense conclusion. It applies in these circumstances. The judge's findings were not findings that no reasonable judge could have reached.

Findings concerning the appellant's prospective future conduct open to the judge

29. The final issue for our analysis is whether the judge erred by failing to appreciate that the fear of being persecuted need only be *a* reason for the appellant's prospective discretion in his manner of conduct, rather than the *sole* reason. There is no merit to this submission. At para. 36, the judge said that he was not satisfied that the reason the appellant would not live openly as a gay/bisexual man in Zimbabwe because was because he, the appellant, was afraid of being persecuted. That was a finding of fact in which any distinction between *a* cause or the *sole* cause did not make a difference. The judge found that the appellant's discretion would not be because he was afraid of persecution. On the judge's findings of fact, the appellant had not lived openly as a gay or bisexual man in the United Kingdom, where there was no suggestion of persecution; those findings formed the basis of the appellant's prospective conduct in Zimbabwe. On the judge's findings of fact, the appellant would not live discreetly on account of the fear of any persecution in Zimbabwe, whether the *sole* cause or merely *a* cause. This ground is without merit.

30. Reading the judge's decision as a whole we consider that it is a paradigm example of a first instance trial judge considering the whole sea of evidence before him, reaching findings of fact on the full spectrum of issues he had to consider. The judge found some points in favour of the appellant, such as his claimed nationality and sexual orientation, and made prospective findings of fact concerning the appellant's reasonably likely conduct in Zimbabwe with which the appellant now disagrees. With respect to the careful submissions of Mr Beech, the appellant has not demonstrated that the judge's findings of fact, and consequential analysis, involved the making of an error of law.

31. This appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

The appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 July 2024