



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06446/2014

THE IMMIGRATION ACTS

Heard at Manchester
On 12 November 2015

Decision and Reasons Promulgated
On 4 December 2015

Before

Deputy Upper Tribunal Judge Pickup

Between

PT

[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant:

Mr M Schwenk, instructed by Arrow Law Solicitors

For the respondent:

Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, PT, date of birth 14.12.72, is a citizen of Zimbabwe.
2. This is his appeal against the decision of First-tier Tribunal Judge Devlin promulgated 20.11.14, dismissing his appeal against the decision of the Secretary of State to refuse his asylum, humanitarian protection and human rights claims. The Judge heard the appeal on 24.10.14.
3. First-tier Tribunal Judge Osborne granted permission to appeal on 22.12.14.

4. Thus the matter came before me on 12.11.15 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below, I find no error of law in the making of the decision of the First-tier Tribunal such as to require the decision of Judge Devlin to be set aside.
6. The asylum claim is founded on fear of persecution and/or mistreatment on return to Zimbabwe due to political opinion and to membership of a particular social group (PSG) as a gay man. The relevant background can be summarised briefly as follows. The appellant claims to have been discrete about his gay sexual orientation whilst in Zimbabwe, but in 1998 was caught by a cousin and his secret revealed to his father, who threw him out and in the process discovered that the appellant had been printing MDC flyers. He claims that his father is the son of a prominent Zimbabwean political figure closely associated with Zanu-PF. He had been a student in the UK in 1993 and returned in November 2000, but became an overstayer. The police arrested him on 14.2.01 on suspicion of fraud. He was granted bail but did not attend the court hearing. Instead he obtained a travel document and returned to Zimbabwe in April 2001. However, he came back to the UK on 29.8.02 using a passport in a false identity. He remained in the UK illegally and did not claim asylum until 2012. He fears his father, his family, and Zanu PF, because he is gay and because he was printing MDC materials prior to the formation of the MDC in November 1998.
7. At §10 of the refusal decision, dated 10.8.14, the Secretary of State accepts that the appellant is a Zimbabwean national, based on his languages of English and Shona, "In addition there are Home Office records showing that you arrived on a Zimbabwean passport in November 2000. In the absence of compelling evidence to the contrary it is accepted you are a Zimbabwean national." The refusal decision goes on to reject both the claims of homosexuality and political activity as a MDC activist in Zimbabwe. However, the claims are also rejected on the alternative basis that even if true on the background evidence the appellant does not face a real risk of persecution or serious harm on account of his sexuality and there is no general risk of persecution for MDC members in Zimbabwe at the present time. It is also stated that he could relocate away from his home area and notes that he had returned to Zimbabwe without facing difficulties.
8. In a careful, comprehensive and detailed decision, Judge Devlin rejected the appellant's account of political activity in Zimbabwe on behalf of the MDC. The Judge was not satisfied he had demonstrated to the lower standard of proof that he is a member of the family asserted to be of high profile and politically prominent in Zimbabwe. Although the judge accepted the appellant is gay, his account of being found out and his sexuality disclosed to his father was rejected and was not satisfied that he would choose to live openly as a homosexual in Zimbabwe. The judge also rejected Mr Schwenk's arguments that the appellant would face discrimination as a HIV sufferer with a STD and be denied access to medication on grounds of his sexuality or being a HIV sufferer. Neither did the judge accept that he would face prosecution and imprisonment for have left using false documents.

9. One of the grounds of appeal is the judge's rejection of the appellant's claimed name and identity as PT and thus by surname and in factual relationship to be part of an allegedly powerful Zanu PF family in Zimbabwe, named in the case papers. Mr Schwenk referred to §10 of the refusal decision, cited above, and argued that the appellant had arrived in the UK in 2000 on a Zimbabwean passport in the name of PT, which has been retained by the Secretary of State but not produced. It is also claimed that at the CMR hearing of 17.9.14 the Home Office Presenting Officer accepted the appellant's identity as PT. Mr Schwenk submitted that the Secretary of State accepted his identity and thus it was an error of law for the judge to raise this issue in the decision and find to the contrary.
10. I do not accept Mr Schwenk's argument. The refusal decision does not concede the appellant's identity at all, merely his nationality. It appears that the Home Office did not seize the passport referred to as having been used in 2000, but according to the information provided by Ms Johnstone, it was taken from him by the police when he was arrested in February 2001. The refusal decision refers to the source of information being "Home Office records" in relation to his entry in 2000, no doubt a record made on his entry. I have examined the handwritten CMR record in the case file before me and it contains no reference to identity having been agreed or conceded, as I notified Mr Schwenk at the hearing. The refusal decision does not directly address the claimed family connection.
11. I find no error in the way in which the judge dealt with this issue. It is common ground that in 2001 the appellant returned to Zimbabwe, having applied for a travel document in his own name. He also applied for and obtained a passport in his own name in order to come back to the UK in 2002. In assessing the credibility of his factual claims the judge considered at §72 the reasons why he returned to Zimbabwe in 2001 and the circumstances of that return. At §85 the judge pointed out that acceptance of the appellant's account of having returned in order to avoid the publicity that might be attendant on his prosecution and deportation was first, so far-fetched and contrary to reason as to be incapable of belief, and second, depended on his identity and being a member of the named powerful family closely associated with Zanu-PF. In his asylum interview he was asked for evidence of his identity and this family connection. He later produced a number of documents, including a birth certificate. The judge noted that he did not produce the emergency travel document, his national identity card or driver's licence with which he obtained the travel document and thus they do not appear to have been available to the Secretary of State. At the hearing before me, but not before the First-tier Tribunal, the appellant produced a letter from his former solicitors, dated 27.12.12, purporting to enclose copies of the birth certificates. However, it was addressed to the Northwest Enforcement and Compliance team in Liverpool and it is far from clear this was received or seen by the Secretary of State prior to the making of the decision. The birth certificate and emergency travel document were before the judge at the appeal hearing, together with witness statements purporting to confirm the appellant's name and identity. The judge was entitled to consider this evidence in the round in the context of the evidence as a whole, but evidently was unpersuaded of the reliability of the documents.

12. In all the circumstances, I reject this ground of appeal as unfounded; the Secretary of State neither accepted nor conceded his identity or claimed relationship to the allegedly powerful political family. I am satisfied that if the identity had been accepted that would have been made clear at §10 of the refusal decision. I find that the First-tier Tribunal was entitled to reach the conclusion, for which cogent reasons have been provided, that the appellant had failed to demonstrate that he is PT and related to a powerful Zanu-PF family as claimed.
13. The grounds also assert that the judge erred in law by unfairly conducting his own post-hearing research and taking into account evidence that was not before the Tribunal.
14. A key claim of the appellant's factual account was that he had been involved in printing stationery for MDC in November 1998. At Q51 he said he was hated by his father for printing stuff for MDC flyers ahead of the launch of the MDC. At Q52 he claimed he had done this printing in November 1998 and it was discovered when he was thrown out of the house in December 1998. §12 of the refusal decision explains that the Secretary of State did not find this claim credible because according to the MDC's own website, the MDC was not formally launched until September 1999, following an initial meeting of 700 in February 1999 at which it was decided to challenge Zanu-PF's policies. It is pointed out that the appellant claims to be printing MDC material at a time when there was no concrete plan to establish the MDC as a political party, or even to give a name to the party. Unsurprisingly, both the Secretary of State and the First-tier Tribunal Judge found the claim not credible. There could be no party name, logo, manifesto or other such information to put on flyers and thus no purpose to the production of the same.
15. The Secretary of State cited the source for the information about the formation of the MDC as being the MDC's official website, setting out the hyperlink to the website. This put the appellant on notice as the source of the information relied on. It was a matter for the appellant whether he or his representatives bothered to check the information or its accuracy. No challenge was made to the information at the First-tier Tribunal. The judge was not only entitled but obliged to consider this issue. This was done very carefully between §34 and §50, citing the wording of the website and concluding at §35, as had the Secretary of State, that in November 1998 there was no such party, and no concrete plan to form such a party. The appellant had attempted to answer this criticism by §31 of his witness statement, suggesting that it was a loose collection of individuals who formed an opposition that was distributing documentation against Zanu-PF, and that opposition parties are always formed over a period of time before being launched. The judge also considered the background information which confirms that the party was not formed until September 1999.
16. Although the judge went into some detail about what was said on the website about the formation of the party, addressing the issue in a comprehensive and detailed way, and comparing the information on the website with the appellant's explanation, there was nothing relied on that was any different in essence to the information or reasons given by the Secretary of State. At §48 the judge found that even making allowances for differences in meaning, it was "very difficult to accept that anyone

would describe November 1998 materials as having been printed “pre” or “ahead of the launch of the MDC, which took place in September 1999.” The appellant’s witness statement explanation was reject and the judge found his account made no sense, concluding that the claimed printing could not have had anything to do with the MDC or its launch. The difference between the meanings of two phrases was not material and either meaning did not in fact assist the appellant.

17. In the circumstances, I find that the judge was entitled to look at the website relied on as source material. The appellant had had the same opportunity and made his witness statement response. What the judge did does not fall into the category of prohibited post-hearing research, or reliance on material not before the Tribunal. The bottom line is that however detailed the analysis, the conclusion was the same and for the same reason as that given by the Secretary of State. There was no procedural unfairness or unfair disadvantage to the appellant. I thus reject this ground of appeal.
18. The grounds also assert that the assessment of the background evidence was flawed, by the failure of the judge to show “sufficient evidence that he has considered the evidence from GALZ.” This material is relied on to suggest that as a homosexual the appellant will be denied access to antiretroviral treatment for his HIV status and that such discrimination amounts to persecution.
19. However, it is clear from the decision that the judge addressed this issue in some detail between §173 and §192. The judge considered the relevant country guidance cases of RS & Ors (Zimbabwe - AIDS) Zimbabwe CG [2010] UKUT 363 (IAC), and LZ (homosexuals) Zimbabwe CG [2011] UKUT 487 (IAC), in the light of Mr Schwenk’s submissions. The judge noted that he could only depart from the country guidance where there are very strong grounds supported by cogent evidence to justify not following the country guidance. At §180 the judge confirmed that he had considered the background material relied on by Mr Schwenk with care. However, the judge concluded this evidence did not demonstrate that gay men with HIV were being denied treatment, or that the shortage of anti-retroviral drugs had been engineered to discriminate against them.
20. I find that the judge gave proper and adequate consideration to the background material, providing reasons for attributing limited weight to some of it. The judge does not have to list all the evidence taken into account, provided that it is clear from the decision that there has been a careful assessment of all the evidence in the round. The judge concluded, for reasons set out in the decision that consideration of the evidence in the round did not justify departing from the country guidance. The judge thus was not satisfied at §192 that the appellant would be denied access to appropriate medication on grounds of either his sexuality or that he is an HIV sufferer. I find that this ground is no more than a disagreement with the findings and conclusions of the judge.

Conclusions:

21. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal against the decision of the Secretary of State remains dismissed on all grounds.



Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. Given the circumstances, I make an anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable in this case and thus there can be no fee award.



Signed
Deputy Upper Tribunal Judge Pickup

Dated