



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/08808/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 14<sup>th</sup> May 2018

Decision & Reasons Promulgated  
On 22<sup>nd</sup> May 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

LM  
(ANONYMITY DIRECTION MADE)

**Appellant**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation:**

For the Appellant: The Appellant in person assisted by her McKenzie Friend  
For the Respondent: Ms Aboni, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a citizen of Zimbabwe.
2. The Appellant, with permission, appeals against the decision of the First-tier Tribunal, who, in a determination promulgated on the 16<sup>th</sup> October 2017, dismissed her claim for asylum and humanitarian protection and on human rights grounds.
3. The Appellant's immigration history and factual background is set out within the determination at paragraphs 5-18, and in the papers before the Tribunal, namely, that the Appellant arrived in the United Kingdom on 11 September 2001. She claimed asylum on the basis of her political opinion in July 2007. The claim was refused by

the Secretary of State on 17 December 2007 and her appeal against the decision was dismissed on 28 February 2008. She became appeal rights exhausted by March 2008. Further representations were made in 2010 and 2013 which were rejected by the Secretary of State. Further representations were made on 3 August 2017 which resulted in the decision under appeal which is dated 25 August 2017.

4. The representations made related to the Appellant's fear of persecution on return to Zimbabwe on the basis her membership of a particular social group account of her sexuality. The Respondent in a decision letter dated 25 August 2017, set out her further submissions at paragraphs 13 to 28 and the conclusions reached at paragraph 29 were that the Appellant failed to demonstrate that she was a member of a particular social group in Zimbabwe, namely an LBGT person. It was further not accepted that in general LGBT people faced persecution or inhuman or degrading treatment from state or non-state actors in Zimbabwe and that she had failed to demonstrate that her personal circumstances would attract such persecution or inhuman or degrading treatment. It was further considered that the Appellant failed to demonstrate that there was an insufficiency of protection and applying the CPIN relating to Zimbabwe; sexual orientation and gender identity, it was considered that in general the societal and state treatment of LGBT people in Zimbabwe, even when taken cumulatively, did not reach the level to constitute persecution or inhuman or degrading treatment. The decision letter also considered Articles 2 to 3 and Article 8 (private and family life both under the rules and outside of the rules). At paragraphs 63 onwards, there was consideration of whether discretionary leave should be granted on the basis of the medical evidence that had been provided. It was concluded that medical treatment would be available to the Appellant which she could access on return (see paragraph 68 of the decision letter).
5. Her appeal came before the FTT on the 9<sup>th</sup> October 2017 and in a decision promulgated on the 16<sup>th</sup> October 2017 her appeal was dismissed.
6. The judge set out her findings and conclusions at paragraphs 25 – 42. It is plain from reading the findings of fact and assessment of the evidence that the judge did not accept her claim as credible concerning her sexual orientation. The findings of fact made can be summarised as follows:
  - (1) she had unsuccessfully claimed asylum on the basis of her political opinion and had made representations on three separate occasions, the last being rejected in 2015 but had made a claim based on her sexuality in 2017. The judge found the delay in claiming on the basis of her sexuality not to be credible.
  - (2) Judge also found it not be credible that she would take 16 years to reach the acceptance of her sexuality having been in the United Kingdom since 2001. The judge did not accept her explanation is adequate for the delay (see [26]).
  - (3) The judge rejected her claim as not credible that she was suppressing her sexuality until 2013 in the light of her evidence at the hearing that

she been attending gay clubs since 2008, two or three times a week(paragraph [27]).

- (4) The judge found that she had given inconsistent evidence in respect of a relationship with another person and there had been no evidence provided from any partner to support any relationship [28-29].
- (5) The judge did not find that the letter from the trust supported her claimed sexual orientation [31].
- (6) She had not provided cogent objective material to demonstrate that the position of the LGBT community in Zimbabwe were at risk of persecutory harm [33].
- (7) The judge considered the grounds of appeal which appeared to argue that Zimbabwean women per se are a particular social group within the definition of the Refugee Convention. The judge observed that there was nothing to corroborate this assertion by any case law or material [34].
- (8) The judge rejected her claim she did not know about asylum when she came to the UK [35].
- (9) The judge not accept her account as credible and that she had not demonstrated the factual circumstances of the claim (see paragraphs [36] – [37]).
- (10) In the alternative, the judge considered the country guidance decision of LZ [37].
- (11) At paragraph [39] the judge considered the medical evidence, in the light of the decision of RS and others (Zimbabwe- AIDS) Zimbabwe CG [2010] UKUT 363.

7. She concluded that she was not satisfied that it had been established to the low standard that she would face a real risk of persecution or serious harm in Zimbabwe on account of her claimed sexuality which the judge rejected or on account of her medical circumstances. Thus the judge dismissed her appeal.
8. The Appellant sought permission to appeal that decision and permission was granted by FTTJ Maller on the 27<sup>th</sup> November 2017 as follows:

“The judge stated at [34] but the grounds of appeal appeared to argue that Zimbabwean women per se are a particular social group. However, they do not corroborate this assertion by any case law.

The ground seeking permission content that the judge made no findings of fact regarding women of a particular social group despite Home Office country information from 2014, is updating 2016 and 2017 which accepted that women do constitute a particular social group in Zimbabwe.

It is arguable that the judge failed to consider whether the Appellant could safely return as a lone woman to Zimbabwe given her particular situation.

It is also arguable that there was no consideration of private and family life issues, and in particular whether there would be obstacles to reintegration after an absence of 16 years.

The grounds are arguable.”

9. Thus the appeal came before the Upper Tribunal. The Appellant had appeared before the First-tier Tribunal representing herself. At the hearing before the Upper Tribunal she was accompanied by Mr G, who provided assistance, advice and support as a McKenzie friend. There was no objection to this course by Miss Aboni and the Appellant was able to advance the points she wished to make via Mr G, her McKenzie friend.
10. At the hearing it became clear that neither party had provided a copy of the Home Office country information referred to in the grounds and in the decision granting permission to appeal. Miss Aboni was able to find the relevant material and it was provided to the Tribunal and to the Appellant. Time was given for all parties to consider that information prior to providing further submissions as to whether the decision of the First-tier Tribunal demonstrated an error of law.
11. As the Appellant did not have a legal representative, I asked Ms Aboni if she would make her submissions first which would then give the Appellant the opportunity to advance any issues she would wish the Tribunal to consider.
12. Ms Aboni submitted that whilst the FTTJ stated at [34] that there had been no corroboration in the form of case law or documentation to support the claim that Zimbabwean women per se are a particular social group and that this was in error, it was not material to the outcome in the light of the guidance and country materials. She referred the Tribunal to paragraph 2.2.2 which stated that while women in Zimbabwe form a PSG this does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be whether the particular person would be at risk of the persecution on account of their membership of such a group.
13. She further referred the Tribunal to the policy summary at paragraph 3.1.2 which stated that the general level of violence and discrimination against women in Zimbabwe and not in most cases amount persecution or serious harm. The onus is on the person to demonstrate that she would personally be at risk of gender-based violence amounting to persecution or serious harm. At paragraph 3.1.3 it was recorded that state protection was likely to be available for women fearing gender-based violence but each case needs to be carefully considered on its facts. Paragraph 3.1.4 made reference to freedom of movement throughout Zimbabwe to escape localised threats the members of their family or other non-state actors. Thus she submitted there was no material error as the circumstances advanced by the Appellant did not indicate any risk on return on the basis of her membership of a PSG, namely woman and that this was not the case that had been advanced before

the FTTJ. The claim had been based on sexual orientation which the judge had rejected.

14. As to the medical issues, she submitted that there had been adequate consideration to the evidence relating to diagnosis at [39].
15. However she conceded that there was a material error of law in the determination by the judge failing to consider the Article 8 issues as the grant of permission set out. In that respect she submitted that there would need to be further evidence provided by the Appellant concerning her private and family life and that to be the subject of findings of fact and assessment by the Tribunal at a further hearing before the first-tier Tribunal. She invited the Tribunal to find that there were no errors of law in the judge's assessment of the asylum/protection claim and that those findings should be preserved.
16. The Appellant and Mr G, her McKenzie friend had been able to read the guidance and to take account of its contents before addressing the Tribunal. The Appellant stated that her position would be as a lone woman and that the judge not taken into account her length of stay in the United Kingdom and absence in Zimbabwe of 17 years. She made reference to her family members in the United Kingdom who were British citizens that all family were in the UK and that she had no effective family in Zimbabwe to offer any care or protection.
17. I asked the Appellant whether there were any other issues relevant to asylum/protection issues that she wished to raise. It was said on her behalf that her current circumstances were not very pleasant and that she had been living in the United Kingdom for a long period of time but had not been able to take up employment that what she was seeking was to regularise status and to live a normal life.
18. It is for the Appellant to satisfy the Tribunal that there is an error of law in the determination of the First-tier Tribunal judge which is material to the outcome.
19. The grounds relied upon by the Appellant are set out in the papers. It is asserted that there was a failure to acknowledge that women are a particular social group in Zimbabwe and to consider the consequences of this on return. The grounds make reference to paragraph 34 and that there was Home Office country information which accepted that women did constitute a particular social group Zimbabwe. Stated that this was "Robinson obvious" and that the judge would need to make findings on the safety of return.
20. The second ground relates to the judge's assessment of Article 8 at paragraph 42. It is submitted that the judge failed to consider whether there were any obstacles to integration after an absence of 16 years and when it was not known if there was any private family support available. It is also asserted that there was no consideration as to whether her ability to mobilise the support of her family members in the UK

(specifically in their belief that she is gay) does, in fact constitute more than “normal emotional ties” or certainly a factor which weighs in proportionality balance.

21. I have carefully considered those grounds in the light of the submissions advanced by each of the parties. Dealing with the first ground, the country information makes reference to the following:

22. **2.2 Particular social group**

2.2.1 Women in Zimbabwe constitute a particular social group within the meaning of the 1951 UN Refugee Convention because they share a common characteristic that cannot be changed – their gender – and based on an assessment of the country information, they have a distinct identity in Zimbabwe which is perceived as being different by the surrounding society.

2.2.2 Although women in Zimbabwe form a PSG, this does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be whether the particular person will face a real risk of persecution on account of their membership of such a group.

### **Policy summary**

3.1.1 Zimbabwe has a legal framework for addressing violence against women but the relevant laws are not always enforced effectively and sexual and gender-based violence remain serious and widespread problems. Patriarchal attitudes and discrimination are prevalent, and women and girls can be subject to harmful traditional practices.

3.1.2 The general level of violence and discrimination against women in Zimbabwe will not in most cases amount to persecution or serious harm. The onus is on the person to demonstrate that she would be personally at risk of gender-based violence amounting to persecution or serious harm.

3.1.3 State protection is likely to be available for women fearing gender-based violence. However, each case needs to be carefully considered on its facts.

3.1.4 Women are able to move throughout Zimbabwe freely and it is likely that internal relocation will be an option, depending on their individual circumstances, to escape localised threats from members of their family or other non-state actors.

23. It is accepted on behalf of the Secretary of State that the judge was in error at paragraph 34 when she stated that women per se are not a particular social group within the definition of the Refugee Convention. As set out above women in Zimbabwe do constitute a particular social group. However as the country information also makes plain, although women do form a PSG that does not mean that establishing such membership will be sufficient to make out a case be recognised as a refugee. The country information makes reference to gender-based violence, domestic violence and forced/early marriage, and the trafficking of women. As Ms Aboni sets out, the Appellant made no reference in her written or oral evidence to be

at risk of harm in respect of these issues. Her claim related to her sexual orientation which the judge rejected for the reasons set out. The grounds do not advance any challenge to those findings of fact made by the judge therefore in the light of those findings being unchallenged, and that no further issues were identified from her evidence, it is not been demonstrated that any error was material to the outcome of this case. The Appellant has not advanced any specific risk on account of her own particular circumstances that would give rise to any risk on return on account of her gender. Ground 1 is therefore not made out.

24. Dealing with the second ground, I am satisfied that the judge erred in law by failing to consider Article 8, both family and private life, and that the consideration of this at paragraph 42 did not engage with any assessment of the Appellant's circumstances in the light of her residence in the UK since 2001 and the private and family life she stated she had established in the United Kingdom, either under the rules relevant to Article 8 or outside of the rules. The decision letter made reference to a number of issues relevant to Article 8 but there was no consideration of those issues by the FTTJ. Consequently I am satisfied that the concession was correctly made by Miss Aboni and that the FTT's decision is vitiated by an error of law and her decision shall be set aside in relation to Article 8. In the light of my assessment relating to ground one, and having found no error of law in the judge's assessment of the asylum/protection claim, the findings of fact made by the judge in the determination shall stand as preserved findings of fact.
25. As to the remaking of the decision, I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:- "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."
26. In the grounds of appeal, the Tribunal was invited to order that the case be reheard wholly or in part by a different judge. There did not appear to be any disagreement that the matter should be remitted to the First-tier Tribunal for the appeal to be reheard which would give the Appellant the opportunity to provide further evidence (both oral and documentary) and from her family members and any further medical evidence that she wishes to rely upon. Therefore I am satisfied that is the correct course to adopt. Accordingly, and in the interests of a fair and just disposal of the Appellant's claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Pacey. I consider that it is appropriate to preserve the findings made by the Judge at [25-39] of the Decision as

no error of law has been demonstrated in the judge's assessment of her sexual orientation.

Decision:

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside; the appeal is remitted to the First-tier Tribunal for a rehearing.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed 

Date: 16<sup>th</sup> May 2018

Upper Tribunal Judge Reeds