



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10777/2017

THE IMMIGRATION ACTS

Heard at Field House
On 5th June 2018

Decision & Reasons Promulgated
On 21st June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS J D
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: Mr D Jones, Counsel instructed by Sutovic & Hartigan Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State I refer to the parties as they were in the First-tier Tribunal.
2. The Appellant, a national of Zimbabwe, appealed to the First-tier Tribunal against the decision of the Secretary of State of 25th September 2017 refusing her application for asylum. First-tier Tribunal Judge Trevaskis allowed the appeal on asylum and human rights grounds in a decision dated 25th March 2018. The Secretary of State now appeals

to this Tribunal with permission granted by First-tier Tribunal Judge Froom on 20th April 2018.

3. The background to this appeal is that the Appellant entered the UK in January 1999 with a visit visa. She overstayed thereafter. She claimed asylum in 2008 and her claim was rejected and subsequent appeal dismissed. In 2010 she made a further asylum and human rights claim which was rejected and her appeal was dismissed in January 2011. She made a further claim in 2016 which was initially rejected but subsequently considered as a fresh claim and its refusal is the subject of the present appeal. The Appellant claims that she has a well-founded fear of persecution in Zimbabwe and that her return to Zimbabwe will amount to a breach of Articles 3 and 8 of the European Convention on Human Rights.
4. The Secretary of State refused the Appellant's application because it was not accepted that the Appellant would be at risk in Zimbabwe as a woman over and above any other woman in Zimbabwe because she has not demonstrated a personal risk. The Secretary of State considered the Appellant's private and family life and decided that her removal would not breach Article 8.
5. At the hearing the judge treated the Appellant as a vulnerable witness. The judge noted the Appellant's oral evidence where she answered questions from her own representative and was cross-examined. The judge heard evidence from the Appellant's son and her sister. Although she was tendered the judge did not hear oral evidence from the Appellant's mother who suffers from dementia. The judge considered the Country Policy and Information Note (CPIN) on Zimbabwe on women fearing gender-based harm or violence: Version 2.0 February 2017 and relevant case law. The judge considered previous findings in line with the case in **Devaseelan [2002] UKIAT 00702**. The judge considered the Appellant's asylum claim and decided that the Appellant had established that she is at risk of mistreatment amounting to persecution in Zimbabwe and allowed her appeal on asylum grounds.
6. The judge went on to consider private life under paragraph 276ADE and was satisfied on the basis of "the numerous factors which I have considered justified a well-founded fear of persecution, and I also find that those factors amount to very significant obstacles to her integration in Zimbabwe". The judge found that the Appellant qualifies for leave based on private life under Section 276ADE(1)(vi). The judge went on to consider Article 8 of the ECHR, finding that the refusal of further leave would interfere with the Appellant's right to respect for her family life as she would be separated from her mother, sisters, son and grandchild. The judge weighed a number of factors in favour of the interference [69] and against interference [70]. The judge considered the best interests of the Appellant's grandchild and minor nieces. The judge concluded at paragraph 78 that the decision by the Respondent amounted to a disproportionate interference with the Appellant's right to respect for private and family life in the UK.
7. The Secretary of State contends in the Grounds of Appeal that the determination is bereft of adequate reasoning and/or an analysis of the evidence and that it is not clear

why the Secretary of State lost the appeal. It is contended that the judge found that the Appellant will suffer persecution but does not draw a link as to why these factors would lead to the Appellant's persecution on account of her gender so as to bring her within a particular social group within the Refugee Convention or why these factors constitute "persecution". It is contended that, although the judge refers to the substantial background evidence of mistreatment experienced by women in Zimbabwe, he did not make reference to any of these pieces of background evidence to support this conclusion. Given that the judge referred to the Secretary of State's background evidence that the general level of violence and discrimination against women in Zimbabwe does not amount to persecution or serious harm, it is contended that the reasoning offered at paragraphs 52-56 is wholly inadequate. It is contended that this error infects the subsequent findings in relation to paragraph 276ADE of the Immigration Rules given that it imports this reasoning to find that there are very significant obstacles to the Appellant's integration in Zimbabwe. It is contended that the judge erred in the proportionality exercise given that there is no weight given to the cost to the public purse of the Appellant's treatment on the NHS. Further it is contended that the judge erred in attributing positive weight to the lack of any offending on the part of the Appellant given that this is a neutral factor (see Nasim & Others (Article 8) [2014] UKUT 00025 (IAC)). It is further contended that the judge erred in weighing the best interests of the children without undertaking any separate malices of these children or why their best interests would be adversely affected.

8. In granting permission First-tier Tribunal Judge Froom noted that it is unclear how the First-tier Tribunal Judge reasoned that the Appellant would be at a real risk of persecution as a woman given the CPIN on which he relied stated that there was no general risk. If the judge considered that there was other background evidence to show an individual such as this Appellant would be at risk, it was incumbent on him to identify it in the decision.

Error of law

9. At the hearing before me Mr Lindsay relied on the Grounds of Appeal. In his submission there is a material error in the First-tier Tribunal Judge's decision. He pointed out that the judge considered the CPIN at paragraph 28 which states that in general women in Zimbabwe do not have a real risk of persecution. The judge went on to consider characteristics of this Appellant at paragraphs 52 to 54. He acknowledged that there was evidence produced that other women had been persecuted. However, in his submission, the judge did not tie all of this together. He accepted that some women in Zimbabwe have been persecuted even with this Appellant's characteristics but in his submission here there is nothing identified to show that this Appellant's characteristics would lead to persecution or who would persecute her. He contended that there is just a bare assertion by the judge without anything further as to why this Appellant would come within the Refugee Convention. Mr Lindsay pointed out that the CPIN cited at paragraph 28 at 3.12 puts the onus on the Appellant to demonstrate that she would be at risk of persecution or serious harm. However in his submission the judge has not explained why any mistreatment would

amount to persecution or serious harm. In his submission the lawful consideration of refugee law remains outstanding in this case.

10. Mr Lindsay submitted that the proportionality assessment stands and falls with the asylum findings. In any event he submitted that the proportionality assessment is fatally flawed as the judge failed to weigh the expense of NHS treatment in the balance. He further submitted that there was no finding at paragraph 77 that there was family life between the Appellant and her grandchild or nieces. He highlighted that the judge failed to take into account the public interest set out in Section 117B of the Nationality, Immigration and Asylum Act 2002 which indicates that little weight should be given to private life established in the UK where an Appellant's status is precarious. He submitted that but for these errors the outcome of the appeal may have been different.
11. Mr Jones submitted that there had been a finding that there was family life in the Article 8 assessment at paragraph 64 where the judge found that the refusal of leave will interfere with the Appellant's right to respect for his family life because it will force her to return to Zimbabwe and she will therefore be separated from her mother, sisters, son and grandchild. Whilst he conceded that this was framed in terms of interference, he submitted that the finding that there was family life was open to the judge in light of the evidence, in particular that set out at paragraph 22 where the Appellant's son said that she was like a mother to her grandchild because her real mother had spent three years in prison. In his submission it was clear that the judge had reached a conclusion that the Appellant did have a family life with the grandchild and with wider family.
12. In relation to the asylum issue Mr Jones submitted that the Secretary of State's challenge was made in a vacuum. In his submission the conclusions reached by the judge had to be considered in light of the surrounding evidence. In his submission the starting point is a skeleton argument which was before the First-tier Tribunal where the judge was asked to be discreet in relation to a number of matters which were matters which were not widely known within her family. Mr Jones pointed to paragraph 52 where the judge noted that it is accepted by the Respondent that women in Zimbabwe do amount to a particular social group but that membership of that group alone will not justify the grant of international protection without further evidence that the Appellant is herself at risk of persecution. He pointed to paragraph 45 where the judge specifically acknowledged that he took into account the oral evidence and that he had referred to the specific background evidence identified in the skeleton argument. In his submission the judge's whole evaluation is based on this Appellant's particular circumstances. In his submission it is clear that the judge looked at the position of the Respondent and the evidence submitted by the Appellant before going on at paragraph 54 to determine whether the Appellant's protection needs had been made out. He submitted that in paragraph 54 the judge did look at the Appellant's particular circumstances including her past experiences in Zimbabwe.
13. Mr Jones submitted that the judge took account of the background evidence referred to in the skeleton argument in considering sufficiency of state protection. He made reference to a number of aspects of the background evidence referred to in the skeleton

argument from the CPIN of February 2017 which he submitted referred to the inefficacy of state protection, the need for a case sensitive evaluation of the individual and the lack of support available for individuals. In his submission it is very clear that the background evidence is the framework within which the judge recorded his findings in paragraph 54. He accepted the judge could have been more expansive about the risk but in so doing the judge would have trespassed into the areas in relation to which he had been asked to exercise caution due to sensitivities around the family members. In his submission the judge has identified sufficient qualities of the Appellant to enable the appeal to be allowed in light of the Respondent's own background evidence.

14. In terms of Article 8 Mr Jones submitted that the judge had taken into account all of the factors. In his submission it was open to the judge to conclude at paragraph 60 that there were very significant obstacles to the Appellant's integration in Zimbabwe. In terms of Article 8 outside the Rules it was his submission that the fact that the Appellant had not committed any crimes was at best a neutral factor. He submitted that the issue about the cost to the NHS had not been raised in the Reasons for Refusal letter or in the submissions to the judge and therefore it is not reasonable to raise this now. In any event he submitted that the Appellant is carer for her mother who suffers from dementia and is thus relieving the public purse from costs in relation to that responsibility. In his view the judge weighed up everything required to make a decision in relation to Article 8 open to him on the evidence. He submitted in any event that the Appellant as at this stage had been in the UK for nineteen and a half years and the outcome to this case is almost inevitable as she will be soon able to qualify under paragraph 276ADE in relation to twenty years' residence in the UK.
15. In response Mr Lindsay submitted that the judge did not deal with the crux of the Home Office case in that he did not explain in paragraphs 52-54 why this Appellant would be at risk of persecution. He accepted that the judge referred to the Appellant's HIV status and past mistreatment but in his submission there is nothing in the judge's decision to explain why the Appellant's characteristics and health conditions would lead to persecution. Although past mistreatment can be an indicator of future risk, he submitted that the judge has not explained why it might be on these facts. In terms of Article 8 he submitted that at paragraph 64 the judge does not clearly find that there is family life existing between the parties. The judge has not considered whether there are more than normal emotional ties between the family members and has not done so and in his submission this is a misdirection.
16. At the end of the hearing I reserved my decision which I now give with reasons.

Error of Law

17. In my view the judge's findings at paragraphs 52- 54 are key to the determination of all of the issues in this appeal. This is because at paragraph 60, in considering private life under paragraph 276ADE, the judge referred back to the factors which he considered justify the well-founded fear of persecution and found that these factors also amount to very significant obstacles to the Appellant's integration in Zimbabwe.

Further, in considering the issue of freestanding Article 8 the judge considered a weighty factor in the Appellant's favour as being the fact that she meets the Immigration Rules for leave based on private life. As this finding was made on the basis of the findings relevant to asylum it cannot be unpicked from the factors in the Appellant's favour. Accordingly, in my view, the key findings from which all of the conclusions flow are the findings at paragraphs 52-54 of the decision.

18. I accept Mr Jones's submission that the findings in relation to asylum cannot be considered in a vacuum and must be considered in the context of the skeleton argument and all of the evidence before the judge. It is clear from the way the decision is constructed that the judge accepted that the Appellant is a vulnerable witness and that the judge accepted the preliminary matter put at paragraph 5 of the skeleton argument where he was asked to respect the Appellant's wish to keep certain information private and to avoid the disclosure of aspects of the Appellant's claim to her family. In my view this has informed the way the judge dealt with key aspects of the Appellant's case.
19. The judge cited the CPIN at paragraph 28 of the decision where he set out 3.1.2 – 3.1.5 of the CPIN which states, *inter alia*:
 - “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.”
20. It is clearly therefore the Secretary of State's view that a woman in Zimbabwe can establish a well-founded fear of persecution depending on the particular circumstances of her case. It is those very particular circumstances of this Appellant's case which were in consideration in this appeal.
21. In my view it would have been better if the judge had specifically referred to the skeleton argument and the matters therein so that the Secretary of State could have understood better the reasons the appeal was allowed. However, in light of the skeleton argument and its contents, I accept that that the judge had those matters firmly in mind when considering the Appellant's particular circumstances and that the constraints imposed by matters raised in the skeleton argument affected the way the decision was written.
22. With that in mind I have considered the evidence before the judge as to this particular Appellant and as to her circumstances and the potential risk of persecution she faces upon return to Zimbabwe. I take into account her witness statements. I take into account the psychiatric report in the Appellant's bundle and the Appellant's history outlined there including the fact that she was subjected to domestic violence in

Zimbabwe. The report highlights her psychiatric condition and her particular vulnerabilities. I accept that the judge took all of this evidence into account in determining the appeal.

23. The CPIN highlights at 3.2.2 that the question to be addressed in each case of a woman in Zimbabwe is whether the particular person will face a real risk of persecution on account of their membership of a particular social group, that is women in Zimbabwe. I accept that I have to read into the reasoning at paragraphs 52-54 to some extent. However I bear in mind the guidance given by the Court of Appeal in the case of **MD (Turkey) [2017] EWCA Civ 1958** which reminds us that the duty to give reasons requires that reasons must be proper, intelligible and adequate. It is my view that it is adequately clear from the reasoning, in the context of the evidence and the skeleton argument, that the judge has accepted that this particular Appellant is vulnerable in light of her past history of mistreatment and that as a result of her vulnerability it is likely that she may face similar mistreatment, and thus persecution, again on return to Zimbabwe.

Notice of Decision

24. The decision of the First-tier Tribunal Judge does not contain a material error of law.
25. The decision of the First-tier Tribunal shall stand.

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 him or any member of their family. 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: 18th June 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT **FEE AWARD**

No fee has been paid and there is therefore no fee award.

Signed

Date: 18th June 2018

Deputy Upper Tribunal Judge Grimes