



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/04595/2017

THE IMMIGRATION ACTS

**Heard at Royal Courts of Justice, Belfast
On 3 April 2019**

**Decision & Reasons
Promulgated
On 25 April 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

**[S M]
(ANONYMITY DIRECTION NOT MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S McTaggart, instructed by Killen Warke Solicitors

For the Respondent: Mr M Matthews, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who was born in 1978, is a citizen of Zimbabwe. She appeals the decision of First-tier Tribunal Judge Handley who for reasons given in his decision dated 7 August 2018 dismissed her appeal on grounds under the Refugee Convention, humanitarian protection and Articles 2, 3 and 8 of the Human Rights Convention. The appellant had lived in Zimbabwe until 2000 when she moved to South Africa where she has immigration status described as “work permit for permanent resident” until her return to Zimbabwe in April 2016. This is when she claims to

have encountered the difficulties that led to her flight to the United Kingdom and application for asylum. Her sister [SMM] was recognised as a refugee following a successful appeal on 10 June 2005.

2. The basis of the appellant's claim was that, whilst in Zimbabwe, she had been taken for her sister when living with her cousin. This has led to her detention from which she escaped. The appellant also is HIV positive. The judge did not consider the appellant had given a credible account and did not consider the appellant's health status would give rise to a breach of Article 3 or that there would be a breach of Article 8 were she to be returned to Zimbabwe.
3. The grounds of challenge argue:
 - (i) Irrationality;
 - (ii) A failure to give reasons.
4. The grounds focus on the judge's finding that neither the appellant's sister nor her cousin had been involved in politics. It is argued that this finding was irrational because the appellant's sister had given uncontested evidence to the fact that she had been awarded refugee status in the United Kingdom having fled Zimbabwe due to her work with the MDC, supported by documentation provided. The appellant herself had "identified" her sister as having been involved in the MDC but she had not asked her about details of that. The appellant had also been specific about her cousin's involvement politically. No reasoning had been by the judge why he had found the appellant's account of escape implausible.
5. In granting permission First-tier Tribunal Judge Hodgkinson considered each of the grounds had arguable merit.
6. At the outset of the hearing Mr Matthews explained that he had first thought that the argument based on the challenge to the judge's finding of implausibility might be sufficient to save the decision but, on reflection, considered that there was no evidence to support the judge's conclusion in paragraph [31] which is in the following terms:

"31. Having carefully considered all the available evidence I do not accept that the appellant's cousin and sister were involved in politics. I find that the appellant had not engaged in any political activities in Zimbabwe. I do not accept that she would be at risk on return on account of imputed political opinion."
7. In his submission, a reasonable inference from the grant of refugee status to the appellant's sister in 2005 would have been on the basis of her political opinion and it appears that the judge had made a factual error in concluding otherwise. Mr Matthews was less persuaded in respect of the finding by the judge as to the appellant's cousin's involvement. He confirmed that the judge did not have a copy of the determination relating to the appellant's sister's appeal in 2005 but nevertheless considered the

expectation that it had been based on political activity was not “too much of a stretch”. He had conferred with Mr McTaggart and both agreed for the decision to be set aside and for the case to be remitted to the First-tier Tribunal for a fresh re-hearing.

8. Neither party required me to give detailed reasons for my decision and so I shall only do so briefly. This remains an adversarial jurisdiction and it was open to Mr Matthews to concede matters. Nevertheless, I reminded Mr McTaggart of my concern over the use of irrationality as a peg on which to hang a challenge when, in reality the concern was an absence of reasoning or evidential support for a particular conclusion. This practice was addressed by Brooke LJ in *R (Iran) and Another v SSHD* [2005] EWCA Civ 982. At paragraphs [11] and [12] Brooke LJ expressed a view which remains equally valid today:

“11. It may be helpful to comment quite briefly on three matters first of all. It is well known that "perversity" represents a very high hurdle. In *Miftari v SSHD* [2005] EWCA Civ 481, the whole court agreed that the word meant what it said: it was a demanding concept. The majority of the court (Keene and Maurice Kay LJ) said that it embraced decisions that were irrational or unreasonable in the *Wednesbury* sense (even if there was no wilful or conscious departure from the rational), but it also included a finding of fact that was wholly unsupported by the evidence, provided always that this was a finding as to a material matter.

12. We mention this because far too often practitioners use the word "irrational" or "perverse" when these epithets are completely inappropriate. If there is no chance that an appellate tribunal will categorise the matter of which they make complaint as irrational or perverse, they are simply wasting time – and, all too often, the taxpayer's resources – by suggesting that it was.”

9. The gap in the judge’s reasoning arose out of a failure to indicate the weight if any he gave to the likelihood bearing in mind the low standard of proof of the appellant’s sister having been recognised as a refugee because of political activity in 2005. His conclusion appears to have been that because of the absence of knowledge by the appellant of her sister’s activity indicated that she had not been politically active. Whilst this was mistaken, it cannot be said to have been irrational.
10. Furthermore, the challenge relating to the appellant’s cousin’s activities was rationally open to the judge with reference to an answer given in response to question 104 in the asylum interview:

“Question: Did you know your cousin was?

Response: Not at that time no I just use to see her wearing kaki [sic] uniform and she said she was going for cleaning the town and giving food, so I used to think she was working for NGO.”

11. The challenge based on an absence of reasons for the judge's plausibility findings needs to be considered in the context of the evidence as whole and the detail provided by the appellant how it was she was able to escape. It was open to the judge to question the plausibility of that on the basis of the likelihood of the events having occurred as claimed.
12. Subject to these points, I accept the concession by Mr Matthews and therefore set aside the decision of the First-tier Tribunal. I direct that the appeal be remitted for consideration by a differently constituted tribunal with none of the findings previously reached preserved. It will be open to the First-tier Tribunal to nevertheless have regard to the evidence that was before First-tier Tribunal Handley in deciding the appeal.

No anonymity direction is made.

Signed

Date 18 April 2019

UTJ Dawson
Upper Tribunal Judge Dawson