



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00911/2014

THE IMMIGRATION ACTS

Heard at North Shields	Determination Sent
On 1 July 2014	
Prepared on 2 July 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

**Y. W.
(ANONYMITY DIRECTION)**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Schwenk, Counsel, instructed by Parker Rhodes
Hickmotts Solicitors

For the Respondent: Mr Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of Zimbabwe who travelled to the United Kingdom on 12 May 2013 by air, using a passport and an identity that she said was not her own. She claimed asylum at port and on 19 January 2014 the Respondent refused the asylum

claim and in consequence made a decision to refuse her leave to enter the UK, and to remove her to Zimbabwe.

2. The Appellant lodged an appeal with the First Tier Tribunal against those immigration decisions, which was heard and dismissed by Judge Doyle in a Determination promulgated on 17 March 2014.
3. The Appellant applied to the First Tier Tribunal for permission to appeal, which was refused on 9 April 2014. The application was then renewed to the Upper Tribunal, and in consequence permission was granted by Upper Tribunal Judge Storey on 12 May 2014 on the basis it was arguable the Judge had failed to take into account evidence that the situation within Zimbabwe had deteriorated since the decision in the country guidance case of LZ (homosexuals) Zimbabwe CG [2011] UKUT 487, which in turn might impact upon the adequacy of the Judge's consideration of the issue raised by HJ (Iran) [2010] UKSC 31.
4. The Respondent filed no Rule 24 Notice and the Appellant has made no Rule 15(2A) application.
5. Thus the matter comes before me.

The grounds

6. I accept as Ouseley J did in CJ (on the application of R) v Cardiff County Council [2011] EWHC 23, the importance of the approach in Tanveer Ahmed v SSHD [2002] Imm AR 318. Documentary evidence along with its provenance needs to be weighed in the light of all the evidence in the case. Documentary evidence does not carry with it a presumption of authenticity, which specific evidence must disprove, failing which its content must be accepted. What is required is its appraisal in the light of the evidence about its nature, provenance, timing and background evidence and in the light of all the other evidence in the case, especially that given by the claimant. The same can properly be said for a claimant's oral evidence.
7. The Judge made a number of positive findings of fact in the Appellant's favour. He accepted that the Appellant had given an honest account of her experiences in Zimbabwe, and that she was indeed a lesbian, as she claimed to be. She had experienced escalating domestic violence at the hands of her husband, which had culminated in her rape in January 2013. That rape had led to her conceiving the child with whom she was pregnant upon arrival in the UK. In the course of the breakdown of her marriage, and subsequently, her husband had told anyone who would listen to him that she was a lesbian, and thus some of her family perceived her to be a lesbian. She had pursued a lesbian relationship in Zimbabwe, and she was "*now more interested in*

women than she had been in the past” and “wants to pursue same sex relationships in the UK”.

8. Nonetheless in reliance upon the guidance to be found in LZ the Judge concluded that whilst she might face discrimination upon return to Zimbabwe, the Appellant would not face persecution.
9. Mr Schwenk pursued two arguments that challenged that conclusion, in line with the grant of permission to appeal. First he argued that the Judge had either failed to engage with the evidence that showed the situation within Zimbabwe had deteriorated significantly since October 2011 when LZ had been decided, or, had failed to give adequate reasons for his decision to follow LZ. Second, that in the light of the findings of primary fact, the Judge had failed to deal adequately with the Appellant’s circumstances in the event she were to return to Zimbabwe and to seek to live there as an openly lesbian woman. His argument was that the Appellant’s evidence had been that through fear of persecution, she would genuinely feel unable to do so; HJ (Iran) [2010] UKSC 31. He argued that her case was therefore that she had to date lived a discrete life in relation to her sexuality, but only because of a fear of serious harm should she do otherwise.
10. I accept that it is not entirely clear from the Determination what view the Judge reached about the prospect of future risk to the Appellant from her husband in the event of her return to Zimbabwe. Since he appears to have accepted the entirety of the Appellant’s account of his past violence towards her, it is perhaps implicit that the Judge accepted that her husband also posed a future risk of harm to her in the event of her return. Certainly I accept that unless he had since died, or had left Zimbabwe, and there was no evidence to that effect before the Judge, the Appellant must be taken to have discharged the applicable burden and standard of proof, and to have established that her husband did pose a future risk of harm to her.
11. Whilst there is little to be found in the Determination by way of analysis of that risk, Mr Schwenk accepts that the only sensible inference to be drawn from the evidence was that any future risk of harm from her husband would be confined to the locality in which they had lived as a married couple, and in which it was to be assumed he continued to live. Whilst her home was not identified in the Determination, Mr Schwenk accepts that the evidence showed that her home area was the district of Sunningdale, in Harare. However real the risk of future harm from her husband might be, there was no evidence that would permit the conclusion that he would learn of her return to Zimbabwe, unless she returned to live in the same locality.

12. The evidence showed that although the police had arrested the Appellant's husband in the past and had spoken to him about his violence towards her, they had not pursued any prosecution of him despite the severity of that violence. Their past interventions had not therefore dissuaded her husband from violence towards her.
13. Mr Schwenk accepted that the evidence showed that any risk of harm that her husband might pose to the Appellant could be avoided were she able to relocate within Zimbabwe upon her return to that country. Mr Schwenk argued however that it was not reasonable to expect the Appellant as a Shona speaker with a young child to relocate to Bulawayo, and that in the light of the currently available evidence there was nowhere in Zimbabwe to which a woman who wished to live openly as a lesbian could in safety relocate. Mr Schwenk accepted that this argument rested upon his attack on the Judge's approach to the relevant country guidance decision of LZ. It was argued that the evidence before the Judge showed that the situation within Zimbabwe for both homosexual men and women had deteriorated significantly with the passage of time since the decision in LZ (October 2011), and it was argued that the Determination did not show that the Judge engaged adequately with that evidence. Thus it was argued the guidance to be found in LZ about internal relocation had been overtaken by subsequent developments within Zimbabwe and was no longer appropriate.

Did the evidence before the Judge show that the situation in Zimbabwe had deteriorated significantly since October 2011?

14. Mr Schwenk placed great reliance in his drafting of the grounds, and in his argument before me, upon the Respondent's OGN, as issued in November 2013. It is not in dispute that this OGN was in evidence before the Judge, and that there is no express reference to it in the Determination. (It is accepted that there is no material difference to the terms of the OGN issued in February 2014). The guidance to be found in the November 2013 OGN does not however in my judgement do any more than to seek to summarise the decisions in HJ (Iran) and in LZ and to remind caseworkers that in the light of the continuing use of anti-homosexual rhetoric by public figures within Zimbabwe they should be careful to ensure they have considered the latest country of origin information. Nothing turns in my judgement upon that guidance, and viewed in isolation it certainly does not establish that the situation in Zimbabwe has deteriorated since October 2011 when the Tribunal heard the appeal in LZ.
15. I therefore asked Mr Schwenk to take me through all of the evidence that was before the Judge, and which was relied upon

to show that the situation faced by lesbian women in Zimbabwe had deteriorated to any material extent since October 2011. Once that exercise was completed it became obvious how little material had been placed before the Judge that addressed this issue.

16. I accept that the evidence before the Judge is entirely consistent with the sadly all too typical picture of an increase in anti-homosexual rhetoric in the period immediately prior to Zimbabwean elections. Elections were held in Zimbabwe on 31 July 2013, but the hearing of this lady's appeal occurred in March 2014, over six months later. Very little of the evidence placed before the Judge related to any incident, or to any utterance that had occurred after those elections.

17. Mr Schwenk placed particular reliance upon evidence that an attack upon the offices of Gays and Lesbians of Zimbabwe ["GALZ"] had occurred on 6 June 2013. Mr Dewison did not dispute that there was an attack upon the GALZ offices on this date, but he argued that the attack must be placed in its proper context, which included the contemporary report of the incident from GALZ itself. That report recorded that the police had attended promptly when called to the offices of GALZ, and that the police were both able, and willing, to arrest the perpetrators of the attack. Thus the report published by GALZ itself upon the incident, on the same day stated [ApB p42];

At around 11 amfive unidentified men wielding hammers violently forced entry into the GLAZ offices in Harare.....the men rounded up all staff and board members and locked them in the guard Room whilst they ransacked the offices collecting all personal property including cellphones laptops and bags.

We commend the Police's swift reaction as they arrive promptly at the scene and promptly arrested the men who are now in custody at Harare Central Police Station. A GALZ board member is currently at Harare Central Police Station assisting the Police. All members present at the office were unharmed and one cellphone and some cash belonging to a board member is allegedly missing

GALZ is not taking this incident as a random act of attempted robbery but that of a deliberate attack by the youth militia acting on the orders of someone superior. The men were constantly making communication with an individual addressed as "Machacha" of an unknown "security wing" over the phone

We applaud the conduct of the Zimbabwe Republic Police in apprehending these men who were bent on creating a situation of lawlessness in Zimbabwe.

18. No other evidence from GALZ in relation to this incident was placed before the Judge. The only other evidence from GALZ was a document published on 14 July 2013 by GALZ on its own website, headed "Position on General Elections 2013" [ApB p46-].

This document makes no reference to the incident of 6 June 2013, or to any subsequent event. It does not suggest that there has been any deterioration in the circumstances of the homosexual community within Zimbabwe since October 2011, and in my judgement there is nothing in that document which materially modifies or alters the evidence given to the Tribunal in LZ by GALZ.

19. The document does contrast the position within Zimbabwe in 1996 with the current position, explaining that in 1996 the state was “*after*” homosexuals, whereas now they “*are not the direct target but are being used as an instrument and MDC is the target. Gays have become a secondary target. ZanuPF will keep the issue on the go to castigate MDC.*”
20. The document also makes direct reference to the phenomena of pre-election rhetoric as follows; “*Given this background the LGBTI community faces an inundation of vitriol from ZanuPF through its leadership, trying to win over a despondent electorate. GALZ therefore realises that hat speech targeting the gay community will be intensified during the election campaign period.*”
21. As to the current position of the homosexual community within Zimbabwe the document states; “*The violent homophobic language used by politicians from both major political parties exacerbates the general stigma against gays and lesbians in the community. Political leaders must immediately cease making statements that in any way vilify dehumanise abuse or slander LGBTI individuals. State authorities have an obligation to address violence both the investigate and punish those who attack others, but also to prevent abuse in the first place. The Zimbabwe Republic Police routinely turn a blind eye to the abuse and violence of LGBTI individuals, thus contributing to the overwhelming sense of impunity*”
22. GALZ was one of the NGOs that provided evidence to the Upper Tribunal in LZ, and a group with whom Dr Oliver Phillips had been connected, and its ability to operate, and the nature of the support it provided to individuals in Zimbabwe seeking help were the subject of the expert evidence of Dr Oliver Phillips [8, 32-4, 41, 44-7, 54-7, 67-72, 82-3, 104-110, and 116].
23. Since GALZ did not provide evidence in this appeal to update the evidence offered in LZ the Judge was entitled, and indeed probably obliged, to consider in the light of the evidence as a whole that there was no change to the evidence reviewed in LZ. The evidence before him did not indicate that GALZ were no longer able to organise social events for its members in Harare, or that the 9 different regional groups and associations affiliated to it had ceased to function. Moreover the public expressions of homophobia remained politically inspired, and as GALZ itself has recently re-stated, a political tool. The finding in LZ was that the background to these public expressions of homophobia was

public indifference to homosexuality, rather than societal homophobia, and that there was a clear distinction to be drawn with the culture of other countries such as Jamaica.

24. There was no evidence before the Judge that suggested either WOZA, or Dr Oliver Phillips had been asked to review the evidence that they had offered to the Tribunal in LZ.
25. The Tribunal's conclusion in LZ [106] was that there was an absence of evidence to suggest that either the Zimbabwean authorities, or non state agents, persecuted homosexuals to any significant extent. Extortion, sometimes with police connivance, was the best documented risk, but even that was not very common, and GALZ in particular had developed effective strategies for dealing with it when its assistance was sought. The formality of the law, and the vehemence of some of the public rhetoric were not matched by the reality. Whilst GALZ had always been careful to operate within the law, if the authorities had wished to close GALZ down no legal impediment would have prevented them from doing so. Thus although it led an uncertain existence, GALZ was able to continue to operate within a degree of tacit official and social tolerance.
26. Without repeating the summary of the evidence set out in LZ, it is plain that the evidence that was placed before the Judge in the course of this appeal did not come close to establishing that there had been a significant deterioration in the position of the homosexual community within Zimbabwe since October 2011. Accordingly there was no error of law in the Judge's decision to apply the guidance of LZ to the evidence before him.

The relevant findings of primary fact

27. The Judge plainly accepted on the applicable standard of proof that the Appellant had told the truth. Accordingly I can infer that the relevant findings are (or should have been) that the following elements of the Appellant's account were accepted.
28. The Appellant is a woman of 35, who speaks both Shona and fluent English. She grew up, and was educated in, Sunningdale 1, where her parents and two elder daughters continue to live. She married in 1996, and the matrimonial home was in Sunningdale 3, a 30 minute walk away from her parents home.
29. The Appellant's marriage broke down seriously in August 2010, in circumstances of violence, alcohol and drug abuse by her husband. The Appellant reported her husband to the police for violence, and he was arrested, but not prosecuted. The circumstances were her husband's discovery that she had stayed out all night on the occasion of his birthday, when she had believed that he would also be out all night celebrating the occasion with others. Unwilling to tell him where she had been,

he had beaten her up. The Appellant was unwilling to tell him where she had been, because she had been to the birthday party of a male homosexual friend, and had decided to take the opportunity to have a “one night affair” with a woman she met at that party.

30. In December 2010 the Appellant decided to leave her husband permanently, and she duly left the matrimonial home with her two daughters, and went to live with her parents in Sunningdale 1. The trigger for this decision being her belief that her husband had attempted to rape her elder daughter, when she had been away from the matrimonial home helping at a family funeral.
31. Whilst living with her parents in Sunningdale, Harare, following the breakdown of her marriage the Appellant was able to discretely conduct a lesbian affair with C. Her husband discovered that affair in December 2012 and beat her up. Up to that point the Appellant believes that no-one other than C and two close friends knew of the affair. Since that incident she has had no further contact with C, who was herself married with children. The affair with C was therefore conducted with discretion, because neither she nor C were prepared to openly acknowledge their sexuality.
32. Following this assault, and the Appellant’s report of it to the police, her husband then attempted to publicise her sexuality within her family (including her daughters), and the local community. Even so, his attempts bore no fruit because even on the Appellant’s account his allegations about her sexuality and her conduct of that affair excited no discrimination or persecution from either her parents, her family, or indeed anyone else. The Appellant refers to only two individuals outside the family making any comment to her about her husband’s allegations, and she accepted that neither of them believed them to be true. The only person she identifies as having believed them to have any substance was a cousin T, who advised her to leave Zimbabwe and claim asylum abroad.
33. In January 2013 the Appellant was raped by her husband at the home of her parents, having threatened to kill both herself and her mother if she resisted him. She reported the incident to the police who were not interested in a prosecution because the couple remained married, but said they would refer the matter to a civil court. The Appellant remained living at her parents home with her two daughters until she left Zimbabwe in May 2013.
34. The Appellant would therefore without more be perceived upon return to Zimbabwe to be the single mother of a young child of some eight months. If she sought to make contact with, and to

live with her two daughters aged 9 and 16, then she would be perceived as the single mother of three children.

35. The Appellant is genuinely a lesbian.

The guidance of LZ

36. The headnote in LZ reads as follows;
- (i) *There has been much public expression of extreme homophobia at the highest levels in recent years.*
 - (ii) *Male homosexual behaviour is criminalised, but prosecutions are very rare. Lesbianism is not criminalised.*
 - (iii) *Some homosexuals suffer discrimination, harassment and blackmail from the general public and the police. Attempted extortion, false complaints and unjustified detentions are not so prevalent as to pose a general risk. There are no records of any murders with a homophobic element. "Corrective rape" is rare, and does not represent a general risk.*
 - (iv) *There is a "gay scene," within limitations.*
 - (v) *Lesbians, living on their own or together, may face greater difficulties than gay men.*
 - (vi) *GALZ (Gays and Lesbians of Zimbabwe) takes a realistic view: Zimbabwe is "not the worst place in the world to be gay or lesbian even though the President, government officials and church leaders have whipped up a climate of hysterical homophobia."*
 - (vii) *Applying HJ & HT [2010] UKSC 31, [2010] Imm AR 729, there is no general risk to gays or lesbians. Personal circumstances place some gays and lesbians at risk. Although not decisive on its own, being openly gay may increase risk. A positive HIV/AIDS diagnosis may be a risk factor. Connections with the elite do not increase risk.*
 - (viii) *The police and other state agents do not provide protection.*
 - (ix) *A homosexual at risk in his or her community can move elsewhere, either in the same city or to another part of the country. He or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances present risk throughout the country.*

The HJ (Iran) point

37. Since there was no error of law in the Judge's decision to apply the guidance to be found in LZ it is difficult to see what is left of Mr Schwenks' secondary argument which depended upon the argument that the Judge had failed to deal adequately with the Appellant's circumstances in the event she were to return to Zimbabwe and to seek to live there as an openly lesbian woman. His argument was that the Appellant's evidence had been that through fear of persecution, she would genuinely feel unable to do so; HJ (Iran) [2010] UKSC 31. He argued that her case was therefore that she had to date lived a discrete life in relation to

her sexuality, but only because of a fear of serious harm should she do otherwise.

38. The guidance to be found in LZ was that the decision to live an openly lesbian life in Zimbabwe did not translate automatically into a real risk of persecution by either the authorities, or non state agents, across the whole of Zimbabwe. The Appellant's own evidence disclosed no threat of harm from the authorities or third party non state agents resulting from her husband's assertions that she was a lesbian. She experienced on her evidence no societal discrimination, and no shunning by her community or by members of her family. Thus, absent the risk posed to her by her husband, she had been able to live in Sunningdale as a single woman of two children in her parents home without difficulties. Whilst doing so she had been able to conduct a discrete affair with a married woman, who wished to continue to live with her husband. Their discretion in conducting that affair therefore appears to have had far more to do with the circumstances and wishes of her lover, than any fear of violence should the Appellant be identified as a lesbian – as indeed she had already been identified by her husband to anybody who would listen to him.
39. That affair is now at an end, and the Appellant denies any contact with her lover for some time before she left Zimbabwe. The Appellant says that she would wish to pursue further lesbian relationships in the future, and there is no reason why that assertion should not be accepted.
40. The Appellant has not to date pursued an openly gay relationship even in the UK, and so the evidence suggests strongly that her approach to her sexuality will by inclination continue to be one of discretion, notwithstanding the evidence that was led from her to the effect that she would wish to live as an openly gay woman. She has the feelings of her children and her wider family to consider, alongside those of any future partner. Even if, in the future, she were able to form a relationship in which both she and her partner wished to live a more openly gay lifestyle the evidence as reviewed in LZ indicates that this would not of itself lead to a real risk of harm, particularly if that lifestyle were one pursued within the more tolerant urban environments of Harare and Bulawayo.

Internal relocation

41. The Appellant's husband has been responsible for violent attacks upon her in the past, and he must be taken to continue to pose a real risk of harm to her in the future. There has been in the past no effective state protection offered to the Appellant

against that risk, and there is no reason to suppose that the situation would be any different in the future in the event of her return to Zimbabwe.

42. The risk posed to the Appellant by her husband is confined to the local area in which the family have lived to date, of Sunningdale, Harare. It could therefore be avoided by the expedient of relocation within Zimbabwe. No doubt upon return to Zimbabwe the Appellant would wish to resume a life that included her two elder daughters. I am not persuaded upon the evidence before me that relocation within Harare itself would be ineffective in avoiding the risk her husband poses to her, but even if that were considered by the Appellant to be the case, it is plain that relocation to Bulawayo would be open to her and her daughters, and that this would avoid the risk he poses.
43. There is nothing in the evidence to suggest that relocation to urban Bulawayo, for one who has always lived in urban Harare, would be an unreasonable expectation. Indeed the evidence suggests that urban Bulawayo provides an even more tolerant community to the LGBTI community than even urban Harare. Mr Schwenk argues that the Appellant would be unable to support herself and her children financially in Bulawayo, but this argument cannot succeed. She was able to do so in Harare without the assistance of her husband, following their separation, and there is no reason to infer (and she does not assert) that the support of her family would not be forthcoming in the event of her return to Zimbabwe. The evidence suggests that the Appellant has held employment in the past in Zimbabwe, and there is therefore no reason to suppose that she would be unable to do so again.
44. On this evidence the guidance of the Tribunal in AN & SS (Tamils - Colombo - risk) Sri Lanka CG [2008] UKAIT 00063 is applicable. In that decision the Tribunal held that it was appropriate to take into account the availability of financial support from the Respondent to a returnee, through the Voluntary Returns Programme;
117. Much has been made of the undue harshness which AN will face as a single mother without accommodation or employment and without friends or family to turn to in Colombo, but this is to leave out of account what even Dr Smith acknowledges to be the very generous support package offered by the IOM to voluntary returnees. After "*smoothing the re-entry process*" the IOM provides "*a comprehensive package of support for five years after arrival*", which includes "*five years shelter guaranteed*." We do not think it is open to the appellant to say that, if she loses her appeal, she will not take advantage of this package, and to argue from that refusal that she will face destitution in Colombo which, accordingly, is not a place to which she can reasonably be expected to relocate.
45. The Appellant cannot therefore legitimately argue that in the event of her return to Zimbabwe she would not take advantage of the assistance that is now provided through Refugee Action's

Voluntary Assistance Return and Reintegration Programme, and their grant schemes. She could not properly argue that she would face destitution upon return, or a risk of a breach of her Article 3 rights upon return as a woman with three children to care for. In any event she has family to whom she could also turn for shelter and support.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 17 March 2014 therefore contained no error of law in the dismissal of the Appellant's appeal which requires that decision to be set aside and remade, and it is accordingly confirmed.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 2 July 2014

Direction regarding anonymity - Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. 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 proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 2 July 2014