



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/09764/2014

THE IMMIGRATION ACTS

Heard at North Shields
On 13 May 2015
Prepared on 14 May 2015

Determination Promulgated
On 29 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

A. D.
(ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Wilkins, Counsel, instructed by Turpin & Miller Solicitors

For the Respondent: Ms Rackstraw, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Zimbabwe who travelled to the United Kingdom on 22 February 2012 by air, using a genuine passport and visa. He had been granted entry clearance as a family visitor, following a successful appeal to the Tribunal. He claimed asylum on the last day of his leave on the basis that he was a homosexual who had experienced persecution in Zimbabwe on the basis of his sexuality in the past, and feared that in the event he were to return he would experience a repeat of that behaviour.

2. On 24 October 2014 the Respondent refused the asylum claim and in consequence made a decision to refuse to vary his leave to enter the UK, and to remove him to Zimbabwe. The Respondent accepted on the applicable low standard of proof that the Appellant was a homosexual.
3. The Appellant lodged an appeal with the First Tier Tribunal against those immigration decisions, which was heard and dismissed by Judge Lloyd in a decision promulgated on 15 January 2015.
4. The Appellant applied to the First Tier Tribunal for permission to appeal, which was granted by Judge Chambers on 17 February 2015. It was considered arguable that the Judge had failed to apply concessions of fact made by the Respondent, and in turn had failed to properly apply the guidance to be found in HJ (Iran) [2010] UKSC 31.
5. The Respondent filed a Rule 24 Notice on 12 March 2015 and argued that the Judge directed himself appropriately and properly applied the country guidance case of LZ (homosexuals) Zimbabwe CG [2011] UKUT 487.
6. Thus the matter comes before me.

Concessions by the Respondent?

7. The first ground asserts that the Judge failed to adopt and to apply concessions of fact made by the Respondent, and that he went behind them in his evaluation of the evidence. Three concessions are said to have been made.
8. The first concession asserted is that the Appellant is a homosexual, as accepted by the Respondent in paragraph 31 of the letter giving her reasons for her decisions. There is no merit in the complaint that the Judge failed to adopt this concession, because the Judge expressly accepted the concession and that the Appellant was a homosexual at paragraph 38 of his decision.
9. The second concession asserted is that the Appellant had suffered past persecution in 2004 (as a schoolboy), and in 2010 in Bulawayo, on account of his sexual identity. No such concession was however made by the Respondent. She accepted only that there had been isolated incidents of discrimination and violence whilst in Zimbabwe at paragraphs 30, 31, and 43 of the letter giving her reasons for her decisions. Neither in advance of the hearing, nor at the hearing, were any further concessions made by the Respondent. Thus the draftsman of the grounds (not Ms Wilkins) significantly overstates the concession that was actually made.
10. There is no merit in the complaint that the Judge failed to accept or adopt the concession that was actually made. It is quite clear from the decision that he did accept the concession in the terms in which it was made. The Judge considered with adequate care the evidence concerning the nature of the incidents relied upon by the Appellant, who was responsible for them, and the circumstances in

which they had occurred in the context of the exercise that he was bound to undertake. That was not to consider whether these incidents had occurred (because that was not in dispute), but whether the fact that they had occurred demonstrated that the Appellant had experienced persecution in the past, and faced a real risk of persecution in the event he should return to his home area. If so, whether it was reasonable to expect him to relocate within Zimbabwe to avoid that risk. That is the exercise the Judge conducted in paragraphs 38 and 39 of the decision and there is no basis for the complaint that he was going behind the concession of fact that had actually been made. On the contrary when the decision is read as a whole, it is perfectly clear that the Judge quite properly took the concession that the Respondent had actually made as his starting point.

11. The third concession asserted is said to be a concession to the effect that the Appellant would live an openly gay life in Zimbabwe in the event of his return. Put shortly the Respondent never made such a concession. Paragraph 39 of the letter giving the Respondent's reasons for her decision, which is relied upon by the Appellant as the location of the concession asserted, simply states in terms the Respondent's view that an openly gay person in Zimbabwe would not be liable to a level of harm that would amount to persecution.
12. Accordingly there is no merit in the first ground as drafted.
13. Before turning to the second ground I should add that in my judgement there is no basis for the criticisms that were advanced by the draftsman of ground one (albeit not by Ms Wilkins) of the Judge's approach to the credibility of either the Appellant's mother, or indeed the Appellant himself. The Appellant's mother was upon her own admission an unreliable witness, perfectly prepared to tailor what she said to the Tribunal on different occasions, and for different purposes [30]. Nor was the Appellant entitled to have all that he might say in evidence accepted without question. On my judgement the Judge did no more than take the Respondent's concessions of primary fact as his starting point and then go on to consider the weight that could be given to the rest of the evidence relied upon. Whilst he made no express reference to it, his approach was entirely consistent with the guidance to be found in Tanveer Ahmed v SSHD [2002] Imm AR 318. 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 referred to therein. Documentary evidence along with its provenance needs to be weighed by the Tribunal 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, and failing which its content must be accepted. Nor does the oral evidence from a witness called in support of an appeal carry with it such a presumption. What is required of the Tribunal is an appraisal of the weight that can be given to the different elements of the evidence relied upon, in the light of its content, provenance, timing, the background evidence and in the light of all the other evidence in the case.

The HJ (Iran) point

14. The second ground criticises the Judge for following the country guidance case of LZ (homosexuals) Zimbabwe CG [2011] UKUT 487, apparently on the basis that it was promulgated in January 2012 and that there was evidence before the Judge which would have permitted him to conclude that the situation in Zimbabwe for homosexual men had deteriorated significantly since that date.
15. 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.*
16. The Appellant does not put his case so high as to suggest that the Judge was bound not to follow that country guidance, and indeed he could not do so. This was not a situation for example in which one or more of the various NGOs who had given evidence to the Upper Tribunal in LZ had provided further evidence to the Judge either to withdraw, or, to significantly qualify, the evidence that they had given to the Upper Tribunal in LZ. In particular the report that was said to have been produced by GALZ into incidents in the Harare area in the

period 2012-3 did not seek to do so [ApB p174-], and nor did the report into incidents in 2011 [ApB p233-]. Curiously those reports made no reference at all to the evidence that had been given by GALZ to the Upper Tribunal in LZ.

17. I have gone through all of the evidence that the Appellant had placed before the Judge, and which had been relied upon to show that the situation faced by homosexual men in Zimbabwe had deteriorated to a material extent since the decision in LZ in October 2011. I accept that this evidence was 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 appeal occurred in January 2015 when there were no elections imminent.
18. 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]. 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 that was placed 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 there was no reason to alter the conclusion that public expressions of homophobia remained politically inspired, and as GALZ itself has always 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, whereas the applicant's case in LZ was that societal attitudes were similar to those in Jamaica.
19. There was no evidence before the Judge that suggested either WOZA, or Dr Oliver Phillips had been asked to review, or to alter, the evidence that they had offered to the Tribunal in LZ.
20. 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. It is plain from the material before the Judge that it continued to do so at the date of the hearing of the appeal.

21. 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.
22. Ultimately Ms Wilkins' argument was no more than that the Judge had disposed of the objective evidence too briefly, and that had he considered it in greater depth, he might have come to a different view. This is in reality no more than a disagreement with the conclusions that the Judge did reach. His decision shows clearly that he did engage with the evidence relied upon of incidents of homophobic assaults, and he gave adequate reasons for the decision that he reached.
23. Indeed what is plain is that the Appellant singularly failed to address in the course of his appeal the direct evidence that was before the Tribunal in LZ from the various NGOs in Zimbabwe about the attitudes within Zimbabwe towards homosexuality, the ability to live without fear of persecution as a homosexual, and the ability to live as an openly gay person in Zimbabwe. Ms Wilkins confirmed that there was no expert evidence relied upon, and no authoritative evidence from the NGOs concerned. Instead the Appellant relied upon a series of news articles, said to have been taken from the internet. The decision shows that the Judge had a proper regard to that evidence, and considered its reliability. He concluded that it did not add to, or change, the overall picture formed by the Upper Tribunal in LZ [33]. That was a decision he was entitled to reach, and he was not obliged to set out each and every document produced by the Appellant in doing so.
24. It is abundantly clear from a fair reading of his decision as a whole that the Judge had well in mind the guidance to be found in LZ and the evidence upon which that guidance had been based.
25. The remainder of the second ground relies upon the Appellant's assertion that the Respondent made a third concession in the terms that were asserted by the draftsman of ground one. As explained above there was no such concession. The Respondent never conceded that the Appellant would choose not to lead an openly gay life out of fear. The Judge reviewed the evidence and also rejected that assertion for the reasons that he gave, which were adequate. The Judge was perfectly entitled to have regard to the Appellant's own evidence about how he behaved at church, and with fellow members of his congregation [18]. The Appellant had said that when with that group he chose not to act or dress in such a way as to flaunt his sexuality, not out of fear, but because of a desire for

acceptance by that community and a desire to avoid embarrassment. That was significant evidence which went to the heart of how the Appellant was genuinely likely to behave in the event of return, and how he behaved generally when living in Bulawayo.

26. The Judge was entitled on the evidence before him to conclude that the Appellant's evidence as to how he behaved when at Church or with members of his congregation was at odds with his evidence of how he behaved generally [18]. He was entitled to conclude that he had not told the truth about how he behaved, and his mannerisms, that would allow his identification as a gay man [38]. He gave adequate reasons for both findings.
27. The Appellant has never had been an activist for gay rights in Zimbabwe, and he did not claim to have become one in the UK. The Judge therefore gave adequate reasons for his decision to decline to accept that he would become one in the event of return to Zimbabwe.
28. Given the credibility difficulties identified by the Judge, he was perfectly entitled to reach the conclusions that he did about the level of incidents of verbal and physical violence that the Appellant had actually experienced in the past in Bulawayo, his home area, and that it was a group of only six non-state agents known to the Appellant who were principally responsible for them [38]. That left the Appellant able to relocate within Bulawayo itself to avoid that group of individuals, since it is a major city, or to do so more generally within Zimbabwe. The Judge was entitled to reach the conclusion that it was not unreasonable to expect him to do so. Moreover the Judge was entitled to reach the conclusion that the evidence suggested strongly that in truth the Appellant's approach to his sexuality would by inclination continue to be one of discretion by personal choice, and not out of fear, notwithstanding the evidence that he had given to the effect that he would wish to live as an openly gay man. The Judge gave adequate reasons for his findings, and the Appellant's criticisms of them are in reality no more than a disagreement with the Judge's assessment of the evidence.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 15 January 2015 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 14 May 2015

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 him. 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 14 May 2015