



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: PA/02239/2015

THE IMMIGRATION ACTS

Heard at Liverpool
On February 6, 2018

Decision & Reasons Promulgated
On February 9, 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[A G]

~~(NO ANONYMITY DIRECTION MADE)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Greer, Counsel, instructed by Broudie Jackson and Canter

For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction in this matter.
2. The appellant is a citizen of Zimbabwe. On June 8, 2015 the appellant lodged an application for asylum but following an interview the respondent refused his application under paragraph 336 HC 395 on October 14, 2015. The appellant appealed that decision under section 82(1) of the Nationality, Immigration and Asylum Act 2002 on October 30, 2015 and the matter was listed before Judge of the

First-tier Tribunal Parker (hereinafter called the Judge) on December 14, 2016 and in a decision promulgated on January 4, 2017 his appeal was dismissed.

3. The appellant appealed that decision on January 14, 2017 and ultimately permission to appeal was granted by Upper Tribunal Judge Southern. The appeal came before me on October 3, 2017.
4. At [27] of his decision the Judge concluded

“There is no evidence that the appellant would live openly and expose him to a risk of persecution. The evidence is that he conducts his relationships in a discreet manner. His asylum interview shows that he has been reluctant to talk about his sexuality and that this would continue in Zimbabwe”.
5. The Judge failed to have regard to the appellant’s answers at Q238 and 239 of his interview when he stated he wanted to live freely and that if returned he would have to hide the fact he was bisexual. The Judge’s finding the appellant would live discreetly contradicted the content of both his interview and statement and possibly his oral evidence.
6. Having heard submissions, I found there was an error in law on the basis the Judge had failed to properly apply the principles of HJ (Iran) v SSHD [2010] UKSC 31 and LC (Albania) v SSHD [2017] EWCA Civ 351 and LC (Albania) v SSHD [2017] EWCA Civ 351.
7. A second point was argued. The appellant’s former counsel argued the Judge had erred in assessing the appellant’s claim that the police were looking for him and he was at risk. I was satisfied the findings made by the Judge on this issue were open to him and that the Judge had then correctly proceeded to consider whether internal relocation was available.
8. It was against that background that the matter came back before me on November 22, 2017.
9. The hearing on that date had to be adjourned because a new issue, his relationship to a child born in April 2017, had been raised for the first time.
10. Mr McVeety agreed that this Tribunal could deal with both matters but as evidence was required I agreed to adjourn the case for further evidence to be served confirming his connection to the child and the child’s nationality.

PRELIMINARY ISSUES

11. At today’s hearing I heard preliminary arguments concerning whether the appellant could be questioned about an inconsistency in the account given to the FTT Judge.
12. He had provided his first statement in May 2016 in which he stated he had not had any time for a relationship with a girl. He adopted that statement at his hearing

before the FTT Judge in December 2016. He failed to mention at that hearing that he and Miss [Z] had slept together on one occasion.

13. It was only after permission to appeal had been given in October 2017 did the appellant disclose not only the relationship but also the fact he had a child from that night together.
14. Mr McVeety wished to revisit the Judge's finding that he was bi-sexual because he clearly had not told the truth at the hearing in December 2016. Regardless of whether he knew about the baby in December 2016 he knew he had slept with her in July 2016 and had misled the Judge. Mr Greer argued that the finding should stand as he had always claimed to be bi-sexual and the fact he had had sex in July did not alter the position.
15. I indicated that as I was making a finding on his sexuality Mr McVeety should be allowed to question him on this issue. However, I made it clear neither party should revisit matters that were no longer relevant.

EVIDENCE

16. Both the appellant and Miss [Z] adopted their statements and gave oral evidence. Both confirmed they met when the appellant "followed" Miss [Z] on Instagram and that they met up a few times culminating in one sexual adventure in July 2016.
17. Miss [Z] did not tell the appellant she was pregnant because after their night together he told her he regretted what had happened and that they could not continue their relationship. They both confirmed that the appellant was only told about the pregnancy in January 2017 and that he had then taken part in pre-natal classes, attended the birth and had since played an active role in his daughter's life visiting around 4 times a week. He would often stay over but he and the appellant only had a parental relationship now. She stated that she realised he liked men and that they could not be together.
18. The appellant stated that since his daughter was born he had not had any relationships with either men or females. He previously met men using the "Grinder" app on his phone but now he hoped to meet a male through normal channels. Miss [Z] hoped to settle down with a partner in the future but at the present time they were both concentrating on their daughter.
19. The appellant stated that previously in Zimbabwe he had not been prepared to discuss his sexuality but if he were now returned he would live life more openly because he did not want hide his true self. His preference was for men rather than women. He did not believe he would be safe anywhere in Zimbabwe.
20. Both Miss [Z] and her parents (in letter and email form) confirmed he was a good father.

SUBMISSIONS

21. Mr McVeety submitted the late disclosure of his child and relationship with Miss [Z] raised questions about his sexuality. He had chosen not to disclose the details of his night with Miss [Z] but if he had, this may have led the Judge to reach a different conclusion about his sexuality. Whilst he acknowledged that there was evidence demonstrating the appellant was gay the only evidence of a recent relationship with anyone was the one with Miss [Z]. The evidence from both was he stayed over up to four nights a week and the Tribunal should consider the nature of the relationship. If he misled the Tribunal in December 2016 then it was credible he would do the same now. Mr McVeety questioned whether the appellant was gay because if the Tribunal concluded he was not gay or bi-sexual then no assessment on HJ (Iran) would be necessary. If however the Tribunal concluded he was gay or bi-sexual then it was necessary to make a finding on how lived and bearing in mind the findings in LZ he submitted the appellant could live in a different area if he felt unable to return to his home area in Bulawayo. With regard to article 8 ECHR Mr McVeety accepted the appellant had a genuine and subsisting relationship with his daughter. If the Judge concluded he hid the truth in December 2016 then frustrating the authorities was a countervailing circumstance that could outweigh his claim to remain.
22. Mr Greer submitted the appellant had never claimed to be gay but had always claimed he was bi-sexual. He had given evidence to the FTT Judge who concluded that he was bi-sexual with a predominant interest in men. He submitted that he did not deliberately conceal his relationship with Miss [Z]. In his mind it was just one night and at the time of the hearing he did not know she was pregnant. He had regretted the night as it caused awkwardness and he submitted it was not unreasonable for him not to disclose the night. The disclosure of that night with Miss [Z] would not have altered the core finding that he was bi-sexual. If anything, it would have strengthened the argument. As for risk on return he submitted the appellant would be unable to live openly in Zimbabwe. He relied on LZ and argued state protection was not available and the fact he had problems in Bulawayo meant he would not be safe anywhere else. With regard to article 8 the respondent accepted he had a genuine and subsisting relationship. In the absence of a criminality or a very poor immigration history he submitted removing the appellant would be disproportionate.

FINDINGS

23. At the resumed hearing I heard from both the appellant and Miss [Z]. They had both provided witness statements and those statements outlined their relationship. Although Mr McVeety cross-examined them both they maintained that they met through Instagram and had slept together once when Miss [Z] was drunk. The appellant regretted it and that led to a drop in contact between them.
24. Mr McVeety has invited me to make an adverse finding over the appellant's failure to disclose this one night of passion. The appellant for his part says he did not view one night together as a relationship and that he did not see the need to mention that night at the hearing.

25. In his first witness statement at [32] he wrote "I have not taken any steps to meet women in the UK, I have not joined any dating sites". That statement is dated May 27, 2016 and predated his night with Miss [Z].
26. The FTT Judge heard the evidence and it was always the appellant's case that he was bi-sexual. I am unclear what he was specifically asked at the hearing but what seems clear to me is that when he adopted his statement he neglected to mention that he had had a one-night stand with Miss [Z]. He felt able to hand up to the Judge evidence of his sexual activities with males which were in picture form. The Judge was not prepared to look at the photographs for the reasons described in [8] of the decision. It was therefore open to the appellant to correct any misunderstanding if he wished.
27. Mr McVeety invites me to find that this omission undermines the Judge's findings on credibility. I struggle to see the merit of that submission because if anything having sex with Miss [Z] merely reinforces the appellant's claim he is bisexual.
28. At [20] of the decision the Judge found there was

"... very little inconsistent evidence in the appellant's story. He was not successfully challenged in cross-examination about his sexuality and the reasons for refusal letter gives inadequate reasons as to why he is not considered bisexual. I therefore make a finding that he is bisexual as claimed."
29. Nothing presented in evidence to me persuades me that this finding should be departed from. I therefore intend to approach his claim that he was bi-sexual with a preference for men.
30. The appellant's evidence was he lived discreetly in Zimbabwe. The evidence given to me today is that his habits have not changed very much. He has chosen to meet people through a social media app called "Grinder". The appellant explained that this was an app that enabled men to meet strangers for sex. He does not appear to have gone out and met a male in the old-fashioned sense although he described in his evidence that this was something he would like to do but so far, despite being here for around 2 ½ years this remains something he is uncomfortable about.
31. In his oral evidence he told me that he would like to live more openly and that may well be his wish, but I question whether he will ever have the confidence to live such a life.
32. I understand he may have been reluctant to live such a life in Zimbabwe but the United Kingdom does not have the same prejudices that the appellant believes would place him at risk in Zimbabwe.
33. I have considered the guidance in HJ (Iran) and am satisfied the appellant would not change his way of life were he to be returned. He is someone who appears embarrassed by his sexuality hence why he has so far chosen to live his life the way he wishes. Nothing I read or heard today persuades me he would act any differently either here or in Zimbabwe. He has not had a relationship with anyone for around

twelve months choosing to put his child above his sexual urges. I am not persuaded a fear of the authorities would be a reason for him to refrain from seeing males in Zimbabwe.

34. The FTT Judge considered LZ (Homosexuals) in the original decision and the FTT Judge's findings on what was said to have happened in Zimbabwe was previously argued in October before me.
35. At [16] of LZ (Homosexuals) Zimbabwe CG [2011] UKUT 487 the Tribunal stated-

"Given the absence of general risk, a homosexual at local and personal risk in his or her community can move elsewhere without much difficulty. That might be within the same city, or in another part of the country. He or she might choose to relocate where there is greater tolerance, such as in Bulawayo, but the choice of a new area is not restricted. The option is excluded only if personal circumstances create a risk throughout the country."
36. The country guidance decision does not identify areas but it is clear the Tribunal acknowledged that homosexuals could, depending on personal circumstances, live safely in different parts of the country.
37. I concluded in October the Judge's finding that he could return and live in a different area was open to him. Mr Greer suggested that Bulawayo was the safest place for the appellant but the Tribunal in LZ (Homosexuals) made it clear that Bulawayo was not the only area. LZ (Homosexuals) is not an authority that being gay or bisexual places gay or bisexual people at risk of persecution.
38. Whilst I accept the appellant is bi-sexual I do not accept that he would be at risk of persecution were he to be returned.
39. I turn now to the secondary issue of article 8 and specifically his relationship with his daughter. Whilst Mr McVeety argued that I could make a finding that he was having a relationship with Miss [Z] I find nothing in the evidence that supports this argument. Both the appellant and Miss [Z] stated their relationship had been platonic since that night in July 2016.
40. This is an appeal on article 8 grounds and I apply the approach set out in Razgar [2004] UKHL 00027. There is family life and removing the appellant would interfere with the family life he clearly has with his daughter. Although I did not hear evidence from Miss [Z]'s parents they attended the hearing and provided statements confirming the role the appellant plays in his daughter's life. Any interference would be in accordance with the law but such interference would enable the respondent to maintain immigration control. As in most article 8 appeals the real issue is proportionality.
41. The child is 9 months of age and she is British. Although her mother was a Zimbabwean national she came him aged 12 and is now almost 22 years of age. She has a British passport and she has a part-time job as a health care assistant in a hospital. She is the primary carer of the child although the evidence presented

suggests the appellant does spend around 4 days of the week with his daughter and that includes staying over on occasions.

42. Section 117B(6) of the 2002 Act applies and the test whether it be under Section EX.1 of Appendix FM of the Immigration Rules or article 8 ECHR is one of proportionality. The respondent's August 2015 policy also applies as I am dealing with a British child. The issue is whether it would be reasonable to expect the child to leave the United Kingdom.
43. The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that consideration of the child's best interests is a primary consideration in immigration cases.
44. I start from the position that the best interests of the appellant's child is a primary consideration. The fact the appellant's child is British must be given significant weight because the respondent's own policy "Family Life (as a partner or parent) and Private Life: 10 Year Routes" states

"Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano."
45. The policy goes on to explain

"Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer. In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship. It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU."
46. I am satisfied that the best interests of the child is to remain in the United Kingdom. However, the "best interests" assessment does not automatically resolve the reasonableness question. If it did then parliament would have said as much when drafting the legislation. It therefore follows that even where the child's best interests is to remain, it may still be not unreasonable to require either the child or the appellant to leave.
47. The appellant has never been charged with any criminal offence and has no criminal convictions. It is not suggested that he has a poor immigration history. Having arrived here on May 27, 2015 on a forged student card he claimed asylum. He has

been here legally throughout albeit his immigration status has always been precarious. I do not accept Mr McVeety's submission he sought to frustrate the immigration process by not mentioning the one-night stand at the appeal hearing in December 2016. He did not apparently set out to have a child with Miss [Z] but such events do happen.

48. Having established that it would not be reasonable to require the appellant's child to have to move to Zimbabwe the sole issue is whether applying section 117B factors, including the respondent's own policy, whether it would be disproportionate to require the appellant to leave.
49. It is clear from the evidence the appellant has a significant role to play in his daughter's life. Section 117B(1) of the 2002 Act makes it clear that the maintenance of immigration control is in the public interest but the respondent's policy undermines Mr McVeety's submissions to an extent because he accepts the appellant plays a key role in his daughter's life and that in the absence of certain negative factors (e.g. criminality, very poor immigration history or frustrating the immigration process) it would be unreasonable to separate the appellant from his daughter.
50. In those circumstances, I find the removal of the appellant from the United Kingdom would be disproportionate and unreasonable and would breach article 8 ECHR.

DECISION

51. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
52. I set aside the original decision and remake it as follows:
 - (a) I dismiss the appellant's protection and article 3 claims.
 - (b) I allow the appellant's appeal under article 8 ECHR.

Signed

Date 06.02.2017



Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT **FEE AWARD**

I make no fee award as no fee was paid.

Signed

Date 06.02.2017

A handwritten signature in black ink, appearing to read 'SPALIS', with a long horizontal stroke extending from the end.

Deputy Upper Tribunal Judge Alis