



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

Appeal Number: PA/01193/2018

THE IMMIGRATION ACTS

**Heard at Birmingham Justice Decision & Reasons Promulgated
Centre
On 29 April 2019 On 13 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE McCARTHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LK

(ANONYMITY ORDER CONTINUED)

Respondent

Representation:

For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer

For the Respondent: Mr S Vokes, Counsel instructed by Genesis Law Associates

DECISION AND REASONS

Background

1. On 29 January 2019, UT Judge Chalkley decided there was legal error in the decision and reasons statement of FtT Judge Fenoughty that was promulgated on 19 March 2018. Judge Chalkley determined that the legal error was in the way Judge Fenoughty assessed the possibility of the respondent's internal relocation in Zimbabwe. Because the parties wanted

time to secure additional evidence, Judge Chalkley adjourned the error of law hearing but retained the case in the Upper Tribunal because the remaining issues are narrow.

2. The First-tier Tribunal directed that the case be anonymised because of the nature of the appeal and the vulnerability of the respondent. It is appropriate to maintain anonymity and I do so, the terms of my order being contained at the end of this decision and reasons statement.
3. The case was transferred to me for the resumed hearing. No further evidence was provided prior to the hearing. On the morning of the hearing, Mr Vokes provided a skeleton argument and the Home Office Country Policy and Information Note (CPIN) Zimbabwe: Sexual orientation and gender identity and expression (version 4.0, January 2019). Mr Vokes explained he was not calling the appellant to give further evidence because the remaining issues were limited to the question of internal relocation. Ms Aboni confirmed internal relocation was the sole issue.

Submissions on behalf of the respondent

4. Mr Vokes asked me to remake the decision in favour of the respondent for two reasons. First, he argued that the appellant was at risk throughout Zimbabwe and not only in her home area. Second, he argued that it was unduly harsh to expect the appellant to move to another part of Zimbabwe.
5. Mr Vokes reminded me of the findings that are preserved. The appellant Secretary of State conceded the respondent was a victim of domestic servitude and sexual exploitation prior to coming to the UK. Judge Fenoughty found the respondent to be lesbian, to have had a relationship in Zimbabwe that became known to her family, that an uncle took her to a local police station where she was abused, that she was forced to marry against her will and suffered abuse within that marriage, that her family brought her to the UK, that while she lived with her parents in the UK she did not express her sexuality, that since leaving her family home she has lived openly and formed a relationship, and that her parents are unwilling to support her unless she lives as a straight female. Mr Vokes concluded that the respondent has experienced persecution in Zimbabwe. Ms Aboni confirmed this conclusion is accepted by the appellant Secretary of State.
6. Mr Vokes argued the information in the current CPIN was sufficient to establish the appellant was at risk of further persecution throughout Zimbabwe. He relied first on paragraph 2.6.3, which recites the fifth head note from *LZ (homosexuals) Zimbabwe CG* [2011] UKUT 00487, insofar as “lesbians, living on their own or together, may face greater difficulties than gay men.” Mr Vokes also referred me to paragraph 4.3.5 as evidence the respondent could not realistically be expected to seek protection from the Zimbabwean police.
7. Mr Vokes developed his argument in the following way. The respondent is more vulnerable than other lesbians because of her past persecution and therefore would be frightened to live anywhere in Zimbabwe, particularly

because she would have to live on her own as she would have no family support.

8. In discussion, I indicated to Mr Vokes that I accepted it is reasonably likely that the respondent would have a subjective fear throughout Zimbabwe because of her past experiences, but reminded him that I had to consider whether such fear was also objective. I reminded Mr Vokes of Judge Fenoughty's findings that the previous experience of persecution was limited to the respondent's home area. Mr Vokes was unable to point to any objective evidence that indicated it was reasonably likely the respondent would be targeted throughout Zimbabwe. His argument focused on the subjective elements and that the respondent was reasonably likely to behave in a way that would result in her not expressing her sexuality to avoid the risk of further persecution.

Submissions on behalf of the appellant

9. Ms Aboni reminded me of the full head note of *LZ (Zimbabwe)*, which are recited by Judge Fenoughty at [47] of her decision. The country guidance indicates that lesbians are not criminalised in Zimbabwe and that there is no general risk to gays or lesbians. The facts of the respondent's case, which are not disputed, did not establish at the lower standard that she had a well-founded fear of persecution throughout Zimbabwe because Judge Fenoughty found at [56] that the risk to the respondent from her uncle did not extend to all areas of Zimbabwe where she could live.
10. Turning to the second ground, Ms Aboni submitted that it was not unduly harsh to expect the appellant to live in another part of Zimbabwe other than that area from where she originates.
11. I reserved my decision and reasons, which I now give.

Legal framework

12. I begin by reminding myself of the relevant legal framework. The appeal is brought on the grounds the respondent is a refugee because she has a well-founded fear of persecution in Zimbabwe as a member of a particular social group. The relevant law is contained in part 11 of the immigration rules, which along with the Qualifications Regulations (SI 2006/2525) transpose the provisions of the Qualification Directive (2004/83/EC). The burden of proof lies on the respondent and the standard of proof is usually described in terms of reasonably likely or the lower standard.

Internal relocation

13. I remind myself of the proper approach to the issue of internal relocation. Paragraph 3390 of the immigration rules provides:
 - 3390 (i) The Secretary of State will not make:
 - (a) a grant of refugee status if in part of the country of origin a person would not have a well-founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return

14. The House of Lords gave the following guidance on how judges should consider the reasonableness of internal relocation in *Januzi v SSHD & Ors* [2006] UKHL 5.

20. I would accordingly reject the appellants' challenge to the authority of *E* and dismiss all four appeals so far as they rest on that ground. It is, however, important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance on the approach to reasonableness and undue harshness in this context. Valuable guidance is found in the UNHCR Guidelines on International Protection of 23 July 2003. In paragraph 7 II(a) the reasonableness analysis is approached by asking "Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?" and the comment is made: "If not, it would not be reasonable to expect the person to move there". In development of this analysis the guidelines address respect for human rights in paragraph 28:

"Respect for human rights

Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative."

They then address economic survival in paragraphs 29-30:

"Economic survival

The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is

clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.

If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. For example, in many parts of Africa, Asia and elsewhere, common ethnic, tribal, religious and/or cultural factors enable access to land, resources and protection. In such situations, it would not be reasonable to expect someone who does not belong to the dominant group, to take up residence there. A person should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship."

These guidelines are, I think, helpful, concentrating attention as they do on the standards prevailing generally in the country of nationality. Helpful also is a passage on socio-economic factors in Storey, *op cit*, p 516 (footnotes omitted):

"Bearing in mind the frequency with which decision-makers suspect certain asylum seekers to be simply economic migrants, it is useful to examine the relevance to IFA claims of socio-economic factors. Again, terminology differs widely, but there seems to be broad agreement that if life for the individual claimant in an IFA would involve economic annihilation, utter destitution or existence below a bare subsistence level (*Existenzminimum*) or deny 'decent means of subsistence' that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth). Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from

relatives, friends or even governmental or non-governmental sources, cannot be excluded."

15. Further guidance is provided by the Court of Appeal in *AH (Sudan) & Ors v SSHD* [2007] EWCA Civ 297, where at [32] and [33] we read:

32. Lord Bingham also quoted with approval an observation by Dr Storey:

What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth)

The indicia given by Dr Storey show that the possibility to survive *economically* is an aspect of living a relatively normal life as an economic operator, rather than as a recipient of charity.

33. An analysis of the judgment of Lord Phillips in *E* and of the speech of Lord Bingham in *Januzi* therefore yields the following propositions as to the approach to whether internal relocation is available in a particular case; bearing in mind always that the standard for rejecting the availability of internal flight is rigorous (per Brooke LJ in *Karanakaran v SSHD* [2000] 3 All ER 449 at p 456, and Lord Carswell in *Januzi* [2006] 2 AC 426 [67]):

- i) The starting-point must be conditions prevailing in the place of habitual residence
- ii) Those conditions must be compared with the conditions prevailing in the safe haven
- iii) The latter conditions must be assessed according to the impact that they will have on a person with the characteristics of the asylum-seeker
- iv) If under those conditions the asylum-seeker cannot live a relatively normal life according to the standards of his country it will be unduly harsh to expect him to go to the safe haven
- v) Traumatic changes of life-style, for instance from a city to a desert, or into slum conditions, should not be forced on the asylum-seeker.

My findings

16. Because the facts found by Judge Fenoughty are unchallenged and conceded by the parties, I adopt them as my own findings. The summary I have included above at [5] sets out the essential findings and I do not need to repeat them.

17. In the absence of more recent country information, I am bound to adopt the approach set out in *LZ (Zimbabwe)* and find that the respondent has failed to establish it is reasonably likely she would encounter persecution

throughout Zimbabwe because the country guidance indicates that lesbians can live in adequate safety in more tolerant areas, such as Bulawayo, which means the respondent would not have to conceal her sexuality to avoid persecution in that part of Zimbabwe. She may decide not to be open about her sexuality in that part of Zimbabwe, but that would not be because she had a well-founded fear of persecution there. Although I accept the respondent has discharged the burden in relation to the subjective element of fear, which arises from the horrendous treatment she experienced, she has not discharged the burden in relation to the objective element.

18. Applying the guidance regarding internal relocation, I must consider whether it is reasonable to expect the respondent to relocate to a more tolerant area, such as Bulawayo. The question I must ask is, "Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?"
19. In her evidence before the First-tier Tribunal, the respondent described living with an uncle in Rusape, which from a map would appear to be a rural town, about 180 km south-east of Harare. The respondent has not provided me with background country information about the economic and social situation in that part of Zimbabwe. As I have indicated, the only additional evidence provided by the respondent for the resumed hearing is the CPIN report. Part 7 of that report examines access to services by members of the LGBT community in Zimbabwe, focusing on access to education, employment, housing and medical care. The information is general and does not describe the situation in Rusape. I am able to infer, however, from the facts accepted in this appeal, that the level of hostility to lesbians and other members of the LGBT community in that part of Zimbabwe is likely to be high. The respondent would be unlikely to secure employment or housing in that area if her sexuality were known to the general population.
20. I mention, for clarification, that at this juncture I am considering the issue of internal relocation and not the issue of risks in the respondent's former place of residence. I am making a finding on the prevailing conditions in that place.
21. The question I need next consider is the prospect of the respondent relocating to a more tolerant area, such as Bulawayo. Again, the background country information is limited to the CPIN report. The key item in relation to the situation in Bulawayo is found in paragraph 7.1.1 and describes the successful appeal of a gay man against his dismissal from the civil service. I find this is evidence that the situation in Bulawayo is more tolerant than elsewhere in Zimbabwe and members of the LGBT community have a right to be employed even if their sexuality is discovered.
22. This is not to suggest the respondent would be able to find employment easily because the fact the gay man who was successful at the Labour Court was dismissed from his position in the civil service indicates discrimination is present. I have no evidence about the prevalence of such

discrimination and must bear in mind that the case cited in the evidence relates to employment by the Zimbabwean government, which has been openly hostile to members of the LGBT community.

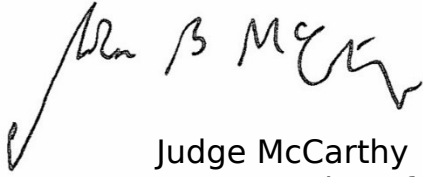
23. Recalling the guidance in *Januzi*, I recognise the respondent might encounter discrimination in Bulawayo as a lesbian but do not find that discrimination would be sufficient to exclude her from being able to support herself or seek assistance from others. As a result – and my conclusion is based on the limited evidence provided – I find that any societal restrictions on the respondent’s ability to be open about her sexuality would not be sufficiently harmful to render the prospect of internal relocation to be unduly harsh.
24. I turn to the respondent’s own characteristics. She has been persecuted in the past because of her sexuality and as recognised by Judge Chalkley it would be unsurprising if it has left her psychologically damaged. I agree, and as I have indicated above, it may be that the respondent will not be open about her sexuality in Zimbabwe because of the subjective fear that has been instilled.
25. Judge Chalkley pointed out that there is no medical or other evidence to indicate the extent or the ways in which the respondent has been affected by what she suffered or how such experiences might affect how she interacts with others and her ability to function in society. Despite the time given for the respondent to obtain further evidence none has been provided. I have not heard directly from the respondent and she has not provided a statement regarding the impact relocation within Zimbabwe would have on her.
26. Without evidence, I am unable to make findings about the impact her past treatment might have on how she conducts herself in the UK or how she might conduct herself in Bulawayo or any other more tolerant part of Zimbabwe. I recall that it is for the respondent to establish that it is reasonably likely that it is unduly harsh to expect her to relocate to Bulawayo or another more tolerant part of Zimbabwe. The evidence I have is limited to inferences drawn from what she has previously suffered. I do not find such inferences to discharge the lower standard of proof that applies because the general background information indicates there is a place in Zimbabwe where the respondent could lead a relatively normal life without undue hardship.

Decision

As found by Upper Tribunal Judge Chalkley, there is legal error in the decision and reason statement of First-tier Tribunal Judge Fenoughty and her decision is set aside. Therefore, the Secretary of State’s appeal to the Upper Tribunal succeeds.

I remake the decision and find the respondent is not a refugee or a person otherwise in need of international protection and I find her appeal against the Secretary of State’s refusal of protection decision dated 15 December 2017 is **DISMISSED**.

Signed



Date

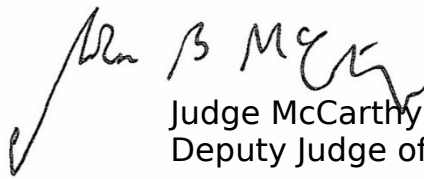
1 May 2019

Judge McCarthy
Deputy Judge of the Upper Tribunal

Order regarding anonymity

I make the following order. I prohibit the parties or any other person from disclosing or publishing any matter likely to lead members of the public to identify the respondent. The respondent can be referred to as "LK".

Signed



Date

1 May 2019

Judge McCarthy
Deputy Judge of the Upper Tribunal