



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005911
First-tier Tribunal No:
HU/52390/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 June 2024

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

ZMJ
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gilbert of Counsel instructed by TMC Solicitors
For the Respondent: Ms Ahmed Senior Home Office Presenting Officer

Heard at Field House on 22 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The appellant is a citizen of China born on 12 December 1988. The appellant, born a male, is transgender and is referred to in this decision as she/her. The appellant claims to have entered the UK in 2008 and made an application for asylum on 18 February 2016 after being detained by the police and being served with a deportation notice. The appellant's application was treated as withdrawn following her failure to attend her asylum interview. The appellant made further submissions on 14 December 2018 with the respondent refusing her application on 24 March 2022. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge French ('the judge') on 21 September 2022, following a hearing on 20 September 2022.
2. Permission to appeal was granted by Judge of the First-tier Tribunal Boyes, on Grounds 2, 3, 4 and 5 on 12 December 2022, on the basis that it was arguable that the judge had erred in law in failing to make crucial findings and/or had failed to give reasons/adequate reasons and had failed to take into account the evidence, including in finding the appellant was not at risk of state persecution; that the judge failed to consider whether internal relocation was unreasonable or unduly harsh in their consideration at paragraph 18(7); that the judge had failed to follow the **HJ (Iran) v SSHD [2010] UKSC 31** principles/test; and that the judge had failed to determine whether there were very significant obstacles to the appellant's integration into China.
3. The appellant had initially also appealed to the Upper Tribunal on two additional grounds; that the judge had not applied the correct standard of proof and that the judge had not used the correct legal test to determine the appellant's article 8 appeal. Although Judge Boyes refused permission on these grounds (Grounds 1 and 6) the appellant renewed their application for permission to appeal to the Upper Tribunal on 19 December 2022.
4. In addition, the appellant's representative made a further application to the Upper Tribunal on 20 July 2023, to add two additional grounds of appeal, Ground 7 that the judge had misdirected themselves in law/failed to provide reasons to support a key finding, at paragraphs 18(14) that the appellant's 2016 asylum claim made 8 years after her arrival in the UK damaged her credibility, including in failing to consider **JT (Cameroon) [2008] EWCA Civ 878** which reads the word 'potentially' into section 8 in terms of damage to an appellant's credibility; and ground 8 that the judge acted with procedural unfairness in failing to adjourn the hearing of the Tribunal's own motion and by failing to enquire why appellant's counsel had not taken instructions of the additional individuals present at the appellant's appeal who would otherwise have given evidence.

5. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and thus whether the decision should be set aside.

Preliminary Issue – Additional Grounds of Appeal

6. The application for the two grounds of appeal refused by the First-tier Tribunal and the two additional grounds remained outstanding before us. At the beginning of the hearing before us, we indicated that we would consider the additional grounds as part of a rolled up hearing.
7. We grant permission in respect of the four additional grounds of appeal, as it was arguable, in the context of the grounds of appeal already before us that there were additional arguable errors for the reasons pleaded in the written grounds. We took into account that Ms Ahmed adopted a neutral position in relation to the inclusion of the additional grounds.

Submissions – Error of Law

8. In the grounds of appeal and in oral submission by Mr Gilbert it is argued, in short summary, for the appellant as follows.
9. Ground 1 argued that the judge did not remind himself of the standard of proof, which in an asylum appeal is ‘reasonable likelihood’ or real risk’ and it was argued that the judge’s findings at 18(4), (5), (6), (7) and (9) did not suggest that he had applied the lower standard.
10. Ground 2 argued that the judge failed to give adequate reasons for rejecting the appellant’s claim to be at risk of state persecution, with the judge failing to give reasons why he preferred the respondent’s country materials over the appellant’s and failed to make a finding as to whether the appellant, if she lived openly as a transgender woman, or was perceived to be a gay man, would be persecuted in China, with it being argued that the judge was incorrect in their analysis of the background information and that the judge appeared to base their finding on the basis that China recognises gender reassignment, without failing to take into account that such is often not possible in practice and that transgender people are subjected to persecutory treatment. It was argued that the findings also failed to take into account that the appellant had herself been subjected to persecutory treatment by state officials. It was further argued that the judge erred in his approach to the appellant’s evidence that she was only allowed to move back in with her parents, if she ‘dressed as a boy’. The judge’s findings, that it did not seem likely that his uncle would have him committed to a psychiatric hospital were also criticised as were the findings that the judge did not believe that the appellant had been ‘persistently persecuted’ (paragraph [18(6)]).
11. Ground 3 argued that the judge’s findings on internal relocation at [18(7)] were flawed. Although the judge did not accept that the appellant was at risk of harm from her local community, the judge was satisfied in

the alternative that the appellant could relocate, including to more urban areas including that there were LGBTQ groups that the appellant might be able to access. It was argued that the judge did not consider whether it would be unreasonable or unduly harsh to expect the appellant to do so.

12. Ground 4 argued that the judge failed to set out and follow the **HJ (Iran)** principles, which it was submitted was 'remarkable' for a case involving sexuality and gender. Although it was acknowledged that the judge was not assisted by the appellant's previous representatives who made no mention of **HJ (Iran)** in their skeleton argument or in submissions, although there was a reference to 'living openly' nevertheless the judge should have applied the test. The judge failed to consider that if the appellant lived openly in her home areas, whether she would be at risk of beating and arrest due to her gender identity.
13. Ground 5 argued that the judge failed to determine whether there were very significant obstacles to the appellant's integration into China.
14. Ground 6 argued that the judge's approach to Article 8 was flawed, and grounds 7 and 8 relied on the arguments summarised in paragraph 4 (above) of this decision.
15. Although there was no Rule 24 response, in oral submissions by Ms Ahmed for the respondent it is argued, in short summary as follows.
16. In terms of Ground 1 Ms Ahmed argued that the judge did not elevate the standard of proof, including in using the words 'I believe', which was similar in Ms Ahmed's submission to using the term 'credible'.
17. Ms Ahmed, in addressing Ground 2, argued that the judge's findings of fact were concise but sufficient. The judge properly considered the objective evidence and noted that the evidence indicated that gender re-assignment was legal, which was inconsistent with a finding that individuals would be persecuted by the state. Ms Ahmed submitted that although Mr Gilbert had relied on some of the articles in the appellant's bundle, there was nothing in this evidence to indicate state persecution. Ms Ahmed further argued that references to concern amongst the 'LGBT community' in some of the evidence, showed that there is an LGBT community in China and that they have freedom of expression. Ms Ahmed submitted that the evidence indicated that there may be discretion, but that the judge was not satisfied that the appellant had shown she would be persecuted. Ms Ahmed submitted therefore that the judge was correct to say the articles relied on by the appellant were selective.
18. Ms Ahmed submitted that in finding that urban areas would be more accepting of the appellant's differences, the judge was plainly finding that the appellant could live openly as a transgender woman without facing persecution. The judge had also found there was no evidence of

systemic abuse of the LGBTQ community. Whilst criticism was made of the judge's references to the respondent's articles, when none were produced by the respondent, Ms Ahmed asserted that clearly the judge was referring to the background country information cited in the reasons for refusal letter. Although the appellant now argued that the evidence relied on by the respondent supported the appellant's case, Ms Ahmed submitted that this was no more than a disagreement with the judge's reasoned findings. Although it was argued on behalf of the appellant that the judge had not taken into account that the appellant had suffered past persecution, at [18.5] and [18.6], Ms Ahmed argued that the judge was stating that he did not find the appellant credible, although she conceded this could perhaps have been set out in more detail.

19. Whilst Ms Ahmed further conceded that an individual does not have to be 'persistently persecuted', Ms Ahmed argued that a fair reading of the decision would indicate that the judge did not accept that the appellant was or would be persecuted, with Ms Ahmed submitting that the judge may have unfortunately conflated the word discrimination with persecution. Any error was not material.
20. Whilst the appellant's grounds argued that the judge, in considering that the appellant returned to live with her family, failed to take into account that the appellant had to dress as a boy to do so, Ms Ahmed argued that the judge did not accept that the appellant had been disowned or that she was estranged. The fact that she may have had to dress as a boy did not show persecution. Ms Ahmed emphasised that the judge did not find the appellant credible, and that the decision had to be considered as a whole.
21. In relation to Ground 3 and the claimed failure to deal with whether internal relocation was unduly harsh, Ms Ahmed relied on the fact that it was the judge's primary finding that the appellant can return home. In addition, although the appellant's skeleton argument raised the issue of internal relocation, there were no submissions made that such would be unduly harsh.
22. In terms of the **HJ (Iran)** point, as the appellant's grounds acknowledged, this was not raised before the First-tier Tribunal and in any event the judge had made clear findings, including in relations to internal relocation, that the appellant could live openly.
23. On Ground 5, again Ms Ahmed noted that the skeleton argument before the First-tier Tribunal simply stated that there would be very significant obstacles, and Ms Ahmed submitted that the judge recorded this submission at paragraph [13] although it did not appear to be the focus of the appellant's case before the First-tier Tribunal. Ms Ahmed accepted that the judge was silent on this, however she argued that any error was not material as the judge's findings indicated that plainly there were no significant obstacles to integration.

24. In terms of Ground 6 and the contention that the judge had not applied the correct test when considering Article 8, in finding that there were no serious or compelling or other consideration which would make exclusion undesirable, Ms Ahmed argued, the judge was finding, in terms, that there were no exceptional circumstances. The appellant had provided no witness statements from any friends and had indicated no family or children in the UK. The appellant had been in the UK unlawfully since 2008 and did not claim asylum until 2016. Given section 117B(4) little weight had to be afforded to her private life, and Ms Ahmed argued therefore that there was no material error.
25. Ms Ahmed submitted that although it was asserted in Ground 7 that the judge had not applied **JT (Cameroon)** the judge's self-direction at paragraph [2] was sufficient to indicate that he had taken all relevant factors into account when considering the appellant's case.
26. Ms Ahmed agreed that Ground 8 was perhaps the most contentious and submitted that there was no merit in the argument that the judge should have adjourned of their own motion, and she submitted that the judge's approach at paragraphs [9], [12] and [14] was correct and it was not for the judge to interfere. She relied on authorities including **Mansoor [2018] UKUT 000274 (IAC)** in relation to poor professional advice and **Ahmed [2023] UKUT 00165**, that blaming a legal adviser won't normally assist. It was Ms Ahmed's submissions that it would not be in line with the overriding objective to take the approach Ground 8 suggested that the judge ought to have in this case.

Conclusions - Error of Law

27. We considered all eight grounds of appeal. We find there to be no merit in the procedural unfairness ground, Ground 8: although for the reasons set out below, the judge's findings of fact are unsustainable, the judge's approach to the issue of the two potential further witnesses on the day of the hearing, and in ultimately deciding to proceed without their evidence, cannot be properly criticised.
28. In circumstances where, despite the judge standing the case down to allow the representatives an opportunity to provide a summary of the proposed evidence, the representative was unable to say what evidence the witness might give, it is difficult to see what other approach the judge might fairly have taken. Although Mr Gilbert suggested that there were deficits in the legal representation provided by the appellant's previous representatives and in those circumstances the judge ought to have adjourned, blaming a (previous) legal advisor will not normally assist an appellant (including as indicated in **Ahmed [2023] UKUT 00165 (IAC)**).
29. However, whilst in isolation a number of the remaining grounds, including the claim that the judge did not apply the correct standard of proof and the argument that the judge did not use the correct legal test in

determining Article 8, are of more limited merit, we accept that cumulatively the errors set out in the remaining grounds of appeal, are made out and are material.

30. Whilst there is no merit in the criticism of the judge in referring to the respondent providing 'articles' when it is clear the judge was referencing the background country evidence cited by the respondent in the reasons for refusal letter, the judge erred in failing to make a finding on whether or not the appellant would be persecuted if she lived openly in China as a transgender woman, (or was perceived to be a gay man).

31. Whilst Ms Ahmed argued that the judge's findings had to be viewed in the context that the judge did not find the appellant credible, the judge's negative credibility findings are inadequately reasoned, including in finding the appellant's credibility damaged under section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, where there was a failure to explain why the judge rejected the appellant's reasons for the delays in making her asylum claim. Although it would have been open to the judge to reject the appellant's explanation, it is not clear from the judge's findings why this was the case.

32. The judge's findings at [18(4)] are problematic; the judge finds:

'Despite the fact that the Appellant had claimed that she had been disowned by her family because of her sexuality, after living away for a month, she had returned to live with her parents. This suggests that she was not estranged from her family'.

Although the judge would appear to be rejecting the appellant's account that she was disowned by her family, the judge fails to consider that, as the judge set out at paragraph [3], it was the appellant's evidence that she was allowed to return if she dressed as 'a boy' which she did.

33. Similarly, although the judge rejected the appellant's claim that her uncle might have her committed to a psychiatric hospital, as her uncle was a poor fisherman, the judge failed to adequately explain why the uncle's status would prevent the appellant's uncle from seeking his admission to what the background country information suggests are publicly funded hospitals.

34. The judge's findings at paragraph [18(6)] are of particular concern. The judge finds:

'For the avoidance of doubt I would state that I do not believe that the Appellant has been persistently persecuted whilst living in China, either by family or villagers (i.e. non-state actors) or by officers of the state. If he had it is my belief that he would not have waited until his parents died before leaving China, and it would be likely that there would be substantially more evidence of that than had been produced.

In those circumstances I conclude that there is no significant that she would be persecuted if she returned to China.'

35. Whilst Ms Ahmed attempted to portray the judge's findings as findings on persistent discrimination, we find it difficult to reconcile the judge's findings with a correct application of the relevant tests, which do not include a requirement for an appellant to have been 'persistently persecuted'. Such errors are material, as we cannot be satisfied that the judge would have reached the same conclusions if he had set out and applied the correct tests, including in relation to past persecution.
36. In finding that the appellant had not been 'persistently persecuted' the judge further failed to give adequate reasons or indeed make any specific findings on the incidents the appellant relied in in 2005 and 2006 where the appellant claimed she was assaulted, including by the police (the judge having noted the appellant's evidence at [3]).
37. We also find the judge's reasoning in relation to both internal relocation and sufficiency of protection to be inadequate. Whilst Ms Ahmed's primary submission was that any such errors were not material given that the judge did not find the appellant credible, as we have indicated the judge's credibility findings are not sustainable.
38. The judge at [18(9)] provides no adequate reasoning for finding there to be sufficiency of protection, beyond accepting the respondent's assertion that this was the case. Whilst it was open to the judge to accept the evidence relied on by the respondent, the judge was required to explain why this was the case.
39. Similarly, in finding at [18(7)] that internal relocation was open to the appellant, in the context of the background country information before the judge of discrimination against the LGBTQ community, and in light of the appellant's own evidence, it was incumbent on the judge to explain why internal relocation would not be unreasonable or unduly harsh for the appellant, if that was the judge's findings.
40. There is also merit in the argument (Ground 4) that the judge failed to apply the **HJ (Iran)** principles. Whilst Ms Ahmed pointed to the lack of reference to the test in the appellant's skeleton argument, the representative did refer to the correct test of 'living openly'. In any event, it was for the judge to adequately consider whether the appellant could live openly in China as a transgender woman, including in the context of the appellant's evidence that she was able to return home only if she dressed as a boy.
41. The judge also materially erred in failing to make any findings on Appendix Private Life of the Immigration Rules and whether there were very significant obstacles to the appellant's integration on return to China. Ms Ahmed accepted that the judge erred in not reaching any findings, but argued that the error was not material given that the judge would have plainly found there not to be such obstacles on the basis of his

existing findings. Whilst it may have been open to the judge to reach such findings, in the absence of any consideration of the difficulties the appellant claimed she would face, including in light of the available country information and in the context of the judge's very limited consideration of Article 8 generally, we find the error to be material.

42. For all the reasons above therefore, we find that the First-tier Tribunal materially erred in its approach. As to disposal, we have considered the Court of Appeal's decision in **AEB v SSHD [2022] EWCA Cin 1512**, the Upper Tribunal's decision in **Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)** and 7.2 of the Senior President's Practice Statements. We are satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Decision:

43. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

44. We set aside the decision and remit the appeal to the First-tier Tribunal for hearing de nova, other than before Judge French.

M M Hutchinson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 3 June 2024