



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004999
UI-2023-005049
First-tier Tribunal No: PA/02314/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of May 2024

Before

UPPER TRIBUNAL JUDGE PICKUP
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

WM (ZIMBABWE)
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Dewa, Dewa Legal Services

Heard at Manchester Civil Justice Centre on 7 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. In order to avoid confusion, we shall refer in this decision to the parties as they were before the First-tier Tribunal i.e. to WM as the 'Appellant' and the Secretary of State as the 'Respondent'.
2. Whilst there are two case numbers in this Tribunal, there is in reality only one appeal under scrutiny; a second case number appears to have been generated for purely administrative reasons.
3. This matter concerns an appeal against the Respondent's decision letters of 20 February 2020 and 26 October 2021, refusing the Appellant's protection and human rights claims made in response to the Respondent's Notice of Decision to Deport dated 26 June 2019.
4. The Appellant's protection claim is made on the basis that he is a member of a particular social group, being someone who is bisexual. His article 8 claim is made on the basis of his family life in the UK, initially concerning that with his parents and siblings and later expanded to include his partner and child.
5. The Respondent refused the Appellant's protection claim on the basis that he had not rebutted the presumptions of being convicted of a particularly serious offence and posing a danger to the community, certified under section 72 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"). Whilst the Respondent accepted that same-sex relationships are criminalised in Zimbabwe and could result in ill-treatment amounting to persecution and/or serious harm, he considered the Appellant had fabricated his account in order to frustrate his removal. The Respondent also considered that the Appellant had not evidenced sufficiently strong family and private life ties in the UK so as to outweigh the public interest in his removal.
6. The Appellant appealed the refusal decisions.
7. His appeal was heard by First-tier Tribunal Judge Austin ("the Judge") at Manchester on 12 May 2023, who later allowed the appeal on humanitarian protection and human rights grounds in a decision promulgated on 29 June 2023.
8. The Respondent applied for permission to appeal to this Tribunal on 4 grounds, namely that the Judge erred:
 - (1) in failing to consider the section 72 certificate issued by the Respondent;
 - (2) in his assessment of the Appellant's claim to be bisexual by failing to address challenges to the Appellant's account raised by the Respondent;
 - (3) in assessing the Appellant's credibility; and
 - (4) in failing to follow the statutory framework set out in section 117C of the 2002 Act when considering the Appellant's human rights claim.
9. Partial permission to appeal was granted by First-tier Tribunal Judge Burnett on 13 September 2023, finding that only ground 1 was arguable.
10. The Respondent applied to this Tribunal for permission to appeal on the remaining grounds, renewing and relying on all of the original grounds.

11. Permission to appeal on all grounds was granted by Upper Tribunal Judge Pitt on 25 January 2024, stating that:
 - “1. The appellant, a national of Zimbabwe, appealed against a decision to refuse a protection and Article 8 ECHR claim. First-tier Tribunal Judge Austin allowed the appeal on protection and Article 8 ECHR grounds. 2
 2. The First-tier Tribunal granted partial permission to appeal in a decision dated 13 September 2023. Permission was granted only on ground one which maintained that the judge did not address the s.72 certificate.
 3. The partial grant of permission was not served on the respondent until 22 November 2023. He now applies in time to renew the remaining 3 grounds.
 4. Grounds 2 to 4 have merit. It is arguable that the assessment of the credibility of the appellant’s sexuality was in error in failing to take into account the appellant’s inability to name any male partners when interviewed and the absence of any reference to his sexuality in the earlier witness statements of his current partner. Paragraph 38 of the decision appears to allow the appeal under Article 8 on the basis that as the appellant had made out his protection claim, Article 8 was also made out. Where it is arguable that the findings on the protection claim were in error, it is also arguable that the decision on Article 8 ECHR was erroneous.
 5. All grounds arguable”.
12. The Appellant did not file a response to the appeal prior to the date of the hearing before us.

The Hearing

13. The hearing came before us on 7 May 2023. We noted that the Appellant’s solicitors had filed a skeleton argument on the morning of the hearing, with the late filing being explained as having been due to late instructions from the Appellant. Mr McVeety confirmed that he had received and reviewed the skeleton argument such that we considered no prejudice had been caused by the lateness in filing it and it was admitted.
14. We heard submissions from both representatives which are a matter of record such that we shall not repeat them here. In essence, Mr McVeety took us through the grounds of appeal, adding little further of substance. Mr Dewa replied to take us through the skeleton argument. We noted the Appellant’s skeleton argument accepted the Judge had erred in accordance with grounds 1 and 4, but argued that these errors were not material. After some discussion as to the nature and effect of the presumptions in section 72 of the Act, Mr Dewa helpfully accepted that the error revealed in ground 1 was material, in which case all of the findings in the decision were likely infected, considering the error revealed in ground 4 had also been accepted.
15. We gave a short extempore judgement finding that all of the grounds of appeal were made out. We now provide our full written reasons for doing so.

Discussion and findings

16. As set out above, the Respondent’s primary position is that the Appellant has not rebutted the presumptions of being convicted of a particularly serious offence

and posing a danger to the community, certified under section 72 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act").

17. Section 72 states:

"1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years

.....

(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

....

(9) Subsection (10) applies where—

(a) a person appeals under section 82 ... of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and]

(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).

(10) The ... Tribunal or Commission hearing the appeal—

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

18. The decision of IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012 cited by the Respondent in the grounds of appeal explains the effect of section 72 as being to require consideration *first* of whether an appellant may (having been convicted by a final judgment of a particularly serious crime and constituting a danger to the community) be 'refouled' pursuant to Article 33 of the Refugee Convention, and only if he only if he may not (as he has rebutted these presumptions) can the Tribunal consider whether he is in fact deserving of protection.

19. It is not in dispute that the Appellant has been convicted in the UK of an offence for which he was sentenced in May 2019 to a period of imprisonment of at least two years. He is therefore presumed under section 72 to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK. It is for the Appellant to rebut these presumptions.

20. It therefore fell to the Judge to consider the Respondent's section 72 certification before going on to consider the substance of the Appellant's protection claim. Had the Judge done so, and had he decided that the certification was sound, he would have been obliged to dismiss that part of the appeal that relates to the Appellant's asylum and humanitarian protection claim and proceeded to decide his human rights claims.
21. There is no indication within the Judge's decision that he did address his mind to section 72. Indeed, there is no mention of this provision at all and it does not feature in the Judge's description of the 'core issues in the appeal' at [20]. As the consideration of the Appellant's protection claim hinged upon his first having rebutted the presumptions contained in section 72, it cannot be said that the Judge would have reached the same overall conclusion had he considered section 72. As such, the failure to consider it was an error which is material. It follows that we find ground 1 is made out.
22. Having found material error, we need not consider the remaining grounds of appeal but shall do so briefly for the sake of completeness.
23. Grounds 2 and 3 are essentially the same in alleging that the Judge erred in his assessment of the credibility of the Appellant's account. The Respondent refers to several paragraphs of his decision letter dated 26 October 2021 which challenged the Appellant's account as regards:
 - (a) the (lack of) detail concerning the Appellant's previous partners and attendances at LGBT clubs in Manchester; and
 - (b) the fact that he chose to disclose his claimed bisexuality only after receiving a negative deportation decision and after becoming the subject of a signed deportation order in February 2020, having had several opportunities to disclose it earlier.
24. The Respondent says that these matters were not adequately addressed by the Judge.
25. The Appellant says that they were addressed in [30] and [32] of the decision, which paragraphs read as follows:

"[30] She [the Appellant's partner] acknowledged the appellant's claimed sexuality. It was known to her but she was aware that he kept it from his extended family (who live in the UK) because of their adverse views. She acknowledged that she was aware of the appellant's status when they met. She rejected the suggestion that he had entered into a relationship with her because of a precarious immigration status. She believes that they are in a committed relationship and that their child is the focus of that relationship. She hopes that they will settle down together. She relies on him for support and assistance with the child, especially as she has been unable to work due to her own mental health problems. She acknowledged that currently reside apart, but that is due to their respective circumstances, and they hope to have a home together soon.

[32] I place less weight than the respondent sought to place on the lack of detail of the appellant's "gay life" as it was put to him in cross examination. The appellant was criticised because he was considered unable to give detail of gay encounters which had taken place at gay locations, such as gay bars and other meeting places. I consider that there is a risk of a one size fits all approach to issues of this kind which creates an unreasonable approach. It must be correct that there are

established places such as gay bars, for example in the acknowledged gay quarter in Manchester, where person who belong to the LGBGT community go to meet. But if a person who says they are gay or bisexual is unable to recount a recent social life centred on such places, I do not consider that this is indicative one way or another of whether they are gay or bisexual. A person may not like to go out to such venues, or may not be able to afford them, for example. A person may seek sexual partners, whether casual or not, by other means. It is likely misleading to consider that there is a narrow channel of behaviour which is to be expected from one particular group or another, and I this case in particular I accept the evidence of the appelland and reject the basis upon which the respondent rejects his claimed sexuality.”

26. We agree with the Respondent that these paragraphs, and the decision as a whole, do not adequately deal with those criticisms made by the Respondent outlined above. Despite the Judge saying at [36] that “I find that the respondent’s reasons for rejecting the account are not credible and do not stand up to scrutiny”, there is no consideration of the allegation that the Appellant could not remember the name of a previous partner with whom he was said to be in a relationship for two months. In addition, whilst the Judge discusses that the Appellant may not wish to go to LGBT venues as not all LGBT people do, this is not the point made by the Respondent. Rather, the point is that the Appellant had mentioned meeting people at such venues but was unable to recall the names and locations of any of them, which undermined his credibility. This point has not been addressed.
27. We accept Mr McVeety’s submission that, in finding the Appellant’s account credible, the Judge appears to rely heavily on the oral evidence of the Appellant’s partner, and that she could only have been going by what the Appellant had told her rather than having witnessed his behaviour for herself, given this behaviour occurred prior to their time together. We also accept that there is a lack of explanation as to why the Judge found the partner’s evidence to be so persuasive when her witness statements do not mention the Appellant’s bisexuality.
28. It is well-established that reasons for a decision must be given. As per the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), heard by the then President of this Chamber as a member of the panel:

“(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal’s decision.

(2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons.”
29. The Appellant’s skeleton argument seeks to argue that the partner’s evidence that the Appellant did not want his family to know about his bisexuality (explaining his late disclosure) is supported by the Appellant’s own evidence that he cared for the welfare of his parents (such that he would not have wanted them to know) and had no money (such that he could not have attended many venues). We do not accept these submissions given, as Mr Dewa confirmed, the Appellant has not said these things in evidence himself. Without the reliance on the partner’s evidence (which, as above, is really second-hand evidence from the Appellant himself), we cannot see any other reasons given by the Judge for

finding the Appellant's account to be credible. On the contrary, at [27] the Judge finds the Respondent's reasons for rejecting the account to have "some basis".

30. We therefore agree that the Judge's assessment of credibility was flawed. Had the Judge fully considered the criticisms made against the evidence, it cannot be said with certainty that he would have reached the same decision. As such, the error is material and grounds 2 and 3 are made out.
31. Mr Dewa conceded that the error alleged in ground 4 is made out i.e. the Judge failed to assess the Appellant's human rights claim under the statutory framework in Section 117C of the 2002 Act.
32. Pursuant to this section:
 - "(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
 - (4) Exception 1 applies where—
 - (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
 - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh".
33. The skeleton argument appears to say that the Judge's error in not considering these provisions is not material because the Appellant meets the exceptions. However, Mr Dewa frankly accepted that the article 8 ECHR assessment was flawed.
34. There is again no mention of these provisions in the decision. The only paragraph addressing the Appellant's article 8 claim is [38] which does not contain adequate detail to show proper consideration of the two exceptions contained in section 117C. Whilst the Judge says he has considered the best interests of the Appellant's child, he does not say how he has done so. Whilst he refers the Appellant having family life with his partner and child, he does not refer to the effect of the Appellant's deportation on them other than to say their family life together can only reasonably continue in the UK, which is not the correct test. As such, the decision cannot be read so as to mean the Judge found, or would have found, either or both of the exceptions to have been met. Without any proper assessment of the exceptions, it is no answer to simply say that the Appellant meets them.
35. Had the Judge assessed the Appellant's article 8 claim under the framework in section 117(C), he may not have come to the same conclusion of allowing the Appellant's human rights appeal. This error is therefore material and ground 4 is made out.

36. Overall, we find the errors found infect the decision as a whole such that it cannot stand.
37. Both parties agreed that the appropriate course of action was for the matter to be remitted to the First-tier Tribunal for hearing afresh.
38. Although not relevant to the substance of the appeal we say also that the Judge, having made an anonymity direction, should have anonymized the Appellant's name and any other details from which he could be identified, such as the name of his partner. We refer to the Presidential Guidance Note No 2 of 2022: Anonymity Orders and Directions regarding the use of documents and information in the First-tier Tribunal (Immigration and Asylum Chamber), noting in particular paragraph 32 which states:
- "If an anonymity order is made, initials should be used to replace the name of the appellant and any others involved in the case, such as family members or witnesses."
39. We have sought to rectify this in our decision and make a further anonymity direction below.

Conclusion

40. We are satisfied the decision of the First-tier Tribunal did involve the making of errors of law.
41. Given that the material errors identified fatally undermine the findings of fact as a whole, we set aside the decision of the Judge and preserve no findings.
42. In the light of the need for extensive judicial fact-finding, and having regard to paragraph 7(2) of the Practice Statements of the Immigration and Asylum Chambers of the First tier Tribunal and the Upper Tribunal as well as Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), we are satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Austin.

Notice of Decision

43. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
44. We remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.
45. Given the claim concerns issues of protection, an anonymity order is made in the terms set out above.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 May 2024