

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



Appeal Number: PA/06547/2016

THE IMMIGRATION ACTS

**Heard at Manchester, Piccadilly
Reasons Promulgated
On the 12th October 2017
October 2017**

**Decision &
On the 18th**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

**MS BERTHA NKOMAZANA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Mutgambizi-Dewa (Solicitor)

For the Respondent: Mr Bates (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge R.D. Taylor promulgated on the 20th December 2016, in which he dismissed the Appellant's appeal on asylum grounds, Humanitarian Protection grounds and on Human Rights grounds.
2. The Appellant is a citizen of Zimbabwe who was born on the 12th October 1982. It was her case before the First-tier Tribunal that she is a lesbian who

was assaulted at a family gathering for being a lesbian by her brother, and that she could not return to Zimbabwe for fear of persecution for a convention reason, namely her sexuality, both in respect of the fear from her brother, and also in terms of the argument that she would be unable to safely relocate elsewhere within Zimbabwe away from her brother and away from persecution from other members of the community, as a result of her sexuality.

3. In his decision, First-tier Tribunal Judge Taylor accepted the Appellant's account of having been attacked by her brother on account of her sexuality as a lesbian, and also found that it was quite possible that her brother would be likely to attack her again, even though he may now have been spoken to by other members of the family, as she returned to Kwekwe. However, Judge Taylor found that following the Country Guidance case of LZ that a homosexual at risk in his or her community can move elsewhere either in the same city or to another part of the country and that he or she might choose to relocate to where there is greater tolerance, such as Bulawayo, but that the choice of new areas are not restricted and that the option was only excluded if personal circumstances presented a risk throughout the country. He also relied upon the Country Guidance case of LZ to find that the position summarised within paragraph 110 of the Judgment was that the evidence did not support the conclusion that Zimbabwean authorities persecuted homosexuals and that they enjoyed tacit tolerance and that Zimbabwe was not a country where finding that a person was gay dictated that persecution was reasonably to be feared. The Judge found that the Appellant would be at risk other than from her brother in her home area, who found it very difficult to accept his sister was a lesbian, but she would not be at risk in other parts of the country including but not limited to Bulawayo and that she had lived independently herself in the past without problems. He found that it did not appear given the answers in interview that she would be openly gay, as a result of a fear of persecution, rather than a fear of rejection or fear of being judged. He found that although the Appellant may be at risk from her brother in her home area there were no grounds for thinking that she would be at risk in other parts of Zimbabwe including Bulawayo and Harare and that she

would be capable of relocating there without undue hardship and that it would be reasonable to expect her to do so. He therefore she did not have a well-founded fear of persecution or ill-treatment or any serious harm upon returning to parts of Zimbabwe other than her home area.

4. Although permission to appeal was initially refused by First-tier Tribunal Judge Pedro on the 27th March 2017, the Appellant renewed the application for permission to appeal to the Upper Tribunal. Within that application she argued that the Judge's finding that the attack by her brother alone was therefore not capable of being accepted as an act of persecution was wrong and that the Judge failed to examine the possibility of the Appellant's brother being a "non-state actor" persecutor and whether or not the Zimbabwean government would be unwilling or unable to protect the Appellant from a non-state actor. It is argued that the Tribunal was not told whether or not the brother was employed by the government or not and that he attacked her in a private gathering in his own capacity and was therefore a non-state actor. It was secondly argued that the Judge failed to consider that the Appellant's attack, followed by police inaction even though a report was made subsequently and demonstrates the absence of a deterrent against a future attack and that as the brother had not received any caution and the police had done nothing, there was nothing to demonstrate that his attack on another citizen would not be tolerated and that he was given an indication of tolerance and that he was a vigilante who would attack the Appellant again and nothing would happen. It is argued that the Appellant's assertion that she cannot live elsewhere is not a bare assertion that her brother could still attack her and there could be another person such as an anti-gay vigilante neighbour who would do so, in the knowledge that there was no law to protect the victim and that the government would be unwilling to protect her. In the third ground it is argued that the Appellant although being an educated person, the Judge failed when considering internal relocation to consider the fact that she had already suffered serious harm and had never lived in Bulawayo and the same law operates in Chegutu where she was attacked as in Bulawayo and Herare as Zimbabwe is not a federal country and that if she

was attacked there again there was no-one to protect her and there would be no deterrent on her attackers.

5. Permission to appeal was granted by Upper Tribunal Judge Finch on the 8th May 2017, who found that it was arguable that the First-tier Tribunal Judge failed to address the issue of sufficiency of protection in his decision and reasons and that this was also relevant to the findings in relation to internal relocation and that it was therefore arguable that the Judge's decision did contain an arguable material error of law and therefore it was appropriate to grant permission to appeal. Permission to appeal was seemingly granted on that limited basis.
6. It was on that basis that the case came before me in the Upper Tribunal. At the Upper Tribunal, I heard oral submissions from Mr Mutgambizi-Dewa on behalf of the Appellant and from Mr Bates on behalf of the Respondent. The full contents of those oral submissions are contained within the record of proceedings and are therefore not repeated in their entirety here, but I have fully taken account of the same in reaching my decision.
7. Although Mr Mutgambizi-Dewa argued that sufficiency of protection and internal relocation could not be separated in the instance of this case and that someone who cannot be protected by the State cannot internally relocate, especially in a country which was not a federal State like Zimbabwe and that the laws applicable in Chegutu applied in Bulawayo and Harare and throughout the country, I do not in fact accept the submission that sufficiency of protection and internal relocation are not separate issues to be considered by a Court in this appeal hearing and that the same cannot be separated. Mr Mutgambizi-Dewa argued that the police had not done anything and the Appellant was simply told that being a lesbian in Zimbabwe is unconstitutional and she had in effect been penalised as a victim and she could not rely upon the protection from the police or authorities wherever she went within Zimbabwe and that she could still be attacked by her brother again or by neighbours or anyone from the community.

8. However, First-tier Tribunal Judge Taylor at [14] of his decision, considered the Country Guidance case of LZ (Homosexuals) Zimbabwe CG [2011] EKUT 00487 and the head note which concluded specifically that a homosexual at risk in his or her community can move elsewhere either in the same city or to another part of the country and that he or she might choose to relocate to where there was greater tolerance, such as Bulawayo, but the choice in the area was not restricted and that the option was only excluded if personal circumstances presented a risk throughout the country. He also properly summarised the position regarding the Zimbabwean authorities at paragraph 110 of the Judgment and quoted that the evidence did not support the conclusion that the Zimbabwean authorities persecuted homosexuals and that they enjoyed tacit tolerance. The Judge properly on the evidence of this case found that the risks simply came from the Appellant's own brother, rather than from other members of her family, and in the absence of any evidence to show that her brother was so highly connected within the government or otherwise so highly connected to mean that he would be able to trace her if she were to internally relocate, the findings of the First-tier Tribunal Judge that she could internally relocate in safety was a finding which was open to him on the evidence. The Judge has given clear, adequate and sufficient reasons for that finding. The Judge has further found that the Zimbabwean authorities on the evidence do not persecute homosexuals and that they mainly enjoy tacit tolerance, that homosexuals at risk of persecution can move elsewhere including to an area where there is greater tolerance which is in Bulawayo. Those were findings open to the judge on the evidence before him.
9. Although First-tier Tribunal Judge Taylor has not made specific findings regarding the question of sufficiency of protection, given that he found that the risk to the Appellant was simply from her own brother and that she could reasonably relocate without undue hardship to another part of the country including Harare, where the Judge found at [15], she had previously worked, or to Bulawayo where she had previously visited, as an educated lady who worked for an international company in quite a responsible position involving international secondment for over 10 years, it was open to him to make

findings that she could without undue hardship relocate to another part of the country and it would be reasonable to expect her to do so, away from her home area, where she would not be at risk from her brother.

10. In such circumstances, given that there is no evidence before the First-tier Tribunal to show that her brother would be able to trace her anywhere else within the country, although the Judge has not dealt with the question of sufficiency of protection, that does not amount to a material error in this case, given the fact that the Appellant on the Judge's findings, could safely internally relocate, given the size and population of the country, without real risk. The Judge's finding on internal relocation, are not dependent upon the finding regarding the sufficiency of protection in that regard, given the fact that the risk is limited to a local area and that the risk is from her brother only, who is a non-state actor, and the Judge was entitled to find that this risk was limited to that home area.
11. The Judge has further given clear and sufficient reasons for his finding that the Appellant would not be openly gay, not due to any fear of persecution, but for reasons of not wishing to be judged for fear of rejection at [15] and [16] of the decision.
12. In the fourth ground of appeal it is argued that the Appellant's position as a brand executive with BAT meant that she was comparative and elite in her own right and that BAT was listed as a major company and major employer of Zimbabwe and that she would be within the Zimbabwean elites. In the fifth ground it was argued that the Judge wrongly placed reliance on the 2011 report by Galz rather than rely upon the new 2013 constitution which it is argued made homosexuality unlawful and showed that hate speeches by political elites were genuinely held entrenched beliefs that found favour within overwhelming majorities in Zimbabweans who voted in the constitutional referendum.

13. I further find that it was also open to the Judge to find that the Appellant was not connected to the “elite” at [16], notwithstanding her role as a brand executive with BAT, as was argued within the fourth ground of appeal.

14. Although within the fifth ground of appeal it is argued that the Judge wrongly relied upon a 2011 report by Galz and that the authority now should be the 2013 constitution which came after the report which made it unlawful to be homosexual and showed that the hate speech by political elites was not in fact harmless political rhetoric but was in fact genuinely held entrenched beliefs and convictions held by the majority of Zimbabweans who voted for the new law in the constitutional referendum, as Mr Mutgambizi-Dewa conceded, that he could not in fact say that the 2013 constitution was actually put before the First-tier Tribunal in evidence. There was no evidence therefore to show that the constitution was in fact part of the evidence before First-tier Tribunal Judge Taylor, and it certainly does not appear to be contained within either the Appellant’s or Respondent’s bundle before the First-tier Tribunal. The Judge cannot be criticised for having failed to consider evidence that was not submitted before him. In such circumstances, I do not accept that the decision of First-tier Tribunal Judge Taylor does contain any material error of law and the decision is maintained. I dismiss the Appellant’s appeal against that decision.

Notice of Decision

The decision of First-tier Tribunal Judge R.D. Taylor does not contain a material error of law and is maintained.

I make no Order in respect of anonymity, no such Order having been made by the First-tier Tribunal, and no such Order having been sought before me.

Signed

RFM^cGinty

Deputy Upper Tribunal Judge McGinty

Dated 12th October 2017