



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-
2021-001954
First-tier Tribunal Nos:
PA/51445/2020
IA/0
0897/2020

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 06 August 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**MMS
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms. G. Patel, Counsel instructed by Scarsdale Solicitors
For the Respondent: Mr. N. Wain, Senior Home Office Presenting Officer

Heard at Field House on 18 July 2023

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

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Andrew Davies, (the "Judge"), dated 21 April 2021, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse her protection claim. The Appellant is a national of Zimbabwe who applied for asylum based on her sexuality.
2. Permission to appeal was granted by First-tier Tribunal Judge Swaney on 12 May 2021 as follows:

"2. The grounds assert that the Judge erred in relying on apparent discrepancies in the appellant's evidence that were not put to her at the hearing; in failing to have proper regard to relevant evidence in finding that the appellant would live discretely on return to Zimbabwe and/or her reasons for doing so; in failing to adequately consider the appellant's personal circumstances which were likely to enhance her risk on return; and in failing to have proper regard to the expert evidence.

3. The appellant's credibility was in issue as set out in the refusal letter. Having considered the record of proceedings it is not apparent that any of the inconsistencies identified by the Judge in the decision and reasons were put to the appellant during the hearing. This gives rise to questions about the fairness of the hearing.

4. The grounds of appeal disclose an arguable error of law. The grant of permission is not limited."

The hearing

3. The hearing took place remotely using Teams. I heard submissions from Ms. Patel and Mr. Wain. I reserved my decision.

Error of law

Ground 1

4. Ground 1 asserts as follows:

"A large part of the Judge's negative findings [29-47] appear based on the Judge going through documents with a fine tooth comb and coming up with a number of "discrepancies" which were never put to the Appellant at the hearing. The Judge acknowledges at one stage that "her witness statement has not been challenged since the Home Office chose not to attend the hearing" [33] and yet it does not appear that at any stage the Judge sought to put any of the discrepancies/ possible negative credibility findings to the Appellant or her representative to give them an opportunity to address these."

5. Ms. Patel referred to the grant of permission where it was clear that the judge who had granted permission had considered the record of proceedings. She then referred me to particular paragraphs. At [30] the Judge states:

"In the Appellant's fresh claim of 14th November 2019 she referred to her sexuality and to the fact that she had to remain discreet, not withstanding her relationship with [L] in Zimbabwe. It is significant however that the Appellant made no reference to her sexuality in her earlier asylum claim in 2011."

6. Ms. Patel submitted that the Appellant had given a reason for why she had not referred to her sexuality in her earlier asylum claim. I was referred to Q67 of the

asylum interview where she said that she had not mentioned her sexuality in her first asylum claim as she did not want her children to know. This was also referred to at [13] of the Skeleton Argument. The Appellant's evidence was that her daughter had thrown her out when she had found out about her sexuality. Ms. Patel further submitted that the Appellant's failure to mention her sexuality earlier had not been taken as an issue by the Respondent in her decision letter. It had not been raised at the hearing, where there had been no Presenting Officer, and it had not been raised by the Judge.

7. Mr. Wain submitted that the issue raised at [30] was a factor that the Judge had to consider. He submitted that this had been raised as an issue in the Respondent's review. In relation to the ground as a whole, he submitted that it was not made out because all of the evidence had been considered and the Appellant had had the opportunity to respond.
8. In relation to [30] I find that the Judge has found it "significant" that the Appellant had not mentioned her sexuality earlier. However, the Judge has made no reference to her explanation for why she did not mention it earlier. I find that it had not been put to her given the lack of explanation, which she had already given at her asylum interview, and which was referred to in the Skeleton Argument. He has referred to her failure to mention her sexuality earlier again at [40] but again there is no reference to the Appellant's explanation. I find that to make an adverse credibility finding without putting this issue to the Appellant, and without considering the evidence before him, is an error of law.
9. Ms. Patel referred to [31] and [32] where the Judge had found that the relationship with L ended in 1983. The Appellant's evidence given at Q34 to Q37 of her asylum interview was that they were still in contact until 2011. I find that this is a further example of an issue which was not put to the Appellant. In her asylum interview she went into detail about why she said the relationship ended in 2011 when she left Zimbabwe.
10. At [41] the Judge referred to the Appellant's answer given at Q53 of her asylum interview. He states:

"She was unable to explain to the interviewer why, after she had had no homosexual relations since 1983, she had started to explore her sexuality again (question 53)."
11. It was submitted by Ms. Patel that the Appellant's answer at Q53 was much fuller than this. The Appellant had stated that she felt she should "live truthfully the way I really am I shouldn't be hiding anything about myself I want to be free when I came I feared if the kids found out then I would have no accommodation and I was right because as soon as my daughter found out she threw me out [...]then she told all the other children and the father." It was submitted that this was also relevant to why she had not mentioned her sexuality and her earlier asylum claim.
12. I find that the Judge has not taken into account the full answer given at Q53. Although he has referred to the specific question he has not considered her answer in full. I find that this lack of explanation and reference to the fuller answer indicates this was not put to the Appellant at the hearing. I reject the submission made by Mr. Wain that all of the evidence had been considered and that the Appellant had had an opportunity to respond. This is simply not borne out by a consideration of the Judge's decision. I find that Ground 1 is made out.

Ground 2

13. This asserts that the Judge failed to use anxious scrutiny and failed “to consider materially relevant evidence before concluding that the Appellant would act discreetly regarding her sexuality in Zimbabwe”.
14. Ms. Patel referred to the Appellant’s evidence in her statement at [48], [52] and [60]. The Judge had accepted that the Appellant was living in a same-sex relationship at the date of the hearing [51]. At Q63 and Q64 of her asylum interview the Appellant had stated that she would not live openly as a homosexual in Zimbabwe because it was illegal. At Q67 she had additionally referred to the consequences of her family finding out. It was submitted that the Judge had not considered this evidence. She submitted that at [65] and [67] of the decision the Judge had set out evidence of how being openly gay in Zimbabwe increased the risk, but he had failed to apply this to the Appellant’s case.
15. Mr. Wain submitted that the Judge had referred to the asylum interview at [41] and [42] but had found that the Appellant chose to live discreetly in the United Kingdom. He submitted that it was open to the Judge to decide whether she would live discreetly. Societal pressure did not equate to a fear of persecution. The Appellant did not live openly in the United Kingdom. Her credibility had not been accepted.
16. I have found above that the Judge’s credibility findings are infected with an error of law given his failure to put matters to the Appellant before making adverse credibility findings. Therefore to the extent that the assessment of the Appellant’s credibility plays a part in his decision as to whether or not she would live discreetly in Zimbabwe, this also involves the making of a material error of law. Additionally, I find that the Judge has not considered the Appellant’s answer given at asylum interview that she would not live openly because it is illegal to do so. Neither has he considered her unchallenged witness statement where she referred to the fact that she lives openly in the United Kingdom. I find that Ground 2 is made out.

Ground 3

17. This asserts that the Judge failed to consider other relevant “personal circumstances” which would enhance the Appellant’s risk and/ or would amount to very significant obstacles, with reference to the expert report. Ms. Patel submitted that the expert report had been before the Judge but he had failed to take it into account. In particular she referred to [27] of this report which listed other features which were relevant to determining the risk of persecution for an individual identifying as a lesbian. These factors were also relevant to integration under paragraph 276ADE(1)(vi).
18. Mr. Wain submitted that these issues had not been outlined in the skeleton argument and referred me to headnote 4 of Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) which states:

“It is a misconception that it is sufficient for a party to be silent upon, or not make an express consideration as to, an issue for a burden to then be placed upon a Judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a Judge is not required to

trawl through the papers to identify what issues are to be addressed. The task of a Judge is to deal with the issues that the parties have identified."

19. In response Ms. Patel submitted that this was not the case here, as these were not new matters which had not been raised in the Skeleton Argument. She submitted that the Appellant's personal circumstances were relevant to relocation and it was not necessary to list them one by one in the Skeleton Argument. She referred to [17] of the Skeleton Argument, which quoted from the CPIN Zimbabwe; Sexual orientation and gender identity and expression, January 2019. At [2.4.17], with reference to the Country Guidance case of LZ (homosexuals) Zimbabwe CG [2011] UKUT 487 (IAC), there was reference to personal circumstances placing some gay men and lesbians at risk.
20. I do not accept Mr. Wain's submission with reference to the case of Lata. I find that the expert report made express reference to the Appellant's personal circumstances, and that the Skeleton Argument referred to the Respondent's own CPIN which in turn referred to the Country Guidance caselaw, and the relevance of personal circumstances. The Judge himself at [65] referred to the fact that "personal circumstances might place some gays and lesbians at risk". However he did not take into account the Appellant's own personal circumstances as set out in her evidence and in the expert report. I find that this is relevant both to her asylum claim and to her claim under paragraph 276ADE(1)(vi) and very significant obstacles. I find that this is a material error of law.

Ground 4

21. This ground asserts that the Judge took a flawed approach to the expert evidence with particular reference to his finding that at [72] that the report was "a shallow piece of work acting as a piece of advocacy for the Appellant's case. There was no attempt to define persecution or consider what constituted persecution". It was submitted that the Judge failed to give adequate reasons for this finding, and failed to provide adequate and cogent reasons for dismissing the expert's opinion.
22. Mr. Wain submitted that the Judge had given correctly substantiated reasons for why the expert report could not be accepted. It was within his jurisdiction to make the comments found at [72] and [73]. This amounted to a disagreement with the weight placed on the report by the Judge. In response Ms. Patel submitted that it was not a disagreement regarding weight but a failure to give reasons. The expert was not acting as an advocate and the Judge needed to give reasons for rejecting the report.
23. The Judge states at [67]:

"The Appellant relied upon expert evidence. [SM] has worked in international development including Southern Africa and Zimbabwe for a considerable number of years and lived and worked in Zimbabwe for over a decade. She has been directly involved in sexual rights work in Zimbabwe. She has published various papers on gender based issues and violence against lesbian and gay people and others."
24. At [72] he finds:

"I found the report to be a shallow piece of work acting as a piece of advocacy for the Appellant's case. There was no attempt to define persecution or consider what constituted persecution. I do not know what material was produced to the expert. She does not appear to have been aware of the earlier tribunal decision and made no reference to the refusal letter which is very detailed. She concluded that the

Appellant is at serious risk of persecution because of her sexual orientation and her previous marriage to a state agent. That conclusion cannot be sustained in respect of the state agent and the overall conclusion is at odds with the country guidance. The report is below the standard to be expected of an expert. There is certainly no comparison to be drawn with the two distinguished experts (Dr Phillips and Dr Aguilar) in the Zimbabwe country guidance case.”

25. Despite the Judge’s findings at [68] of the experience of the expert in her field, he then finds at [72] that her report is a “shallow piece of work acting as advocacy”. In relation to his comment that she did not attempt to define persecution I find that this was not within her remit. Had she attempted to do so it could legitimately have been argued that she had gone beyond her remit. In her report she set out her qualifications and experience, and also set out footnotes and references to sources that she had considered. I find that Ground 4 is made out and that the Judge has failed to give adequate reasons in respect of the expert report.
26. I find that the grounds are all made out and not the decision involves the making of material errors of law.
27. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”
28. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). I have found that the decision involves the making of material errors of law. With particular reference to this consideration, I have found that Ground 1, procedural unfairness, has been made out. Therefore I find that the Appellant has been deprived of a fair hearing and it is appropriate for the appeal to be remitted to the First-tier Tribunal to be reheard.

Notice of Decision

29. The decision of the First-tier Tribunal involves the making of material errors of law.
30. I set the decision aside. No findings are preserved.
31. The appeal is remitted to the First-tier Tribunal to be reheard.
32. The appeal is not to be listed before Judge Andrew Davies.

Kate Chamberlain

First-tier Tribunal Nos: PA/51445/2020
IA/00897/2020

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
30 July 2023