Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03328/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 3 November 2015	**On 9 November 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

NOMATHEMBA MOYO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. By determination issued on 20 August 2015, First-tier Tribunal Judge Farrelly dismissed the appellant's appeal against refusal of recognition of her claim to asylum as a lesbian from Zimbabwe. She appeals to the Upper Tribunal on the following grounds:

    1. **The judge erred in law because he was not entitled to hold that the appellant was not gay**. He has not believed either the appellant or Miss Tshuma but gives no reasons why he does not

accept evidence from other sources that the appellant is gay. First, as regards the letter from the Unity Centre, they subsequently wrote and corrected the error noted by the judge in paragraph 24. A faxed letter was sent on the day of hearing and lodged in process from Unity Centre confirming there was a typographical error in the original letter and the 2 women [the appellant and Miss Tshuma] had been attending meetings since January 2014 and not 2013. The judge had taken account of an irrelevant matter which had been addressed during the course of the hearing … No reasons are given why the judge did not accept the evidence of either Andile Moyo or Edwin Mathe … that the appellant is gay. Nor is there any acknowledgement of a statement … from Noma Sibanda who had attended the Tribunal [on a previous date when the case had been adjourned] and on account of her pregnancy was unable to attend the reconvened hearing … The judge was informed of the position and yet no acknowledgement is made of the statement of the witness … that this person also knew … that the appellant was gay …

The judge further erred in failing to give appropriate weight to the evidence of the 4 witnesses whose statements were before the judge, 3 of whom gave evidence at the hearing. The judge was obliged to give proper consideration to the weight of evidence … in favour of a finding that the appellant is gay. The judge should have considered that evidence from Edwin Mathe and Noma Sibanda were from completely independent sources in that there was family … nor sexual relationship … no reasons provided [the grounds continue repetitively].

2. **The judge erred in law because he has not considered the second part of the first question in paragraph 82 of *HJ and HT***. This part of the question requires the fact finding judge to be satisfied that an appellant "… would be treated as gay …" (in their country of origin). There was evidence … that people may be perceived in Zimbabwe as gay and accordingly … that the appellant would be treated as gay … No findings have been made in relation to whether even if the judge did not believe the appellant she would be perceived as gay or treated as gay in Zimbabwe.

3. **The judge erred in law in applying country guidance**. *LZ* Zimbabwe CG [2011] UKUT 487 states … that relocation to Bulawayo is an option. But on the evidence the appellant came from that city … so … the judge … is saying that even if the appellant is gay she can relocate in Bulawayo, the very city she claims to have suffered persecution in.

Submissions for appellant.

2. At paragraph 24 the judge dealt with the letter from Unity Centre without noting the correction to a chronological error. He had not acknowledged in any respect that there was evidence from Noma Sibanda, and that there had been good reason for her non-attendance. She was an independent witness whose evidence had to be considered. Nor was there any mention

of the evidence of Edwin Mathe, who had attended and given evidence. There had also been oral evidence from the appellant's sister Andile Moyo. The judge rejected the appellant's evidence and that of Miss Tshuma, but did not say what he made of those other witnesses. Taken along with the failure to mention the corrective letter, these were material omissions. (I note that Mr Mackay did not pursue ground 1 to the extent that the judge was "not entitled" to find that the appellant is not gay.)

3. Mr MacKay made no submission further to ground 2.

4. On ground 3, if there had been a finding that the appellant was lesbian and part of a couple, there would have to be consideration of how openly they might live together.

5. The errors of the judge required a remit to the First-tier Tribunal for fresh findings, which would include the application of country guidance.

Submissions for respondent.

6. The outcome was not based only on what the judge said (under the heading "Conclusions") at paragraph 34, where he finds that the appellant and Miss Tshuma have created a false claim. The grounds and submissions had focused on that paragraph, but ignored paragraph 24 (under the heading "Findings"). The judge there says that he looks at all the evidence and does so in the round. He goes on to note that not only do the appellant and Miss Tshuma say she is lesbian, so also do her sister and friend. "These are not independent witnesses but this does not mean that they cannot be believed. Their evidence is part of the whole on which I draw my conclusions."

7. The judge did overlook the corrective letter from the Unity Centre, but that was a minor element.

8. The judge considered the evidence of the two principal witnesses, the appellant and her alleged lesbian partner, in detail. He did not find the appellant reliable, for several good reasons (paragraphs 26 to 32) and did not believe Miss Tshuma, also for good reasons, mainly based on the timing of her alleged realisation that she was bisexual and the alleged beginning of her relationship with the appellant, shortly after failure of her previous claim, made on other grounds.

9. The key evidence having been dealt with, the judge needed to say no more about the further supporting evidence.

10. At paragraph 35 the judge approached the case in the alternative, concluding that even if the appellant were lesbian and her account was true, there were parts of Zimbabwe where she and Miss Tshuma could safely and reasonably live together. That was a complete answer to the case.

Response for appellant.

11. Although the judge referred at paragraph 24 to other evidence, the passage implied there had been only 2 other witnesses, when there had

been 3. The question was not whether he made any reference to that evidence and to considering all the evidence in the round, but whether he actually adopted that approach. There had been 3 witnesses on whose evidence no express finding was made. It was not sufficient for such findings to be implicit. Paragraph 33 did not amount to a good reason for finding Miss Tshuma not to be credible.

12. The judge had not in reality considered the case "at highest", because the previous relationship in Zimbabwe to which he referred was a secretive one, not 2 lesbians living openly together. The errors would therefore require a further hearing, and could not be avoided by the alternative conclusion.

Discussion and conclusions.

13. Ground 1 incorrectly categorises any legal error which it might show. The judge was *entitled* to hold that the appellant was not gay. That was an issue, although not by itself decisive. Any real point goes to the adequacy of the reasoning to support the finding.

14. The principal evidence was plainly from the appellant and Miss Tshuma. If there were good reasons for rejecting the evidence from both of them, evidence from other witnesses that they believed both to be gay was not likely to achieve another conclusion.

15. It might have been better if the judge had been more explicit, but the appellant's grounds and submissions inaccurately focused on paragraph 34 to the exclusion of the rest of the determination, and in particular of paragraph 24.

16. There was an oversight regarding the corrective letter from the Unity Centre but I agree that was a minor matter.

17. Ground 1 shows no inadequacy of reasoning or other significant error in the conclusion that the appellant is not gay.

18. Ground 2 makes little sense. It does not show that the judge was required to consider any principle derived from *HJ and HT* further than he did. The appellant put forward no case that although not gay, she might be perceived as such, and ill-treated as a result.

19. Ground 3 shows no error of law. The country guidance is that relocation is generally available, and not only in Bulawayo. Appellants from Bulawayo may relocate elsewhere.

20. The Presenting Officer was correct in pointing out that the finding on internal relocation is a complete answer to the case. There was no case developed for the appellant in the First-tier Tribunal which required the judge to go any further than he did.

21. The determination of the First-tier Tribunal shall stand.

22. No anonymity direction has been requested or made.

Upper Tribunal Judge Macleman
6 November 2015