



IAC-FH-CK-V1

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

Appeal Number: AA/10625/2014

**THE IMMIGRATION ACTS**

**Heard at Taylor House  
On 20 October 2015**

**Decision & Reasons Promulgated  
On 13 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**DM**

**~~(ANONYMITY DIRECTION NOT MADE)~~**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. A. Morgan, Counsel instructed by Pembridge Solicitors  
For the Respondent: Ms E. Savage, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Drabu who refused the Appellant's appeal against the Respondent's decision to refuse to grant asylum.
2. Permission to appeal was granted on the basis that it was arguable that the judge had applied irrelevant considerations when considering the core of the Appellant's claim. It was also arguable that the judge had inaccurately summarised the law when he said "If his sexuality were as he claims the jurisprudence clearly states that as long as he remains discrete

in his activities, he would not be at any real risk of persecution". Additionally the judge made no reference to delay or Article 8, and both issues were raised in the grounds of appeal. It was arguable that the failure to address those issues in the decision constituted a material error of law.

3. In the Rule 24 response the Respondent stated that she opposed the appeal. The judge had directed himself appropriately. In relation to Article 8, it was clear that the Appellant would not satisfy the requirements of the immigration rules, and in any further assessment, the Tribunal would have been required to attach little weight to the Appellant's private life, lack of financial independence etc in addition to the Appellant's adverse immigration history. To that extent the judge did not materially err in law.
4. At the hearing Mr. Morgan applied to add a further ground of appeal. In his skeleton argument he submitted that the judge had made an error of law "when he failed to consider, properly or at all, A's documentary evidence regarding his Zimbabwean nationality". He submitted that evidence to prove the Appellant's Zimbabwean nationality had been provided to the Respondent in 2010. Additionally the Respondent had been in possession of the Appellant's driving licence since 2005. This issue was not discussed at the hearing in the First-tier Tribunal. The reasons for refusal letter was based on removal to Malawi and removal decision was to Malawi. He submitted that without establishing his nationality, it was difficult to establish that he would be at risk. The judge had not made a finding on the issue of the Appellant's nationality.
5. I considered that the Respondent knew of the Appellant's claim to be Zimbabwean, and it was not an issue of which she was unaware. In paragraph [17] of the reasons for refusal letter there is a reference to "original birth certificates". I gave leave to amend the grounds to include the additional ground regarding the failure to establish the Appellant's nationality.
6. On the grounds on which permission had been granted, Mr. Morgan submitted that in paragraph [14] of the decision it was clear that the Appellant's lack of credibility, inferred from the fact that he had previously claimed to have been Malawian, had spread to consideration of the Appellant's sexuality. It was not clear whether the reference to the leading gay activist was to Peter Tatchell. There was a clear error of law in the failure to take into account the case of HJ (Iran) and HT (Cameroon) [2010] UKSC 31. This error alone enough to set the decision aside. Regarding delay and Article 8, the Appellant had a partner to whom he had referred.
7. Ms Savage relied on the Rule 24 response dated 10 September 2015. The judge had given cogent reasons for rejecting the Appellant's credibility in paragraphs [12] and [13]. These reasons were adequate in the light of the history of the case. That "Peter Tosh" was a leading gay rights activist

was unsupported by evidence. Any error of law in paragraph [14] was not material given the judge's reasons for rejecting the Appellant's credibility. Although the last sentence of this paragraph did not reflect HJ (Iran), this was immaterial given the adverse credibility findings. The Appellant would not have to live discretely for any reason.

8. There was no error in failing to deal with Article 8 and delay. There was no evidence that Article 8 had been pursued at the hearing. The skeleton argument before the First-tier Tribunal dealt only with asylum and risk on return. I was referred to the case of Sarkar [2014] EWCA Civ 195. In that case Article 8 had been raised in the grounds of appeal, but there was no evidence provided at the hearing, and Article 8 was not pursued.
9. In relation to the additional ground, Ms Savage accepted that there was no clear finding as to the Appellant's nationality. The Appellant had previously provided evidence that he was Malawian. In 2010 a claim had been made that he was of Zimbabwean nationality. There had been little evidence before the Tribunal. In summary, the credibility findings were open to the judge and there was no material error of law.
10. In response Mr. Morgan submitted that the Appellant needed to answer the issue of why he entered the UK on a Malawian passport. Even if he were found not to be credible in 2005, this did not contaminate all of the evidence related to Zimbabwe.
11. I announced at the hearing that I found that the decision involved the making of an error on a point of law as inadequate reasons had been given in relation to the adverse credibility finding. I indicated that my full reasons would follow, and I set them out below.

#### Error of law decision

12. Paragraph [14] of the decision states:

"On the claim of his sexuality I have no other evidence except his own and given his very poor credibility, I cannot and do not accept that he is a homosexual. He could not even get the name of the gay rights leading activist in the UK right. If his sexuality were as he claims the jurisprudence clearly states that as long as he remains discrete in his activities, he would not be at any real risk of persecution".

13. This is the totality of the judge's reasoning in relation to the Appellant's claim to be gay. He dismisses his claim to be gay "given his very poor credibility". He further adds that he was not able to name the leading activist, but the judge does not name the gay rights leading activist either, so it is not clear from the decision who is being referred to as the "gay rights leading activist". In paragraph [4] he states that the Appellant had said that he had met "Peter Tosh", but it is only a guess that the judge may have considered this to be an attempt to refer to Peter Tatchell. Given the judge's failure to name any gay rights activist so as to make

clear the Appellant's lack of knowledge, I find that this is not a reason to find that the Appellant lacks credibility, and to reject his claim to be gay.

14. Further, the judge does not refer in paragraph [14] to any of the other evidence provided by the Appellant in support of his claim to be homosexual, but dismisses it all based on his previous poor credibility. I find that, given the Appellant's evidence, inadequate reasons are given for rejecting the Appellant's claim to be gay. It is not enough, given the evidence provided, to rely on the Appellant's previous poor credibility to find that he is not gay.
15. Ms Savage accepted that the statement in paragraph [14] did not accurately reflect the law given the case of HJ (Iran), but argued that this was immaterial given the adverse credibility finding. However, I have found that the judge has failed to give adequate reasons for the adverse credibility finding, and therefore has failed to give adequate reasons for finding that the Appellant is not gay. I therefore find that to suggest he can live discretely, given the case of HJ (Iran), is a material error of law.
16. In relation to Article 8, this was raised in the grounds of appeal. It was submitted by Ms Savage that it was not addressed at the hearing. However in paragraph [1] the judge refers to the Appellant appealing against the decision refusing to grant him asylum and "leave to remain in the UK on any other basis", which indicates that the judge was aware that the Appellant was appealing against the decision not only on asylum grounds. The Appellant also gave evidence of his partner [7] and [9], and there is reference to his partner in the findings in paragraph [13]. The Respondent's representative made submissions regarding the Appellant's partner and asked that the appeal be dismissed "on all grounds" [10]. It appears from the decision that the judge was aware that the appeal was not only in respect of asylum but he only made findings as to the decision to refuse asylum. I find his failure to address this issue is a material error of law.
17. Regarding the additional ground of appeal, the Appellant's nationality is clearly an issue which needed to be resolved. However, although the judge refers to the fact that the Respondent does not accept that the Appellant comes from Zimbabwe [5], there are no findings in relation to the Appellant's claim that he is from Zimbabwe. He refers to the fact that the Appellant claimed to be a national of Zimbabwe in 2010, having originally claimed asylum on the basis that he was from Malawi [12]. However he does not resolve the issue. I find that the Appellant's disputed nationality is a central issue which needed to be addressed, and the fact that the judge has failed to do this constitutes an error of law in failing to resolve a conflict on a material matter.

### **Notice of Decision**

The decision involved the making of an error on a point of law and is set aside. No findings are preserved.

The appeal is remitted to the First-tier Tribunal for rehearing.

~~No anonymity direction is made.~~

Signed

Date 12 November 2015

Deputy Upper Tribunal Judge Chamberlain