Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07131/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 July 2019	**On 18 July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS T J M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Draycott of counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a Zimbabwean national. This is an appeal against the decision of First-tier Tribunal (FTT) Judge Lodge on 2 February 2019 to dismiss her appeal on asylum and human rights grounds.

2. Judge of the First-tier Tribunal Nightingale gave the appellant permission to appeal on 21 May 2019, noting two particular failings on the part of the judge, namely:

(1) a failure to adjourn the appeal in order for directions previously made to be complied with by the respondent;

(2) a failure to have regard to findings that had been made in a decision of Judge Pooler in 2014 when he had dismissed the appellant's appeal against a decision of the respondent on 16 April 2010 to refuse an application for asylum at that time.

3. The judge may have made factual errors with regard to the background evidence and applicable case law. The judge also arguably made errors of fact in relation to the appellant's siblings and who had, or had not, visited Zimbabwe given that her siblings had British citizenship. The judge also considered that there had been an arguable error in relation to the production of documents which were ordered to be provided by the respondent. These documents were described by the judge as only of "historical interest". In fact, it was arguable that the documents continued to be highly material, because the appellant had been involved with an organisation called Zimbabwe Vigil and with the MDC. Had those documents been fully considered by the judge, those documents and that background was of more than historic interest. In fact, it was arguably the case, and suggested by the appellant, that she was of continuing interest to the Zimbabwean authorities. Permission to appeal was given on all grounds by Judge Nightingale.

Background

4. The background to the current appeal is that the appellant first came to the UK on 20 December 2003 and claimed asylum as long ago as 2010. Her asylum claim was refused on 16 April 2010. The subsequent appeal before Judge Pooler against that decision was refused and her appeal rights became exhausted in 2016, but she made a new application which resulted in a refusal on 8 May 2018 and that was appealed to the FTT but dismissed by Judge Lodge, following a hearing in Birmingham in January 2019.

The hearing

5. Before the Upper Tribunal I heard oral submissions by both representatives. Mr Bramble began the hearing by acknowledging that there were material errors in the decision of the First-tier Tribunal and his initial view was that the matter needed to be remitted to the First-tier Tribunal for a fresh hearing, however he did not accept that all the grounds of appeal were made out. He identified those grounds which were, effectively, conceded by the respondent and of particular concern in the decision of the First-tier Tribunal was the extent to which the appellant had been a youth committee member in Zimbabwe. There were also questions about work she had done on a book stall and her *sur place* activities were "definitely of concern". Put in context the appellant may be of interest if she returns to Harare Airport.

6. The appellant's representative, Mr Draycott, acknowledged that the respondent had accepted certain of the findings were arguably erroneous. He said that the only way this matter could safely proceed would be to set aside the entire decision and remit the matter for a *de novo* hearing before the First-tier Tribunal, there being a clear error of law.

7. I directed over the lunch adjournment that the parties should consider whether it was necessary to set aside the entire decision of the FTT and direct a *de novo* hearing in that Tribunal or whether in fact any part could be preserved, and fresh findings made, if necessary, as to any contentious issues. I heard further oral submissions after the luncheon adjournment but was not persuaded that the requirements of the Presidential Practice Statement of 25 September 2012 (the Practice Statement) for remitting the case to the FTT were met and for that reason I decided to find that the decision of that Tribunal contained a material error of law which had to be set aside, indeed, both sides agreed it was material. However, I reserved my decision as to ultimate disposal. I indicated I would do so within fourteen days of the hearing. Mr Draycott invited me to give him permission to make further written submissions disposal, but I directed that any such submissions should be received no later 4 PM on Wednesday, 10 July 2019. In fact, a facsimile transmission was received by the IAC at 17.27 on that day but I will waive any breach of the timetable set and I will consider those submissions below.

8. There is one area of particular contention which relates to the conduct of the hearing on the last occasion, but that appears to be very much contested and without referring the matter to the judge I am not in a position to know whether that could be made out or not. As Mr Bramble submitted, in order to decide that issue it may require oral evidence from those present at the hearing which would delay matters and increase costs. It seems to me to be peripheral in the sense that if there is going to be a further hearing that hearing will determine the key issues in the appeal afresh in any event. I was therefore not persuaded by Mr Draycott to separately consider this issue further. The appellant will in due course be given an opportunity to place all relevant material before the Tribunal.

Disposal

9. The greater part of the hearing was taken up with argument over the correct means of disposal of the appeal. I will now consider whether it is necessary to remit the matter to the FTT or to direct a *de novo* hearing in the Upper Tribunal.

10. I refer to the Practice Statement of 25 September 2012 which provides that:

> "7.2 The Upper Tribunal is likely on each such occasion to proceed to remake the decision, instead of remitting the case to the First-

tier Tribunal, unless the Upper Tribunal is satisfied that: (a)the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or (b)the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be remade is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary."

11. The issues in relation to which the respondent conceded the material error was made out appeared reasonably distinct and the endless cycle of remitting matters to the FTT only for them to return for re-hearings, at significant cost to the parties, and cost to the public purse, as well as delaying the ultimate outcome, is highly undesirable. This is reflected in the Practice Statement where it states in paragraph 7.3, to which I have referred, that remaking the decision in the Upper appeal will constitute the "normal approach determining appeals where an error of law is found, even if some further fact finding is necessary".

12. The distinct issues I refer to are:

    (1) To fully consider the decision of Judge Pooler and consider how much it impacts on the overall outcome of the case;

    (2) To examine the documents that the respondent was ordered to produce.

13. Mr Draycott submitted that his client would be disadvantaged in a subsequent appeal if the matter is to be left in the Upper Tribunal as she would then need to satisfy the "second appeals" test CPR 52.7. However, that is not a proper reason for remitting the matter to the FTT.

14. He also submitted that there were procedural irregularities in the FTT which prevented his client having a fair hearing. That would represent a more cogent reason for remitting to the FTT. However, in truth, what he meant was that there were documents that were not considered. It is not a case of setting aside the entire decision and remitting the but actually considering those documents, in my view.

15. I am not persuaded that there was anything in the decision of the FTT which constituted an unfair hearing. However, of greater substance is the assertion that it will be difficult at an adjourned hearing before the Upper Tribunal to identify clearly distinct issues which do not impact on the overall assessment of credibility of the appellant's claim. There is particular force in the submission in the final paragraph of page 2 of the written submissions that the starting position may include consideration of the appellant's mother's and sister's decisions in the FTT. For present purposes, it is impossible to say how much substance there is in that

submission but there is a risk that the adjourned hearing in the Upper Tribunal will consider it hampered by some of the earlier findings and that further delay and expense would be caused by the need to re-visit these matters possibly by adjourning the hearing. There is also some force in the submission that in adjourned hearing will require lengthy oral evidence from the appellant and other witnesses that is perhaps less suited to an appellate tribunal and a first-tier tribunal. There is little substance in the submission that the venue is of crucial importance, given the excellent rail service between London and Birmingham and the fact that the Upper Tribunal does sit in Birmingham.

16. Therefore, although finely balanced I have in the end decided it is appropriate to remit the matter that the FTT for a *de novo* hearing before a new judge setting aside all the findings. For those reasons it will not be necessary to reach detailed conclusions on all the grounds of appeal before the Upper Tribunal – suffice it to say that those grounds conceded by the respondent are sufficient to justify the setting aside of decision as it contains a material error of law.

Directions

17. Accordingly, I have decided to make the following directions:

    (1) The Tribunal finds a material error of law so that the decision of the FTT must be set aside;

    (2) None of the findings of fact of are to be preserved;

    (3) I direct a *de novo* hearing before any judge other than Judge Lodge in the FTT;

    (4) That hearing is preferably to take place in the Birmingham IAC;

    (5) All further directions are to be issued by Birmingham IAC, unless otherwise advised;

    (6) The respondent is directed to produce the documents ordered in October 2018 by the FTT. Those documents are to be examined in detail at the new hearing and submissions made on them.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 12 July 2019

Deputy Upper Tribunal Judge Hanbury