



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

Appeal Number: PA/11116/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 6 June 2019**

**Decision & Reasons Promulgated
On 19 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**AN
(ANONYMITY DIRECTION CONTINUED)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Jaja of Counsel instructed by Knightbridge, solicitors
For the Respondent: Ms J Isherwood of the Specialist Appeals Team

**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 him or any member of their 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.

DECISION AND REASONS

The Appellant

1. The Appellant claims to be a Zimbabwean born in 1987 but entered the United Kingdom on a South African passport giving a year of birth of 1989 and which he claims he had fraudulently obtained. The Respondent (the SSHD) considers him to be South African. He has two brothers in the United Kingdom.
2. On 29 December 2008 he arrived on a South African passport and claimed subsidiary protection because on return to Zimbabwe he feared persecution on account of political opinion and his sexual orientation.
3. The Appellant's older brother also claimed to be Zimbabwean and arrived in the United Kingdom in 2007 with entry clearance as a Working Holiday Maker endorsed on a South African passport which he also claimed to have been fraudulently obtained. Immediately prior to expiry of his leave, he claimed subsidiary protection because he feared persecution on account of his political opinion on return to Zimbabwe. His claim was refused, his appeal dismissed and his appeal rights were exhausted on 20 July 2007. Further representations in 2013 and 2015 were refused, the latter with a right of appeal which was exercised.
4. By a decision promulgated on 24 October 2016 Judge of the First-tier Tribunal JJ Maxwell allowed the appeal of the Appellant's elder brother against the SSHD's decision but only on the basis of his private and family life on account of his marriage to a Zimbabwean woman who had been recognised as a refugee and their British citizen child born in 2016. In the course of his decision Judge Maxwell concluded the Appellant's elder brother was a national of Zimbabwe because there was evidence before him that the South African High Commission had refused to renew the elder brother's passport and he had obtained temporary travel documents for 6 months from 3 December 2013 from the Zimbabwean embassy.
5. The Appellant's other brother's claim is referred to in the determination of Judge of the First-tier Tribunal Omotosho dismissing the Appellant's first appeal in 2009. It appears he claimed to be Zimbabwean and to have arrived on a South African passport. His asylum appeal had been dismissed before Judge Omotosho heard the 2009 appeal of the Appellant. Ms Jaja stated that this brother had made either further representations or a further application to the SSHD in respect of which a response or decision was awaited. No further details were given to the Tribunal.

The Home Office Decision

6. On 18 June 2009 the SSHD refused the Appellant's claim and on found the Appellant to be a South African and by a determination promulgated on 8 September 2009 Judge Omotosho dismissed his appeal. By 25 September 2009 the Appellant's rights of appeal had been exhausted.

7. Three sets of further representations were refused by the SSHD in 2013, 2015 and 2017. The Appellant obtained permission to bring proceedings for judicial review of the 2017 refusal of further representations which led to the fresh decision referred to in the next paragraph.
8. By a decision of 14 August 2018 the SSHD refused the Appellant's protection claim. The SSHD considered the Appellant to be a citizen of South Africa and the background evidence about gay men in South Africa did not show the Appellant would be at real risk on return to South Africa. There was no evidence the Appellant had a partner or any dependents in the United Kingdom or that there were exceptional circumstances such that he should be granted discretionary leave.

Proceedings in the First-tier Tribunal

9. By a decision promulgated on 4 February 2019 Judge of the First-tier Tribunal Shore found the Appellant to be South African and dismissed his appeal on all grounds.
10. By a decision of 12 March 2019 a Judge of the First-tier Tribunal refused the Appellant permission to appeal.

Proceedings in the Upper Tribunal

11. The Appellant renewed his application to the Upper Tribunal and on 13 May 2019 Upper Tribunal Judge Eshun granted permission to appeal on the grounds that the Judge's findings on the Appellant's nationality were unsafe and that his nationality finding infected his findings on the Appellant's sexual orientation.
12. The Appellant with his two brothers and a family friend attended. Other than to confirm his current address, he took no part in the proceedings.

Submissions for the Appellant

13. Ms Jaja referred to the presence of the Appellant and his two brothers, all of whom had entered the United Kingdom on South African passports and claimed to be Zimbabwean nationals. The SSHD had rejected the claimed Zimbabwean nationality of each of the Appellant and his two brothers and, notwithstanding the decision of Judge Maxwell in the case of the elder brother in which he found him to be a Zimbabwean national, continued to reject the claimed Zimbabwean nationality of the Appellant and his other brother who had an outstanding claim awaiting the SSHD's decision. That the SSHD had treated the three brothers as a group was evident from page 5 of the SSHD's decisions of 12 May 2015 and 6 April 2017 and the original decision of 18 June 2009 at pages 101, 107 and 121 of the SSHD's bundle (RB). Because the SSHD had treated the three brothers together Judge Maxwell's finding that the elder brother is Zimbabwean was central the Appellant's case. Judge Shore had failed to have regard to Judge Maxwell's decision at RB p.69.

14. Judge Maxwell had given sound reasons for finding the elder brother not to be South African at paragraphs 44, 47 and 48 of his decision. The SSHD had concluded the Appellant was South African for the same reasons which Judge Maxwell had rejected in respect of his elder brother. Judge Shore had erred in law by failing to make any reference to Judge Maxwell's findings. I note that Judge Shore directly or indirectly referred to Judge Maxwell's decision at paragraphs 7, 55-56, 93, 100, 113 and 116 of his decision, he also referred extensively to the Appellant's elder brother who gave evidence at the First-tier Tribunal hearing. Paragraph 56 sets out at some length the findings of Judge Maxwell.
15. At paragraphs 19, 32 and 118 Judge Shore had made reference to travel documents issued to the Appellant by the Zimbabwean authorities. The Appellant had given evidence how he obtained these travel documents and that dual nationality is not permitted under Zimbabwean law. The Judge had not addressed the point that the Zimbabwean embassy had accepted the authenticity of the Appellant's Zimbabwean birth certificate before issuing these travel documents. He had relied on Judge Omotosho's rejection of the Zimbabwean birth certificate whose authenticity had not been challenged by the SSHD and he had not addressed the claim that Zimbabwean law prohibited dual nationality. The reasons for Judge Shore's rejection of the Zimbabwean birth certificate were simply because the Appellant had produced a South African passport. Finally, he had not given a reason why he had found the Appellant to be South African when his elder brother had been found to be Zimbabwean.
16. The decision of Judge Shore should be set aside.

Submissions for the SSHD

17. Ms Isherwood submitted there was no material error of law. The submissions for the Appellant had not grappled with the Judge's decision but had simply sought to re-argue his case. The decision was detailed, paragraph 32 noted the careful and thorough cross-examination which dealt with both the nationality and sexuality aspects of the appeal. The Appellant's account how he had acquired and used a South African passport had been dealt with at paragraphs 33-39 of the decision. Additionally, the Judge had at paragraph 54 noted the Appellant, like his elder brother, arrived in the United Kingdom using a South African passport with entry clearance endorsed on it.
18. The Judge had identified at paragraph 48 inconsistencies in the Appellant's several accounts of his arrest in Zimbabwe and at paragraph 78 as to the date of the death of one of his brothers. His elder brother had approached the South African High Commission for a passport and been refused. The Appellant had not claimed to have made any similar application to the South African authorities. At paragraph 73 he had recorded the SSHD's submissions why there were differences between the cases of the Appellant and his elder brother.

19. At paragraph 101 the Judge had taken into account the previous decisions and most importantly found it necessary at the commencement of the part of his decision dealing with his findings of fact to refer to the jurisprudence in *TK (Burundi) v SSHD [2009] EWCA Civ. 40* about the need for a party to produce evidence to support a claim where such evidence is readily available or failing which to explain the absence of such evidence. He had noted the extensive adverse finding made by Judge Omotosho against the Appellant in respect of his account of fear of persecution in Zimbabwe for reasons of political opinion. The Appellant had not pursued the political opinion claim for subsidiary protection at the hearing before him which was clear evidence of the soundness of Judge Omotosho's 2009 adverse findings against him on the political opinion aspect of his claim. He had not sought to adduce any fresh evidence in support of this aspect of his claim.
20. Judge Shore had been acutely aware of the appropriate approach in the light of the jurisprudence of *Devaseelan *[2002] UKIAT 00702*, demonstrated by paragraphs 108-120.
21. The Appellant's elder brother had been to the South African high commission, the Appellant had not.
22. The Judge had separately addressed the Appellant's claim based on his sexual orientation at paragraphs 121-130 and at the end of 132. At paragraph 130 he had considered the obstacles to re-integration on return to either South Africa or Zimbabwe. The decision contained no material error of law and should stand.

Response for the Appellant

23. Ms Jaja repeated her submission that the Judge had not adequately dealt with the decision of Judge Maxwell. The Appellant had been unable to apply to the South African High Commission because his passport had been held by the SSHD. He could only go to the Zimbabwean embassy which he had done. The SSHD had treated all three brothers together and Judge Maxwell had made a decision on the elder brother's nationality.
24. The Judge's treatment of the Appellant's claim based on his sexuality was inadequate and at paragraph 130 clearly wrong in respect of Zimbabwe in the light of the background evidence.
25. The Judge had placed too much reliance on the findings of Judge Omotosho on the Appellant's Zimbabwean birth certificate. At the time she made her decision, the Appellant had not obtained any travel documents from the Zimbabwean embassy. The decision contained material errors of law and should be set aside.

Findings and Consideration

26. The Appellant has been engaged in pursuing applications to the SSHD and litigation in the Immigration and Asylum Chambers since 2008. In

2009 Judge Omotosho made extensive adverse credibility findings. His lawyers will have been aware of the jurisprudence in *Devaseelan* and that in the light of the adverse 2009 determination the Appellant faced a substantial hurdle if his claim was to succeed. It is notable that the Judge commences his findings with a reference to the jurisprudence in *TK (Burundi)*. The Appellant did not pursue his subsidiary protection claim based on political opinion in respect of which Judge Omotosho had made adverse credibility findings. The Judge noted other inconsistencies and made additional adverse findings.

27. In this light, it is inadequate for the Appellant simply to rely on the findings on the nationality of his elder brother contained in the decision of Judge Maxwell. Ultimately, the Appellant's brother succeeded because he was married to a Zimbabwean who had been recognised as a refugee and together they had a British citizen child. The brother's nationality cannot fairly be described as a relevant factor in the core reasoning by which Judge Maxwell reached his conclusion.
28. I accept that like his elder brother the Appellant successfully sought travel documentation from the Zimbabwean embassy and that unlike his brother he did not have his South African passport but there was no evidence that he had approached the SSHD for the return of his passport or requested the SSHD to obtain a renewed passport or other travel documentation from the South African High Commission. Given the hurdle of the 2009 adverse credibility findings, the Appellant may well have had little option but to pursue such a course of action.
29. I have noted the Zimbabwean birth certificates for the Appellant and his elder brother in the Appellant's bundle. A birth certificate is not proof of nationality unless the law of the land provides that the fact of birth within its jurisdiction confers nationality. There was no evidence that this was the case in Zimbabwe at any time relevant for the Appellant. There was no explanation for the absence, for instance, of birth certificates for the Appellant's parents or their marriage certificate. Long residence of the family in Rhodesia and then Zimbabwe might have added to the Appellant's claim to be Zimbabwean.
30. The sustained and adequately reasoned adverse credibility findings against the Appellant inevitably cast doubt on the credibility of his claim to have fraudulently acquired a South African passport, particularly in the light of the matters referred to at paragraphs 33- 38 of the Judge's decision. Again, in this light, the media reports about the fraudulent issue of authentic South African passports alone were insufficient to make the case for the Appellant particularly since two of them referred to the recipients been mainly Pakistani adults and the account of how these passports were acquired in a third one is different from the account given by the Appellant how he acquired his South African passport.
31. Independently of the issue of the Appellant's nationality, the Judge made further adverse credibility findings about events in Zimbabwe which have

not been challenged. The only ground for appeal relying on the Appellant's claimed sexual orientation is that "the Judge's findings on the issue of nationality must logically infect the findings made with regard to the claimed sexual orientation of the Appellant".

32. There was no explanation why one's nationality has relevance to one's sexual orientation. At paragraphs 125-126 the Judge gave sustainable reasons to reject the evidence of the Appellant's claimed sexual orientation. There was no express challenge to any of the particular adverse credibility findings on sexual orientation made by the Judge. Consequently, any findings about the situation of gay men in either South Africa or Zimbabwe become otiose.
33. The Judge gave ample and sustainable reasons for his conclusions and I do not find his treatment of the claim discloses any material error of law. The appeal is therefore dismissed because the decision of the First-tier Tribunal contains no material error of law.

Anonymity

34. No submissions were made about the anonymity direction made by Judge Shore and in the circumstances, I direct that it should continue.

SUMMARY OF DECISION

The decision of the First-tier Tribunal did not contain a material error of law and it shall stand. The consequence is the Appellant's appeal is dismissed.

Anonymity direction continued.

Signed/Official Crest

Date 14. vi. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal