



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00557/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 9 February 2018

Decision & Reasons Promulgated
On 27 February 2018

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

NZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Mottershaw (Counsel)
For the Respondent: Mr A McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal from a decision of the First-tier Tribunal ("the tribunal") which it sent to the parties on 23 March 2017; whereupon it dismissed her appeal on international protection grounds but allowed it under Article 8 of the European Convention on Human Rights (ECHR). The claimant has pursued this appeal to the Upper Tribunal because she believes herself to be a refugee and is not, therefore, content with the tribunal's decision to allow the appeal under Article 8 only.

2. On 12 October 2017, having heard from representatives for both parties, I decided to set aside the tribunal's decision but to preserve its findings and conclusions with respect to the Article 8 aspects. I did so, in a nutshell, because I considered the tribunal to have erred in rejecting the

international protection arguments solely on the basis of sufficiency of protection in circumstances where that had not been raised as an issue either prior to or at the oral hearing held by the tribunal. There had, I therefore decided, been consequent unfairness because had the matter been raised at the appropriate time arguments might have been put on behalf of the claimant which may have led to a different outcome.

3. My having set aside the tribunal's decision I directed that there be a hearing before me in the Upper Tribunal so that the question of entitlement or otherwise to international protection could be considered afresh.

4. By way of background, the claimant was born on [] 1984 in Zambia. She is a national of that country. She gave the following account of events in Zambia: She said that, when she was a very young child, her father had had little or nothing to do with her. However, when she attained the age of 12 years she was told that he wished to have her marry a 30 year old man. In order to avoid that happening her mother sent her to live with a different family who resided some considerable distance away in a different part of Zambia. That family has been referred to, throughout the proceedings, as her "foster family". She went there in or about 1996. However, in 1998 her foster mother married a man I shall simply refer to as EC. She says that EC raped her multiple times over a period of years. Such treatment continued through to her adulthood and when she was aged 22 she reported what had happened to her local police station. However she says that she was laughed at and told to "go home and enjoy everything". She says that the final rape took place in 2009. In 2010 she came to the United Kingdom travelling in possession of a transit visa. She says that she successfully entered the UK and lived, for a time, with her foster mother's sister. She subsequently discovered that she is HIV positive and has stated that she must have been infected by EC.

5. Having remained in the UK without permission for some time the claimant made a claim for asylum on 17 June 2015. The basis of the claim, as subsequently pursued, was that if she had to return to Zambia she would be at risk of persecution or serious harm at the hands of her foster family and EC because she had informed family members of what EC had done to her and would herself be blamed by them for his actions or for speaking about them. She also expressed a fear of her natural father in connection with her previous unwillingness to enter into a forced marriage as a child on the basis that he might once again try to have her forcibly married to another. She also said that she feared being targeted as a lone woman in Zambia and thought she might be exploited, as such, for sexual purposes. With respect to asylum the applicable 1951 Convention Reason was said to be that of membership of a particular social group.

6. The tribunal's decision to allow the appeal, but only in part, was made after a hearing of 3 March 2017. As I say I have set aside that decision whilst preserving the Article 8 findings and conclusions. My having done so there was a further hearing which took place before me and at which representation was as indicated above. That was to enable me to remake the decision with respect to the international protection issues.

7. At the hearing I had, before me, the various documents which had been before the tribunal when it had made its decision. That consisted of a Home Office bundle in the usual form, a Country of Origin Information Response concerning availability of medication in Zambia, a bundle of documents which had been filed on behalf of the claimant and which included her witness statement of 13 December 2016, a psychiatric report and some background country material, some case law, an expert country report prepared by one Professor Beyani and a skeleton argument. In addition to that I had a letter of 25 January 2018 concerning the claimant's medication and I also had the various documents which had come into existence as a result of the subsequent challenge to the tribunal's decision.

8. At the outset of the hearing Mr McVeety said that he would not seek to argue that the claimant had available to herself, in Zambia, a viable internal flight alternative. He indicated that he was not seeking to dispute the truth of the account the claimant had given. He said that he would argue matters solely on the basis that she would have, available to her, a sufficiency of protection from the authorities in her home area. But even as to that, he expressed the view that he was in some difficulty because of what was said about a lack of protection for victims of sexual violence in Professor Beyani's report of 24 February 2017 coupled with the evidence, which he was not disputing, that the claimant had unsuccessfully sought the protection of the authorities in the past. But he did point to an indication in the expert report that the Zambian authorities were trying to address the difficulties surrounding sufficiency of protection for such victims.

9. Ms Mottershaw argued that Professor Beyani's report demonstrated that, whilst the government may have good intentions, protection for victims of sexual violence is not in place. Given that the claimant had sought to disclose the previous history of such violence there would be a risk of her being persecuted by EC's family. It was significant that the police had laughed at her when she had sought protection in the past.

10. I should add that the claimant did not give evidence before me. That was because, I think, Ms Mottershaw considered it unnecessary given Mr McVeety's indication that he would not seek to dispute the truth of the actual factual account she had previously given. I also note, incidentally, that that factual account had been accepted by the tribunal despite its dismissing her appeal. I should also add that I ascertained, at the hearing, that the part of Zambia where her foster family resides is some 12 hours drive away from the part of Zambia where the claimant's natural family reside. It was accepted by all parties that the claimant's home area was to be regarded as the place where she had lived with her foster family.

11. I have concluded, for the reasons which I will now explain, that the claimant is a refugee and that her appeal does, therefore, succeed on asylum grounds.

12. There was, in truth, little which was in issue before me. So, I have proceeded on the basis that the claimant did tell the truth about her previous history and, in particular, about the treatment she has received at the hands of EC. I do not know whether EC is alive or whether, if he is, he resides in the same part of Zambia. But Mr McVeety did not seek to argue that there would be no longer any risk emanating from him and I would conclude, in any event, that there is a real risk that he remains in the claimant's home area (the area she will return to) in Zambia. Given his extensive ill-treatment of her in the past I would conclude that there is a real risk he would repeat such behaviour. That would obviously amount to persecution.

13. Professor Beyani also suggests, in the report of 24 February 2017, that victims of sexual violence in Zambia who disclose the relevant history they may be blamed by family members of the perpetrator for instigating the abuse and that such disclosure transgresses traditional views of good behaviour. So Professor Beyani suggests that, even absent any direct risk from EC, there would be a risk of harm at the hands of other members of her foster family.

14. What Professor Beyani has to say about this was not the subject of any challenge before me. So, on the basis of the material which is before me and in the context of this particular appeal, I am able to and do accept that there would be a real risk of persecution emanating from the foster family including but not limited to direct relatives of EC.

15. All of the above is sufficient to demonstrate that absent a sufficiency of protection (as indeed was not in issue before me in any event) the claimant would be at risk of persecution if she were to

return to her home area in Zambia. Since internal flight was not argued before me that means that I must conclude that she is a refugee so long as I am satisfied that she is able to bring herself within one of the five categories set out in the 1951 Refugee Convention (she claims to be a member of a particular social group) and that there would not be a sufficiency of protection for her in her home area of Zambia.

16. I shall take the second point first. Mr McVeety, whilst as I say acknowledging that he considered himself to be in some difficulty, did take me to a part of the report of Professor Beyani which indicated the government had been making efforts to improve the situation with respect to the way in which the authorities deal with complaints concerning the sort of behaviour the claimant had been the victim of. Indeed, at paragraph 83 of the report, it is noted that a national anti-corruption policy was adopted in 2009 in order to improve police performance in the context of sexual violence. At paragraph 84 reference is made to the government having taken specific measures to deal with the problem of sexual violence. There is also reference at paragraph 86 to a national action plan on gender based violence. But the overall tenor of the report is to the effect that these measures have not, as yet at least, yielded significant concrete results. For example, reference is made at paragraph 82 to the poor training of the police and the lack of adequate resources which it is said explains “the lack of effective implementation of the measures deployed by the Zambian authorities to combat sexual violence”. At paragraph 87 it is said that whilst measures focus upon victims perpetrators are not dealt with. So it is suggested that this claimant remains at risk, as I understand the report, at the hands of EC and her wider foster family. There is, of course, the history of the claimant having sought protection in the past but not having received it. I fully accept that one such incident does not, of itself, demonstrate an unwillingness or an inability to, in general terms, provide protection. It is always possible that an individual might be unlucky in encountering rogue officers. But the claimant’s previous experience is not irrelevant in considering what level of protection she is likely to receive in future. Further, the accuracy of what is contained in the report about the ongoing shortcomings in the context of protection was not challenged before me.

17. In the circumstances I have concluded, on the material before me and in the particular circumstances of this case, that this claimant will not have available to her a sufficiency of protection upon return to Zambia. I would stress, though, that I am not purporting to make any general findings as to the availability or otherwise of protection for victims of sexual violence in Zambia. I am focusing solely upon this particular claimant. But my having reached this conclusion does mean that the claimant has only one further hurdle to surmount, in the context of asylum, which is that relating to her claim to be a member of a particular social group.

18. Very little was said about that particular issue before me. That might be because Mr McVeety did not actively see to persuade me that the claimant, in her circumstances, is not a member of a particular social group. I do note, though, that the matter was addressed before the tribunal by Ms Mottershaw in her skeleton argument of 2 March 2017. She offered, in that skeleton argument, a number of different formulations as to the social group to which it was argued the claimant belonged. The suggestions put forward were “single women”; “women who had transgressed social and cultural mores”; or “single woman who have transgressed expectations by being a victim of sexual violence and reporting this”.

19. I can think of other different formulations. I do not, however, feel the need to be specific here. As I say Mr McVeety did not seek to argue before me that the claimant was not a member of a particular social group. In those circumstances I would accept that she is. In the circumstances that is all I have to do.

20. I have concluded, therefore, that the claimant has made out her claim to be a refugee. That being so it is inappropriate and unnecessary for me to go on to consider whether she is entitled to a grant of humanitarian protection. I would, however, also conclude that for the reasons I have accepted her as a refugee she is also a person who would be at real risk of receiving treatment which would breach Article 3 of the European Convention on Human Rights if she were to be returned to Zambia. She is, therefore, a person who is entitled to international protection.

21. As to anonymity, I am aware that anonymity was granted by the tribunal. Nothing was said about anonymity before me but it seems to me obvious, given the particular circumstances of this case, that the claimant should continue to have protection from publicity. Accordingly I have granted her anonymity myself.

Decision

The decision of the First-tier Tribunal, which was sent to the parties on 23 March 2017 has already been set aside.

In remaking the decision I allow on asylum grounds and on human rights grounds (Article 3 of the European Convention on Human Rights) the claimant's appeal against the Secretary of State's decision of 30 June 2015.

Signed:

Date: 23 February 2018

Upper Tribunal Judge Hemingway

Anonymity

I grant the claimant anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, such grant to continue unless and until a tribunal or court directs otherwise. No report of these proceedings shall directly or indirectly identify the claimant or any member of the claimant's family. This direction applies to all parties to the proceedings. Failure to comply could lead to contempt of court proceedings.

Signed:

Date: 23 February 2018

Upper Tribunal Judge Hemingway

TO THE RESPONDENT FEE AWARD

Since no fee is payable there can be no fee award.

Signed:

Date: 23 February 2018

Upper Tribunal Judge Hemingway