

JD (homosexual – MDC supporter – internal relocation)
Zimbabwe [2004] UKIAT 00259

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 2 August 2004
Determination prepared: 13 August 2004
Date Determination notified: 17 September 2004

Before:

Mr Andrew Jordan (Vice President)
Ms C. St Clair
Mr S.S. Percy

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

For the Appellant: Ms M. Plimmer, counsel instructed by
South Manchester Law Centre
For the Respondent: Mr J. Wyatt, Home Office Presenting Officer

1. The Appellant is a citizen of Zimbabwe who appeals against the determination of an Adjudicator, Mr D. M. Brunnen, promulgated on 27 October 2003, dismissing the Appellant's appeal against the decision of the Secretary of State to refuse both her asylum and human rights claims.
2. The Appellant was born on 23 October 1980 and is 23 years old. She arrived in the United Kingdom on 15 January 2002 on a flight from South Africa using her own passport and was granted six months leave to enter as a visitor. One week before the expiration of her leave, the Appellant applied for asylum. The Secretary of State refused her asylum claim and made a decision on 6 September 2002 refusing her application for variation of her leave to enter or remain. This decision gave rise to a right of appeal under section 69(2) of the Immigration

and Asylum Act 1999. The Appellant gave notice of appeal on 10 September 2002.

3. The Appellant is a lesbian and claimed to fear return to Zimbabwe both because of her sexual orientation and as a result of her involvement with the Movement for Democratic Change (MDC). The Appellant is an only child who, after the separation of her parents and the remarriage of her mother, went to live with her grandmother. When her grandmother died in 1998, the Appellant went to live with her uncle who lived in Harare. In October 2000, she formed a sexual relationship with another young woman, Ms Moyo. A conversation between the two of them was overheard and the Appellant was only permitted to remain in her uncle's house under strict supervision. Ms Moyo was a member of the MDC and the Appellant joined that organisation in November 2000. The Appellant attended three MDC rallies, two of them in the company of Ms Moyo. At a rally on 26 December 2001, supporters of Zanu PF attempted to disrupt the meeting. In the ensuing violence, the Appellant was assaulted by police officers, arrested and detained for two weeks. She was questioned about her involvement with the MDC. Eventually, her uncle arranged for her release. Upon her release, supporters of Zanu PF came to her uncle's house. A stone was thrown through one of the windows. The Appellant was subjected to taunts over her sexuality.
4. The Appellant went by coach to South Africa on 11 January 2002 and flew to the United Kingdom four days later. On arrival in the United Kingdom, she went to stay with her aunt.
5. The Adjudicator found the Appellant to be an open and honest witness. Although the Secretary of State in his refusal letter had raised doubts as to the Appellant's credibility, those matters were considered by the Adjudicator who concluded that the Appellant retained her credibility. In paragraph 17 of the determination, the Adjudicator expressly finds that the Appellant's evidence was truthful.
6. The Adjudicator, however, examined the nature of the Appellant's claim. Taken at its highest, he considered the Appellant to be a low-level supporter of the MDC. She could not properly be described as an activist or a leader and had only attended three or four rallies.
7. The Adjudicator had before him a report by Mr Matyszak which he regarded as well researched, well balanced and reliable. He noted that lesbian acts were not regarded as criminal although the political leaders have made virulently homophobic remarks. There is widespread condemnation against homosexuality, often viewed as a product of western values and, therefore, in opposition to the Zimbabwe

government. The Appellant is a Shona. Homosexuality, it is said, undermines traditional kinship, highly valued by the Shona, rendering it impossible for a black rural Zimbabwean woman to adopt a lesbian lifestyle. Even in an urban environment, it would be very difficult.

8. Having considered the report of Mr Matyszak, the Adjudicator concluded that the Appellant was not at risk of ill-treatment of sufficient severity to amount to persecution or a violation of her Article 3 rights. Mr Matyszak had suggested that it was possible for lesbians to adopt "a position of invisibility"; in essence, concealing their sexual orientation to an extent that it remained private, or largely so. The Adjudicator did not consider that a restriction on the Appellant's ability to express her sexual orientation in this way imposed a limitation on the Appellant's freedom sufficiently severe to engage Articles 3 or 8 of the European Convention.
9. The Appellant appealed. The grounds of appeal challenge the Adjudicator's assessment that the Appellant's account did not disclose persecution or Article 3 ill-treatment sufficient to the purposes of Article 3 and was in error in his assessment of risk on return both as a result of her involvement with the MDC and because she is lesbian.
10. In his report, Mr Matyszak refers to the homophobic utterances by members of the Zimbabwe leadership. He also refers to the link that is drawn between western standards and homosexuality. At page 9 of his report, we find:

"The discourse and the milieu outlined above has exacerbated an already difficult situation for the lesbians in two ways. Firstly, lesbian and gays are held up as the epitome of the evil that results from adopting western lifestyles. They are people who, in the eyes of the present government, show by their very identity that they have thrown in their lot with "the enemy". Homosexuality is portrayed in the State controlled media as foreign and as non-existent in unadulterated Shona society... Being gay or lesbian, to supporters of Mr Mugabe's Zanu PF party, immediately connotes that individual as a person hostile to Mugabe's Zanu PF party, as someone who represents an incarnation of the intrusion of western values which Mugabe professes to abhor and the embodiment elements seen to constitute Zimbabwe's enemies."

11. This same report speaks of physical violence:

"Physical violence against gays and lesbians in Zimbabwe is not endemic or systematic. In this regard, despite the homophobic

environment, instances of physical gay bashing are less frequent than in many jurisdictions where homosexual relationships are formally recognised. However, sporadic instances of physical violence have been recorded by GALZ and tend to occur when some event has raised the profile of gays and lesbians in Zimbabwe. Such violence that there has been has largely been directed against gay men. This is most probably due to the greater invisibility of lesbians. Several black lesbians whose sexual orientation has become public have been subjected to violence."

12. The report concludes:

"Clearly, a hostile climate exists in Zimbabwe as far as lesbians are concerned. The impact of this hostility in some cases is specific to the individual. An openly and overtly lesbian woman is very likely to face some sort of persecution of one form or another. The government provides an ideological structure conducive to persecution and even encourages it in some instances. However, the extreme hostility of the climate forces most lesbians to adopt a position of invisibility. Their reduced access to public space, reduced independence and socio-economic status result in few incidents of abuse coming to the attention of the only lesbian and gay NGO in the country. Finally, it is worth mentioning that there have not to my knowledge been any cases of persons, male or female, who sought asylum on the basis of sexuality, facing persecution on return. However, as such asylum cases are rare no conclusions may be drawn from this. I have not been able to locate any jurisprudence on this point in any common-law African country apart from South Africa."

13. The Country Report for Zimbabwe, prepared by CIPU in April 2004 contains the following material:

Homosexuals

6.151 Sex between men is illegal in Zimbabwe, although the law makes no mention of sexual acts between women. Zimbabwean law recognises three classes of 'unnatural offence': sodomy, bestiality, and a group of proscribed acts referred to generally as an 'unnatural offence'. According to a 1999 World Legal Survey, High Court cases in Zimbabwe suggested that sexual behaviour between men should no longer be punished by custodial sentences, however, magistrate's courts continued to serve "harsh custodial sentences" [18a]. There have been no reports of the

authorities bringing cases on the grounds of sexual acts between females. [28a].

6.152 Gays and Lesbians of Zimbabwe (GALZ) was established in 1990. GALZ has offices in Harare and Bulawayo and is considering forming a group in Mutare. The organisation reports itself to be relatively well funded and it owns its premises in Harare. The ILGA Africa 2000 Report highlighted GALZ'S submission to the Constitutional Commission in that year, appealing for the inclusion of a sexual orientation clause in the draft constitution. GALZ discussed lesbian and gay issues with the MDC, which stated that it would pursue a policy of tolerance towards gays and lesbians. [18b]. There are reported to be approximately 600 paid-up members of GALZ, and the organisations claims to be in contact with another 5,000 gays and lesbians nation-wide. [201].

6.153 In his New Year address on 1 January 2000 President Mugabe criticised homosexuality, describing homosexual relations as an abomination and decadence. In the mid-1990s, when gay rights group GALZ applied to take part in Harare's prestigious international book fair, President Mugabe described homosexuals in a speech as "worse than pigs and dogs". BBC reported on 12 August 1998 that he called homosexuals "a scourge planted by the white man on a pure continent". Although GALZ had participated in the book fair in 1995, the following year their stand had been attacked and destroyed. [3v][18a]

6.154 On 12 August 1998 the BBC reported GALZ's claim that police arrested members of the organisation on "trumped-up charges" and that they were pressured at work and at home to renounce their sexual orientation. According to the Los Angeles Times of 27 July 1998, the Government encouraged the media to criticise homosexuality and report it negatively. The state-controlled Herald published articles that GALZ headquarters was a "pick-up point" for local and foreign homosexuals that offer teenage boys for hire, accusations that GALZ denied. [3v][19]

6.155 More recently, in September 2003, GALZ stated in the Zimbabwe Standard that homosexuality issues slid down the government's agenda as they faced serious economic and political problems. Keith Goddard, the director of GALZ, believed that the government's stance on homosexuals was just political rhetoric and that it was using the gay and lesbian community as scapegoats. [201]. In 2003, GALZ applied to have its own stand at the Zimbabwe International Book Fair. According to GALZ, the

application was “accepted without hesitation”. This was the first time GALZ had a stand of its own since 1996. From 1997 to 2002, GALZ displayed its literature on the general Human Rights stand at the fair. [66]. One gay man, interviewed by the Zimbabwe Standard, agreed that conditions for gays and lesbians in Zimbabwe has improved over the last few years. He stated that it wasn’t the authorities that posed the real threat, but traditional culture, particularly in the townships and rural areas. [201].

6.156 Societal discrimination against homosexuality is rife in Zimbabwe. Gays and lesbians often hide their sexuality from their families, leading some to be forced into marriages. According to one gay man, he was evicted from his lodgings by his landlord. The same report questioned a lesbian, who stated that her partner had had stones thrown at her. Some have suffered “verbal abuse and assault”. [201].

6.157 GALZ is active in the field of HIV/AIDS and through its support group, GALZ Positive, provides home-based care training for members. According to ILGA’s Africa 2000 Report, six workshops on sexual activity within and outside relationships were held in Harare and Bulawayo during the year. [18b]

14. The picture that emerges from this material suggests that societal discrimination against homosexuality in Zimbabwe is deep-rooted in a way that may have some similarities to the attitude adopted in the United Kingdom some years ago. As a result, however, of cultural attitudes amongst the Shona, homosexuality may be perceived as being particularly corrosive of Shona values. Gays and lesbians can therefore become scapegoats to be targeted by government as a rhetorical enemy, perhaps simply for political purposes. That said, the government's attitude appears to be largely rhetorical and hostility waxes and wanes depending upon other political imperatives. There is no compelling evidence that the government attempts to put its rhetoric into effect. Meanwhile, the general attitude of homophobia has resulted in little concrete evidence of violence, or even harassment.
15. Ms Plimmer, who appeared on behalf of the Appellant, submitted that the Adjudicator was in error in his conclusion that the Appellant was not at risk of ill-treatment on account of her homosexuality sufficient to overcome the high threshold in both the Refugee Convention and the ECHR. She submitted that it was difficult to distinguish between the Appellant's MDC membership and her homosexuality and both had become public knowledge in the area in which she lived. For these two reasons, taken together, she was arrested and detained for two weeks.

She submitted that the Appellant's prospective risk had to be assessed against this background.

16. We have considered the Appellant's evidence in relation to her arrest. It arose from her presence at an MDC rally. Although in paragraph 22 of her statement, she claims that she was taunted about her sexual orientation by a group of Zanu PF youths who recognised her, it is apparent from paragraph 23 of the statement that she was hit in the indiscriminate violence meted out by the police and directed towards MDC supporters as a whole. Whilst in detention, she claims that she was placed in a cell with a male prisoner. Although her statement does not expressly make this point, it was submitted that this choice was a deliberate effort to humiliate her. The Adjudicator did not conclude that this arrest and detention arose as a result of her sexual orientation. It seems to us that this conclusion was properly open to the Adjudicator given the facts that we have set out above.
17. Ms Plimmer submitted that the risk faced by this Appellant should be judged by what happened to her partner. In paragraph 35 of her statement, the Appellant stated that she received a telephone call from an unidentified friend to the effect that Ms Moyo had been abducted by Zanu PF youths. In our judgment, neither the Adjudicator nor the Tribunal has any means of assessing the reliability of this material. We do not know whether the informant was a direct eyewitness or whether she received the information from a more remote source. Accordingly, it is impossible to make any assessment of its weight. Furthermore, there is no evidence of what subsequently occurred. In our judgment, it would have been entirely speculative for the Adjudicator to have concluded that there is a reasonable likelihood of history repeating itself, were the Appellant to return, on the basis of this telephone conversation. We simply do not know what happened.
18. We are not satisfied on the material that has been produced to us, including the helpful report of Mr Matyszak, that homosexuals are persecuted in Zimbabwe. Nor do we consider that the Appellant's evidence is sufficient to establish that she will be persecuted or subjected to Article 3 mistreatment on return. It was submitted that, no matter how "invisible" she becomes, she is known in her community and has already been branded as a lesbian. Ms Plimmer submitted that the option of maintaining a cloak of invisibility is not available to her because she has tried this in the past and it failed. She conceded that not all homosexuals are at risk but claimed this Appellant is a marked person and so falls into a separate category. Whilst conceding that this does not appear to happen to other individuals, she submitted that it was sufficient that the Adjudicator accepted the claim that it had happened to her.

19. In our judgment, this submission suggests that the Appellant has been the victim of hostility felt by some of her immediate neighbours who are supporters of Zanu PF. If the level of hostility is so great that, even after the passage of nearly three years, the Appellant faces the continued risk of violence on return, it cannot reasonably be said that the same risk applies wherever she may settle. If, as she claims, the hostility is so great that she cannot return to her immediate area, no credible reason has been put forward why she should not relocate to another part of Harare. It was submitted that this was not possible because, in the past, she has failed to keep her homosexuality secret from the wider community. In our judgment, however, the background material is clear and suggests that if a lesbian or gay couple act with sufficient discretion, they are able to attain the invisibility of which Mr Matyszak speaks. We do not consider that the restraint that this requires is sufficient to constitute persecution or a violation of human rights. Nor do we consider the evidence sufficient to establish that the Appellant's relationship with her partner was conducted in any way differently from other similar relationships. Her claim was based on the discovery of her sexuality as a result of her cousin's overhearing a private telephone conversation she had with Ms Moyo. It was not part of her case that she intended to broadcast her sexual orientation. Rather the reverse. The tenor of her evidence was that she wished to keep this part of her private life, private. Although it was conceded that the Appellant would take no overt steps to inform the wider public, it was said that the Tribunal should infer that her sexuality is bound to emerge from her everyday life. It seems to us that this submission flies in the face of the background material in which it is clear that gays and lesbians are able to maintain relationships with partners without risk of persecution or similar adverse consequences.
20. For these reasons, we consider that the Adjudicator reached a conclusion that was entirely justified by the evidence. Accordingly, this appeal is dismissed. We reach this decision in spite of the poor human rights record displayed by the government of Zimbabwe and which is evidenced in the background material.

Decision: The Appellant's appeal is dismissed.

ANDREW JORDAN
VICE PRESIDENT