



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

Appeal Number: AA/03548/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 21st October 2015**

**Decision Promulgated
On 9th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**YAW
(anonymity order made)**

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N Wilkins, counsel instructed by Duncan Lewis solicitors

For the Respondent: Ms Fujiwala, Senior Home Office Presenting Officer

ERROR OF LAW & REASONS

1. The Appellant is a national of Uganda, born on 6 December 1982. She last arrived in the United Kingdom on 28 September 2012 and claimed asylum on 20 August 2013 on the basis of her political opinion and sexual orientation. She gave birth to her son, R, on 26 September 2013 by a British national, DO. She was interviewed on 7 January 2015 and her application for asylum was refused on 16 January 2015, along with a decision to remove her to Uganda.

2. The Appellant appealed against the decision on 3 March 2015 and her

appeal came before First Tier Tribunal Judge Jerromes for hearing on 27 May 2015. She and DO gave evidence but her partner, K, did not attend the hearing. In a decision dated 2 June 2015, she dismissed the appeal as she did not find the Appellant to be credible [44]; she did not consider that she would be at risk on return to Uganda as a result of her involvement with A4C [44.1.]; she did not accept that the Appellant is a lesbian nor that she is in a same sex relationship with K [44.2(i)]; she found that the Appellant has sole responsibility for R [44.3] but it would not be unreasonable to expect him to leave the United Kingdom with the Appellant [51.2].

3. The Appellant sought permission to appeal to the Upper Tribunal on the following bases: (i) the Judge failed to take into account relevant evidence of the Appellant's arrests; (ii) the Judge failed to take into account relevant evidence/insufficient reasoning for disregarding the evidence of the Appellant's sexuality; (iii) the Judge misdirected herself in law and failed to take into account a material matter with respect to the Appellant's Article 8 claim.

4. Permission to appeal was granted by First Tier Tribunal Judge Shimmin on 7 July 2015 on the basis that it was arguable that the judge misdirected herself in law and failed to take account of material matters with respect to the Appellant's Article 8 claim, particularly in respect of the position of her child who is a British citizen and that, whilst the remaining grounds were less persuasive, she did not reject them.

Hearing

5. Ms Wilkins referred me to the grant of permission to appeal and the fact that permission had been expressly granted in respect of the Article 8 point. However, she also relied on the other two grounds which were a little more subtle. She stated that the Home Office Presenting Officer at the hearing before the First Tier was concerned that there had been no opportunity for the Home Office to consider the Appellant's sexuality and fact that her child is British.

6. Ms Fijiwala stated that she intended to defend the decision. The Judge made findings she was entitled to make at 43.5 the credibility finding goes to the heart of the case and the Judge takes this into account in her overall assessment. She stated that the Judge's finding was open to her to make based on the evidence and to find she was not credible in relation to A4C and arrests. She submitted that Ground 1 was a disagreement and was no material error.

7. In respect of Ground 2 she stated that in terms of the Appellant's claimed sexuality the Judge fully considered this claim at 40.1. The Appellant had a heterosexual relationship and a child whilst with K; at 40.2 the Judge noted that the Appellant did not raise her sexual orientation at the screening interview; at 40.3 the Judge found that the Appellant denied being in a relationship in the United Kingdom and did not mention her sexual orientation despite being aware of LGBT issues in terms of her political stance. At 40.4 the Judge noted that K did not attend the hearing. At 40.5 the Judge took account of Mr O's evidence. At 44.2 the Judge did not accept that the Appellant is a lesbian and in

a relationship with K and this evidence could not be tested and went to the core of the claim in relation to her sexuality. The case of ABC C/148/13 - C/150/13 was also taken into account but the Judge notes the Appellant had three opportunities to raise this claim but did not mention it until the appeal hearing. The Judge was satisfied the Appellant would have been aware of the possibility of making a claim based on sexual orientation. She asserted that the second ground is simply a disagreement and the Judge was entitled to reach the conclusion she did based on the evidence.

8. In respect of the third ground and the Article 8 claim, the Judge dealt with the case under Appendix FM and EX1. The Appellant was in breach of the Immigration Rules and could not meet the financial requirements. She went through the Judge's findings at 51.1. through to 53.3(iii) and submitted that since Sanade and the guidance, the section 117B (vi) test is whether it would be reasonable to expect the child to leave the United Kingdom and this reflects Parliament's intention. The Judge has properly considered that and there are no errors in the determination.

9. Ms Wilkins submitted in respect of Ground 1 and the Appellant's involvement with A4C that because the sexuality issue had not been previously considered this was the focus of cross examination and that she had made submissions on A4C based on the Appellant's detailed answers in her asylum interview, where there had been extensive questioning from 84-114 - over 12 pages of interview. She submitted that it was not sufficient for the Judge not to record the totality of the Appellant's answers and then make a negative credibility finding based on delay and one answer in the screening interview, where the Appellant misunderstood and thought she was being asked about being arrested in the United Kingdom and had been in the United Kingdom for 1 year at that time. It was incumbent upon the Judge to look at all the evidence. The Appellant's political claim was the central plank and should have given anxious scrutiny. The Judge made a material error given the detail and the Appellant's consistent answers. Regarding *sur place* activities in the United Kingdom, A4C is a grassroots organisation in Uganda not an international organisation. No regard was given to any of the Appellant's evidence on A4C - it was a very sweeping finding based on a general credibility concern without looking at detail of the claim.

10. In respect of Ground 2, Mr O came to the hearing principally in relation to their son but he also gave evidence as to seeing the Appellant's partner, K. This is particularly significant in that he said not only that it was not an act but also expressed his discomfort with the nature of the same sex relationship. He is not supportive of the relationship but a third party giving evidence in support of it. This evidence should have been weighed in the balance in her assessment. No reasons as to why Mr O's evidence in this respect was not taken into account or given any weight. With regard to the decision of the CJEU in ABC just because someone is intelligent and articulate does not mean they are forthcoming about sexuality particularly as the Appellant is from Uganda where it is not possible to speak about one's sexuality.

11. In respect of Ground 3, she submitted that, in respect of Appendix FM the

structure adopted by the Judge was unusual as she has not followed the Rules appropriately as she started with the balancing exercise. There was little guidance from the Respondent as R's nationality was not confirmed at that time. In respect of the decision in Sanade it is not permissible for the Respondent to submit R should relocate outside the EU nor for the Judge to do this: 11.23 of the Respondent's IDIs at paragraph 12 of the grounds of appeal provide that it is only in cases of criminality or a very poor immigration history where a person has repeatedly breached the Rules that considerations of sufficient weight are raised to justify separation where a child could otherwise stay with another parent or alternative primary carer. No part of Appendix FM under the parent rules for sole responsibility permits for this to be switched to someone else cf. 44.3.(i). In terms of the consideration of reasonableness; paragraph 11.7 of the grounds of appeal, there were a series of errors in the consideration of Mr O's evidence. It is not an option in any case for R to remain here with his father as he cannot live with him full time, due to the fact that Mr O is married and has two children with his wife, all of whom are unaware of R's existence and he does not wish to divorce his wife.

Error of law decision

12. I indicated at the end of the hearing that I found the First Tier Tribunal Judge erred materially in law. I now give my reasons.

13. Permission to appeal was granted expressly with regard to Ground 3, which concerned the manner in which the Judge had assessed the Article 8 claim. This was based in particular on her decision at [51.2] that it would not be unreasonable to expect R to leave the United Kingdom with his mother. The grounds of appeal at [11] identified 7 errors in the Judge's assessment which include: the failure to properly apply the decision of the Upper Tribunal in Sanade [2012] UKUT 00048 (IAC) and the Respondent's IDI on Family Migration Appendix FM section 1.0b at 11.23 (*where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.*) Whilst at 52.3(iii) the Judge referred to the decision in Sanade she found that Mr O would "step up" and care for R and he could exercise his residence in the United Kingdom. The difficulty with this finding is threefold:

(i) R was at that time 20 months old and it was not disputed that the Appellant is his primary carer albeit he has contact with his father, the level of that contact was not accepted by the Judge. It is clearly inappropriate to separate such a young child from his mother and primary carer and this in itself amounts to a material error of law;

(ii) the Judge found at 50[4] that it would be in R's best interests to remain in the United Kingdom with his mother and to have contact with and build a relationship with his father. This is clearly correct in terms of a best interests consideration but is contradiction with her subsequent finding at 52.3 that R remain and the Appellant leave the United Kingdom;

(iii) as Ms Wilkins sets out in her grounds of appeal, the Judge's findings

on Mr O's potential care were based on highly selective quoting from his evidence and ignored the fact that in order to care for R, he would have to divorce his wife, which he did not wish to do; that R would not be able to come and live with him and his wife and two children as she would not accept that and it was clear that his evidence was at best equivocal, given that his wife and children are entirely unaware of the existence of R. I consider that this submission is well founded when Mr O's evidence is considered in its totality.

14. Whilst the Judge attempted to grapple with quite a complex family setup without much assistance from the Respondent who at [36] of the refusal letter erroneously rejected the contention that R is British, I consider for the reasons set out in [13] above that she materially erred in law in finding that it would not be unreasonable for R to leave the United Kingdom with his mother. I note that in respect of R's British nationality that his birth certificate was examined by the Miss Knight, the Presenting Officer at the First Tier Tribunal who is "forgery trained" and she confirmed it as genuine [11].

15. I also consider that the Judge erred materially in law in her assessment of the Appellant's asylum claim and that it is arguable that this infected her assessment of the Article 8 claim, as it was predicated upon the basis that, if returned to Uganda with R the Appellant would not experience persecution. In respect of Ground 1, at [44.1(i)] the Judge accepted that the Appellant was a supported of A4C but failed to give any reasons as to why she found that the Appellant was not an active member, given her express acceptance that the Appellant's accounts are largely consistent and any inconsistencies were minor; at [44.1(ii)] the Judge rejected the Appellant's accounts of having been arrested on two occasions on the sole basis that she did not refer to this in her screening interview. However, I accept the submission by Ms Wilkins that the Appellant misunderstood the question and thought she was being asked about arrested in the United Kingdom. I note that question 5.1 of the screening interview asks about arrests "in any country" and this is potentially confusing. Moreover, the purpose of the screening interview is to obtain a basic rather than a detailed account of the asylum claim and the Appellant gave details of her arrests during her asylum interview.

16. In respect of Ground 2, the Judge rejected the Appellant's claim that she feared persecution on return to Uganda because of her sexuality on the basis that her claimed partner, K, did not attend the hearing; the Appellant got the age of K's daughter wrong and because the Appellant failed to mention her sexual orientation at the screening and asylum interviews. I note that in the decision of the CJEU in ABC C/148/13 - C/150/13 two of the Applicants, A & C, had made previous asylum claims in which they did not mention their sexual orientation at all [24] and [28] refer. They did not seek to challenge the refusals of their first claim but made fresh claims based on their sexual orientation. Thus the Judge materially erred in finding against the Appellant on this basis in that she relied only on [71] of ABC and misconstrued the meaning of this aspect of the judgment as a whole, in that it is not simply a failure to declare sexual orientation at the first occasion that is in issue but the reasons for this, including an understandable reticence in revealing intimate aspects of

a person's private life [69]. In the context of Uganda, where it is uncontroversial that gay people suffer persecution, it is explicable that the Appellant might be reluctant to disclose her sexual orientation. I note that, in part, her activities with A4C were campaigning against the government's stance on LGBT issues and she did refer to this on a number of occasions during her asylum interview. In evidence she stated that she focused on fighting for LGBT rights as she could not express her own sexuality through fear. The Appellant had a relationship with a girl at school, Mary, but this was not an intimate relationship [21] however, it caused her to be suspended from school and she was sent to Bible School in the United Kingdom in 2004 by her mother as a consequence and on her return to Uganda kept her sexuality hidden [22].

17. Moreover, whilst K was unfortunately not present at the hearing to give evidence, she provided a letter dated 25 March 2015 attesting to the relationship and also a further undated letter as to the fact that she was unable to attend due to the fact that it was half term and she is a single parent with a 5 year old daughter and also financial constraints as she lives in Bristol (the hearing was in Birmingham). I accept Ms Wilkins' submission that the Judge materially erred in law at 44.2. in failing to take account of a material consideration *viz* the evidence of Mr O confirming that the Appellant is in a same sex relationship with K and that he does not approve of this relationship. In the light of the evidence in support of the existence of this relationship I do not consider that the fact that the Appellant wrongly stated that K's daughter was 7 rather than 5 years of age materially undermines this aspect of her claim.

Conclusion

18. For the reasons set out above I find that First Tier Tribunal Judge Jerromes erred materially in law in dismissing the appeal and that decision is set aside. In light of the fact that the Judge did not accept the credibility of the Appellant's account there will need to be a further hearing in order that the Appellant and any witnesses upon which she wishes to rely can give oral evidence. I remit the appeal for a hearing *de novo* on all issues by the First Tier Tribunal.

Directions

19. I make the following directions:

19.1. The hearing will take place on the first available date with a 3 hour listing.

19.2. The anonymity order should continue given that the appeal involves both asylum and a child.

19.3. None of the findings of fact can be preserved. However, I note that Miss Knight, the Respondent's forged Presenting Officer at the last hearing confirmed that R's birth certificate is genuine and thus the appeal should

proceed on the basis that R is a British citizen.

19.4. Any supplementary decision letter on the part of the Respondent setting out her position regarding R's British nationality and the Appellant's sexual orientation to be served on the Tribunal and the Appellant's solicitors 21 days prior to the hearing.

19.5. Any further evidence is subject to the requirement to apply under the provisions of paragraph 4(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

19.6. Skeleton arguments to be submitted 5 working days before the hearing.

Deputy Upper Tribunal Judge Chapman
5 November 2015