



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00089/2016
PA/12889/2016

THE IMMIGRATION ACTS

Heard at Field House
21st November 2017, 13th March 2018,
14th May 2018 & 26th June 2018

Decisions & Reasons Promulgated
On 5th July 2018

Before

UPPER TRIBUNAL JUDGE COKER

Between

JS
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Bundock, instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as JS. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. JS, born on 1 May 1989 and a Ugandan citizen, arrived in the UK on 26 May 2006 to join his mother, a Ugandan national, who had had been recognised as a refugee. He was granted leave to enter. In 2013 he was convicted of attempted rape and sentenced to five years imprisonment. On 7 December 2015, JS was notified that the respondent had recorded her decision to cease his refugee status because Article 1C(5) 1951 Refugee Convention and paragraph 339A (v) Immigration Rules applied.

A deportation order was signed on 5 February 2016 for the reasons set out in an accompanying decision of the same date.

2. That order and reasons were served on JS on 9th February 2016. His solicitors lodged an appeal on 8th July 2016 – out of time. Time was extended and the appeal admitted (RP/00089/2016).
3. Whilst in detention JS stated that he feared return to Uganda because of his sexuality – he claimed to have been in a secret relationship with a man. That claim was refused for reasons set out in a letter dated 12th September 2016. He appealed that decision in time (PA/12889/2016).
4. The two appeals have since been linked.
5. For reasons set out in a decision promulgated on 22nd May 2017, First-tier Tribunal Judge R Sullivan dismissed both appeals.
6. First-tier Tribunal Judge Sullivan found:
 - (i) On arrival in the UK on 26 May 2006, JS was granted leave to enter as a refugee. He was recognised as a refugee because of his mother’s history, her status as a refugee and his relationship to her.
 - (ii) He was not recognised as a refugee because of any claimed risk directed personally at him.
 - (iii) The conditions for cessation of refugee status under paragraph 339A(v) were established due to a change in circumstances in Uganda since his mother was recognised as a refugee and since he was granted entry clearance as her family member.
 - (iv) He continues to constitute a danger to the community for the purposes of s72 Nationality Immigration and Asylum Act 2002.
 - (v) JS would not be treated as a deserter from the Ugandan army if returned to Uganda and would not be of interest to the authorities on that account.
 - (vi) JS is not bisexual or gay.
 - (vii) JS suffers from severe PTSD, severe depression and poses a suicide risk but his condition is not so serious as to engage Article 3. JS does not have any significant level of contact either with his daughter or a former partner. He does not have family life with his mother and siblings such as engage article 8.
 - (viii) He is now married to a British Citizen of Zimbabwean origin and they have a (British Citizen) child. They have family life such as engages Article 8. It is in the child’s best interest to remain with her mother in the UK; JS’ removal from the UK will not have a significant impact upon her because he has never lived with her and she does not rely upon him for day to day care.
 - (ix) There are no significant obstacles to his reintegration into Uganda.
7. Permission to appeal was granted to the appellant on all grounds. Those grounds were that the First-tier Tribunal:
 - Ground 1: failed to address the legality of cessation of refugee status in terms of family unity and/or whether the First-tier Tribunal was correct to determine the issue with reference to a risk of being persecuted in Uganda;

- Ground 2: made errors in law in determining the appellant's account of what happened to him prior to leaving Uganda including failing to apply the correct standard of proof; failing in assessing the evidence to take account of the appellant's severe depression and PTSD and the background evidence; attributing inconsistencies which were not present; irrational reasoning; lack of reasons for disagreeing with expert report;
- Ground 3: erred in its decision under Article 3 (medical);
- Ground 4: erred in its decision on Article 8.

8. On 21st November 2017 I heard submissions from both parties. I adjourned my consideration and made the following directions:

1. Both parties to file and serve skeleton arguments by 4pm on 5th January 2018 to address the consequences of an unlawful cessation decision in deportation proceedings where there is a s 72 finding. There is no need for either party to address any other issues that arise in this appeal.
2. Liberty to both parties to reply within 14 days of service of the skeleton.
3. Resumed hearing to be listed first available date after 19th January 2017 for 2 hours.
4. The attention of both parties is drawn to *ST (Eritrea) v SSHD* [2012] UKSC 12 and *Dang (refugee – query revocation- Article 3)* [2013] UKUT 00043.

9. Written submissions were received from both parties and I heard further oral submissions on 13th March 2018. On 14th May 2018, I reopened my Error of Law decision that had been sent to the parties dated 29th March 2018 for further submissions regarding Article 32 and 33 Refugee Convention and relisted the hearing for 26th June 2018.

10. Mr Bundock identified a bundle of documents¹ that had been before the First-tier Tribunal which considered the question whether JS had been recognised as a

¹ The email trail in that small bundle of documents included versions of the Family Reunion Policy from 1998 to 2011. One email states

“It seems we only changed our policy from granting ‘status’ in line to granting ‘leave’ in line in July 2011. As such I suggest CCD take the following approach to family members of refugees who were granted family reunion (unless Bill or Cathy disagree):

- * In all cases, seek first to trace the record of the individual to establish the status they were granted.
- * If the record cannot be traced and the application for FR was made between July 1998 and July 2011, assume refugee status was granted in line.
- * If the application was in or after July 2011, assume leave was granted in line.

This isn't ideal but I don't see that we have an alternative and we can at least support our position at appeal with the policy documentation.....
This is the only logical approach I can see based on the policy....
Bill/Cathy – please chip in if you think this isn't the correct approach....”

There are no emails disclosed by the SSHD from Bill/Cathy in response to that invitation. The Asylum Directorate Instructions July /98 Chapter 6 Section 2 states:

....
3.1. Where the sponsor has refugee status
If a person has been recognized as a refugee we will normally recognize his family in line with him. If his family are abroad we will normally agree to their admission as refugees.
....

refugee or given leave in line with his mother. Mr Bundock had represented JS before the First-tier Tribunal but Mr Nath had not appeared on behalf of the SSHD before the First-tier Tribunal. As a result of those documents the First-tier Tribunal Judge proceeded on the basis that JS had been recognised as a refugee under the policy then in force. Paragraph 31 of the First-tier Tribunal decision states

In light of that policy and the documentary evidence I am satisfied that on 10 May 2006 the Appellant was granted entry clearance as if he was a refugee and on arrival in the United Kingdom on 26 May 2006 he was granted leave to enter as a refugee. I am satisfied that he was recognised as a refugee because of his mother's history, her status as a refugee and his relationship to her.

Paragraph 39 goes on to say

I am satisfied that the Appellant was recognised as a refugee because of the account his mother had given prior to his arrival in the United Kingdom. I am satisfied that he was not recognised as a refugee on the basis of any activity or profile of his own or due to any suspicion about him, his activities or views.

11. The SSHD did not seek permission to appeal the findings in either paragraph 31 or 39 of the First-tier Tribunal decision. Mr Nath's written submissions to me submit that there is "no evidence to show that the appellant has ever been a refugee within the meaning or ambit of the 1951 Convention". This was not expanded upon in oral submissions but in any event, is difficult to reconcile with the approach by the SSHD in her decision letters where she treats the appellant as a refugee and purports to cease or revoke his refugee status. It is also difficult to reconcile with the policy which led to the appellant being recognised as a refugee and accorded that status. Although the Refugee Convention does not impose an obligation to grant family reunion to family members of refugees, the UN Human Rights Committee "exhorts" contracting states to provide for this² and in this case, that was what the UK did. It is perhaps self-evident to say that if the SSHD had not previously considered JS to be a person who had been recognised as a refugee then she would not subsequently have sought to cease or revoke his refugee status.
12. I proceed on the basis that JS was recognised as a refugee because of his mother, as determined by the First-tier Tribunal Judge.
13. It is uncontested that the offence of which JS was convicted constituted serious criminal offending. It is uncontested also that he qualifies as a "foreign criminal" for the purposes of s32 UK Borders Act 2007.
14. It is uncontested that JS does not have the protection of article 33(1) of the 1951 Refugee Convention; he has not rebutted the presumption in s72.

...

This policy continues unchanged in subsequent Asylum Directorate Instructions until 5 July 2011 when the relevant section reads:

3.5 Granting family reunion

If Case Owners are satisfied that the relationship is as claimed then leave *only* [emphasis in policy] should be granted in line with the sponsor.

...

² see for example *Mosira* [2017] EWCA Civ 407 [13]

Ground 1 – “cessation of refugee status”

15. The respondent, for reasons set out in a decision dated 7 December 2015, took a decision to cease JS’s refugee status

28. ...the Home Office is satisfied that, subsequent to obtaining refugee status, you can no longer, because the circumstances in connection with which you have been recognised as a refugee have ceased to exist, continue to refuse to avail yourself of the protection of the country of your nationality.

29. In light of the above, it has been decided to cease your refugee status in view of the fact that Article 1C(5) of the 1951 Refugee Convention and subsequently paragraph 339A(v) of the Immigration Rules, now applies. This decision has been recorded as determined on 7 December 2015.

30. As you are no longer a refugee, you should now surrender any original Grant of Refugee status letter that you may have been issued with....

There is, and was, no statutory appeal against that decision. The lawfulness of that decision was not challenged in judicial review proceedings although it is accepted that any challenge is effectively incorporated into the appeal against the refusal of the current claim for international protection based upon the appellant’s asserted sexuality. Those reasons were subsequently incorporated in the reasons for the signing of the deportation order dated 5 February 2016 as paragraphs 48, 49 and 50.

16. The grounds of appeal to the First-tier Tribunal against the 5 February 2016 decision refusing his protection and human rights claim (RP/00089/2016) state, *inter alia*:

By way of background the appellant is a Ugandan national... his mother was politically affiliated. As a result of this he was tortured at the hands of the current Ugandan government. His family home in Uganda was raided. He has visible scars and marks on his body following the physical attacks. As a result of this he was granted asylum. His mother was granted asylum on 11 April 2005.

....he has been in a secret relationship with a man named C for the last 7 years....

It is submitted that the SSHD has erred in her decision in ceasing the appellant’s asylum claim, on the basis that a risk continues to exist.

...

17. A second decision was taken by the respondent on 12th September 2016 and served on 13th September 2016 refusing the appellant’s international protection and human rights claim. The grounds of appeal against that decision (PA/12889/2016) state, *inter alia*,

The appellant’s grounds of 8 July 2016 [RP/00089/2016] have been amended in light of the most recent decision served on 13 September 2016.

....

It is submitted that the SSHD has erred in her decision in refusing the Appellant’s protection and human rights claim and in her decision to issue a deportation order against the Appellant, on the basis that a risk continues to exist.

18. The First-tier Tribunal judge analysed the appellant’s evidence and found he would not be of interest to the authorities if returned to Uganda and that he was not a gay or bisexual man. The judge considered the country evidence before him and found there to be no reason to depart from the country guidance. He concluded his decision:

102. The circumstances in connection with which the Appellant was recognised as a refugee in May 2006 have ceased to exist and the Appellant can no longer continue to refuse to avail himself of the protection of the Ugandan authorities.

103. ...

104. The Appellant cannot rely on Article 33(1) of the 1951 Convention because he has been convicted by final judgment of a particularly serious crime and constitutes a danger to the community of the United Kingdom.

...

19. The skeleton argument filed on behalf of JS in the First-tier Tribunal submitted that the circumstances at issue were the relationship between the appellant and his mother; that the First-tier Tribunal had to determine whether the circumstances in connection with which the appellant had been recognised as a refugee had ceased to exist.

20. The respondent in her decision letters and in submissions considers the appellant's status in the context of the Immigration Rules and the change in any threat posed by the Uganda authorities since he was recognised as a refugee. The conclusions drawn as to any threat posed by the authorities may or may not be correct but, as is stated in more than one paragraph in the First-tier Tribunal decision, the appellant was not recognised as a refugee because of threats to him but was recognised as a refugee because of his relationship with his mother. His mother remains recognised as a refugee. The appellant was not recognised as a refugee under paragraph 334 of the Immigration Rules. The Immigration Rules so far as relevant are

Revocation or refusal to renew a grant of refugee status

338A. A person's grant of refugee status under paragraph 334 shall be revoked or not renewed if any of paragraphs 339A to 339AB apply. A person's grant of refugee status under paragraph 334 may be revoked or not renewed if paragraph 339AC applies.

Refugee Convention ceases to apply (cessation)

339A. This paragraph applies when the Secretary of State is satisfied that one or more of the following applies:

....

(v) they can no longer, because the circumstances in connection with which they have been recognised as a refugee have ceased to exist, continue to refuse to avail themselves of the protection of the country of nationality;

....

In considering (v) and (vi), the Secretary of State shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Exclusion from the Refugee Convention

339AA. This paragraph applies where the Secretary of State is satisfied that the person should have been or is excluded from being a refugee in accordance with regulation 7 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006.

As regards the application of Article 1F of the Refugee Convention, this paragraph also applies where the Secretary of State is satisfied that the person has instigated or otherwise participated in the crimes or acts mentioned therein.

Misrepresentation

339AB. This paragraph applies where the Secretary of State is satisfied that the person's misrepresentation or omission of facts, including the use of false documents, were decisive for the grant of refugee status.

Danger to the United Kingdom

339AC. This paragraph applies where the Secretary of State is satisfied that:

- (i) there are reasonable grounds for regarding the person as a danger to the security of the United Kingdom; or
- (ii) having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom.

339B. When a person's refugee status is revoked or not renewed any limited or indefinite leave which they have may be curtailed or cancelled.

339BA. Where the Secretary of State is considering revoking refugee status in accordance with these Rules, the following procedure will apply. The person concerned shall be informed in writing that the Secretary of State is reconsidering their qualification for refugee status and the reasons for the reconsideration. That person shall be given the opportunity to submit, in a personal interview or in a written statement, reasons as to why their refugee status should not be revoked. If there is a personal interview, it shall be subject to the safeguards set out in these Rules.

339BB. The procedure in paragraph 339BA is subject to the following exceptions:

- (i) where a person acquires British citizenship status, their refugee status is automatically revoked in accordance with paragraph 339A (iii) upon acquisition of that status without the need to follow the procedure.
- (ii) where refugee status is revoked under paragraph 339A, or if the person has unequivocally renounced their recognition as a refugee, refugee status may be considered to have lapsed by law without the need to follow the procedure.

Paragraph 339A reflects Article 1C(5) of the Refugee Convention.

21. The respondent's decision is predicated, albeit not explicitly, on the basis that the appellant was recognised as a refugee under paragraph 344 Immigration Rules. The First-tier Tribunal Judge did not address the submission made on behalf of JS that the circumstances to be considered in determining whether JS' refugee status was lawfully revoked are the circumstances that related to him and existed at the date of the grant of refugee status to him, namely that he was his mother's son and that she had been recognised as a refugee. The judge reached his decision on the basis that the change in circumstances in Uganda was such that JS was no longer in need of protection in Uganda. This was an incorrect basis upon which to decide whether JS' refugee status could be lawfully revoked. As was said in *Mosira* [2017] EWCA Civ 407 [49]:

....Mr Mosira was not granted refugee status by reason of the threat of ill-treatment by the authorities in Zimbabwe. Nor was his mother. Therefore the change in the threat posed by the authorities in Zimbabwe has no bearing upon "the circumstances in connection with which [Mr Mosira] has been recognised as a refugee." He was granted refugee status under the 2003 family reunion policy, to join someone in the United Kingdom who had (and continues to have) refugee status here: those were the "circumstances in connection with which he was recognised as a refugee". It cannot be said that the change in the threat posed by the authorities in Zimbabwe means that those "circumstances" have ceased to exist.

The factual matrix of the instant case is different in that JS' mother was recognised as a refugee because of her activity in Uganda. Although some doubts as to the basis of her recognition as a refugee were raised by the First-tier Tribunal judge, the fact remains that she was recognised as a refugee under paragraph 344 Immigration Rules and remains so recognised. There was no evidence that her refugee status had been or was being curtailed by the SSHD in accordance with the Immigration Rules.

22. Mr Nath submitted that the judge considered the cessation of the appellant's status in the context of his mother's status and that this was permissible. The cessation of protection was, he said, dealt with in the overall context of what was known about the basis of the mother's claim upon which she was recognised as a refugee and the change in circumstances in Uganda. The difficulty with that submission is that JS' mother continues to be recognised as a refugee. As the First-tier Tribunal judge said, he did not have the full material before him upon which the decision to recognise the mother as a refugee was made. Although the judge made some findings in relation to the mother's post recognition activity and generally, the SSHD had not taken a decision to revoke or curtail the mother's refugee status; her continued status was not an issue upon which the First-tier Tribunal judge was either required or able to make a decision. Comments on her status or why she obtained that status or whether she could retain that status in the current climate are insufficient to found a successful submission that the cessation of JS' status was lawful. The fact remains that he was recognised as a refugee *because* his mother was a refugee *and* she remains a refugee.

23. Where a person has been recognised as a refugee under the family reunion policy³, it is the circumstances that led to that recognition namely the relationship between the refugee and the individual, that are to be addressed when deciding whether to cease Refugee Status under Article 1C(5) of the Refugee Convention. Where the SSHD has not taken a decision to curtail or revoke the status of the person through whom the individual was recognised as a refugee, the First-tier Tribunal cannot reach a decision as if that status has been curtailed or revoked.

24. The headnote of *Dang (Refugee – query revocation – Article 3)* [2013] UKUT 00043 (IAC) reads, where relevant, as follows:

A decision to revoke or refuse to renew a grant of asylum under paragraph 339A Immigration Rules only relates to the individual's status under the Qualification Directive (European refugee status) and not his status under the Refugee Convention....

25. Dang had arrived in the UK, as a child, with his father. The SSHD had no papers showing the basis of the claim for asylum but Dang's counsel said that her papers indicated that his father's claim had been processed and decided in Hong Kong. The decision records that Dang did not have an independent claim for asylum. Before the First-tier Tribunal, the SSHD had purported to revoke Dang's refugee status under paragraph 339A(v) of the Immigration Rules (which was then as it is now). The First-tier Tribunal found that Dang was still a refugee because the SSHD could not show that the cessation clause (of the Refugee Convention) she sought to rely upon, applied. That finding by the First-tier Tribunal was not challenged.

³ See paras 10-12 above; family members are no longer recognised as refugees but are granted 'leave in line'.

26. *Dang* [25] identifies the requirement to issue a residence permit under the Qualification Directive as going further than the Refugee Convention, as noted by the Supreme Court in *ST(Eritrea)* [2012] UKSC 12 [45]. The Qualification Directive permits revocation of a permit where the circumstances are such that an individual is no longer entitled to it under its terms and the SSHD is, as said in *Dang*

“25.entitled to “revoke, end or refuse to renew” a grant of asylum in certain circumstances including those set out in para 339A”

26. In other words, what Article 14 [Qualification Directive] permits member states to “revoke, end or refuse to renew” is the status that was granted by that Member State to the individual pursuant to its obligations under the Qualification Directive. It is therefore necessary to distinguish between refugee status granted pursuant to the provisions of the Qualification Directive and refugee status under the Refugee Convention which exists independently of any recognition. ...Given that section 2 of the 1993 Act prohibits the Immigration Rules from laying down any practice that is contrary to the Refugee Convention, the provision in para 339A for revocation or non-renewal of the grant of asylum can only refer to European refugee status. In other words, the true effect of any revocation under para 339A (x), when read with the Qualification Directive, is that the individual’s European refugee status is revoked. Such revocation does not affect the individual’s status under the Refugee Convention.

27. Para 339A(x) as considered by the Upper Tribunal in *Dang* had been deleted by the time JS’ appeal came before the First-tier Tribunal but its content is now to be found in the Immigration Rules at paragraphs 339AC and 339B. No reasons to depart from the conclusions of *Dang* were put to me.

28. *Dang* did not consider Article 32 of the Refugee Convention but reached its conclusions in the context of Article 33:

Article 32
Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return (“refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

29. The Upper Tribunal in *Dang* concluded that any entitlement to remain under the Qualification Directive had been lawfully revoked; his removal to Vietnam was not

shown to breach Article 3 and although a refugee he was not immune from removal to Vietnam.

30. *ST (Eritrea)* [2012] UKSC 12 considered Article 32 of the 1951 Refugee Convention and in particular the meaning of the word “lawfully” in that context. As the Supreme Court says:

1. ...Every refugee has the protection of article 33. The protection of article 32 is more generous. Its effect is that, once a refugee has been admitted or his presence has been legalised and so long as entitlement to refugee status continues, he is entitled to stay indefinitely in the receiving state. He can only forfeit that right by becoming a risk to national security or by disturbing public order. But he requires to have been afforded a certain degree of attachment to the receiving state before this privilege becomes available.
2. The question that this case raises is the extent of the attachment that is needed to attract that protection....does article 32 apply only to a refugee who has been given the right lawfully to stay in the contracting state, as its domestic law would answer that question? Or must the words “lawfully present in the territory” be given an extended and autonomous meaning, so as to ensure that a refugee who has not yet been given a right to remain in the territory is afforded protection under article 32 that extends beyond the basic obligation under article 33 not to expel or return (“refouler”) to a territory where his life or freedom would be threatened for a Convention reason?....

In [49] Lord Hope concludes

....the word “lawfully” in article 32(1) must be taken to refer to what is to be treated as lawful according to the domestic laws of the contracting state...

Lord Dyson adds to the reasons given by Lord Hope

61. Article 33 applies to refugees whether they are lawfully present in the territory or not. It applies to any refugee to whom the Convention applies. It provides the protection that lies at the heart of the Convention. Article 32(1) does not provide protection to a refugee at risk of persecution. It provides protection against expulsion in any circumstances except on grounds of national security or public order. It undoubtedly provides this additional protection to the refugee who has been granted asylum. Bearing in mind the fundamental object of the Convention, it is not surprising that it was intended by the Contracting States that this degree of protection was not to be accorded to a refugee who has been given temporary permission to remain in a territory pending the determination of her claim for asylum. If a refugee who is claiming asylum is to be protected from the risk of persecution, she needs the protection afforded by article 33. She does not need the additional protection afforded by article 32(1).

.....

64. In my view, if it had been intended to restrict the power of the Contracting States to decide whether a refugee is lawfully present in its territory, this would surely have been stated explicitly. Where the Convention limits the power of a state to expel a refugee it says so in terms: see articles 32 and 33. There are no circumstances in which a refugee may be expelled in breach of article 33. But if a refugee is to enjoy the additional protection afforded by article 32(1), she must be lawfully present in the territory....

31. Although on their face it appears that there may be some contradictions between the various positions taken in *Mosira*, *Dang* and *ST* that is not the case. Each was considering a different factual matrix in the context of very specific issues. The totality of the issues that arise in this case were not considered in those cases as a whole.

This case

32. The SSHD signed a deportation order, in accordance with s32(5) UK Borders Act 2007, on 5th February 2016. S5(1) Immigration Act 1971 states:

Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or whilst it is in force.

33. Ss78, 79 and 104 Nationality Immigration and Asylum Act 2002 read, so far as relevant to this appeal

78 No removal while appeal pending

(1) While a person's appeal under section 82(1) is pending he may not be—
(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or
(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section "pending" has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending—
(a) the giving of a direction for the appellant's removal from the United Kingdom,
(b) the making of a deportation order in respect of the appellant (subject to section 79), or
(c) the taking of any other interim or preparatory action.

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92.

79 Deportation order: appeal

(1) A deportation order may not be made in respect of a person while an appeal under section 82(1) that may be brought or continued from within the United Kingdom relating to the decision to make the order—
(a) could be brought (ignoring any possibility of an appeal out of time with permission), or
(b) is pending.

(2) In this section "pending" has the meaning given by section 104.

(3) This section does not apply to a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007.

(4) But a deportation order made in reliance on subsection (3) does not invalidate leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies.

104 Pending appeal

(1) An appeal under section 82(1) is pending during the period—
(a) beginning when it is instituted, and
(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99).

....

34. Although as stated in *Dang*, the Secretary of State is entitled to revoke the status granted to JS, in accordance with the Qualification Directive, any such revocation does not affect the status under the Refugee Convention.
35. In *Tirabi (Deportation : “lawfully resident”: s(5(1))* [2018] UKUT 00199 (IAC), the Vice President of the Upper Tribunal considers the provisions of ss78 and 79 of the 2002 Act and concludes that for the purposes of paragraph 399A of the Immigration Rules and s117C of the 2002 Act, the invalidation provisions of s5(1) 1971 Act are to be ignored, by analogy with paragraph 276A as discussed in *SC (Jamaica)* [2017] EWCA Civ 2112.
36. In this case, the issue is the interpretation of ‘lawfully resident’ for the purposes of the Refugee Convention.
37. By analogy and on close reading of ss78, 79 and 104 of the 2002 Act, JS is, currently, lawfully resident in the UK.
38. In accordance with *Mosira*, JS remains a refugee under the Refugee Convention. His mother remains a refugee; he was granted refugee status on the basis of her recognition as a refugee and the circumstances of that recognition have not changed – or at least the SSHD has not established that they have changed. The attempt by the SSHD to utilise a change of circumstances in Uganda to justify the cessation of JS’ refugee status in accordance with article 1C(5) under the 1951 Convention cannot succeed because the appellant did not gain his refugee status on that basis. The SSHD’s conclusion to that effect is therefore wrong in law.
39. That JS is a refugee does not preclude his removal from the UK – Article 33(2) Refugee Convention. But JS can invoke the more generous protection of Article 32 Refugee Convention – he is a refugee lawfully on the territory of the UK and can only be expelled “on grounds of national security or public order”.
40. It follows that not only did the First-tier Tribunal approach the issue of cessation incorrectly and conclude that the circumstances in Uganda were such that the Article 1C(5) was met, but the consequences of that error are material.
41. Ground 1 is made out.

Ground 2 – *made errors in law in determining the appellant’s account of what happened to him prior to leaving Uganda including failing to apply the correct standard of proof; failing in assessing the evidence to take account of the appellant’s severe depression and PTSD and the background evidence; attributing inconsistencies which were not present; irrational reasoning; lack of reasons for disagreeing with expert report.*

42. The grounds upon which permission has been granted do not seek to challenge the finding of the First-tier Tribunal judge that the appellant is not a gay or bisexual man.
43. The First-tier Tribunal judge referred in [63] to “significant discrepancies” which are “indicative of an account which is not entirely true”. Although the grounds and submissions relied upon refer to a lack of a specific statement by the First-tier Tribunal judge of the burden and standard of proof, it cannot be extrapolated from that, that the judge failed to apply the appropriate burden and standard of proof. Nevertheless,

the judge referred to discrepancies in the account which are not supported by the evidence, did not provide any reasons for disagreeing with Dr Hartree's report that there are no indicators of a faked or exaggerated account. On the one hand the judge accepted that the injuries JS sustained are consistent with military training but on the other hand did not appear to take into account Dr Hartree's view that significant lesions were caused by torture. There is no real assessment by the judge of the effect of diagnosed PTSD and severe depression or of the assessment that JS was not fit to give evidence. The conclusions drawn by the First-tier Tribunal Judge in this context are such as to render the findings by the judge as to JS' abduction, torture and escape unsafe. The First-tier Tribunal judge addressed the conditions in Uganda in the context of JS' mother's status as a refugee and did not fully consider JS' protection claim separate and distinct from his mother save in so far as he addressed whether JS was gay or bisexual.

44. Ground 2 is made out.

Ground 3 – Article 3 medical

45. The First-tier Tribunal considered the appellant's mental health. As referred to above, the Judge did not give any or any sufficient reasons for rejecting Dr Hartree's opinion that there was no exaggeration or faking of symptoms. JS was considered by Dr Wood, a psychologist approved under s12 Mental Health Act, to be unfit to give oral evidence. Dr Wood gives his opinion that JS

- Is suffering from a depressive episode; has persistently low mood and marked anhedonia; his depression is of a severe nature.
- Meets the criteria for post traumatic stress disorder as a result of events in Uganda over a protracted period of time which appear as being of an exceptionally threatening nature; has regular nightmares; pervasive distress.
- Describes symptoms highly suggestive of dissociation and depersonalisation.
- Suffers from auditory hallucinations that represent a manifestation of anxiety and distress.
- Claimed kidnapping, torture and forced involvement in the Uganda army are significant traumatic experiences which could lead to significant mental illness.
- Detoxification and subsequent abstention from alcohol and cannabis whilst in prison was beneficial, as was access to psychiatric care but he continued to experience symptoms whilst in prison.
- witnessing of violence in prison and the nature of prison was important in the perpetuation of PTSD and associated depression.

46. Dr Wood, in his report dated 24th February 2017 refers to JS having strong daily suicidal thoughts, self-harming by cutting and deliberately banging his head. He gives his opinion that JS' current suicide risk is moderate and that risk factors would increase at removal when his risk of suicide would become very high. Dr Wood expressed the opinion that the presence of his family in the UK "would no longer be a protective factor and he would be at significant risk of completing suicide should he receive removal orders".

47. The First-tier Tribunal Judge referred to the guidance in *Paposhvilli v Belgium* (App no 41738/10) but did not indicate what he considered the guidance to be and there

is nothing to indicate that his assessment was informed by that guidance. Nor is it evidenced that he considered or applied applicable UK jurisprudence.

48. Since the First-tier Tribunal decision was promulgated, the Upper Tribunal reported the decision of *EA & others (Article 3 medical cases – Paposhvilli not applicable)* [2017] UKUT 445 (IAC) which held that the test in *Paposhvilli* is not a test that it is open to the Tribunal to apply, given judicial precedent. The Court of Appeal in *AM (Zimbabwe)* [2018] EWCA Civ 64 states:

The effect of the judgment in Paposhvilli

37. I turn, therefore, to consider the extent of the change in the law applicable under the Convention which is produced by the judgment in *Paposhvilli*, as compared with the judgments in *D v United Kingdom* and *N v United Kingdom*. In my view, it is clear both that para. [183] of *Paposhvilli*, set out above, relaxes the test for violation of Article 3 in the case of removal of a foreign national with a medical condition and also that it does so only to a very modest extent.

38. So far as the ECtHR and the Convention are concerned, the protection of Article 3 against removal in medical cases is now not confined to deathbed cases where death is already imminent when the applicant is in the removing country. It extends to cases where "substantial grounds have been shown for believing that [the applicant], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy" (para. [183]). This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state.

49. There was no real analysis by the First-tier Tribunal judge of the medical evidence before him, taking into account the Rule 35 report and the opinion of Dr Hartree that some of the lesions on JS' body were highly consistent with self-harm, assault or deliberate injury, his claim to have had his wrists tied with a rope and account of ill treatment. The extent to which the evidence supports the possibility of Article 3 ill treatment if returned to Uganda and the availability or otherwise of treatment is not reasoned or examined with sufficient reasoning by the First-tier Tribunal Judge.

50. But in the context of current jurisprudence, taking the medical claims at their highest, an Article 3 medical claim will not succeed. Therefore, any error made by the judge is not material.

Ground 4 – Article 8

51. The appellant was sentenced to 5 years' imprisonment for attempted rape. He had indefinite leave to remain prior to the signing of the deportation order and he has a child in the UK. The First-tier Tribunal judge took into account the family circumstances at the date of the hearing which included the length of relationship, that he has a British Citizen child and they had only been living together for a short

period of time. There is nothing in the family relationship or the relationship that he has with his child that comes anywhere close to meeting the requirements of the Immigration Rules. As is said in so many cases, separation from a parent is harsh for a child when there is a close relationship but that has to be weighed in the balance of the criminal offending. This appellant has been convicted of a very serious offence for which he received a significant prison sentence. There are no compelling circumstances identified in the ground of appeal upon which permission was granted which were not fully considered by the First-tier Tribunal Judge and as a consequence of which the judge found that his deportation was proportionate.

Summary of Error of Law Decision

52. There is a material error of law by the First-tier Tribunal judge in his consideration of the appellant's refugee status.
53. There is a material error of law in the First-tier Tribunal judge's decision that he would not be at risk of Article 3 mistreatment because of his claimed previous political or perceived political activity; the judge has not adequately considered the evidence or given adequate reasons for its rejection.
54. The First-tier Tribunal judge did not materially err in law in his consideration of the appellant's medical matters such that the decision on Article 3 (medical) should be set aside this being a claim that simply cannot succeed.
55. The First-tier Tribunal judge did not materially err in law in his consideration of Article 8.

Remaking the decision

56. JS falls within Article 32(1). He can only be removed from the UK on grounds of national security or public order. Article 32(1) is more prohibitive than Article 33(2). Article 32(1) requires "grounds of national security or public order" whereas Article 33(2) requires there to be reasonable grounds that the individual can be regarded as a danger to the security of the country. Conviction for a particularly serious crime is not one of the criteria that enables expulsion under Article 32(1).
57. It is not asserted and cannot be sustainably argued that there are grounds of national security as relate to JS that would bring him within Article 32(1). Nor was it submitted by Ms Petterson that there were public order grounds such as would result in him losing the protection of Article 32.
58. In this case, the respondent did not advance a submission that there were grounds of national security or public order such that JS should be expelled.
59. I am satisfied that JS falls within the protection offered by Article 32(1). His appeal succeeds on protection grounds.
60. I am conscious that this does not cover ground 2. Nevertheless, I take the view that there is no need for me, at this juncture, to remake the appeal under Ground 2, given that the appellant is a refugee who has the protection of Article 32.

Conclusion

61. The First-tier Tribunal erred in law and the decision is set aside to be remade. I remake the appeal and allow it.



Upper Tribunal Judge Coker

Date: 4th July 2018