



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003650
HU/50618/2022
IA/01047/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 November 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KS (Uganda)
(anonymity order made)

Appellant

and

Entry Clearance Officer

Respondent

Representation:

For the Appellant: Ms C. Robinson, Counsel instructed by Bindmans LLP
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

Heard at Field House on 24 October 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION ON 'ERROR OF LAW'
DECISION TO ADJOURN

1. The Appellant is a national of Uganda born in 2008. She appeals with permission against the decision of the First-tier Tribunal (Judge S Taylor) to dismiss her appeal against a refusal to grant her entry clearance on Article 8 grounds.

Background

2. The Appellant wants to come to the United Kingdom in order to settle here with her father, S.
3. S came to the UK in 2009. He was granted refugee status in 2018 and now has indefinite leave to remain. His story, insofar as it relates to his daughter, is this. S is bisexual. Same-sex relationships are illegal in Uganda. As a young man concerned for his safety S entered into a relationship with the Appellant's mother, M, as a means to cloak his sexuality. In May 2008 M discovered that S was gay. She was horrified and her reaction led to the Appellant being exposed: a mob surrounded the house he was in with his male lover. They were both arrested. S was detained and tortured over a period of two months. Medical examination in the UK has found that S bears numerous scars from this period that are either diagnostic of, or highly consistent with the torture he describes. The doctor who prepared that report remarks "this man in fact had prominent scarring almost everywhere". Following his release he went into hiding for a period, and then left Uganda for his own safety. That is how he came to be in the UK. M, meanwhile, gave birth to the Appellant. S left the country before ever seeing her.
4. It the evidence of S that M has never been a mother to her daughter, or at least not a loving one. M is consistently displayed hostility towards the Appellant and has expressed a desire for her to be "off her hands". The implication is that this hostility emanates from the circumstances of her conception and the deception by S about his sexuality. Over the years M's hostility has been an obstacle to the Appellant and S building a relationship. In her earlier years he had to rely on his sister, who lives near her in Uganda, to report on how she was doing. It is only as the Appellant has got older and able to communicate on her own that he and she have managed to forge a bond. They communicate regularly and in 2018 he was able to meet with her in Kenya. S expresses strong fears about his daughter's safety should she remain in Uganda. Her mother is very volatile and has for instance threatened to poison her. M's partner has acted inappropriately towards the Appellant, touching her sexually, and the S is concerned that M has done nothing to protect her. At present the Appellant is living in a boarding school paid for by S. He states that he does this because "her home life is unbearable" and he wants her to spend as little time as possible with her mother.
5. Although S is recognised as a refugee it is common ground that this was never an appeal that could succeed with reference to the refugee family reunion provisions, since the Appellant was not part of S's family unit at the date that he left Uganda. It has always been put on the basis that it would be a disproportionate interference with the Appellant's Article 8 right to family life should she continue to be refused entry clearance.
6. The Respondent refused entry clearance and in its decision of the 2nd July 2023 the First-tier Tribunal upheld that decision. The Tribunal concluded that:

- a) that there was not an Article 8 family life between the Appellant and S
- b) in the alternative, if there is, the decision does not constitute an interference with it
- c) the exceptional compelling circumstances said to be faced by the Appellant in Uganda have not been established
- d) it would be contrary to the Appellant's best interests to admit her to the UK into the care of her father

The grounds of appeal challenge each of these findings. It is therefore convenient that I deal with the findings, the challenge to them, the Respondent's defence and my conclusions thematically.

Issue 1: Family Life

7. The Tribunal's conclusions on this primary issue are set out at its paragraph 19:

"The previous Tribunal found that there was no family life. I similarly note that there is no dispute that the appellant and sponsor never lived in the same household, indeed the sponsor confirms that he left the family home before the appellant was born. At the time of the previous decision, the parties had never met, and perhaps the biggest single change of circumstances since the last hearing is that the parties have now met, on one occasion in Kenya in 2019, and he had not seen her since. The sponsor states that he remains in regular contact with the appellant on the telephone, he states that it is difficult to speak to her in the presence of her mother so he speaks to her when she is at school. The sponsor has submitted no supporting evidence that he speaks to the appellant on a regular basis. The letter from the appellant's school, dated December 2020, confirms that the sponsor pays the appellant's school fees but does not mention that she appellant speaks to the sponsor on a fortnightly basis as claimed. The evidence before this Tribunal remains that the parties have never lived in the same household, the parties have only met once, in 2018 or 2019, and have not since met, and apart from payment of school fees, the sponsor has submitted no other supporting evidence of a family life of any significance. I find no basis on which to interfere with the finding of the previous Tribunal that there is no established family life between the parties of a magnitude which would engage article 8 ECHR. Even if there was extant family life, I find that the refusal does not constitute an interference with family life, as it merely maintains the current position of the appellant living with her mother".

8. The reference here to the "previous Tribunal" relates to a decision made by First-tier Tribunal Judge Lingham on the 7th July 2017. Judge Lingham was, as Judge Taylor here indicates, not satisfied that in the circumstances there was an extant family life within the ambit of Article 8. Before Judge Taylor it had been

argued that new facts had emerged since then. The Appellant had now met her father in person, the two having met in Kenya in 2019. Furthermore, there was now evidence that S had been financially supporting his daughter throughout the intervening period, including paying for her boarding school fees. The contact between the pair had continued by telephone/social media. It was their evidence that their bond had strengthened since 2017. This was evidenced, *inter alia*, by: a letter from the Appellant herself, a letter from her school, the statement of M, a letter from her aunt in Uganda, money transfer receipts, photographs and a report prepared by an independent social worker. Ms Robinson submits that the Tribunal fails to have regard to this important evidence: that it omitted it from its consideration is clear from its statement “there is no other supporting evidence of a family life”.

9. The second criticism made by Ms Robinson is that nowhere does the Tribunal consider the relevant guidance on whether a family life might exist in these unusual circumstances. She relies on Keegan v Ireland (16969/90), a ECtHR case in which the parents had never been married, and the father had seen his child once only. There was, nonetheless, protected family life between him and his child, and the fact that he was not entitled to participate in later adoption proceedings breached his Article 8 rights. See also Ciliz v Netherlands (29192/95: 11/07/2000) and Boughanemi v France (22070/93: 24/04/1996). In respect of the importance of biological ties more generally, Ms Robinson relied on X, Y and Z v UK (21830/93). She also stressed the importance given in the caselaw to giving family relationships the opportunity to grow and develop.
10. For the Respondent Mr Tufan expressed a general scepticism about the evidence of family life. He stressed that the Appellant has only ever met her father once, and submitted that family life cannot be created by financial support alone. He pointed out that there were no call logs before the judge that would support the claim made in oral evidence that the Appellant and S speak frequently. As to the caselaw, Mr Tufan did not accept that there was any presumption of family life between a natural father and child. It all depended on the facts.
11. Paragraph 8.81 of the 8th edition of *Macdonald's Immigration Law & Practice* reads “the presumption in favour of family life between parent and child operates between a child and its natural father, provided he continues to have a level of contact with the child”. The footnote to that sentence refers the reader to the same cases that Ms Robinson relies upon, and adds the caveat: “the presumption may be defeated in the face of a total lack of interest or contact by the father”. In *Human Rights Law and Practice*, Hill, Pannick and Herberg 3rd edition [at 4.8.45] the writers concur that “family life normally exists between biological parents and their dependent children” and cites this passage from the decision in Berrehab v Netherlands (10730/84):

“the concept of family life embraces, even where there is no cohabitation, the tie between a parent and his or her child regardless of whether or not the latter is legitimate...although that may be broken by subsequent events, this can happen only in exceptional circumstances”
12. What this academic opinion, and the jurisprudence on which it is based, establishes, is this. That there *is* a presumption of an Article 8 ‘family life’ between a child and her natural father but that is a presumption which can be

rebutted, for instance as *MacDonald* suggests, where the father has entirely abdicated all responsibility. Hill et al cite another example, this time from the UK family court, where the biological father had in effect been no more than a sperm donor with no further involvement in his child's life: Re R (a child) (IVF child: paternity rights) [2003] EWCA Civ 182. I cannot be satisfied that either Judge Lingham or Judge Taylor understood that this should have been the starting point. It was from there that the enquiry into whether this was a subsisting family life capable of attracting protection should have been launched. The starting point is that S is this child's father. The question is whether that tie has been broken or diminished to the point where it is a relationship no longer deserving of protection.

13. As to the state of the actual relationship today Judge Taylor acknowledges that some evidence of ongoing contact between daughter and father has been submitted, but curiously reaches no real finding on it. The Sponsor's written and oral evidence that he speaks on a regular basis to his daughter is mentioned, but then no finding on whether that it accepted is set out. At best, the Tribunal implies that it is rejected in the absence of "supporting evidence", but no reasons are offered as to why that might be. The Tribunal notes that since the 2017 decision the parties have spent some time together in Kenya, but gives no consideration to what that meeting might have meant to the parties. There is no acknowledgment at all of the evidence - from multiple sources - that S is dedicated to his daughter, is deeply concerned for her welfare and that he has, since at least 2016, been making a huge effort to get her to the UK to live with him. All of that evidence was plainly relevant to whether the family life presumed to have existed from birth have been broken. Nor has any consideration been given to Ms Robinson's submission that an important facet of Article 8 is the right to have the opportunity to develop relationships with others.
14. Accordingly I am satisfied that the First-tier Tribunal's reasoning on whether a family life exists, and therefore whether the decision amounts to an interference with it, is flawed for error of law and must be set aside.

Issue 2: Proportionality

15. The Tribunal was asked to find that there was exceptional circumstances in this case which rendered the decision to refuse entry clearance disproportionate. Its conclusions are set out at its paragraph 20:

"The sponsor sought to persuade the Tribunal that there were exceptional circumstances, as the appellant's mother hated her and did not wish for her to be in the house, and that the appellant was being abused by her stepfather, as well as being generally at risk. He even suggested that the appellant's life may be at risk because her mother had threatened to poison her. The main evidence of this allegation is the unsupported reported conversation between the appellant and the sponsor that she was being abused and was at risk. In addition, the appellant's mother states that she is angry with the sponsor, for reasons which are clear from the history, she states that the appellant reminds her of the sponsor, but the suggestion that she is at risk is not supported by evidence. There is no evidence from any authority

in Uganda which suggests that there is any concern about the appellant and the sponsor states that the allegations of abuse have not been reported to any authority. Contrary to the sponsor's evidence that the appellant's mother is not interested in her, the school letter states that Sylvia is committed and diligently looks after the appellant's needs. The sponsor's evidence that Sylvia did not want the appellant in the house and she was brought up by a grandmother, was rejected by the previous Tribunal, and no new evidence has been submitted which would militate against that finding. The appellant has now lived with her mother for 14 years, there is no medical evidence of abuse or reports of poisoning, and the supporting evidence of the three therapists who attended the hearing is only what they heard from the sponsor. On the available evidence, I am not satisfied that the appellant is at risk as claimed.

16. Ground 2 is that these findings are flawed for error of fact, and a failure to take relevant evidence into account. The Tribunal reasons, in essence, that the evidence about the negative relationship that the Appellant has with her mother is all coming from S, whom it concludes (with no reason offered as to why) cannot be trusted on this matter. Ms Robinson points out that this is simply not true. M herself provided a statement in this appeal where she said things like:

“My partner beats [the Appellant] up for no reason and says that he does not want this abomination in his house...[the Appellant] would like to join [S] because of the way my current partner is treating her. [The Appellant] is 12 years old. The older she gets the more difficult it will be for me to continue to look after her. I just want [S] to have his daughter and I don't want to hear from her ever again...”

17. Furthermore, M is interviewed and assessed by independent social worker Judith Jones, who was able to interview her online. Ms Jones reports: “[the Appellant's] mother showed me fear and hatred in relation to her daughter. I detected no love or empathy and she was clear that she has felt this way and tried to have her placed elsewhere. This means that [the Appellant] has already suffered significant emotional harm...”.
18. This was clearly an important part of the case. As Mr Tufan submits, the Tribunal was certainly entitled to look critically at the evidence, and to be alert to indications that all might not be as it is being portrayed. It is of course possible that the S, M and the Appellant are colluding to make matters seem much worse than they are. It is not outside the realms of possibility that M is pretending to hate her daughter because she wants to help her get entry clearance.
19. In the absence of any social services assessment from Uganda, the Tribunal only had two independent sources of information: the letter from the school, and the report of independent social worker Ms Jones. The reasoning at paragraph 21 of the decision turns in large part on the former, it being the only evidence identified as being at odds with the Appellant's case. The decision reads “Contrary to the sponsor's evidence that the appellant's mother is not interested in her, the school letter states that Sylvia is committed and diligently looks after the appellant's needs”. That is not entirely accurate. What the letter actually says is this:

“Throughout these years we have known [S] and [M] as her parents. [S] has been responsible for paying all her fees and all her welfare needs and **he** has been committed to that very diligently through [M]”

(emphasis added).

20. The commitment and diligence relate not then, to M’s meeting of her daughter’s needs, but to the efforts made by S to look after her welfare and pay her school fees, which are, as the school notes, paid directly to M who then settles the bill. It is correct to say that the letter does then go on to say that the “school is very satisfied that both parents are committed to her well-being” but that of course must be read in the context that this is a boarding school, so the writer would have no knowledge of the interaction between the Appellant and her mother at home out of term time.
21. As to Ms Jones’ assessment of M, this features nowhere in the deliberations on this important matter. This is a striking omission given that Ms Jones is an experienced social worker (of over 30 years’ standing) specifically instructed because of her familiarity with Ugandan society (she worked in Kampala for 5 years). As is apparent from her report Ms Jones is not concerned with supporting the Appellant’s application for entry clearance: her professional duty compels her to be specifically, and *only*, concerned about her *welfare*. That is why her report on what she was told by M, and how she interpreted that interview, is so important. In her summary transcript of that interview the word “hate” is frequently used: M tells Ms Jones that she “cannot stand” having her daughter in her house. Ms Jones’ global conclusion is that she would be “alarmed” if the Appellant ended up remaining in her mother’s household. All of that was relevant to whether the Appellant is currently living in exceptional compelling circumstances, and it was an error to omit it from the reasoning.

Issue 3: Best Interests

22. Although not divorced from the broader issues of proportionality, this element of the case emerges as a distinct issue because it concerns not the current circumstances of the A, but the personal history of S. The Tribunal finds significant reasons to be concerned about whether it would in fact be in the Appellant’s best interests to live with her father:

21. Even if it was accepted that the appellant was at risk and that it was in her interest to move to the UK, I also have to be satisfied concerning the arrangements for her care in the UK and that the move would be in her interest under S55 of the 2009 Act. The previous Tribunal was most concerned that the sponsor had a previous conviction for being involved in the management of a brothel, for which he received a suspended sentence of eight months, he was also required to carry out 120 hours of unpaid work. The Sentencing Judge accepted that the sponsor had a low level of involvement and that he pleaded guilty, but nonetheless found it necessary hand down a suspended sentence of eight months imprisonment. As stated in the previous decision, this

results in the sponsor being convicted of a sexual offence which carries certain restrictions for a period of ten years, one of which is being in sole charge of a minor child. Ten years has since past, since the date of sentence, but there remains the concern that the appellant's mother has not been told that the sponsor has been convicted of a sexual offence of managing a brothel, which may well affect her attitude to the sponsor being in sole charge of her child.

22. The conviction of a sexual offence is not the only concern relating to the sponsor. The sponsor has another child in the UK, [C2], who is currently aged around 7 years, and the sponsor's relationship with the mother, [M2], has now ended. Of utmost concern as that the split between the sponsor and [C2]'s mother involved violence by the sponsor, to the extent that a safeguarding concern was raised and the sponsor was limited to supervised access to the child. He now states that he has unrestricted access but he accepts there was a period when access was limited to supervised only. The problems which occurred during split from [M2] are not mentioned in the sponsor's statement, they are only alluded to, when he states that has had some sessions on dealing with conflict without becoming overwhelmed and escalating to verbal and emotional abuse, he has also been offered a session on domestic abuse. [M2]'s statement to the independent social worker, Judith Jones, confirms that the sponsor subjected her to verbal and emotional abuse, as well as breaking things. The Judith Jones report notes that social services were involved with the sponsor and [M2], there was a time when the sponsor only had supervised contact with [C2], and that Social Services reports dated 2019 had been seen. It is a most concerning aspect of this appeal that three therapists attended the hearing and submitted reports relating to support given to the sponsor, but none of the reports addressed the issue of the sponsor's conviction, his domestic abuse, the safeguarding concern, and the requirement for him to have supervised access to [C2]. I find that the weight of their evidence is severely diminished by this omission. In addition, I consider that the absence of a social services into the issues of domestic abuse and the need for supervised contact, raises additional concerns on the suitability of the sponsor to have sole care of the 14 year old appellant. The sponsor's own lack of perspective when giving evidence is worrying, in that he referred to the domestic abuse and the need to raise a safeguarding report, as a mere misunderstanding between himself and [M2].

23. These were indeed legitimate concerns. In her submissions Ms Robinson candidly acknowledges there was another, not mentioned here by the Tribunal. That was S's mental health challenges, for which he was also receiving support. She wholly accepts that these matters - the conviction, the domestic violence, the lack of parenting experience and a diagnosis of Post Traumatic Stress Disorder - were all 'red flags' as far as Judith Jones was concerned, and that they were certainly matters that the Tribunal must carefully consider. Her submission,

however, and the final ground of appeal, is that this is not what the Tribunal has done.

24. In respect of the conviction Ms Robinson submits that the Tribunal has unfortunately confined itself to the evidence that was before Judge Lingham in 2017, and that it is wrongly omitted to consider highly pertinent evidence about the S's offending. The conviction for 'management of a brothel' is certainly not something that goes to S's credit. Ms Robinson however submits that the facts surrounding this conviction, and in particular the remarks made by the trial judge when sentencing, cast the offence in a very different light from that suggested by the 'headline news' of the conviction. The sentencing remarks, for reasons unknown, were not available to Judge Lingham. They are only briefly alluded to by Judge Taylor. They read as follows:

JUDGE RENNIE: You get maximum credit for pleading guilty to this charge at the earliest opportunity. I bear in mind that you are a man of previous good character and so I must pass sentence on a basis that this activity was wholly out of character. I recognise, without going into any detail, that your experiences in Uganda were absolutely horrific. You have been left with not only appalling physical scars, as a result of torture, but also profound psychological scars that will need expert help if they are to heal in time. Your involvement in this offence of keeping or managing a brothel could scarcely have been lower than it was. Somebody was going to be needed to open up and do some cleaning; it happened to be you. People should understand that those who are involved in running brothels, in anything less than a caretaker role, will inevitably face long prison sentences measurable in years and not in months. It is only because of your good character, your guilty plea, the very, very powerful mitigation and the fact that the prosecution accept that your involvement was at the lowest level that I am able to pass a short sentence and to suspend it.

25. Ms Robinson submits that the analysis at the First-tier Tribunal's paragraph 21 betrays a lack of anxious scrutiny in the reading of those remarks. First the decision contains a significant error of fact. Judge Taylor adopts Judge Lingham's speculation that S is likely to be subject to some form of restriction (the parties are in agreement that what both judges had in mind were Sexual Offences Prevention Orders): "as stated in the previous decision, this results in the sponsor being convicted of a sexual offence which carries certain restrictions for a period of ten years". There was no basis for this conclusion from the remarks, or anywhere else in the evidence. Ms Robinson submits this to be a significant error of fact.
26. The second error of fact is the Judge's assumption that none of the three "therapists" who attended the hearing to give evidence either knew about the Appellant's conviction, or alternatively thought it important enough to mention in their evidence. He concluded that the weight that could be attached to their evidence was "severely diminished" as a result. Ms Robinson was, I think it fair to say, fairly gobsmacked by that reasoning. She pointed out that the *whole point* of the Appellant's engagement with these professionals, and the entire point of their

evidence, was to address the concerns expressed by Judge Lingham, which included the conviction.

27. Overall Ms Robinson submitted that the Tribunal had chosen to focus on the bare conviction itself rather than the facts as they emerge from the sentencing remarks, and this led the Tribunal to attach far greater weight to it that was warranted by the evidence. S was a cleaner in a brothel. His involvement in the enterprise could “scarcely have been lower than it was”. He was not, as implied by the decision, on the sexual offenders register.
28. Mr Tufan accepted that S had not technically been ‘running a brothel’ but submitted that he had still chosen to take work which he knew to be illegal. His involvement had still warranted an eight month sentence of imprisonment, albeit suspended. This was obviously a serious matter which the Tribunal could not overlook in its assessment of whether this man is an appropriate person to be caring for children.
29. It is correct to say that the focus of the combined evidence of the therapists was not on the conviction. Psychotherapist Maureen McCamley reported on her work to help S overcome his PTSD. Support worker Jane Smith, with specialist experience in delivering domestic violence training and working with refugees, was helping S understand why the behaviours he had exhibited towards his former partner needed to stop, and working to develop his parenting skills. Support worker Gemma Challenger is helping S with practical matters (employability, housing, skills) but also with coping with the residual symptoms of his PTSD and ability to parent. Whilst all of them are aware of the conviction, they have not, as far as the evidence indicates, undertaken any specialist work with him to address the fact that he was a cleaner in a brothel over ten years ago. The question then becomes whether that was a matter which entitled the Tribunal to say that the weight to be attached to their evidence was “severely diminished”.
30. Weight is of course, generally a matter for the Tribunal. I am not able to interfere with conclusions on weight unless I can be satisfied that they are irrational. I am satisfied that that high hurdle is reached here. Mr Tufan is of course entitled to point to the conviction; Judge Lingham, in the absence of the sentencing remarks, was right to be alarmed; the bare charge itself does indeed raise a red flag. It nevertheless remains the case that the three “therapists” to whom the Tribunal refers came to the hearing to give evidence because in their experience S is a person actively working to overcome his past, and the behaviours – wholly consistent with his diagnosis of PTSD – which have wreaked havoc in his relationships over the past decade. It was not in my view rational to dispense with their combined expertise and knowledge of S simply because they did not speak more directly to a job he had in 2011 (I am told that Ms McCamley did in fact give oral evidence on the conviction to the effect that it was not an ongoing concern for her). I am further satisfied that the Tribunal’s reasoning was underpinned by its erroneous conclusion that S would, as a result of his conviction, have been subject to some form of restriction or order. Had that been the case, then the omission in the work of the therapists would indeed have been striking. But absent any ongoing concern on the part of the court, police or probation service, and in light of the fact that this remains S’s sole conviction, it is apparent why these professionals have been focused on other matters.

31. This third ground is also made out.

Decisions

32. The decision of the First-tier Tribunal is set aside.

33. The parties were in agreement that were that to be my decision, this was a matter which had to be remitted to the First-tier Tribunal. I agree. The remaking will not turn on any point of law, but on a detailed analysis of a large volume of evidence, and complex factual issues. There will be four witnesses. The decision in the appeal must be remade by a First-tier Tribunal Judge other than Judge Taylor or Judge Lingham. The parties have leave to submit any updated evidence. Listing times are obviously a matter for the First-tier Tribunal but I would give it a full day.

34. There is an order for anonymity in this case involving a child and a refugee.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
24th October 2023