Neutral Citation Number: [2019] EWCA Civ 1508

Case No: C4/2019/1609

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON MR JUSTICE LEWIS
[2019] EWHC 1616 (Admin)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 16 July 2019

Before:

LORD JUSTICE HICKINBOTTOM

Between:

PN (UGANDA)

Applicant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Charlotte Kilroy QC (instructed by **The Migrant Law Project, Islington Law Centre**) appeared on behalf of the **Applicant**

Zane Malik (instructed by **the Government Legal Department**) appeared on behalf of the **Respondent**

Judgment

(As Approved)

LORD JUSTICE HICKINBOTTOM:

1. The Applicant is a Ugandan national, born on 20 July 1993. In September 2010, aged 17, she came to the United Kingdom on a visitor visa valid until 25 February 2011; but she overstayed.

2. On 21 July 2013, immigration enforcement officers went to an address in London where they forced a bedroom door to find the Applicant in bed with a man. She was arrested as an overstayer. The Applicant did not give her correct identity details. She admitted being an overstayer, and said that she had no relatives in the UK. She was working as a hairdresser, cash in hand. She had no medical condition or special needs, nor was she otherwise vulnerable. An immigration officer determined that she should be detained, which she was.

3. The following day, 22 July 2013, she claimed asylum on the basis that she was a lesbian, and would face a risk on her return to Uganda because of her sexual orientation. She took part in an asylum screening interview. On 29 July 2013, the decision was taken to process her asylum claim through the Detained Fast Track scheme ("the DFT scheme"), the immigration officer determining that her application could be processed quickly and fairly through that scheme. In her screening interview, she had referred to several lesbian relationships which she said she had had as a child in Uganda with three identified women. She also referred to two further lesbian relationships she had had since being in the UK, one of which she said was ongoing.

4. Her asylum claim was refused on 6 August 2013. The decision-maker did not accept that the Applicant was a lesbian, and referred particularly to the lack of evidence of her asserted relationships in both Uganda and the UK and the evidence of her being found in bed with a man at the time of her arrest.

5. The Applicant appealed, and at the hearing before the First-tier Tribunal (Immigration and Asylum Chamber) on 14 August 2013, there was an adjournment to enable her to obtain further evidence. The matter returned to the tribunal on 28 August 2013, when no application was made to adjourn and the substantive appeal was heard before First-tier Tribunal Judge Ievins. The Applicant gave evidence, as did the man with whom she was found at the time of her arrest, another male friend and a woman who gave evidence that she had had sex with the Applicant on two occasions since she had been in the UK. The evidence of the first man was to the effect that his relationship with the Applicant was not intimate, and he had been with her in bed that day having seen her home the night before as a friend after they had been drinking.

6. In a determination promulgated on 30 August 2013, Judge Ievins refused the appeal, in effect finding that the Applicant's evidence lacked any credibility. Permission to appeal was refused by the First-tier Tribunal on 5 September 2013, and by the Upper Tribunal on 10 September 2013. There were various other applications, but none successful so far as the Applicant was concerned. She was removed to Uganda on 12 December 2013.

7. On 30 October 2015, through different solicitors, the Applicant commenced judicial review proceedings against the Secretary of State, challenging the decision to remove her in December 2013 and the lawfulness of her detention for periods between July 2013. As part of that claim, it was submitted that, as found in a series of judgments including R (Detention Action) v Secretary of State for the Home Department [2014] EWCA Civ 1634; [2015] INLR 372, the DFT scheme was unlawful in a number of respects.

8. On 5 November 2015, permission to proceed with that claim was refused by William Davis J. It was renewed on 11 November 2015, but stayed by consent pending the Applicant's application to the First-Tier Tribunal to set aside its own 30 August 2013 decision. However, on 30 May 2017, in TN (Vietnam) and US (Pakistan) v Secretary of State for the Home Department, the First-Tier Tribunal held that it did not have jurisdiction to set aside its own decision in these circumstances. On 21 September 2017, at an oral hearing, permission to proceed in the judicial review claim was granted, but the matter was again stayed pending the ultimate outcome of TN (Vietnam) and US (Pakistan). That occurred on 19 December 2018, when this court and the Divisional Court handed down judgments confirming the tribunal's view as to the scope of its own jurisdiction (Court of Appeal (Civil Division) [2018] EWCA Civ 2838; [2019] 1 WLR 2647 and Divisional Court [2018] EWHC 3546 (Admin); [2019] 1 WLR 2675).

9. At a further hearing in this claim on 6 February 2019, Supperstone J lifted the stay and ordered the substantive hearing of the judicial review to be listed on the first available date after 6 May. He gave the Applicant permission to amend her grounds of claim to reflect the judgment of this court in TN (Vietnam), and the Applicant duly provided amended grounds.

10. The substantive claim came before Lewis J on 24 June 2019. One issue before him was whether the Applicant had permission to challenge the First-Tier Tribunal decision of 30 August 2013. In his judgment ([2019] EWHC 1616 (Admin) at [61]), he held that, looking at the proceedings before an order of Supperstone J as a whole, she had that permission. Lewis J also held that the DFT scheme procedure in which she was required to engage was unlawfully unfair to the Applicant because she had had no proper opportunity to obtain evidence of her lesbian relationships from Uganda. He also found the Applicant's detention was unlawful but only for the period 6 August to 10 September 2013.

11. The judge quashed the 30 August 2013 decision of Judge Ievins, and directed the Secretary of State to take steps to return the Applicant to the United Kingdom to enable her to play a proper part in the now unresolved appeal from the Secretary of State's refusal of her asylum claim, in which her credibility would be a (if not the) main issue. Lewis J refused permission to appeal to this court, and refused to stay his order requiring the Secretary of State to take steps to return the Applicant to the UK pending the determination of the Secretary of State's application to this court for permission to appeal.

12. The Secretary of State lodged a notice of appeal on 5 July 2019, contending that Lewis J erred in concluding that (i) permission to proceed in respect of the challenge to Judge Ievins' decision had been given by Supperstone J, the grounds noting that the First-tier

Tribunal had not been joined as a party to the claim; and (ii) if the Applicant had been given permission to proceed, the judge had erred in concluding that it was procedurally unfair not to have given her an opportunity to obtain evidence from Uganda in support of her case that she had lesbian relationships there, in circumstances in which she had not indicated that she wished to do so or wished to have more time to do so.

13. On 11 July 2019, I gave directions in the appeal, setting the application for permission to appeal down for a hearing on a rolled-up basis on 30 July 2019. In the meantime, I granted a stay in relation to the return direction; and I gave permission to apply.

14. The Applicant has duly applied to lift that stay.

15. In her submissions in support of the application, Miss Kilroy QC conformed that it is common ground between the parties and uncontroversial that lesbians are at risk in Uganda, the issue before the First-Tier Tribunal in August 2013 being whether the Applicant was indeed a lesbian. However, she submitted that it was that issue upon which she did not have a fair hearing, because she had been subject of the DFT scheme which had denied her a proper opportunity of obtaining evidence from Uganda in support of her appeal. Ms Kilroy relies upon the general principle, accepted by Mr Malik for the Secretary of State, that a stay of an order is granted by way of exception, the general rule being that a litigant who has won his or her case at first instance should not be deprived of the benefits of that victory merely because the losing party proposes to appeal. Consequently, to that extent, as Mr Malik accepts, there is a burden upon the Secretary of State now to show why the Applicant should be denied those benefits. As to the correct approach, as Sullivan LJ put it in Department of the Environment, Food and Rural Affairs v Downs [2009] EWCA Civ 257 at [8]:

> "A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted."

16. Mr Malik submits that the grounds of appeal which have now been put forward on behalf of the Secretary of State, together with a skeleton argument supporting them which was filed and served yesterday, are at least arguable; and, in those circumstances, I should engage in a balance exercise to assess where justice lies in terms of granting or not granting a stay.

17. In respect of that balance, he submits that the Applicant has now been in Uganda now for about five-and-a-half years, and there is no evidence of any risk of imminent harm to her over the next two weeks before the substantive hearing before this court. He relies upon the fact that the Applicant waited for two years before bringing her judicial review proceedings. The evidence that has been submitted on behalf of the Applicant of a media report of the judgment of Lewis J is anonymised, and indeed appears to emanate from Kenya and not Uganda. That, he submits, does not assist the Applicant in this application.

18. He submits that, on the other hand, if the Applicant were to be returned to the UK, she would then be within the jurisdiction, and her history suggests that it is highly likely that she would continue to argue that she should not be removed from the United Kingdom to Uganda, most likely in the form of a further asylum or human rights claim. In that event, even if that claim is found ultimately to be unmeritorious, then the Secretary of State would have to engage in what he described as "another cycle of appeal and removal with all the opportunities for legal challenge at every step of the way". In those circumstances, he submits, the situation for all practical purposes would be the same as if the Secretary of State were now not to appeal to this court, and simply accepted that the Applicant's appeal must simply restart afresh. In other words, not to have a stay would render the appeal nugatory.

19. However, I am unpersuaded that that is the correct approach. As the authorities stress, the starting point is that the Applicant has a judgment in her favour and a stay of it is the exception and not the rule. Although, as I understand it, Lewis J had some evidence before him as to her circumstances during the last five years or so in Uganda, I have no such evidence. I accept Mr Malik's submission that the media article with which I have been provided does not substantially assist the Applicant; but, nevertheless, the Applicant is currently being exposed to the risk of persecution which she asserts because of the procedural failings of the DFT scheme, which denied her a fair hearing of her appeal in respect of the crucial issue as to whether she would face persecution as a lesbian if returned to Uganda.

20. Ms Kilroy relied upon De Souza Ribeiro v France (Application No 22689/07) (2014) 59 EHRR 10 at [82], in which the European Court of Human Rights stressed that, where a complaint concerns allegations that a person's expulsion would expose him or her to a real risk of suffering treatment contrary to article 3 of the European Convention on Human Rights, in view of the importance attached to that provision and given the irreversible nature of the harm that might occur if the risk of relevant treatment alleged materialized, the effectiveness of the remedy requires imperatively that the complaint be subject to particularly close scrutiny by the national authority. That effectiveness requires that the person concerned should have access to a remedy with automatic suspensive effect. That is supportive of Ms Kilroy's submission.

21. Therefore, on the one side of the balance there is the risk that the Applicant will continue to be exposed to treatment which would breach article 3 and that the harm to which she would be exposed would be at least potentially irremediable.

22. On the other side, there is the admitted inconvenience that the Secretary of State would suffer if the Applicant were to be returned to the United Kingdom and the Secretary of State were to succeed in his appeal before this court. If that were to occur, then I accept that it is possible, and even likely, that she would attempt to make a fresh asylum and/or human rights claim. However, that would be the subject of the usual restrictions to such claims; and would, in effect, simply put her in the same position (and certainly no better position) than those who have been the subject of the DFT scheme but who have not been removed and consequently are still in the United Kingdom. There is no evidence that there are many, or indeed any, other individuals in the same position as the Applicant, i.e. individuals who

have been removed under the DFT scheme; and so the Secretary of State cannot (and Mr Malik did not) rely upon any burden that he may be put under as a result of multiple claims from a similar source.

23. Therefore, balanced against the risk of the Applicant suffering as a result of a breach of article 3, there is the (at most, moderate) inconvenience to the Secretary of State of possibly having to deal with a further claim by the Applicant for leave to remain.

24. Given the burden that is upon the Secretary of State to persuade the court that Lewis J's order should be stayed, in my view the balance of justice lies – and lies firmly – on the side of the Applicant.

25. For those reasons, I would propose to lift the stay on the Order of Lewis J requiring the Secretary of State to take steps to return the Applicant to the UK which I imposed on 11 July 2019.

Order: Application granted.