Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03715/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Date Sent**
On 1st November 2013	**On 11th November 2013**
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

HELLEN TUSINGWIRE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Selway, Halliday Reeves
For the Respondent: Mr S Spence, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Dickson made following a hearing at Bradford on 22nd July 2013.

Background

2. The Appellant is a citizen of Uganda born on 12th December 1983. She arrived in the UK on 23rd August 2011 and worked for a charity organisation. She overstayed her visa and presented herself to the police on 4th February 2013. The following day she was arrested by Immigration Officers and informed that she was considered an illegal overstayer and liable to removal. On the same day she claimed asylum.

3. On 26th March 2013 a decision was made to refuse to grant her asylum under paragraph 336 of HC 395 and to remove her from the UK by way of directions under Section 10 of the Immigration and Asylum Act 1999.

4. The basis of the Appellant's clam is that she fears returning to Uganda because she is bisexual and has had a lesbian relationship and would be at risk on return to Uganda. The judge did not accept that she had ever entered into a gay relationship whilst she was in Uganda and did not accept that she would be at risk on return.

5. Whilst she has been in the UK the Appellant has had a relationship with a British national and has given birth to a British national child, Gabriella, born on 24th June 2013.

6. The judge accepted that the Appellant's partner was the father of the child and that his mother was 96 years old and suffering from dementia. In view of his mother's problems, he said it was clearly not in the interests of the child that the father should see his daughter in his mother's presence.

7. He concluded that the Appellant would have the support of her parents when she returned to Uganda and it would be possible for the father to keep in contact with his daughter through modern means of communication. He distinguished the case of ZH (Tanzania) [2011] UKSC 4 and dismissed the appeal on Article 8 grounds.

The Grounds of Application

8. The Appellant sought permission to appeal on the grounds that the judge had failed to properly consider the relevance of the child's status as a British citizen. There could be no basis in law for suggesting that the Section 55 rights of a UK national child are best served by removing that child from the UK to Uganda. It was also submitted that the asylum findings were insufficiently reasoned.

9. Permission to appeal was granted by Designated Judge Appleyard on 21st August 2013 for the reasons stated in the grounds. The Designated Judge noted that it was arguable that in failing to take account of Omotunde (Best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 247 the judge had erred.

Submissions

10. Mr Selway submitted that the judge had made insufficient findings on the asylum claim but said that there was no reason to revisit the issue if the Appellant were to succeed on Article 8 grounds, which she clearly should.

11. According to the Respondent's own guidance on the application of EX1, at paragraph 7:

> "Save in cases involving criminality it will not be possible to take a decision in relation to the parent of a British citizen child where the effect of that decision will be to force the British citizen child to leave the EU – this is consistent with the ECAJ judgment in Zambrano."

12. Furthermore, at paragraph 11:

> "In cases where the decision being taken in respect of the person with parental responsibility would require that person to return to a country outside of the EU then the case must always be assessed on the basis that it would be unreasonable for the child to leave the UK with their parent. In such cases it will usually be the case that the person with parental responsibility will be allowed to stay in the UK with the child provided that there is satisfactory evidence of a genuine and subsisting relationship. It may, however, be appropriate to refuse to grant leave where the conduct of one of the parents gives rise to considerations of such weight as to justify separation, if the British citizen child could otherwise stay with another parent or primary career in the UK."

13. Mr Selway submitted that there were no such considerations here. The Appellant was the sole and primary carer of the child. She lived 19 miles apart from the father and he was the primary carer of his 91 year old mother who suffered from dementia.

14. Mr Spence submitted that the judge had reached a decision open to him on the facts so far as the asylum claim was concerned but accepted that the Appellant's circumstances in the UK were unchallenged and it was not arguable that the British citizen child could live with her father.

Findings and Conclusions

15. So far as the asylum claim is concerned, the judge reached a decision open to him on the evidence. The Appellant did not disclose her claim to be bisexual until after having been arrested by the Respondent. The judge considered the photographs which the Appellant had produced and was entitled to find that they did not establish any gay relationship. When asked why the Appellant could not return to Uganda she said that the family would not accept her because of her pregnancy but not because she was bisexual. The judge's conclusion that the Appellant had not established a risk on return to Uganda is unassailable.

16. However, he did err with respect to the consideration of the human rights claim in not applying the law properly in respect of the British citizen child.

In Omotunde the Tribunal held that the welfare of a child, particularly a child who is a British citizen, is a primary consideration, but there is no such consideration in this determination.

17. Furthermore, it is clear that the Appellant meets the requirements of the Respondent's own guidance on the application of EX1, which states in terms that save in cases involving criminality it is not possible to take a decision in relation to the parent of a British citizen child where the effect of that decision would be to force the British citizen child to leave the EU.The evidence before the judge was that the Appellant herself was the sole carer of the child and that the father was not in a position to offer such care.

18. The decision is set aside and remade in favour of the Appellant.

Decision

19. The decision in respect of the asylum claim stands. The decision in respect of the Article 8 claim is set aside and remade. The appeal is allowed on Article 8 grounds.

Signed Date

Upper Tribunal Judge Taylor