LSH

Heard at Field House

On 22 January 2004

EK (non overt - homosexual) Uganda [2004] UKIAT 00021

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

12 February 2004

Before:

His Honour Judge N Ainley (Chairman)
Mr A Smith

Between

APPELLANT

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. This is the adjourned hearing of the claimant's appeal against the determination of Mr Adjudicator Britton, sitting on 22 August 2002.

2. By that appeal the Adjudicator rejected the claimant's assertions that the Secretary of State was wrong to refuse him asylum and to issue removal directions against him. From that judgment he appeals to the Tribunal on the basis that the Adjudicator has made a number of errors of fact in his determination which render that determination unsafe. The principal thrust of the appeal before us has, however, centred upon the Adjudicator's finding that the claimant was not a homosexual and his findings therefore that there was no conceivable risk of persecution or

Article 3 harm that the claimant would run were he to return to Uganda.

3. We should point out at the outset that part of the matters before the Adjudicator were and remain certified. These concern the asylum claim that was made. The human rights claim that was made was never the subject of certification and accordingly we have jurisdiction to deal with it.

4. The question that this Tribunal to deal with as it seems to us as follows.

   (a) Was the Adjudicator right to come to the conclusions on the facts that he did as to the claimant's sexuality and

   (b) If he was wrong, does that mean that the claimant would, even on his own account be someone who was at real risk of persecution were he to be returned to Uganda.

In order to analyse that, and before we turn to the facts of the case, it will be necessary to consider whether the laws of Uganda as far as we are made aware of them are laws that prohibit homosexuality. It seems to us abundantly plain that they are. We have been assisted by citation from two reports, the first being a CIPU report of October 2003 which states in its relevant paragraphs as follows:

"6.103 Under the Uganda Penal Code homosexuality is illegal for men. Homosexual acts between women are not mentioned. The maximum penalty for homosexuals in Uganda is life imprisonment. Section 140 of the Penal code criminalises "carnal knowledge against the order of nature" with a maximum penalty of life imprisonment. Section 141 "attempts at carnal knowledge with a maximum penalty of 7 years imprisonment". Section 143 punishes acts or procurement of or attempts to procure acts of gross indecency between men in public of private with up to 5 years imprisonment. In September 1999 President Musevene called for the arrest of homosexuals for carrying out "abominable acts" following the wedding of two gay men.

6.104 In March 2002 while accepting an award for his government's successful campaign against HIV/AIDS President Musevene said "we do not have homosexuals in Uganda so this is mainly heterosexual transmission". In December 2002 the Bishop of

Mukono Diocese cautioned Christians against homosexual organisations that want to join the church in the pretext of funding them."

5. We have further had placed before us the 2003 report by Amnesty International into Uganda which covers events from January to December 2002 and deals with the problems faced by sexual minorities in that country. We will cite the relevant passage:

"Discrimination against lesbian, gay and bisexual and transgender LGBT Ugandans continued. Legislation discriminating against gays and lesbians remained in place. In March President Musevene said in a speech to the Commonwealth heads of government meeting in Australia that the relative success of fight against aids in Uganda was because the country has no homosexuals. On 30 August the Ministry of Ethics and Integrity ordered police to arrest and prosecute homosexuals. Security agents continued harassing members of the LGBT community throughout 2002 and seven were arrested because of their sexual orientation. In December the police arrested and released on police bond a prominent member of an association of gay men and lesbians who went to a police station to enquire about two members of the association, arrested him allegedly because of their sexual orientation. "

6. It is plain from these passages that at least enshrined in the law of Uganda there are very severe penalties for persons who practice homosexuality. It is also apparent that at the highest levels of government and indeed of the church there is the strongest deprecation of persons who engage in homosexual acts, and there does appear to be on occasions a willingness to prosecute persons who engage in homosexual acts.

7. What we can infer from the material that is placed before us is that a number of arrests have taken place and there have been detentions. There is nothing that suggests to us that lengthy prison sentences are imposed on those who have been caught in engaging in homosexual acts. If there were such evidence we would find it surprising, to put it no higher, that evidence of these sentences does not appear in either the CIPU report or in Amnesty Internationals report.

8. Thus the position as far as we can tell from the evidence as to what happens to homosexuals in Uganda is that they are plainly discriminated against and that they are the subject of disapproval. They are at times, arrested and it seems that they are at times detained. We note that the word used to characterise the extent of arrest in the Amnesty international

report is "several". It does not seem to us that this is the sort of wording that is consistent with a very wide scale crackdown against homosexuals or indeed the imposition of draconian penalties upon them. Nonetheless, to be a homosexual in Uganda would it seems to be a person who at least in theory might be subject to arrest. We have been assisted by two authorities that have been laced before us that help show what the tribunal's approach should be to this particular problem. The first in the judgement of the Court of Appeal in **N and Z against the SSHD [2002] EWCA Civ 952**. In that case the Court of Appeal was faced with persons who came from Zimbabwe where as, in Uganda it is criminal to engage in homosexual acts. At page 6 of our copy of the judgment the following citation appears which we consider to be of great assistance.

"Mr Blake submitted that whatever the submissions which the ECHR had currently reached this Court was free to develop its case law under the Human Rights Act. So it is. The question thus arises whether this court should Rule that no immigration policy considerations could justify the return of an individual to accompany where his expression of his sexual desires with another adult in private is in anyway inhibited.

For my part I would not rule in such broad terms. This is a difficult area. Consider a proposed expulsion of a heterosexual man to a destination state which has, and enforces laws which would inhibit that man from marrying or founding a family or more than say, 1 child - for instance laws which prohibit marriages between persons of different races or laws which place it as a severe disadvantage for those who have more than 1 child. These are fanciful examples and I consider that we should develop the law on a case by case basis in the light of the facts of that case rather than rule on the points in the abstract."

8. That case was followed by the Administrative Court on 18 February 2003 in the application of Dawkins against the Immigration Appeal Tribunal heard by Mr Justice Wall. The case concerned a Jamaican citizen. The claim was set out in paragraph 5 of the judgment.

"The essence of his claim is that it would be a breach of his human rights and in particular Article 8 were he to be returned to the jurisdiction of Jamaica where homosexual activity is a criminal offence. Not just because of that factor but becau8se he will suffer an element of persecution and disruption to his life in the jurisdiction."

9. There is a further passage from Dawkins which we must cite because again it assists us in the way that we approach the facts of this case. At paragraph 46 the learned judge quoted the

passage in **Ullah** where the Master of the Rolls had stated as follows:

"This appeal is concerned with Article 9, our reasoning has however wider implications. Where the Convention is invoked on the sole ground of treatment which an alien refused the right to enter or remain is likely to be subjected by the receiving state and that treatment is not sufficiently severe to engage Article 3. The English court is not required to recognise it. Any other article of the Convention is or may be engaged. Where such treatment falls outside Article 3 there may be places which justify the grant of exceptional leave on humanitarian grounds."

"After referring to the case of **N & Z**

> "49. It simply cannot be the more in my judgment that merely because the law of Jamaica has a criminal statue it criminalises homosexual behaviour, that mere fact cannot of itself be sufficient to require this country to grant immigration status to al practicing homosexuals in Jamaica. On that basis anyone who is a homosexual could come to this country and claim asylum.
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> 50. Therefore the matter must be fact sensitive and the applicant must show something in addition to the mere fact that he his homosexual. In my judgement the over whelming weight of the authorities is that an applicant in the position of this applicant has to bring himself either within Article 3 or at least show some substantial sub-stratum fact that he is going to be subject to substantial discrimination and/or violence and abuse."

10. It seems to us therefore that the position that has been reached the courts of this country is that it is not enough that homosexuality is a crime in Uganda. It would have to be shown that there would be a real risk to this claimant on return to Uganda of being subjected to treatment as that would consist of inhuman treatment defined under Article 3 of the European Convention on Human Rights. The threshold for such treatment is of course set very high. With all that in mind it is necessary now to turn to the facts of the case and to do so applying the facts in relation to his sexuality that the claimant himself put forward in support of his own case. It seems to us that it is certainly arguable in this particular case that the Adjudicator too readily dismissed the description that the claimant gave of his past personal life. We will therefore put the case as he would wish it to be put in so far as his sexuality is concerned and analyse the risk to him on that basis.

11. The claimant was born on 28 August 1969. He states that he first expressed his homosexual identity when at boarding school at the age of 18. This would have been in 1987 or 1988. His sexual activities were confined to the boarding school they did not carry on after he left.

12. In 1989 when he was about 20 he began to work as shop assistant in Kampala. He remained working there until 1993. He abandoned his homosexual lifestyle during the whole of this period. He was without difficulty for a period of 3 years until 1992 but in 1992 people began to suspect that he was homosexual and he began to be the subject of abuse. One day a lady shouted abuse at him, another day a group of young men threatened him in the street On a further day he went to collect water and had stones thrown at him one of which hit him causing a scar over his eye. That night people went by his house threatening him. This caused him to leave and he went by Taxi to another area of Uganda called Bweyogerere having collected his belongings.

13. He then worked in Bweyogerere as a barber until 1998. He had no problems during that period until eventually rumours began to circulate about him in January 1998 when threats were made again. Again, he asserts that during the whole of this period he did not engage in homosexual activity. Indeed his case is that he did not engage in homosexual activity from the time that he was at school until the time he arrived in the United Kingdom.

14. He then having had the trouble that he had in Bweyogerere left and joined his brothers who were in another part of Uganda. He asserted that he was engaged with some rebels at the time but this was not accepted by the Adjudicator and there have been no submissions before us on this point. The long and short of the matter is that he was out of circulation and was not engaging homosexual activity. On 18 March 2000, according to him he left the country from Entebbe airport on a false passport arriving in the United Kingdom but not immediately claiming asylum. Asylum was claimed on 19 April 2000. It is said by a witness called to this effect that during his time in the United Kingdom he had a 6 week homosexual relationship but he has had no other homosexual relationships.

15. That is not the end however of the history of the personal life of this claimant in so far as it is relevant to the matters before us however because he has also had a heterosexual life in Uganda. He had a female partner who gave birth to his daughter on 4 January 1999. It thus appears that appearances whatever rumours might have been spreading about him in 1998 or 1999 he was also living what to others would appear to have been an entirely heterosexual family life. It is finally submitted on his

behalf that he did not engage in homosexual activities in Uganda because he was frightened of the consequences of doing so. We of course have to consider against this background of facts whether there is a real risk

(a) that he would be identified as being homosexual on his return and

(b) whether he would be at real risk on return because of any conduct that he might be likely to engage in after he returned to Uganda.

16. We consider that first and fore most on immediate arrival in Uganda there would be no reason for the authorities to suspect that he was homosexual at all. He has never been charged with any criminal offence of that nature in Uganda or indeed so far as we are aware with any criminal offence. He would simply be a returning Ugandan passing through the airport. Would it be likely thereafter that he would so conduct himself that he would come to the adverse attention of the authorities? We consider that there is no real risk or likelihood that he would do so. His entire past shows that his homosexual urges are not matters which he has ever felt compelled to display, whether that be from fear of the authorities or otherwise. He did no engage in any homosexual activity at all from the age of 18 to about the age of 31 or 32 when he had a brief homosexual experience with a man in this country. He did however engage in what must have been a relatively long standing heterosexual relationship in Uganda as the result of which he is the father of a daughter.

17. It seems to us that the real risk that this man would subject himself to any penalty in Uganda as a result of such sexual inclination as he may have in fact so slight that it cannot be characterised as a likelihood or real risk at all. We do not consider that the fact that he is unable to express his sexuality as he would wish or says that he is would in any event sufficient to engage Article 3 but that, it seems to us, would be to look at matters in two abstract a form. The fact is that throughout his early adult life he never engaged in any homosexual acts. We do not consider that the fact that he may not again engage in homosexual acts in Uganda or at least not engage in them in public is a matter that is so detrimental to him that it could be said to engage Article 3.

18. For these reasons as Article 3 is the article to which we must play heed we consider that this appeal must be dismissed.

His Honour Judge N Ainley
Vice President