Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05668/2015

THE IMMIGRATION ACTS

Heard at Birmingham ET	**Decision & Reasons Promulgated**
On 5 February 2016	**On 11 February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MS THERESA SITHOLE
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Chapman promulgated on 13 July 2015, in which he dismissed the appellant's appeal.

2. Permission to appeal was granted by Upper Tribunal Judge McWilliam on 16 October 2015.

Anonymity

3. No direction has been made previously, and there is no reason for one now

Background

4. The appellant states that she arrived in the United Kingdom on 4 September 2013, using false documents provided by an agent. She applied for asylum on 27 January 2014. The basis of the appellant's asylum case is that she was a television presenter in Zimbabwe and a lesbian who was in a long-term relationship with a woman. When news of her sexuality emerged, the appellant had to go into hiding and was dismissed from her employment. Her claim is that Zanu PF thugs kidnapped the appellant, detained her on a farm and threatened to rape her. The farm owner helped her to escape her captors and leave Zimbabwe the same day. Since arriving in the United Kingdom, the appellant formed a relationship with a British citizen male, namely DS, and they had a child on 12 July 2014, namely L. The appellant and DS are no longer in a relationship, if they ever were.

5. The Secretary of State refused the application on 15 March 2015, concluding that the appellant's claim to not be attracted to men was inconsistent with her claim to have had a relationship with a man shortly after arriving in the United Kingdom. The appellant's claim to be well known in Zimbabwe owing to being a television presenter was rejected owing to the lack of any supporting evidence. The credibility of the appellant's claim was described as damaged owing to her delay in seeking asylum and use of false documents to enter the United Kingdom. In addition, the appellant failed to satisfy the requirements of Appendix FM, particularly under the parent route, as there was no evidence to support her claim that her child's father was a British citizen. Consideration was also given to the appellant's private life under paragraph 276ADE of the Rules, exceptional circumstances and section 55 of the Borders, Citizenship and Immigration Act 2009, with the Secretary of State concluding that the appellant did not qualify for a grant of Discretionary Leave to Remain.

6. The appellant appealed to the First-tier Tribunal and indicated that she would be providing a birth certificate showing that her child's father was a British citizen.

The hearing before the First-tier Tribunal

7. The appellant was unrepresented and was the only witness. The FTTJ found that the appellant's claim to be a lesbian or, as she subsequently claimed, bisexual, was not credible. Nor was it accepted that she had a high profile in Zimbabwe. The FTTJ was not satisfied that DS was the father of L, notwithstanding that a new birth certificate had been produced which included his name and accordingly Appendix FM was not met in relation to the parent route.

8. In considering the appellant's Article 8 claim outside the Rules, the FTTJ found that L was not a qualifying child, that DS would not play any role in L's life and that she could accompany the appellant to Zimbabwe.

The grounds of appeal

9. The grounds of appeal to the First-tier Tribunal, written by the appellant, merely asked that her case be looked at again and referred to an intention to obtain a DNA test. In renewing her application, the appellant referred to a letter before the FTTJ, said to be written by DS to the Home Office a month before the appellant's application was refused, in which he stated that he was L's father. She said that she had now obtained DNA evidence.

10. Permission to appeal was granted on the basis that Upper Tribunal Judge McWilliam could not say with certainty that the FTTJ would have reached the same conclusion as to L's parentage if he had considered the letter from DS. If that evidence were accepted, this would mean that L was a qualifying child and an assessment of reasonableness would be required. The grant of permission was stated to be on this basis alone, with UTJ McWilliam finding that the FTTJ made "*lawful and sustainable findings in relation to risk of return*" and that the "*many adverse credibility findings made by the judge (were) grounded in the evidence and adequately reasoned*."

11. The Secretary of State's response of 6 November 2015 indicated that the appeal was opposed. It was argued that there was no evidence to suggest that the FTTJ would have reached a materially different finding on paternity on the basis of a handwritten letter with no supporting evidence. It was properly open for the FTTJ to find that DS was not the father on the basis of the limited evidence before him.

The error of law hearing

12. The appellant, Ms Sithole, attended the hearing. I explained that the appeal was limited solely to the issue of the parentage of her child and that permission had not been granted in relation to the FTTJ's findings on the asylum aspect of her appeal. When asked to explain how she thought the FTTJ had erred, she stated that the FTTJ was wrong to say that she had only obtained the letter from DS after the refusal of her application. That letter was written before her asylum interview and they had also registered the baby before the said interview.

13. I asked Ms Sithole about her reference to DNA evidence in her application for permission to appeal. She told me that she had submitted an original report to the First-tier Tribunal after the hearing. That report had not made its way to the case file.

14. I was able to see parts, albeit not all, of the DNA report, which the appellant brought with her to the hearing. Briefly, that DNA evidence

indicated that the father of her child was a Mr Lillywhite. I was told that he was a British citizen.

15. Mr Diwnycz stood by his Rule 24 response. He acknowledged that the appellant had been candid in asserting that someone other than DS was the father of the child. He advised me that there was evidence on the Home Office file, which also showed that DS was not the father of the child. That evidence consisted of a DNA report dating from April 2015, which stated that DS was not the father of the child and a letter from DS to the Home Office in which he requested that his name be removed from any parental acknowledgement. Mr Diwnycz explained that this evidence had not been placed before the FTTJ owing to confidentiality issues.

16. Mr Diwnycz further argued that the FTTJ did not err in failing to deal with a DNA report, which was not before him. If the FTTJ had this report, his decision would have been pronounced more firmly. The new evidence bolstered the findings the FTTJ made and the result would have been the same.

17. In response, Ms Sithole stated that she did not know until after the hearing what the DNA test results were. DS had obtained the DNA report without her knowledge, by way of a home test. She also did not know that he had communicated with the Home Office. Ms Sithole further advised me that she is in the process of contacting the general registry office in order to place the correct father's name on the birth certificate.

18. At the end of the hearing, I announced that I found no material error of law in the FTTJ's decision. While it was not apparent from the decision and reasons that the FTTJ had considered the handwritten letter from DS, which was dated 9 March 2015 and contained in the respondent's bundle, I find that any error was not material in view of Ms Sithole's acceptance that DS was not her child's father and that another man was. It is, of course, open to Ms Sithole to make a further application to the Secretary of State based on her current circumstances.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed Date: 7 February 2016
Deputy Upper Tribunal Judge Kamara