First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06066/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 13 November 2014	**On 27 November 2014**

Before

JUDGE OF THE FIRST-TIER TRIBUNAL RINTOUL

Between

K M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F MacCrae, Counsel, instructed by Morgan Dias
For the Respondent: Mr P Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Botswana, appeals with permission against the determination of First-tier Tribunal Judge Hillis promulgated on 4 October 2014, dismissing her appeal against the decision of the respondent made on 6 August 2014 to refuse her claim for asylum and to remove her to Botswana.

2. The appellant's case is that she is a lesbian and, as a result faces persecution on return to Botswana. She has two children born on 23

November 2010 and 5 October 2012. The father of the older child is a citizen of Botswana. It is claimed the appellant had a relationship. She met that man via Facebook and came to the United Kingdom as a visitor between 5 February 2012 and June 2012. She became pregnant during that stay but returned to Botswana.

3. The appellant returned to the United Kingdom on 5 June 2013 with her children, and claimed asylum on 19 October 2013.

4. The respondent accepted the appellant's identity, but did not accept that she is a lesbian or that she had, as a result, come to adverse attention. The respondent concluded also that to return her to Botswana would not be in breach of her rights under the Human Rights Convention, and concluded that she had not established a family life in this country for the purposes of appendix FM of the Immigration Rules. In doing so, she found that the appellant had not established a family life in the UK with the claimed father of the second child, nor that he was in fact the father of the child.

5. The respondent also considered, having had regard to her duty under section 55 of the Borders, Citizenship and Immigration Act 2009, that while the children's bests interests were a primary consideration, that is not the sole consideration and that the family could be removed to Botswana together; that there were no exceptional circumstances, such that consideration of a grant of leave outside the requirements of the Immigration Rules was warranted. While decisions were made on 8 August 2014 to remove the two children as well as their mother, the Respondent considered that as no human rights claim had been made in respect of either, that they did not have a right of appeal within country. That decision was upheld by the First-tier Tribunal who concluded that the appeals were therefore not valid for reasons given in decisions of 27 August 2014. There was no challenge to those decisions.

6. At the hearing, Judge Hillis heard evidence from the appellant. She also heard submissions from Mr T Hussain of Counsel and Mr Lees, a Home Office Presenting Officer. He also had before him bundles prepared by both parties.

7. Judge Hillis found:-

   i) The appellant was not a credible witness in the core aspects of her applications [24];

   ii) The appellant was not at risk on return to Botswana [25]; and

   iii) As it is to be accepted that the asylum and human rights claims stand or fall together in the circumstances of the appeal, there was no evidence before him to disagree with that submission made by both representatives [26].

8. The appellant sought permission to appeal on the grounds that:-

i) It was incumbent on Judge Hillis pursuant to section 55 of the UK Borders Act 2009 to undertake an evaluation of the bests interests of the children; and,

ii) He had not done so, which constitutes an error of law.

9. I note in passing that there is no challenge to the finding that the appellant was not credible witness or to the dismissal of her appeal on asylum grounds.

10. On 16 October 2013 First-tier Tribunal Judge Gibb granted permission stating:-

> "The grounds are arguable. The appellant's representatives should be prepared to clarify what evidence and/or submissions made in the correlation to the best interests of the children, and whether it is accepted that there was a joint agreed position by both representatives that the asylum and human rights claims stood or fell together ([26] of the determination). There is nothing in the determination on the subject of whether the younger child may be a British citizen (see [22]), which would be a highly significant matter, as would the contact, if any, with his father (if paternity is established). Subject to the concern that the judge may have been unclear on the agreed position in not considering the children the matter merits further the consideration.

11. Despite these observations, there has been no additional material submitted by the appellant's representatives. I accept that Ms MacRae had been instructed only shortly before the hearing, and I make no criticism of her. She, quite correctly, sought the assistance of Mr Hussain who had previously represented the appellant but had been unable to obtain any information of assistance such as his note of the hearing. Mr Mangion was unable to provide any copy of Mr Lees' note of the hearing. There was thus only the record of proceedings kept by Judge Hillis as evidence of what occurred at the hearing. I showed this to both representatives

12. It is recorded in his manuscript record by Judge Hillis that Mr Lees for the Home Office had submitted that Article 8 did not apply as there was no family or private life in the United Kingdom and the requirements of Appendix FM and Paragraph 276ADE were not met. The record of the submissions made by Mr Hussain contains no reference to the best interests of the children. What is recorded is as follows:

> "HR [Human Rights] stand or fall."

13. Ms MacRae quite properly and candidly admitted that in light of that submission, she was in some difficulty, although she submitted that it was nonetheless a duty on a tribunal to consider the best interests of

children. In the context of this appeal, this would have been pursuant to any assessment pursuant to Article 8.

14. It has to be borne in mind that in this case the Respondent had set out, albeit briefly, in the refusal letter her assessment of the best needs of the children. There was no express reference to the best interests of the children in the grounds of appeal nor is there any indication that this matter was raised in any skeleton argument put before Judge Hillis; there is no indication that any such document was put before him. Further, as noted above, no submissions were made on this issue. I considered that Judge Hillis was entitled to conclude in light of the above and that there was no challenge to the Secretary of State's analysis of the best interests of the children and that issues regarding Article 8 were simply not being raised or pursued. In the circumstances, Judge Hillis did not err in law as it is not an error of law for a judge not to make findings of an issue which not only was not raised before him but had in effect been conceded.

15. Accordingly, I am not satisfied that the determination of Judge Hillis involved the making of an error of law and I uphold it.

16. Whilst I note that there are indications that the younger child may, if what is said is true, be a British citizen, but as yet to be established. If he is a British citizen then it would be open to the Appellant to make a fresh application for a leave to remain on that basis including an application pursuant to Regulation 15A(2a) of the Immigration (European Economic Area) Regulations 2006.

Summary of Conclusions

1. The determination of First-tier Tribunal Judge Hillis did not involve the making of an error and I uphold it.

Signed Date: 26 November 2014

Upper Tribunal Judge Rintoul