Neutral Citation Number: [2010] EWHC 338 (Admin)

Case No: CO/13525/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2010

Before:

MR JUSTICE HICKINBOTTOM

- -

Between:

SB (Uganda)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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S Chelvan (instructed by **TRP Solicitors**) for the Claimant
Vinesh L Mandalia (instructed by **The Treasury Solicitor**) for the Defendant

Hearing date: 18 February 2010

- -

Judgment

Mr Justice Hickinbottom :

Introduction

1. The Claimant is a lesbian, and a Ugandan national.

2. Homosexuality is a matter of sexual orientation or identity rather than behaviour (DW (Homosexual Men - Persecution - Sufficiency of Protection) Jamaica CG [2005] UKAIT 168: see also Regulation 6(1)(e) of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006 No 2525)). For asylum purposes, homosexuals in Uganda form a particular social group, and a member of that group is entitled to refugee status if he or she has a well-founded fear of persecution if returned to Uganda (Islam v Secretary of State for the Home Department [1999] 2 AC 629, and Jain v Secretary of State for the Home Department [2000] Imm AR 76).

3. The proper approach to the question of whether a gay man or lesbian will suffer such persecution was considered in Jain, in which (at pages 82-3) Schiemann LJ said:

> "As it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect. Of course no person has a right to engage in interpersonal sexual activity. His right in this field is primarily not to be interfered with by the state in relation to what he does in private at home, and to an effort by the state to protect him from interference by others. That is his core right. There are permissible grounds for the state interference with some persons' sexual life - e.g. those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others. However, the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a state which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee. That is one end of the continuum.
>
> The other end of the continuum is the person who lives in a state in which such activity is not subjected to any degree of social disapprobation and he is free to engage in it as he is to breathe.
>
> In most states, however, the position is somewhere between those two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from so doing. Some pressures may come from the state - e.g. state subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the community, without those members being subjected to effective sanctions by the state to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-takers is when to ascribe the word "persecution" to those pressures on the continuum."

4. Schiemann LJ went on to stress that, for there to be "persecution", there must be ill-treatment of some severity in terms of persistence and seriousness, without just cause. He also noted, in the context of unenforced legal prohibitions of homosexuality, that a policy of non-enforcement may be subject to change and that the very existence of such a prohibition is capable of adversely affecting a person's private life.

Factual background

5. The Claimant arrived in the United Kingdom on 24 November 2004 on a visitor visa valid until 9 February 2005. She overstayed without attempting to regularise her

immigration status until, on 8 May 2008, she was arrested during an immigration operation. She was found to have a false Ugandan passport and, on 28 May 2008, she was convicted of possessing the identity document of another, and sentenced to 12 months' imprisonment. She was also recommended for deportation.

6. On 25 June 2008, she claimed asylum on the basis that, as a lesbian, she would be at risk on return to Uganda. The Defendant did not accept the Claimant's credibility, specifically not being satisfied either that she had been twice detained in Uganda on account of her sexual identity as she claimed or indeed that she was a lesbian at all. Her claim was refused on 17 December: and a deportation order was issued on 22 December 2008.

7. The Claimant appealed the decision to deport and, as part of that, she challenged the underlying decision refusing her asylum. The appeal was heard on 23 March 2009 by Immigration Judge Grimmett who, in a determination dated 6 April 2009, found:

   (i) The Claimant was a lesbian.

   (ii) The police in Uganda had no right to detain the Claimant because of her sexuality, because the Ugandan anti-homosexual laws were restricted to males.

   (iii) However, the Claimant had been arrested in Kampala in May 2004, and had been briefly detained by police in September 2003 in her home town of Mukono, both on account of her sexual identity.

   (iv) Having been arrested in Kampala in 2004, she was granted bail but failed to comply with the reporting requirements. There was consequently a record in Kampala of that failure to report, referred to in the evidence as a "wanted list". However, although that record would have been known to the police in Kampala, it would not have been notified to other forces. The Claimant would therefore not have been at particular risk of arrest except in Kampala. Even if arrested there, the Immigration Judge found that there was no evidence that she was at risk of ill-treatment of such severity as to amount to persecution, the ill-treatment she had received when arrested in 2003 and 2004 not being of that severity.

   (v) The Claimant had exaggerated the risk on return, her decision to stay in the United Kingdom being less to do with a fear of return to Uganda and more to do with supporting her family through difficult times by working here and sending money back to Uganda. The only evidenced problem in a specific case involving lesbians in Uganda concerned the high profile chair of a particular gay group. The Claimant was a very discreet person, and had conducted her sexual relationships discreetly in the past - and would continue to be discreet if she returned to Uganda; for example, she would not talk to anyone about her sexuality, except those who were close to her whom she could trust.

8. The Immigration Judge consequently found that the Claimant could return to Uganda and continue her discreet homosexual life, without fear of persecution. Her appeal was refused. Reconsideration was refused by a Senior Immigration Judge on 27 April 2009 and by this Court (Burton J) on 15 July 2009.

9. On 23 July 2009, the Claimant made further representations, in the form of a new application for asylum and discretionary leave, which was treated by the Secretary of State as an application to discharge the deportation order. The application was refused on 31 October, and was certified under section 94(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") as being clearly unfounded. On 2 November, the Defendant's Criminal Casework Directorate made the decision to remove the Claimant, the relevant caseworker and decision-maker (Ms Sharon Peet) recording:

> "There are no barriers to [SB's] removal. It is intended to detain her when she reports on 6 November 2009 and to arrange for removal directions to be set for the earliest available flight."

10. In the course of this judgment, I shall have to consider that decision and the events that were consequent upon it in some detail. However, at the time of that decision (2 November 2009), Ms Peet was correct. There was no outstanding representation or application, nor any other barrier to removal, and the Defendant had appropriate statutory powers to detain the Claimant pending removal.

11. The Claimant failed to report on 6 November, telephoning the centre to say she was ill. She was asked to report on 9 November, but did not do so. A direction was therefore made by Ms Peet that day (9 November) for her to be detained when she reported on 13 November.

12. However, in the meantime, on 5 November further representations had been made on behalf of the Claimant, with additional objective evidence including evidence relating to the Anti-Homosexuality Bill which had been tabled in the Ugandan Parliament in October. Those were again treated as an application to discharge the deportation order. The application was refused and certified as clearly unfounded that same day.

13. Further representations were made on behalf of the Claimant the following day, 6 November, particularly expanding upon the new Bill.

14. On 12 November, before any response had been received to those latest representations, the Claimant issued this judicial review, seeking to challenge the Defendant's decisions of 31 October and 5 November 2009 to certify the Claimant's asylum claims as clearly unfounded. The claim was accompanied by an application for urgent consideration and interim relief in the form of an injunction to prevent removal. That day (12 November), I granted an injunction restraining the Defendant from taking any steps towards removing the Claimant pending resolution of the judicial review. That order was served on the Defendant that afternoon, which was of course the day before the Claimant was due to be detained when she reported.

15. The Claimant did report on 13 November, and was detained from 3pm that day, until 3.30pm on 17 November when she was released pursuant to the Order of His Honour Judge McKenna sitting as a Deputy High Court Judge dated 16 November, which ordered the Defendant to release the Claimant "forthwith".

16. It was on 14 November, during the period of that detention, that the Defendant responded to the 6 November representations. Again, he refused to discharge the

deportation order and certified the application as clearly unfounded. Following further correspondence, on 11 February 2010, the Secretary of State reviewed the matter and issued a further detailed 18-page decision letter. That letter refused the Claimant's asylum claim, certifying it as clearly unfounded under section 94(2). It also certified the claim under section 96(1) of the 2002 Act on the ground that the Claimant had failed to raise matters earlier that she now sought to rely upon. Each of those certifications had the consequence of denying the Claimant an in-country right of appeal, the latter denying her any right of appeal at all.

17. Therefore, as can be appreciated from that brief history, since the issue of this claim, matters have moved on: and, by the time of the hearing, the Claimant in substance challenged (i) the Secretary of State's various decisions to certify her asylum and human rights claims as clearly unfounded under section 94(2), (ii) his decision of 11 February 2010 to certify the claims under section 96(1), and (iii) his decision to detain her between 13 and 17 November 2009.

18. In relation to (i), the Secretary of State now relies upon his decision letter of 11 February 2010 and, given that in relation to that decision he was bound to consider all material to that date, the submissions before me rightly focussed on that decision. The earlier section 94(2) decisions have, effectively, been superseded by that decision, and whether that decision was lawful is determinative of the section 94(2) issue before me.

19. In relation to (i) and (ii), the Claimant's applications were focussed on her asylum claim, because her human rights claims (under Articles 3 and 8) were based on the same facts and foundation and, in my view, neither could succeed if her asylum claim failed. The submissions before me therefore concentrated exclusively on the asylum claim, as will this judgment.

20. I shall deal with those challenges in turn, as follows:

    (i) section 94(2) certification (paragraphs 21-56):

    (ii) section 96(1) certification (paragraphs 57-59): and

    (iii) unlawful detention (paragraphs 60-85)

Section 94(2) Certification: The Law

21. Under the UK Borders Act 2007, the Secretary of State must deport a "foreign criminal", which is defined to include a person who is not a British citizen who is convicted of an offence in the United Kingdom for which she is sentenced to a term of imprisonment of 12 months or more (section 32). That obligation is subject to a number of exceptions, including where removal would breach a person's rights under the European Convention on Human Rights or the United Kingdom's obligations under the Refugee Convention (section 33(2)).

22. A decision refusing to revoke a deportation order attracts a right to appeal out of country (section 82(2)(k) and 92(1) of the 2002 Act), but in-country if asylum and/or human rights are raised (section 92(4)). However, such an in-country appeal cannot

be brought if the Secretary of State certifies the asylum and/or asylum claims as "clearly unfounded" (section 94(2)).

23. Counsel before me (Mr Chelvan for the Claimant, and Mr Mandalia for the Secretary of State), in my view wisely, did not enter into a debate as to whether the scope of "clearly unfounded" for the purposes of section 94(2) differs from the scope of the perhaps more frequently encountered "[no] realistic prospect of success" for the "fresh claim" purposes of paragraph 353 of the Immigration Rules (HC 395). The test for a fresh claim imposes what has rightly been called "a somewhat modest test" (WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495; [2007] Imm AR 337 at [7] per Buxton LJ), namely whether there is a realistic prospect that a tribunal, considering the new material with that previously considered, and applying anxious scrutiny to it, will conclude that the applicant will be exposed to a real risk of persecution on return (WM (DRC) at [11]). There is high authority that the test for "clearly unfounded" is, at least in practice, the same (ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6; [2009] 1 WLR 348 per Lord Phillips of Worth Matravers at [20], Lord Brown of Eaton-under-Heywood at [73] and Lord Neuberger at [81]; cf Lord Carswell at [62] and Lord Hope at [46]). In R (AK (Sri Lanka)) v Secretary of State for the Home Department [2009] EWCA Civ 447, Laws LJ considered the difference between "clearly unfounded" (i.e. "no chance of success") and "[no] realistic prospect of success" (i.e. "no more than a fanciful chance of success") to be of "invisible" practical significance. I respectfully agree, particularly in a case such as this in which the Claimant claims that, following a decision of the tribunal that the Claimant will not be at risk on return to Uganda, new material would or might lead the tribunal to a different conclusion.

24. To show a claim is not "clearly unfounded" is therefore a very low hurdle for a Claimant to overcome: and with good cause because, if an asylum or human rights claim is not "clearly unfounded" there is, by definition, a risk that the applicant will suffer persecution and/or a breach of his or her human rights on return. Where there is any such risk, the statutory scheme requires the issue of risk to be tested before an independent tribunal whilst the applicant is in the United Kingdom.

Section 94(2) Certification: Discussion

25. Mr Chelvan submitted that, in certifying the Claimant's asylum claim (which she put forward by way of application to discharge the deportation order) as clearly unfounded under section 94(2) of the 2002 Act, the Secretary of State erred in law. In the light of the additional evidence made available as to the position of gay men and lesbians generally in Uganda and as to the particular risks to the Claimant, he submitted that the Secretary of State had acted irrationally in deciding that there is no chance that a tribunal would conclude (contrary to the Secretary of State's own view) that the Claimant will be exposed to a real risk of persecution on return.

26. The Claimant relies upon the following material - all expert evidence - that was not available to Immigration Judge Grimmett which, she contends, shows that the situation for homosexuals in Uganda has materially deteriorated since the determination of the immigration judge, and that the risk factors specifically for the Claimant in returning to Uganda are materially different from those assessed by the Judge.

(i) Reports of Dr Michael Jennings dated 22 and 27 July 2009, and 27 January 2010

Dr Jennings is a Senior Lecturer in the Department of Development Studies, The School of Oriental and African Studies, University of London, specialising in the politics and society of East Africa. He has spent much time in East Africa, and is the Uganda expert for the annual journal of record, "Africa South of the Sahara".

(ii) Report of Mr Paul Dillane dated 2 February 2010 ("the AI Report")

Mr Dillane is the Refugee Researcher at Amnesty International ("AI") UK, who works with the AI Office in Kampala. AI have a Uganda Team that conducts field research, and has daily contact with a range of sources in Uganda, including the Government as well as refugee and human rights organisations. The Court of Appeal has remarked that:

> "Amnesty International is recognised as a responsible, important and well-informed body. Immigration tribunals will always give consideration to their reports, even if they are in report form and not in the form of evidence from someone present to be questioned." (R (K) v Immigration Appeal Tribunal (1999) (Unreported, 4 August 1999, Transcript page 9, per Buxton LJ).

Certainly, the opinions of AI are worthy of considerable respect.

(iii) Report from Dr Chris Dolan dated 31 January 2010

Dr Dolan is the Director of the Refugee Law Project in Uganda, a community project of the Faculty of Law, Makere University, and also the project coordinator for the organisation's work on sexual and gender-based violence, harassment and persecution. As such, he has regular contact with sexual minority groups within Uganda. His report particularly addresses issues arising out of the Anti-Homosexuality Bill.

(iv) The Immigration Advice Service Country Information Centre Country of Origin Information Report, January 2010 ("the COI Report")

This comprises over 350 pages of recent background material, almost all from the period 2009-10, including reference to a fieldwork project conducted by Dr Dolan on treatment of returnees, particularly at Entebbe Airport.

27. Before me, the Defendant did not adduce any expert evidence, although, before responding to the Claimant's claims, he had apparently looked at material relevant to the Claimant's claims on the internet. Mr Mandalia did not doubt the experience and expertise of the Claimant's experts, but submitted that the evidence could be given no or no significant weight because it lacked specific examples of ill-treatment of identified gay men and lesbians in Uganda. However, not only are there some such examples in the material, but these are experts, entitled to give opinion evidence based upon their experience and expertise. They give evidence, for example, that there is widespread underreporting of incidents: and evidence of general trends in

public and state violence towards lesbians. The weight to be given to the evidence - and the extent to which evidence in general form is undermined by the lack of specific examples, where there are few or none given - are matters for the decision-maker (or, on appeal, the tribunal): but evidence of ill-treatment of lesbians as a group in Uganda is relevant to the risk the Claimant may face on return there, and may of course have significant weight. The sparsity of specific examples is not, in itself, a reason for ignoring expert evidence. That evidence must be considered on its merits.

28. It is unnecessary for me to go through all of the evidence relied upon by the Claimant in detail. However, it includes evidence of the following.

29. The Ugandan Penal Code provides that a person who "has carnal knowledge of any person against the order of nature" commits a criminal offence (section 145), and is liable to a maximum sentence of 7 years imprisonment (section 146). It is uncertain whether, as a matter of law, this criminalises intimacy between women. However, the new material includes evidence that (i) members of the Government have recently suggested that this provision does criminalise lesbianism, and (ii) whether or not it is criminal, lesbians have been arrested on charges of homosexuality, and certainly detained by the police as a result of their identity; and there are reports of poor and violent treatment during detention including rape of lesbians (see Dr Jennings' Report 29 July 2009, paragraph 5; and Dr Jennings' Report 27 January 2010, paragraphs 8, 13 and 15).

30. Prosecutions against gay men under these current provisions are rare, but gay men have been arrested on charges of homosexuality (Dr Jennings' Report 27 July 2009, paragraphs 10 and 16)

31. In the period 2009-10, the ill-treatment of gay men and lesbians on account of their sexuality has become more intense in the face of a public campaign against homosexuality which appears to have driven Government efforts to be seen to be addressing the issue (Dr Jennings' Report 27 July 2009, paragraph 18).

32. In terms of social attitudes to homosexuality, there has been a significant worsening in the period 2009-10: and there are reports of "continuing attacks on [lesbian, gay, bisexual and transexual] people and on human rights defenders working on [lesbian, gay, bisexual and transexual] rights", and now a high risk of violence towards those identified as being gay or lesbian (Dr Jennings' Report 27 January 2010, paragraph 6, the quote used by Dr Jennings being from the AI Report on Uganda, 2009: and AI Report, page 4). Because of the attitude of the police and authorities, there is significant underreporting of incidents (Dr Jennings' Report 27 January 2010, paragraph 6).

33. In relation to the Government stance, the Ugandan Government has issued warnings that it will take firm action on homosexuality and the human rights of gays and lesbians will not be respected or protected (Dr Jennings' Report 27 January 2010, paragraph 9: and AI Report, page 4). The Government appears broadly to support the Anti-Homosexuality Bill, although it is a Private Member's Bill (Dr Jennings' Report 27 January 2010, paragraph 12).

34. Dr Dolan gives evidence on the Anti-Homosexuality Bill. The Bill was tabled in the Ugandan Parliament in October 2009. It is currently on its second reading (of three

readings). The evidence suggests that the Bill will be passed, although not necessarily in exactly the form of the current draft, which has sparked heated debate in Uganda and considerable international concern, described as "outrage", in some quarters.

35. The Bill has as a premise that "same sex attraction is not an innate and immutable characteristic", and same sex attraction is a behavioural "deviation" (Memorandum, paragraph 1.1: cf the premise upon which international refugee law is based, paragraph 2 above). It makes clear beyond doubt that under the Bill's provisions lesbianism would be criminal, by making it an express offence (Clause 1(1)(c)), with a maximum sentence of imprisonment for life or, for "serial offenders", the death penalty (Clause 3(1)(f) and (2)), although the evidence suggests that the death penalty might be replaced with a lesser penalty, such as enforced "corrective therapy". Furthermore, under the Bill, it would be made an offence (i) as the owner, occupier or controller of premises, knowingly to suffer any person to be on the premises and "carnally know" someone of the same sex (maximum penalty 5 years): and (ii) to be a person in authority, and not to report any offence under the Bill (maximum penalty 3 years). Under the Bill, it would therefore become an offence, for example, to rent property to a known gay man or lesbian, or, in certain circumstances, not to report a gay or lesbian to the police. There is a long-arm jurisdiction clause: it would be an offence under the Bill to be a Ugandan national and do acts outside the Ugandan jurisdiction that, under the Bill, would be an offence in Uganda (Clause 16). These would all be extensions of the current law. Clause 18 would purport to nullify any international obligation of Uganda that is contrary to the "spirit and provisions" of the Bill, and would appear specifically to deny the human rights of Ugandans in this regard.

36. Gay men and lesbians in Uganda face a high risk of being targeted by police and state security forces, especially if they have a high profile whether from having their sexuality made public or through being engaged in activism (Dr Jennings' Report 27 July 2009, paragraph 19). However, there is evidence of identified gay men and lesbians being the subject of ill-treatment, by both the public in terms of lynching and the police, without being otherwise "high profile" (e.g. the newspaper report of an incident at Kawaala, COI Report, page 42).

37. If the police or other state authorities became aware of the Claimant's presence, and of her history of previous arrest and failure to report, there is a high risk that the police would want to detain her, and that she would be arrested and refused bail (Dr Jennings' Report 27 July 2009, paragraphs 28 and 31).

38. There is a risk that the police will become aware of her presence. Given she is on a "wanted list", there is high risk of her being detained on arrival if a close check is made on arrival (Dr Jennings' Report 27 July 2009, paragraph 28), and there is at least some evidence that there is a check on failed asylum seeker returnees (Refugee Law Project, Fieldwork Findings from Kampala, July 2009: COI Report, page 47). It is also very likely that the "wanted list" including the Claimant will have been passed on to all police stations, which would raise the risk of arrest outside Kampala (Dr Jennings' Report 29 July 2009, paragraph 30). She would not be able to relocate within Uganda, because of her history (AI Report, page 10: see also Report of Dr Dolan, page 7).

39. Given the current hostile attitude towards homosexuality, it would be more difficult for the Claimant to bribe her way out of detention, and it is likely that any bribe would be for a considerable sum (Dr Jennings' Report 27 July 2009, paragraph 32: and Dr Jennings' Report 27 January 2010, paragraph 18).

40. For the vast majority of Ugandan homosexuals, the only strategy to avoid ill-treatment by the public and the authorities (including imprisonment and the risk of corrective rape) is to present as heterosexual, i.e. by getting married (Dr Dolan Report, page 8). It would be difficult for the Claimant to maintain discretion to ensure her sexuality remained secret, given that she is unmarried and without children (Dr Jennings' Report 27 January 2010, paragraph 19).

41. On return, the Claimant would "be at real risk of harm should she be forcibly returned to Uganda due to her profile and her history of arrest and detention" (AI Report, page 8), her fears being "well placed and plausible" (AI Report, page 9). She would face "a substantial risk of persecution" (Dr Jennings' Report 27 July 2009, paragraph 33).

42. Given this evidence - much of which post-dates the determination of Immigration Judge Grimmett last year - it is perhaps surprising that the Secretary of State took the view that this material, taken with the material the Claimant previously relied upon, was not such as to give the Claimant any chance at all of succeeding with her new asylum claim before a tribunal.

43. The Secretary of State did so on two main grounds.

44. First he in his decision letters, and Mr Mandalia in his submissions before me, relied heavily upon JM (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 1432, in which judgment was delivered as recently as 18 November 2009. As the case name indicates, JM was a Ugandan national, and he sought asylum on the basis that he was gay and would suffer persecution in Uganda because of the anti-homosexuality laws found in the Ugandan Penal Code. The evidence was (and the Asylum & Immigration Tribunal, from whom the appeal was made, had found) that the legislation was not enforced and there was no evidence of arrest or harassment from the Ugandan authorities or the population generally. The evidence in the case was from before December 2007, when the case was heard by the tribunal.

45. The Court of Appeal's judgment was therefore made on the premise that the ill-treatment of gay men in Uganda was limited to discriminatory legislation that was not enforced. The court held that (at [14], per Sir David Keene who gave the only substantive judgment):

> "… [T]he existence of a discriminatory legislative provision in an applicant's home country will, by itself, not normally amount to persecution unless it has the consequences of sufficient severity for that individual.".

Given there was no evidence that gay men and lesbians were arrested, harassed or abused by either the state authorities or the public in Uganda, the court unsurprisingly held that JM would not face the risk of persecution on return. The mere fact of (unenforced) discriminatory legislation was insufficient to amount to persecution.

46. But this case is very different. Particularly, the premise upon which JM was based (i.e. that the only ill-treatment of homosexuals in Uganda is unenforced discriminatory legislation) is not a premise upon which the Claimant's claim for asylum can be determined. Not only is there the recent evidence of gay men and lesbians being arrested in Uganda because of their sexual identity, Immigration Judge Grimmett found that the Claimant had herself been arrested twice because she was perceived to be a lesbian. There is evidence that both public and the state in Uganda are now more active in their opposition to the gay and lesbian community. The force of the evidence relating to the Anti-Homosexuality Bill (which of course has not yet been passed), and evidence that those in authority in Uganda are increasingly suggesting that the current Penal Code provisions relate to lesbians as well and gay men, is that it arguably reflects a growing willingness on the part of the state to enforce anti-homosexuality legislation in Uganda. As Schiemann LJ said in Jain (at page 83):

> "… I am conscious of decisions such as Modinos v Cyprus 16 EHRR 492, where the court held that a policy of not prosecuting provides no guarantee that the policy will continue."

There is also evidence in the material that, amongst significant sections of the public in Uganda, the Bill is a popular measure, and it has strengthened public attitudes against homosexuals there, with the result that there has been an increase in anti-homosexual ill-treatment since the Bill was tabled in October 2009.

47. There was therefore evidence before the Secretary of State on 11 February 2010 which strongly suggested that the place of Uganda on the continuum of conditions in which gay men and lesbians may be required to live in a particular state, as described by Schiemann LJ in Jain, has moved recently, and certainly since the time the evidence was submitted in JM (December 2007). Given the findings of the tribunal in relation to the Claimant's arrests, whatever view is taken of the other evidence, this claim is necessarily different from JM. The question is whether, on the evidence as it now stands, the risk to this claimant is sufficient to enable her to claim refugee status: or rather, in relation to the application now before me, whether the Secretary of State could properly find that, on that evidence, there was no chance of a tribunal concluding that there may be such a risk. JM, which was decided on the basis that the Ugandan authorities did not arrest or ill-treat gay men or lesbians (nor did the public ill-treat them), cannot be a determinative answer to the issue raised in this claim.

48. Nor, in my judgment, is the determination of Immigration Judge Grimmett a trump card for the Secretary of State, as Mr Mandalia's second ground suggested.

49. From the decision letter of 17 December 2008 (refusing the Claimant's asylum claim), the Secretary of State clearly did not believe the Claimant's core account: he did not accept that she was a lesbian at all, nor that she had been arrested twice in the circumstances she claimed. The Immigration Judge considered that the Claimant had exaggerated her fear of return, and did not consider the abuse she had suffered at the hands of the police during her periods of detention was sufficiently severe to amount to persecution - but the judge accepted and found that (i) she is a lesbian, (ii) she had been arrested twice in 2003 and 2004 in the circumstances as the Claimant described, (iii) she was on a "wanted list" of those who had not complied with their reporting

conditions of bail and (iv) she ran the risk of being arrested again where the wanted list was known to the police.

50. In support of his contention that the new evidence does not materially change the Claimant's case from that which was before the Immigration Judge, the Secretary of State particularly relies upon the Judge's findings that:

(i) The Claimant would only be at risk of arrest in Kampala (because the record of her bail infringement was only kept there) and she could internally relocate.

(ii) Even if arrested in Kampala, she would not face the risk of persecution because the harassment she suffered at the hands of the police when she was arrested in 2003 and 2004 was not sufficiently severe to amount to persecution, and there was evidence of only one incident in which lesbians had suffered ill-treatment during detention.

(iii) The Claimant could and would live discreetly in Uganda, as a lesbian, without fear of persecution.

51. However, the new evidence includes evidence to the effect that the position of lesbians in Uganda has generally deteriorated over the last 12-18 months, with regard to the conduct of the public, the Government and the police. In respect of the findings of the Immigration Judge upon which the Secretary of State relies, there is evidence as follows:

(i) The "wanted list" is likely to have been distributed to all police stations, and hence the risk of the Claimant being arrested is not restricted to Kampala. Internal relocation would not be practically possible for the Claimant.

(ii) There is some evidence of the abuse suffered by those in detention as lesbian being severe, and certainly there is the risk of more severe ill-treatment than that which the claimant suffered in 2004 (although that included some touching of her intimate parts and a threat of her being put into a male cell with the consequent risk of rape).

(iii) There is evidence that the Claimant faces a risk of being identified as a bail runner and/or a lesbian on entry into Uganda: and, in Uganda, it is likely that the Claimant will be known as a lesbian because of her history and listing on the "wanted list" and/or because of the increased sensitivity and opposition to homosexuality. It is unlikely that she will be able to live a discreet lesbian life in Uganda.

52. This evidence, if accepted, would undoubtedly have the potential for undermining the Immigration Judge's conclusion that the Claimant would not face a real risk of persecution on return to Uganda.

53. Although I can only intervene if the Secretary of State has erred in law - i.e. if his conclusion that the Claimant's claim is clearly unfounded is itself irrational or otherwise unlawful - I stress again that the "clearly unfounded" hurdle is, for the Claimant, low. Given the potential for the new material undermining the conclusion of Immigration Judge Grimmett as to risk on return, I am satisfied that the Secretary

of State did err in concluding that there was no chance of a tribunal finding that, contrary to his own view, if she were returned to Uganda, there would be risk of the Claimant being persecuted on the ground that she was lesbian. In my judgment, on the material available to him as at 11 February 2010, the Secretary of State could only rationally and lawfully conclude that there was a chance - if it matters, more than a fanciful chance - that a tribunal would take a different view.

54. Of course, the view the tribunal may take is a matter for them, and not me. Nothing I have said in this judgment should be taken as any opinion on the substantial merits of the Claimant's asylum claim (over and above the view I have taken of the evidence for the limited purposes of this application), nor should it give the Claimant undue optimism as to her chances of ultimate success on that claim.

55. However, for the reasons I have given, I shall allow the judicial review and quash the decision of the Secretary of State of 11 February 2010 under section 94(2) to certify the Claimant's claim for asylum (made in response to the deportation order and by way of application to discharge that order) as clearly unfounded. I need not make any formal order in relation to the earlier section 94(2) decisions.

56. As I understand it, in those circumstances, the Secretary of State intends to rely upon his decision of 11 February 2010, against which the Claimant will now have a right of appeal to the First-tier Tribunal. I hope and expect the parties will be able to agree directions in relation to that, but, if they cannot, I will hear submissions.

Section 96(1) Certification

57. Under section 96(1) of the 2002 Act, there is no appeal against an immigration decision where the Secretary of State certifies:

> "(a) that the person was notified of a right of appeal under that section against another immigration decision ('the old decision') (whether or not an appeal was brought and whether or not any appeal brought has been determined),
>
> (b) that the claim or application to which the new decision relates relies on a matter that could have been raised against the old decision, and
>
> (c) that, in the opinion of the Secretary of State… , there is no satisfactory reason for that matter not having been raised in an appeal against the old decision."

58. Properly in my judgment, this ground was not pursued by Mr Mandalia at the hearing. The section 96(1) certificate of 11 February appears only to have been made in relation to the Claimant's Article 8 claim - and the Claimant does not pursue a claim that removal would be in breach of her rights to a family life with her partner in the United Kingdom. Insofar as it relates to the asylum claim (or her related human rights claim), the Claimant's new claim relied upon new evidence and it is clear that the matter could not have been raised in its present form in the original application that led to the initial decision (and ultimately to the appeal before Immigration Judge Grimmett).

59. Insofar as the certificate did concern the asylum and related human rights claim, I shall simply quash it.

Unlawful Detention: The Law

60. I now turn to the final decision which the Claimant challenges, namely the decision to detain her from 13 to 17 November 2009.

61. Where a person has served a period of imprisonment and the Secretary of State thinks that section 32(5) of the UK Borders Act 2007 applies (i.e. the person is a "foreign criminal": see paragraph 21 above), then that person may be detained pending the making of a deportation order. Where a deportation order is made in accordance with section 32(5), the Secretary of State is obliged to detain the deportee pending removal "unless in the circumstances the Secretary of State thinks it inappropriate" (section 36(2)).

62. Although I do not appear to have a copy of the deportation order of 22 December 2008 itself, it is clear that it was made in accordance with section 32(5) (see, e.g., paragraph 4 of the UK Border Agency letter to the Claimant, 17 December 2008, the Case Summary in the Minute of Decision to Detain, 2 November 2009 and the determination of Immigration Judge Grimmett, paragraph 1).

Unlawful Detention: Discussion

63. I have already set out the background to the detention, but some further consideration of the facts is now required.

64. As I have indicated, the Claimant's 23 July 2009 representations were refused as an application for asylum and discharge of the deportation order (and certified as clearly unfounded) on 31 October 2009. On 2 November, Ms Peet on behalf of the Defendant made the decision to detain the Claimant and serve removal directions "to be set for the earliest available flight". That was minuted, with reasons. That minute notes (correctly) that, as at 2 November, there was no barrier to the Claimant's removal, the 31 October letter having responded to the only outstanding applications. In making the decision to detain, Ms Peet considered "any evidence of previous absconding, failure to comply with conditions of temporary admission or release on immigration bail" and noted, "None known". There being no barriers to removal, that removal was noted as "imminent".

65. The Claimant did not report on 6 or 9 November, although she contacted the centre on 6 November to say that she could not report because she was unwell. The 2 November minute is noted by Ms Peet on 9 November as follows:

> "New detention papers faxed on 9/11/09 to detain on 13/11/09."

However, the justification for detention, and the proposal that she be detained with a view to her being removed on "the earliest available flight" remained the same. New representations had of course been made on 5 and 6 November, those from the 6 November being outstanding as at 9 November. Nevertheless, as at 9 November, there was no barrier to removal.

66. On 12 November, the judicial review claim was issued, together with an application for urgent consideration and interim relief. That afternoon, on the papers, I made the following order:

> "1. The Defendant or anyone acting on his behalf or otherwise be prohibited from taking any steps towards removing the Claimant from the United Kingdom pending the resolution of this judicial review or further order of the court.
>
> 2. Permission to the Defendant to apply to discharge or vary this order upon 24 hours written notice to the Claimant's Solicitor.
>
> 3. The Claimant's solicitors shall notify the Defendant of the making of this Order forthwith…."

67. The Defendant received the Order that day. Ms Peet said (Sharon Peet Statement, 2 February 2010, paragraph 7) that she understood the effect of the order to be:

> "… that the Claimant could not be deported until the judicial review was resolved, however, there was no indication that there was a bar to her detention (after all the Claimant had no form of leave to remain in the United Kingdom and was a such liable at this stage to be detained)".

68. Hence, Ms Peet's instructions of 9 November were not withdrawn: and, when the Claimant reported the following day, she was detained. The Claimant had with her a copy of the 12 November Order, but those at the Enforcement Unit said it was not up to them: they had had "orders from above", and the Claimant would be detained, as she was (Sean McLoughlin Statement 24 November 2009, Paragraph 4).

69. On 13 November, at the time of her initial detention, the Claimant was handed a letter dated that day setting out the justification for the detention. I stress that this letter was dated the day after Ms Peet had received the Order of 12 November.

70. The letter appears to have been written on a misunderstanding, because it suggests that the Secretary of State thought that section 32(5) applied and a deportation order in accordance with that section was pending: and so he considered whether the Claimant was liable to detention under section 36(1). If fact, a deportation order had been issued in accordance with section 32(5) on 22 December 2008, and consequently section 36(2) applied, under which the Secretary of State was required to detain the deportee pending removal "unless in the circumstances the Secretary of State thinks it inappropriate".

71. In any event, the Claimant's detention was considered under the broader discretion of section 36(1). That is reflected in the Notice to Detainee served on the Claimant on 13 November 2009 which states:

> "Detention is only used when there is no reasonable alternative available."

It is also reflected in the Defendant's Supplementary Grounds of Defence at paragraphs 10 and following, which confirm that Ms Peet considered the question of

detention in accordance with the Defendant's Operation Enforcement Instructions and Guidance ("EIG"), asking herself "whether removal [was] imminent and whether detention in all the circumstances [was] appropriate" (paragraph 11).

72. The letter of 13 November indicated that the Secretary of State had decided to detain the Claimant "to effect removal from the United Kingdom", that removal being "imminent", and the decision had been reached:

> "on the basis of the following factors:
>
> - There are no barriers to your removal and you can safely be returned to Uganda.
>
> - You have exhausted all of your rights of appeal and your removal from the United Kingdom is pending."

The Secretary of State considered that the Claimant's "detention was justified for the reasons stated in this letter."

73. In those circumstances, was the Secretary of State's decision to detain the Claimant on 13 November 2010 lawful?

74. I do not consider it was lawful for two reasons.

75. First, in accordance with his own EIG, the Defendant considered detention appropriate on the basis of two factors, namely removal was imminent and the risk of the Claimant absconding. However, these factors - whether considered separately or together - provided no proper basis for the decision to detain.

76. In respect of imminence of removal, the EIG indicates that removal is imminent where it may be effected within 4 weeks. Although there was a judicial review in progress - and Ms Peet understood that, following the 12 November Order, the Claimant could not be removed pending the conclusion of that judicial review or further order of the court - it was considered that "the Claimant's judicial review could be dealt with expeditiously" (Supplementary Grounds of Defence, paragraph 15(d): and Sharon Peet Statement 2 February 2010, paragraph 9). However, the Defendant made no application to the court to lift the order of 12 November to allow removal, nor did he make an immediate or specific application for expedition of the judicial review. The Defendant wished to remove the Claimant on "the earliest available flight", and apparently had in mind removing her on a flight of 19 November. The Acknowledgment of Service (which contained a standard form request for expedition) was lodged on 24 November.

77. The Defendant erred in detaining on the basis that removal was "imminent" in his own terms, or, having detained the Claimant, in failing to take appropriate steps to ensure that she could be removed within that time frame.

78. The second factor was the risk of absconding, i.e. that, in the light of her lack of ties in the United Kingdom, the exhaustion of her claims for asylum and previous history of absconding, there was a risk that she would abscond. The Defendant's Supplementary Grounds rely very heavily upon this factor (paragraphs 13-15).

79. However, Ms Peet accepts that the Claimant had arguably not absconded by 2 November 2010 and she accepts that the Claimant adhered to her reporting requirements from 17 November 2008 until her detention on 13 November 2009 (Statement 2 February 2010, paragraphs 16-17). Ms Peet had noted in the 2 November minute (which was the basis of the detention decision) that there was no evidence of previous absconding or failure to comply with conditions of temporary admission or release. On the basis of the EIG definition (paragraph 19.1.2), the Claimant was not an absconder at any time before 13 November 2010, because, even during the period 6-13 November 2009, she remained in contact with the Defendant and her whereabouts were known. It is noteworthy that the box relating to the likelihood of absconding in the Notice to Detainee of 13 November 2009 was apparently not ticked. The risk of absconding was clearly not a factor that Ms Peet took into account when deciding that it was appropriate to detain the Claimant on 13 November 2009.

80. In the circumstances, the decision to detain the Claimant on 13 November 2009 was unlawful because it had no rational basis and was in breach of the Defendant's own policy guidance set out in the EIG. No reason has been put forward by the Defendant for departing from that guidance.

81. That is sufficient to find for the Claimant in relation to this challenge, but I also consider that the decision of 13 November 2009 to detain was unlawful as it was made at a time when the Defendant was injuncted by the Order of 12 November 2009 from "taking any steps towards the removal of the Claimant". When the Defendant detained the Claimant on 13 November, the Defendant had notice of that Order.

82. The power to detain under section 36 of the UK Borders Act 2007 (or the powers of detention pending deportation under the Immigration Act 1971, which are referred to in some of the Defendant's documents in this case) can only be used for the purpose of removing the detainee by way of deportation (R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888; [2003] INLR 196 at [46] per Dyson LJ). In any event, the minute of 2 November 2009 and the letter to the Claimant of 13 November 2009 make clear that the Claimant was in fact being detained to effect her removal. That was the intention. Whilst I accept Ms Peet's evidence that she misunderstood the terms of the Order of 12 November - she thought that it merely prevented actual removal - the detention of the Claimant on 13 November could only have been a "step towards removal". The Order of 12 November 2010 clearly prohibited such a step. Whilst I accept that Ms Peet acted in good faith, her misunderstanding of that Order cannot be any defence to a claim that detention of the Claimant was in contravention of that Order.

83. The detention was therefore also unlawful as being in breach of the 12 November 2009 Order.

84. Given that I have found the entire period of the Claimant's detention unlawful, I do not have to make any specific findings in relation to the continuing detention after the Claimant had obtained the Order of 16 November 2009 from Judge McKenna ordering her release "forthwith". However, it may be of assistance if I made two observations in relation to the Defendant's failure to release the Claimant sooner, following that Order. First, the Order of 16 November was clear: it ordered the Claimant's release "forthwith", i.e. immediately. The permission to apply on 24

hours notice did not derogate from that. Second, although again I accept that Ms Peet acted in good faith, I do not accept that, although the Order of Judge McKenna was not received until about 5.30pm that evening, "arrangements could not be made that evening to release the Claimant" (Sharon Peet statement, 2 February 2010, paragraph 10). No evidence is put forward to substantiate that. In any event, the Claimant was not released until 3.30pm the following day. I appreciate that the Defendant sought the advice of the Treasury Solicitors, but there is no good reason why that took nearly 24 hours. Properly, and for obvious reasons, access to the Treasury Solicitors is available immediately and round the clock.

85. For all those reasons, I consider the detention of the Claimant from 3pm on 13 November to 3.30pm 17 November 2009 to have been unlawful. I shall quash the decision to detain, declare the Claimant's detention from 3pm on 13 November, to 3.30pm on 17 November 2009 to have been unlawful, and I shall transfer the claim to the appropriate county court to assess damages on the basis of directions which, I hope, will be agreed between the parties. Again, if there are any difficulties, I shall hear submissions.

Conclusion

86. For those reasons, I shall allow the application for judicial review, and quash the following decisions of the Secretary of State:

(i) his decision of 11 February 2010 to certify the Claimant's claim for asylum under section 94(2) of the Nationality, Immigration and Asylum Act 2002:

(ii) his decision of 11 February 2010 to certify the Claimant's claim under section 96(1) of the Nationality, Immigration and Asylum Act 2002: and

(iii) his decision of 13 November 2009 to detain the Claimant.

87. I shall further:

(i) declare that the Claimant's detention from 13 to 17 November 2010 was unlawful: and

(ii) transfer the quantification of the Claimant's damages for the unlawful detention to the appropriate county court, subject to directions, to be agreed between the parties if possible.

88. I hope that an order in relation to all other matters, including costs, can be agreed between the parties but, insofar as it cannot, I will be pleased to hear submissions.