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The Republic of Poland
Refugee Board

Warsaw, 25 July 2012



The Decision

Acting on the basis of the Art 13 p. 1 and Art 89p p.1 of the Law of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland (unified text JL of 2009, no 189, item 1472) as well as Art 138 § 1 p. 2 of the Code of Administrative Proceedings (unified text JL of 2000 no 98, item 1071 with amendments), the Refugee Board panel of:

- 1) Roman Wieruszewski – the Chairperson
- 2) Marian Kozlowski – the Member
- 3) Michal Kowalski – the Member

on 25 July 2012, after the consideration of the appeal of
Mr. W.S.
born on
citizen of Uganda

from the decision of the Head of the Office for Foreigners
no [REDACTED] of 6 April 2012
refusing the refugee status, refusing the subsidiary protection and issuing the expulsion
order based on the assumption that there are no grounds for granting tolerated stay

- 1. revokes the challenged decision in all aspects**
- 2. grants the refugee status**

The Justification

Mr. W.S., citizen of Uganda, of Ugandan nationality, has applied for asylum in the Republic of Poland on 3 January 2011.

The Head of the Office for Foreigners, in his decision no [REDACTED] of 6 April 2012, refused the foreigner the refugee status, refused the subsidiary protection and issued the expulsion order based on the assumption that there were no grounds for granting tolerated stay. Before issuing the decision, the Head of the Office for Foreigners allowed the Association Campaign Against Homophobia to participate in the proceedings, in its ruling no [REDACTED] of 22 March 2012.

Within the deadline prescribed by the law the applicant submitted the appeal to the Refugee Board, asking for revoking of the decision of the Head of the Office for Foreigners and granting the international protection. Subsequently, the applicant supplemented the appeal with a number of motions as to the evidence referring to the situation in the country of origin. Appeal from the above mentioned decision of the Head of the Office for Foreigners as well as the motions as to evidence referring to the situation in the country of origin were also filed by the Association Campaign Against Homophobia, participant to the case.

After the consideration of the applicant's appeal, filed within the given deadline, the Refugee Board recognizes the following:

The first instance body reviewing the evidence material gathered in the case stated that the applicant did not indicate the relevance of his fear of persecution based on the race, religion, nationality, membership in the particular social group or political opinion, as referred to in Art 13 p. 1 of the Law of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland (unified text JL of 2009, no 189, item 1472 with amendments, hereinafter referred to as LGPA). Subsequently, the first instance body assumed that the applicant does not fulfil the criteria indicated in Art 15 of the LGPA on subsidiary protection as well as there were no grounds to grant the applicant the permit for tolerated stay in line with Art 97 p. 1.1 and 1.1a of LGPA.

After a full consideration of the gathered evidence material the Refugee Board does not agree with the above assumptions of the first asylum body, stating that in the case of the applicant there were no circumstances allowing to claim the well founded fear of persecution based on the race, religion, nationality, membership in the particular social group or political opinion, as referred to in Art 13 p. 1 of the LGPA.

The applicant was stopped by the Border Guard officers on 16 December 2010 in the transit hall of Warszawa – Okecie Airport. He arrived to Poland by air, based on the visa issued by the relevant Polish consular authorities in Nairobi, Kenya. The applicant received the visa based on the planned participation in the scientific conference at the Jagiellonian University in Krakow, Poland. However, upon the arrival in Poland the applicant bought the air ticket to Stockholm, where he intended to travel instead of

Krakow. Subsequently, the District Court in Warsaw decided on 18 December 2010 to place the foreigner in the Guarded Centre for Foreigners, as the applicant declared that he applied for Polish visa to escape from his country. On 3 January 2011, the applicant filled the application for asylum in Poland. The applicant claimed the risk of persecution in the country of origin due to his homosexual (bisexual) orientation. The applicant allegedly had been beaten, tortured and humiliated in the country of origin because of his orientation. He claimed he had been stopped by the Police twice (in 2007 [2006] and 2010) also because of his orientation. The first time he was caught during the homosexual intercourse in the car. In 2010, he was stopped after he organized a meeting for the persons with homosexual orientation. The applicant claimed being the member of the organization of Ugandan homosexuals called "Smug". In the asylum application the foreigner also claimed that on 20 December 2010 his house in Uganda was burned down and his family is under the threat because of his earlier activity. The above circumstances were further clarified during the asylum interview, which took place on 26 January 2011. The applicant explained that his wife and two children remained in Uganda. The applicant had decided to get married to hide his dominant homosexual orientation as well as because he wanted to have children.

In accordance with Art 13 of the LGPA the refugee status shall be granted to a foreigner, if as result of a well founded fear of persecutions in the country of origin because of his/her race, religion or nationality, political opinion or membership in a particular social group he/she can not or does not want to enjoy protection of such country. In case of the applicant it was stated that the reason for his persecution was the sexual orientation. Art. 14 p. 2 of the LGPA states that depending on conditions prevailing in the country of origin a determined social group may constitute a group, whose members have common sexual orientation, with the reservation that sexual orientation should not be bound with any acts constituting the offence under the Polish law. Thus, it is necessary to establish, if the applicant belongs to the group of persons with homosexual orientation in the notion of particular social group and if due to that fact he possesses a well founded fear of persecution in the country of origin, Uganda.

The first instance body declared as proven the fact that the applicant is a person with homosexual orientation (page 17 of the challenged decision). The other circumstances, claimed by the applicant with regard his individual situation, were assessed by the first instance body as not credible or not relevant to the case. The first instance body also assessed the situation of the homosexual persons in Uganda, stating that their situation is bad and there are some incidents reported however, there is no real risk of persecution based on the homosexual orientation. Comparing the individualized situation of the applicant with the situation in the country of origin, the first instance body assessed that no well – founded fear of persecution was indicated by the applicant therefore no refugee status shall be granted.

The Refugee Board does not agree with the assessment of the first asylum body regarding the situation of the homosexual persons in Uganda. From the evidence material collected in the case, including the number of evidentiary motions filled by the applicant and the Association Campaign Against Homophobia as a participant to the procedure, both at the

first and appellate instances (vide the case file) – it is clearly visible that the situation of the homosexual persons in Uganda is very bad. As reported by the Country of Origin Information Unit of the Office for Foreigners in its paper of 8 August 2011: “*practically all organizations monitoring the situation of the human rights in the world asses the situation of homosexual (and in general LGBTI) persons as very bad.*” It is also reported in the paper that the homosexual intercourses are penalized in Uganda (charged with the penalty of imprisonment including the life imprisonment). It is however stated in the paper that no cases of imprisonment based on the above regulations were reported. On the other side the paper reports that there were cases of detention and/or proceedings against persons charged with homosexual acts. The evidence material collected in the case, including the number of evidentiary motions filled by the applicant and the Association Campaign Against Homophobia as a participant to the procedure also confirm that from the beginning of 2012 there was an increase of the actions leading to further radicalisation of the legal sanctions against homosexuals and in general LGBTI persons.

The above paper of 8 August 2011, also confirms the strongly negative social attitude towards homosexual persons. It is stated that often such attitude is expressed in a verbal form; however in January 2011 a well known homosexual activist was killed by unknown perpetrators.

Taking the above into consideration and contrary to the assessment of the first instance body, as well as in line with its earlier decision of 12 March 2012 no RdU-495-2/S/11, the current panel of the Refugee Board finds that the situation of the homosexual persons and in general LGBTI persons in Uganda is definitely bad and may cause the real risk of persecution. Of a particular importance is a mere fact of penalization of homosexual acts in the law. According to the expert report of S. Jansen and T. Spijkerboer eleven EU countries recognize that the mere existence and execution of the provisions penalizing the homosexual acts may be sufficient to grant a refugee status (S. Jansen and T. Spijkerboer, *Fleeing homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, p. 28). Such interpretation is in line with the Art. 13 p. 4 of the LGPA, which states that the persecution may particularly consist in applying legal, administrative, political or judicial means in discriminating manner or applying discriminating means. It is also of relevance that according to the above mentioned paper of the Country of Origin Information Unit of the Office for Foreigners of 8 August 2011, the legal provisions penalizing the homosexual acts in Uganda are – at least to some extent – executed in practice.

With regard to the above it is therefore necessary to establish if the applicant is a person with homosexual orientation and if the individual circumstances claimed by him indicate the well founded fear of persecution in the country of origin. In the opinion of the Refugee Board, taking into consideration the above mentioned particular situation of homosexual persons in Uganda, the mere fact of the recognizing the applicant’s sexual orientation by the first instance body is highly indicating the risk of persecution upon the return to the country of origin.

The first instance body recognized the homosexual orientation of the applicant based on his declaration. In case of the applicant the additional complication aroused from the fact that the foreigner has a wife and biological children. Expert materials provide that due to the multifaceted indicators shaping the sexual orientation of the human being there are no objective methods allowing for definite medical assessment of one's sexual orientation (S. Jansen and T. Spijkerboer, *Fleeing ...*, p. 53-57). It is acknowledged that "*the medical and psychiatric expert opinions are an inadequate and inappropriate method for establishing an applicant's sexual orientation or gender identity.*"(S. Jansen and T. Spijkerboer, *Fleeing...*, p. 57 *in fine*). Concurrently, it is acknowledged that the recognition of this matter should be done based on applicant's declaration. The current panel of the Refugee Board agrees with this statement. It has to be underlined however, that the declaration of the applicant requires verification in the scope of his credibility in general, i.e. the overall credibility of the applicant based on the entire evidence material.

The Refugee Board needs therefore to assess the general credibility of the applicant based on the evidence material gathered in the case. The Refugee Board agrees with the detailed argumentation of the first instance body (p. 16 – 26 of the challenged decision) that the circumstances claimed by the applicant are somehow incoherent. In the assessment of the Refugee Board those discrepancies are not sufficient enough to challenge the overall credibility of the applicant. In particular, the first instance body did not find any reasons to challenge the credibility of applicant's statement regarding his detention in 2006 after being caught during a homosexual act. The statement of the first instance body that "*assessing the applicant's statement in this regard as credible cannot influence the result of the proceedings*" (p. 23 of the challenged decision), has to be considered, in the view of the overall evidence material, as arbitrary. Similarly, in relation to the detention of the applicant in 2010, the first instance body "*does not challenge the mere fact of detention at the given time and circumstances*" (p. 23 of the challenged decision). The statements of the applicant provide a story that in the opinion of the Refugee Board is credible enough not to challenge the overall credibility of the applicant. Thus, in the opinion of the Refugee Board the statement of the applicant regarding his sexual orientation is found credible.

In the opinion of the Refugee Board considering very bad situation of homosexual persons in Uganda, as presented above, the mere homosexual orientation of the applicant is sufficient to indicate the risk of persecution upon the return to the country of origin. Summing up, it needs to be assessed that the decision of the first instance body rejecting the refugee status with regard to the applicant was not justified. The applicant may possess a well – founded fear of persecution on the ground of membership in a particular social group, i.e. a group of homosexual persons. Other considerations of the first instance decision do not need further recognition.

In this regard it is stated as in the sentence of the decision.

The Instruction:

The decision is deemed final as far as administrative instances are concerned. However, a party dissatisfied with the decision, should it decide that the decision is in violation of legal regulations, may file an appeal against it to the Voievodships Administrative Court in Warsaw (Wojewodzki Sad Administracyjny), within 30 days from the date the decision is delivered. The appeal shall be filed through the Refugee Board (office located at Al. Szucha 2/4, Warszawa, address for correspondence 00-584 Warszawa, Aleje Ujazdowskie 1/3)

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(signatures of the Members of the Panel)