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CONTROL OR NO CONTROL: ANALYSIS OF THE UNITED KINGDOM SUPREME COURT DECISION IN UBER BV v ASLAM

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Abstract

This paper analyses the United Kingdom Supreme Court decision in Uber BV v Aslam, a landmark ruling in employment law. It asserts that it has streamlined the relationship between employers and employees in the technology industry and gig economy. For years, Uber contended that its drivers were independent contractors and not employees, and its only role was to provide a platform through an application that enabled drivers and customers to access each other. However, applying the control test, the Supreme Court observed that Uber drivers were employees and not independent contractors because of the high degree of control exercised over them. This paper discusses why the decision is an important milestone in advancing the employment rights and benefits of workers. Finally, this article elucidates the applicability of the decision in the Ugandan jurisdiction with regard to employment scenarios covering similar kinds of contractual relationships.

1.0 INTRODUCTION

New ways of working organized through digital platforms pose pressing questions about the employment status of the people who do the work involved.[2] This was the case concerning the employment status of Uber drivers. The main question in *Uber BV v Aslam* was whether drivers whose work was/is arranged through Uber's smart phone application (*herein* referred to as Uber app) worked for Uber under an employment contract and as such qualified for the national minimum wage, paid annual leave and other workers' rights and benefits.

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* Fourth year student of law at Makerere University, Kampala. My sincere appreciation goes to Mr. Joel Basoga, Cristal Advocates for his guidance on the complex intricacies of Ugandan Employment Tax Law, Ms Julianne Mwebaze and the entire editorial team of the Makerere Law Journal for their guidance and enormous editorial contributions to this paper.

2 *Uber BV v Aslam* [2021] UKSC 5 at page 2.

Uber contended that the drivers did not have these rights because they worked for themselves as independent contractors performing services under contracts made with passengers through Uber as their booking agent.[3]

The United Kingdom Supreme Court resolved this question in the affirmative, holding that Uber drivers are employees of Uber and not independent contractors due to the amount of control exerted on them by the company.

This paper discusses the unanimous decision of the United Kingdom Supreme Court, its implications in Uganda and compatibility with Ugandan employment law. Section one introduces the scope of this paper, section two discusses the decision. Section three elucidates the implications of the decision in Uganda, section four discusses the applicability of the decision in Ugandan employment law and section five concludes the paper.

2.0 ANALYSIS OF THE CASE

2.1 THE FACTS

The appellants own the rights in the Uber app and have been licensed to operate private vehicle hires in and out of London. The Respondents are individuals who work or used to work as private hire vehicle drivers for the appellants under the Uber app.[4]

The respondents brought a claim against the appellants in the employment tribunal for a determination that they are/were workers of the appellants and not independent contractors. They claimed that they were entitled to a minimum wage and annual leave. The respondents' claim was successful in all the lower courts hence this appeal by the appellants to the Supreme Court.[5]

2.2 THE ARGUMENTS OF THE PARTIES

3 Ibid.
4 Supra at Page 2.
5 Supra at Page 11.

The appellants postulated that the respondents were independent contractors and not workers within the meaning of employment law. This argument was based on the existing contracts between them and the respondents. These contracts stipulated that the Respondents were independent contractors.[6] They also argued that the respondents were deemed to be working when they were driving passengers to their destination.[7]

The respondents contended that they were workers and not independent contractors within the meaning of employment law and that this determination was based on statutory and not contractual interpretation of the existing contract between them and the Appellants.

2.3 THE DECISION

On the issue of whether determination of employee or worker status was based on statutory interpretation or contractual interpretation, the Court observed that whether one was an employee or independent contractor was a question of statutory and not contractual interpretation because the rights asserted were statutory.[8] This was because employment law aims at protecting employees due to the unequal bargaining power between them and employers.[9] Court relied on its earlier decision in Autoclenz Limited v Belcher.[10]

The Court equally stated that it was contrary to the purpose of employment law to treat the terms of a written contract as the basis for determination whether an individual falls within a definition of a worker or not.[11] Court considered the contract between the appellants and the respondents. It observed that the contract was drafted by the appellants' lawyers and presented to the respondents as containing terms which they had to accept in order to use, or

6 Supra at Page 12.
7 Supra at Page 2.
8 Supra at Page 23.
9 Ibid.
10 [2011] UKSC 41.
11 Ibid.

continue using the Uber app.[12] It was unlikely that the respondents or any other drivers ever read these terms or, even if they did, understood their intended legal significance. Also, there was no possibility of negotiating any different terms.[13]

The Court relied on a number of decisions, including Hashwani v Jivraj[14] where the Court previously observed that an arbitrator was not a person employed under a contract personally to do any work. Lord Clarke at paragraph 34 of his judgment identified the essential distinction between workers and independent contractors;

> "whether on the one hand, the person concerned performs services for and under the direction of another person in return for which he or she receives remuneration or, on the other hand, he or she is an independent provider of services who is not in a relationship of subordination with the person who receives the services"

The aversion by Mr. Recorder Underhill QC in Bryne Bros (Formwork) Ltd v Baird[15] was adopted:

> "The policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu- workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers:

12 Ibid.
13 Ibid.
14 [2011] UKSC 40; [2011] 1 WLR 1872.
15 [2002] ICR 667.

> the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus, the essence of the distinction must be between , on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

In McCormick v Fasken Martineau DuMovlin LLP[16], the Supreme Court of Canada Court observed that;

> "Deciding who is in an employment relationship...means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on part of a worker...The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace..."

On the issue of whether the respondents were workers or independent contractors, relying on the decisions in Carmichael v National Power Plc[17], Autoclenz Limited v Belcher[18] and Bates van Winkelhof v Clyde & Co LLP[19], court observed that the respondents were workers and not independent contractors as alleged by the Appellants.[20]

The Court opined that the provisions of the contract categorizing the Respondents as independent contractors were void for contracting out of the

16 [2014] 2 SCR 108.
17 [1999] 1 WLR 2042.
18 [2011] UKSC 41.
19 [2014] UKSC 32 ; [2014] 1 WLR 2047.
20 Supra at Page 18.

employment law that categorized the Respondents as workers and not independent contractors. [21]

The Court justified this by applying the control test to the relationship between the Appellants and the Respondents. In the Court's view, the appellants exercised control over the respondents due to the following reasons;

a) The Appellants fixed the remuneration paid to the Respondents for the work they did, and the respondents had no say in it. [22]
b) The contractual terms between the Appellants and the respondents were dictated by the Appellants. The respondents were required to accept these terms as the contract between them and the appellants was a standard form contract that left no room for negotiation.[23]
c) The respondents, once logged onto the appellants' application were had no liberty to decline the request without consequences. The respondents were penalised for declining many requests through a temporary and permanent removal from the Appellants' application.[24]
d) The appellants exercised a significant degree of control over the respondents' delivery of their services. They vetted the type of car that could be used by the respondents; the technology as an integral part of the service was wholly owned and controlled by the appellants; a designated route was chosen for the respondents to take and a deviation from that route without the permission of the passenger could lead to consequences to the respondents; the rating system required passengers to rate the respondents after the end of each trip and failure by the respondents to maintain an average rating resulted in warnings and termination of employment.[25]

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21 Supra at Page 25.
22 Supra at Page 29.
23 Ibid.
24 Ibid.
25 Supra at Page 30.

e) The appellants restricted communication between passengers and the respondents and took the necessary steps to prevent the respondents from establishing any relationship with passengers capable of extending beyond an individual ride.[26]

The Court's application of the control test was in tandem with the circumstances of the case. Even though the control test is not the only tool for determining a subordinate relationship between a worker or employee and employer,[27] it was the most appropriate tool in this case.

On the issue of working time , the Court held that the respondents were deemed to be working as long as they were logged onto the appellants' application and not when they were driving passengers to their destinations as alleged by the Appellants. [28] The Court was of the view that not driving passengers to their destination did not preclude the Respondents from being deemed to be working. [29]

Given that it is the duty of the employer to assign tasks or duties to an employee or worker, failure to assign a worker or employee duties cannot be vested on the worker or employee. Holding that an employee or worker is working during the period when they are executing tasks or duties could prove detrimental to the job security of an employee.

On the issue of multiple apping, Court observed that no evidence was adduced to show that there was a possibility of the respondents to hold themselves out to other service providers and the Court did not see the need to decide on the issue in the abstract leaving it to the possibility of revisiting in future in case it arises.[30]

3.0 IMPLICATIONS OF THE DECISION IN UGANDA

26 Supra at Page 31.
27 Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32 ; [2014] 1 WLR 2047.
28 Supra at Page 41.
29 Ibid.
30 Ibid.

Uganda's Judicature Act[31] provides for common law as applicable in Uganda, subject to the written law and aspirations of Ugandans.[32] This decision, if applied in Uganda subject to the doctrine of stare decisis[33] and adopted as the position of the law, will have a number of implications.

3.1 IMPLICATIONS TO GIG , DIGITAL AND APPLICATIONS EMPLOYERS

This decision will lead to legal claims for annual and sick leave emoluments[34] that have accumulated over time against gig, digital and applications operating a similar arrangement like Uber due to their classification of workers as independent contractors instead of employees.[35]

3.2 IMPLICATIONS TO THE GIG, DIGITAL AND APPLICATIONS EMPLOYEES

This decision will come to the rescue of Ugandan gig, digital and applications employees who are mostly the youth facing numerous financial hardshipsThe would have a legally recognised entitlement to paid holiday leave, on-the-job breaks, and other important rights.[36]

3.3 PENSION IMPLICATIONS

This decision would mandate individuals that work under similar arrangements as Uber drivers[37] who are eligible employees[38] together with their employers to make mandatory contributions to the National

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31 Section 14(2)(b)(i) Judicature Act.

32 Article 126 (1) of the constitution ; Section 14(3) Judicature Act ; Irumba v Irumba Supreme Court Civil Appeal Number 45 of 1995 ; Nyali v AG [1956] 1 QB 1.

33 Article 132(4) of the constitution.

34 Uganda currently does not have a minimum wage as the National Minimum Wage Bill that was passed by parliament was returned to parliament by the President without assent.

35 https://www.fitzgeraldhr.co.uk/uber-bv-and-others-v-aslam-and-others-supreme-court-judgment/ [accessed 16 June 2021]

36 https://blog.harvardlawreview.org/recent-case-_uber-bv-v-aslam_/ [accessed 16 June 2021]

37 Section 1(i) of the National Social Security Fund Act defines an employee as person employed under a contract of service.

38 Section 6 of the National Social Security Fund Act provides for the employee eligibility for purposes of contributing to the National Social Security Fund.

Social Security Fund.[39] These employees would equally be entitled to acquire pension benefits[40] on the fulfilment of the requirements.[41]

3.4 TAX IMPLICATIONS

This decision will mandate individuals who work under similar arrangements as Uber drivers to pay tax on their employment income.[42]

3.5 GIG, DIGITAL AND APPLICATIONS EMPLOYER LIABILITY IMPLICATIONS

This decision will have far reaching implications on liability of gig, digital and applications employers for acts or omission to third parties. The characterization of individuals working on similar terms like Uber drivers as employees brings their employers into the scope of direct responsibility for acts or omissions committed against employees and vicarious responsibility for acts or omissions by employees against third parties.[43]

This decision equally establishes a duty to provide a safe system of work to workers who work under these arrangements which has not previously been the case.[44]

3.6 APPLICATION USAGE

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39 Section 7 of the National Social Security Fund Act provides for registration of eligible employees and employers to the Act ; Sections 11, 12, 13 and 16 of the National Social Security Fund Act provides for payment of contribution to the National Social Security Fund by an employee and employer ; National Social Security Fund v Uganda Revenue Authority Civil Appeal Number 29 of 2020.

40 Section 19 of the National Social Security Fund Act provides the description of benefits of the National Social Security Fund to an employee.

41 Sections 20 , 21 , 22 , 23 and 24 of the National Social Security Fund Act provides for the various requirements to be met in order for an employee to be entitled to benefits from the National Social Security Fund.

42 Sections 4 and 19 of the Income Tax Act.

43 Sheryn Omeri (2019) Uber-careful: Implications of Modern "Gig Economy " Litigation for the Employer's Common Law Duty of Care , Journal of Personal Injury Law , Issue 1 at Page 63.

44 Ibid.

Ugandan businesses that allocate work through the use of applications would need to review their terms and conditions since their employees will be deemed to be working whenever they are logged into the application and available for work not when they are allocated work in light of the finding in the case that the drivers were working whenever they were logged in and available for work.[45]

The implication of the decision on multiple application usage which is common among many individuals employed in the transport and delivery application businesses in Uganda, who do so to earn extra income, is still not certain. [46]

The Court did not pronounce itself on the same as there was no evidence adduced to show the possibility or incidents of use of multiple applications by Uber drivers belonging to other transport operators and competitors of Uber.[47]

4.0 THE DECISION IN LIGHT OF UGANDAN EMPLOYMENT LAW AS A WHOLE

4.1 NATURE OF EMPLOYMENT CONTRACTS

The Employment Act 2006 provides for both oral and written contracts.[48] However, oral contracts are limited by the Contracts Act 2010[49] to only those whose value is below 500,000 Ugandan shillings. As such, the Court's decision that a contract of employment can either be oral or written is in tandem with Ugandan employment law in regards to the nature of employment contracts.

4.2 VARIATION AND EXCLUSION OF EMPLOYMENT ACT

45 https://www.hcrlaw.com/blog/uber-v-aslam-the-implications/ [accessed 16 June 2021]

46 https://www.gillespiemacandrew.co.uk/knowledge-centre/news/2021/determining-worker-status-uber-bv-and-others-v-aslam-and-others-uber [accessed 17 June 2021]

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48 Section 25

49 Section 10(5)

The Employment Act 2006 renders agreements between employers and employees which exclude any provision of the Act void and of no effect.[50] The import of this provision is in pari materia with the import of the provisions in the legislations at issue in the case. As such the Court's decision that a contract between an employer and employee cannot override or exclude the protection of legislation is in tandem with Ugandan employment law.

4.3 DEFINITION OF EMPLOYEE

The Employment Act 2006[51] defines an employee as; "*Any person who has entered into a contract of service or an apprenticeship contract ……"*

This definition is similar in import with the definition of an employee provided for by the legislations at issue in the case. As such the Court's definition of an employee is in tandem with Ugandan Employment Law with regards to definition of an employee.

However Ugandan Employment Law does not provide for a definition of a worker provided for by the legislations at issue in the case. As such there is a case for reform of Ugandan Employment Law to broaden the scope of categories of people engaged in employment.

4.4 ANNUAL LEAVE

The Employment Act 2006[52] stipulates that employees shall be entitled to annual leave. The Industrial Court of Uganda in Mbika v Centenary Bank[53] observed that;

> "*Section 54 of the Employment Act 2006 obliges employers to grant rest days during a calendar year for purposes of making employees*

50 Section 27(1)
51 Section 2
52 Section 54
53 [2018] UGIC 11

> *rejuvenate and work better. The rest days are an entitlement and not a privilege to be granted by the employer to the employee."*

From the above, it is evident that the decision is in tandem with Ugandan Employment Law with regards to annual leave as well.

5.0 CONCLUSION

In as much as the issues in contention in the case have not been the subject of litigation in Ugandan courts, the Uber business model together with the agreements are in pari materia with the Safe boda Ugandan business model and agreements. Recently, Safe boda Uganda changed its terms and conditions and introduced clauses that completely absolved it of any liability for the acts or omissions of its riders contending that the same are independent contractors and not employees.[54]

This decision comes as a breath of fresh air as it reinforces that Safe boda Uganda, which operates in a similar manner as uber, can no longer claim that its riders are independent contractors and not employees. There is hope that litigation on this matter shall come up in the Ugandan Courts of law. Hopefully, a judgment that enriches our legal jurisprudence in light of the subject discussed herein will come in soon.

[54] https://www.monitor.co.ug/uganda/news/national/outrage-as-safeboda-changes-terms-and-conditions-3278750 [Accessed 17 June 2021]

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4) Contracts Act, 2010.
5) Elias Lukwago v Attorney General Miscellaneous Cause Number 393 of 2020.
6) Employment Act, 2006.
7) Google v Oracle 593 U.S. _ (2021).
8) *Hashwani v Jivraj* [2011] UKSC 40; [2011] 1 WLR 1872.
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