



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02533/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 July 2013
Prepared 8 July 2013

Determination Sent

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

D J
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H Foot, Counsel, instructed by Legal Rights Partnership
For the Respondent: Mr S Allan, Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge N M K Lawrence, promulgated on 11 April 2013, dismissing the appeal against the respondent's decision made on 14 March 2013 to refuse him asylum and to refuse him leave to enter the United Kingdom.

The Appellant's Case

2. The appellant's case is set out in his witness statement. In summary, he qualified as a teacher and was previously a youth mobiliser for the APRC, the governing party in Gambia. He began to distance himself from the party in 2006 after one of his cousins disappeared and was killed following an accusation of involvement in an attempted coup d'état. As a result, the appellant, another cousin Mr Faye (an APRC Member of Parliament), and Mr Faye's constituents became disillusioned with the APRC. The party then dropped Mr Faye as an MP. The appellant then applied to be allowed to stand as an independent MP but this was blocked he believes by the APRC fearing that he would be successful. Although prevented from standing, the appellant assisted covertly the opposition NRP candidate who lost the election in February 2007 by a narrow margin. The appellant believes that the APRC were aware of his involvement and that he was subsequently monitored by the National Intelligence Agency and thus he kept a low profile.
3. By coincidence, the appellant had the opportunity to go on an educational visit to the United Kingdom as part of his teaching career. He applied for, and was granted, a visa to come to the United Kingdom for that purpose, arriving here in June 2007. The appellant remained here, after his visa expired, and claimed asylum on 16 February 2013.
4. In the meantime, the appellant met a British citizen, Ms W and in February 2012 they became engaged. Ms W has two daughters, C aged 12 and M aged 19. M has also given birth to a child recently. It is the appellant's case that they have formed a family life together. Given the ages of C and the granddaughter, I have referred to them (and the other members of the family) by initials to protect their identity

The Respondent's Case

5. The respondent's case is set out in the refusal letter dated 13 March 2013. In summary, although accepting the appellant's identity, nationality and date of birth [16] the respondent did not accept that:
 - (i) the appellant had worked for the APRC given his lack of knowledge of his role and how he would conduct campaigns for them [19];
 - (ii) that the appellant had worked undercover for the NRP and had masterminded their political strategies in his area [22];
 - (iii) that the National Intelligence Agency were tracking him [23] given that he had no contact with them from February until June although staying in the family home [24] and he was able to leave the country using his own passport without difficulties [25]; the appellant's credibility was damaged by his failure to claim asylum on arrival or in the subsequent five years [30, 31]; the relationship between the appellant and Ms W was subsisting given that they lived so far apart [49];

- (iv) that the appellant had established a parental relationship with Ms W's children;
 - (v) that he had therefore failed to fulfil the requirements of Section EX.1 of Appendix FM of the Immigration Rules [54] and that his removal was proportionate;
 - (vi) the appellant did not fulfil the requirements of paragraph 276ADE of the Immigration Rules and that therefore his removal was proportionate [58].
6. At the hearing on 10 April 2013, within the Fast Track the judge heard evidence from the appellant as well as Ms W and her older daughter, C. He also had before him a bundle produced by the appellant's solicitors, containing an expert report from Dr Cessay. The judge dismissed the appeal.
8. Permission to appeal to the Upper Tribunal against that decision was granted by Designated Judge of the First-tier Tribunal Digney on 17 April 2013. The appeal then came before me, sitting at Harmondsworth on 2 May 2013. For the reasons set out in the annex to this determination, I concluded that the determination of the First-tier Tribunal did involve the making of an error of law and that it should be set aside. The matter was then adjourned until 5 July 2013 when I heard further evidence and submissions.

The hearing on 5 July 2013

9. The appellant gave evidence, adopting his witness statements, and adding that each day his route to work from his village was to walk to the ferry, cross to Banjul and return by the same route. He said that the day before he left he crossed the river late at night, this time to Serrekunda which is closer to the airport in the Gambia than Banjul or his village. He said on the morning he left he travelled from Serrekunda to the airport.
10. In cross-examination the appellant said that he was followed by the NIA from about January/February 2007; that he had decided to go abroad after the elections between February and March; and that he kept the fact that he was going abroad to himself. He said it was not he who decided to go abroad but that that had been chosen by his school, but he had not planned to leave. He said he had not planned to leave and although he knew he was in trouble, he had a second plan which meant that he would go to Senegal and stay there if things got worse. He said that the NIA had nothing to do with his school and it was just he and his head teacher who were going on the educational visit. The appellant said that the NIA started following him in February after which he realised that he was in trouble, but until he came here he kept a low profile, knowing that he had to stay out of trouble. He said he had not gone to Senegal as he had not been arrested but that he knew they were looking for him and he had to avoid a lot of things. He denied being happy to wait in Gambia, thinking it was only a matter of time before they did something. He confirmed that he could have gone to Senegal and had things got worse, he could have left.

11. The appellant confirmed that he had had to apply for his UK visa whilst he was being followed; that he had gone to the Embassy in May; and, that he had no idea if he had been followed, although he was usually followed from his village to the school and back. He said he knew some of the people who did this personally as some of them lived in the same village but that it was not possible that they were going to work because he knew where they work and did not believe that they could have been following anyone else as everyone knows the NIA operatives and that they cannot keep quiet, which is why information had come to him that he was being watched. He confirmed that he had no choice as evidence had come in February that he was being watched.
12. The appellant said that he had no documentary evidence to show that he was related to Jain Colley Faye or Manlafi Corr and that they were all "cousin brothers". He said that his maternal grandmother's brother was Jain Colley Faye's father and Jain Manlafi Corr's mother was his maternal grandmother's sister.
13. It was put to the appellant that he had said in the first hearing that Sonia with whom he was staying in Reading was not his blood sister and he had referred to her as a "sister" because they were from the same town and that she was sympathetic towards him when he was in Reading. He said that he did know people in Reading who would know him in Gambia but that he had not thought about asking them to give evidence on his behalf. He said that Sonia had given a statement to his solicitors but she was not able to come to court as she might not be able to spend resources on him. He said that he had a lot of extended family in the United Kingdom but that he had not contacted them to come to court. It was put to him that Dr Ceesay had indicated that he had spoken to the family member of Manlafi Corr but was not here to give evidence as the firm could not force anyone to come or tell things. It was put to him that the reason he had given that Sonia might not come as he was not a blood relative but the other people could not come, his understanding of blood relative being someone who has the same mother and father, and he denied saying that he was lying.
14. The appellant said that he had not told Ms W when they met online that he had been married as he was just out of a relationship and had lots of problems with his wife and children, and had said that he had not wanted to get into a relationship. He said that they had both met on the website "Tagged" to find friends online; that they met there and things went further. The appellant said he had last had contact with his daughter in 2011.
15. The appellant said that he had been married in Gambia in 1987 and that he and Ms W were planning to get married although that had been cancelled. He was not sure when it had been booked but it was his partner Ms W who had booked it. He said it was not her decision as he had instructed her to do that but he could not recall the dates. He said he is divorced in Gambia but that he had no evidence of that. He said his ex-wife has custody of her marriage certificate and has married again. He said he knew that he had been divorced as he had friends and a sister in Gambia who told him that the divorce had taken place in 2008. He said that he had discussed with Ms

W that she would need to get the certificate if she was going to negotiate to have that sent to the United Kingdom. Asked why he had booked a room if he did not even have a divorce certificate he said that was not what he was saying and that it had been cancelled. It was put to him that he had cancelled the wedding booking due to a lack of divorce certificate to which he replied that he knew he could get it when he was ready. There had not been enough time. He said it was not the situation that they had booked a room for the wedding that he knew he could not do as all the financial problems would have to have been sorted out first. He said he had made no effort since June 2012 to get the divorce certificate as the marriage had been cancelled.

16. I then heard evidence from Dr Ceesay who adopted his initial report and his addendum dated 2 July 2013. He also said that he had brought with him copies of his books and reviews of his books from academic journals.
17. In cross-examination Dr Ceesay said that he had left Gambia on 28 November 1996 and had not returned due to the security situation although he had been to Senegal. He said he was not an opponent of the regime but was an academic and a scholar doing research based on qualitative and quantitative methods. He said in producing his report he had used different methods, speaking to diplomats on the ground and also people who were in the heart of the regime. He said that he had also spoken to family, neighbours and people going to Gambia and had spoken to people by Skype. He said that his knowledge base was not anecdotal and had done firsthand quantitative research. He said that his expertise was used by FCO, DFID and Amnesty International. Dr Ceesay said that he had used his contacts on the ground to find out about the appellant whom he had never met prior to that day and had decided to investigate what is happening in Gambia. He said that most of what the appellant, in fact all, of what he had said had been corroborated. He qualified that to say that most had been corroborated.
18. Dr Ceesay was asked what had not been corroborated, replying that he wanted to know if the appellant had been APRC and it turned out that he was from 1994 to 1996; that he was the cousin of Jain Colley Faye although he was not sure whether he was first or second cousin and that it was confirmed beyond doubt that Jain Colley Faye was the MP in the area from 1996 until 2007, so it was also confirmed to him that the appellant was a cousin of Manlafi Corr.
19. Asked whom he had contacted to verified the relationship Dr Ceesay said that he had sources, one was a head teacher, and that he had also spoken to a former governor of the area who he had asked if he could confirm that the appellant was related as claimed to which the reply had been yes.
20. Dr Ceesay said that he had also spoken to a family member of the appellant who had confirmed the relationship, but that this person cannot be named as his status in the United Kingdom was not correct and he was uncomfortable for his name to be given. Dr Ceesay said that he thought that person's presence in the United Kingdom might be illegal.

21. Dr Ceesay said that he could not confirm the name of the governor of the region in which the appellant had lived as he was not in a position to disclose any name not even by way of factual background. It was put to him that as a result he would submit that less weight should be given to his evidence and he said he had explained he could not give his sources. Dr Ceesay declined to comment on the fact that the appellant had named the governor as Lamin Jobarteh. I asked Dr Ceesay to comment on the fact that it would be a matter of public record who the governor of a particular area had been in a particular year but said that he had promised that the name would not be disclosed as he knew the regime and he could not put people in jeopardy. He said he had not named the person in the UK because he might be illegal here; it was a person who had come as a visitor to his house and they had talked about other matters and it was whilst he was talking to him about the appellant that he had confirmed the appellant's relationships but that he was not keen to be named in the report. He said that he did accept this person's evidence, adding that it simply added weight to what had already been confirmed.
22. Dr Ceesay said that he had found out that the allegations that the Home Office had made about the appellant were unfounded, that the appellant had in fact been a youth mobiliser and had wanted to contest a parliamentary constituency as an independent candidate and that, as is common in Gambia, the Ministry of Education was used and his tax clearance certificate had not been processed on time to prevent him from standing. He said he was sure this was deliberate although he had no evidence to confirm that. He said that he had relied on people who were in a position to know, having spoken to the director of education and permanent secretary in the Ministry who said that he was known to them. They had confirmed that he had been an untrained teacher, had then trained and then was teaching until he left Gambia. He said they had confirmed he had wanted to run as an independent and had been blocked. Dr Ceesay said that in March 2006 an accusation of a coup plot had arisen in the area where he was from and that Jain Colley Faye had started to have problems with the regime around that time. This arose from the alleged involvement of Manlafi Corr in the coup attempt in 2006, and it was at that point that the regime had started to distance itself from Jain Colley Faye, cousin of Manlafi Corr, who had had problems. He said the regime was using different methods and in the case of Jain Colley Faye they had just not selected him as a candidate and, as he had been popular in the area, the community and elders had decided to prevail on the appellant's stand as an independent. He did not know why Jain had not stood as an independent thinking that he might have been threatened, or, once he had told him he might be chosen had left it at that.
23. Dr Ceesay said that there was no standard pattern to surveillance by the NIA. He said that he knew people who were suspected and then arrested, and charges fabricated against them. Sometimes they take their time until they have ample evidence against people and they could even take people to court and try the law, keeping people incommunicado. Dr Ceesay said that what he had established is that once the appellant had said he would run as an independent there was a problem, but to make matters worse, the regime had discovered that he was supporting the NRP, the opposition party, and he knew this from the former Director of Education.

It was put to him that the appellant had left without difficulty, indicating a lack of interest. Dr Ceesay said that it depends on how the appellant's solicitor asked questions. He said that he had said that they normally have a list of people placed at border posts and at the airport of those wanted. He said that the fact that this was not done would suggest that the team at the airport might not have had his name and that the NIA is not that efficient at times.

24. It was put to him that it could be that the appellant was not being followed to which Dr Ceesay replied "that is entirely your opinion". After further questioning Dr Ceesay said that he did know that the appellant was being followed as he had spoken to contacts and sources in different ministries including the Ministry of Defence. The person who had told him had now absconded to Dhaka and had previously been the Permanent Secretary of the Ministry of Defence and prior to that had been Director General of the NIA. He said that he knew this person from his time in Gambia when he was a Deputy Director General and confirmed that this person knows the appellant personally.
25. Dr Ceesay said that his source had told him that the appellant was campaigning, trying to help the NRP candidate to the point of ARPC1 but only by a narrow margin which they attributed to the role of the appellant. He said that they knew he was in the United Kingdom and he was making a general comment about Gambians who came here, discrediting the regime and said he would have to be careful. Dr Ceesay said that Mr Sambu, former Director General, had confirmed this to him and that he understood reports said that he was now claiming asylum in Dhaka as people had wanted to kill him.
26. As to why he had described some of his sources as unimpeachable, Dr Ceesay said that the person who he had not named and whose status about which he was unsure had come to his house for an entirely different matter and was unimpeachable as he had no reason to tell the appellant lies.
27. It was put to Dr Ceesay that Amnesty International had distanced itself from his report. Dr Ceesay said that one would have to ask Amnesty why they had done so and that they used different methods in checking facts, but he could call people in the know and speak to people from there in the same language. It was just standard practice for them not to adopt his findings.
28. In re-examination Dr Ceesay said that the person who had come to his house was a teacher who was separate from the former head teacher to whom he had also spoken.
29. I then heard evidence from Ms W who adopted her witness statement and was then cross-examined. Ms W said that she had met the appellant on the website "Tagged" which was just a social site and they had not lived together until the appellant had been released on bail. She said that he had been living with someone she had learned was his sister whom she had met, and so far as she was aware the appellant did not have any other family in the United Kingdom. She said she was not surprised by the fact that he had said that he does have other family here.

30. Ms W said that it was the decision of all of them, including her daughter, to make the provisional booking for marriage and it had not gone ahead because they needed money which they did not have. She was asked if she would get married if she had the money and she said yes, there was nothing else preventing it. She said they had discussed the need to have divorce papers but that she did not know how to get hold of them and the appellant would have to do that. She said they had first discussed that a few weeks ago.
31. Ms W confirmed that she has two daughters, the younger of whom who suffers from a heart murmur and high blood pressure which is under control as a result of medication. She explained that the letter dates from 2009 as subsequently there have only been appointments requesting them to go to appointments and which had not set out the condition. She said that recently the younger daughter needs to go back into hospital as a result of MRI scans indicating she is at risk of a stroke. She said that she had recently had an operation to remove bone from her shoulder due to arthritis, but things had not got better and she would be seeing the consultant again. She said that in relation to the booking of the marriage in 2012, she had no idea that the appellant had been married at that point.
32. In re-examination Ms W said that she did not know whether Sonia was a blood relative or not.
33. I then heard evidence from C who adopted her witness statement. She said that she was aware that the appellant had lived with Sonia in Reading and that she thought Sonia was a friend. She said they were not related and that he had not referred to her as a sister. She said she did not know why her mother had thought that they were brother and sister and she said that she did not know why the marriage had not taken place as it was a matter between them, and she did not know anything about the appellant's time in Gambia.

Submissions

34. Mr Allan submitted that the appellant's credibility was severely damaged by his failure to claim asylum on arrival and subsequently, and he had failed to provide an adequate explanation for this. He submitted that note should be taken of the discrepancies highlighted in the previous determination and that further discrepancies had now arisen.
35. Mr Allan submitted that the most credible explanation for the appellant's being able to leave, if what he said was true, was that he was not at risk. He said it was not credible he had kept it to himself that he was going abroad given that the head teacher knew about this. He submitted that the appellant's earlier activities, as a youth motivator neither enhanced nor diminished his claim that he was at risk, his risk primarily being related to people who are significant individuals. He submitted there was no credible evidence that he was related to these people as claimed; that he could have provided evidence from those present in the United Kingdom but did not do so; and that the expert had relied on a source who was said to be a family

member. He submitted this was a significant issue and omission, and there was a dearth of evidence to confirm the appellant's claims.

36. Mr Allan asked me to note that the appellant was at best part of an extended large family and there was no indication that any other members of the family faced problems. Even taking the evidence at its highest, Manlafi Corr had fallen under suspicion in 2006 and if he was at risk due to that relationship the appellant would have faced problems before February 2007.
37. Mr Allan accepted that simply dismissing Dr Ceesay's evidence was not appropriate but that there were problems with his evidence, specifically that the sources were not referenced and that there was no record of the conversations he had had with his sources or the questions asked aside from the fact that they were not named. He submitted that the practice of not according when or how the conversations took place was contrary to the principles set out in LP (paragraph 40) and that he had been wrong to describe his sources as unimpeachable as, when probed on them, indicated that one might be an illegal entrant. Mr Allen submitted that accordingly less weight should be attached to Dr Ceesay's evidence as it was not possible to test any of his sources, some of whom may be biased or who have given evidence from an unbalanced perspective. He submitted that the risk had been exaggerated. Mr Alan submitted also that it was significant that Amnesty had declined to comment on Dr Ceesay's comments as to credibility and that there were issues regarding the appellant's propensity to lie.
38. Mr Allan submitted that it was clear that the appellant had not disclosed to his "new family" the existence of the previous family, and whilst the most recent witness statement had tried to rectify the problem that Ms W was unaware until the previous hearing that the appellant had a wife and children in Gambia, that there were discrepancies in the reasons given as to why the marriage booked for June 2012 was cancelled. He submitted that the appellant was misleading Ms W as to the nature of their relationship and there is no family life between them or between him and her children. It was submitted that the appellant was not a necessary care giver for the younger daughter and that cohabitation was only recent.
39. Ms Foot relied on her skeleton argument, submitting that caution should be exercised in approaching what was recorded in the previous determination given the credibility findings which had been set aside and that she he had no specific submissions to make to the recording of the evidence. Ms Foot submitted that the appellant had given adequate reasons for not claiming asylum earlier, that his claim was strong, and little weight should be attached to the delay in this case.
40. Ms Foot submitted that Dr Ceesay's evidence and that of Amnesty International indicated the appellant's claim was consistent and congruent with the information, and it was not a fair gloss on the Amnesty International report to say that it distances itself from Dr Ceesay. She accepted that in some cases it may be appropriate to attach less weight to anonymous sources, but that Dr Ceesay had given good reasons for not naming sources and that these sources are reliable. She submitted it would be

unfair to require a transcript of the conversation which would be risky but she accepted that less weight could be attached if questions were open or leading. She said that it was possible to infer that the questions put by Dr Ceessay were broad, on the basis of his general credentials. As such she submitted that an expert is more able to make findings about specific individuals than Amnesty International.

41. Ms Foot submitted that there is no requirement to corroborate information in that the sources given by the expert evidence the appellant was monitored by the NIA consisted of a former Permanent Secretary and Intelligence Officer to whom significant weight can be attached. She submitted there was clear evidence both from the country guidance and the expert report that the actions of the NIA are arbitrary and inconsistent; that often the left hand does not know what the right is doing and that may explain how the appellant was able to leave.
42. Ms Foot submitted also that the appellant would be at risk on return as a failed asylum and as a result of his online associations, submitting that it was likely that these online associations would have come to the attention of the NIA.
43. Ms Foot submitted that the appellant and Ms W had formed a family life together, and that this included the two daughters. She submitted that adequate explanation had been given as to why the previous marriage had been explained and that, if I were to accept that family life exists, that the best interests of the younger daughter should be taken into account, and that it would be contrary to her interests to remove the appellant given the impact on her and on her mother. She submitted also that the requirements of EX1 of Appendix FM were met.

Decision and reasons

44. A person is a refugee and, therefore, entitled to asylum pursuant to Directive 2004/83/EC, (the Qualification Directive) if, (in the words of Article 1A of the Geneva Convention relating to the Status of Refugees) owing to well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country. I have considered the totality of the evidence before me, applying throughout the lower standard of proof applicable to asylum appeals.
45. A person not entitled to refugee status may nevertheless be eligible for 'subsidiary' protection pursuant to Article 2 of the Qualification Directive if at risk of serious harm defined in Article 15.
46. It is accepted that, if what the appellant said was true, he is at risk on return to Gambia. It therefore follows that the credibility of his claims is a core issue in this case.
47. In assessing the appellant's claim, I bear in mind the background evidence relating to Gambia. The country is, in effect, under the control of the president, Yahya Jammeh, in a generally repressive political environment. There is effective impunity for the

security forces, in particular the National Intelligence Agency (NIA), and corruption is a serious problem. The security forces are implicated in torture of detainees, and are frequently corrupt; the judiciary are not independent, and there is no effective means of challenging the state.

48. The appellant's account of his political activities is, until 2006, one of support for the ruling APRC. It is to be noted that it is his cousin brothers, Manlafi Corr and Jain Colley Faye were more prominent, the latter being a former MP.
49. The coup attempt in 2006 is well-documented. A substantial number of people were arrested, according to Amnesty International, included government officials, military and security forces, including at least five people who had held position in the cabinet, and six were members of parliament from the President's own party. The killing of Manlafi Corr is reported in the Freedom Newspaper and appears to be related to the coup.
50. There no documentary evidence to show that Jain Coffey Faye was an MP for the appellant's area, nor is there documentary evidence of the appellant's attempt to stand as an independent candidate. That aspect of the appellant's claim appears to be confirmed by Dr Ceesay as does his claim that he assisted the opposition; and, more importantly, that that came to the knowledge of the NIA.
51. There are, however, difficulties in the appellant's evidence about how he was able to leave the country without being stopped despite being monitored. The appellant said in evidence that his problems began around February 2007, and that he was followed to and from school, and he says in his initial witness statement of 25 February 2013 [12] that he knew his movements were monitored. In his asylum interview [Q.54] that he started to realise he was under surveillance a few months after the elections, as people he knew [Q. 55] passed on that information to him. He also mentioned [Q. 60,61] that when he had travelled within Gambia from Barra to Farafenni with Jani Colley Faye, and his presence had been radioed ahead [Q.61]. He was told by a police man who was a former colleague [Q.63] that they had a radio message about him. Such close surveillance would indicate a significant degree of interest in the appellant.
52. If the appellant's account is truthful, then despite this surveillance and following him to and from work each day, the NIA did not notify the airport about him, and, presumably, did not know about the issue to him of a visa, despite the fact that the school he was working at had arranged an exchange visit, and his visit to the British Consulate to obtain a visa.
53. I find the appellant's explanation for remaining in Gambia, despite being under surveillance, is wholly unsatisfactory. If, as he claims, he thought he was at risk of being detained, it makes not sense not to have gone to Senegal which he said was an option, and is a neighbouring country, rather than to wait for the chance of a visa to come to the United Kingdom, a journey which would necessitate passing through an airport checkpoint. It makes little or no sense for him, if he could have been arrested

at any time, not to have gone to Senegal; his assertion that he would have done so had things got worse does not adequately explain this, given he says he feared being arrested and ill-treated. I find that this undermines significantly his credibility.

54. The appellant arrived in the United Kingdom in 2007 yet, despite having left Gambia in fear of ill-treatment, he made no attempt to claim asylum until 2013, despite being told by friends (witness statement, 25/02/13 [15]) that he would be killed if he returned. The appellant speaks English and I do not accept that not knowing the procedure for claiming explains this delay. I consider that this delay undermines considerably his claims about his activities in Gambia
55. Dr Ceesay's evidence, it is said, confirms the appellant's account of his activities in Gambia prior to departure and his links with both Jain Colley Faye and Manlafi Corr. It is also submitted that they confirm adverse interest in him by the NIA.
56. Dr Ceesay's evidence in this regard is the provision of additional evidence not otherwise available to the Tribunal. In this respect, it is entirely understandable that he has access to a greater range of sources than for example Amnesty International. There are, however, difficulties in Dr Ceesay's evidence with regards the sources. First, they are not named although their positions are given which is not necessarily a problem; and, second, what questions were put to the individuals is unclear. As Ms Foot accepts, there is a big difference between asking "can you confirm that [the appellant] is a cousin of Jain Colley Faye and/or Manlafi Corr" and "do you know [the appellant]? If so, what can you tell me about him?" While I can accept that there may be, as Dr Ceesay sets out in his addendum [13 to 17] good reason not to name sources in Gambia, this does not explain adequately a failure to explain in sufficient detail how and what questions were put to the sources, or the precise responses, not least as it was by the time the report was commissioned nearly 7 years since the appellant had left Gambia. I do not accept in this regard Ms Foot's submission that this can be assumed.
57. I consider that Dr Ceesay's use of the word "unimpeachable" to describe some of his sources is misplaced, particularly when he had suspicions about whether one of them, said to be a relative of the appellant and thus related also to Manlafi Corr and Jain Colley Faye.
58. Further, in his oral evidence Dr Ceesay relies on a source, the former Director General of the NIA and former Permanent Secretary of the Ministry of Defence, who says that he knew the appellant and was able to confirm adverse interest in him on the part of the NIA. This individual is not mentioned either by name or position as a source in the initial report, although one might have thought that in the circumstances such an individual was an important source. This source is not mentioned either in the addendum, the sources being referred to in each being a former Permanent Secretary at the Ministry of Education of the Gambia, a retired director of education and a former head teacher at one of the schools where the appellant taught (first report [12]). Whilst sources at the Ministry of Defence are quoted, these are as authority for the confirmation as to what happened to Manlafi

Corr and his blocking as an independent candidate [12]. What Dr Ceesay has done is to introduce only in cross-examination an important source for his evidence not previously identified or mentioned, despite references to other NIA operatives in the initial report [14].

59. Taking these factors together, I consider that in the particular circumstances of this case, that I cannot attach weight to Dr Ceesay's evidence as being confirmatory of the appellant's account.
60. Further, in assessing the report from Amnesty International, I note that it is in assessing the risk to the appellant dependant in part on Dr Ceesay's corroboration of aspects of the appellant's account [page 26]. While I note the endorsement of his credentials and expertise, Amnesty International's report does not address the specific concerns about Dr Ceesay set out above. In the circumstances, while I accept the analysis set out in Amnesty International's report about the general circumstances in Gambia, I am unable to attach weight to its assessment of risks specific to the appellant, given that it is predicated on the assumption that he has given an accurate account of his activities. Similarly, it is difficult to attach much weight to the findings of District Judge Purdy in the extradition case put before me, as the facts are different and thus of little relevance to the assessment of the risk to the appellant on return.
61. The appellant claims to have several relatives in the United Kingdom yet none of them have appeared to give evidence on his behalf. I consider that it was reasonable for him to have asked them so to do, as they may have been able to give direct evidence in support of his claims. His explanation - that he did not think of asking them to come - is not satisfactory.
62. Further doubts arise as to the appellant's credibility from the evidence given by him, Ms W and C as to the nature of his relationship with Sonia with whom he was staying in Reading.
63. It is recorded in Judge Lawrence's determination [47-48] that the appellant had that he had lived in Reading, staying with "Sonia" who is a sympathiser and not a relative. Ms W said that Sonia is the appellant's blood sister.
64. The appellant now says in his supplementary witness statement [4] that he never told Ms W that Sonia is his blood sister but had referred to her as a "sister" as a cultural usage as they had grown up in the same town. In her supplementary witness statement dated 2 July 2013, Ms W does not retract her evidence about what the appellant told her about Sonia.
65. I bear in mind Ms Foot's submission that it is dangerous to attach too much weight to a determination which has been set aside, but no challenge has been made that this aspect of the evidence was not properly recorded. I consider that there is a discrepancy in what the appellant said about Sonia which casts doubt on his credibility and on the strength of his relationship with Ms W.

66. Taking these factors into account and viewing them as a whole, I am not satisfied that the appellant is related to Manlafi Corr or Jain Colley Faye, nor am I satisfied that he has come to the adverse attention of the authorities in Gambia. I am not satisfied that he attempted to stand for parliament, nor am I satisfied that he was perceived to have supported any person standing as an independent candidate for parliament.
67. The appellant claims that he is at risk on return to Gambia on account of his involvement with "Hello Gambia" and "Freedom Newspaper". He claims that this will have become known to the Gambian authorities. While I note the evidence at page 65 of the appellant's bundle shows his Skype account, the account is in the name "njuffa joof" and there is no indication that anything other than that name would be available to the authorities, and I am not satisfied that they would be able to link it to the appellant.
68. It is submitted that simply as a failed asylum-seeker, the appellant would be at risk on return. The evidence for this is the statement from President Jammeh (reported in the Freedom Newspaper [AB page 99] that those who return will regret being born. This issue is dealt with at length in Dr Ceesay's report, but I note that the assessment of the risks (page 9 of the report) are predicated on the appellant being an opponent of the regime, or being perceived to be such. I am not satisfied that that is the case, nor is there sufficient evidence in the material before me to show that those who are returned are questioned to determine if they claimed asylum, nor that anyone who admitted such a thing would, without previous opposition to the regime, be at risk. While Dr Ceesay does refer to the ill-treatment of one individual at footnote 7, that incident was in 2007, and the individual in question was a journalist unlike the appellant. Viewed as a whole, I consider that there is insufficient evidence to show that the appellant would be at risk on return to Gambia of ill-treatment of sufficient severity to engage either the refugee convention or Articles 2 or 3 of the Human Rights Convention.
69. I now turn to the appellant's relationship with Ms W and her daughters. As noted above, I was not, in considering whether the determination of Judge Lawrence involved the making of an error of law, satisfied that his findings in respect of these issues, in error. For the reasons set out above, I consider that the appellant is wholly lacking in credibility, but it is not in dispute that the circumstances of the appellant and Ms W have changed, as they are now living together. It is therefore, in these circumstances, necessary to reconsider these issues.
70. I consider that there are discrepancies in the explanations given for cancellation of the proposed marriage ceremony. Ms W's explanation was that the ceremony was cancelled in 2012 as they did not have enough money, and that it was only within the last few weeks that they had discussed the divorce. Given that Ms W was unaware until the hearing before the First-tier that the appellant had been married, that timing must be correct, or Ms W did not tell the truth to Judge Lawrence about that.

71. The appellant's explanation for the cancellation was evasive as was his evidence about why he had agreed to marry and for a room to be booked when he had no evidence (as would be needed) to show he was divorced. The fact that he had taken steps to marry Ms W without telling her that he had been married, and had no evidence of his divorce, casts significant doubt on his intentions and credibility. I do not accept his explanation that he knew he could get the divorce certificate explains this and I consider that this is another evasion, not least as he admitted he has taken no steps to obtain it.
72. It is not disputed that the appellant is now cohabiting with Ms W, or that her daughters (and recently born grandchild) live with her, but that is a recent development. It has to be set against the previous lack of candour on the part of the appellant. The reasons for not cohabiting prior to now make little sense. It was initially said that the reason was money, Ms W now saying in her supplementary statement [5] she did not previously mean a reduction in her benefits, but one more mouth to feed. That is inconsistent with her earlier statement [10] where she said that if the appellant came to live with her, her benefits would be affected and already they are not enough to support him [10]. Yet despite what was put forward as reasons why they did not cohabit, they now do so without any change in finances. Although it is said that they have economised, I consider that this is not a sufficient explanation for what was said to be an obstacle to their claimed intention to marry and cohabit in the past.
73. While I have heard evidence from Ms W and C about the strength of their relationship with the appellant, I bear in mind both the appellant's lack of credibility, his lack of candour to Ms W over a significant period of time, and the fact that their cohabitation is a recent development.
74. I am not persuaded that the appellant's true intention is to form a family life with the appellant or her children. I am satisfied that the appellant is simply using Ms W and her family in an attempt to remain in the United Kingdom. Accordingly, I am not satisfied that he has established a family life with any of them. I am not satisfied accordingly, that he meets the requirements of paragraph 276ADE of the immigration rules, or appendix FM, and in particular, I am not satisfied that the appellant meets the requirements of exception EX1 or any of the other provisions of the immigration rules.
75. I therefore turn, in the light of MF (Article 8 - new rules) Nigeria [2012] UKUT 393 (IAC), Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 60 (IAC) and Izuazu Article 8 - new rules [2013] UKUT 00045 (IAC), to the learning in respect of article 8. In turning to that, I bear in mind the questions set out by Lord Bingham at paragraph 17 of the opinions in Razgar. I accept that the appellant has established a private life in the United Kingdom but, for the reasons set out above, I do not accept that he has established a family life here either with Ms W or her children or her granddaughter.

76. The best interests of the children in this case are a primary consideration. In this case, I consider that these are best served by remaining with their mother (in the case of Ms W's daughters) and with her mother in the case of the older daughter's baby.
77. I accept that Ms W's younger daughter has been diagnosed as suffering from a heart murmur and high blood pressure. That is evident from the letter dated 2009 to that effect, but there is no more recent medical evidence that her condition has worsened, or that the appellant's removal would have a significant effect on her.
78. While it may well be the case that Ms W and her children have formed an attachment to the appellant, and his removal may have an emotional impact on them, this must be seen in the context of his actions, intentions, and the very short length of the time they have lived together. I accept that the appellant has helped out in the household, but that is a recent development, and I am not satisfied that his continued presence as a carer is necessary. Accordingly, in all the circumstances, I am not satisfied that the best interests of the children require the presence of the appellant in this country.
79. The appellant has, I accept, formed a private life here, but in the knowledge that he could be removed at any time as he had no right to be here. He has, I accept, some ties to this country as a result of his time here, but he has also sought to remain here on the basis of an unfounded claim for asylum. Other than his relationship with Ms W and her children, there is little evidence of the contact of his private life.
80. There will, inevitably, be an interference with the appellant's right to respect for his private life as a result of his removal, and that is sufficiently serious to engage article 8. It would also be in accordance with the law, and with the legitimate aim of maintaining immigration control.
81. I consider that, bearing in mind the need to maintain immigration control to which a significant interest is attached, that the respondent has satisfied me that the interference caused to the appellant's right to respect for his private life is proportionate.
82. In conclusion, for the reasons set out above, I remake the decision of the First-tier Tribunal by dismissing the appeal on all grounds.

SUMMARY OF CONCLUSIONS

- 1 The determination of the First-tier Tribunal did involve the making of an error of law and I set it aside.
- 2 I remake the determination by dismissing the appeal on all grounds.
- 3 The anonymity order made by the First-tier Tribunal is preserved, and will remain in force unless a further order is made.

Signed

Date: 3 September 2013

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/02533/2013

THE IMMIGRATION ACTS

**Heard at Harmondsworth
On 2 May 2013
Prepared 2 May 2013**

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR D J

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Easty, Counsel, instructed by Legal Rights Partnership
For the Respondent: Mr Jagpal, Presenting Officer

DETERMINATION AND REASONS

7. The appellant appeals with permission against the determination of First-tier Tribunal Judge N M K Lawrence, promulgated on 11 April 2013, dismissing the appeal against the respondent's decision made on 14 March 2013 to refuse him asylum and to refuse him leave to enter the United Kingdom.

The Appellant's Case

8. The appellant's case is set out in his witness statement. In summary, he qualified as a teacher and was previously a youth mobiliser for the APRC, the governing party, but

began to distance himself from the party in 2006 after one of his cousins disappeared and appears to have been killed after an accusation of being involved in an attempted coup d'état. As a result, the appellant, another cousin Mr Faye, and Mr Faye's constituents became disillusioned with the APRC. They then dropped Mr Faye as an MP. The appellant then applied to be allowed to stand as an independent MP but this was blocked he believes by the APRC fearing that he would be successful. Although prevented from standing, the appellant assisted covertly the opposition NRP candidate who lost the election in February 2007 by a narrow margin. The appellant believes that the APRC were aware of his involvement and that he was subsequently monitored by the National Intelligence Agency and thus he kept a low profile.

9. By coincidence, the appellant had the opportunity to go on an educational visit to the United Kingdom as part of his teaching career. He applied for, and was granted, a visa to come to the United Kingdom for that purpose, arriving here in June 2007. The appellant remained here, after his visa expired, and claimed asylum on 16 February 2013.
10. In the meantime, the appellant met his partner, Ms W and in February 2012 they became engaged. Ms W has two daughters, C aged 12 and M aged 19. It is the appellant's case that they have formed a family life together.

The Respondent's Case

11. The respondent's case is set out in the refusal letter dated 13 March 2013. In summary, although accepting the appellant's identity, nationality and date of birth [16] the respondent did not accept that:
 - (i) the appellant had worked for the APRC given his lack of knowledge of his role and how he would conduct campaigns for them [19];
 - (ii) that the appellant had worked undercover for the NRP and had masterminded their political strategies in his area [22];
 - (iii) that the National Intelligence Agency were tracking him [23] given that he had no contact with them from February until June although staying in the family home [24] and he was able to leave the country using his own passport without difficulties [25]; the appellant's credibility was damaged by his failure to claim asylum on arrival or in the subsequent five years [30, 31]; the relationship between the appellant and Ms W was subsisting given that they lived so far apart [49];
 - (iv) that the appellant had established a parental relationship with Ms W's children;
 - (v) that he had therefore failed to fulfil the requirements of Section EX.1 of Appendix FM of the Immigration Rules [54] and that his removal was proportionate;

- (vi) the appellant did not fulfil the requirements of paragraph 276ADE of the Immigration Rules and that therefore his removal was proportionate [58].
12. At the hearing on 10 April 2013, the judge heard evidence from the appellant as well as Ms W and her older daughter. He also had before him a bundle produced by the appellant's solicitors, containing an expert report from Dr Cessay.
13. The judge dismissed the appeal finding that:
- (i) The government in Gambia does not tolerate opposition to it [18];
 - (ii) The appellant's suspicions that he had been followed by the NIA were without foundation [19]; that it was not plausible that he would have been tracked and followed on a daily basis for two to three weeks but not arrested [33] and that the explanation for not being arrested was not plausible;
 - (iii) Had the appellant been tracked it was not plausible that no attempt would have been made to stop him from leaving the country [32];
 - (iv) It was not plausible that the NIA would not have known about his planned departure given that he needed to get government approval for his trip to the United Kingdom [23];
 - (v) No weight can be attached to the opinion of Dr Cessay [30] and that the expert's opinion was in part matters which are exclusively the provenance of a finder of fact [30];
 - (vi) It was not likely that the appellant's name was on the list held at the border of those who were wanted [32, 34];
 - (vii) Dr Cessay's belief that all failed asylum seekers are likely to be viewed as dissidents on return to Gambia is not tenable [35];
 - (viii) Even if questioned the appellant is not likely to face ill-treatment [36] or otherwise faces adverse attention on return [37];
 - (ix) The appellant was not involved with any opposition party in the past [37];
 - (x) There was no evidence of the appellant's alleged activities in the United Kingdom unknown to the Gambian authorities [38];
 - (xi) The appellant had been deceptive towards Ms W and her children in an attempt to secure his status in the United Kingdom [46] and that the appellant had not formed a family life with Ms W and her two daughters [49, 50];
 - (xii) The appellant's involvement with Ms W's daughters are not sufficiently close that their best interests are invoked [52]; that the appellant's removal to the Gambia is proportionate to Article 8 [60].

8. Permission to appeal to the Upper Tribunal against that decision was granted by Designated Judge of the First-tier Tribunal Digney on 17 April 2013.

Does the determination of the First-tier Tribunal involve the making of an error of law?

Ground 1 Errors in Approach to Expert Evidence

9. Miss Easty submitted, relying on the grounds of appeal that the judge had erred in making adverse findings of credibility before going on to consider the expert evidence, his approach being an expert's factor justification of the earlier adverse credibility findings. She submitted also that the judge had failed to provide proper reasons for concluding that the expert's credentials are such he could not be treated as an expert, had erred in failing to put to Dr Cessay, if necessary at a further hearing, the concerns raised about his credentials; and, that the judge had improperly dismissed Dr Cessay's evidence on the basis that his sources were not sufficiently identified.
10. Whilst I note Mr Jagpal's submission that this is just a disagreement, and there are difficulties arising from the expert being asked to comment on the credibility and plausibility of the appellant's account, I am not satisfied, viewing Dr Cessay's report as a whole, that he is, as Mr Jagpal submitted, acting as an advocate on behalf of the appellant. The nature of an expert in immigration hearings is somewhat different from that in other hearings. An expert is frequently, as Dr Cessay appears in this case, to be providing additional evidence not otherwise available to the Tribunal. In this case, that evidence was capable of corroborating some aspects of the appellant's claim which the judge had projected. I note Mr Jagpal's submission that the judge did raise with Counsel the defects in the expert report as to the expert's credentials and that the Counsel did not ask for an adjournment. That said, that does not absolve the judge from taking a balanced objective view of the expert.
11. Nonetheless, at paragraph 30 the judge states "I am unable, in law, to attach any weight to the views expressed by Dr Cessay, having concluded that he was seeking to usurp the role of a fact finder.
12. I consider that what Dr Cessay was seeking to do, as is permissible, is to provide evidence in the form of information supplied from his contacts in Gambia which were capable of supporting the appellant's claim. Whilst it may have been open to the judge to attach more or less weight to those aspects of the expert report, it was not permissible to reject it out of hand without any attempt at analysis of why it is he thought that the expert had attached too much weight to the sources consulted.
13. Accordingly, I am satisfied that there is a material error of law in respect of the judge's approach to the expert's evidence arising from a misdirection that he could not accept his evidence.

Ground 2 Unlawful Approach to the Appellant's Credibility

14. Ms Easty submitted that the judge had erred in considering not whether the appellant's account was credible but it was implausible. She submitted further that the judge had erred in his analysis in failing to take into account the background evidence and more particularly the evidence of Dr Cessay.
15. Whilst I note Mr Jagpal's submissions that viewed as a whole these findings are unexceptional and sustainable, I consider that the judge has, partially affected by his approach to ruling out the expert evidence, failed adequately to explain why he considered certain events implausible. As Ms Easty conceded, it would have been open to him to say that they were not credible but the test for saying that they are not plausible is somewhat different. Accordingly, I am satisfied that this ground also identifies an error of law in the determination.

Ground 3 Failure to Make Adequate Findings on Material Matters

16. I find less merit in the submission given that the appellant's evidence of his sur place activities are limited to follow online publications, that there is, as Miss Easty accepted, a lacuna in the chain of evidence is damaging first that the appellant had subscribed either to "Hello Gambia" or "Freedom Newspaper"; that this evidence held by them would be sufficient to identify the appellant as an individual; or, that that evidence would have come to the attention of the Gambian authorities. That said, I accept that was not the analysis given by the judge and whilst the error made the error of law, there were other bases on which he could have come to the same finding. That said, given my findings above, I do not consider that these findings are sustainable

Ground 4 Failure to Identify Standard of Proof

17. I find no merit in this ground. The judge refers at several places in his determination to the lower standard of proof and it can be expected that the judge was aware that this was the reasonable degree of likelihood.

Ground 5 Failure to Conduct Lawful Assessment of Best Interests of the Children

Ground 6 Errors in Assessment of Family Life

19. These grounds fall to be taken together. Aside from the concerns I have with relation to credibility as set out above, once those findings had been made, I consider that it was open to the judge to find that the appellant had not established a family life with Ms W or with her daughters. Similarly, it is difficult to impugn the judge's findings or rather failure to make findings in respect of the best interests of Ms W's daughters given that he found there was no family life between the appellant and them.
20. That said, in light of the observations regarding the credibility findings above, it may be necessary to revisit the findings in respect of family and private life and also the best interests of the children.

21. For these reasons, I find that the determination of the judge did involve the making of a material error of law. The errors are material in that it was open to the judge on the material found to come to other conclusions regarding the risk to the appellant on return to Gambia and in respect of his family life with Ms W. Accordingly, I set the decision aside.

Re-making the Decision

22. I do not consider that, in all the circumstances, it is necessary to order that this matter be heard de novo. As Miss Easty accepts, there is a limited amount of further evidence that can be given although it will be necessary to hear evidence, in all the circumstances, from Dr Cessay.
23. As the matter has now been taken out of the Fast Track, I make the following directions.
- (1) The matter is to be listed before UTJ Rintoul at Field House on a date to be fixed.
 - (2) That the appellant serve on the Upper Tribunal and on the respondent, ten working days before the hearing, a further witness statement capable of standing as examination-in-chief setting out any further information he wishes to give with respect to his activities in the United Kingdom and in relation to his family life.
 - (3) That the appellant serve on the Upper Tribunal and on the respondent a witness statement from Ms W, setting out any further information with respect to her family life with the appellant. That statement capable of standing as examination-in-chief.
 - (4) Any further material to be submitted must comply with Rule 15(2)(a).

Signed

Date: 16 May 2013

Upper Tribunal Judge Rintoul