



IAC-AH-CO-V1

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

Appeal Numbers: IA/49692/2014
IA/49700/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 26th November 2015**

**Decision & Reasons Promulgated
On 6th January 2016**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

**Y (FIRST APPELLANT)
O (SECOND APPELLANT)
(ANONYMITY DIRECTIONS MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Makulu (Counsel)

For the Respondent: Mrs Pettersen (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of the Appellants, to the Upper Tribunal, in respect of a decision of the First-tier Tribunal (Judge Turnock) promulgated on 21st May 2015, in which he dismissed their appeals against decisions of the Respondent, made on 1st December 2014, to remove them from the UK. The First-tier Tribunal made anonymity orders with respect to both Appellants and I have continued those orders.

2. I shall call the first Appellant Y and the second Appellant O. Y is the mother of O. O is a minor child who was born on 2nd December 2009. Both are nationals of Gambia.
3. Y came to the UK on 17th September 2008 as a dependant of her husband A, who is also a national of Gambia. She says that her relationship with A ran into difficulties whilst the two were together in the UK. She became pregnant with O and, after his birth on 2nd December 2009, suffered from post-natal depression. She says that, by this time, A had become very controlling. In June 2010 her father passed away. A suggested that Y should travel to Gambia for a short period to mourn her late father and she did so, taking O with her. However, when they were due to return, A said to Y that she would have to leave O behind in Gambia for a time while he "sorted out his paperwork". So, Y returned to the UK alone, leaving O with her own family. According to Y, her relationship with A deteriorated further. This led to A's family in Gambia collecting O from Y's family. Judge Turnock explained that all of that in this way;

"26. The First Appellant states that on her return home following her attendance at the birthday celebrations of a close friend her husband confronted her with, 'furious anger, accusations of cheating and being disloyal'. A few days later her husband asked his younger brother to go to collect the Second Appellant from the First Appellant's mother, who was looking after him so that he could go and visit her husband's side of the family. The First Appellant states that she did not object to that but when the Second Appellant was not returned to her mother the First Appellant realised that her husband's plan was to 'snatch' her son from her family. The First Appellant states that she then started making plans to bring back the Second Appellant to the United Kingdom. She states that she was supported by friends and family who assisted her to raise the necessary funds, so she could travel to Gambia to be reunited with the second Appellant. During that time she states that the abuse she was suffering at home had escalated to a high level because she was no longer working very long hours to support her husband."
4. Y did return to Gambia, collect O from A's family, and return with him to the UK. However, she says that by that time, her marriage had broken down. She moved away from where he was living. She applied for leave to remain for herself and or on the basis that she had been a victim of domestic violence. She provided evidence that she was receiving support due to stress and mental health issues, that she had made reports to the police regarding A's conduct towards her and that O was doing well at school.
5. It was accepted before Judge Turnock that Y could not meet the requirements of the Immigration Rules relating to domestic violence but it was contended that removal would breach her and O's rights under Article 8 of the European Convention on Human Rights (ECHR) and that, in particular, with respect to O, Section 55 of the Borders, Citizenship and Immigration Act 2009 had relevance. The key argument pursued, in this context, was to the effect that if Y and O had to return to Gambia O would

be snatched by A's family such that he would be separated from his mother.

6. At the hearing before the First-tier Tribunal, a document which has been referred to as a "legal opinion" was produced. This opinion related to how matters of custody were dealt with in the courts in Gambia. Judge Turnock admitted the report for consideration. He accepted, in Y's favour, that she had been the victim of domestic violence as claimed, albeit that she could not meet the Immigration Rules as a result of it because she did not have the form of leave required by Section E-DVILR 1.2 and 1.3. of Appendix FM to the Rules. He considered matters outside the Rules. He said this;

"45. The first Appellant produced an opinion with regard to the legal position of an estranged wife regarding custody against the husband where the latter wanted full custody of the son under Gambian law.

46. The opinion stated that the Children's Act of 2005 was established in order to strengthen laws relating to the welfare of children and what is in their best interest. It also established a children's court where amongst other things proceedings regarding the custody and maintenance of children are held. The children's court being a special court that deals with matters of children has the jurisdiction to hear all cases concerning children irrespective of the religion the parents belong too. A child in the Act is regarded as anyone below the age of 18 years. In Section 146(ii) of the Act it states,

'The power of the children's court under sub-Section (i) to make an order as to the custody of a child and the right of access to the child may be exercised, notwithstanding that the mother of the child is at the time not residing with the father of the child'.

47. The opinion confirms that in the Gambia 'the paramount consideration generally in custody matters is the interest of the child, which includes taking steps to avoid exposing the child to unnecessary social trauma". The opinion continues,

'however, we have not lost sight of the fact that age old customs and misinterpretation of religious precept by trado - social authorities, still hold sway and is usually the first port of call by a mischievous party, which may engender more harm before the matter gets to the official authorities'.

This is a situation that can be avoided at all cost so long as the child is with a safe party and in a safe environment. The opinion concludes,

'It is our opinion that though the Legal Process is in place, however, there is total lack of awareness by certain persons in the hinterland where the family of [Y] and her husband comes from, and due to age old local customs, may exercise force and social/psychological torture of her and her son if she comes back to the Gambia with him. Despite legal provisions the entrenched belief is that the custody of the male child is the preserve of the husband, irrespective of his age'.

48. There is evidence from her that previously the second Appellant was retained for a while by her husband's family although he was recovered without mishap. It is not suggested that the son is in any

physical danger but, it is said, his emotional well-being would be adversely affected if he were to be kept by his father's family.

49. However, the legal opinion produced makes it clear that there is due process in law in Gambia and a court could be called upon to decide what it was considered was in the best interests of the child, and make an order accordingly. The evidence presented by the Appellant does not justify her assertion that the second Appellant's father or his family would seek to remove the second Appellant unlawfully and the first and second Appellants have the protection of the courts."

7. The judge then went on to set out the content of Section 117A and B of the Nationality, Immigration and Asylum Act 2002, and having done so said this;

"53. The Appellants entered the UK with limited leave to remain which has now come to an end. Neither is a British citizen with the right to remain in the UK. They have been in the UK for a comparatively short period of time and they are able to relocate to Gambia where they will be able to re-integrate without any real difficulties and it is not unreasonable to expect them to do that. They will be able to enjoy family life in Gambia.

54. I find that the decision to remove the Appellants is proportionate and is not in breach of their rights under Article 8 of the ECHR."

8. So, the appeals were dismissed.

9. An application for permission to appeal to the Upper Tribunal followed. Permission was granted in these terms.

"While this is a very careful and detailed decision, it may be arguable that the FTTJ erred in failing to resolve the conflict of opinion on the material matters, in that while he found that there was no evidence that the Appellant's former partner would seek to remove the second Appellant unlawfully and that they would have the protection of the court, there was evidence before him indicating the *'entrenched belief is that the custody of the male child is a preserve of the husband, irrespective of age.'* It is relevant, that the FTTJ accepted that the second Appellant's father had arranged for his long term removal from the first Appellant's family previously and without her consent at [26] of the decision."

10. Mr Makulu, for the Appellant, submitted the position was that if Y returned to Gambia with O, then O would be taken to live with A. What the judge had said at paragraph 49 of his determination could not stand in the face of what had been said at paragraph 26. Indeed, the judge had failed to reach a decision as to whether the assertions of Y, as recorded at paragraph 26, were accepted. Thus, the conclusion at paragraph 49 was unsupported by any evidence.

11. Mrs Pettersen, submitted that the judge had had proper regard to the legal opinion before him. He had noted the culture rule customs but had also noted that there is an operating legal system. The legal opinion does not say that people are prevented from accessing courts. The judge had

reached a clear finding that although O had been retained by A's family for a period, he had been re-secured without any mishap.

12. Mr Makulu, being entitled to the final word given that it was his clients who were appealing to the Upper Tribunal, suggested that the report indicated that persons from rural parts of Gambia, as are this family, do not tend to go to the courts. Whilst the legal opinion did not say that people were prevented from going to court that should be implied. The author of the legal opinion is saying that, in effect, that pressure is brought to bear on persons not to access the courts. The judge had not engaged with that.
13. I reserved my decision as to whether or not the determination of the First-tier Tribunal should be set aside for legal error. Having considered matters I have decided it should not be. That is because I have concluded that the First-tier Tribunal did not make an error of law. I explain why I have reached that view below.
14. The judge noted Y's account as to how she came to return to Gambia to fetch O back to the UK at paragraph 26 of the determination. What he said is set out above. At paragraph 29 he notes that Y did return with O. At paragraph 48 he accepts that O "was retained for a while" by A's family, but that he was subsequently "recovered without mishap". So, he was finding that despite Y's fears that he had been snatched, she had been able to recover him without difficulty, from A's family, when she travelled to Gambia in order to do so. Clearly, that was a finding open to the judge on the evidence before him.
15. The judge admitted the "legal opinion" for consideration. The opinion appears to have been authored by a lawyer in Gambia but the author's precise experience and qualifications are not stated. In light of that it might well have been open to the judge to simply reject the opinion or attach little or no weight to it. However, as Mr Makulu points out, he did accept and attach weight to the opinion and no complaint has been made about his doing so.
16. The judge carefully considered the content of the opinion including what it had to say about the availability of the courts and about custom and practice in rural areas which might lead to pressure being put upon persons not to access the courts. However, I agree with Mrs Pettersen that what the judge said at paragraphs 48 and 49 of the determination was of significance. He noted, as already commented upon, that O had been recovered by Y without mishap and, at paragraph 49, he said that there was nothing to justify her assertion that A or A's family would seek to remove O unlawfully. That, in context, must have been based upon her having been able to recover O, without mishap, from A's family, in the first place. So, what the judge was really finding, in effect, was that if Y did not want O to be taken from her, which of course she does not, A's family would not forcibly remove him against her wishes. It seems to me that it was open to the judge to take that view on the material before him and, particularly, in the light of the history of her having recovered O in the

past. There was no suggestion that, for example, A's family had sought to resist Y taking O. So, the question of her being able to access the courts did not arise. Further, and in any event, the legal opinion did not say that family members actively prevent or succeed in preventing persons from accessing a court and, given the existence of the courts, it is difficult to see how Y might be prevented from having recourse to them if that is what she wanted to do. The judge did not make an express finding that A's family would not prevent her from going to court in some way but given his acceptance that A's family would not seek to remove O unlawfully, that would seem to follow. The report certainly does make it clear that the children's court would be an appropriate forum for matters concerning the welfare of O to be considered.

17. In light of the above it is my conclusion that the First-tier Tribunal reached findings which were properly open to it on the material before it. It did not, therefore, err in law.

Conclusions

18. The decision of the First-tier Tribunal did not involve an error of law and shall stand.
19. The First-tier Tribunal made anonymity orders. I continue those orders (see below).

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT FEE AWARD

Since no fees are payable there can be no fee awards.

Signed

Date

Upper Tribunal Judge Hemingway

