



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/08947/2016

THE IMMIGRATION ACTS

Heard at Liverpool
On 30th April 2018

Decision & Reasons Promulgated
On 16th May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Mr R O’Ryan of Counsel instructed by Greater Manchester
Immigration Aid Unit

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appealed against the decision of Judge Farrelly of the First-tier Tribunal (the FtT) promulgated on 28th July 2017.

2. The Respondent before the Upper Tribunal was the Appellant before the FtT and I will refer to him as the Claimant. He is a Gambian citizen who made a protection and human rights claim in the UK on 8th February 2016.
3. The Claimant feared persecution and ill-treatment if returned to Gambia because of his association with a cousin of the former President, President Jammeh who had been arrested and accused of stealing from President Jammeh. The cousin was granted bail and fled Gambia. In July 2014 the Claimant was arrested, told to sign a statement implicating the President's cousin. Initially he refused and he was then tortured while in detention. He eventually gave a statement implicating the President's cousin.
4. The Claimant was serving in the Gambian Army and was offered promotion and a financial reward if there was a successful court case against the cousin. After being released from detention the Claimant left Gambia in December 2015 although he was still a serving soldier. He therefore left the army without permission.
5. The Claimant's protection and human rights claim was refused by the Secretary of State on 8th August 2016 and his appeal was heard by the FtT on 28th June 2017.
6. The FtT heard evidence from the Claimant, and allowed the appeal under the Refugee Convention and with reference to Articles 2 and 3, finding that the Claimant had given a credible account. However at paragraph 15 the FtT did not find that prison conditions in Gambia would engage Article 3 and that aspect of the appeal was dismissed, although in the conclusion of the decision, the FtT specifically allowed the appeal with reference to Articles 2 and 3.
7. The Secretary of State applied for permission to appeal to the Upper Tribunal relying on two grounds. Firstly it was contended that the FtT had erred by failing to make findings on factual issues as to whether the Claimant had been tortured and forced to sign a statement. Secondly it was contended that the FtT had made a misdirection in law by failing to give adequate reasons for finding that the Claimant would be at risk of persecution on return. Permission to appeal was granted by Judge Pedro on 19th October 2017.
8. Following the grant of permission the Claimant submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In very brief summary it was submitted that the FtT had not erred in law in allowing the appeal under the Refugee Convention, but had in fact erred in law in finding that prison conditions in Gambia would not breach Article 3 of the 1950 European Convention on Human Rights (the 1950 Convention). The FtT had failed to take into account or address relevant evidence including the Respondent's own Operational Guidance Note dated 7th January 2014 and a US Department of State Report dated 3rd March 2017.

Error of Law

9. On 30th January 2018 I heard submissions from both parties in relation to error of law. On behalf of the Secretary of State oral submissions were made on the second ground, and no oral submissions made upon the first ground. It was submitted that the

situation in Gambia had changed after the refusal decision dated 8th August 2016 because there had been democratic elections, and President Jammeh had been forced to leave Gambia. The FtT had erred by failing to take into account the change of regime when considering risk on return.

10. On behalf of the Claimant, it was submitted that the FtT had given adequate reasons for findings made, but had erred in law in concluding that prison conditions in Gambia did not meet the Article 3 threshold.
11. I found that there was a material error of law disclosed in the FtT decision, and set aside the decision but preserved some findings which had not been the subject of challenge. Full details of the application for permission, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 30th January 2018, promulgated on 9th February 2018. I set out below paragraphs 16-22 of that decision, which contain my conclusions and reasons for setting aside the FtT decision;
 - “16. The FtT erred in law by failing to give adequate reasons for concluding that the Claimant would be at risk of persecution on return to Gambia. In my view the FtT failed to engage with the regime change in Gambia, and failed to give adequate reasons for concluding that the Claimant would be at risk of persecution from the new regime if returned to Gambia.
 17. The FtT did not err in law by failing to make findings of fact on disputed matters. The FtT found at paragraphs 12-14 that the Claimant served in the army as claimed, and that he left the army without permission. The FtT found that a cousin of the former President had been arrested and accused of theft from the former President. The FtT found that a newspaper report referred not only to the cousin facing charges, but there was also mention of the Claimant.
 18. The FtT found that medical evidence supported the Claimant’s account to have been ill-treated while in detention.
 19. I find that the FtT also erred at paragraph 15 in failing to give adequate reasons for concluding that conditions in detention in Gambia would not amount to inhuman or degrading treatment. There is no indication that the FtT considered documentary evidence before it on this issue, including the Respondent’s own Guidance Note, and the US Department of State Report, and failed to consider the Claimant’s mental health issues.
 20. The decision of the FtT is therefore unsafe, and is set aside. I have considered paragraph 7 of the Senior President’s Practice Statements, and do not find that it is necessary or appropriate for this appeal to be remitted back to the FtT to be heard afresh. It was accepted by both representatives that some findings made by the FtT could be preserved and I agree that it is appropriate.
 21. The preserved findings are that the Claimant served in the Gambian Army. He left the army without permission. He was arrested and detained as a result of his association with the former President’s cousin. He was ill-treated while in detention.

22. There will be a further hearing before the Upper Tribunal. The issue to be decided is whether the Claimant would be at risk if returned to Gambia."

Re-Making the Decision - Upper Tribunal Hearing 30th April 2018

12. At the commencement of the hearing it was confirmed that no further oral evidence would be called, and further submissions would be made by both representatives in relation to risk on return if the Claimant was returned to Gambia.
13. I ascertained that the Tribunal had all documentation to be relied upon and each party had served the other with any documentation upon which reliance was to be placed. The Tribunal had the documentation that had been before the FtT, which amounted to the Secretary of State's bundle with Annexes A-C, the Claimant's bundle with 243 pages, the Claimant's skeleton argument dated 27th June 2017 and attached documents, a preliminary psychological therapy report on the Claimant dated 14th March 2017, and an extract from chapter 19 of the Gambia Armed Forces Act.
14. In addition the Tribunal had received the Home Office Country Policy and Information Note on Political Opinion in Gambia dated March 2017 and a supplementary bundle of documents comprising nineteen pages served on behalf of the Claimant, in relation to prison conditions in Gambia.
15. Just prior to commencement of the hearing Mr Bates served a further document headed "Gambia's Road to Democratic Reform" prepared by the Africa Center for Strategic Studies dated 24th April 2018. There was no objection to the late production of this document, and Mr O'Ryan did not seek an adjournment in order to consider the document.
16. I heard submissions from both representatives which are set out in full in my Record of Proceedings and briefly summarised below.
17. Mr Bates submitted that there had been a regime change in Gambia since the Claimant had left Gambia in December 2015. The Claimant would not be at risk if returned. The Claimant had left Gambia because he feared persecution from the former President Jammeh.
18. President Jammeh had lost the elections in December 2016 and subsequently went into exile. The most recent background evidence was that prepared by the Africa Center for Strategic Studies dated 24th April 2018. It was submitted that this document indicated that the 22 years of authoritarian rule by President Jammeh had ended, major reforms were being undertaken, political prisoners were being released, and exiles returning home. A National Human Rights Commission had been created, together with a Truth Reconciliation and Reparations Commission (TRRC) which in January 2018 began recording testimony from victims and perpetrators to shed light on human rights abuses committed during President Jammeh's rule. President Barrow had replaced the previously feared National Intelligence Agency (NIA) with a civilian state intelligence service overseen by Parliament. The evidence indicates that nine former NIA officers are now on trial. In July 2017 four army officers close to the former

President were arrested in connection with a failed mutiny, in October seven senior officers discharged for misconduct, and in November 2017 twelve officers court martialled on charges of attempting to overthrow the government.

19. Mr Bates referred to the Home Office CPIN of March 2017 which also refers to the release of political prisoners, and indicates that individuals fearing former President Jammeh's regime are unlikely to be at risk or in need of international protection. This document also makes reference to the ongoing reform of the security services and refers at 8.6 to many Gambians returning to Gambia having previously fled to Senegal, fearing the former regime of President Jammeh.
20. Mr Bates submitted that the Claimant had not provided evidence to indicate that he would be at risk from the new regime in Gambia. The Claimant had left the army without permission, because he feared the previous regime. He had not submitted satisfactory evidence to indicate that he would be subject to any action from the new regime.
21. Mr O'Ryan relied upon the skeleton argument which had been before the FtT together with the rule 24 response and submitted that the Secretary of State had not demonstrated a sufficient change of circumstances in Gambia to show that the Claimant would not be at risk.
22. It was submitted that there are still supporters in Gambia, of the previous President, and the Claimant would therefore be at risk from such individuals. It was submitted that the documentation attached to the skeleton argument indicated that there were still human rights abuses in Gambia notwithstanding the regime change, and the Claimant would be at risk.
23. In addition the Claimant risked imprisonment because he had left the army without permission. It could not be said that he had left the army while on active service, but section 56 of the Gambia Armed Forces Act was relevant which indicates that a soldier who absents himself without leave is guilty of an offence and on conviction is liable to imprisonment for a term "not exceeding two years or to any less punishment provided by this Act". Mr O'Ryan pointed out that at page 32 of the Appellant's bundle there is a wanted notice for the Claimant dated 6th August 2014 issued by the Gambia Police Force. This was issued because he had left his guard post without permission. It was submitted that there was no evidence to indicate there had been an improvement in prison conditions and I was referred to the Home Office Operational Guidance of January 2014 at pages 121-122 of the Appellant's bundle. The conclusion at 3.21.15 is that

"... prison conditions were harsh and life-threatening and taking into account the incidents of torture, serious overcrowding, poor sanitation, inadequate food and medical facilities and deaths in detention, are likely to breach the Article 3 threshold."
24. I was also referred to the Claimant's supplementary bundle at page 2 dated 18th January 2018 which describes prison conditions remaining "dire, with prisoners

lacking appropriate housing, sanitation, food and adequate medical care.” I was also asked to take into account the Claimant’s medical condition and the fact that medical evidence in March 2017 indicates that he at that time was suffering post-traumatic stress disorder and depression. I was asked to find that the Claimant would be at risk of being imprisoned in Gambia if he returned because he left the army without permission, and conditions in prison would breach Article 3, and the Claimant’s medical condition was a relevant consideration.

25. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

26. The burden of proof is on the Claimant to show that he has a well-founded fear of persecution for a Convention reason, and that he would be at risk if returned to Gambia, and he would be unable to avail himself of state protection, and there would be no reasonable internal relocation option. The standard of proof is a reasonable degree of likelihood which is a lower standard than the normal civil standard of a balance of probabilities.
27. I have taken into account all the evidence both documentary and oral that has been presented, and the oral submissions of the representatives.
28. It is appropriate to record at this point that there are preserved findings made by the FtT. These confirm that the Claimant served in the Gambian Army and left the army without permission. Prior to leaving Gambia he had been arrested and detained as a result of his association with a cousin of former President Jammeh. He was ill-treated while in detention.
29. I find that there has been a regime change in Gambia which took place after the Appellant left. The Claimant left Gambia in August 2014. His wife and children remain in Gambia. The reason that the Claimant left Gambia was his fear of the regime of President Jammeh.
30. The issue before me is whether the Claimant has proved to a reasonable degree of likelihood that he would now be at risk if returned to Gambia. I find that he has not discharged that burden. My reasons for reaching that conclusion are set out below. I do not find that the Claimant has submitted independent background evidence to indicate that individuals who feared the previous regime would be at risk from the new regime. The CPIN of March 2017 at 3.1.3 refers to the new government led by President Barrow making respect for human rights and the rule of law central pillars for the “new Gambia”, and this has been demonstrated by the release of political prisoners, and reform of the security services.
31. At 3.1.4 it is stated that “Those fearing former President Jammeh’s regime are unlikely to be at risk or in need of international protection”.
32. Each case must of course be looked at on its own facts. I do not find that the Claimant has submitted any satisfactory evidence to show that he would be at risk from the new

regime. He was detained by the previous regime, and ill-treated, and forced to make a false statement against the former President's cousin. This would not put him at risk from the new regime. The former President lost elections in Gambia in December 2016 and despite initially trying to remain in power, was forced into exile. President Barrow was inaugurated in January 2017. At 2.3.4 of the CPIN of March 2017 it is stated;

'It is not considered reasonably likely that Jammeh has the will or the means to attempt to regain power. As such, those whose claim is based on fear of his regime are unlikely to be able to demonstrate a real risk of persecution or serious harm on the basis of their actual or perceived political opinion.'

33. I do not find that the Claimant has submitted evidence to counter the view expressed above in the CPIN of March 2017.
34. The most recent background evidence is that produced by the Africa Center for Strategic Studies dated 24th April 2018 to which I attach weight. At the commencement of this report it is stated that Gambia's "democratic reforms have benefitted from political will, national ownership, and international backing. However, the country's dark legacy continues to pose risks to the process."
35. The report indicates that considerable progress is being made in Gambia, one example being to replace the NIA with a civilian state intelligence service overseen by Parliament. There are still divisions in Gambia and the report at page 6 describes "despite commendable progress, Gambia's democratic transition remains fragile. Ongoing cleavages between Jammeh loyalists and supporters of a new government pose a risk to stability." Judicial reforms have started with the appointment of Gambian judges to replace foreign judges who had been appointed by President Jammeh. Comment is made that the former President had long used the courts as a tool to consolidate his power, and judges from abroad were "hired and fired with regular frequency at Jammeh's whims". There has been vetting and training of judicial staff and recruitment of new personnel.
36. I conclude that because of the regime change, the Claimant would not be of adverse interest to the new regime in Gambia. It is the case that he left the army without permission. The evidence indicates that prison conditions in Gambia, in January 2014 breached the Article 3 threshold. I take into account that in March 2017 the Claimant was diagnosed with PTSD and depression, although there is no more up-to-date medical evidence. The most recent evidence on prison conditions is contained in the Claimant's supplementary bundle which makes a reference to more than 250 prisoners being pardoned in February and March 2017 which significantly reduced prison overcrowding. The US Department of State Report of 2016 refers to prison cells being overcrowded, damp and poorly ventilated with inmates complaining of poor sanitation and food and occasionally of having to sleep on the floor. The facilities in prisons are described as poor. The Amnesty International Report of February 2018 makes reference to dozens of political prisoners and prisoners of conscience being released between December 2016 and January 2017. Prison conditions are said not to meet international standards due to inadequate sanitation, food and access to medical care. There is reference within this report to prisoners being released in order to reduce

prison overcrowding. The Human Rights Watch Report of January 2018 is the report which refers to prison conditions remaining dire, with prisoners lacking appropriate housing, sanitation, food and adequate medical care. This report also makes reference to the government significantly reducing prison overcrowding by pardoning more than 250 prisoners in February and March 2017.

38. I therefore accept that the evidence in relation to prison conditions is that they do not meet international standards, but the Article 3 threshold is high, and none of the recent reports make reference to the prison conditions being so bad that Article 3 is breached. The reference to Article 3 was made in January 2014. It may be that prison conditions in Gambia do still breach Article 3, but I do not find that sufficient evidence has been produced to prove that to be the case. My conclusion is that although prison conditions do not meet international standards and are inadequate, the evidence does not demonstrate that they breach Article 3 of the 1950 Convention.
39. I do not find that it has been proved that the Claimant would in fact be imprisoned if returned to Gambia. If found guilty for leaving his post without permission, the maximum sentence is said to be two years' imprisonment, but that is not a mandatory sentence and section 56 of the Gambia Armed Forces Act confirms that there can be "any less punishment provided by this Act". The Claimant left the army without permission because he feared persecution from the previous regime. Background evidence indicates that the present regime is trying to make significant improvements, and is investigating human rights abuses committed by the previous regime. In those circumstances, I do not find that it has been proved to a reasonable degree of likelihood, that the Claimant would receive a sentence of imprisonment for leaving the army without permission.
40. With reference to the Claimant's mental health, no up-to-date evidence has been provided to show what treatment if any he is receiving or needs, and no evidence has been submitted to show that treatment would not be available in Gambia.
41. I conclude that the Claimant has not proved that he would be at risk if returned to Gambia, and therefore he is not entitled to a grant of asylum or humanitarian protection, and his return would not breach Articles 2 and 3 of the 1950 Convention. The Claimant has not established a family life in the UK. His wife and children remain in Gambia. He has established a private life in the UK but has done so while his immigration status has been precarious and therefore little weight must be attached to that private life. The maintenance of effective immigration control is in the public interest. The Claimant can speak English but this is a neutral factor in the balancing exercise, and he is not financially independent. I do not find that the Claimant has proved that there would be very significant obstacles to his integration into Gambia, and I find that he cannot satisfy the requirements of paragraph 276ADE(1)(vi). Therefore I conclude that the Claimant's removal from the UK would not breach Article 8 of the 1950 Convention.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and was set aside. I substitute a fresh decision as follows.

The Claimant's appeal is dismissed on asylum, humanitarian protection and human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the Claimant has made a claim for international protection.

Signed

Date: 7th May 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

The appeal is dismissed. There is no fee award.

Signed

Date: 7th May 2018

Deputy Upper Tribunal Judge M A Hall