Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08009/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Date Sent**
on 25 March 2014	**On 7 April 2014**
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MATTHEW OSEI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr K H Forrest, Advocate, instructed by Livingstone Brown, Solicitors

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Ghana, born on 7 July 1973. He arrived in the UK on 7 March 2013 on a medical treatment visa, accompanied by his wife and son (dependants in these proceedings) on visit visas. On 8 April 2013, he sought asylum.

2) The respondent refused the claim for reasons explained in a letter of 20 May 2013. At paragraph 14 the respondent says that the appellant's claim has been:

> … wholly considered at the highest (meaning as if all material aspects were accepted as being true). No findings have been made as to whether the material aspects of your case are accepted as being true or not, rather an assessment has been made as to whether, even if your account were accepted as true, you could still return to Ghana.

At paragraphs 15-29, the letter holds that there is sufficiency of protection available to the appellant, under reference to *Horvath* [2000] UKHL 37 and to background evidence. At paragraphs 30-46, the letter analyses the availability of internal relocation in relation to the claimed facts, the geography of Ghana, and case law. It is found reasonable to expect the appellant to relocate to major urban centres in Ghana, where he has not allegedly experienced any problems. The respondent certifies the claim as clearly unfounded, with no right of appeal from within the UK.

3) The appellant made further representations, asserting that since he left Ghana unknown assailants threatened his family members, enquiring about his whereabouts; as a perceived supporter of the National Patriotic Party (NPP) his life would be in danger; there was a risk of persecution from the opposing party, the National Democratic Party (NDC); and as a public figure with family living in different parts of Ghana, he was not safe anywhere in the country. He submitted a further newspaper article, and an extract from a police station diary.

4) In a further refusal letter dated 20 August 2013 the respondent refers again to background information about the public authorities in Ghana, and in particular police corruption. At paragraph 15 the further newspaper report is considered to be "self-serving, in no way objective and … provided by your family to help bolster your claim." Paragraph 16 comments that the appellant has not explained why he would have the original of an extract which the police would need for their records, and on the lack of detail which might be expected. Paragraph 17 declines to place reliance on the documents produced. The letter maintains the refusal of the claim, but does not certify it as clearly unfounded.

5) First-tier Tribunal Judge Kempton dismissed the appellant's appeal by determination dated 2 November 2013. At paragraph 36, the Judge makes some observations on the most recent of the newspaper reports produced by the appellant, and clearly has doubts about its authenticity, but concludes by saying that she "simply makes these observations". At paragraph 40, the judge refers to evidence about recent elections, which despite some problems were deemed generally free and fair by international observers, with few reports of isolated violence. There is a reference to one of nine judges who were hearing a petition regarding the Presidential election being threatened, as a result of which the police ordered increased security at the residences of all nine judges. The judge goes on:

> 41. Accordingly it would seem that the police do protect those who need assistance. They could not offer assistance to the appellant as he is not in the country. The persons who were threatened and who made subsequent reports to the police were persons who

had been targeted by persons unknown looking for the appellant specifically. After the appellant left the country, the police could do nothing.

42. The appellant does have a political profile in Ghana. However, it cannot be said that his profile is so well known that the general public would know he had left the country. The extract from the police diary suggests that the appellant's brother-in-law should inform the police if the appellant returns … there is an inference … that the police would give him protection. It is still not clear … who exactly is interested in him and why, given that he has not been in the country promoting peace for some months.

43. I do not consider that the appellant engages either Articles 2 or 3 of ECHR. I do not accept that the appellant has been persecuted … he has not made it known that he is a member of the NPP, so there is no reason for him to be singled out on that basis. At the time of the elections he had no problems. There were a couple of threats … the month before the elections … and then the appellant's family was targeted after he left the country, although there was one letter to his wife in March 2013, just before they left Ghana. This is not indicative of a problem relating to the elections. There is no credible evidence of where the threats emanate from. The police had noted the incidents and have said in the extract report that they should be informed if the appellant returns … that implies they will look out for him if he is returned. There would in the circumstances appear to be no need for internal flight, although that would be an option, if the appellant felt it to be necessary.

6) Mr Forrest expanded on the appellant's grounds of appeal to the Upper Tribunal in a skeleton argument as follows:

1. **Introduction:** Two questions arise: first was there an error of law; and second, if so, what can be done to correct it.

2. **Was there an error in law**;

2.1 The FTT summarises its conclusions between paragraphs 34 to 43. In particular at paragraph 43, it is said that there is no evidence of past persecution. There are two problems with this: first, it is not clear what facts the FTT accepted and what it has rejected; and second its focus has been on the *past* and not the *future*:-

2.2.1 **Findings in Fact;** the difficulty which the FTT faced was that the Home Office appear to have accepted that the newspaper extracts in which much of the allegations on which the appellant founds is genuine. The FTT plainly think it is not although do not go as far as finding this, confining its remarks to "… *simply (making) observations …" (paragraph 36).* The FTT do not make any findings on matters which might be in dispute (*and from the [refusal letter] and the Home Office Presenting Officer's submission appear to be)* such as whether threatening letters received and were members of his family/staff threatened. Such findings – one way or the other – would have made the task easier of identifying whether the appellant had made out to the appropriate standard whether he had a well founded fear of persecution if returned to Ghana.

2.1.2 **Possible future persecution:** and the distinction between past and future events is an issue that follows on from the above. If it is evaluation of *future* risk which is crucial, then findings in relation to what would happen on return have to be made. Admittedly some guidance as to this can be made on the basis of findings following evidence about *past* events, but if there are none (or they are inadequate as averred … above), then there is

no basis on which future risk can be evaluated. There are "hints" of this in paragraph 43 where there is discussion around the elections, but – crucially – there is no discussion of what might happen on return. Given (a) the inadequacy of findings in fact and (b) such as have been made were positive (*for example that the appellant is a public figure in Ghana)*, this is an important omission.

2.2 **Other:** points raised are:

2.2.1 Even if his account of persecution is accepted, the findings about whether the police would protect him seem flawed because there is no indication on evidence that he would fall into the same/similar category of persons offered protection *(paragraph 40, 41)*;

2.2.2 The option of internal relocation is not explored in any detail.

3. **If so, what is the UT to do?** The deficiencies in fact finding discussed above are too excessive and important for the UT to be able simply to re-make the decision itself. The appeal should be allowed, and the case remitted to another Immigration Judge of the FTT who should be directed to make specific findings particularly in relation to whether the appellant would be harmed if returned to Ghana and if so why.

7) The above was expanded upon in a supplementary skeleton argument as follows.

1. The appellant ... seeks to expand **on his submissions on the issue of sufficiency of protection** *(see paragraph 2.2.1 (page 3) in the Skeleton):-*

2. Sufficiency of Protection:

2.1 *Esto* case: Even if the approach of the FTT *(eg like the Respondent – see her first [refusal letter] (23.5.13) ...* is to take the appellant's case at its highest and accept that the appellant's allegations of threatening behaviour occurred, but he is not entitled to international protection because there is a sufficiency of protection in Ghana, the decision is still unsafe because:

2.2 **Future Fear:** the conclusion in the first sentence at paragraph 41 is based *not* on the appellant (*or others who might be similarly exposed to persecution on political/perceived political grounds)* but on other categories of prominent person (*members of the judiciary).* Nor can the second sentence in the same paragraph stand because the issue is what might happen in the future, based on what may have happened on the past.

2.3 **Objective evidence:** *see R/19-38 (including R27 – referred to by FTT at paragraph 40 in its decision),* and *A/22/17-20 and A/22/31 -36).* For such an approach and such conclusions to be justified, the evidence of sufficiency of protection in Ghana to persons such as the appellant would require to be significantly clearer. On the contrary, this evidence indicates that although there appears to be a functioning police force as part of a state apparatus that seeks to uphold the rule of law, the incidence of corruption is widespread and there has been a recent history of political violence.

> **2.4 Conclusion:** in such circumstances, it is not enough to infer that the appellant would obtain sufficient protection if returned. Perhaps he would, but only if his allegations of threatening behaviour are so fully examined that clear findings of fact are made in relation to each of them. Only then – and if all/some of them were found to be correct/truthful, would it be safe to conclude, having regard to the objective evidence about the police in Ghana, that there would be sufficient protection in Ghana.
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> **3 Final:** the appeal should be allowed and the case remitted to a differently constituted FTT to reach clear findings on whether the appellant was threatened as he complains, and if so whether, having regard to objective evidence about the police in Ghana, he would on return receive adequate protection.

8) Mr Forrest further submitted that the determination was flawed by the lack of clear findings of fact on the threats made to the appellant and to his wife and family. The determination left the reader in the dark. There could be no evaluation of future risk without findings on the past history. The determination could not be saved by treating the appellant's claim "at its highest". Although the respondent took that line in the first refusal letter, material was produced which post-dated that, although admittedly of a similar nature. Even if the claim had been taken at highest, and sufficiency of protection was the crux, the determination was unsafe. The conclusion at paragraph 41 was based on the situation of one member of the judiciary, and was not a basis for making findings in relation to this appellant. For the appeal to fail on this basis, given the accepted evidence of police corruption and of recent political violence, the determination would have to be based on significantly clearer evidence. Without making findings on the substance of the actual threats, there was not enough to support the finding of sufficiency of protection.

9) Mr Mullen in reply submitted that the judge made it clear that she also treated the claim "at highest". Although she expressed doubts, for sensible reasons, about the new evidence produced, she explicitly put that to one side and the rest of her determination proceeded as if both newspaper articles were genuine. It was for her to assess the actual level of threat, measuring the individual circumstances at their highest against the background evidence, and she was entitled to reach the conclusion she did on sufficiency of protection. That was sufficient to dispose of the case. The judge was correct to say that internal flight issues did not arise, but also that in the alternative that the claim would have been defeated on that basis. Where the police had a record of the incident directed against the appellant, and encouraged him to contact them on return, the judge could not reasonably have found that they would fail to investigate and prosecute. There was evidence of police corruption, but that did not negate legal sufficiency of protection either generally or in this case.

10) Mr Forrest in response said that the appellant's case, particularly as shown by the newspaper extracts, was of risk throughout Ghana, against which internal flight would not be available. As to sufficiency of protection, the

Horvath test of reasonable willingness to operate a system of protection was not satisfied.

11) I reserved my determination.

12) The argument for the appellant was pinned on the proposition that his case could not be resolved without deciding whether his specific allegations were established. I do not agree. If a claim fails when taken essentially at face value, there is no point in an analysis of which specific allegations are reasonably likely to be true. That approach is the essence of the first refusal letter. Although the point was not particularly focused either in the First-tier Tribunal or in the Upper Tribunal, the second refusal letter to some extent departed from that approach, because it declined to place reliance on the further documents produced. However, I do not think that is significant. Mr Forrest accepted that the further evidence produced was of a similar nature to that previously relied upon. The judge expressed doubts about the newspaper report, but she put them to one side and took the case as a whole. The police station diary extract, although there were also doubts about that, was also treated at face value in making the decision. The appellant could have asked for no more favourable findings on his allegations. It is perhaps unfortunate the judge expressed her finding as one of no past persecution, but that is one sentence in a determination of 10 pages, and requires to be put in context. Read as a whole, the judge was plainly finding at paragraph 43 that there was no evidence of a real risk to the appellant on return to Ghana. She reached an equally plain conclusion that there is legal sufficiency of protection in Ghana from such risk as alleged herein.

13) The refusal letter cites *Horvath*:

> The sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights, but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it.

14) *Horvath* also approved the proposition that inefficiency and incompetence is not the same as unwillingness, unless extreme and widespread.

15) In this case the judge had evidence not only of the general nature of the legal system of protection, but of specific willingness to act upon complaints in relation to this appellant. The conclusion that legal sufficiency of protection applied to this case was properly open to her. On all the evidence, the contrary conclusion would have been rather surprising.

16) The alternative conclusion based on internal flight is briefly stated, but it followed naturally from the judge's other conclusions.

17) The determination of the First-tier Tribunal, dismissing the appellant's appeal, shall stand.

31 March 2014
Judge of the Upper Tribunal