



IAC-FH-AR-V1

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

Appeal Number: AA/03171/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 16th March 2016**

**Decision & Reasons
Promulgated
On 12th April 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**S H S
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Chaudhry, Counsel, instructed by Duncan Lewis & Co
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Gambia, born in 1983. She appeals against the decision of First-tier Tribunal Judge Povey dismissing her appeal against removal on asylum, humanitarian protection and human rights grounds in a decision promulgated on 26th November 2015.

2. Permission to appeal was sought on the ground that the judge failed to give adequate reasons for a finding on material matters. The judge concluded that the Appellant will not be at risk on return as a result of claiming asylum in the UK on the basis that she was lesbian because there was an anonymity order in place. It is submitted that the judge materially erred in law in concluding that this was sufficient to protect the Appellant. This conclusion was further undermined by the threat by the Gambian President. There was evidence before the judge which showed that the threat was enforced against asylum seekers because the Gambian authorities treated asylum claims as tarnishing the image of the country.
3. The judge erred in law in failing to determine the safety of the route of return in accordance with HH (Somalia) and Others [2010] EWCA Civ 426 and in failing to apply the appropriate test in relation to the risk to a failed asylum seeker set out in AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061, namely, at paragraph 31:

“The issue is whether the evidence establishes a real risk. The appellant does not need to show a certainty or a probability that all failed asylum seekers returned involuntarily will face serious ill-treatment upon return. He needs to show only that there is a consistent pattern of such mistreatment such that anyone returning in those circumstances faces a real risk of coming to harm even though not everyone does. So is there is [sic] evidence pointing to a substantial number of cases in the context of general evidence showing that involuntarily returned failed asylum seekers, are at real risk of being subjected to serious ill-treatment, on that account alone? That requires a careful analysis of the evidence as to what has happened to returnees and, of course, of the country information which provides the background.”

4. It was submitted that in the case of Gambia it had been passed into law that failed asylum seekers or those who tarnish the image of the country commit a treasonable offence. This was further declared by the President on national television.
5. Permission to appeal was granted by First-tier Tribunal Judge J M Holmes on 18th December 2015 on the following grounds

“The judge appears to have concluded briefly that the Appellant could return to the Gambia on her own passport and that anonymity to the decision meant that no one in the Gambia would know why she had claimed asylum. It is not at all clear whether the judge accepted, or rejected, the claim that there was real risk of harm to all those who were perceived to be failed asylum seekers, or, only those who were perceived to have falsely claimed asylum on the basis of homosexuality or only to those who were perceived to be homosexuals. That itself arguably amounted to an error of law.

The judge's approach also begged a number of unanswered questions such as whether the Appellant's passport was still valid and thus whether there was a risk she would be returned on emergency travel documents giving rise to the risk of perception as a failed asylum seeker, whether the lack of any valid visa for the UK would give rise to questioning at the airport, whether travellers returning to the UK were generally questioned about what immigration status they had and enjoyed there and whether the Appellant could be expected to lie in response."

Submissions

6. Mr Chaudhry submitted that the issue was whether the Appellant could return to Gambia safely as a failed asylum seeker. The Appellant would be at risk travelling on a document she had obtained from the High Commission.
7. At paragraph 91 of the Appellant's bundle there was an internet news report posted on 8th May 2014 which stated:

"Gambian leader Yahya Jameh has warned asylum seekers not to use this government's position on gays and lesbians to tarnish his image as they attempt to resettle in the West as refugees. APA can report Thursday. Speaking in Basse in the upper region of the country. President Jameh said those among his compatriots leaving the country to tarnish his image abroad are doing so at his own detriment.

'Some people go to the west and claim they are gay and that their lives are at risk in the Gambia in order for them to be granted a stay in Europe. If I catch them I will kill them,' the Gambian leader warned.

According to him the British authorities have realised the untruthfulness of those claims which people use as a strategy to stay in Britain.

He said the British have decided to conduct a test on traveller's claiming to come from the Gambia and information to confirm their sexual orientation. Describing them as vermin, President Jameh has been on record as threatening gays and lesbians with stiff punishments if they were caught committing acts of homosexuality."

8. Mr Chaudhry submitted that, although the judge took into account what the President had said, he did not take into account the entirety of the report. The President was threatening all asylum seekers, particularly those claiming to be homosexual. The Appellant would be at risk because of the documents on which she travelled. He relied on the skeleton argument which was before the judge in relation to this point and submitted that the judge had failed to make any findings on it. The judge's

finding that the Appellant could return on her own passport was perverse because she did not have a passport.

9. Further, the Respondent had not considered the Appellant's mode of return in the refusal letter and it was incumbent on the judge to do so. There was insufficient reasoning in paragraphs 79 to 82 to support the finding that the Appellant would not be at risk on return. The Appellant would be detected because she had no leave to remain in the UK and this would lead to further interrogation of her claim. It was not for the Appellant to mislead the authorities or to lie about her whereabouts on return. The judge's conclusion at paragraph 82 was against the weight of the evidence.
10. For the Respondent, Mr Duffy submitted that the Appellant's appeal depended on a sound bite from a speech of the President and it was not clear in what context the quote had been made. It was also made almost two years ago in May 2014. There was no actual evidence before the First-tier Tribunal that failed asylum seekers were at risk on return. Even if the judge had failed properly to set out his reasons on risk on return the error was not material because there was no evidence before the judge to show that failed asylum seekers who had claimed to be homosexual were at risk on return.
11. The judge found that the Appellant was not homosexual and therefore she would not be at risk on return to Gambia. The Appellant was not lesbian and there was no evidence that failed asylum seekers were at risk.
12. Mr Chaudhry submitted that there was evidence that homosexuals were at risk and those returned were likely to face questioning. The judge had failed to make a finding on the mode of return and the judge should have been well aware that the Appellant did not possess her own passport.
13. Mr Duffy submitted that it did not matter whether the Appellant returned on her own passport or an emergency travel document because there was no evidence before the judge to show that she would be questioned on return or that she would be put at risk because of the documents she produced.

Discussion and Conclusion

14. The First-tier Tribunal judge found that the Appellant was not homosexual and gave cogent reasons for coming to that conclusion. There was no challenge to the judge's finding in that respect. The judge rejected her claim that she was lesbian and rejected her claim that her actions in Gambia in the past may have given rise to a perception that she was lesbian.

15. The judge found that the Appellant had fabricated her asylum claim and could return to Gambia of her own volition. He did not fail to make a finding on the safety of the method of return. The Appellant came to the UK in 2014 on a visit visa using her own passport. A copy of her passport appeared in the bundle valid from November 2012 to November 2017.
16. In the skeleton argument before the First-tier Tribunal there was no reference to the Appellant being at risk on return because she would be returned on an emergency travel document or on her own passport that she had obtained from the High Commission in the UK. There was no background evidence to support the submission that returnees to Gambia with such documents were questioned, interrogated or indeed of any interest to the authorities.
17. Accordingly, there was no error of law in the judge's failure to deal with this distinct issue, given that it was not argued before him, was not apparent on the face of the papers and there was no background material to support such a submission and therefore give rise to the need to make a finding on it.
18. The issue in this appeal was whether the Appellant would be at risk on return as a failed asylum seeker or as a failed asylum seeker who had made a claim for asylum on the basis that she was homosexual, albeit that that claim had indeed been rejected.
19. Mr Chaudhry could direct me to no evidence in the Appellant's bundle, which was before the First-tier Tribunal, which showed that the Gambian authorities questioned people on return who were travelling on emergency travel documents. Indeed he could point to no background evidence in the Appellant's bundle which demonstrated that failed asylum seekers in general were of interest to the authorities or indeed failed asylum seekers who had made a false claim to be a homosexual were of interest to the authorities.
20. The only evidence which was before the First-tier Judge was evidence of a statement from the President made in a speech in 2014 that some people go to the west and claim they are gay and their lives are at risk in the Gambia in order for them to be granted a stay in Europe "If I catch them I will kill them." There was no evidence that the authorities had indeed carried out the threat issued by the President or that asylum seekers whose claim to be homosexual had been rejected were at risk of harm on return to the Gambia.
21. Accordingly, I find that the evidence which was before the First-tier Tribunal was insufficient to show that the Appellant would be at risk on return either as a failed asylum seeker or as a failed asylum seeker who had claimed asylum on the basis of being homosexual. There was insufficient evidence to show that travelling on an emergency travel document or a document obtained from the High Commission in the UK would put the Appellant at risk.

22. In any event, any error in relation to the failure to make an explicit finding on risk on return for failed asylum seekers was not material because there was insufficient evidence before the First-tier Tribunal to support the conclusion that failed asylum seekers were indeed at risk.
23. I conclude that applying the test of failed asylum seekers set out in AA the Appellant had failed to show that there was a consistent pattern of mistreatment such that anyone returning to the Gambia having claimed asylum on the basis of homosexuality faced a real risk of coming to harm. There was insufficient evidence pointing to any case that involuntary returned failed asylum seekers were at risk of being subjected to ill-treatment.
24. Accordingly, I find that there was no material error of law in the First-tier Tribunal's decision of 26th November 2015 and I dismiss the Appellant's appeal.

Notice of Decision

Appeal dismissed

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 her or any member of her 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.

J Frances

Signed

Date: 30th March 2016

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 30th March 2016

Upper Tribunal Judge Frances