



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA075272015

THE IMMIGRATION ACTS

Heard at Bradford
On 5th May 2016

Decision & Reasons Promulgated
On 25th May 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

N T
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hussain (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant has the benefit of an anonymity order. This is his appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, against a decision of the First-tier Tribunal (Judge Hillis hereinafter “the judge”) promulgated

on 31st July 2015, dismissing his appeal against the Respondent's decision of 9th April 2015 refusing to grant him asylum or any other form of international protection.

2. After a hearing before the Upper Tribunal (before me) I set aside the decision of the judge on the basis that he had erred in failing to consider whether, if the Appellant were returned to his home country, he would be politically active there such as to place himself at risk of persecution or serious harm or would refrain from such political activity solely for the reason of avoiding persecution. In this determination I shall explain, below, how I have re-made the decision.
3. By way of background, the Appellant, who was born on [] 1970, is a male national of the Gambia. He came to the UK on 23rd December 1999 having obtained leave to enter as a student. He made his claim for asylum on 6th November 2014. The basis for his claim was that he had had some previous oppositionist political activity in the Gambia, though he did not claim to be at risk as a result of that, but that he had also been active in the UK, albeit relatively recently, and those UK based activities would place him at risk upon return. As to those activities he said that he had attended some political demonstrations in London, had been critical of the President of the Gambia and the ruling regime on Twitter and had written three published articles, available on the internet, which also contained criticisms of the President. He suggested the articles would have been read by those in authority in the Gambia such that he would be immediately persecuted upon his return. There was, in fact, no dispute about the fact that he had written the three articles, that he had put his name to them, that they had been published by an organisation called Kairo News and that they were available to be read via the internet.
4. The judge hearing his appeal identified, as the central issue, the question of whether he had come to the adverse attention of the Gambian authorities as a result of his UK based activity and whether there was a real possibility he would be identified as a returning dissident on arrival in the Gambia. He said that the background material before him suggested that the human rights situation for identified dissidents either inside the Gambia or abroad "is one which breaches the terms of Article 3 of the Human Rights Convention and the Refugee Convention on the basis of either actual or imputed political opinion".
5. The judge, in considering what the Appellant had had to say regarding the demonstrations and some photographs taken of him on them and in considering the three articles and the consequent risk upon return to the Gambia said this;

"Has the Appellant been identified as a Political Dissident?"

The Photographs

24. It is accepted by the Respondent that the Appellant has written three articles which have been published on the World Wide Web criticising the Gambian regime and calling for President Jammeh to stand down. It is also accepted he has posted comments on Twitter to other users of that site and has attended a demonstration in London against the Gambian regime. Mr. Archibald, very

properly, concentrated his questions and submissions on the issue of whether or not the Appellant has been or will be on return identified as a dissident.

25. The Appellant relies on a number of photographs in respect of his attendance at the demonstration in London in support of his claim that he will have been identified by the Gambian authorities as a participant.
26. During oral testimony he was unable to identify himself on photograph 4 but was able to identify himself in photographs 1 and 2 as holding a poster stating of President Jammeh 'This man in white is the Gambian Terrorist' below a photograph of the President. He also identified himself as standing in the background behind others who were holding a banner criticising President Jammeh and his regime. The photographs were taken by friends but also one was taken by a person he did not know who he gave his name to and it was sent to him later.
27. He stated that he was not aware of those photographs ever being published anywhere at all but claimed that there are Gambian spies in the UK. He stated that he has never been contacted by the Gambian authorities about his articles, comments on Twitter or the photographs.
28. I do not find the Appellant credible in his claim that an unknown person who took at least one of the photographs introduced himself to the Appellant and he then gave the person his address to send the photograph to, particularly without even getting this person's name if he was of the genuine belief that Gambian spies would be present at the demonstration.
29. I have taken into account that the Appellant's attendance at the demonstration is after he had been arrested in the UK as a suspect in a criminal offence of soliciting and had been served with a Notice of Liability of Removal as an overstayer and all his previous appeals were now exhausted.
30. I conclude that the Appellant has failed to show, to the low standard required, he may have been identified at the demonstration as claimed.

The Articles on the Internet

31. The Appellant readily conceded in his oral testimony that the only people who have contacted him about these articles are members of the Gambian public and not anyone in a position of power or authority. Additionally, he did not claim in his oral testimony that the people who contacted him had told him that the authorities were aware of the articles and that he had been identified as a dissident abroad. There is no evidence before me to show, to the low standard required, that the Appellant's articles have been seen by the Gambian authorities or security forces and that he has come to their adverse attention. There is no reply to these articles posted by the Gambian authorities on the evidence before me. I note here that the article at page 19 in the Appellant's bundle, for example, states 'You can follow any responses to this entry through the RSS2.0 feed.'
32. I have taken into account that the Appellant has not only put his name to these articles but also published his own photograph as part of them at a time when he had already been arrested in the UK and was on notice of the UK Government's

intention to remove him. The fact that he readily identified himself on the Article does not, on the evidence before me, seem to have led to his identification by the Gambian authorities or drawn any response from them whatsoever.

33. There is no reliable evidence before me to show that any of the Appellant's Twitter posts have brought him to the adverse attention of the Gambian authorities.

Risk on arrival in Gambia

34. The Appellant has not based his claim for asylum on being homosexual and I, therefore, conclude he will not be at risk of death on return pursuant to the President's avowed intention to kill those returning failed asylum seekers who made such a claim (AB48).
35. I have taken into account in my assessment of the evidence the contents of the article entitled 'Gambian Justice Monitor Warns Gambians abroad of Backlash for Denigration.' In my judgment, it clearly shows that the Justice Minister, Edward Gomez, is more concerned with 'defending the integrity' of the Gambian Government and its President than the rights and freedom of speech of the Gambian citizens at home or abroad. I have paid particular attention to his pronouncement on dissidents abroad that 'We will wait here for them to come' and that they will be prosecuted any time they come to The Gambia and his statement that 'These are unfortunately evil members of the Gambian society who took refuge abroad putting every nonsensical story on papers and on radios to tarnish the good image of the Gambian Government.'
36. I note here that Mr. Nicholson has not submitted before me that there is any record of names held at the airports or other ports in Gambia of dissidents abroad that the authorities have identified as of adverse interest to them, nor has he submitted that returning asylum seekers are routinely detained and questioned on arrival about their political views and activities abroad.
37. The Appellant, in my judgment, will not be an obvious candidate for questioning on return as someone not yet identified as a political dissident and there is no evidence he will be seen as anything more than someone who came to the UK as a student and is returning to Gambia at the end of his studies and the breakdown of his relationship with his wife.
38. The Report of the Special Rapporteur dated 16th March, 2015 deals with the many abuses in the Gambian security and legal institutions but provides no evidence of what Gambians who return from abroad face at the point of entry or once they are in their home area.
39. It is accepted by Mr. Nicholson that any political activity the Appellant was involved in prior to leaving The Gambia in 1999 cannot engage the Refugee Convention or the ECHR as the Appellant has not come to the adverse attention of the authorities due to that activity and has returned to The Gambia on two occasions without any difficulty since coming to the UK."

6. For the purposes of my remaking of the decision those findings are preserved. I note here that they do not represent a comprehensive adverse finding regarding his credibility at all but that a discrete aspect of what he had to say regarding one of the photographs taken of him at a demonstration was found not to amount to a credible contention.
7. At the hearing concerned with remaking I had before me the various documents which had been before the judge. I was also provided with some additional documentation in the form of an updated witness statement of the Appellant of 21st April 2016, some evidence relating to his Twitter activities and some further background material regarding the attitude of the Gambian authorities to political oppositionists.
8. The Appellant gave oral evidence before me. He gave his evidence in English. In his evidence-in-chief he simply adopted his witness statement of 21st April 2016. I shall, therefore, summarise the content of that statement at this stage in my determination.
9. The Appellant said, in his statement, that if he is returned to the Gambia he would continue to pursue oppositionist activity. He wishes to free the Gambia from what he describes as a dictatorship. He said that on 20th February 2016 he had attended a demonstration against the Gambian authorities and had, pursuant to that, spent time outside the Houses of Parliament and then outside 10 Downing Street. He has continued to "tweet" about political issues in the Gambia. He recently discovered that one of his Twitter followers is a Mr Njie who is the newly appointed chairman of the electoral commission in the Gambia. He thought that the fact he was being followed by that person suggested the authorities are aware of his UK based activities.
10. In cross-examination the Appellant explained a number of aspects of how Twitter works. He thought Mr Njie remained sympathetic to the regime in the Gambia because he had been so sympathetic in the past. He was not certain, however, because he "does not know the man". If he was returned to the Gambia and was able to "get through the airport" he would take part in political and campaigning activities. He feels he has a responsibility to let people know what the current President of the Gambia is like. He had attended the demonstration of 28th February 2016 because it is necessary to create awareness of the human rights abuses which are occurring in the Gambia. A UK based organisation had urged people to attend that demonstration. The demonstrators had not gone anywhere near the Gambian High Commission on that occasion.
11. In response to some questions put by me the Appellant said that he had attended the demonstration because of his concerns about human rights abuses and that, since there had been some recent abuses of that sort carried out in the Gambia, he thought it was necessary. He feels people from the Gambia have a duty to fight for their country. He had started his UK based political activities in 2014 when a former neighbour of his in the Gambia had had to flee the country and go to Senegal in

order to save his life. That person had been close to him and he had decided that then was “the right time to get involved”.

12. There was no re-examination.
13. Having heard the oral evidence I received submissions from the representatives. Mr Diwnycz said that he did not doubt that the Appellant’s political convictions are genuinely held. He also said that he accepted he had a subjective fear of return. He would not contend that he was making things up or embellishing matters. However, there was no evidence to suggest he had already come to the attention of the authorities in the Gambia and the mere fact that he was or appeared to be being followed by Mr Njie on Twitter did not demonstrate he would be at risk. There would be no risk stemming from the recent demonstration he had attended because the demonstrators had not gone anywhere near the Gambian High Commission. Whilst his political views are genuinely held, submitted Mr Diwnycz, they are “not as deep as it may seem”. His activities would not “raise the conscientiousness of the Gambian State”.
14. Mr Hussain, for the Appellant, submitted that he was likely to be politically active on return and those activities would be likely to place him at risk. The background country material showed that oppositionists were at risk. He drew my attention, in particular, to a Human Rights Watch article of 17th September 2015.
15. It is in light of all of the above that I must now go on to remake the decision. In so doing I have reminded myself that the burden of proof rests upon the Appellant and the standard of proof is what is often described as the “real risk” test. I have, in fact, concluded, for the reasons I set out below, that the Appellant has demonstrated, to that standard, that if he is returned to his home country of the Gambia he will face a real risk of persecution in consequence of his actual political opinion.
16. As indicated, a number of findings of the judge have been preserved. In consequence, I must conclude that the Appellant was not, at the time of the hearing before Judge Hillis (20th July 2015) at real risk of persecution upon return on the basis that his UK based activities had come to the attention of the authorities in the Gambia. Despite the subsequent filing of evidence concerning a follower he has acquired on Twitter I made it clear when setting the decision aside and giving directions for its remaking, that the issue to be considered was whether the Appellant, on the assumption that he would not be picked up by the authorities at the airport and had not already come to their attention, would indulge in oppositionist activities in the Gambia such as to bring him to the adverse attention of the authorities or would not do so simply as a means of avoiding persecution. That, then, is what I have focused upon.
17. It will be noted that the judge did have a credibility concern regarding the Appellant’s contention that he had given his address, at a previous demonstration, to an unknown person who had taken a photograph of him. There are no other adverse credibility findings and, therefore, no other preserved adverse credibility findings.

Mr Diwnycz, before me, in effect, accepted the credibility of the Appellant with respect to the genuineness of his political convictions. That is a concession of some significance. Further, as Mr Diwnycz again very properly acknowledged, the Appellant did not appear to seek to embellish when giving his evidence before me. For example, he did not seek to contend that Mr Njie was definitely still associated with the authorities in the Gambia, although he thought he might well be, nor did he seek to suggest that a demonstration he had attended, whilst including a march from the Houses of Parliament to 10 Downing Street, had passed anywhere near the Gambian High Commission. Further, he was able to offer an explanation as to what had triggered his UK based political activity in 2014 and what he had said to me about that was consistent with his earlier accounts. Bearing in mind all of that and Mr Diwnycz's acceptance that he has genuinely held political views I have found, to the lower standard, that he is a genuine political activist and that his articles concerning the regime in the Gambia, his tweets concerning the regime and his attendance at demonstrations are all genuine expressions of his political views rather than, for example, any attempt to artificially create an asylum claim.

18. The above does not mean, of itself, that I should uncritically accept his assertion that he will continue to indulge in oppositionist activity if he is returned to the Gambia. There is always the possibility that a person will indulge in such activities when outside of a country but will not be prepared to do so when inside the home country. However, given that I accept he does hold oppositionist views and given his willingness to put his name to three articles sharply critical of the regime and which he would have been aware might become available on the internet for all to see such that he is prepared to accept some degree of risk, and given the absence of any direct credibility challenge before me, I do accept, to the lower standard, the Appellant's assertions that he will pursue oppositionist activities upon return. I accept, to the lower standard, what he has said in the witness statement of 21st April 2016 that he will seek to raise people's awareness about the activities of the regime and that he would join although opposition groups with similar objectives to him "until such time that this government is brought down".
19. The only remaining question, then, is whether or not there is a real risk that such activities would place him at risk of persecution or serious harm. In that context I note that there was no contention before the judge, on behalf of the Respondent, to the effect that oppositionists would not be at risk in the Gambia. However, I have sought to reach my own view about that. Mr Diwnycz submits that the type of activity the Appellant says he would indulge in would not be such as to attract the wrath of the authorities.
20. When granting permission to appeal I note that the granting judge observed that "the human rights record of Gambia is not beyond criticism". That is clearly artistic understatement. I have looked at the background material which has been placed before me. There are a number of reports and news items in the most recent bundle filed on behalf of the Appellant which suggest that the authorities do, indeed, take a hard line against oppositionists. There is a Human Rights Watch Report of 16th

September 2015 which claims that the current President of the Gambia, President Jammeh

“has ruled Gambia with often ruthless repression of dissent, a tight clamp on virtually all independent media, and the use of State security forces and shadow in paramilitary groups to intimidate and silence all deemed critics of the government”.

It is suggested that the population “lives in a climate of fear” as a result of that. The report talks of the arbitrary arrest and detention “of countless people” for political reasons. It is indicated that some persons have been arrested because they have criticised the President or highlighted the current administration’s policy failures. That is the sort of thing which the Appellant has done in his articles and which I have accepted, to the lower standard, he will continue to do upon return. The report goes on to indicate that oppositionists have been tortured in various ways when detained. There is, before me, a Home Office Operational Guidance Note relating to the Gambia which was issued in June of 2013. It refers to credible reports dating from 2012 that the government held civilians in captivity “based upon their political views or associations”. Of course, that document is now somewhat dated but there is nothing before me to suggest that there has been any material change in the Gambia since it was issued. There is a BBC News article, which Mr Hussain also drew to my attention, and which is dated 16th April 2016 and which reports that an opposition activist in the Gambia has, according to Amnesty International, died in detention. It is said that he was one of a number of persons who had been detained after taking part in what is described as a peaceful protest. The article also indicates that he was detained shortly after the commencement of a protest march which had been swiftly dealt with by the authorities.

21. The above material does certainly appear to suggest that oppositionists are at risk of persecution or serious harm simply on the basis of their voicing disapproval or criticism of the regime. Mr Diwnycz suggested that the Appellant’s activities would not be sufficient to trigger interest in him by the authorities but the material referred to above seems to suggest otherwise and Mr Diwnycz has not drawn my attention to any background country material suggesting that oppositionist activity has to reach a particular threshold before an adverse interest is taken.
22. In light of the above, therefore, I do conclude that the activities I have found the Appellant will carry out in the Gambia will be such as to create a real risk of his coming to the adverse attention of the authorities and, subsequently, being treated in a way which will amount to persecution or serious harm. In light of all of that I conclude that he has demonstrated that he is a refugee. I also conclude, on the basis of the same reasoning and the same findings that he has demonstrated he will face a real risk of treatment which will contravene Article 3 of the European Convention on Human Rights (ECHR).
23. In remaking the decision, therefore, I allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal has been set aside. In remaking the decision I allow the Appellant's appeal on asylum grounds and on human rights grounds with reference to Article 3 of the ECHR.

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

Dated 23 May 2016

Upper Tribunal Judge Hemingway

TO THE RESPONDENT FEE AWARD

No fee is paid or payable so there can be no fee award.

Signed

Dated 23 May 2016

Upper Tribunal Judge Hemingway