Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06693/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Friday 23 November 2018	**On Monday 3 December 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

H C
[ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Chowdhury, Counsel instructed by Stuart & Co Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was not made by the First-tier Tribunal. However, as the Appellant claims that he would be at risk in his home country it is appropriate to make that direction. 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 his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION

BACKGROUND

1. By a decision promulgated on 11 September 2018, I found an error of law in the decision of First-tier Tribunal Judge J Bartlett promulgated on 18 June 2018 dismissing the Appellant's appeal against the Respondent's decision dated 3 July 2017 refusing his protection and human rights claims. I therefore set aside the First-tier Tribunal's decision and gave directions to permit the filing of further evidence prior to re-making the decision in this Tribunal. My error of law decision is annexed hereto for ease of reference.

2. Notwithstanding the setting aside of the First-tier Tribunal's decision, I preserved the factual findings made at [26] to [32] of the decision to which there had been no challenge. Those read as follows:

> "[26]I did not find the appellant to be an entirely truthful witness. The circumstances about the initial years of his relationship with Mr [J] and particularly on what basis Mr [J] wrote the letter dated May 2013 were unclear. Further, I found his evidence about contact with and relationships with his family in Gambia to be particularly unconvincing. I do not accept that he has had no contact with his family in Gambia since 2008. The evidence he gave to the 2012 Tribunal was that his mother was supportive of him despite her knowledge of his sexuality. His aunt paid for and arranged for his travel to the United Kingdom from Gambia. His stepbrother provided an affidavit in support of his appeal in 2012. These are not the actions of a homophobic family who would not help the appellant.
>
> [27] I find that the appellant is in a genuine and subsisting relationship with Mr [J]. The appellant's evidence about their lives together was knowledgeable and his description of their relationship and his feelings had all the appearance of being genuine and heartfelt. I accept the appellant's explanation that he had no official documentation because he has no identification documents and therefore he is excluded from opening a bank account, holding the driving licence, being on a tenancy agreement and the like. Further, Mr [JJ]'s evidence about their lives together was also consistent. Mrs [AC] provided further supporting evidence. She gave a coherent account of how she knew the appellant and his partner. The evidence of all 3 of them about when they had met on various occasions was consistent. She talked knowledgeably about the Gambian community and openly about her thoughts and beliefs about homosexuality. Mr [FC] provided further supporting evidence. For of these reasons [sic], I find that the appellant is in a genuine and subsisting relationship with Mr [J]. The exact date on which this relationship became a proper or serious relationship was hard for the appellant and Mr [J] to identify. In these circumstances it is very hard for me to identify when that relationship started. However, I

am satisfied that at the latest they were in a serious and committed relationship from early 2015. I find that they have been living together since 2014.

[28] It is not disputed that Mr [J] is a Gambia national who is in the United Kingdom with refugee leave which was granted in July 2014 and is due to expire in July 2019. I have not been provided with the full details of the basis on which he was granted leave. However, I have been led to believe that is because he was a homosexual and that he suffered persecution in Gambia. Mr [J] made reference to very difficult circumstances with his family in Gambia.

[29] I have carefully considered the decision in **Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka * [2002] IAT 00702** and the 2012 Determination. The 2012 Determination very carefully considered and rejected, for a number of reasons set out therein, the appellant's account that he had been detained and was wanted by the Gambian authorities. The 2012 Determination made findings that the appellant was homosexual, that he had a homosexual relationship in Gambia, that his teachers and some of his family members knew that he was homosexual and rejected his claim as false that he had suffered at the hands of the authorities in Gambia. The test in **HJ (Iran)** was applied and it was found that the appellant would be at risk of persecution from the state authorities but that the appellant would, for reasons not linked to the risk of persecution, be discreet and therefore not attract the attention of the authorities and not face a real risk of harm.

[30] In summary the 2012 determination takes the appellant's claim about risk of harm in Gambia at its highest, even on the footing it has been put before me today.

[31] Mr Mannan's submission relied on a material change in circumstances in that the appellant was now in a homosexual relationship in the United Kingdom. I accept this is the case as set out above. I accept that this is a circumstance that was not pertaining at the time of the 2012 Determination. I consider that the 2012 Determination decided the issues before it on the facts existing at that time but that circumstances have changed in respect of the appellant's relationship status.

[32] The evidence before me was that the appellant did not publicise his relationship because it was private. He was happy in his relationship and he did not need to go on gay dating websites. I accept this evidence. The appellant's evidence was also that he was happy leading his life freely as a gay man in the United Kingdom. I do not accept that being openly gay requires an individual to publicise it on social media, to attend lots of demonstrations and to be vocal about it. I consider that being openly gay is as the appellant described it, which is being free to live one's life as a homosexual without having to conceal it. He has told people in the United Kingdom that he is a homosexual: he told Mrs [AC] after they met for the 2nd time. Mr [J]'s evidence was that they attended homosexual parades which is a public act in support of homosexuality. Therefore, I do not accept that the

> appellant would conceal his homosexuality if he returned Gambia [sic] simply because of fear of social opprobrium. The appellant's evidence is that the Gambian community is hostile to him due to his sexuality in the United Kingdom, but he still attends Gambia community events. I find that any concealment would be because he fears persecution. His evidence was that he believed he would be killed if he returned to Gambia. Therefore, on the facts before me I have come to a different conclusion in respect of this limb of the HJ (Iran) test."

3. I remind myself that the Respondent's decision to refuse the Appellant's protection and human rights claim is made in the context of a decision refusing to revoke a deportation order signed against him for an offence of possessing a Class B drug with intent to supply for which offence he was convicted on 8 February 2010 and sentenced to twelve months' imprisonment.

Issues and Legal Framework

4. In order to be recognised as a refugee an appellant must show that he has a well-founded fear of persecution for one of five reasons set out in Article 1(A) of the 1951 Refugee Convention ie for reasons of race, religion, nationality, membership of a particular social group or political opinion. The 1951 Convention is interpreted in European law through Council Directive 2004/84/EC ("the Qualification Directive"). The Qualification Directive is incorporated in UK law through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and the Immigration Rules ("the Rules"). The Appellant's claim that he is an openly gay man at risk on return to Gambia engages the Refugee Convention on the basis that he is a member of a particular social group.

5. The burden of proof is on the Appellant to show that as at the date of the hearing before me there are substantial grounds for believing that he meets the requirements of the Qualification Regulations or that he is entitled to be granted humanitarian protection in accordance with paragraph 339C of the Rules. In relation to Articles 2 and 3 ECHR, the Appellant must show that he is at real risk of facing treatment which is contrary to those articles. Those rights are absolute. No derogation from them is permitted.

6. In relation to Article 8 ECHR, the burden of proof is on the Appellant to show that he comes within the applicable Rules or that the Respondent's decision is disproportionate when considered outside the Immigration Rules. The standard of proof is the normal civil standard.

7. Since this is a deportation case, it is accepted that paragraph 398 of the Rules apply. Deportation is in the public interest as conducive to the public good. The Respondent in assessing the claim will consider whether paragraph 399 or 399A applies and, if it does not, the public

interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A. In addition, when considering the public interest question, I am required to have regard to Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C").

8. Ms Chowdhury accepted that my decision in relation to the Appellant's protection claim was likely to be determinative of the appeal since, if I accept that he is at risk, he cannot be removed. Conversely, Article 8, as a qualified right requires a balance to be made between the interference with the Appellant's right to respect for his private and family life against the public interest which is that much higher in a deportation case.

The Evidence

Expert report of Dr Ebrima Ceesay

9. The Appellant relies on the report of Dr Ebrima Ceesay dated 20 October 2018. He is "a Gambian-born British citizen, independent researcher and multi-disciplinary scholar with a broad and diverse professional background in social science research". He sets out his experience in the report. Although resident outside Gambia, he keeps abreast of developments via professional and personal contacts in Gambia and online research. I am satisfied that his expertise is deserving of weight.

10. Dr Ceesay recognises that there has been a change in the political administration in Gambia which is capable of affecting the position towards homosexuals. At [4] of the report, he records that the new Foreign Secretary, on assuming office, declared a governmental intention to repeal anti-homosexual laws. President Barrow also spoke out about homosexuality, declaring it not to be an issue in Gambia and expressing intention to support the repeal of anti-gay laws. However, as Dr Ceesay goes on to observe, no action has been taken to repeal those laws. As a result, homosexuality remains criminalised and there is no protection against discrimination based on sexual orientation.

11. Dr Ceesay asserts that "[h]omophobia, stigma and discrimination against homosexuals are common in the so-called new Gambia", and that Muslim and Christian scholars have declared homosexuality incompatible with the teachings of the Quran and the Bible. Dr Ceesay is of the view that "gays and lesbians in the country have continued to suffer discrimination and threats from both government officials and non-state actors." He provides an example of a public declaration by one Government Minister in 2017 who stated that homosexuality would never be allowed in the Gambia.

12. Dr Ceesay recognises that there have been public pronouncements by President Barrow which suggest positive developments (he has "been making all the right noises") but says that so far this is only lip service and the words are not matched by actions.

13. In any event, Dr Ceesay says that the societal position for homosexuals has not improved. He summarises at [8] and [9] of his report as follows:

> "[8] Homosexuality is still frowned upon in Gambian society and therefore, both gays and lesbians have to remain in the closet. Sexual minorities in the 'new Gambia' if they are found out, are often publicly humiliated and harassed because religious scholars in the country in particular, have succeeded in making the case that homosexuality is something 'abnormal', 'unnatural' and imposed from abroad. As such, Gambians, in general, have had negative attitudes towards homosexuals and these hostilities can, at times, lead to discriminatory acts and violence.
>
> [9] This therefore, leaves [HC] at greater risk of harassment, public humiliation and possibly being subjected to mob justice if he were to return to Gambia. In light of the fact that [HC]'s homosexuality is now an open secret in the Gambia, I would therefore, not rule out [HC] being subjected to jungle justice, so to speak, if he were forced to return to The Gambia".

He concludes with the opinion that the risk to the Appellant on return is a real one and that he will be subject to "degrading treatment" if returned.

Other Background Material

14. Mr Walker produced the latest background evidence published by the Home Office entitled "Country Information and Guidance: The Gambia: Sexual orientation and gender identity". That was published in January 2016 and therefore prior to the change in government. It is however instructive as to the Respondent's views of the risk at that time and the reasons for them.

15. The Respondent's policy is summarised as follows:

> "[2.7.1] Same-sex physical relations are criminalised and sanctions against LGBT persons were increased during 2014 with the introduction of the offence of 'aggravated homosexuality' which led to a number of arrests and ill-treatment of (perceived) LGBT persons, including incidents of beatings and torture. Homophobic rhetoric, including calls by President Jammu and senior politicians for 'homosexuals' to be killed, and societal intolerance is widespread.

> [2.7.2] While each case needs to be considered on its individual merits, and the onus is on the person to demonstrate that they are at real risk, the cumulative impact of anti-LGBT legislation and widespread societal intolerance is likely to amount, in individual cases, to persecution."
>
> [2.7.3] There is no effective state protection and internal relocation is not likely to be an option."

I note that the guidance has not been withdrawn from publication notwithstanding the regime change in Gambia.

16. I drew the attention of the parties to the US State Department report for 2017 in relation to Gambia. That reads as follows:

> "In 2014 then President Jammeh signed into law an amendment to the criminal code making "aggravated homosexuality" a crime punishable by life imprisonment. The bill defines "aggravated homosexuality" to include serial offenders or persons with a previous conviction for homosexual activity, persons having same-sex relations with someone under the age of 18 or with members of other vulnerable groups, or a person with HIV having same-sex relations.
>
> President Barrow dismissed homosexuality as a nonissue in the country, citing more pressing priorities. As a result the government had not articulated its intention whether it would attempt to reverse or change the aggravated homosexuality bill. The provisions of the bill were not enforced.
>
> There was strong societal discrimination against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. There were no LGBTI organizations in the country."

17. The Appellant has also produced two further articles published by the International Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA"). The first dated February 2017 reports on President Barrow's public statement that homosexuality is not an issue in Gambia but comments that laws criminalising homosexuality remain in place. The second dated May 2017 sets out the relevant provisions of the criminal law which remain in place and render homosexual activity illegal. That article concludes with ILGA's opinion that "[i]t is also clear that The Gambia is increasingly embracing Islamic law in its governance practices, which will lead to further erasure of the rights of sexually diverse people in a country where they are already vilified, suspected and targeted in a climate of political unsteadiness."

Submissions

18. Ms Chowdhury relied on Mr Ceesay's report. She acknowledged that his report did not comment specifically on the extent to which the

criminal laws are enforced against homosexuals in the Gambia nor provide much detail about the likelihood of acts of violence being perpetrated by non-State agents against those who are or are perceived to be gay. She submitted, however, that based on the Home Office's own guidance, a homosexual under the previous regime would be likely to be granted refugee status and that the evidence since did not show that much had changed in spite of the change in regime. In particular, the evidence did not show any change in societal attitudes.

19. Mr Walker recognised that Mr Ceesay's report touches on the religious background to societal attitudes in Gambia and noted that both the Christian church and the Islamic religion in the country is opposed to homosexuality. He also accepted that the Home Office guidance did indicate that, as at January 2016, an openly gay man returning to Gambia would be likely to be at risk on return and although that guidance pre-dated the change in government, in spite of the positive indications, there had, according to the evidence, been little change particularly in societal attitudes. Given the laws criminalising homosexuality, he also recognised that an openly gay man could not seek the protection of the authorities in the event of being subjected to violence by non-State agents.

Discussion and Conclusions

20. In light of Mr Walker's submission, I can take the appeal on protection grounds quite shortly.

21. The Home Office guidance recognised in January 2016 that an openly gay man would be likely to be entitled to refugee status due to the criminalisation of homosexuality in Gambia, coupled with intolerant views of the government and societal intolerance described as "widespread". Although the regime has changed and with it there have been positive indications from the new President, the legal position has not changed. Homosexuality remains criminalised in spite of stated intentions to repeal those laws. Although there is no evidence about whether those laws have been enforced since the change in government, that is only one aspect which has to be considered. Religious groups, both Christian and Islamic, have spoken out against homosexuality. There is no evidence to suggest that societal attitudes have changed. Dr Ceesay speaks of a risk of "mob justice" albeit only in terms of possibility.

22. Taken as a whole, when the expert report of Dr Ceesay is read with the other background evidence to which I was referred, the evidence does not suggest that there has been such a change in the position on the ground in Gambia or attitudes in that country that the previous guidance published by the Home Office (and not withdrawn since the change in government) should be departed from.

23. For those reasons, and taking into account Mr Walker's submissions, I am satisfied that the Appellant would be at real risk of persecution or ill-treatment on return to Gambia. Accordingly, his appeal succeeds on protection grounds.

24. I do not need to go on to consider the Article 8 claim. However, if I had needed to resolve the appeal on this basis, I would have dismissed it. I have regard to paragraphs 399 and 399A of the Rules. The Appellant was born in the Gambia in 1984. He arrived in the UK in 2008 and has had lawful leave only for the initial period as a visitor. He cannot meet paragraph 399A.

25. As to the relationship with Mr [J], that also was formed when the Appellant was in the UK unlawfully and for that reason alone, he cannot meet paragraph 399. The Respondent has also taken issue with whether Mr [J] has sufficient status to qualify as a "partner" for these purposes. I do not need to consider either issue, though, because, even if the Appellant had been here lawfully, the evidence about the relationship is insufficient to satisfy the very high threshold of showing that it would be unduly harsh for Mr [J] to remain in the UK without the Appellant (see Supreme Court judgment in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 in particular at [23] of the judgment). I of course accept that Mr [J] could not be expected to return to the Gambia with the Appellant. He is recognised as a refugee in the UK. However, although the relationship has been found to be a committed one since 2015 and that the Appellant and Mr [J] have lived together since 2014, the relationship is quite short-lived and Mr [J]'s short statement does not suggest that deportation of the Appellant would have any significant impact on him. He says he would be "heart broken" and that he has been advised that he could not sponsor the Appellant's return in light of his criminal conviction but there is nothing to suggest that the impact goes beyond the normal consequences for a relationship of deportation. A similar test is evident in Section 117C save that the lawfulness of residence when the relationship is formed is not taken into account (but whether the partner is British or settled still is). Again, the evidence does not point to unduly harsh consequences.

26. When considering family and private life outside the Rules, Section 117C requires me to consider whether there are compelling circumstances over and above the two exceptions (which are broadly the same as paragraphs 399 and 399A). In this case, there is insufficient evidence of any such circumstances, certainly insufficient to displace the high public interest in deportation. Had I not reached the view I have about risk, therefore, the Appellant would not be able to succeed when the interference with his private and family life is balanced against that high public interest in his deportation.

27. However, for the reasons I have set out above, I am satisfied on the evidence that the Appellant has shown that he has a well-founded fear of persecution on return to Gambia. Accordingly, he is entitled to succeed on protection grounds.

DECISION

I allow the appeal on protection grounds

Signed Dated: 29 November 2018

Upper Tribunal Judge Smith

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06693/2017

THE IMMIGRATION ACTS

Heard at Field House
On Friday 31 August 2018

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE SMITH

Between

H C
[ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Mannan, Counsel instructed by Stuart & Co Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was not made by the First-tier Tribunal. However, as the Appellant claims that he would be at risk in his home country it is appropriate to make that direction. 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 his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

ERROR OF LAW DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant appeals against a decision of First-tier Tribunal Judge J Bartlett promulgated on 18 June 2018 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 3 July 2017 refusing his protection and human rights claims.

2. The Appellant is liable to deportation. An earlier appeal against the Respondent's decision to deport the Appellant was allowed but subsequently overturned on the Respondent's appeal. The Upper Tribunal found that the Appellant would not face a real risk of serious harm in Gambia and that his deportation would not be a disproportionate interference with his human rights.

3. The Appellant is a national of Gambia who claims that he cannot be deported to that country because he is a homosexual and will for that reason be at risk on return. I do not need to set out the chronology of the Appellant's case because that is set out the Decision at some length at [2] of the Decision. Similarly, I do not need to set out the background in relation to the deportation case or the relevance of the previous appeal decision as that is set out at [19] of the Decision.

4. Having taken into account the previous appeal findings, the Judge concluded at [26] to [32] of the Decision that the Appellant is a homosexual, that he is in a genuine and subsisting relationship with Mr J who is a Gambian national with refugee status in the UK to July 2019 and that any concealment by the Appellant of his sexuality would be due to a fear of persecution. There is no challenge by the Respondent to those findings.

5. However, the Judge went on to find that the Appellant would not be at risk from the authorities as a homosexual in Gambia. The Judge also found that there was no evidence before her that the Appellant would face persecution from non-State agents. She therefore dismissed the appeal.

6. The main ground of appeal is that the Decision is perverse because the Judge made findings which were not open to her on the evidence. There is a subsidiary ground relating to the finding that the Appellant's deportation is in the public interest because he is a foreign criminal because it is said that he is at low-risk and has not committed any offence since 2010. That ground was not argued before me.

7. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 19 July 2018 in the following terms (so far as relevant):

> "… [2] I am satisfied there is an arguable error of law in this decision in that following the Judge's finding the Appellant is a homosexual he went on to find he would not be at risk on return to the Gambia despite the country information to the contrary."

8. The appeal comes before me to determine whether there is a material error of law in the Decision and if so either to re-make the decision or to remit to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

9. The Judge's findings which are the subject of the Appellant's challenge are set out at [18] and [33] to [41] of the Decision as follows:

> "[18]The appellant's bundle contains a substantial amount of objective evidence and I will not repeat it all here. The respondent relied on a press article dated 18 April 2018 relating to the speech that President Barrow of Gambia gave to Chatham House. This article included the following:
>
> > *"On the issue of the draconian anti-gay laws passed by his predecessor dictator Yahya Jammeh, President Barrow said plans are afoot to amend the constitution so that all genders in the country are treated equally.*
> >
> > *Homosexuality is not an issue in the Gambia, he reiterated. He said the promotion of fundamental rights, liberties and freedoms are sacrosanct as far as his government is concerned. Mr Barrow said the upcoming constitutional changes will guarantee freedom of the press, speech, expression and dignity…"*
>
> …
>
> "[33]…I must also consider whether the appellant would be at risk of persecution in Gambia. Ms Sreeramen's submissions were that the situation in the Gambia as regards the treatment of homosexuals has changed since President Barrow took office in January 2017. This was effectively a regime change. I consider that the exile of President Jammeh and the election of President Barrow when combined with the statement set out by President Barrow in the article provided to me dated 18 April 2018 and earlier objective evidence which is littered with quotes from President Jammeh making offensive comments about homosexuals establishes that there may be a material change in the situation such that I should consider the risk at this time.
>
> [34] I remind myself that the burden of proof lies on the appellant to establish that he is at risk of persecution and that this is the lowest standard. The majority of the objective evidence provided by the appellant about the situation of homosexuals in the Gambia is dated 2014 which was around the time that the draconian anti-homosexual laws were introduced in the Gambia. I accept that the objective evidence at page 62 of the appellant's bundle is dated May 2016 and refers to the criminalisation of homosexual acts under the 2014 legislation. However there is no

objective evidence from a later date. Further, there is no evidence that the anti-homosexual legislation has been enforced since President Jammeh has been exiled.

[35] Mr Mannan submitted that because the anti-homosexual legislation remained law the appellant faced a real risk of persecution. I do not accept this submission. In many countries, included the United Kingdom there are laws which remain on the statute book but which have not been enforced and will not be enforced. I do not accept that their mere existence is sufficient to establish a real risk of harm. I recognise that the anti-homosexual laws has been enforced in the past. However I also recognise that President Jammeh is widely regarded as a dictator who ruled the Gambia for over 20 years. The expert report from [Mr C], again no relative of the appellant, which was prepared for the 2012 Determination refers to the repressive acts of the government under President Jammeh, including restrictions on freedom of speech, targeting of political opponents, the lack of judicial independence and scrutiny and widespread abuse of human rights. However I find that this report is of virtually no assistance to me in 2018 because it provides no consideration of what has happened since the removal of President Jammeh.

[36] The objective evidence at page 56 dated 21 November 2014 sets out the following: *"President Jammeh's inflammatory public statements against LGBTI people have been put into practice through this odious law and the witchhunt that followed its secretive passage..."*

[37] The objective evidence at page 59 and 60 of the appellants bundle sets out the following: *"Jammeh is virulently homophobic, often referring to LGBTI people as "vermin", "satanic", "a threat to population growth", "anti-God, anti-human and anti-civilisation".*

[38] The objective evidence of page 79 of the appellant's bundle sets out the following: "President Yahya Jammeh said: *"we will fight these vermin called homosexuals or gays the same way we are fighting malaria causing mosquitoes, if not more aggressively."*

[39] The objective evidence about 81 of the appellant's bundle set out the following: *"President Yahya Jammeh said in a public speech in the Wolof language, cited by Vice news. "If you are a man, I want to marry another man in this country and we catch you, no one will ever set eyes on you again, and no white person can do anything about it."*

[40] I find that the objective evidence sets out that President Jammeh adopted a personal vitriolic approach against homosexuality. I find that President Jammeh has now been replaced by President Barrow and the objective evidence sets out that Mr Barrow has adopted a course of action trying to end Gambia's isolation from the rest of the world. Further, the objective evidence provided by the respondent set out that "*On the issue of the draconian anti-gay laws passed by his predecessor dictator Yahya Jammeh, President Barrow said plans*

> *are afoot to amend the constitution so that all genders in the country are treated equally."*
>
> [41] Therefore taking all of this evidence together I am not satisfied that the appellant has discharged the burden of proof to show that he is at risk of persecution from the Gambian authorities. I note that Judge Spencer when making his finding about risk of persecution in 2012 had the benefit of an expert report, which was prepared for the purposes of the tribunal to specifically deal with the risk of persecution at that time. Regrettably, I do not have any such evidence. There is no evidence before me that the appellant would face persecution from any other actors in the Gambia. Further, the 2012 Determination rejects the appellant's claim about persecution he claimed to have suffered in the Gambia before coming to the United Kingdom in 2008. There is no reason for me to interfere with those conclusions."

10. Mr Mannan submitted that the speech made by President Barrow on which the Judge relied was only a statement of intent and had not been reflected in any actual change to the position for homosexuals in Gambia. He argued that, in light of the background material which the Appellant produced, it was not open to the Judge to find as she did that there would be no real risk on return. He did not accept that the change of regime made any difference to the reliance which could be placed on that material. There was no consideration whether President Barrow's view was reflected by the authorities as a whole and therefore whether any change, even if the authorities would implement that change, would be accepted by those other organs. Further, there was no indication whether the new President's views would make any difference to societal attitudes in Gambia.

11. Mr Walker, having heard Mr Mannan's submissions, indicated that he conceded there is an error in the Decision. He accepted in particular that there was a potential conflict between the conclusion at [41] of the Decision and the findings in relation to the overall background material set out at [34] to [40] of the Decision.

12. Following discussions, I accepted the concession made and identified the error of law in the following way:

> "In light of the concession made, I accept there is a material error of law in terms of the Judge's failure to provide adequate reasons for preferring the one piece of background evidence on which the Respondent placed reliance over the previous background evidence, particularly in the context of the attitude of society in the Gambia and the wider attitude of the authorities there (beyond the President's own personal view)."

13. For those reasons, I accept that the Decision discloses a material error of law. As there is no challenge to the factual findings made at [26] to [32] of the Decision, I preserve those findings. As such, the only issue for redetermination is whether the background evidence

discloses a risk to a homosexual who wishes to openly demonstrate his sexuality on return to the Gambia.

14. Mr Mannan urged on me an immediate re-making of the Decision on the basis that he said that the background evidence disclosed that such a risk continues to exist. I disagree. The evidence on which the Appellant relies is outdated, relating as it does to the period before President Barrow came to power. Equally, as I have already indicated, the Respondent relies only on one article which is narrow in its ambit.

15. For those reasons, I indicated that I would require further evidence in order to re-make the decision. It was not clear from discussions whether there is publicly available material which is more up-to-date in relation to this issue. I therefore considered it likely that the Appellant would need to consider whether to commission a further expert report as he had done for his appeal in 2012. I have therefore given directions allowing sufficient time for the Appellant to obtain such a report if he chooses to do so.

DECISION

The First-tier Tribunal Decision involves the making of a material error on a point of law. I therefore set aside the First-tier Tribunal Decision of Judge J Bartlett promulgated on 18 June 2018. However, I preserve the findings made at [26] to [32] of that decision. I make the following directions for the re-making of the decision.

DIRECTIONS

1. **By 4pm on Wednesday 31 October 2018, the parties shall file with the Tribunal and serve on the other party any further evidence on which they wish to rely.**

2. **The appeal is to be re-listed for hearing on the first available date after Monday 12 November 2018. Time estimate is half a day. There is unlikely to be a need for further oral evidence and an interpreter is not required and will not be booked unless the Appellant's representatives inform the Tribunal at least fourteen days before the resumed hearing that the Appellant will be called to give oral evidence and that he requires an interpreter in order to do so.**

Signed Dated: 6 September 2018
Upper Tribunal Judge Smith