



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

Appeal Number: PA/01279/2018

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Decision & Reasons Promulgated
Centre
On 16 May 2019 On 4 June 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**ESC
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West, instructed by Duncan Lewis, Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Gambia who was born on 8 June 1978. He last came to the United Kingdom as a visitor on 23 December 2010 with leave valid until 23 June 2011. Thereafter, he overstayed. On 17 October 2014, he was arrested, bailed and, thereafter, absconded. He was again arrested on 9 October 2017.
3. On 10 October 2017, the appellant claimed asylum. He claimed asylum and claimed to be at risk on return to Gambia for four distinct reasons:
 - (1) he had worked as an Immigration Officer in Gambia and had been accused of issuing passports fraudulently to individuals who were not entitled to them;
 - (2) he was a supporter of the former government and the Alliance for Patriotic Re-orientation and Construction (“APRC”) party;
 - (3) as a result of his uncle being killed in June 2017; and
 - (4) he had been critical of the current regime in a WhatsApp audio message which had been widely shared.
4. On 10 January 2018, the Secretary of State refused the appellant’s claims for asylum, humanitarian protection and on human rights grounds.

The Appeal

5. The appellant appealed to the First-tier Tribunal. His appeal was initially heard on 15 March 2018 and dismissed by the First-tier Tribunal. He sought permission to appeal against that decision and, on 26 April 2018, the First-tier Tribunal reviewed its own decision and set it aside.
6. The appeal was, therefore, relisted for a *de novo* hearing before the First-tier Tribunal on 20 June 2018.
7. In a determination sent on 19 July 2018, Judge R Sullivan dismissed the appellant’s appeal on all grounds. She made a number of adverse credibility findings in respect of the appellant and his evidence.
8. First, she did not accept that he had been employed as an Immigration Officer in Gambia and that he had been accused of issuing false passports. Secondly, she did not accept that the appellant was the nephew of the individual, whom he claimed to be his uncle, and who had died on 3 June 2017. In any event, she also found that even if the relationship had been established it had not been shown that this would create a real risk to the appellant on return to the Gambia. Thirdly, the judge rejected the appellant’s account that the relied upon WhatsApp audio file had been uploaded or disseminated in the way that he claimed and so he had not established that he was at risk from the regime in Gambia as he claimed. Finally, the judge was not satisfied that the appellant was an APRC

member and was, therefore, at risk of harm on return due to his political affiliation.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal. Permission was initially refused by the First-tier Tribunal on 20 August 2018. However, on 13 November 2018, on a renewed application, the Upper Tribunal (UTJ Finch) granted the appellant permission to appeal.
10. The Secretary of State did not file a rule 24 response.

The Submissions

11. Mr West, who represented the appellant, relied upon the two sets of grounds of appeal, in particular the more detailed grounds filed with the First-tier Tribunal application for permission dated 2 August 2018. He relied upon all *five* grounds.
12. First, he submitted that the judge had acted unfairly by raising issues concerning the reliability or authenticity of a number of documents which had not been raised at the hearing and, therefore, the appellant had been unfairly denied the opportunity to deal with them. He submitted that in para 41(a) and (b) and para 43, the judge had raised points in relation to the certificates from the Gambia Armed Forces Training School and the Gambia Immigration Department and photographs of the appellant in uniform.
13. Secondly, Mr West submitted that the judge's adverse view of the appellant's credibility had been wrongly tainted by her reliance on the fact, at para 23, that the appellant was "a man willing to tell lies", in that he had initially said at the hearing that he was working in the UK but had changed his evidence when the contents of email were put to him which showed he made financial provision for relatives in the Gambia.
14. Thirdly, Mr West submitted that in finding that the appellant had failed to establish that he was related to the person, whom he claimed to be his uncle and who had been killed on 3 June 2017, the judge had failed to take into account all the evidence, including that his mother's name on her birth certificate was the same as that of his claimed uncle, namely her brother, and that there was an APRC letter (at page 73), referring to the appellant's relationship with that individual as his uncle. Further, there was a death certificate at page 53, relating to the individual which he claimed related to his uncle and which identified the informant by name and there was evidence at pages 57-58 from that individual linking the appellant to the deceased. Mr West submitted that the judge had inadequately reasoned that there were "no official documentary evidence" of any relationship between the deceased individual and either of the appellant's parents.

15. Fourthly, Mr West submitted that in relation to the judge's finding in respect of the WhatsApp audio file, there were a number of supporting documents, in particular at pages 57-72 of the bundle, supporting the appellant's claim that the audio message had been posted and widely shared. The judge had failed to take this evidence into account, in particular at para 60 when she had stated that there was no "documentary evidence that the critical message was posted to WhatsApp by the appellant or, if it was, that it was widely shared".
16. Fifthly, Mr West submitted that the judge had wrongly failed to take into account the expert evidence by Dr Kea in relation, in particular, to the authenticity of the official documents upon which the appellant relied. Mr West pointed out that the judge had accepted that Dr Kea was an expert in "the culture and politics of Gambia" but had been wrong at paras 25 and 40 to doubt her expertise in assessing the documentation because she was not a "forensic document examiner".
17. On behalf of the Secretary of State, Mr Howells made a number of submissions in response to the appellant's grounds and Mr West's submissions.
18. First, as regards ground 1, Mr Howells submitted that the most important document considered by the judge was the appellant's claimed ID card which the judge dealt with at length at para 41(c) of her determination and in the light of the appellant's evidence at the hearing in relation to it. Mr Howells was unable to indicate whether the Presenting Officer at the hearing had specifically challenged the authenticity of the two certificates referred to by the judge in paras 41(a) and (b) and the photographs referred to at para 43. He did, however, acknowledge that it did not appear that the judge had asked any questions about these documents at the hearing. Mr Howells accepted that that was an error but, given the overall reasoning of the judge, was not material to her decision.
19. Secondly, Mr Howells submitted that the judge was entitled to take into account, as she stated at para 23, that the appellant had lied in his evidence before the Tribunal. Mr Howells submitted that it was clear from the judge's detailed determination and reasons that she had not taken that lie as the basis for finding his account not to be credible. Mr Howells submitted that the judge considered each element of the claim at length and made a finding in relation to the credibility of each of the bases upon which the appellant put his claim.
20. Thirdly, Mr Howells submitted that the judge was entitled to find that there were no "official documents" establishing the claimed relationship between the appellant and his claimed uncle. Whilst that might not have been possible in a single document, it would have been possible by producing a number of documents. In any event, Mr Howells submitted that the judge had found at paras 53 and 54(f) that even if the appellant were related to the individual who had been killed, he had not established that he was at risk on return to Gambia by reason of that relationship. Mr

Howells submitted that that finding was not challenged and therefore any error in the judge's approach to the evidence concerning the claimed relationship was not material to the outcome of the appeal on the basis that he claimed to be at risk because of his uncle.

21. Finally, Mr Howells submitted that the judge had, in fact, considered the opinion of Dr Kea in relation to the authenticity of the documents at para 41(c) and paras 42–43. Mr Howells submitted that the judge had given good and sound reasons for not accepting the reliability of the documents.

Discussion

22. Whilst I do not accept Mr West's submissions in their entirety, there is in my judgment merit in a number of them (Grounds 1, 4 and 5) such that I am satisfied that the judge's adverse findings are not legally sustainable.

Grounds 1 and 5

23. First, and Mr Howells effectively accepted this, the judge took a number of points, adversely to the appellant, in relation to two certificates relied upon in order to assist him in establishing a central feature of his claim, namely that he had worked as an Immigration Officer in the Gambian government. So, at paras 41(a) and (b) the judge said this:

"a) The certificates from the Gambia Armed Forces Training School and the Gambia Immigration Department appear to relate to the Appellant's attendance on the same training course. However one says that the course started on 4 October 2004 and the other that it started on 20 October 2004. Dr Kea does not mention this difference.

b) The two certificates are both stamped for the Gambia Armed Forces Training School and have the same signatories notwithstanding that one of them purports to be a certificate from the Gambian Immigration Department rather than from the Gambia Armed Forces Training School. Dr Kea does not mention this anomaly or cast any light on key personalities in office at either establishment in February 2005."

24. Then, at para 43 the judge added this in relation to a number of photographs which were said to show the appellant in appropriate uniform:

"The Appellant has also provided photographs showing him in various uniforms with varying indications of rank and other insignia. In one photograph he is sitting with at least one senior officer. Dr Kea has offered no view as to what the uniforms or several insignia denote and has not expressed a view about any feature of any of the photographs which may indicate its date."

25. Although the originals of these documents appear to have been handed up to the judge towards the end of the hearing (see para 18 of her determination), it was accepted before me that the documents were, in copy form, in the respondent's bundle. Mr Howells was unable to indicate

whether the Presenting Officer had challenged the authenticity of these documents at the hearing. His position was that it would appear that no questions were asked of the appellant either in cross-examination or by the judge in relation to the points raised, and relied upon by her, in paras 41(a) and (b) and 43.

26. It is axiomatic that fairness requires that an individual have an opportunity to deal with any potentially adverse points of any significance which are raised by the evidence and which the judge subsequently takes into account in reaching his or her factual findings; at least in respect of significant matters which, otherwise, the appellant would not appreciate might be taken into account adversely by the judge (see, e.g. R (Maheshwaran) v SSHD [2002] EWCA Civ 173). Here, it was a central plank of the appellant's case that he had been employed as an Immigration Officer and the two certificates and photographs were significant elements of the evidence relevant to that issue. It does not appear that they had been challenged by the respondent at the hearing and, as a result, it is difficult to see how the points taken by the judge adversely to the appellant could have been anticipated or foreseen by the appellant or his representative. I accept, as Mr Howells submitted, that the judge also rejected the reliability of the appellant's ID card at para 41(c). Nevertheless, I do not accept that the unfairness in denying the appellant the opportunity to deal with the adverse points taken in relation to the two certificates at para 41(a) and (b) and the photographs at para 43 was not material, in the sense that it can be said that the appellant would not have been able to offer an explanation which might have affected the judge's overall view of the documentation relevant to his claim to have been an Immigration Officer in Gambia.
27. Related to this is the issue concerning the judge's treatment of Dr Kea's evidence as to the genuineness of these documents.
28. At para 25 of her determination, the judge first set out her "reservations" about Dr Kea's expertise in assessing the documentation relied on. The judge said this:

"25. In considering the country evidence, given her qualifications and experience, I accept the report of Dr Kea as an expert report concerning the culture and politics of Gambia. I have reservations about her expertise as a document examiner as will become clear."
29. Then at para 40, the judge set out Dr Kea's "expert view" in relation to the documents as follows:

"40. The expert view is that 'the certificate of appointment/ ID card issued to the client is a genuine document. The layout and stamp are typical of Gambian ID cards. The certificate issued by the Gambian Armed Forces Training School and the certificate issued by the Gambian Immigration Department are also genuine documents. Similarly the layout, format and official stamp are typical of official certificates in the Gambia. Based on my

experience of working and carrying out research in the Gambia I have found that the quality of materials, production, and presentation of printed documentation in the Gambia can be below the standards one would expect'. Dr Kea is an anthropologist rather than a forensic document examiner by way of background and last conducted research in Gambia in October 2007. She has knowledge of Gambian culture and political economy but it is not apparent from the CV she offers to what extent she has examined Gambian identity, armed forces or immigration documentation. In short Dr Kea appears to be saying that because these Gambian documents are typical of such Gambian documents they are genuine. I am not satisfied that the conclusion necessarily follows from that reasoning."

30. Then, in para 41(a) and (b), having identified the issues that the judge saw with the two certificates relied upon and, at para 41(b) noting that Dr Kea did not deal with the anomaly identified by the judge, at para 41(c) the judge dealt with the appellant's claimed ID card as follows:

"c) The Gambia Immigration Services identity card bears a typed date 2/4/01 but the photograph on it is date stamped 5 May 2009. It is an obvious difference but Dr Kea does not mention it. Asked about this identity card the Appellant said that it was issued to him on 2 April 2001 and that it was the card originally issued to him. The rank typed on the card is 'A.I.CO'. I asked the meaning of the abbreviation and the Appellant said that it meant that he was a corporal immigration control officer. He said that he was promoted to Corporal in 2004 and had held no rank when he was appointed in 2001. In my view these answers were not consistent with the card having been issued to the Appellant in 2001. I asked about the date stamp 5 May 2009 and after a notable pause the Appellant said that it was dated when he updated the picture; he had not mentioned this when earlier asked if there had been any amendment or alteration to the card since its initial issue. There is nothing visible on or around the photograph to suggest that an earlier photograph had been affixed there; asked about this and in direct contradiction to his earlier evidence the Appellant said that he had been given a replacement identity card, that his original identity card had been a brown one and that the card he had filed in evidence was his second identity card. Dr Kea says nothing about different colours of identity cards being used by the Gambian Immigration Service. I would have expected a person purporting to give expert evidence about the documentation of the Gambian Immigration Service to know something about the entry rank, promotion and documentation of staff and to say something about differences in the colour of the card from time to time."

Then at para 42 the judge said this in relation to Dr Kea's evidence:

"42. I find that Dr Kea has not engaged meaningfully with the details of the training certificates or the Gambian Immigration Services identity card. She ought, if she has the expertise, to have explained it in her CV and to have addressed the discrepancies on the documentation. I am not satisfied that she has the training,

background or experience to offer an expert view about the authenticity of any of these documents. It is not sufficient to say that they are typical of their sort.”

31. It is difficult to know precisely what, if any, weight the judge placed on Dr Kea’s opinion. The judge appears to have ‘topped and tailed’ her conclusion in relation to the documents by doubting Dr Kea’s expertise. Dr Kea’s report is at pages 23–44 of the appellant’s bundle. It sets out her expertise including her qualifications as an anthropologist and her current academic post in the University of Sussex. It also points out that she has written many expert reports in relation to Gambia and cowrote the *COI* report for 2011. Whilst she does not purport to be, as the judge noted, a “forensic document examiner”, she does appear to have extensive knowledge of the Gambia, even though she has not visited there to carry out research until October 2007. She has, as her report points out, visited there subsequently in September 2012 and September 2014. The judge was not entitled to disregard her expertise to the extent that she was entitled to say, as an expert, that the documents were “typical” of those emanating from the Gambia. Of course, as Mr Howells submitted, the judge also engaged with Dr Kea’s views, at least to some extent, in relation to some of the documents, commenting that she did not refer to a particular issue relied upon by the judge. I am unable to discount, however, that given the judge’s ‘top and tailing’ of her consideration of the documents and Dr Kea’s report, that she has not given it due weight on the erroneous basis that Dr Kea’s views were not entitled to some weight as an expert on Gambian politics and culture including the typical appearance of some of the documents relied upon by the appellant.
32. Taken together, therefore, grounds 1 and 5, I am satisfied that the judge’s adverse findings, at least in relation to the first limb of the appellant’s claim, are legally unsustainable.

Ground 4

33. I am also satisfied that ground 4 has merits. The judge found that the appellant had not established that the WhatsApp audio message had been posted or widely shared so as to create a risk to him. The judge dealt with this at paras 55–62. At para 60, in particular, the judge said this:
- “60. Several of the emails from the Appellant’s relatives and friends in Gambia refer to them having heard the critical audio message or spoken to friends or associates who had heard it. There is evidence that there retaliatory action was taken in the form of an attack on a business run by the Appellant’s ex-wife. However none of these witnesses has provided documentary evidence that the critical message was posted to WhatsApp by the Appellant or, if it was, that it was widely shared.”

Whilst it is true to say that the judge found “discrepancies” in the appellant’s evidence, she also stated at para 62 that: “He has not provided reliable evidence of the uploading or dissemination of the single audio message on which this element of his claim is based.” As Mr West

submitted, there was supportive evidence from a number of individuals at pages 57-72 of the bundle. The judge appears, at para 60 to have been focussed on the absence of “documentary evidence”. Mr Howells suggested that this might include evidence of the ‘thread’ of a WhatsApp message showing the dissemination of the message and/or audio file. At para 57, the judge refers to the absence of any supporting evidence from the “other 300-[500] members of the WhatsApp group to which the message was sent”. But, at para 60, the judge refers to several emails from the appellant’s relatives and friends who claim to have heard the message or spoken to friends and associates who have heard it. It is unclear whether the judge is, in fact, referring to the evidence at pages 57-72 which are not emails but rather are statements or letters from individuals who, inter alia, speak to the dissemination of the audio file and from others who had heard it.

34. Whilst the judge deals at some length with the evidence concerning the claimed uploading and distribution of the WhatsApp file, I am not satisfied that in reaching her adverse conclusion that it had not been established that it had been uploaded and widely disseminated, she fully took into account and grappled with the evidence at pages 57-72 supporting that as having occurred. So, for that reason, I am satisfied that ground 4 is made out and that the judge’s adverse finding in relation to the risk to the appellant as a result of the claimed dissemination of the WhatsApp file is flawed.

Grounds 2 and 3

35. I do not, however, accept Mr West’s submissions in relation to ground 2 and ground 3.
36. As regards the ground 2, I accept Mr Howells’ submission that the judge did not wrongly take into account that the appellant had sought to mislead the Tribunal in his evidence as a matter going, in general terms, to his credibility. It would, of course, have been quite wrong for the judge to reason that because he had lied to the Tribunal in respect of whether he was working in the UK, then none of his evidence should be accepted. It was, merely, a relevant matter in assessing his general credibility. But, as Mr Howells submitted, it is plain that having referred to the appellant’s lie at para 23, the judge, thereafter, went on to consider in detail the evidence relevant to each limb of the appellant’s claim and to reach credibility findings and conclusions based upon the evidence. She did not, therefore, improperly take into account by giving it undue weight, the fact that the appellant had lied to the Tribunal in relation to whether he was working in the UK.
37. As regards ground 3, I accept Mr Howells’ submissions that the judge cannot be criticised for taking into account that there were “no official documentary evidence” of any relationship between the appellant’s claimed uncle and the appellant’s parents. In truth, there was no such evidence. Even though Mr West sought to persuade me that there was

evidence linking the appellant to the person whom he claimed was his uncle, at its highest this amounted to a reliance upon the fact that the appellant's mother and his claimed uncle had the same surname. There was, however, no evidence before the judge that this was an uncommon surname which made the coincidence unlikely or, as Mr West himself observed in his submissions, a name such as "Smith" when seeking to establish a relationship between two individuals with that surname in the UK.

38. Even if I were persuaded by Mr West's submissions that the judge had erred in law by failing to take into account the APRC letter (at page 73) which spoke to the appellant's relationship with his claimed uncle or the evidence from the "informant" on his claimed uncle's death certificate, in themselves this would not materially affect the judge's finding based upon the risk to the appellant on the basis of his uncle. As Mr Howells pointed out, the judge found that, even if the individual claimed to be his uncle was indeed his uncle, he had failed to establish that there was a real risk to him on this basis and that finding is not challenged in the grounds.

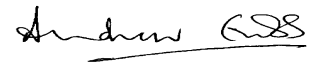
Conclusion

39. Nevertheless, for the reasons I have given above, I am satisfied on the basis of grounds 1, 4 and 5 that the judge materially erred in law in reaching her adverse findings and dismissing the appellant's claim for asylum.
40. Both representatives acknowledged before me that if the judge's decision could not stand, the proper disposal of the appeal was to remit it to the First-tier for re-hearing. That, in my judgment, is inevitable despite the fact that the appeal has already twice been heard in the First-tier Tribunal. It would not be appropriate, in my judgment, to leave intact any of the judge's findings as the claim turns upon, in large measure, the credibility of the appellant and his account. The appellant's credibility must be assessed globally and, in particular, in relation to each of the elements of his claim. The appeal must, in my judgment, be re-heard *de novo*.

Decision

41. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. That decision is set aside.
42. Having regard to the nature and extent of fact-finding required and to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* re-hearing before a judge other than Judge Telford or Judge R Sullivan.

Signed

A handwritten signature in black ink that reads "Andrew Grubb". The signature is written in a cursive style and is underlined.

A Grubb
Judge of the Upper Tribunal

30 May 2019