IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/07303/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 October 2014	**On 11 November 2014**

Before

THE HONOURABLE MR JUSTICE T R A KING
UPPER TRIBUNAL JUDGE DAWSON

Between

MR GUSTAVE LOUIE JARLEY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R M Jarley
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a national of The Gambia where he was born on 26 January 1991, appeals with permission the decision of First-tier Tribunal Judge Robson, who for reasons given in his determination dated 15 May 2014 dismissed the appeal by the appellant against the Secretary of State's decisions.

2. Those decisions, which were made on 21 January 2014, were twofold. The first was a decision to refuse to vary the appellant's leave to remain. The

second was a decision to remove the appellant. The background to the decision was that the appellant had made application based on a concession under the Immigration Rules on 1 March 2013 for leave to enlist in Her Majesty's Armed Forces. On 12 August 2013 whilst the application was pending before the Secretary of State the offer from the British Army was withdrawn. Accordingly the Secretary of State concluded that she was not satisfied that the appellant has sought a variation of leave for a purpose covered by the Immigration Rules and thus refused with reference to paragraph 322(1) of HC 395.

3. In granting permission to appeal Upper Tribunal Judge Gill raised the possibility that the appellant was unable to rely on asylum grounds having regard to the nature of the decision made by the Secretary of State. We are satisfied that her concerns were misplaced. S.88 of the 2002 Act bites on decisions refusing to vary leave but it does not prevent an appellant bringing an appeal on asylum, race relations or human rights grounds. In any event the appellant can rely on the removal decision which permits all grounds to be argued, and in this regard we have taken account of s.85(2) of the 2002 Act.

4. The appellant did not mention the basis of his asylum claim, which is his sexual orientation, until he filed his grounds of appeal to the First-tier Tribunal. In this he refers to the difficulties that he had encountered in The Gambia and a sense of relief he achieved on arrival in the United Kingdom. He submitted with his grounds of appeal a letter from his brother, who spoke on his behalf before us today. His brother is serving in the British Army. He explains in that letter that the appellant is gay and that he is afraid to go back home. In addition, at some point two items of country of origin information were lodged by the appellant regarding the negative attitude of the Gambian authorities to gay people. That was the extent of the evidence before the First-tier Tribunal.

5. The appellant did not attend the hearing. This was because he had requested that the appeal be determined on the papers.

6. The judge noted the grounds with reference to the appellant's orientation and reached the conclusion that if he wished to raise the issue of breach of Article 8 he should make an appropriate application to the respondent. He also observed that there was insufficient information to make a decision as to the entitlement or otherwise to humanitarian protection and thus the appeal was dismissed.

7. The application for permission to appeal states that the decision of the First-tier Tribunal was wrong. He was not given the chance to appeal on asylum grounds and thus this would lead to his returning to Gambia where he would face fail. He would lose his life if left to return to that country and that his right to human rights and life had not been fully considered.

8. In our view the First-tier Tribunal erred in failing to determine the Article 8 and refugee law rights that the appellant relied on. S.85(2) we have

referred to already provides that the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in s.84(1) against the decision appealed against.

9. The evidence before the judge was limited as we have described already. The appellant had the burden of proof to establish the matters that he relied on in support of his claim to refugee protection and otherwise on Article 8 grounds. He chose to have the appeal decided on the papers and although he was entitled to take that course he had to take the consequences of doing so. On the evidence before him our conclusion is that had the judge proceeded to determine the human rights and asylum grounds he could have only come to one decision which was to dismiss the appeal on the basis that the appellant had not discharged the burden of proof.

10. Under s.12 of the 2007 Act, even if we find an error of law in a decision of the First-tier Tribunal we may but need not set aside that decision. As we consider that there was only one outcome open to the judge had he decided the grounds we do not consider the error material and accordingly his decision stands.

11. We are aware that the appellant maintains his protection claim. He is aware from our conversation with him today that it is open to him to apply to the Secretary of State in accordance with the usual practice for his claim to be considered and he is able to rely on paragraph 329 of the Immigration Rules which provides that he will not be removed until that claim has been decided. Helpfully Ms Isherwood on behalf of the Secretary of State will provide him with the address which he can go to.

12. Accordingly this appeal is dismissed.

Signed Date 10 November 2014

Upper Tribunal Judge Dawson