Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: HU/23129/2016**

THE IMMIGRATION ACTS

Heard at: Field House
ON 31 JANUARY 2018

Decision and Reasons promulgated
ON 15 FEBRUARY 2018

Before

Upper Tribunal Judge Gill

Between

Entry Clearance Officer, UKVS Sheffield

Appellant

And

PA Saikou Bojang
(Anonymity Order Not Made)

Respondent

Representation:

For the appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer.
For the respondent: Mr Y Y Darboe of Queen's Park Solicitors.

Decision and Directions

1. The Entry Clearance Officer (hereafter the "ECO") has been granted permission to appeal the decision of Judge of the First-tier Tribunal Kimnell who, in a decision promulgated on 6 October 2017 following a hearing on 26 September 2017, allowed the appeal of Mr Pa Saikou Bojang (hereafter the "claimant"), a national of the Gambia born on 17 November 1982, against a decision of the respondent of 14 September 2016 to refuse his application of 13 June 2016 for entry clearance as the husband of Mrs. Kemi Liza Bojang (hereafter the "sponsor") under Appendix FM of the Immigration Rules. The sponsor is a British citizen.

2. The ECO refused the application under paragraph 320(11) of the Rules and S-EC.1.4.(c) of Appendix FM because the claimant was apprehended previously when he arrived at Luton Airport on 25th May 2015 travelling on a Belgian passport (in the

identity of a person with a date of birth of 17 November 1983) which had been deliberately altered to make it appear as if it belonged to him. He was carrying a Swedish bank card in another name. He claimed asylum, saying that he feared returning to the Gambia or Denmark. He withdrew his asylum claim two hours later. He was removed on the same day to Denmark where he was convicted of a criminal offence and sentenced to 40 days' imprisonment.

3. In relation to the refusal under paragraph 320(11), the ECO considered that the claimant had attempted to frustrate the intentions of the Immigration Rules in view of the fact that, on 25 May 2015, he had carried a fraudulently altered passport, used different identities with no satisfactory explanation and made a frivolous application to remain in the United Kingdom.

4. In relation to the refusal under S-EC.1.4.(c) of Appendix FM, the ECO considered that the claimant did not meet the suitability requirements on account of the fact that he had a criminal conviction for which he was sentenced to 40 days' imprisonment. The ECO accepted that the remaining requirements for entry clearance as a partner were satisfied.

5. Paragraph S-EC.1.4.(c) provides that an applicant will be refused entry clearance on the grounds of suitability where exclusion is conducive to the public good because he has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than twelve months, unless a five year period has passed since the end of the sentence. Where that paragraph applies, unless refusal would be contrary to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

6. Accordingly, as the judge noted (at para 23 of his decision), the appellant in this case could make another application without being caught by the suitability requirement, provided he waits a further three to four years before making a renewed application.

7. The ECO also considered the application outside the Immigration Rules under Article 8 of the ECHR. The ECO considered that the decision was proportionate, noting, in particular, that no reason had been advanced as to why the sponsor was unable to enjoy family life with the claimant in the Gambia.

The judge's decision

8. In summary, the judge found that, although *"highly borderline"*, it was just about possible to say that the sponsor cannot reasonably be expected to join the claimant in the Gambia. He considered that the claimant had returned at his own expense to the Gambia and waited for 12 months before making the application for entry clearance, that he withdrew his asylum claim speedily "*thus causing the UK authorities virtually no trouble, expense or inconvenience"*, that the prison sentence was short and there was no other criminality, that the factors in s.117B of the Nationality, Immigration and Asylum Act 2002 as to financial independence and English language were satisfied and that the decision to maintain the refusal now and insist that the claimant wait until 5 years had elapsed would have a disproportionate impact on the sponsor, regardless of the impact on the claimant.

9. The judge gave his reasons for his decision at paras 11-34 which read:

"11. The burden is on the [claimant] to establish the facts on which he relies, though in this case there is no dispute between the parties as to the facts; it is the decision to be drawn from those facts that is in dispute between the [claimant] and [ECO].

12. The accepted facts are these: the [claimant] was born on 17th November 1982 in Gambia and is married to his current wife, his sponsor, Mrs Kemi Liza Bojang whom he first met in Gambia on 25t1 October 2011.

13. The couple married in Gambia on 25th April 2014. In May of that year the [claimant] had a visit visa for Denmark for a period of three months. He travelled there on 29th June 2014 and moved to Sweden on 30th June 2014, the following day. The visa expired and the [claimant] remained living illegally. A civil marriage ceremony was conducted in Sweden on 31st January 2015. The couple could not settle in Sweden, consequently it was decided that the sponsor should return to the United Kingdom, which she did, and where she secured employment with a software company earning £26,500 per year which has since increased to an annual salary £47,000 a year.

14. The [claimant] accepted advice that he could use a fake Belgian passport to visit the United Kingdom and with that passport he travelled to Luton where he was apprehended. The [claimant] confessed to possession of a false passport and claimed asylum but after a short period of time the [claimant] acknowledged that he was happy to return it to Denmark, and he was removed the same day. He was detained on return to Denmark and sentenced to a term of imprisonment for 40 days, following which he returned to the Gambia.

15. The [claimant's] wife advised him to return to the Gambia to make a proper application to join her in the United Kingdom. He waited, as advised, for a period of twelve months before making his application during which time he has remained in the Gambia whilst his wife has lived in the UK.

16. In his witness statement the [claimant] protests that he is not a criminal, but he has obviously committed a criminal offence.

17. As regards paragraph 320(11), where an applicant has previously contrived in a significant way to frustrate the intentions of the Rules by using deception in an application for entry clearance or leave to remain, and where there are aggravating circumstances, for example using an assumed identity of switching nationalities or making a frivolous application, the application may be refused.

18. In the present case, the [claimant] did use deception involving a different nationality and he had documents in more than one identity. He did make a frivolous asylum application.

19. That is not disputed by the [claimant], but Mr Darboe refers to the case of [**PS** (paragraph 320(11) discretion: care needed) India [2010] UKUT 440 (IAC)]. That was a case where the Entry Clearance Officer making the decision to refuse an application referred nowhere to guidance issued by the [ECO] under paragraph 320(11). The Tribunal found that the Entry Clearance Officer in that case should have specifically recognised that the [claimant] had voluntarily left the United Kingdom more than twelve months previously with a view to regularising his immigration status. There was no question but that the marriage was a genuine one and there was a risk that the decision could be counterproductive to the general purpose of the Rules and to the maintenance of a coherent system of immigration.

20. The guidance issued to Entry Clearance Officers referred to in paragraph 10 of the decision of **PS** relates to the meaning of "aggravating circumstances". Where such a circumstance applies paragraph 320(11) dictates that entry clearance or leave to enter should normally be refused.

21. The Tribunal in **PS** had regard to paragraph 320(7B) and 320(7C). Those paragraphs, the Tribunal observed, were intended to encourage a person in the position of the [claimant] in that case voluntarily to leave the UK and to remain outside the UK for a significant period, which is a desirable objective. Paragraph 320(7B)(iii) adds a proviso where an applicant left the UK voluntarily, not at the expense of the Secretary of State, more than twelve months previously. Paragraph 320(7B) leads to an automatic refusal of

entry clearance, but it is Mr Darboe's argument that the period of twelve months referred to in 320(7B) is a reasonable yardstick to apply when considering an application under 320(11).

22. In the present case, in common with the Entry Clearance Officer in PS, no recognition was made for the fact that the [claimant] voluntarily departed and spent twelve months residing in the Gambia before he made the application leading to the decision now under appeal. It was accepted that the bogus asylum claim was withdrawn within two hours of making it, which is another matter that should have been taken into account against the background of so many bogus asylum seekers who maintain a deceitful application for many months and even pursue an appeal process against a refusal of such an application.

23. As regards the other basis for refusal, namely S-EC.1.4.(c) that provides that an applicant will be refused entry clearance on the grounds of suitability where exclusion is conducive to the public good because an [claimant] has been convicted of an offence for which he has been sentenced to a period of imprisonment of less than twelve months, unless a five year period has passed since the end of the sentence. Where that paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors.

24. The [claimant] in this case could make another application without being caught by the suitability requirement, provided he waits a further three to four years before making a renewed application.

25. Turning to Article 8 principles, there is undoubtedly a family life between the [claimant] and sponsor, and that is not challenged. [The ECO's representative] argues that the decision involves no breach thereof because family life can continue as it has been while the couple have been living apart, but I do not accept that argument. The [claimant] and sponsor are unable to be reunited in the United Kingdom, which, if the sponsor cannot reasonably be expected to join the [claimant] in the Gambia, interferes with their family life and would be sufficiently grave a consequence as to engage Article 8 ECHR.

26. The sponsor has said at paragraph 15 of her witness statement that it is not possible for family life to take place in the Gambia because it would be difficult for the sponsor to find work there comparable with her current employment, indeed her husband has found it difficult to obtain work in the Gambia. By remaining in the United Kingdom the sponsor has the ability to meet other aspects of Appendix FM, particularly the financial provisions. It is highly borderline but on balance it is just about possible to say that the sponsor cannot reasonably be expected to join her husband in the Gambia.

27. The decision is in accordance with the law and in pursuit of a legitimate aim so it comes to the question of proportionality, weighing the private and family life rights of the [claimant] and sponsor against the undoubted national interest in maintaining immigration controls.

28. The [claimant] would meet the requirements of Appendix FM, suitability apart.

29. I find as regards the paragraph 320(11) refusal that the [ECO], when exercising discretion, should have taken into account the fact that the [claimant] returned at his own expense and has waited for twelve months before making his current application and should also have taken into account the speed with which the asylum claim was withdrawn, thus causing the UK authorities virtually no trouble, expense or inconvenience. The magnitude of the [claimant's] offence ought to have been taken into account; the prison sentence was short and there is no other criminality. Discretion ought to have been exercised in the [claimant's] favour.

30. The only point standing in the way of allowing the appeal is therefore the five year period stipulated in S-EC.1.4.(c) which the [claimant] should observe before successfully making an application for entry clearance, but there is the proviso that where the decision is contrary to the Human Rights Convention the public interest is capable of being outweighed.

31. Section 117B factors need to be taken into account. The section reiterates the importance of maintaining immigration controls in the public interest and that is always a weighty factor; indeed, it was a weighty factor even before the legislation was passed.

32. It is in the public interest that a person seeking entry can speak English, which appears to be the case in this appeal. The couple are certainly capable of maintaining themselves without recourse to public funds. There are no children to take into account. The relationship between the [claimant] and sponsor has developed while the couple have been living apart in separate continents.

33. There is of course the matter of the [claimant's] conviction, as previously stated, but he returned voluntarily to the Gambia to make this application and waited for a period of twelve months before doing so. His criminal history is an isolated offence which was dealt with comparatively leniently, and, whilst serious, was not the most serious offence of its kind. He did not maintain a false asylum claim for any significant period.

34. The [claimant] has done his best to make amends for his foolish behaviour in the past; not merely foolish but criminal, and he deserves some credit for that. The decision also has an impact on the sponsor whose employment and career prospects in the United Kingdom are good. It was not the sponsor who committed the criminal offence and indeed it was she who encouraged the [claimant] to return to the Gambia and wait for a year before making his application. The decision to maintain the refusal now and insist that the [claimant] wait until five years have elapsed would have a disproportionate impact on her, regardless of the impact on the [claimant].

The grounds:

10. The grounds may be summarised as follows:

(i) (Ground 1) The judge provided inadequate reasons for finding that it would be unreasonable for the sponsor to enjoy family life with the claimant in the Gambia. The grounds state (incorrectly, as Ms Brocklesby-Weller accepted before me) that the sponsor was of Gambian ethnicity. The grounds contend that the judge failed to identify anything that would pose a substantial obstacle to family life continuing in the Gambia without under hardship. The fact that the sponsor would not be able to obtain a comparable job was insufficient.

(ii) (Ground 2) The judge failed to have regard to the fact that the claimant was removed to Denmark by the Secretary of State and only as a result of having been detected at the border. If the claimant had not been apprehended, it was his intention to enter the UK and remain illegally. Accordingly, the grounds contend that the fact that he returned to Denmark and served his sentence before returning to the Gambia is immaterial. The judge's finding that the claimant had returned to the Gambia voluntarily had unduly influenced his decision in the claimant's favour. The renewed grounds contend that the claimant was given credit for returning to the Gambia on a false basis.

Submissions

11. At the hearing before me, Ms Brocklesby-Weller accepted that the author of the grounds was mistaken in stating that the sponsor was of Gambian origin. Mr Darboe informed me that the sponsor was born in the UK. Her mother is of Jamaican descent and her father of Nigerian descent.

12. I asked for clarification as to whether the claimant had travelled to Denmark on his own volition in the sense that he made the travel arrangements himself or whether he

was removed by the Secretary of State and, if so, whether his removal was arranged at the Secretary of State's expense.

13. Ms Brocklesby-Weller submitted a copy of form IS.83. This was a notice to the relevant carrier (in this case, Ryanair) directing the carrier to remove the claimant on 25 May 2015 at 17:40 on Flight FR7408 to Copenhagen. She also submitted a screenshot showing an entry in the Secretary of State's CID database, which records the "*Departure Outcome*" as "*Removed with EU Letter*". Ms Brocklesby-Weller submitted that these two documents show that the claimant was removed to Denmark at the Secretary of State's expense. The most that can be said is that he did not resist or disrupt removal. In that sense, he returned to Denmark voluntarily but, she submitted, it cannot be said that he returned to Denmark voluntarily in the sense that he arranged his own departure and at his own expense.

14. In relation to ground 1, Ms Brocklesby-Weller submitted that the only reason given by the judge for his finding that it was unreasonable to expect the sponsor to enjoy family life with the claimant in the Gambia was that her employment prospects in the Gambia were not comparable to her employment prospects in the UK. The judge said that the claimant had found it difficult to find work in the Gambia. This accords with para 15 of his witness statement where he said that he was unable to find work on his return to the Gambia. However, Ms Brocklesby-Weller submitted that this ignores the fact that the claimant said at para 2 of his witness statement that he had previously worked in the Gambia at a hotel. Ms Brocklesby-Weller submitted, in reliance upon the Court of Appeal's judgment in R (Agyarko and others) v SSHD [2015] EWCA Civ 440, that the mere fact that the sponsor is a British citizen and that she would not be able to obtain a comparable job in another country is not sufficient to establish that there are insurmountable obstacles to family life being enjoyed outside the UK. The judge erred in limiting his consideration of whether it was reasonable for the sponsor to enjoy family life in the Gambia to her employment prospects and failed to consider other factors such as whether she is familiar with the Gambia and whether she could obtain assistance from the claimant.

15. In relation to ground 2, Ms Brocklesby-Weller submitted that the judge had made a material error of fact at para 29 when he said that the claimant had returned to the Gambia at his own expense. There was no evidence before the judge to this effect. The judge did not hear any oral evidence. The claimant had not said in his witness statement that he returned to the Gambia at his own expense. The judge had therefore speculated when he said that the claimant returned to the Gambia voluntarily and at his own expense.

16. In addition, the judge took into account in the claimant's favour the fact that the claimant withdrew his asylum claim two hours after claiming asylum whereas para 320(11) specifically lists the making of a frivolous asylum claim as an aggravating factor. Ms Brocklesby-Weller submitted that the judge failed to understand or take into account the purpose behind this being an aggravating factor. The making of a frivolous asylum claim is an abuse of process. Furthermore, it was clear that, if the claimant had not been apprehended, he would have entered the UK illegally and lived here illegally. The Immigration Rules provide the route by which individuals should make their applications for leave to enter to remain. The claimant chose to attempt to enter illegally on false documents. The judge's decision would mean that there would be no deterrence. It would be a precedent to other would-be applicants to abuse the system.

17. Ms Brocklesby-Weller submitted that, in any event, the judge erred in stating that the claimant's withdrawal of his asylum claim caused the UK authorities virtually no trouble, expense or inconvenience. She submitted that the Secretary of State had incurred expense in detaining the claimant and arranging his removal.

18. Ms Brocklesby-Weller submitted that the judge's misunderstanding of events after the claimant's arrival in the UK was material to his decision.

19. Mr Darboe relied upon the reasons given by Judge of the First-tier Tribunal Lever in refusing the application to the First-tier Tribunal for permission to appeal to the Upper Tribunal.

20. In response and in relation to ground 1, Mr Darboe submitted that the judge took into account the impact of the decision on the sponsor at para 34. Mr Darboe submitted that para 34 reflects the decision in PS. The sponsor is not of Gambian ethnicity or origin. The sponsor and the claimant had tried to live in Sweden. They had tried to obtain jobs in Sweden. The sponsor had to return to the UK. Para 13 of the judge's decision shows that the sponsor's earnings increased substantially in the UK. The judge was correct to conclude that it was not reasonable for the sponsor to live in the Gambia, although he said that it was a borderline decision.

21. Mr Darboe submitted that it was immaterial to the judge's decision whether or not the claimant was removed at the Secretary of State's expense. This issue was not material to his decision that the ECO's decision was disproportionate because he reached that decision on account of the impact on the sponsor.

22. In relation to ground 2, Mr Darboe submitted that the ECO had not provided conclusive evidence to show that the claimant was removed to Denmark at the Secretary of State's expense, although he accepted that the claimant had not said in his witness statement that he travelled to Denmark or the Gambia at his own expense. However, at para 11 of his statement, the claimant said that he informed the UK authorities that he would be happy to return to Denmark and that he was then removed to Denmark. Mr Darboe submitted that this evidence was correctly recorded at para 14 of the judge's decision where the judge said that *"… [the claimant] acknowledged that he was happy to return to Denmark, and he was removed the same day".*

23. Mr Darboe asked me to note that not only did the claimant voluntarily return to Denmark, he returned voluntarily to the Gambia. On returning to the Gambia, he waited for 12 months before making his entry clearance application. This was in line with the decision in PS. The judge took these factors into account in considering proportionality outside the Immigration Rules. He also emphasised the role of the sponsor in encouraging the claimant to return to the Gambia and wait for 12 months. It would be counter-productive to ignore all this, as the Upper Tribunal said in PS.

24. At para 22, the judge noted that the claimant withdrew his asylum claim after two hours and compared this with cases in which the claim is pursued.

25. Mr Darboe submitted that the judge followed the approach at paras 40-41 of the Court of Appeal's judgment in Entry Clearance Officer, United States of America v MW (United States of America) and others [2016] EWCA Civ 1273 which deals with S-EC.1.4. At para 29 of his decision, the judge said that the magnitude of the claimant's offence should have been taken into account, that the prison sentence was short and that there is no other criminality.

26. Mr Darboe submitted that the fact that the claimant had attempted to enter the UK on false identity documents was not such as to justify excluding him for 5 years. PS is authority for the proposition that, where an individual leaves the UK voluntarily and waits for a period before making his entry clearance application, entry clearance should be granted where Article 8 would be engaged.

27. In response and in relation to ground 1, Ms Brocklesby-Weller submitted that, when paras 26 and 34 of the judge's decision are read together, it is clear that the judge found that the decision was disproportionate due to the sponsor's career prospects.

28. In relation to ground 2, Ms Brocklesby-Weller submitted that the judge incorrectly considered that the facts of the instant case were similar to the facts in PS, whereas PS was fundamentally different, in her submission. In PS, the claimant was present within the UK. He left the UK voluntarily and made an entry clearance application. In the instant case, the Secretary of State set removal directions and paid for the claimant's flight. Although the claimant may not have been disruptive, the fact is that he did not leave the UK on his own volition.

29. Ms Brocklesby-Weller submitted that, although the judge had correctly recorded the claimant's evidence at para 14 of his decision, he said in terms and incorrectly at para 29 that the claimant had returned at his own expense. He plainly made an error of fact. In the alternative, he speculated. Although the judge gave other reasons at para 29 for finding that the discretion in para 320(11) should have been exercised in the claimant's favour, the error he made as to whether the claimant had left of his own volition was material to his decision on para 320(11).

30. Ms Brocklesby-Weller submitted that MW was irrelevant in the instant case. Pursuant to paras 40-41 of MW, if an individual was convicted abroad of an act which is a crime in that country but not in the UK, for example, engaging in a homosexual act, then the person should not be excluded under para 320(11). Similarly, if an individual is sentenced more harshly abroad for a crime that would attract a lesser sentence in the UK, one should take that into account. However, in the instant case, it is not being suggested that a sentence of 40 days was harsh when compared with the sentencing regime in the UK. Accordingly, MW does not assist the claimant. Furthermore, in MW, the claimant freely admitted his convictions. In the instant case, the claimant attempted to enter the UK in a carefully thought-out plan to secure his illegal admittance and illegal stay in the UK. The judge had failed to consider the deterrent effect of para 320(11) in the circumstances of the instant case and the reason why the discretion had not been exercised by the Secretary of State in the claimant's favour.

Assessment

31. I shall first consider ground 2.

32. In relation to ground 2, the two documents that Ms Brocklesby-Weller submitted (para 13 above) were not before the judge. I shall leave them to one side as I have concluded that it is not necessary for me to consider these documents.

33. At para 22 of his decision, the judge referred to the claimant having "*voluntarily departed*". He did not say whether he was referring to the claimant's departure from the UK for Denmark or his departure from Denmark to the Gambia. At para 29, the judge referred to the claimant having "*returned at his own expense*". Again, he did

not make it clear whether he was referring to the claimant having returned to Denmark at his own expense or to the Gambia at his own expense.

34. However, Mr Darboe accepted that the claimant had not stated anywhere in his witness statement that he had left the UK at his own expense. I can see that the claimant did not state in his witness statement that he left Denmark for the Gambia at his own expense either. There was no oral evidence before the judge.

35. Not only was there no evidence in the claimant's witness statement before the judge to the effect that he left the UK for Denmark at his own expense or that he left Denmark for the Gambia at his own expense, the judge had specific evidence before him to the contrary, as follows:

    (i) A "*Notice of Refusal of leave to enter*", form "*IS.82 No AR RLE*" dated 25 May 2015. Under the heading "*Removal Directions*", the following is stated:

> "I have given directions for your removal to Denmark by flight: FR7408 to copengahen [sic] at 17:40 on 25/05/2015."

    (ii) In his application dated 13 June 2016, the claimant gave the following answers to questions 34-36:

Qn 34:	Have you ever been deported, removed or otherwise required to leave any country including the UK in the last 10 years?
Answer:	Yes
Qn 35:	
Country:	UK
Date of deportation/removal:	24 May 2015
The port or airport:	Luton Airport
Reason for Deportation/Removal:	Removed/Denied entry for using false Belgium pass.
Country:	Denmark
Date of deportation/removal:	08 Jul 2015
The port or airport:	Copenhagen Airport
Reason for Deportation/Removal:	Travelled there with a false Belgium passport.
Qn 36: Have you ever voluntarily elected to depart the UK?	No

36. It is clear from the "*Removal Directions"* in the decision notice dated 25 May 2015 that the claimant's departure from the UK was arranged by an immigration officer. In light of this fact, the most that can reasonably be inferred from para 11 of the claimant's witness statement where he said that he told the UK authorities that he "*would be happy to return to Denmark*" is that he indicated that he would not disrupt his removal by the Secretary of State. In that sense, his removal may have been voluntarily but the decision notice dated 25 May 2015 shows that it cannot be said, as the judge plainly inferred, in referring to the claimant's departure at his own expense, that he left on his own volition, i.e. by making his own arrangements and at his own expense.

37. However, even if I am wrong in what I have said in the preceding paragraph, it is clear from the claimant's answers to questions 34-36 that: (i) the claimant was deported or removed from the UK and from Denmark; and (ii) he had not voluntarily departed from the UK.

38. I am therefore satisfied that the judge erred in law by either misapprehending the evidence before him or speculating in the absence of evidence, when he said that the claimant had departed voluntarily and that he had done so at his own expense. I am therefore satisfied that, in applying PS, the judge gave credit on this issue to the claimant on a false basis. Whereas the claimant in PS had indeed voluntarily departed the UK at his own expense, i.e. he made his own arrangements and at his own expense, there was nothing in the evidence before the judge that showed that the claimant in the instant case made his own arrangements to leave the UK or Denmark and/or that he did so at his own expense.

39. I turn to the judge's reasoning at paras 22 and 29 to the effect that, as a consequence of the claimant having withdrawn his asylum claim two hours after making it, he had caused the UK authorities *"virtually no trouble, expense or inconvenience*". Plainly, a frivolous asylum claim that is pursued for a long time and through the Courts is a more serious matter than a frivolous asylum claim that is withdrawn two hours later. However, speedy withdrawal of a frivolous asylum claim does not extinguish the public interest in ensuring that the system of immigration control is not abused by the making of such frivolous applications. There is nothing in the judge's decision which shows that he recognised that a speedy withdrawal of a frivolous asylum claim does not extinguish the need to consider what weight should be given to the fact that the individual has made a frivolous application. The judge plainly failed to consider this issue. He therefore failed to take into account the public interest in the deterrent effect of para 320(11).

40. There is also nothing in the judge's decision which shows that he took into account the fact that, if the claimant had not been apprehended at Luton airport, it was his intention to enter, and remain in, the UK illegally.

41. I am therefore satisfied that the judge failed to take into account relevant considerations, i.e. the public interest in deterring the making of frivolous asylum claims and the public interest in deterring people from illegally entering and remaining in the UK.

42. In summary, in relation to ground 2, I am satisfied that the judge erred in law as follows:

    (i) The judge erred in law by either misapprehending the evidence before him or speculating in the absence of evidence, when he said that the claimant had departed voluntarily and that he had done so at his own expense.

    (ii) This led him to err, further, by applying PS on a false basis.

    (iii) He failed to take into account the public interest in deterring the making of frivolous asylum claims.

    (iv) He also failed to take into account the public interest in deterring people from illegally entering and remaining in the UK.

43. These errors are plainly material to his decision that the discretion under para 320(11) should have been exercised in the claimant's favour. This is because, when one strips away the reasoning that relates to the errors described above, one is left with the following: that the claimant waited 12 months in the Gambia before making his current application, that the magnitude of the claimant's offence had not been taken into account, that the prison sentence was short and that there was no other

criminality. These factors, taken cumulatively, cannot compel a positive decision in the claimant's favour in the absence of a proper assessment of the public interest in deterrence.

44. I turn to ground 1.

45. The judge's error in relation to ground 2 in failing to take into account the public interest, as explained above, is also relevant to ground 1, to which I now turn. The fact that the judge failed to take into account the public interest in deterring the making of frivolous asylum claims and the public interest in deterring people from illegally entering and remaining in the UK is fatal to his decision to allow the Article 8 claim outside the Rules. This is because the balancing exercise in relation to proportionality cannot be lawfully conducted otherwise.

46. In any event, even if I am wrong in this regard, it is clear that the judge found that it was unreasonable to expect the sponsor to relocate to the Gambia because he accepted her evidence that she would not be able to find employment there that was comparable to her current employment. In reaching this finding, he relied upon the fact that the claimant had said that he had found it difficult to find work in the Gambia.

47. It is not clear what the judge meant by "*comparable work*", whether he was referring to the nature of the employment and career prospects or whether he was referring to work for a comparable salary. If the latter, the judge failed to recognise that an equivalent standard of living (even if that is the yardstick, which is not the case) may be attainable in the Gambia at a lower salary. However, it has to be said, more importantly, that a lower standard of living does not necessarily make it unreasonable to expect the sponsor to enjoy family life in the Gambia with the claimant. It is often the case that it is argued that one or more persons affected by an adverse decision will not have the same employment or career prospects or earn an equivalent salary in another country outside the Rules. Such considerations are not generally sufficient, on their own, to render a decision disproportionate. The judge did not explain why the sponsor's circumstances compel a different outcome.

48. Furthermore, there was simply no evidence before the judge to substantiate the claimant's evidence that he had been unable to find work and the sponsor's evidence that she would not be able to find "*comparable work*".

49. Even if the sponsor was unable to obtain comparable work in the Gambia, which was not properly evidenced before the judge, this is not reasonably sufficient on its own to displace the weight to be given to the general public interest in immigration control.

50. Given the absence of any evidence, independent of both the claimant and the sponsor who have vested interests in the outcome of the appeal, to substantiate their evidence that it would be difficult for them to find employment in the Gambia, I have concluded that, notwithstanding that the judge said at para 31 that the public interest in immigration control is always a weighty factor, the only reasonable inference that can be drawn is that the judge placed no weight at all on the public interest. I say this for the following reasons:

    (i) At para 32, the judge took into account as *positive factors* in the claimant's favour, the fact that he speaks English and that he and the sponsor are capable of maintaining themselves without recourse to public funds, contrary to AM (S 117B) Malawi [2015] UKUT 0260 (IAC) and Rhuppiah v SSHD [2016] EWCA Civ 803. At best, these are neutral factors.

(ii) The whole of the judge's reasoning, save for para 31, shows that he was only focused on factors that were either in claimant's favour or that were, or should have been regarded by him as, neutral.

51. Thus, save for the bare assertion at para 31, that the public interest is a weighty consideration, there is nothing that indicates that the judge in fact considered that the public interest was a weighty consideration in the instant case. In the absence of any independent evidence of any difficulties experienced by the claimant and the sponsor to find employment in the Gambia, he could only have reached his decision, that the ECO's decision is disproportionate, by placing no weight or impermissibly very little weight on the public interest contrary to what he said at para 31.

52. In summary, in relation to ground 1, I am satisfied that the judge erred in law as follows:

(i) The judge's material error of law in relation to his decision under para 320(11) is fatal to his decision to allow the Article 8 claim outside the Immigration Rules.

(ii) In any event, the judge erred in finding that it would be unreasonable to expect the sponsor to relocate to the Gambia on the basis of her evidence that she would not be able to obtain comparable employment in the Gambia.

(iii) Furthermore, the judge erred in placing no weight or impermissibly little weight on the public interest contrary to what he said at para 31 of his decision.

53. I am satisfied that these errors are each material to the judge's decision to allow the appeal on the basis of Article 8 outside the Immigration Rules.

54. For all of the above reasons, I set aside the decision of Judge Kimnell in its entirety.

55. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

56. In my judgment this case falls within para 7.2 (b). In addition, given that the claimant won his appeal before the First-tier Tribunal and having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

Notice of Decision

The decision of Judge of the First-tier Tribunal Kimnell involved the making of errors on points of law such that his decision is set aside in its entirety. This case is remitted to the

First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Kimnell.

Upper Tribunal Judge Gill Date: 12 February 2018