



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: AA/00656/2015**

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 25<sup>th</sup> January 2016**

**Decision & Reasons**

**Promulgated**

**On 2<sup>nd</sup> February 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**MW**

**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Tarlow a Home Office Presenting Officer

For the Respondent: Mr Costello of Counsel

**DECISION AND REASONS**

**Background**

1. For the purpose of continuity with the determination in the First-tier Tribunal I will hereinafter refer to the Secretary of State as the Respondent and MW as the Appellant.
2. The Respondent refused the Appellant's application for asylum or ancillary protection on 23 December 2014. Her appeal against the refusal of asylum and humanitarian protection was dismissed by First-

tier Tribunal Judge Miller (“the Judge”) following a hearing on 20 July 2015. The Judge allowed the appeal on human rights grounds.

3. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so as MW has a serious psychiatric condition and so as not to compromise her asylum claim given it is based on her sexuality.

#### The grant of permission

4. Judge Cruthers granted permission to appeal (7 October 2015) on the grounds that it is arguable that;
  1. “...it was inappropriate for the judge to proceed when the respondent’s representative did not have in his possession a copy of the 356 page bundle for the appellant...”
  2. “the judge has not sufficiently engaged with the respondent’s argument...that there are relevant health care facilities in Zambia” and “should have paid greater attention to the authorities” such as GS (India) & Others [2015] EWCA Civ 0040, J [2005] EWCA Civ 629, and Y (Sri Lanka) & Others [2009] EWCA Civ 362.”
  3. “it is not entirely clear whether the judge ... allowed the appeal by reference to article 3 or article 8 of the European Convention on Human Rights (or both)”.

#### Preliminary issue

5. At the commencement of the hearing I raised with the representatives whether there was a “Robinson obvious point” (Robinson v Secretary of State for the Home Department and Immigration and Appeal Tribunal [1997] AR 586 CA) on the basis of Demirkaya v Secretary of State for the Home Department [1999] INLR 441. That was because the Judge appeared to make no finding as to whether, as alleged, the Appellant had been subjected to past persecution in Zambia when she and her then girlfriend were raped by soldiers, and the evidence that her psychotic condition (which formed the basis of the human rights appeal being allowed given the likelihood she would commit suicide if faced with being returned to Zambia) was due to her experience in Zambia and sexuality. Her asylum claim, which was dismissed, was on the basis that she feared persecution due to her sexuality, it being found that she was in a same sex relationship here.
6. Both representatives accepted that there was indeed a “Robinson obvious point”. Mr Costello applied for permission to appeal the refusal of asylum out of time on that basis. Mr Tarlow conceded that there as a

clear material error of law on this point and he did not object to the application.

7. In the interests of justice I extended time for the application for permission to appeal the refusal of asylum to be made, granted the application as the Appellant should not be penalised by her legal representative's oversight on such a crucial matter, determined that there was a material error of law regarding the asylum refusal, set the asylum decision aside, and remitted that to the First-tier Tribunal for rehearing.

#### Appellant's position regarding the human rights appeal

8. The Appellant asserted in her reply (26 October 2015) in essence that the Judge was entitled to proceed as the case had already been adjourned, a bundle had been served, a replacement could have been requested, adjourning again would be detrimental to the Appellant's mental health, and the Judge made findings open to him regarding her mental health. The Appellant said that in fact the hearing had been stood down for 15 or 20 minutes for the Respondent's representative to read the bundle that was provided for him after which the Judge asked him if he was happy to proceed and he said he was.
9. It was clear that the appeal had been allowed pursuant to Article 3 given the finding [62] "that, were the Appellant to be removed to Zambia, there would be a real risk of rapid deterioration in her mental health leading to her committing suicide". That was open to the Judge given the medical evidence referred to in the determination at [60] and the Judge reminded himself that such cases can only succeed rarely [63].
10. The Respondent relied on documents regarding the availability of mental health services in Zambia that had not been disclosed and were not available publicly.

#### Respondent's submissions regarding the human rights appeal

11. The caseworker had requested information regarding the availability of mental health services in Zambia and this would be available on request. In any event the threshold to succeed on an Article 3 claim is high and there was no indication as to why it was met in this case. This amounted to a material error of law.

#### Discussion

##### Ground 1

12. I am not satisfied that there was a material error of law for the following reasons. I pointed out to the representatives that during the extensive cross-examination, the Judges record of proceedings refers to 4 specific references to the Appellant's bundle (pages 36, 248, 249, and

247). I do not accept that the Presenting Officer could have asked those questions if he had not had sight of the bundle. In addition, of the 356 page bundle, pages 4 to 86 were from the Respondent's bundle as were almost all the medical reports appearing from pages 103 to 279, and the vast majority of the remained of the bundle related to her evidence of the same sex relationship she was then (and still is) in. The additional documents took the case no further forward. No application was made to adjourn the proceedings for more extensive preparation to be undertaken. In those circumstances I am satisfied that the Presenting Officer had sufficient access to the bundle and was able to adequately present the Respondent's case. I am therefore satisfied that the application on that point was misleading.

## Ground 2

13. It would have been helpful if the Judge had made reference to the relevant case law. Not referring to is not fatal providing the principles are applied.
14. The Judge noted the evidence of Dr Catherine King [60 (iv)] that the Appellant has a "psychotic illness, a major depressive disorder, and PTSD" and is "currently unstable and deteriorating further. If she was informed that she would be returned to Zambia it is highly likely that the existing level of suicide risk would be increased". When combined with the rest of the psychiatric evidence he referred to, the Judge was entitled to find [62] that, "were the Appellant to be removed to Zambia, there would be a real risk of rapid deterioration in her mental health leading to her committing suicide." It was on that basis that he determined that [66] "I find her case to be exceptional, and that it would be unduly harsh for her to be removed to Zambia at the present time."
15. It is clear from J that a suicide claim can succeed, albeit with significant difficulty. Y (Sri Lanka) notes that if Claimants were so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they would not be capable of seeking treatment they needed which could ameliorate the real risk of suicide, a forced return would reach the high threshold of inhuman treatment prohibited by Article 3. This is not vitiated by GS as that presupposes an ability to access some treatment, albeit the treatment not being effective. Given that guidance in Y (Sri Lanka) and J, in my judgement, the human rights finding was open to the Judge on the evidence.

## Ground 3

16. I am satisfied that it is clear from reading [63] and [66] that the Judge allowed the appeal by reference to Article 3 and 8 of the European Convention on Human Rights on health grounds only and not due to her current same sex relationship.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to the asylum decision.

I set aside the asylum decision.

The asylum appeal shall be remitted to the First-tier Tribunal for a de novo hearing before a Judge other than Judge Miller.

Signed:  
Deputy Upper Tribunal Judge Saffer  
31 January 2016