



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

Appeal Number: AA/09217/2015

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 4 July 2016**

**Determination issued  
On 7 July 2016**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

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

Appellant

**and**

**[E K]**

**~~(ANONYMITY DIRECTION NOT MADE)~~**

Respondent

For the Appellant: Mr M Matthews, Senior Home Office Presenting Officer  
For the Respondent: Mr U Aslam, of McGlashan MacKay, Solicitors

**DETERMINATION AND REASONS**

1. The parties are as described above, but the rest of this determination refers to them as they were in the first-tier tribunal.
2. The appellant is a citizen of Malawi, born on [ ] 1986.
3. The SSHD appeals against a decision by first-tier tribunal judge Kempton, promulgated on 5<sup>th</sup> May 2016, allowing the appellant's appeal against refusal of asylum.
4. These are the SSHD's grounds:

Ground 1:

At paragraph 27 the judge finds that the appellant will be at risk on return to Malawi on the basis of his homosexuality. This seems to be largely on the basis of what is said at

4.1.1 and 4.1.2 of the [SSHD's] Country Information and Guidance Malawi [COIR]: sexual orientation and gender identity document.

... in doing so the judge has failed to take into account the following passages of that document:

*2.3.5 However, in December 2015 two men were arrested on suspicion that they were engaging in homosexual acts in their house at Area 25 Township. They were released on bail and ordered to return to the court to face sodomy charges. Subsequently, the two men were released from custody and all charges dropped. However, the moratorium on arrests and prosecution under the laws remains in place.*

*2.3.7 An LGBT person is unlikely to be prosecuted under existing laws because of their sexual orientation or gender identity.*

*2.3.10 While societal intolerance and discrimination occurs, that is no evidence of widespread harassment of and violence against persons known or perceived to be LGBT. A number of NGOs actively (and openly) support LGBT persons and there are signs of growing societal tolerance of their rights.*

... the background evidence does not demonstrate a general risk to LGBT individuals in Malawi and therefore there are inadequate reasons given for finding that the appellant would be at risk.

Ground 2:

At paragraph 26 the judge accepts that the appellant is homosexual but does not explain why. Given that the appellant has given conflicting evidence and has admitted giving false evidence (paragraph 22), cogent reasons need to be given for accepting the appellant's sexuality.

5. Mr Matthews submitted firstly on ground 2. He said that paragraph 26 states a conclusion but gives no reasons. The preceding paragraph is only a narration of the evidence from the appellant's sister that she has heard him say he is gay, that he has never brought home a girlfriend and that there was speculation about his sexuality when he was a teenager in Malawi. There was no finding on that evidence, even implicitly. At the last sentence of paragraph 22 the judge said that the appellant's sexuality was not challenged but that was wrong. There was a direct challenge in the refusal letter. The respondent made no concession at the hearing. The Presenting Officer might not have cross-examined, but was not bound to put questions on an issue already raised. The evidence about his sexuality left the appellant in some difficulty. He did provide some evidence to support it, and the judge was entitled to decide the point in his favour, but she failed to say why.
6. I referred to the finding at paragraph 27 that in the event of mental health problems developing in Malawi the appellant was "highly likely ... to behave bizarrely once again and risk making statements in public in relation to his sexual orientation." Mr Matthews accepted my observation that any risk on return to Malawi of a homosexual would depend on findings of how he was likely to behave, and that a conclusion such as stated by the judge might be relevant. I indicated that it would be useful, if there is any supporting evidence for that finding, to be referred to it. Mr

Matthews said there was nothing in the medical or other evidence to indicate that the appellant had made public statements of that nature in the past or was likely to do so in future.

7. Turning to ground 1, and on the question of how the appellant might behave, Mr Matthews said that his condition is controlled by medication taken by injection, and he made no case of similar treatment not being available in Malawi (which is contrary to the judge's finding at paragraph 27). The judge narrated evidence about criminalisation of homosexuality in Malawi, but that on its own does not show risk. There was no reference in the decision to evidence other than in the COIR, which was to the effect of no general risk to LGBTI persons, and non-enforcement of the law. There was nothing in the decision to justify a finding of general risk.
8. In a written response to the grant of permission the appellant says on ground 1 that the question was whether the particular person might face a real risk; the judge clearly showed the real risk arising when the appellant's mental health deteriorates; it was shown that the necessary medication is not available; the judge was right about the possibility of revealing public statements; and risk in consequence was from the authorities, so the judge was also right about absence of state protection. On ground the response 2 rehearses the evidence to justify a finding that the appellant is homosexual, and says it was open to the judge, who gave "cogent reasons".
9. In his oral submissions Mr Aslam pointed to the appellant's mental health history, which includes compulsory detention. He said the relative weight to be given to items of evidence was for the judge, and that the appellant's orientation had not been challenged in cross-examination. He accepted that the judge had not said explicitly that she accepted the oral evidence of the appellant and his sister, but he said that she must clearly have been impressed by that evidence. The COIR information justified the finding in favour of the appellant, not as a generality for gay men, but based on his individual circumstances. The judge's reasoning provided the reader with a legally adequate explanation for the outcome and the decision should stand.
10. Mr Matthews in response referred to the medical evidence, being two brief items from the same doctor, and said there was nothing there to indicate that the appellant's disorder had ever resulted in any episode of acting out in the way suggested by the judge, or that any such manifestation was likely in the future.
11. I reserved my decision.
12. The finding that the appellant is homosexual was open to the judge, but she failed to state her reasons for reaching it. She further failed to explain her findings that the appellant's mental health might deteriorate for lack of medication, and that if it did so, he might behave in a particular way. The written submissions say that the evidence for the first of those

findings was before the judge, but I was not directed to it. There was no evidence for the second. The further conclusion that such behaviour, were it to occur, would give rise to risk of persecution is similarly unsupported. It runs counter to the evidence that prosecutions are rare. No instance has been cited of prosecution (or other persecution) of a person who makes homosexual manifestations as the result of mental disturbance.

13. Mr Aslam did his best to find the underpinnings by which the judge's conclusions might be supported, even implicitly, but they are not there.
14. At best for the appellant there might have been enough to infer why his sexual orientation was accepted. However, the case turned not on that single issue but on an inter-connected consideration of how (if gay) he might behave, and with what consequences, in Malawi. The decision as a whole cannot stand. It would be artificial to single out any finding for preservation, and it would complicate the rehearing of the case.
15. The respondent's decision is based primarily on the view that the appellant has not shown that he is homosexual, and it does not contain any analysis along the lines of *Hj and HT* [2010] Imm AR 729 (see paragraphs 35 and 82, in particular). The judge did not use that case as a guide. There is no relevant country guidance on Malawi, and of course one country cannot be taken as a guide to another, but reference to cases on other countries might have given the judge a useful pattern for her approach, once having accepted the appellant to be gay.
16. The decision of the first-tier Tribunal is **set aside**. None of its findings are to stand. The nature of the case is such that it is appropriate in terms of section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to **remit the case to the first-tier Tribunal** for an entirely fresh hearing.
17. The member(s) of the first-tier Tribunal chosen to consider the case are not to include Judge Kempton.
18. No anonymity direction has been requested or made.



6 July 2016  
Upper Tribunal Judge Macleman