Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: **PA/05684/2016 (P)**

THE IMMIGRATION ACTS

Decided under rule 34	**Decision & Reasons Promulgated**
On 6 July 2020	**On 21 July 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to directions issued by myself on 24 April 2020 and 29 May 2020.

2. The appellant is a national of Kenya born on 29 April 1962. She entered the UK in 2005 using a counterfeit Swaziland passport, having previously resided in the UK from September 1996 until she was deported to Kenya in May 2000 pursuant to a deportation order issued as a result of drugs-related criminal convictions for which she received a seven-year prison sentence in 1997. In May 2008 she was issued with a certificate of naturalisation as a British citizen, which she was given after obtaining a counterfeit French passport with a different date and place of birth to her true identity. On 22 May 2008 the appellant was arrested and charged with possession of a false

instrument, when her true identity became known to the authorities. On 6 March 2009 she submitted representations stating that she feared return to Kenya as a result of her sexuality and on the basis that her daughter would be subjected to FGM.

3. On 16 March 2009 the appellant was notified that the Secretary of State was considering depriving her of her British citizenship under section 40(3) of the British nationality Act 1981. On 29 April 2009 she was served with a notice of a decision to deprive her of her British citizenship. It seems that nothing further happened at that time. However, in September 2012 the appellant requested the return of her counterfeit French passport and permission to return to Kenya to see the installation of her brother as Nabongo King, which was refused. Following that, on 28 March 2013, she was served with a decision nullifying the grant of British citizenship on the basis that it had been obtained fraudulently.

4. In June 2013 the appellant applied again for asylum on the same basis as previously. On 24 July 2015 she was served with a notice informing her that section 72 of the Nationality, Immigration and Asylum Act 2002 would be applied to her case. She did not respond at the time. She also failed to attend an asylum interview arranged for 23 November 2015. On 11 January 2016 she was arrested for driving offences and was detained under immigration powers. Following a screening interview in relation to her asylum claim, the appellant claimed to be a victim of human trafficking and, as a result, a referral was made under the National Referral Mechanism (NRM). A decision was made that there were reasonable grounds to believe that she was a potential victim of trafficking, but then on 19 April 2016, following an asylum interview on 23 February 2016 and a PVOT (potential victim of trafficking) interview on 16 March 2016, she was notified that there were not conclusive grounds to believe that she was a victim of human trafficking or slavery. The appellant’s asylum claim was then refused by the respondent in a decision of 19 May 2016 and a supplementary decision of 26 July 2016.

5. In her asylum claim, the appellant claimed to have been born in France and to have left France at the age of nine years and then lived in Dubai, Kenya and Denmark. She claimed to have been married in Kenya, but to have been lesbian and to have had three lesbian relationships. Her first relationship was with V and lasted from 1995 to 2001, the second was with D and lasted from 2003 until 2010 and the third, current relationship, was with AZ. When she returned to Kenya in 2000 her ex-husband found out she was lesbian and she was beaten and raped by him and her brothers-in-law, nephew and cousin as a result. A herbalist made marks on her body and rubbed potions into it and she was burned on her thigh with a hot iron rod. In August 2000 V came to Kenya and took her to hospital and she arranged for her return to the UK in November or December 2000 using a counterfeit document. She was forced to pay V back for the flight ticket and travel documents and, although she was in love with V, V forced her to work as a prostitute so that she could earn the money to pay her back. She claimed to have been trafficked to the UK by V.

6. In the Conclusive Grounds decision of 19 April 2016 it was noted that there were extensive discrepancies in the appellant's account of her relationship with V and being forced into prostitution and her claim to have been trafficked to the UK was not believed.

7. In the decision of 19 May 2016 refusing her asylum claim the respondent certified that the presumption in section 72 of the 2002 Act applied on the basis that the appellant's continued presence in the UK constituted a danger to the community. The respondent rejected the appellant's claim to be gay or bisexual and did not accept her account of being in a gay relationship. It was noted that there were significant inconsistencies in the appellant's account of her relationships. The respondent considered that the appellant could safely return to Kenya and that she had a daughter living there who could provide her with support. The respondent rejected the appellant's claim to no longer be a Kenyan citizen and considered that she was a Kenyan citizen by birth. The respondent considered that the appellant's removal would not breach her Article 3 or 8 human rights. Although it was noted that she suffered from mental health problems, it was considered that she would be able to access treatment in Kenya. The respondent maintained the deportation decision.

8. In a subsequent decision of 26 July 2016, issued in response to a psychiatric report from Dr Mounty on behalf of Medical Justice, the respondent accorded little weight to the conclusions in the report in view of the fact that they were based upon the information given by the appellant, and considered that medical care was available to the appellant in Kenya. It was not considered that the appellant met the test in J v SSHD [2005] EWCA Civ 629 to make out an Article 3 claim on the basis of a risk of suicide.

9. The appellant appealed against the respondent's decisions. Her appeal was initially allowed in the First-tier Tribunal, but that decision was subsequently set aside in the Upper Tribunal and the case was remitted to the First tier Tribunal to be heard *de novo*. The appeal was then heard on 11 May 2017 by First-tier Tribunal Judge Henderson and dismissed in a decision promulgated on 2 June 2017.

10. At the hearing of that appeal, the judge heard from the appellant and her claimed partner, AZ. The judge noted that AZ had been successful in her asylum appeal in February 2017, where her evidence, and that of the appellant, in regard to their relationship, had been accepted. However the judge noted various inconsistencies in the evidence given before her by the appellant and AZ of how they had met and the details of their relationship and did not accept that they were in a relationship. Neither did she accept the appellant's account of her relationship with V and D. The judge also rejected the appellant's account of being attacked by her husband on her return to Kenya in 2000. The judge concluded that the appellant would not be at risk on return to Kenya. She accepted that there were medical reports in relation to mental health concerns and the risk of suicide but concluded that the appellant was currently not at risk on that basis and that her removal from the UK would not breach her human rights.

11. The appellant sought permission to appeal the judge's decision on four grounds. Firstly, that the judge failed to follow the Tribunal decision in AZ's appeal and accept that the appellant and AZ were in a genuine relationship; secondly, that the judge failed to take the appellant's psychiatric condition into account when assessing her credibility; thirdly, that the judge erred in law in failing to give weight to the doctor's conclusions in the Rule 35 report; and fourthly that the judge failed to take account of relevant evidence when considering the risk of suicide.

12. Permission to appeal that decision to the Upper Tribunal was granted on 28 June 2017.

13. The matter was listed for an error of law hearing in the Upper Tribunal, on 27 September 2017, but was adjourned, and has since been adjourned on several occasions, for various reasons. One of those reasons was the fact that the Secretary of State had withdrawn the nullity decision in February 2018, following the judgment of the Supreme Court in Hysaj & Ors, R (on the application of) v Secretary of State for the Home Department [2017] UKSC 82, and was considering whether to make a decision to deprive the appellant of her British citizenship under section 40(3) of the British Nationality Act 1981. In addition, on 18 December 2018, the respondent decided to withdraw the original deportation decision in light of the fact that the appellant remained a British citizen. It was considered by the Upper Tribunal Judge, Judge Hemingway, upon the application and agreement of the parties, to be appropriate to adjourn the error of law determination pending the respondent's decision on the deprivation matter. In addition, in response to the appellant's request, UTJ Hemingway made a ruling, on 21 February 2019, that the appeal in the Upper Tribunal could continue notwithstanding the respondent's withdrawal of their decision, in accordance with SM (withdrawal of appealed decision: effect) Pakistan [2014] UKUT 64. A decision was then made by the respondent, on 26 November 2019, to deprive the appellant of her British citizenship, and the appellant lodged an appeal against the decision, which is currently outstanding in the First-tier Tribunal (appeal reference DC/00133/2019).

14. The most recent adjournment of the error of law hearing was on 10 January 2020 due to the appellant being unwell and not in attendance. In his note of that hearing the judge referred to having granted an application to the appellant to amend her grounds to include a further ground. That further ground made assertions of procedural irregularity in [83] to [86], [88] and [94] to [98] of Judge Henderson's decision, whereby the judge erred by making adverse findings against the appellant without giving her an opportunity to respond. The respondent was directed to indicate her position in response to the amended grounds. On 10 February 2020 Upper Tribunal Judge Hemingway gave directions that the matter be relisted before him after 31 March 2020 for the error of law issue to be dealt with and reiterated his previous direction for the respondent to respond to the amended grounds of appeal.

15. On 24 April 2020, owing to the impact of the coronavirus, I made the following directions:

> "1. I have now reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Tribunal Procedure (Upper Tribunal) Rules 2008, I have reached the provisional view that the decision in this case can be made without a hearing on the following basis.
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> 2. Irrespective of whether the First-tier Tribunal Judge made an error of law in her decision of 2 June 2017 on the grounds upon which permission was granted, any error would not be material as the appellant simply cannot succeed in her appeal. As a British national, which the appellant has been since May 2008, she cannot meet the requirements within the Refugee Convention as a refugee, since she is not outside the country of her nationality, and she cannot succeed on human rights grounds since she will not, as a British national, be required to leave the UK. Alternatively, considering matters outside the grounds upon which permission was granted, the First-tier Tribunal Judge erred in law by failing to consider the appellant's case on the basis that she was a British citizen, irrespective of the fact that at that time the position before the judge appeared to be that the appellant was no longer considered to be a British national, and the decision in the appeal must be re-made by dismissing it on the basis as set out above. Either way the appellant's appeal against the decision to refuse her protection and human rights claim, must be dismissed. The fact that an order may be made in the future depriving the appellant of her British citizenship is irrelevant to this appeal.
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> 3. Any reasonable objection to the above is to be made in writing to the Upper Tribunal not later than 21 days from the date this notice is sent out.
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> 4. Following that period, in the absence of any satisfactory response, and notwithstanding the views expressed by a party, the Tribunal may nevertheless proceed to determine the error of law and the re-making of the decision in the appeal on the basis set out above."

16. A response was received from Mr Draycott on behalf of the appellant, entitled "appellant's written submissions opposing the striking out of her appeal to the Upper Tribunal", in which he expressed concerns about the proposal to strike out the appeal, given that there would be a lack of opportunity for the appellant to address the adverse findings in Judge Henderson's decision.

17. I made the following further directions on 29 May 2020:

> "1. Further to my Notice and Directions dated 1 April 2020 and sent out on 24 April 2020, submissions have been received from Mr Draycott for the appellant, dated 15 May 2020. There has been no response from the Secretary of State to the directions.
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> 2. Contrary to the submissions made by Mr Draycott, there was no suggestion in my directions of the appellant's appeal being struck out and Mr Draycott appears to have misunderstood the basis and intention of those directions. I therefore make further directions which are to be read together with those sent out previously.

3. As stated at [5] of my previous directions, having reviewed the file and the history of the appeal as set out at [2] and [3], I have reached the provisional view that it would in this case be appropriate to proceed to making a decision without a hearing.

4. Having read Mr Draycott's submissions and given due consideration to the lengthy history of this case, I do not accept that it is appropriate or necessary to stay the matter further in order to await the outcome of the appellant's appeal in relation to the decision to deprive her of her British citizenship, as stated at paragraphs 2 and 16 of Mr Draycott submissions. I do, however, have regard to the matters raised by Mr Draycott at paragraphs 2(b)(i) and 18(i) of his submissions in relation to the opportunity to challenge the findings of the First-tier Tribunal Judge and to the issue of fairness arising out of that.

5. Accordingly, I make the following DIRECTIONS:

(a) The appellant may submit further submissions in support of the assertion of an error of law and on the question whether the First-tier Tribunal's decision should be set aside if an error of law is found, to include the challenges raised in the grounds of appeal as well as addressing the matters at [6] of my previous directions dated 1 April 2020, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);

(b) Any other party may file and serve submissions in response, no later **than 21 days after this notice is sent out**;

(c) If submissions are made in accordance with paragraph (b) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out.**

(d) All submissions that rely on any document not previously provided to all other parties in electronic form must be accompanied by electronic copies of any such document.

6. Any party who considers that despite the foregoing directions a hearing is necessary to consider the questions set out in paragraph 5(a) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 5 above must be complied with in every case.

7. If this Tribunal decides to set aside the decision of the First-tier Tribunal for error of law, further directions will accompany the notice of that decision."

18. On 12 June 2020 submissions were received from Mr Draycott on behalf of the appellant and on 16 June 2020 submissions were received from Mr Melvin for the Secretary of State. There was no reply by Mr Draycott to the respondent's submissions, in accordance with paragraph 5(c) of my directions of 29 May 2020.

19. In the written submissions, Mr Melvin stated that the respondent had no objection to the error of law matter being decided on the papers without an oral hearing, whilst Mr Draycott did object. I have had careful regard to Mr Draycott's objections and have considered Rule 5A as inserted into the Tribunal

Procedure (Upper Tribunal) Rules 2008 in that regard. I note that Rule 5A(3) makes it clear that a decision to determine a matter without a hearing is not restricted to the conditions in 5A(2) and it remains open to the Tribunal to apply Rule 34.

20. Mr Draycott's main objection to the appeal being determined without a hearing is based for the most part upon his amended grounds of appeal which raised procedural irregularity. He asserts that such matters are not appropriate to be determined on the papers. He asserts further that the respondent ought first to be directed to file a response to the amended grounds and that the appellant then submit a response to that reply. Mr Draycott relies upon Rule 31 of the Upper Tribunal rules in asserting that the respondent was required to lodge a response. However, Rule 31 relates to judicial review proceedings. The relevant rule for statutory appeals is Rule 24, whereby the respondent "may" file a response. As noted above, UTJ Hemingway directed the respondent on two occasions to make her response to the amended grounds clear, but that has not happened. An explanation of sorts is provided by Mr Melvin at [9] of his submissions. There has, in any event, been ample time for the respondent to respond and I do not consider the absence of such a response to be a reason for further postponing this matter. Further, the respondent has made her position clear in the submissions of 16 June 2020 from Mr Melvin, whereby he has adopted my provisional view set out in my directions of 24 April 2020, that any error of law identified in the grounds is immaterial given the fact that the appellant was a British citizen at the time of the hearing before Judge Henderson. Mr Melvin has decided not to address the individual grounds. Mr Draycott was therefore aware of the respondent's position and has not sought to address my provisional view further.

21. In any event, I find Mr Draycott's objection to the error of law being decided on the papers provides no satisfactory reason as to why, in this particular case, the appellant would be prejudiced by the absence of an oral hearing, particularly given the findings I have made below on the error of law. I have the benefit of detailed grounds of appeal from the appellant, together with Mr Draycott's two sets of submissions and Mr Melvin's submissions, and I can find no reason why a consideration of the grounds and submissions, as opposed to hearing from counsel in person or remotely, would prejudice the appellant in this particular case. I am therefore satisfied that I am able to proceed to decide the error of law issue without a hearing and do not consider that that gives rise to any unfairness on either side.

22. I therefore turn to the grounds of appeal. Although the grant of permission by the First-tier Tribunal did not exclude any of the grounds, the focus of the grant was on the judge's assessment of the evidence relating to the risk of suicide. Whilst the judge's assessment of the medical evidence was, for the most part, a thorough one, it is notable that no mention was made of the records of the appellant's suicide attempts and indeed the judge proceeded on the basis that there was no evidence of any such attempts. At [106] she referred to a lack of any earlier history of self-harm corroborating the appellant's claim recorded in the Yarls Wood medical history for 21 January 2016. Although, as the judge found, the evidence does not include any records

of attempts at self-harm by the appellant prior to that date, aside from the appellant's own claim in that regard, there is evidence of her having overdosed on two occasions after that date, on 16 June 2016 and 29 September 2016. The first incident is recorded at page 125 of the appellant's bundle in the Yarls Wood report, and confirmed by a report from Bedford Hospital at page 239. That led to an assessment by Dr Ward on 20 June 2016, in a Rule 35 report, that there had been a significant deterioration in the appellant's mental health condition and that the risk of suicide in detention was very high. The second incident is confirmed in a letter from Bedford Hospital at page 14 of the bundle. It was following that second incident that the appellant was referred to Solace for psychological support, as mentioned in the letter dated 8 May 2017 to which the judge referred at [109]. In the absence of any record by the judge of having taken account of the appellant's attempts at self-harm, it seems to me that her assessment of the evidence at [106] and her conclusions arising out of that evidence are therefore flawed.

23. Whilst that may not in itself be a reason to conclude that the appellant would be at risk of committing suicide if returned to Kenya, and indeed may fall well short of such a conclusion, it seems to me that the matter has to be looked at again and that a full and proper assessment would have to be made in the light of all the evidence. In addition, the fact that the judge reached her conclusions without a full understanding of the extent of the appellant's mental health condition undoubtedly impacted upon her assessment of the evidence as a whole, as asserted in the second ground of appeal. Although there were discrepancies identified by the judge in the appellant's evidence, in regard to her claimed relationships and her sexuality, and in regard to her claim of being attacked in Kenya, which may well have justified an adverse credibility finding, I do not consider that the judge's conclusions can be sustained when they appear to have been reached without a full and complete assessment of the appellant's psychological state.

24. In the circumstances it seems to me that the judge's findings and conclusions on the evidence are infected by errors of law and cannot stand. Having said that, I maintain the view I expressed provisionally in my directions of 24 April 2020, namely that even if Judge Henderson had made errors of law in her decision of 2 June 2017 on the grounds upon which permission was sought, any error would not be material as the appellant, as a British citizen, simply cannot succeed in her appeal. Mr Melvin, in his submissions, agreed with my provisional view. Mr Draycott has not engaged with the matter, despite being directed to do so on two occasions.

25. At the time of the hearing before Judge Henderson the appellant was a British citizen. Although the appeal proceeded on the basis that the appellant's British citizenship had been nullified in March 2013 and that she was therefore not a British citizen at that time, the nullity decision was subsequently withdrawn in February 2018 with the result that her British citizenship, acquired by way of a certificate of naturalisation in May 2008, remained intact and remains so unless and until a deprivation order is made further to an unsuccessful appeal. Clearly the judge could not be blamed for proceeding on the basis that the appellant was a non-British national. However, the decision

that she reached, namely to dismiss the appeal, was inevitable given that the appellant was in fact a British national. As such, she could not meet the requirements within the Refugee Convention as a refugee, since she was not outside the country of her nationality, and she could not succeed on human rights grounds since she would not, as a British national, be required to leave the UK.

26. Even if I am wrong in considering that the withdrawal of the nullity decision had retrospective effect, and in concluding that the appellant was a British citizen at the time of the hearing before Judge Henderson, the fact remains that if the judge's decision is set aside on the basis of the errors of law identified above, it can only be re-made by dismissing the appeal given that the appellant is a British citizen and cannot be a refugee nor can she be compelled to leave the UK. Whilst I am mindful that such a view does not provide an opportunity for further directions and submissions on the re-making of the decision, as per [7] of my directions of 29 May 2020, I cannot foresee any other outcome. My understanding was that Mr Draycott's concerns in regard to a lack of such an opportunity was that the adverse findings of Judge Henderson would remain in place and could subsequently be relied upon by the respondent. However, that is no longer the case as I have set aside those findings and accordingly no unfairness arises.

DECISION

27. The First-tier Tribunal's decision contains material errors of law. However, for the reasons given above, the decision to dismiss the appeal stands. Alternatively, the decision is set aside and is re-made by dismissing the appeal.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 6 July 2020