



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2023-004329

First-tier Tribunal No:
PA/00334/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

**JMM
(ANONYMITY ORDER MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Miss V Delgado, Refugee Law Clinic

For the Respondent: Miss F Ahmed, Home Office Presenting Officer

Heard at Field House on 6 November 2023

DECISION AND REASONS

Introduction

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge LK Gibbs heard on 6 July 2023 and promulgated on 14 August 2023. Permission to appeal was granted by First-tier Tribunal Judge D Hollings-Tennant on 14 September 2023.
2. The Upper Tribunal regrets the delay in promulgating this judgment. The appeal was heard on submissions alone with no oral evidence. I have a clear note of the submissions of both parties and also all of the material

which was before the First-tier Judge. I reached my decision shortly after the hearing.

Anonymity

3. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity, and is to be referred to in these proceedings by the initials J M M. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. **Failure to comply with this order could amount to a contempt of court.**

Factual Background

4. The appellant is a national of the Democratic Republic of Congo. She was born on 19 April 1960 and is now aged 64. She is one of seven siblings, of whom three are surviving, and she grew up in the Kasai-Occidental Province in the south of DRC. She has a younger sister who lives in the UK and an older brother who lives in DRC.
5. In 2014, the appellant made an application for a family visit visa, which was refused on 26 July 2014. On 5 May 2017 she entered the country and claimed asylum because of her claimed membership of the Union for Democratic and Social Progress. She said that she had been detained and ill-treated following a march in Kinshasa on 19 September 2016.
6. That application for asylum was refused by a decision dated 10 August 2017 based on inconsistencies in her account. She appealed that refusal, and First-tier Tribunal Judge Carroll considered her appeal and refused it by a decision promulgated on 5 January 2018. Judge Carroll found the appellant not to be credible in respect of the circumstances of her departure from DRC or her claimed fear of return for the reasons specified at paragraph 14(a-i) of the judgment.
7. The appellant sought permission to appeal, which was refused by the First-tier Tribunal on 6 March 2018 and the Upper Tribunal on 11 July 2018. From 13 July 2018 she was appeal rights exhausted, but nonetheless she did not leave the United Kingdom.
8. On 29 May 2020 the appellant made further submissions to the respondent. They were refused by a decision dated 4 February 2022. The appellant appealed that refusal to the First-tier Tribunal.

The decision of the First-tier Tribunal

9. At the hearing before the First-tier Tribunal, the issues in dispute were agreed to be whether the appellant would be at risk on return as a failed

asylum seeker; whether she was at risk as a member of a particular social group; whether the appellant would face very significant obstacles to integration on return to the DRC, and whether her removal would be in breach of Articles 3 and/or 8 ECHR.

10. First-tier Tribunal Judge Gibbs determined that the appellant was not at risk on return as a failed asylum seeker in light of *PO (DRC – Post 2018 elections) DRC CG* [2023] UKUT 00117. Simply being a failed asylum seeker did not mean a person was at risk on return.
11. The judge found that the appellant would not because of her mental health problems (depression and PTSD) be perceived as a member of an identifiable social group which is discriminated against in the DRC in such a way that it would go to the core of her fundamental human rights.
12. Regarding Article 3, the judge found that the appellant was not seriously ill as required by *AM (Article 3, health cases) Zimbabwe* [2022] UKUT 131 (IAC) in that she suffered from depression and was being treated with a first line antidepressant. The threshold for such a finding is a high one which was not met in this case.
13. The judge found that the appellant would be seriously inhibited from integrating on return because of her mental health conditions, the difficulties she was likely to face in obtaining employment, the fact she had no family support and the wider societal discrimination against women, particularly single women and those with mental health problems. She therefore met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules and on that limited basis her appeal was allowed.
14. The appellant appealed to the Upper Tribunal against the dismissal of her international protection claim under the Refugee Convention, alternatively under Article 3 ECHR on mental health grounds.

The grounds of appeal

15. Two grounds of appeal were advanced against the decision of Judge Gibbs.
16. Firstly, the appellant argued that the judge had failed adequately to consider whether she was at risk on return to DRC due to her membership of a particular social group and under Article 3 of ECHR, due to her mental health issues, and had failed adequately to consider a material matter, namely the country information contained in the Appellant's bundle concerning mental health in the DRC.
17. The appellant's second ground of appeal was that the judge failed adequately to consider whether, if the appellant were to return to DRC, it would breach Article 3 of ECHR, given her health issues, and in particular that the judge had not considered a material matter, the evidence of the Appellant's GP Dr Munir.

18. Permission to appeal was granted on the basis sought by First-tier Tribunal Judge Hollings-Tennant. In granting permission the judge commented about the first ground that

“Whilst it is clear that the Judge considered relevant country information on availability of treatment, this was in the context of her assessment as to whether there are significant obstacles to integration. It is not entirely clear whether she had regard to or placed weight on relevant country information presented indicating that those suffering from mental health issues other than psychosis may be subjected to ill-treatment before reaching conclusions on the protection aspect of the Appellant’s case.”

19. Regarding the second ground, Judge Hollings-Tennant commented that Judge Gibbs ought to have considered:

“...whether the Appellant was at risk as a woman, the point having been raised in her skeleton argument. There is some merit in this assertion. At paragraph [19], the Judge records that the point was not pursued at the hearing but there is no indication it was explicitly conceded. Again, whilst the Judge refers to relevant country information on gender based violence when considering significant obstacles to integration, she does not consider the extent to which this factor may give rise to risk under Article 3 of the ECHR. Perhaps more importantly, there was no explicit consideration of the cumulative effect of these factors, i.e. returning as a single woman with physical and mental health issues who faces significant difficulties in accessing required treatment (see paragraph [30]).”

20. The respondent filed a Rule 24 response dated 12 October 2023. In it, the appeal was opposed, and the respondent’s position in respect of the 2 grounds of appeal was articulated.

21. Regarding the first ground, the Respondent submitted that if this point was relied upon it was not enough to simply rely on the skeleton argument. Lata (FtT: principal controversial issues) [2023] UKUT 00163 made it clear that the judge’s task was to deal with the issues that the parties have identified, and more was required than setting them out in a skeleton argument.

22. Regarding the second ground, the Respondent’s position was that the Judge had properly made the finding that the appellant did not have a serious illness for the purposes of the first part of the test in *AM (Article 3, health cases) Zimbabwe* and in those circumstances that analysis was sufficient.

The error of law hearing

23. Miss Delgado relied upon her skeleton argument dated 30 October 2023. She accepted that she made a concession regarding the political situation in DRC, but said that she had not made such a concession in respect of her PSG status.

24. Regarding her second ground concerning article 3 and medical issues, Miss Delgado relied in particular on the letter from Dr Shazia Munir dated 3 May 2023. Dr Munir is a General Practitioner and Clinical Lead in Refugee Services Guy's & St Thomas' NHS Foundation Trust. The letter expressed concern about the appellant's risk of suicide if returned to the DRC without adequate mental health support.
25. The Presenting Officer Miss Ahmed relied on the respondent's rule 24 response to the appeal.
26. Regarding the issue of whether the appellant's PSG status was a live issue, Miss Ahmed relied on *Lata (FtT: principal controversial issues)* in particular at paragraph 4 of the headnote, to the effect that the judge's task is to determine the issues identified by the parties, and argued that if the point was relied upon it was not enough just to set it out in the skeleton argument.
27. Miss Ahmed argued on ground 2 that the appellant bore the burden of establishing that she was seriously ill as required by *AM Zimbabwe* [2022] UKUT 00131. The Judge had correctly directed herself on this at paragraph 20 and found that the appellant's symptoms of depression and PTSD did not meet this threshold. The appellant had not been referred for specialist treatment and had only recently started counselling. Given the Judge's finding that the condition did not meet the seriousness requirement, it was unnecessary for her then to consider the availability of medication.

Discussion

28. Miss Delgado's argument under the first ground of appeal concerning the appellant's status as a member of a Particular Social Group ("PSG") focussed in particular on paragraph 19 of the Judge's decision. In that paragraph Judge Gibbs stated
"19. Although in the appellant's skeleton argument Ms. Delgado makes the submission that the appellant would be at risk as a woman (a member of a particular social group) she did not pursue this submission at the appeal hearing."
29. Miss Delgado submitted in her oral submissions that she explicitly stated to Judge Gibbs that she relied on the content of her skeleton argument, and she did not state that she resiled from any of it. Paragraphs 23-39 of that skeleton argument addressed the PSG aspect of her case as a woman, as a person with mental health problems and as a person with a disability and the associated risks to her on return to DRC.
30. It is notable that the Judge stated that Miss Delgado did not pursue her submissions about PSG, but did not state that she formally abandoned them. Her position is that they were addressed at some length in her skeleton argument and the judge should have determined them.

31. It is also notable that at paragraph 7, the Judge identified as one of the agreed issues for determination *“Is she at risk as the member of a particular social group?”*
32. I have considered *Lata*. It is concerned with how the parties should assist the First-tier Tribunal by engaging constructively, providing relevant information and seeking to define the issues. The headnote states at point 4 that the reformed First-tier Tribunal procedures mean that a judge is required to determine the issues which the parties have identified, and not to trawl through the papers seeking the issues out. At paragraph 28 the Upper Tribunal stated
“...unless a point was one which was Robinson obvious, a judge’s decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules [emphasis added].”
33. However, that is not the case here – it cannot properly be said that the point about the appellant’s PSG status was never raised for the Judge’s consideration. In fact the situation was very different. The appellant had identified the issue clearly, and set out her submissions over 16 paragraphs of the skeleton argument. The Judge also identified the issue as one that was agreed as needing to be determined.
34. In addition to the failure to consider the appellant’s PSG status, there was no consideration of the cumulative factors relevant to that status i.e. that she would be returning as a woman, as a person with physical and mental health issues and as a person who faces difficulties in accessing treatment.
35. In those circumstances, the failure to determine them amounts to an error of law.
36. I have considered whether it could be said that the error was not material. However, given the absence of related findings of fact it cannot be said that it was not material. Accordingly the appeal on ground 1 is allowed.
37. The respondent did not cross appeal or otherwise seek to challenge the Judge’s findings of fact. Accordingly they are not affected by the above analysis.
38. On ground 2, the Judge directed herself to *AM Zimbabwe*, which is the leading recent authority on healthcare and article 3 and which follows from the Supreme Court’s judgment in *AM (Zimbabwe) v SSHD* [2020] UKSC 17. She took a two stage approach as required and asked firstly whether the appellant was seriously ill.
39. The Judge found that the appellant was not seriously ill and gave short, clear reasons at paragraph 22 of her judgment. The reasons were that she

was being treated with a first line antidepressant, had only recently started counselling, had not required hospitalisation and had not been referred to a specialist. There was no evidence of suicidal ideation. Accordingly the case was not one especially serious.

40. In my view, these reasons are cogent and properly based on the evidence. Depression is a serious illness, but the appellant's case of depression was not one where she could be said to be seriously ill.
41. Miss Delgado relied on a passage in Dr Munir's letter which focussed on her risk of suicide on return to DRC if she did not have access to appropriate mental health support. However, that is relevant to the second part of the *AM Zimbabwe* test. It must still be established that she was seriously ill, and Judge Gibbs gave sufficient reasons for her finding that that was not the case.
42. The Judge took account of the other evidence concerning the availability of medical treatment in DRC - see paragraphs 24-35 of her judgment. Although that analysis was in the context of the Judge's findings regarding Paragraph 276ADE of the Immigration Rules, nonetheless it is clear that the Judge had taken this evidence carefully into account.
43. On ground 2, I find that there was no error of law. The Judge correctly directed herself and came to conclusions which were properly open to her.

Notice of decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

J Jolliffe

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 September 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email