



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

Appeal Numbers: AA/08602/2012  
AA/08616/2012

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 June 2013**

**Determination Sent  
On 15 July 2013**  
.....

**Before**

**UPPER TRIBUNAL JUDGE STOREY**

**Between**

**MR MWANDIDA MEKI  
MS TAMALA GUMBOH**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellants: Mr M Ismail, Counsel instructed by Lawrence Lupin Solicitors

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. On 20 March 2013 First-tier Tribunal (FtT) Judge Birkby dismissed the appellants' appeals against a decision made by the respondent refusing to remove them by way of directions - having refused to grant them asylum. They were successful in obtaining a grant of permission limited to two grounds, the first was an alleged error in the treatment of the expert evidence from Dr

Aguilar. It was said that contrary to the guidance given by the Court of Appeal in AM [2012] EWCA Civ 521 the judge had rejected the second appellant's account on the sole basis that the expert had 'accepted' the appellant's account. The second error was an alleged reliance on pure speculation in coming to a conclusion that the second appellant probably still had a Malawi passport. One consequence of there being only two grounds in play is that the first appellant's case is entirely dependent on the outcome of the second appellant's case in respect of those two grounds although I shall deal in para 10 with what might be said to be either an extension of ground 2 or a separate ground.

### Ground 1

2. The second appellant's asylum claim was based on fear of persecution in Zambia due to her father's political activities and a fear that if returned to Malawi, she would face serious difficulties because of her Zambian origins and her lack of family ties in Malawi. It is common ground that if the second appellant was properly found by the FtT judge not to be at risk on return to Malawi, the grounds of appeal could not succeed. Although it was accepted that the second appellant came to the UK using a Malawian passport, it was argued that her behaviour would cause the Malawian authorities to regard her as having shown disloyalty or treason against the Malawian government and someone who could not be deemed a Malawi citizen. Particular criticism was made of what the judge had said at [52], in dealing with the second appellant. The judge said that it was clear to him that:

"Dr Aguilar accepted the plausibility of the account of the second appellant's history which I believe has undermined his findings and conclusions. Dr Aguilar has not shown an awareness of the above evidence of the second appellant's lack of credibility. Consequently, I cannot rely on his conclusions. Whilst it may be the case that her history included many difficulties for her father, it is also apparently the case that Dr Aguilar is of the view that the second appellant has been in the UK since 2004

3. I am not persuaded that the judge's treatment of Dr Aguilar's evidence was vitiated by legal error.

4. It is first of all clear that the FtT judge took careful account of the evidence of Dr Aguilar within the context of the evidence as a whole: see [49].

5. Secondly, the judge's comments at [52] did not amount to a failure to recognise that Dr Aguilar's evidence was independent evidence (such a failure would have violated the principles set out in AM), but simply that the value to be attached to this report as evidence was undermined by certain aspects of it.

6. Thirdly, it is far from clear that Dr Aguilar's report had been prepared with reference to the respondent's Reasons for Refusal (RfR) Letter dated 18 September 2012 relating to the second appellant. Dr Aguilar's report does state he has read the asylum interview and "supporting documents" but despite stating that "the client's account is plausible", there is no reference in

it to the adverse view taken of various aspects of the second appellant's evidence in the RfR. This RfR letter had noted that the background evidence did not support her or her brother's (Kondwani Gumboh's) claim regarding their father being a victim of persecution in Zambia because his problems had only been with one man in Zambia; that she had not provided any evidence that their remaining brother in Zambia had had any problems due to his relationship with their father nor her or her brother; that it was not accepted that she had arrived in the UK in 2004 or that she was ignorant of the fact that she could make a claim for asylum for some eight years after her arrival in the UK or four years after her brother claimed asylum for her to claim, nor why she had waited until arrested to do so; that when she was first arrested she had indicated a willingness to return to Malawi; that her failure to disclose the claimed incident of rape including to her own family meant that this aspect of her claim remained in doubt; and that in any event on her own account this was an isolated incident unrelated to the problems her father faced in Zambia. Further, she had failed to demonstrate that the authorities in Zambia would be unable or unwilling to protect her. In relation to her claim to have no family in Malawi, the letter noted that her brother Kondwani had written to state that their father was now living in Lronga, which was in the north of Malawi. Dr Aguilar's report fails to address these findings or reasons to any significant degree. In relation to the second appellant's father, his opinion that he "would face difficulties as a person who had never lived in Malawi" and that he "is likely to be perceived as a traitor to his Malawian heritage" was clearly made in ignorance of the appellant's brother's evidence to the contrary. I shall deal with another aspect of Dr Aguilar's report when addressing ground 2.

## Ground 2

7. As regards the second ground on which permission was granted, which alleged that the FtT judge erred in speculating about the second appellant having renewed her passport, or having returned her passport, I do not consider it is made out either. A key part of the appellant's claim to be at risk in Malawi was that she had lost her passport and the Malawi authorities would not renew it because she had been outside the country for seven years without proper registration with the Malawian Consulate. At the hearing the respondent had challenged her claim to have lost her passport and to face being denied a new passport. She was asked when she lost the passport and she was vague and evasive about the date, about why she had not reported it to the police and why, even though her brothers had made enquiries about Malawian citizenship, she had not inquired about replacing her passport. The judge also noted that the evidence given by her brother to Judge Kopieczek in October 2008 was that she (the appellant) had been able to get her Malawian citizenship when in Malawi on the basis that she and her brother were under 21 and had returned their Zambian passports and applied for Malawian passports. On the basis of that evidence the judge was fully entitled to find that the appellant had not shown her passport was lost and that if there were any doubts as to her Malawi citizenship she would have contacted the Malawian authorities in the UK. Even if the judge might be said to have gone beyond the evidence in stating that "in all probabilities" the appellant still had her

Malawian passport, that did not undermine the cogency of her reasons for finding the second appellant's claim about not being a citizen of Malawi or not being likely to be accepted as such by the Malawian authorities, not credible. I would observe that the second appellant has had ample opportunity to produce evidence to show that the Malawian authorities would not accept either that she had been issued with a Malawian passport which was still current or that if she applied to renew her passport she would be refused.

8. I do not consider that the FtT judge erred in not attaching any significant weight to what Dr Aguilar had to say about the second appellant's nationality and passport problems. First of all, it is clear that significant passages of Dr Aguilar's report are based on the assumption that the second appellant would be returned or would return on a former (as opposed to a current) passport or without a valid passport or in some way illegally. (In that respect I attach no blame to Dr Aguilar because the question posed to him was whether the second appellant "has a claim/or is likely to be given Malawian nationality or any rights to enter and/or remain given her family's background and past events of persecution"

9. Second, leaving aside the fact that it is a matter for the respondent to deal with the practical arrangements of securing travel documents which will be acceptable to destination state authorities, on the judge's findings of fact the appellant would not be returning without a valid passport or in some way illegally. Second, to the extent that Dr Aguilar's report sought to maintain that the second appellant would have difficulties on return the report appears to be addressing the situation of those who are suspected by local authorities of not being Malawian despite having passports and in that context they can face difficulties. However, on the judge's findings the second appellant's father was living in northern Malawi and hence there was no reason to think the second appellant would be unable to satisfy the local authorities of her bona fides.

10. I noted earlier that there is a further argument which may be considered either as an extension of Ground 2 or a separate ground. It seeks to argue that the judge was wrong to confirm the respondent's view that the appellant was entitled to Malawian citizenship given that she faced exclusion. In any event, however classified, it needs addressing.

11. Insofar as reliance is placed on this argument, I do not find it at all persuasive. As regards the text of Malawian nationality law, even on the basis of the expert's opinion, the appellant would only face exclusion if she was either -

- (i) a person who has shown disloyalty, or treason against the Malawi government;
- (ii) a person who had been resident outside Malawi for seven years or more without proper registration.

12. However, on the basis of the judge's findings of fact (which were not inconsistent with Dr Aguilar's analysis of Malawian nationality law provisions)-

- (i) there was no reasonable degree of likelihood that the second appellant would be considered to have shown disloyalty, or treason against the Malawi government; and
- (ii) the second appellant had not shown she had been outside Malawi for seven years – on the judge’s findings she had not shown she was not there in 2008 and, even if the appellant had been accepted as being outside Malawi for seven years, she had not shown she lacked proper registration.

13. For the above reasons I consider that the grounds of appeal have not been made out.

14. Accordingly my conclusion is that the FfT judge did not err in law and his decision to dismiss the appellants’ appeals shall stand.

Signed

Date

Upper Tribunal Judge Storey