Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03758/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 August 2019	**On 16 August 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

G M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Pipi, instructed by Templeton Legal Services
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge M A Khan promulgated on 5 June 2019 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 9 April 2019, refusing the Appellant's protection and human rights claims.

2. The Appellant is a national of Kenya. He claimed asylum on the basis of his sexuality. The Judge did not accept that claim as credible. He also dismissed the Appellant's Article 8 claim for reasons which I will need to come to in due course.

3. The Appellant appeals the Decision on three grounds. First, he says that the Judge has failed properly to consider his Article 8 case. Second, he says that the Judge should have permitted the Appellant an adjournment in order to obtain an expert medical report. Third, he says that the Judge should not have based his findings on the Appellant's claim to have been ill-treated on the evidence of a Rule 35 report.

4. Permission to appeal was granted on 4 July 2019 by First-tier Tribunal Judge Povey in the following terms so far as relevant:

> "... 2. The grounds allege that the Judge erred in his Article 8 assessment and in his decision to refuse the Appellant's adjournment application.
>
> 3. The Judge's self-direction at [64] on the Appellant's private life clam was confused (between the provisions of the Rules and Article 8) and arguably erroneous (regarding the threshold to consider an appeal outside of the Rules). The subsequent analysis appeared to consider the appeal outside of the Rules (referencing section 117B considerations at [65] to [68]) but failed to make a clear finding on whether Article 8 was engaged and, if it was, whether any interference was proportionate. In refusing the Appellant's appeal under Article 8, the Judge's reasoning was unclear and constituted an arguable error of law. In addition, in refusing the application to adjourn, the Judge made a material mistake of fact, referring to a speech expert's report (at [11]), when the Appellant was seeking to obtain an expert medical report. That error was material to the Judge's determination that it was just and fair to proceed with the hearing and similarly constituted an arguable error of law.
>
> 4. As the application for permission disclosed arguable errors of law, permission to appeal is granted. All grounds may be argued."

5. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

DISCUSSION AND CONCLUSIONS

6. Although it is evident that the Article 8 ground was considered by Judge Povey to be the stronger, it is appropriate to begin my consideration with the other two grounds

which relate principally to the protection claim as the findings in relation to that claim are relevant to the Article 8 ground.

7. I begin with the adjournment ground. The Judge deals with this at [8] to [11] of the Decision as follows:

> "[8] Mr Pipe of Counsel for the appellant made an application for an adjournment on the following ground:
>
> (a) to obtain an expert report
>
> (b) the appellant was not satisfied the way his previous legal representatives were dealing with his case so he instructed his current solicitors on 26/02/2019; they have not had sufficient time to prepare his case and also to instruct an expert.
>
> [9] Mr Wain for the respondent opposes the adjournment application on the basis that this application has been previously refused on 15/05/2019 on the grounds the appellant has not provided any evidence to show as to whether any steps have been taken to instruct an expert.
>
> [10] Mr Pipe made no reply to the respondent's opposition to the adjournment.
>
> [11] Upon hearing both parties, I refused to postpone the hearing on the basis that the appellant and his legal representatives have had more than sufficient time to instruct an expert; there is no evidence that any steps have been taken to instruct an expert. Speech expert's report would not be of assistance to the Tribunal. It is fair and just to proceed with the hearing."

8. I accept of course that there is an error in the reference to the report being that of a speech expert. That was not nor could it be relevant to this case. The issue here was whether the Appellant was to be believed in his claim to be homosexual and to have been ill-treated on that account. The reference to the wrong type of expert is, I suspect, a template or typographical error. I do not accept Mr Pipi's submission that I must conclude that this is what the Judge had in mind because that is what he wrote. It is obviously regrettable that the Judge has not read the Decision adequately to pick up what I consider is likely to be a transposition error. I also accept that the Judge has not, in those paragraphs, made direct reference to the type of report that the Appellant was seeking to obtain. However, I do not accept that this error is material. The Judge was clearly aware of the earlier request for an adjournment and the refusal of it. That was in the following terms:

> "The application for a postponement of the hearing is refused on the information provided. The appellant has not provided any documents to show that he has attended an appointment with Berkshire Talking Therapies. He has not provided any evidence to show what steps he has taken to instruct an expert to provide a medical report or any other form of expert evidence."

9. It is also relevant to this ground and the third ground to look at the way in which the application for an adjournment was made on that and a previous occasion. The Applicant's representatives first sought an adjournment by letter dated 30 April 2019 in the following terms:

> "The appellant's background experience which include mental and psychological trauma, invite assessment of his mental state by an expert which is central for the appellant's appeal.
>
> We understand that our client has a number of appointments with his therapist and GP on 07/05/2019 and 15/05/2019 with respect to his medical circumstances.
>
> Under the above circumstances we should be grateful if you would allow our client time for a psychological report to be made available in support of his appeal. Given the above reason we should be grateful if you would adjourn his appeal listed to be heard on 17/05/2019 and re-list his appeal in 2 months' time, possibly in July 2019 for a psychological report to be made available to allow the Tribunal to make conclusive findings in this case."

10. That request was refused at the pre-trial review hearing in the following terms:

> "No evidence has been provided that the Appellant has upcoming appointments with his GP and therapists, and how this will assist the tribunal to justify adjourning the hearing for a further two months."

11. That prompted the further request made by e mail dated 13 May 2019 which reads as follows:

> "We write further to receipt of our client's asylum appeal pre-hearing review form indicating that our request of adjournment was refused. The basis of the refusal is that no evidence were provided confirming our client's appointment with his GP and therapist, for a medical report to be adduced in support of his appeal hearing.
>
> Under the above circumstances we renew the request for our client's upcoming appeal hearing of Friday 17 May 2019 to be adjourned for 1-2 months for a medical/psychological report to be made available by UK experts.
>
> We further draw your attention to enclosed Rule 35 of our client, where the Doctor has indicated that our client may have been the victim of torture in his country of origin and his case should be further investigated. We further provide evidence that our client has attended a therapy session as previously indicated on 09/05/2019.
>
> Under the above circumstances we should be grateful if you would adjourn our client's upcoming appeal of 17/05/2019 for a medical/psychological report be made available to us which is vital to allow the Tribunal to make a conclusive finding in this case."

12. In light of Judge Khan's reference to the earlier refusal of the adjournment request, I cannot accept that he did not have in mind the nature of the expert evidence which the Appellant wished to adduce. The request to which the 15 May 2019 decision responded very clearly identifies the report which the Appellant wished to adduce as being a medical one, as does the decision refusing that adjournment. The reference to the report being that of a speech expert is therefore a slip and not material.

13. Further and in any event the utility of the report is only one of a number of reasons why the Judge refused the adjournment request. He did so also on the basis that the representatives had ample time between February and May to obtain the report, that they had failed to explain why they could not obtain one in that period and that they had produced no evidence to show that a report had even been sought.

14. The earlier reasons for refusing the adjournment are also relevant as to the issues which the Judges refusing the adjournment request on those occasions saw as material. Those included not simply the failure to provide any evidence of having sought a report (or to show therefore when one might be produced) but also that the applications failed to identify what it was that the report was intended to prove.

15. I explored with Mr Pipi during his submissions why no report had been produced even now and what it was that the Appellant sought to prove by that evidence. As I note below, the Rule 35 report which forms the subject of the third ground identifies three scars. Mr Pipi confirmed as was my assumption that it was not the Applicant's physical injuries of claimed torture that the Applicant sought to demonstrate via a medical report but his mental state. Mr Pipi submitted that it was essential to the Applicant's case that he have such evidence because it would assist in establishing the credibility of the Applicant's case. As I observed at the hearing, that puts the point too high. Such a report may assist in relation to credibility if, for example, the expert were to say that the Appellant's memory was affected which might explain inconsistencies in his evidence. It may assist in providing reasons why the Appellant did not make his claim earlier if he were suffering from post-traumatic stress. However, all of that is speculation because, as I say, even now, there is no evidence of a report.

16. In that regard, Mr Pipi sought to adduce at the hearing a letter from Berkshire Healthcare NHS Foundation Trust dated 31 July 2019. I refused to have any regard to that, not simply because it could not assist in relation to the asserted error of law (as it was not before the Judge) but also because there was no application to adduce further evidence. In any event, I observe that even this letter only shows that the healthcare trust has offered to arrange an appointment for the Appellant if he contacts them by 21 August. It does not show that any appointment has taken place. Apart from the Rule 35 report (the content of which I deal with below) and the e mail from Talking Therapies making the referral to the NHS Mental Health Services, there was absolutely no evidence of any medical treatment.

17. That leads me on to Mr Pipi's further submission that the reason that no report has yet been commissioned is because it could not be until the Appellant had been treated. However, that is to misunderstand the nature of a report prepared for use in the Tribunal. A medical practitioner treating a person may be an appropriate expert if he or she is accustomed to providing reports but will not do so in any event unless separately requested to do so. Similarly, the expert does not need to be the person who is treating the appellant. In many if not most cases, it will be an entirely different person. There is still no explanation why an expert report has not yet been sought nor any indication when it is intended that this be done.

18. Mr Pipi's other reason for those instructing him not to have sought a report to date is because the Appellant has not yet been treated for his mental health problems and therefore there would not be a strong evidential foundation on which the expert could base his conclusions. There are two answers to that submission, neither favourable to the Appellant's case. First, it is not the purpose of an adjournment to

allow an appellant time to evidentially strengthen a case which he cannot establish at the time in the hope that the expert will provide support for his case. In other words, the Appellant ought to be able to show that he has mental health problems – perhaps by medical notes or even his own evidence of his problems – before seeking to justify deferring a hearing in order to obtain expert evidence of those problems. Allied to that point, the submission underlines the lack of medical evidence which was before the Judge in this case. That lack of evidence has to be considered in the context of a case where the Appellant did not claim asylum until some twelve years after first arriving in the UK and about ten years after he claims to have been tortured in Kenya.

19. Second, it is not necessarily the case that an expert must have regard to other medical evidence. It may be best practice to have regard to medical notes, particularly if a person claims to have a long-standing medical history in order to assess that account. However, experts often base opinions on what they are told by the person being examined, coupled with diagnosis based on objective tests and their own observations. It is not essential to the commissioning of a report that there be medical evidence of treatment. As I have already said, though, that the Appellant has not had treatment in the ten years since he claims to have been tortured is something to which an expert would need to have regard (as did the Judge).

20. As Mr Pipi submitted, and I accept, there is an overlap between the second ground and the third ground concerning the Rule 35 report, not least because that is the main evidence on which the Appellant relies as showing that he is a potential victim of torture. I therefore deal with this ground first before reaching my conclusion on the second ground.

21. As I have already indicated at [11] above, the Rule 35 report was evidence adduced by the Appellant. It is annexed to the e mail dated 13 May 2019 to which I there refer. It also appears at [49-56] of the Appellant's bundle. The report is written by Saeed Ahmad "CP" (which I assume indicates that he is a clinical practitioner) on 3 April 2019. At section 4 he sets out the Appellant's account as follows:

> "This man says he is victim of torture in his country Kenya.
>
> He says he is homosexual but never declared it as it is illegal in his country and not accepted in society. He says on 21st of April 2009 he was walking along a street in Nairobi when he saw that a homosexual man was beaten up by another person. He intervened and tried to stop him and when police arrived he was also arrested and detained in police station for one night and tortured by police by various means like punches, kicks and cigarette burns. He was also kept with other criminals and they were told that he is homosexual and he was tortured and abused by other prisoners as well. He has scars. He was released after giving police some money.
>
> Now he is complaining of generalised anxiety, insomnia, panic attacks and flashbacks which are affecting him. He is having medical treatment for his condition. He is also expressing suicidal thoughts and has been referred to mental health team. He is also complaining of aches and pains as a result of the torture."

22. Having indicated on a diagram that the Appellant has "2 fading scar marks R thigh" and "one scar mark L thigh", Mr Ahmad provides his assessment at section 6 as follows:

> "In my opinion the symptoms he is describing can be consistent with the clinical findings today. I am raising my concerns that he may be victim of torture in his country and his case needs further investigated [sic]
>
> My opinion is that continued detention will be deleterious to his mental health due to history given and the nature of being detained with uncertain status."

23. The Judge dealt with this evidence as follows:

> "[49] The appellant for the first time mentioned in his Section 35 report that he had been burned with cigarettes, which has caused scars on various parts of his body. When asked why he did not mention these cigarette burns in his asylum interview, he said that he forgot to mention this to the interviewing officer. I do not find the appellant's evidence credible or consistent. I find that the appellant simply added this evidence in order to bolster his asylum claim.
>
> [50] In section 35 report at page 53, the appellant told the doctor he saw a homosexual man being beaten by another man, he intervened to stop him and when the police arrived, he was arrested and detained in police station for one night and tortured by various means. However, in his asylum interview and his oral evidence at the hearing, the appellant claimed that he told the doctor that he saw person or persons beating the gay man and did not say 'another man'. I find that the appellant's evidence is contradictory and inconsistent as to whether he said persons; the doctor clearly reports that he said he saw 'another man' was beating a gay man. Again, as in his asylum interview and his oral evidence, the appellant said that the police were part of the 'mob' beating the gay man. In his section 35 report he said that the police arrived at the scene and arrested him. I find that the appellant has made up this part of his evidence and it is not credible or consistent. Had the event actually taken place as claimed by the appellant, he would be able to clearly state as to whether the police were there when he himself arrived on scene or they came later. The appellant's evidence is not credible or consistent."

24. The Appellant's ground in this regard is that the Judge should not have assessed the claim of having been tortured based only on the Rule 35 report because it was not sufficient evidence on which to evaluate that claim. He says therefore that it was a material error not to allow the Appellant to provide a comprehensive medical report. It is in that way that this ground is tied in to the second ground.

25. As is evident from the assessment in the Rule 35 report, that is not a comprehensive report, nor does it purport to be. However, the basis on which the Appellant says that he ought to have been granted an adjournment in order to obtain a fuller report is because he says that such a report is capable of supporting the credibility of his claim. The Judge referred to the Rule 35 report not for what it has to say about the Appellant's scars (apart from the omission in that regard in interview) but to draw attention to the inconsistencies between his account given at interview and at the hearing compared with what he told Mr Ahmad. Far from being unfair for the Judge

to rely on the Rule 35 report in that way, that is entirely consistent with the guidance given in JL on which case the Appellant relies in relation to his adjournment ground. The Judge was entitled to rely on what is said in the Rule 35 report in this way; the more so because it was evidence on which the Appellant sought to rely. The third ground is not made out.

26. I observe that although the Rule 35 report indicates that the Appellant "is having medical treatment for his condition" (referring it appears to his mental health and not physical ailments), the Appellant did not produce any other evidence to show that he had sought medical assistance apart from a one page e-mail dated 9 May 2019 from "Talking Therapies" which is referred to in the earlier adjournment refusal and which indicates only that the Appellant had attended an assessment in May and that he was being referred to Berkshire Traumatic Stress Service. Even the Appellant's own witness statement says only that "[he] was subjected to severe mental and physical torture in Kenya to which I continue to carry the mental and physical scars. It has not been easy emotionally and mentally speaking that I was referred to counselling by my GP". There is no evidence from the Appellant's GP in support of that assertion (in fact it appears that it was Talking Therapies who have since referred him to the NHS Mental Health Services). Nor is there any evidence that the Appellant has been prescribed medication for his mental health problems, which, I reiterate, are said to stem from events about ten years ago.

27. When considering the second ground relating to the alleged unfairness of refusing to adjourn, I bear in mind the guidance given in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) as follows:

> *"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."*

28. To the extent that the Judge referred to a speech expert, that was of course an irrelevant consideration as that was not the nature of the report sought. I have already explained though why I consider that to be a slip and not to reflect the nature of the report which the Judge thought that the Appellant wished to adduce. The other considerations set out at [11] of the Decision are clearly relevant. As the guidance makes clear though the question is not whether the Judge's refusal was reasonable but whether the Appellant was deprived of the right to a fair hearing. This brings me on to the way in which the Appellant relies on the need for expert medical evidence.

29. The basis of the Appellant's ground in this regard is that a medical report would be "an important consideration in the overall assessment of credibility". The Appellant relies in this regard on JL (Medical Reports – credibility) China [2013] UKUT 00145 (IAC). I do not need to cite the passage referred to in the grounds save to note that it does not form part of the guidance. The relevant part of the guidance for these purposes is at [4] as follows:

> "*For their part, judges should be aware that, whilst the overall assessment of credibility is for them, medical reports may well involve assessments of the compatibility of the appellant's account with physical marks or symptoms, or mental condition: (SA (Somalia) [2006] EWCA Civ 1302). If the position were otherwise, the central tenets of the Istanbul Protocol would be misconceived, whenever there was a dispute about claimed causation of scars, and judges could not apply its guidance, contrary to what they are enjoined to do by SA (Somalia). Even where medical experts rely heavily on the account given by the person concerned, that does not mean their reports lack or lose their status as independent evidence, although it may reduce very considerably the weight that can be attached to them.*"
>
> [my emphasis]

30. As that passage makes clear, whilst a medical expert is entitled to opine on an appellant's credibility (provided the other parts of the guidance there given are followed), the ultimate determination of credibility is a matter for the Judge on all the evidence. The central question here is whether the Appellant is homosexual. The assistance which a medical expert could provide on that central issue is more nuanced. He could say that he believed the Appellant's account of past experiences but ultimately that would depend on the Appellant's own evidence which the Judge would have the benefit of seeing tested under cross-examination. The medical expert could provide comment about an appellant's account of past experiences of ill-treatment and the impact of return on an appellant's mental state. However, that too could only form one part of the credibility assessment. Here, as I have already indicated, there is a paucity of medical evidence on which an expert could rely other than the Appellant's own account. Indeed, that the Appellant has not yet received treatment for his mental health problems was one of the reasons why Mr Pipi urged me to conclude that to refuse to adjourn was unfair because the evidence on which an expert could base his report would not be strong. I have already dealt with that submission and rejected it as a good reason for adjourning.

31. For the reasons given by the Judge and the reasons set out above, the refusal of the adjournment did not deprive the Appellant of a fair hearing. It is unlikely that a fuller medical report would have made any material difference to the case, the Judge was entitled to assess credibility based on all the evidence including the Rule 35 report and, if the Appellant wished to obtain a fuller medical report, he had ample time prior to the hearing (and since) to commission one. He has not done so. As Mr Walker also pointed out, the Judge has given other reasons for rejecting the Appellant's credibility at [48] to [55] of the Decision. Other than those based on the Rule 35 report (with which I have already dealt) none of those are challenged. The

Judge was entitled to reject the Appellant's protection claim as not credible for the reasons there given.

32. That then disposes of the second and third grounds. I turn now to the first ground concerning Article 8 ECHR. In light of what I say above, the context of the Article 8 consideration is that the Appellant is not gay and is not at risk on that account on return to Kenya. It is for that reason that the Respondent, whilst conceding that the Judge's reasoning on this part of the case, says that the error is not material. As I indicated to Mr Pipi during the hearing, I am not entirely persuaded that the Respondent's concession that the reasoning does contain an error of law is a correct one. I therefore turn to consider the way in which the Judge dealt with this issue.

33. The first paragraph of the Judge's reasoning is to be found at [64] as follows:

> "[64] Under Article 8.1 of the ECHR, the appellant has the burden of showing that he has established a private or family life and that there is an interference with it. The appellant entered the UK in 2007; he has no family in the UK. At the date of the hearing, the appellant has lived in the UK for 12 years and not 20 years to engage the consideration of his private life under Article 8 of the ECHR. The appellant has not put forward any compassionate circumstances for his claim to be considered outside the Immigration Rules. The fact that he claims to be gay is not believed. I find that he can reintegrate into Kenyan society on return."

34. As I pointed out to Mr Pipi in the course of his submissions, that paragraph makes the following points:

    (a) The Appellant cannot meet Appendix FM to the Rules on the basis of having a partner or child ("he has no family in the UK"): Mr Pipi accepted this was factually accurate.

    (b) The Appellant cannot meet paragraph 276ADE of the Rules based on his length of residence (he entered in 2007 and "has lived in the UK for 12 years and not 20 years"): Mr Pipi accepted this was so.

    (c) The Appellant's protection claim and sexuality having been rejected, the Appellant can reintegrate in Kenya on return: here Mr Pipi conceded that this might indicate consideration of paragraph 276ADE(1)(vi) on the basis of there being no very significant obstacles to integration but submitted that the reasoning was inadequate.

35. Mr Pipi also submitted that if this was the way in which the Judge's reasoning at [64] was to be read, it was unclear why the Judge made reference to compassionate circumstances outside the Rules in that paragraph. I accept there is some merit to that point but that does not necessarily undermine the remainder of the reasoning. I also accept that it would have been preferable if the Judge had referred to the relevant provisions rather than by inference. It might be said, for example, that he has not had regard to the threshold which applies to obstacles on return. I also accept that the Judge has not developed his reasons for finding that the Appellant

could reintegrate into Kenyan society. To that extent, I accept that there is some legal error in the Judge's consideration in that paragraph.

36. Before I look at the materiality of the error based on the evidence, though, it is necessary to consider the remainder of the Judge's conclusions about Article 8. Having set out sections 117A and 117B Nationality, Immigration and Asylum Act 2002 at [65], the Judge proceeds to consider the Appellant's case outside the Rules as follows:

> "[66] The appellant has lived in the UK since 2007, having entered the UK as a business visitor, claiming asylum February 2019. Under Section 117B(5) little weight is to be given to private life when the person's immigration status is precarious. The word precarious has been defined the Upper Tribunal in the case of **AM (S117B) Malawi [2015] UKUT 0260 (IAC)**. Under heading 4 it is stated, '*Those who at any given date held a precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or remain. A person's immigration status is 'precarious' if their continued presence in the UK will be dependent upon their obtaining a further grant of leave'*. The appellant in this case had a limited leave to remain in the UK as a visitor.
>
> [67] This position is further, made clear by the Upper Tribunal at paragraph 23 of the above-mentioned case. *'Our starting point must therefore be that Parliament has now drawn a sharp distinction between any period of time during which a person has been in the UK 'unlawfully', and any period of time during which that person's immigration status in the UK was merely 'precarious'. We are satisfied that those who at any given date held precarious immigration status must have held at that date an otherwise lawful grant of leave to enter or remain. They must have enjoyed some immigration status within the UK at the given date, because if that were not the case then their presence in the UK would have been unlawful at that date. Thus we are satisfied that parliament envisaged that the immigration history of a particular individual might disclose periods when they were in the UK unlawfully because they had enjoyed none. Some might enter unlawfully and never acquire a grant of leave. Others might subsequently acquire a grant of leave. Others might enter lawfully but then fail to obtain a variation of their leave. Others might always have held a grant of leave. We regard the immigration history of the individual whose Article 8 rights are under consideration as an integral part of the context in which any Article 8 decision is made, whether by the Respondent or the FtT".*
>
> [68] The appellant's case is subject to consideration under Section 117B (5). The whole of the appellant's time spent in the UK is in the knowledge that he has no right to reside here."

37. I confess that I do not entirely understand why the Judge found it necessary to refer quite so fully to the decision in AM (Malawi) particularly since the points there made about weight of a person's private life established unlawfully or precariously have received more authoritative consideration since by the Supreme Court in Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58. I also accept that the reasoning does not contain the sort of balance sheet approach advocated by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60. However, it is possible to discern from what is said at [66] to [68] and having regard to the references to Section 117B (albeit the wrong sub-section) the

point that the Appellant's private life is to be given little weight because he was here on a precarious basis (in fact for the most part here unlawfully) and that the maintenance of effective immigration control weighs in favour of the public interest for the same reason. Again, though, the Judge's reasoning is very short and undeveloped.

38. I therefore turn to consider whether the errors disclosed by the Article 8 consideration are material ones. As I have already indicated, Mr Pipi accepted that the Appellant has no family in the UK. In fact, as referred to at [34] and [35] of the Decision, the Appellant has a wife (or possibly an ex-wife) and two sons in Kenya albeit he claims to have lost contact with them due to his sexuality (which it will be recalled is not accepted). The Appellant claimed in evidence to have had a relationship with a man in the UK, but that relationship had broken down ([38]). He has some friends. He has not worked in the UK ([40]). There is no reference to his private life in the UK in his statement ([AB/44-47]. The letters of support from friends relate mainly to the protection claim. One of the friends is providing the Appellant with accommodation ([AB/58] and [AB/61]).

39. As the Respondent points out in her Rule 24 statement, the basis of the Article 8 claim made to the Judge was based on obstacles to integration into Kenyan society. At [44] of the Decision, the following submission is recorded:

> "… As a homosexual, the appellant would not be able to reintegrate into Kenyan society and therefore Article 8 of the ECHR is engaged in this case; and I should find that the appellant is a qualifying person under Section 117B of 2014 Act."

Given the way in which that submission was put forward it is perhaps unsurprising that the Judge went about the Article 8 analysis in the way he did. In any event, given that the only basis of the submission is based on sexuality (as also is the position in the Appellant's own statement), the brevity of the reasoning on this point at [64] is understandable.

40. Having regard to the evidence (or rather the lack of it) on the issue of very significant obstacles to integration, any error of reasoning is not material. The Appellant's grounds do not identify any evidence which the Judge is said to have failed to consider. Other than to submit that the reasoning was inadequate, Mr Pipi did not draw my attention to any evidence in submissions. The Appellant has simply failed to provide sufficient evidence of very significant obstacles meeting the high threshold implicit in that test. As the Judge rightly notes (at [64] of the Decision), the Appellant bears the burden of establishing his Article 8 claim and has failed to do so.

CONCLUSION

41. For the above reasons, the grounds do not disclose any material error of law. I therefore uphold the Decision.

Notice of Decision

I am satisfied that there is no material error of law in the decision of First-tier Tribunal Judge M A Khan promulgated on 5 June 2019. I therefore uphold that decision with the consequence that the Appellant's appeal remains dismissed.

Signed  Date: 8 August 2019

Upper Tribunal Judge Smith