Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01503/2019

THE IMMIGRATION ACTS

Decision Under Rule 34 Without a hearing **On 28th September 2020**	**Decision & Reasons Promulgated** **On 05th October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AHMED CHAYOWA LESHEVE
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Baker ('the Judge') promulgated on 24 January 2020 in which the Judge dismissed the appellant's human rights appeal.
2. The appellant was granted permission to appeal by First-tier Tribunal Judge Keane on 23 April 2020, the operative part of the grant being in the following terms:

> "Notwithstanding their length the grounds amounted in large part no more than a disagreement with the findings of the judge, an attempt to reargue the appeal and they did not disclose an arguable error or errors of law but for which the outcome of the appeal might have been different. It was contended (with some force) that in preparing the decision as long as four months after the date of the hearing the judge delayed inordinately. The author

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of the grounds contended that the delay rendered findings arrived at in respect of the appellant's credibility unsafe. Such however, was not a true characterisation of concerns advanced by the judge in the decision. The author of the grounds did not explicitly identify a claim made by or on behalf of the appellant which Judge rejected. Rather, the judge chose not to accord that weight to expert medical evidence in line with the appellant's counsel's submissions. Any procedural impropriety constituted by the judges delay even if an arguable error of law did not amount to a material error of law. The judge however, arguably did not have regard to all relevant considerations when considering the weight to be accorded the private life established by the appellant during his period of residence in the United Kingdom. It was common ground between the parties to the appeal that the respondent only made a decision in respect of the appellant's most recent application for leave to remain dated 16 January 2017 on 8 January 2019. Such a delay, amounting to very nearly 2 years, was arguably inordinate. In assessing the appellant's private life, the judge arguably should have taken into account such a period of delay as reinforcing the appellant private life. Nowhere in the decision did the judge to do so. It was common ground between the parties to the appeal that the appellant arrived in the United Kingdom on 7 April 2008 and his leave to remain in the United Kingdom expired on or shortly after 24 August 2010. The appellant had resided in the United Kingdom for a period greater than two years. At paragraph 36 of the decision, however, judge stated that, "Development of private life: has developed his private life in the UK at all times whilst his status was precarious". Such a finding that the appellant had developed his private life in the United Kingdom at <u>all times</u> [my underlining] while his status was precarious could not be reconciled with the agreed immigration history. Rather, the appellant had acquired a period of two years lawful residence and there was the additional period in the region of two years in which (through no fault of his own but attributable to the neglect of the respondent) he had to await a decision in respect of his most recent application. The judge arguably did not take into account all relevant considerations when assessing the appellant's private life. The application for permission to appeal is granted."

3. Following the grant directions were sent to the parties indicating a provisional view that the question of whether the Judge had erred in law in a manner material to the decision to dismiss the appeal could be determined without a hearing. The parties were invited to express their views in relation to such a proposal and to provide any further informational they sought to rely upon. Both parties have responded. At [18] of his submissions dated 25 August 2020 the appellant writes:

> "18. I would like there to be a hearing to decide the error of law issues in my case. I believe this is relevant as the Home Officers miscomputed my case and the First Tier Immigration Judge has further failed to properly assess it."

4. The respondent's position, set out in the response dated 18 August 2020, is that there is no need to have a hearing in any form to decide the error of law issue.

5. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
6. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
7. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> '34.—
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> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
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> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
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> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
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> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
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> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
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> (b) consent to withdrawal, pursuant to rule 17;
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> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
>
> (d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.'

8. It has not been shown to be inappropriate or unfair to exercise the discretion provided in Rule 34 by enabling the error of law question to be determined on the papers. Nothing on the facts or in law has been shown to make consideration of the issues on the papers not in accordance with overriding objectives at this stage. Consideration has been given to not only the submissions but also the evidence provided to the Judge in documentary form and the grounds of appeal when considering this question. Whilst the appellant may want to come along and speak to another judge in relation to this matter it is not made out there is anything factually or legally complex or that it is a case in which the interests of justice can only be served by there being an oral hearing. It is not made out there is anything that needs to be said orally that has not been said in writing

Background

9. The appellant is a citizen of Tanzania born on 13 February 1985. The appellant applied for leave to remain on the basis of his private life in

the United Kingdom and what he claims to be very significant obstacles to his integration to Tanzania, exceptional circumstances concerning his immigration history, and his health issues.

10. It was not made out before the Judge that the appellant has a partner, parents, or children in United Kingdom, or was able to succeed based on his family life either within or outside the Immigration Rules.

11. After carefully considering the documentary and oral evidence the Judge sets out her findings of fact from [27] of the decision under challenge. This is a detailed and carefully written determination in which the Judge assesses the merits of the appellant's claim under a number of relevant headings. For example, the appellant's mental health issues are considered that [27(q)] and the background evidence on healthcare provisions in Tanzania at [27(s)] and thereafter. The Judge notes the appellant has a diagnosed mental health disorder, paranoid schizophrenia, for which he receives ongoing treatment by assessment and medication. The Judge records that the appellant fears very significant obstacles to his integration including but not limited to his belief concerning the societal stigma in Tanzania attached to such mental health disorders, family rejection, and lack of state provision for mental health. At [32] the Judge writes:

> "32. Drawing together all my relevant findings above I conclude that the appellant would be regarded as an insider and so be accepted in Tanzania, not face discrimination by third parties nor rejection by his family. He also has his ability to use his skills in the employment market in Tanzania not limited to healthcare employment, which he has gained whilst in the UK. I find that he would be able to participate successfully in society in Tanzania not withstanding his diagnosis of paranoid schizophrenia just as he has done in the UK. I accordingly find there are not very significant obstacles to his integration into Tanzania. I find that he cannot qualify for leave to remain under paragraph 276ADE. I have reached this decision on the basis of all the evidence in this appeal."

12. The Judge then goes on to consider article 8 ECHR in a properly structured manner finding the appellant has private life recognised by article 8 in the United Kingdom and that the proposed interference with that private life, as a result of the respondent's decision, is of sufficient severity to engage article 8. The Judge identifies that the key question in the appeal is whether the respondent's decision is proportionate. The Judge adopts a 'balance sheet approach' to assessing proportionality setting out factors against the appellant between [36 – 38] and those in favour of the appellant between [39 – 43] before concluding that it was not made out that the appellant's circumstances are exceptional. The Judge considers section 117B finding little weight should be given to the private life the appellant has developed whilst his immigration status has been precarious. This is not a finding that the appellant has had no lawful leave to remain in the United Kingdom but recognition of the fact that any leave he had was not settlement or of a permanent nature and that for the majority of his time in the UK he has been an overstayer. The Judge finds when applying the balance sheet approach that the countervailing factors

do not outweigh the importance attached to the principles of legitimate immigration control and that whilst the appellant may face some difficulties on return to Tanzania they did not mean his article 8 rights will be breached. The Judge concludes at [45]:

> "45. Putting all the factors into the balance, I find that the interests of the appellant in the UK do not outweigh the interests of immigration control. I find that the balance does not come down in favour of those rights as against the principle of legitimate immigration control. I find that the hardship consequent on refusal of leave to remain does not go far enough beyond the baseline to make removal a disproportionate use of lawful immigration controls. The appellant can reasonably be expected to return to Tanzania where he could continue his life. The appellant can be expected to reintegrate into that country and make a life for himself there. I find that the interference with the appellant's rights to a private life is not of such a level as to breach those rights and that the decision to refuse leave to remain is therefore proportionate under Article 8 of the European Convention."

Error of law

13. In relation to the time it took to provide the determination, date of hearing 18 September 2019 date of promulgation 24 January 2020, such delay does not per se automatically makes the decision unsafe sufficient to amount to a procedural impropriety or material error. The appellant claims that in a case in which credibility was an issue the evidence in the proceedings would not have been fresh in the mind of the Judge when she sat down to consider his case. The appellant asserts such a proposition applies whether it is an asylum or human rights case and that the delay amounts to a travesty of justice.
14. It is accepted that the First-tier Procedure Rules make provision for the period in which it is hoped a judge of that tribunal will promulgate their decision but it is not made out that if a decision cannot be made within such period a procedural irregularity occurs. The wording of the relevant rule is also important. It reads:

> 'Decisions and notice of decisions
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> 29.— (1) The Tribunal may give a decision orally at a hearing.
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> (2) Subject to rule 13(2) (withholding information likely to cause serious harm), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) which disposes of the proceedings—
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> (a) a notice of decision stating the Tribunal's decision; and
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> (b) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.'

15. It is not made out the period in which the decision was provided is outside that when it was reasonably practicable to provide the same.
16. The case law is also against the appellant on this point. In Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC) it

was held that to establish that a delay in the promulgation of a decision has led to an error of law it has to be shown that the decision was not safe and therefore unlawful. There must be a nexus between the delay and the safety of the decision: see Secretary of State v RK (Algeria) [2007] EWCA Civ 868.

17. The Court of Appeal in R (on the application of SS (Sri Lanka) v SSHD [2018] EWCA Civ 1391 approving the decision in Arusha and Demushi held that there was no rule that delay of more than three months rendered the decision unsafe. The correct approach was to ask whether the delay had caused the decision to be unsafe so that it would be unjust to let it stand. The only significance of the fact that delay between the hearing and the decision exceeded three months was that, where the decision is challenged on an appeal, the Upper Tribunal should examine the FTT judge's factual findings with particular care to ensure that the delay has not caused injustice to the appellant.

18. The factual findings made by the Judge have been carefully considered in accordance with the guidance provided by the Court of Appeal by considering not only the determination holistically but also the evidence relied upon by the appellant in support of his appeal. It is noted the Judge took a clear legible typed note of the proceedings and had access to not only the statements and other evidence but also to submissions made on the appellants behalf. A clear understanding of the issues in the appeal and evidence given can be ascertained by a reader of this material even though not the judge who heard the case. It is not made out the Judge’s decision is unsafe so that it will be unjust to let it stand. No injustice is made out to the appellant in relation to the alleged delay and is not made out the period after which the Judge promulgated the decision supports the appellant’s claim of procedural impropriety sufficient to amount to a material error of law.

19. The appellant also asserts a failure by the Judge to consider delay by the respondent in the decision-making process of some two years. Such claim is without arguable merit. The Judge was clearly aware of the chronology as a reading of the decision shows. The Judge was not required to set out findings in relation to each aspect of the evidence provided it was properly considered, which I find is the case. In EB (Kosovo) (FC) v SSHD [2008] UKHL 41 the House of Lords said that delay could be relevant in three ways. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. To the extent that it is true the applicant’s case will be strengthened. Secondly, delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as relevant to the quality of the relationship. With delay the sense of impermanence in such a relationship will fade.

Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results. The Supreme Court in Agyarko [2017] UKSC 11 considered (para 52), referring to EB (Kosovo) that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish or looking at the matter from the opposite perspective, the weight to be given to precarious family life was liable to increase if there was a protracted delay in the enforcement of immigration control.

20. Delay of two years in making a decision in the context of immigration and asylum applications in the United Kingdom is not arguably excessive. I appreciate that for an individual applicant awaiting a decision on their application the same could be very frustrating but the appellant failed to establish, either before the Judge or in his grounds of appeal, that any delay that occurred in making the decision was sufficient on the facts to render the respondent's decision unlawful. The delay enabled the appellant to further develop his private life in the United Kingdom and to benefit from the medical care and assistance he received from the UK authorities. The Judge clearly took into account the appellant's evidence regarding this aspect and accepted that he had established private life in United Kingdom and the nature of the same. It is, however, the case as noted by the Judge that despite the appellant having being in the United Kingdom since 7 April 2008, at that time a period of eight years and nine months at the date of the hearing, his time was made up by a mixture of lawful, unlawful, and section 3C residence rights, with no evidence that the appellant had ever been granted settled status.

21. It is not clear why Judge Keane granted permission in relation to the Judge's finding that little weight should be given to the private life relied upon by the appellant whilst his immigration status was precarious. In Rhuppiah [2018] UKSC 58 it was held, referring with approval to AM, that a person's status is precarious if he has leave to remain which is other than indefinite. Considering the nature of the appellant's previous leave and lack of a right to remain when the same expired, his status has always been precarious. The provision of section 117(5) of the 2002 Act required the Judge to apply little weight to the private life developed during such a period. There was nothing made out before the Judge to suggest that this was a case in which judicial discretion should be exercised to attribute greater weight to the appellant's private life than the Judge did, on the facts.

22. The appellant also relies upon an argument the Judge failed to adequately consider and assess his medical condition asserting in his submissions of 25 August 2020 that the Judge failed to adequately consider his position in accordance with the judgement in AM (Zimbabwe) [2020] as the Judge only applied the threshold required in N v the United Kingdom [2008] 47 EHRR 39.

23. A reading of the decision under challenge does not show the Judge relied upon any specific authority and the assertion the Judge failed to apply the law relating to the appellant's medical condition or to give legal reasons as to why they are insufficient to engage article 3 or 8

has no arguable merit when the decision is read as a whole. It is also the case that the Supreme Court handed down its decision in AM (Zimbabwe) [2020] UKSC 17 on the 29 April 2020 and was not a decision the Judge could have taken into account as it did not exist at the date the Judge's decision was promulgated. The decision under challenge shows the Judge clearly assessed the merits of the medical aspect of the appellants claim in accordance with the guidance of the Court of Appeal in force at that time.

24. It is also clear the Judge considered the medical evidence provided, background evidence on healthcare provisions in Tanzania, and gives adequate reasons for why the appellant was unable to succeed under either article 3 or 8 ECHR.

25. It is not disputed that the Supreme Court in AM lowered the threshold previously established in N v UK but it still maintained a high threshold by reference to the applicable test. The finding of the Judge that the appellant could not succeed on medical grounds is a finding, if transposed into the judgement in AM, that he could not meet that test. There was nothing in the medical evidence before the Judge, including the expert reports, to support a claim that he could as it was not made out that he will face a real risk of being exposed to a serious, rapid, and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy and that any serious, rapid, or reversible decline in health leading to intense suffering or the substantial reduction in life expectancy would arise as a result of the absence of appropriate treatment in the receiving country or the lack of access to such treatment. The Judge finds that medical assistance or treatment that was required is available in Tanzania which has not been shown to be a finding infected by arguable legal error.

26. Reference by the appellant to paragraphs EX.1 and EX.2 do not assist him as these are not freestanding provisions and appendix FM is not relevant or applicable on the facts. Paragraph 276ADE was properly considered. There was nothing in the facts as found by the Judge to suggest the appellant would face very significant obstacles on his return to Tanzania or that such return would result in unjustifiably harsh consequences.

27. Whilst the appellant disagrees with the Judge's findings and conclusions and wishes to remain in the United Kingdom the grounds fail to establish arguable legal error sufficient to warrant the Upper Tribunal interfering any further in this matter. This is a carefully considered and written decision in which a very experienced judge clearly took the required degree of care to establish the factual matrix, in ensuring the correct legal provisions applicable at the date the decision was handed down were applied, and in providing adequate reasons in support of the findings made. The appellant fails to establish anything procedurally improper or wrong in the way in which the Judge assessed the proportionality of the respondent's decision meaning the only challenge arguably open to the appellant will be on public law grounds. It is not made out there is anything arguably irrational or perverse in the Judge's conclusions. There is no material legal error in the Judge's decision which shall therefore stand.

Decision

28. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 28 September 2020