Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09784/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated On**
On 17 May 2019	**04 July 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

GM
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sills (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 27 November 2018, following a hearing of 21 November 2018, and which it sent to the parties on 30 November 2018. The tribunal decided to dismiss the claimant's appeal against the Secretary of State's decision of 27 July 2018, refusing to grant him international protection.

2. The tribunal granted the claimant anonymity. Nothing was said about that before me but I have decided to maintain the status quo and to continue that grant. Accordingly, the claimant is not named in this decision.

3. By way of background, the claimant is a national of Rwanda and was born on 28 May 1987. He entered the United Kingdom (UK), lawfully, on 16 September 2016. Indeed, prior to coming to the UK he had obtained a visa permitting him to study in the UK. He was given leave to enter until 30 January 2018 and made his claim for international protection (it appears) on that very day.

4. Shorn of all of but the essentials, the account relied upon by the claimant when seeking international protection may be summarised as follows: In 2014 the claimant became involved with the Rwandan National Congress (RNC) which is an oppositionist party based in Rwanda. He played an undercover role in co-ordinating the work of the party along with other individuals two of whom were arrested in April of 2014. The claimant himself was arrested on 25 May 2014 and was subjected to questioning, threats and ill treatment prior to being released. In June 2014 he travelled to the USA so that he could be trained for a role he had obtained with an American NGO. Following his training he returned to Rwanda and in January 2015 he travelled to Uganda but on return, was stopped and questioned by the Rwandan police. He was physically ill-treated and items, including his laptop computer were taken from him. He was, however, released on the following day. Having considered his situation, he decided it would be safer if he were to secure employment in a different area to where he had previously been based. So, he went to Karongi in Rwanda. However, whilst there, rumours spread that he was actively recruiting members for the RNC. That drew the attention of the authorities. It was suggested to him that in those circumstances he might wish to leave Rwanda for his own safety and it was that, he says, which prompted him to obtain a Rwandan passport and apply to study in the UK. He says that once in the UK he felt safer and hoped that things would change in Rwanda so that he could safely return. However, he subsequently received news that one of his former political associates had been killed and, in January of 2018, he received an email from an unknown source (but he believes it was from a contact of his) which had attached to it a summons requiring him to attend at a Rwandan police station. He says it was that which prompted him to claim international protection when he did.

5. The Secretary of State did not believe that the claimant had given a truthful account of events and neither, upon appeal, did the tribunal. Indeed, in its written reasons of 27 November 2018, the tribunal devoted much time to a detailed explanation as to why it was rejecting the account. That consideration started with an assessment of the position under section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. It is perhaps worth setting out the salient part of section 8 which has been in its current since 20 October 2014 and so, in that form, for all relevant dates material to this appeal. It relevantly provides:

> **8. Claimant's credibility**
>
> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority will take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks –
>
> (a) is designed or likely to conceal information,
>
> (b) is designed or likely to mislead, or
>
> (c) is designed or likely to obstruct or delay the handling or resolution of a claim or the taking of a decision in relation to the claimant.

(3) Without prejudice to the generality of sub-section (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead-

(a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,
(b) the production of a document which is not a valid passport as if it were,
(c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,
(d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or of a document connected with travel, and
(e) failure without reasonable explanation to answer a question asked by a deciding authority.

(4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.

(5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.

(6) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless –

(a) he had no reasonable opportunity to make the claim before the arrest, or
(b) the claimant relies wholly on matters arising after the arrest.

5. Subsection 7 contains a number of definitions. The phrase "safe country" is defined as being "a country to which Part 2 of Schedule 3 applies". As to that, there is a list of countries appearing at paragraph 1 of Part 1 to Schedule 3 and which includes, amongst others, France, Belgium and Bulgaria. I mention those because they were mentioned by the tribunal at paragraph 26 of its written reasons which I shall set out below. So, that is what section 8 says.

6. In dealing with section 8 matters the tribunal, in its written reasons, said this:

"Section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and Paragraph 339L of the Immigration Rules

23. The Respondent says that the Appellant's failure to claim asylum until the day his student visa was to expire seriously undermines his credibility. Section 8 provides:
(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
(2) This section applies to any behaviour by the claimant that the deciding authority thinks – (a) is designed or likely to mislead, or (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.
(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead – (c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport.
(4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.
(12) this section shall not prevent a deciding authority from determining not to believe a statement of the grounds of behaviour to which this section does not apply.

24. The Appellant accepts that he did not claim asylum on arrival in the United Kingdom, or at any time thereafter, until shortly before his visa was due to run out, when he

made an appointed [sic] to make an asylum claim, an appointment he attended on 30 January 2018.

25. In his screening interview he said, 'I came as a student but also wanted safety because my life was in danger in my country', suggesting that his experiences in Rwanda were a reason for coming to the United Kingdom. In his asylum interview, when asked why he had not claimed asylum on arrival, he said 'I had come to study, on a student visa, because I had come as a student but with no security I continued the chance of studying I was to continue my studies because I was in a country which was peaceful, I therefore could continue my studies, because I was peaceful.' He said he had never intended to return to Rwanda. In his witness statement he suggests that he 'closely followed what was going on home [sic] with hopes the situation would change for me to return.' In evidence he said he feared being refused entry if he had claimed at the airport, and thereafter he thought he would be expelled if he claimed and he wanted to finish the course he was studying. He said that he was prompted to claim when he received the email in January 2018 attaching the police summons.

26. I am therefore satisfied that he entered the country and failed to claim asylum when he had an opportunity to do so. He thereafter failed to claim when he had ample opportunity to do so. He thereafter failed to claim when he had ample opportunity. He travelled, on his own account, to France, Belgium and Sofia (Bulgaria). He had the opportunity to claim on arrival back in the United Kingdom each time. He did not do so. I find the explanation he gives for his delay in claiming to be wholly unimpressive. If he was in fear, as he claims, I find it difficult to accept that he would wait until the 'eleventh hour,' to seek international protection. Given the number of opportunities he had to claim, his clear education and intelligence, and his ability with the English language, I consider his failure to claim earlier to be significantly damaging to his credibility. That said, this is only one factor to weight in the balance when considering his case. I am mindful, and it is clear, that this does not in itself justify refusal of a claim".

7. Then, having said what it had wanted to say about section 8, the tribunal set out a number of matters which it thought weighed against the claimant with respect to its credibility assessment. It did so in an extensive passage commencing at paragraph 27 and concluding at paragraph 46. I have not found it necessary to set all of that out for the purposes of this decision. But I would observe, at this stage, that it would not be inappropriate to describe the tribunal's reasoning as set out in that passage as being cogent.

8. The issuing of the tribunal's decision was followed with an application for permission to appeal to the Upper Tribunal. The grounds as drafted were thought to be unpersuasive by a Judge of the First-tier Tribunal who refused permission and by a Judge of the Upper Tribunal who granted it. It is not necessary for me to say anything more about them. But the granting Upper Tribunal Judge took a point concerning the tribunal's treatment of section 8 of the 2004 Act and relevantly said this:

> "2. However, the First-tier Tribunal Judge has started his credibility findings with making findings under section 8 of the 2004 Act. Arguably, that is an error of law since it will have undoubtedly influenced the Judge in consideration of his other findings. As a result, it may be that the Appellant has been denied a fair hearing. On this ground only, I grant permission".

9. So, the grant was limited. Permission having been granted, albeit on limited grounds, the case was listed before the Upper Tribunal (before me) for an oral hearing so that it could be decided whether the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative.

10. Mr Sills drew my attention to the decision of the Upper Tribunal in *SM (Section 8: Judge's Process) Iran* [2005] UKAIT 00116 and the judgment of the Supreme Court in *JT (Cameroon) v Secretary of State for the Home Department* [2008] EWCA Civ 878. He argued that, when taken together, that decision and that judgment meant it was impermissible for a tribunal to "compartmentalise" its consideration of the section 8 issues and that it should not, or at least need not, commence its credibility assessment with a consideration of section 8. It should also read in the word "potentially" in section 8(1) immediately prior to the word "damaging". The tribunal here had fallen foul of all of that and had not considered section 8 points as part of a holistic credibility consideration but rather had effectively elevated the status of the section 8 points in a way which had prejudiced its consideration of the other credibility aspects. Further, it had not actually specified, in circumstances where it should have done, what behaviour it was relying upon as offending section 8 and had not explained how section 8, in its view, applied at all. Mr Diwnycz, whilst not formally conceding, struck a conciliatory note by expressing the view that the tribunal's approach to section 8 was "open to serious criticism". As I understand it (though my understanding may be wrong) he also seemed to suggest (and if this was the suggestion I disagree with it) that generally speaking it would not be open to a tribunal to take an adverse credibility point against a claimant with respect to delay in claiming so long as the claimant had lawful leave to remain in the UK during the period of any such alleged delay.

11. I agree with Mr Sills that the tribunal did not, in terms and with reference to the content of particular sub-sections of section 8, specify the behaviour of the claimant which it thought offended the provisions of section 8. But it seems to me clear from what it said in the passage I have set out above and in particular from the content of paragraph 26 of the written reasons, that it had in mind what it found to be an unexplained or inadequately explained delay in claiming international protection from the point of the claimant's arrival in the UK. So, although there was some discussion at the hearing as to whether it might have had other section 8 provisions in mind, I have proceeded on the basis that it was deciding the claimant had fallen foul of section 8(4) of the 2004 Act. But I am not sure that it was open to the tribunal to do that or, at least, not in the way that it did. It seems to me (and no cases on this issue were cited before me) that section 8(4) primarily contemplates behaviour on the part of a claimant who passes through safe countries, as defined, on his/ her way to the UK and who spurns the opportunity of seeking international protection in any of those countries. The UK itself does not appear in the list of safe countries I have referred to above. That would be consistent with what I think the purpose of section 8(4) is (see above). I have not found it necessary to actually decide whether delay in claiming after arrival in the UK is capable of falling within the ambit of section 8(4) but it seems to me, on the basis of the material and arguments before me, that there is sufficient uncertainty about the point to have required an explanation from the tribunal, which it did not give, as to why given the way the subsection is expressed the internal delay it was relying upon fell within its terms. Interestingly, though, the tribunal did note that, after arriving in the UK, the claimant had travelled to France, Belgium and Bulgaria. It made the point about that that he had had "the opportunity to claim on arrival back in the United Kingdom each time" and had not done so. But it may be that it would have been open to the tribunal to have regarded the failure to actually claim in those three countries as falling within section 8(4) but that is not what it did. I should add that if the tribunal had section 8(5) in mind instead, once again as explanation as to why it thought it applied was required. If section 8 is relied upon there does need to be certainty as to which of its

provisions are thought to apply as well as why it is thought one or more does even though an explanation as to all of that will not normally need to be detailed.

12. As to holding the delay in claiming against the claimant, notwithstanding his existing grant of leave, I see nothing to say that such was not permissible. The tribunal, at paragraph 26, reasoned out why it thought, in the circumstances of this particular case, such a delay was damaging to his credibility. Its conclusion as to that, of course, comprised part of (indeed the nub of) its section 8 assessment. But interestingly, it seems to me that irrespective of section 8 and its existence, it would have been open to the tribunal to have taken a general adverse credibility point stemming from the delay if it had wished to do so anyway.

13. Whilst it seems to me it will not be good practice for a tribunal to commence a credibility assessment with its findings as to the position under section 8, it does not seem to me that the positioning of such points at the outset of a credibility assessment is, of itself, an error of law. As Mr Sills recognises, whilst the Upper Tribunal in *SM* decided that section 8 did not require the behaviour to which it applies to be treated as the starting point of the assessment of credibility, it did not say that such was precluded. Further, the Supreme Court in *JT*, cited above, did not (see paragraph 16) regard the positioning of the section 8 assessment "as necessarily fatal". The point that does emerge, though, from that decision and that judgment is that section 8 considerations are not to have an elevated status and should only be a component of an overall credibility assessment. I agree with Mr Sills that the tribunal, given the way it has expressed itself in its written reasons, has at least given the appearance of having compartmentalised its section 8 assessment. Further it appears to have reached a view as to section 8 and then looked at general credibility considerations, having already reached a view as to section 8 first of all. It has given the appearance of having then looked at general credibility through the lens of its adverse section 8 conclusion. I have decided that in so doing, it has erred in law. Indeed, insofar as it is relevant, it does appear that, to a large extent, it has made the same mistake which had been made by a tribunal in the case which ultimately led to the Supreme Court's judgment in *JT*.

14. It does not necessarily follow that, simply because I have identified an error of law in the tribunal's approach, that its decision has to be set aside. I have asked myself whether it can be said that the error I have identified was not material and could not therefore, have affected the outcome of the appeal, given what I perceive to be the cogency of the adverse credibility findings which have been made independently of section 8. Indeed, it seems to me that if the tribunal had not referred to section 8 at all and had simply based its adverse credibility findings on what it perceived to be an inadequately explained delay in claiming (notwithstanding the grant of leave) alongside the various other points which it made, it would have been very difficult to have faulted it. But Mr Diwnycz did not seek to argue before me that any error might not have been material. Further, I have not found myself able to dismiss the possibility that had the tribunal not undertaken a separate section 8 consideration prior to addressing the remaining credibility concerns and had it not found the claimant's credibility to be damaged to a significant extent due to the section 8 considerations, it might (though I am far from saying would) have taken a different view. So, I cannot be satisfied that, had it not made the error it did, it would nevertheless have reached the same outcome. That does mean I have to set aside its decision. But I do so with regret bearing in mind the obvious care and depth of thought which has gone into the making of the decision by the tribunal.

15. the next thing to consider is whether I should remake the decision myself in the Upper Tribunal or whether I should remit. Since I have concluded that the credibility assessment is unsafe it follows that the tribunal's findings are unsafe. In those circumstances it is not appropriate for me to preserve any of the findings. So, there will have to be a complete rehearing. Given that, it seems to me that the most appropriate course of action is remittal. That then is what I have decided to do. Since I am remitting I am statutorily obliged to give directions to the tribunal for the remaking of the decision. I set out those directions now:

Directions for the rehearing

A. The decision of 27 November 2018 has been set aside. None of the tribunal's findings and conclusions are preserved. In those circumstances, there shall be a complete rehearing of the appeal before a differently constituted First-tier Tribunal (a different Judge). That hearing shall take place at the Bradford hearing centre with a time estimate of three hours. A Kinyarwandan speaking interpreter shall be provided for the benefit of the claimant.

B. The First-tier Tribunal rehearing the appeal shall consider all matters, both fact and law, entirely afresh.

C. These directions may be replaced, supplemented or amended at any time by any Salaried Judge of the First-tier Tribunal in the Immigration and Asylum Chamber.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. Further, the case is remitted to the First-tier Tribunal for a complete rehearing.

Anonymity

The First-tier Tribunal granted the claimant anonymity. I continue that grant under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. That grant applies to all parties to the proceedings. No report of these proceedings shall name or otherwise identify the claimant or any member of his family. Failure to comply may lead to contempt of court proceedings.

Signed: **Dated: 2 July 2019**

M R Hemingway
Judge of the Upper Tribunal