Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/13076/2019 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 9 October 2020 **On 16 October 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

KEN ROGERS KAMIDI ENDASE

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr M McHardy, Hatten Wyatt Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS (P)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion

of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Kenyan national with date of birth given as 20.5.85, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 7.1.20, dismissing his human rights appeal against the decision of the Secretary of State, dated 23.7.19, to refuse his application for Indefinite Leave to Remain on the basis of 10 years' long residence pursuant to paragraph 287B of the Immigration Rules.

2. The relevant background is that the appellant first came to the UK as a student in 2004. However, he returned to Kenya in 2006 and came back to the UK more than 6 months later in September 2006. He made a further visit to Kenya in 2009. In November 2009 he applied for further Leave to Remain as a Tier 4 student, which application was invalid for non-payment of the fee. A letter informing him that his application had been rejected as invalid was sent to the appellant in March 2010 at the address he had given for correspondence. However, he claims not to have received this letter and to have believed that his application remained outstanding until he purported to vary a human rights application in September 2016 to one based on long-residence under the Rules. It is the refusal of this last application which is the subject matter of the appeal.

3. As part of the considerations in the First-tier Tribunal, the judge rejected his claim not to have received the Home Office letter in March 2010. Noting that the human rights claim related to private life only, the judge went on to conduct the article 8 proportionality balancing exercise, concluding that the refusal decision was proportionate and, therefore, dismissed the appeal.

4. The grounds as drafted assert (1) that the judge failed to consider whether the appellant's claimed sexual orientation would be an "insurmountable obstacle to his return to live in Kenya," (an incorrect formulation of the test under the Rules), and (2) that the respondent failed to provide evidence that the letter of 9.3.10 was given to the appellant. The inference of this second ground is that the appellant's leave continued from his last entry to the UK on 7.9.06.

5. In granting permission on 27.5.20 on all grounds, First-tier Tribunal Judge Gumsley considered it arguable that the First-tier Tribunal Judge erred in law in failing to have any regard to the appellant's claim to be of gay sexual orientation when considering the article 8 claim.

6. In relation to service of the letter rejecting the Tier 4 application made in time on 27.11.09, I am satisfied that in point of fact this was not a refusal of leave to remain but a letter informing him that his application was invalid for non-payment of the fee. It follows that as there had been no valid application, there could be no refusal to grant leave. The legal effect is that the appellant's leave simply continued until it expired on 30.11.09, so that thereafter the appellant became an illegal overstayer with

no valid immigration status. It follows that his continuous leave was broken on the expiry of his leave in 2009.

7. In any event, even if I am wrong in concluding that the March 2010 letter was not a refusal of leave, Articles 8ZA & 8ZB of the Immigration (Leave to Enter and Remain) (Amendment) Order 2013 provide that:

> ***"Grant, refusal or variation of leave by notice in writing***
>
> ***8ZA.*** *- (1) A notice in writing –*
>
> *(a) giving leave to enter or remain in the United Kingdom;*
>
> *(b) refusing leave to enter or remain in the United Kingdom;*
>
> *(c) refusing to vary a person's leave to enter or remain in the United Kingdom; or*
>
> *(d) varying a person's leave to enter or remain in the United Kingdom, may be given to the person affected as required by section 4(1) of the Act as follows.*
>
> *(2) The notice may be –*
>
> *(a) given by hand;*
>
> *(b) sent by fax;*
>
> *(c) sent by postal service to a postal address provided for correspondence by the person or the person's representative;*
>
> *(d) sent electronically to an e-mail address provided for correspondence by the person or the person's representative;*
>
> *(e) sent by document exchange to a document exchange number or address; or*
>
> *(f) sent by courier.*
>
> *(3) Where no postal or e-mail address for correspondence has been provided, the notice may be sent –*
>
> *(a) by postal service to –*
>
> *(i) the last-known or usual place of abode, place of study or place of business of the person; or*
>
> *(ii) the last-known or usual place of business of the person's representative; or*
>
> *(b) electronically to –*
>
> *(i) the last-known e-mail address for the person (including at the person's last-known place of study or place of business); or*
>
> *(ii) the last-known e-mail address of the person's representative.*
>
> *(4) Where attempts to give notice in accordance with paragraphs (2) and (3) are not possible or have failed, when the decision-maker records the reasons for this and places the notice on file the notice shall be deemed to have been given.*
>
> *(5) Where a notice is deemed to have been given in accordance with paragraph (4) and then subsequently the person is located, the person shall as soon as is practicable be given a copy of the notice and details of when and how it was given.*

> *(6) A notice given under this article may, in the case of a person who is under 18 years of age and does not have a representative, be given to the parent, guardian or another adult who for the time being takes responsibility for the child.*
>
> ***Presumptions about receipt of notice***
>
> ***8ZB. -*** *(1) Where a notice is sent in accordance with article 8ZA, it shall be deemed to have been given to the person affected, unless the contrary is proved –*
>
> *(a) where the notice is sent by postal service –*
>
> *(i) on the second day after it was sent by postal service in which delivery or receipt is recorded if sent to a place within the United Kingdom;*
>
> *(ii) on the 28th day after it was posted if sent to a place outside the United Kingdom;*
>
> *(b) where the notice is sent by fax, e-mail, document exchange or courier, on the day it was sent.*
>
> *(2) For the purposes of paragraph (1)(a) the period is to be calculated excluding the day on which the notice is posted.*
>
> *(3) For the purposes of paragraph (1)(a)(i) the period is to be calculated excluding any day which is not a business day.*
>
> *(4) In paragraph (3) "business day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971(2) in the part of the United Kingdom to which the notice is sent."*

8. It follows that there is a process for deemed service by sending by post and in respect of which the burden is on the appellant to prove non-receipt.

9. The First-tier Tribunal Judge accepted the assertion that the letter had been sent by post to the address given by the appellant for correspondence, and that it had twice been returned marked that the appellant had gone away. Mr McHardy complained that no formal evidence was given but I am satisfied that the judge was entitled to accept what the Presenting Officer told him about the sending of the letter, as evidently this had simply been gleaned from the Home Office computer system.

10. Whilst the presumption that a 'notice' had been served can be rebutted, the judge disbelieved the appellant and was satisfied that he received the letter. Even if he did not receive the letter, and even if it was a 'notice' of refusal of leave, rather than merely a letter as I am satisfied it was, then by sending it by post it was deemed to have been given to the appellant in accordance with Article 8ZA, whether or not it was physically received by him. On the findings of the judge, the appellant failed to rebut the presumption by proving he did not receive it.

11. In a related issue, Mr McHardy sought to take what he claimed was a *Robinson obvious* point not raised as a ground of appeal, suggesting that at]35] of the decision the judge made a speculative finding that it was likely that the appellant or his sister has returned the correspondence stating that he had gone away. There is no merit in this point as it is not material to the outcome of the appeal. The judge provided cogent reasons for disbelieving the appellant's claim that he had not received the

letter and how it came to be returned was irrelevant and a mere observation rather than a material finding of fact. In the circumstances, I do not give leave to argue this additional point.

12. It follows from the above that the appellant's last valid leave expired in 2009, his lawful leave was broken at that point and, therefore, he cannot demonstrate 10 years' continuous lawful residence in the UK. In addition, the refusal decision of 23.7.19 explains that the application was also refused for failure to meet the English language requirement of 276B(iv). The application also fell to be refused on the grounds that the appellant was in the UK in breach of immigration laws. Mr McHardy accepted that under the Rules the long-residence application failed to meet the requirements.

13. It follows that the long residence application made under the Immigration Rules was doomed from its inception and I also find that there is no error of law in the decision of the First-tier Tribunal in relation to the letter sent to him on 9.3.10, whether or not it was a refusal of leave or merely a rejection of his application as invalid.

The Sexuality Claim

14. The remaining ground of appeal relates to the issue of very significant obstacles to integration in Kenya, pursuant to paragraph 276ADE and relies on the appellant's claimed sexuality as a gay man.

15. Reliance is made on the fact that his claimed sexual orientation was raised at D17 of his application form, where the appellant claimed that as a homosexual he would likely face inhumane and degrading treatment on return to Kenya. As made, the claim was clearly a protection claim, the appellant making no reference to integration *per se*. I note from the refusal decision of 23.7.19, that the respondent was aware of the sexual orientation claim but declined to consider it, stating: "*You have stated in your representations that you have a fear of return to Kenya as a result of your sexual orientation. If you feel you are unable to live in any part of Kenya because you fear persecution, you can apply for leave on protection grounds, also known as claiming asylum*." The sexual orientation claim is also raised in the grounds of appeal to the First-tier Tribunal, where it is pleaded as 'exceptional circumstances'.

16. I also note that at the appeal hearing, the appellant's representative handed in the CPIN for Kenya: 'Sexual Orientation and Gender Identity', dated March 2017, which points out that same-sex activity between men is criminalised in Kenya but that the police do not generally target and prosecute LGBT persons. However, at 2.3.9 of the overview or summary it states: "*In general the evidence available does not establish that LGBT persons are likely to be subject to persecution or serious harm by the state*." Whilst societal attitudes are said in the CPIN to be generally intolerant of LGBT persons, I am satisfied that alone does not give rise to a well-founded fear of persecution. I am satisfied that the evidence contained within the CPIN could not of itself discharge on the balance of probabilities the burden to prove that on return to Kenya the appellant would be persecuted for being a gay man on return. In this regard Mr McHardy also accepted that the burden on the appellant in an article 8 claim was more difficult to

discharge, being on the balance of probabilities as opposed to the lower standard of proof in a protection claim. Other than the appellant's own assertions of a fear of return, the CPIN was the only evidence adduce in support.

17. I also note from the grounds that the appellant's legal representatives wrote to the respondent before the appeal hearing, suggesting that the First-tier Tribunal appeal hearing be adjourned to allow the respondent sufficient time to consider the sexual orientation claim, but the respondent evidently declined to do so without a formal application for international protection. The respondent's position at the First-tier Tribunal appeal hearing appears to have been that this was a 'new matter' and it was open to him to make an asylum claim on the basis of his sexual orientation but had not done so. There is no indication that the respondent consented to this new matter being considered when it had not been considered in the refusal decision.

18. If this was a 'new matter', only with the respondent's consent could the judge consider it. Mr McHardy denied that it was a new matter, on the basis that it had been raised by the appellant in his application and that it had been considered but rejected by the respondent. That is not accurate, as pointed out above, the respondent declined to address it in the context of a claim for Indefinite Leave to Remain on grounds of long residence and in the alternative on article 8 private life grounds. I am not satisfied that merely raising what was clearly a protection claim in private life claim is sufficient. In his application the appellant did not raise his sexual orientation as an issue for integration. In his undated witness statement prepared for the First-tier Tribunal appeal hearing he stated, "I am a homosexual and have a genuine fear of returning to Kenya as a result of my sexual orientation." In his oral evidence, according to the judge's typed contemporaneous notes of evidence, the appellant stated that he had been homosexual all of his life and confirmed that he did not have any problems because of his sexual orientation when he returned to Kenya in 2009 and did not have any problems when he was younger because he had no partners. It is clear that the First-tier Tribunal Judge considered the CPIN but pointed out that the appellant had not made a claim for international protection against return to Kenya on the basis of being a gay man and declined to consider the issue further.

19. However, in his submissions to the First-tier Tribunal and in the appeal to the Upper Tribunal, Mr McHardy framed the sexuality issue rather differently to how it was originally pleaded in the appellant's application. Mr McHardy now asserts that the CPIN was potentially sufficient to demonstrate 'very significant obstacles to integration' on return to Kenya and more particularly as 'exceptional circumstances' in the article 8 proportionality assessment outside the Rules. As recorded by the First-tier Tribunal Judge at [28] of the decision, Mr McHardy submitted that "*the appellant's sexuality was an additional factor which when taken in the round added to the claim that his removal would breach his right to a private and family life, it went to proportionality*." At [38] of the decision, the judge considered the submissions and noted that the appellant stated that although he had not experienced any hardship in Kenya as a result of sexuality, he claimed that because homosexuality was illegal he could not express himself openly and that this "*should be another factor taken into account in considering whether requiring him to return to his country of origin would be a*

disproportionate act on the part of the respondent." However, at [41] the judge concluded that as the respondent had not been given the opportunity to consider whether the appellant's claimed sexuality is credible, it was not appropriate to simply accept as a fact that he is gay and to rely on this to add weight to his claim that his return is disproportionate.

20. In his skeleton argument, Mr McHardy relies on SSHD v Kamara [2016] EWCA Civ 813, where it was held that the concept of 'integration' calls for a "*broad evaluative judgement to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life*." Mr McVeety accepted the general principle but pointed out that Kamara does not indicate that a protection claim must be considered under the heading of integration in a human rights claim. Mr McVeety complained that this is yet another attempt by an appellant to make a protection claim "*by the back door*."

21. After due and careful consideration, I am not satisfied that even if the judge had considered the sexuality claim in the way contended for by Mr McHardy, any different outcome to the appeal could or would have ensued; the evidence relied on, including the CPIN, is simply insufficient, particularly when it is also to be noted that the appellant returned to Kenya for some 7 months in 2006 and made another visit in 2009, without any difficulties at all relating to his sexuality, which rather undermines the claim of very significant obstacles to integration. He has also admitted that he had no difficulties in Kenya as a young man before coming to the UK. It is difficult to see on what basis either very significant obstacles to integration or exceptional circumstances falling short of a well-founded fear of persecution or presenting a real risk of serious harm could ever a grant of leave outside the Rules could be made out. The alternative would be the startling proposition that the mere claim of being gay was sufficient to make return to Kenya disproportionate.

22. In the circumstances, even if the judge should have considered or taken into account the appellant's sexual orientation as relevant to the human rights claim, either under 276ADE or outside the Rules on article 8 private life grounds, I am satisfied that there was no sufficient evidential basis upon which the judge, properly directed, could have reached a conclusion either that there were very significant obstacles to integration, or, alternatively, such exceptional circumstances as to render the refusal decision unjustifiably harsh, on the basis of the appellant's claimed sexual orientation and the facts of this case. In relation to the relevance in the proportionality balancing exercise, as I pointed out to Mr McHardy, the appellant has not been required to leave the UK by the respondent's decision but was clearly advised to make his protection claim in the proper way, which requires it to be made in person. It is difficult to see how, where the appellant is not subject to removal, the respondent's insistence that before such a claim is considered he make a claim for international protection in the proper way, can be disproportionate. There was a route open to him to resist removal on such a ground, but he declined to pursue it. I am satisfied that

the respondent's approach to this issue in the context of a long residence and human rights claim was entirely proportionate.

23. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup Date: 9 October 2020