Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12452/2016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 25 July 2017	**On 1 August 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

K M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Swain instructed by Virgo Consultancy Services Ltd
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the

appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Kenya who was born on 19 March 1980. He arrived in the United Kingdom as a student in 2009. He entered with leave and that leave was extended, first as a student and then as a Tier 1 Highly Skilled Migrant and then as a Tier 2 Skilled worker until 24 October 2016.

3. On 4 May 2016, the appellant claimed asylum. The basis of his claim was that he is gay and would be at risk of persecution if returned to Kenya.

4. On 31 October 2016, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the European Convention on Human Rights.

The Appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 19 December 2016, Judge C J Woolley dismissed the appellant's appeal on all grounds. The judge accepted that the appellant was gay but did not accept that there was a real risk of persecution due to criminal prosecution for consensual same-sex conduct between adults or, on the basis of the background evidence, arising from societal intolerance of gay men.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the basis that, in dismissing the appellant's appeal on asylum grounds and under Art 8 of the ECHR, the judge had failed properly to consider the background evidence concerning the risk to gay men in Kenya and by taking into account that the appellant had been able to live in Kenya whilst in a gay relationship free from persecution without also taking into account that the appellant had concealed his sexual orientation in order to avoid persecution.

7. On 23 March 2017, the First-tier Tribunal (Judge Nightingale) granted the appellant permission to appeal.

8. On 5 April 2017, the Secretary of State lodged a rule 24 response seeking to uphold the judge's decision.

The Submissions

9. On behalf of the appellant, Mr Swain submitted that the judge had failed to take into account the background evidence to which he was referred, in particular passages from the Home Office, "Country Information and Guidance, Kenya: Sexual orientation and gender identity" (22 March 2016)". Mr Swain referred me to a number of paragraphs in that

document including paras 2.3.7, 5.1, 5.1.5, 5.2.4, 6.3 and 6.2.1. These passages, he submitted, demonstrated a level of intolerance and violence (including mob violence which the appellant in his evidence specifically feared). Mr Swain also drew attention, in relation to the risk of prosecution, to the prosecution referred to in para 5.2.2 of two gay men in February 2015 for "unnatural offenses" under the Kenyan Penal Code. He submitted that the judge had erred in law in reaching his finding that the appellant had not established a real risk of persecution by failing to take into account this evidence, together with that of violence and police inactivity and the targeting of gay people by the press.

10. In addition, Mr Swain submitted that the judge had been wrong in para 35 of his determination to take into account that the appellant had been able to live previously in Kenya whilst in a gay relationship free from persecution because the appellant's evidence had been that he had lived discretely in order to avoid persecution. Mr Swain submitted that the judge had wrongly, in effect, reasoned that because the appellant had experienced no problems previously then he would experience no problems in the future. That was impermissible reasoning because it would require the appellant to live discretely which was something he could not be required to do in order to avoid persecution.

11. Finally, in his reply, Mr Swain submitted that the judge had also erred in his adverse finding under para 276ADE(1)(vi) of the Immigration Rules (HC 395 as amended) and Art 8 by failing properly to assess whether there were "very significant obstacles" to the appellant's integration into Kenya. He submitted that the judge had, again, failed to take into account the background evidence and had simply been wrong in para 43 of his determination to state that "homosexuals are integrated" in Kenya. The evidence showed that they plainly were not.

12. On behalf of the respondent, Mr Mills submitted that the judge had properly directed himself in accordance with HJ (Iran) v SSHD [2010] UKSC 31 at para 20 of his determination. Mr Mills submitted that the judge had accepted that the appellant was gay and that finding was not now challenged by the Secretary of State. Thereafter, Mr Mills submitted, the judge had properly and adequately considered the background evidence in paras 32 and 36 of his determination. Mr Mills submitted that it was not necessary for the judge to set out all the evidence. He had set out sufficient and in para 36 had stated that he had "considered the wider country evidence on the position of homosexuals in Kenya". Mr Mills submitted that the judge was entitled to find that the appellant had not established a real risk of persecution on return. He accepted that the background evidence was ambiguous and that another judge could have made a different decision but the judge's finding was not irrational.

13. Mr Mills accepted that the judge's reference to the appellant having been able to live previously in Kenya free from persecution in para 35 "muddied the waters". Nevertheless, he submitted that it did not affect the judge's finding based upon the background evidence.

14. As regards Art 8, Mr Mills submitted that the judge had been entitled to find that there were not "very significant obstacles" and that his reasoning in para 43 was adequate to sustain that finding even though the judge's reference to homosexuals being "integrated" in Kenya was troubling. Nevertheless, given the judge's adverse finding in respect of the appellant's international protection claim, namely that he could safely live openly as a gay man in Kenya, there was nothing in the evidence to reach the high threshold set by the "very significant obstacles" test.

Discussion

The Asylum Claim

15. In reaching his adverse decision, the judge correctly identified the approach to be followed in determining the appellant's claim based upon him being at risk as a gay man in Kenya as set out in Lord Rodgers' judgment in HJ(Iran) at [82] (see para 20 of the determination). Mr Swain did not suggest otherwise.

16. The first issue, which the judge determined in the appellant's favour, was that he accepted the appellant was gay (see paras 22-28 of the determination).

17. The judge then went on to consider the second issue namely whether gay men who lived openly in Nigeria would be liable to persecution (see paras 29-37).

18. At para 37, having concluded that there was no real risk of persecution, the judge correctly observed that it was unnecessary for him to consider any of the further issues identified in HJ (Iran). I point that up because, although Mr Swain initially appeared to contend to the contrary, what the judge says in para 35 about the appellant having previously lived in Kenya in a gay relationship free from persecution, did not involve a consideration of a further question identified in HJ (Iran), namely whether the appellant would on return live openly and, if not, why he would not do so. I will return to Mr Swain's submission in relation to para 35 of the judge's determination shortly.

19. There were, before the judge, two limbs to the appellant's argument that he faced a real risk of persecution on return to Kenya as a gay man. The first was that he would be at real risk of prosecution and conviction for consensual same-sex conduct with a partner. Secondly, he would be at risk from societal attitudes and intolerance (including violence) directed against gay men.

20. As regards to the first limb, it was common ground that the Kenyan Penal Code prohibited and criminalised consensual same-sex conduct between adults. The appellant's (then) Counsel accepted that the mere existence of legislation criminalising homosexual acts could not in itself amount to persecution applying the CJEU's decision in Minister voor Immigratie en

Asiel v X and Y; Z v Minister voor Immigratie en Asiel (Cases C-199/12 to C-201/12) [2014] Imm AR 440 at [55]. At [56] the CJEU stated that:

> "However, the term of imprisonment which accompanies a legislative provision which, like those at issue in the main proceedings, punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation."

21. That was the approach which the judge was invited to take by the appellant's (then) Counsel. At para 32 of his determination, the judge dealt with the background evidence not only in relation to criminalisation and prosecution of gay men for consensual same-sex conduct but also in relation to societal attitudes to gay men. For the present, I need only set out the former:

> "The recent Country Guidance report on Kenya summarises the most up to date information. In the Policy summary at page 8 it acknowledges that same-sex activity is criminalised for men. …. At page 15 (para 5.2) the report considers arrests and prosecutions for same sex activity. As Mr Joseph conceded, the information on this is far from clear. Some reports suggest that between 2012 and 2014 there were 8 prosecutions of gay men on indecency charges. It is however difficult to read across the situation accurately since many charges are for 'unnatural offences' which include rape and bestiality and appear to conflate these with cases involving consensual sex. At 5.2.2 it is commented 'it is unclear whether anyone has ever been convicted for consensual adult same sex relations in Kenya', while the National Gay and Lesbian Human Rights Commission (NGLHRC) at the time of writing 'had not yet determined whether there were in fact any convictions on the record based on consensual same-sex conduct'. At 5.2.5 it is reported that there had been few prosecutions under any of these Penal Code provisions in recent years …"

22. The judge returned to the background evidence at paras 33-34:

> "33. The respondent has referred to further extracts from this report in her letter of refusal. There has been real progress in the recognition given to LGBT groups – for instance on April 25th 2015 the Kenyan High Court ruled that the NGLHRC should be allowed to officially register. Kenya has promised to review its penal code to align it with the constitution. The Kenyan government has generally respected LGBT activists' right to freedom of expression, even though there have been some efforts to stifle them. The Health Minister James Macharia has in fact made a statement in support of LGBT rights.
>
> 34. It is common ground that the Penal Code at sections 162, 163 and 165 prohibit and criminalise consensual same-sex conduct between adults. The penalty for same-sex conduct does include imprisonment. According to the ECJ case this however is not enough to reach the threshold of persecution. What must be shown is that the relevant state imposes imprisonment as a penalty in practice. Mr Joseph was in difficulty at the hearing in pointing me to any evidence that imprisonment was imposed in practice. He argued the other side of the coin, namely that there was no evidence that imprisonment was not imposed for such same-sex conduct. Such an argument faces, I find, insuperable objections. To begin with the country evidence suggests that same sex activity is not even prosecuted (see the NGLHRC report

> quoted above). If same sex activity is not even prosecuted it is not surprising that there is no evidence either way as to whether imprisonment was ever imposed for same-sex conduct. More fundamentally it is for the appellant in protection appeals to produce evidence that he or she is likely to be persecuted, and this cannot be done simply by referring to an absence of evidence."

23. Then at para 36, the judge concluded in relation to this limb of the appellant's case as follows:

> "Assessing all the evidence in the round I find that it has not been shown that imprisonment is imposed in practice for same-sex conduct, even if such a penalty may be on the statute book. I apply the ECJ ruling in finding that this is not enough to constitute persecution. The mere fact that an activity is criminalised with a custodial penalty is not enough to constitute persecution, in the absence of evidence that such a penalty is imposed."

24. In his submissions, Mr Swain placed some weight upon the report at para 5.2.2 of the Home Office document relating to the arrest and charge of two gay men for "unnatural offences". He told me that there was new material on that, submitted in a bundle before the Upper Tribunal, but he accepted that that evidence had not been before the judge. It was, in those circumstances, clearly not relevant in assessing whether the judge had erred in law.

25. I do not accept that the judge failed to consider the instance of arrest and "charge" of two gay men in February 2015. He made specific reference to para 5.2.2 in para 32 of his determination as I have set out above. As Mr Mills submitted, as set out in the Home Office document, this was a case in which the two men had been involved in the trafficking of "obscene material". And, further, as para 5.2.2 points out it is unclear whether "anyone has ever been convicted for consensual adult same-sex relations in Kenya."

26. In my judgment, the judge's finding that the appellant had failed to establish that there was a real risk of prosecution and conviction, amounting to persecution, for consensual same-sex conduct if he returned to Kenya was properly open to the judge on the basis of the background evidence to which he was referred and the gist of which he sets out in paras 32, 34 and 36 of his determination.

27. Consequently, I reject Mr Swain's submissions challenging the judge's adverse finding on the first limb upon which the appellant claimed to be at risk of persecution.

28. Turning now to the second limb, Mr Swain's principal submission was that the judge had failed to take into account the background evidence concerning the intolerance, societal attitude and violence directed against gay men in Kenya and that the police condone or actually contribute to it.

29. As I have already indicated, the judge referred to the background evidence concerning the "wider" situation in Kenya at para 32 as follows:

> "There have been some reports of harassment of LGBT persons. LGBT persons face widespread discrimination, especially those LGBT members involved in sex-work. There is no suggestion that the appellant would be vulnerable on this account. At 3.1.3 the report concludes 'There is no evidence of systematic persecution from state and non-state actors'. Any individuals who claim to be at risk of persecution need to demonstrate that they are at real risk and each case needs to be considered on its individual merits. …. there are well documented reports of police harassment (e.g. at 5.2.3 it is said that the police arrested more than 60 people at a gay-friendly nightspot in Nairobi) which conduct often seems to be motivated by blackmail. At 5.3.1 it is reported that the police play an ambiguous role – on occasion protecting LGBT people from mob violence but not bringing the perpetrators to book; while on other occasions they have failed in their duty to protect."

30. I have already set out at para 33 of the judge's determination where he refers to "real progress in the recognition given to LGBT groups" and that the Kenyan government generally respect LGBT activists' right to freedom of expression. Then, at para 36 the judge reached his conclusion as follows:

> "I have considered the wider county evidence on the position of homosexuals in Kenya. It is clear that there are many places where gays can congregate openly (e.g. in gay friendly nightspots and in coastal resorts) and the very fact that these exist say much about the position on Kenya. While I accept in part Mr Joseph's submission that the toleration given to LGBT NGOs may reflect the position at the higher level, this toleration is nevertheless relevant to the changing attitude of the authorities to homosexuality even if the bulk of the populace may be hostile to gay rights. Even though gays may be harassed and discriminated against in Kenya this does not mean that they are persecuted. I have considered the appellant's individual circumstances and find that they have not shown that a person in a gay relationship is likely to be persecuted."

31. It is clear that the judge had well in mind the material to which he was referred. In addition to material I have set out, at para 16 (dealing with Counsel's submissions) he noted that the evidence shows "90% of Kenyans are anti-gay".

32. The material to which Mr Swain drew my attention in the Home Office document, in truth, adds nothing of a significantly different flavour to the evidence to which the judge expressly referred in his determination. As he accepted, the evidence showed that gay men may be harassed, discriminated against and the police may on occasion arrest gay men and "mob violence" can occur against which the police may or may not provide protection. That is the flavour of the material to which I was referred, and which I have set out above.

33. The experienced judge expressly stated that he had "considered the wider country evidence" at para 36 of his determination. The appellant, therefore, is faced with an onerous task of establishing that the judge, in fact, ignored the background evidence in the very document from which he cited and which he relied upon. In my judgment, the appellant fails to establish that to be the case.

34. Further, in my judgment, the appellant has failed to establish that the judge's finding, based upon the background evidence, that the appellant would not face a real risk of persecution on the basis of the second limb relied upon, was not a finding properly open to the judge and was irrational.

35. Article 9 of the Qualification Directive (Council Directive 2004/83/EC) sets out the definition of "acts of persecution" as follows:

> **"Article 9**
>
> **Acts of persecution**
>
> 1. Acts of persecution within the meaning of article 1A of the Geneva Convention must:
>
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> 2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> (c) prosecution or punishment, which is disproportionate or discriminatory;
>
> (d) denial or judicial redress resulting in a disproportionate or discriminatory punishment;
>
> (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
>
> (f) acts of a gender-specific or child-specific nature.
>
> … "

36. There, as is made clear, persecution require a "sufficiently serious" interference or violation of an individual's human rights.

37. In Sepet and Another v SSHD [2003] UKHL 15, Lord Bingham emphasised that "persecution" is a "strong word" (at [7]). In Amare v SSHD [2005] EWCA Civ 1600, Laws LJ at [27] stated that:

> "… the violation, or rather perspective or apprehended violation, must attain a substantial level of seriousness if it is to amount to persecution."

38. In HJ (Iran), Lord Hope at [13] cited with approval Lord Bingham's words in Sepet and Another, cited Art 9 of the Qualification Directive (at [12]) and cited with approval from the judgments of McHugh and Kirby JJ in the Australian High Court decision of Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 216 CLR 473 at [40] that:

> "Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it."

39. More recently, the Court of Appeal in MI (Pakistan) and MF (Venezuela) v SSHD [2014] EWCA Civ 826, having cited Lord Bingham's speech in Sepet and Another and Lord Hope's judgment in HJ (Iran) concluded at [63] that those:

> "Clearly demonstrate, the concept of persecution for the purposes of the Geneva Convention (and indeed the Directive) requires that the past or apprehended harm to the asylum seeker must attain a substantial level of seriousness. Similar considerations apply to the demonstration of serious harm for the purposes of a humanitarian protection claim or an Article 3 claim. Family or social disapproval in which the state has no part lies outside his protection. Discrimination against members of a particular social group in the country of origin is not enough, even though such discrimination might be contrary to the standards of human rights prevailing in the state in which asylum is sought."

40. In my judgement, although the background evidence undoubtedly established a level of intolerance, discrimination and even actual hostility towards gay men in Kenya, it was not irrational for the judge to find that exposure to that society would not create a real risk of "persecution" to the appellant on the basis that it had not attained the necessary level of severity (cumulatively or individually) to engage the Refugee Convention's protection.

41. That then leaves Mr Swain's final argument in relation to the second limb of the appellant's claim to be at risk of persecution. That seeks to challenge the judge's reasoning in para 35 of his determination which was as follows:

> "Adopting the advice of the recent Kenyan COIS an assessment of the individual circumstances of the appellant should be undertaken. In respect of this hearing the appellant said that he lived with [E] at his sister's house in Kenya for a period of some 2 years – two years first then a break up, then for a period in 2009 before the appellant came to the UK. In the 2011 hearing he gave a different account – that he had lived with [E] from 2003 to 2004 and then from 2005 until the appellant came to the UK in 2009 i.e. a period of 5 years. While in Kenya they had changed address on one occasion. On any account this is a long period in which the appellant was living in a gay relationship in Kenya without any reported problems. More significantly he was asked at the 2011 hearing what he would do if the appeal was refused

> and the present appellant said that he would go back to Kenya to be with the appellant. These are not the words of someone who fears persecution on account of his homosexuality in Kenya, but rather show that he foresaw no difficulty in going back to a gay relationship in Kenya. On an assessment of the individual circumstances of this appellant I find that he has not shown any particular factor that would place him at risk of persecution, but instead find that he had lived in a gay relationship in Kenya previously without any instances of persecution."

42. Mr Swain's contention is that this reasoning materially undermined the judge's finding that the appellant had not established a real risk of persecution on return and the reasoning was unsustainable because the judge has failed to take into account that the appellant's evidence was that he was able to live free of persecution because he deliberately lived discretely in a gay relationship in order to avoid that persecution.

43. It is clear from reading the judge's determination as a whole that he was aware that that was the appellant evidence (see para 8) and it was expressly part of the submissions made on behalf of the appellant that he only lived discretely out of fear of persecution (see para 15). In the light of that, the judge's reasoning is, at least, questionable. However, the judge's reasons, which are detailed between paras 29 and 37 of his determination, must be read fairly and as a whole. It is plain in doing so, in my judgment, that the judge found that the appellant had failed to establish a real risk of persecution based, not upon the fact that he had been able to live safely by being discrete, but because the background evidence did not show a real risk of persecution based either upon prosecution and conviction for consensual same-sex activity or as a result of Kenyan society's attitudes and response to gay men. It was not founded, as Mr Swain's contention would require, at least in part on the judge's finding in para 35 that the appellant had been free of persecution when he lived in Kenya. The judge's finding would, in my judgment, have been precisely the same if para 35 is excised from his reasoning.

44. For these reasons, I do not accept Mr Swain's submissions that the judge materially erred in law in reaching his adverse finding that the appellant had failed to establish a real risk of persecution for a Convention reason on return to Kenya.

The Art 8 Claim

45. I now turn to consider Art 8. Mr Swain's first submission was that the judge had been wrong to reach his findings both under para 276ADE(1)(vi) that there were not "very significant obstacles" to the appellant's integration into Kenya and that there were no compelling circumstances outside the Rules because he had failed to consider properly the background evidence concerning the position of gay men in Kenya. For the reasons I have already given, the judge did not err in his consideration of that evidence in respect of the appellant's international protection claim and for those reasons also did not fail to take into account the relevant

background evidence in reaching his adverse conclusion under para 276ADE(1)(vi) and Art 8 outside the Rules.

46. Mr Swain's additional submission was that the judge was in error in his assessment of whether there were "very significant obstacles" to the appellant's integration into Kenya in applying para 276ADE(1)(vi). In particular, Mr Swain took issue with the judge's assessment in para 43 of his determination which is in the following terms:

> "The appellant's rights under Paragraph 276ADE fall next to be considered. The respondent considered this paragraph in her reasons for refusal. He has not lived in the UK for 20 years nor has he spent at least half his life in this country. Paragraph 276ADE(vi) has been amended by HC532 to include the words 'there would be very significant obstacles to the applicant's integration into [with] the country to which he would have to go if required to leave the UK'. The test put forward in **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC)** is therefore now obsolete and I must determine if there are 'very significant obstacles'. I have not accepted that the appellant is at risk in Kenya. He arrived in the UK in 2009 and the community and society from which he came will not have changed significantly in that period. He is very well educated and has not only achieved his education in the UK but has also worked in his specialism. He said at the hearing that he would be able to get employment in Kenya where he has worked before. I find that he has every prospect of finding employment. He still has family in Kenya. Above all he must show very significant obstacles to his integration in Kenya. Mr Joseph argued that his homosexuality was such a significant obstacle. I have however found above that homosexuals are able to live openly in Kenya and that the country information when taken as a whole does show that homosexuals are integrated in that country. I find that he has not shown 'very significant obstacles' to his integration. He lived in Kenya until he was aged 29 with a gay partner and would be able to do so again. I find that he cannot qualify for leave to remain under Paragraph 276ADE."

47. It is trite law that the issue of whether there are "very significant obstacles" to integration imposes a high threshold. Mr Swain, in his submissions, made reference to the Supreme Court's decision in R (Agyarko and Another) v SSHD [2017] UKSC 11 that the test had to be applied in a realistic rather than absolute way. In fact, Agyarko was concerned with the phrase in para EX.1 of Appendix FM of the Rules relating to "insurmountable obstacles" to family life continuing with a partner outside the UK. In his judgment, Lord Reed (with whom the other Justices agreed) in interpreting that latter phrase said that it must:

> "be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non-national concerned."

48. Lord Reed added at [43] that it imposed a "stringent test".

49. I am content to accept that the interpretation of the phrase "very significant obstacles" also requires it to be understood in a "practical and realistic sense" but also that it is a "stringent" test.

50. In this case, the submission made on behalf of the appellant before Judge Woolley was that the appellant's homosexuality was a significant obstacles

to his integration. It was in that context that the judge, applied his finding (which I have found to be sustainable) in respect of the appellant's international protection claim, that the appellant could live openly as a gay man in Kenya without facing a real risk of persecution. Whilst Mr Swain took issue with the judge's statement that "homosexuals are integrated" into Kenya, in my judgment that has to be seen in the light of the judge's adverse finding in relation to the international protection claim and the fact that gay men live in Kenya as part of its society. Mr Swain's submission may have at its core a premise that integration requires total acceptance. That, however, would be to require too much to demonstrate "integration". The Court of Appeal in SSHD v Kamara [2016] EWCA Civ 813 at [14] set out the position as follows:

> "The idea of 'integration' calls for a broad evaluative judgment 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."

51. Of course, the test in para 276ADE(1)(vi) addresses the issue not of whether the individual will integrate into their own country but rather whether there are "very substantial obstacles" to that being achieved. In my judgment, it was properly open to Judge Woolley to find that given the appellant's history and in the light of the background material that, despite societal attitude to gay men, it had not been established that there were "very significant obstacles" to the appellant living and participating in Kenyan society to the extent identified in [14] of the Court of Appeal's judgment in Kamara.

52. Finally, in his reply, Mr Swain raised an issue about the judge's decision under Art 8 outside the Rules. As I understood his submission, he criticised the judge's decision that there were no "compelling circumstances" sufficient to outweigh the public interest on the basis that the judge had not dealt with the risk factors relevant to the appellant and had, in relation to the appellant's private life in Kenya, simply identified that the background information showed that "gay friendly venues" existed in Kenya.

53. The judge's consideration of Art 8 outside the Rules is detailed and careful running to over six pages. He sets out in some detail the legal approach based upon Razgar ([2004] UKHL 27) and the factors relevant to the public interest under s.117B of the Nationality, Immigration and Asylum Act 2002. It is not necessary, in my view, to set out the judge's factual assessment, dealing with the evidence, at pages 19 and 20 of his determination under the para heading of para 52B(i)-(vi).

54. In truth, it is difficult to see what further factors, outside the consideration of the Rules, could have led the judge to find there were sufficiently "compelling circumstances". At para 52B(v), the judge refers to the "risk"

issue put forward by the appellant, namely his circumstances as a gay man in Kenya. Again, the judge refers to the fact that he has found that the appellant could live openly as a gay man in Kenya without risk of persecution even though gay men may be discriminated against. The judge's reference to the existence of "gay friendly venues" in Kenya is in response to the appellant raising the issue of whether he would be able to find a new partner in Kenya. Again, the judge's determination must be read fairly as a whole. It was not incumbent upon the judge to cite repetitively the evidence and findings that he had made throughout his determination. A fair reading of his judgment entails a recognition that the judge took into account the matters that he had found and considered throughout his determination in reaching his adverse finding under Art 8.

55. In the light of those findings, and the matters set out in para 52B(i)-(vi) of his determination, there is no reasonable basis upon which the appellant could have succeeded under Art 8 outside the Rules.

56. For these reasons, the judge did not materially err in law in dismissing the appellant's appeal under Art 8, including his consideration of the relevant Art 8 Rules.

Decision

57. Accordingly, the First-tier Tribunal's decision to dismiss the appellant's appeal on all grounds did not involve the making of a material error of law. That decision stands.

58. The appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 28 July 2017