Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11544/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 October 2018	**On 16 November 2018**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE SMITH

Between

S M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The appellant in person
For the Respondent: Mr P Deller, Senior Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Kenya who was born in 1976. He came to the United Kingdom on 26 January 2001 with a work permit for employment as a circus acrobat which was extended as the appellant

continued his career. On 24 December 2004 he was granted leave based on his marriage to a British citizen JM and on 18 January 2007 he was granted indefinite leave to remain on the basis of his marriage which however ended towards the end of 2010 or early 2011. The couple have two children born 2005 and 2007.

2. The appellant then formed a new relationship with SH. They have a daughter born in 2015. That relationship has also come to an end. The appellant's current partner is KK.

3. On 12 April 2017 the Secretary of State made a deportation order under section 32(5) of the UK Borders Act 2007. This followed the appellant's conviction on a guilty plea on 24 April 2015 for rape for which he was sentenced to four years and three months' imprisonment. He was diagnosed with HIV in 2013, a condition that he acquired after arrival in the United Kingdom which he attributes to SH who had been unwell prior to their meeting.

4. The appellant applied for recognition as a refugee on being notified in May 2015 of the Secretary of State's intention to make a deportation order as the result of his conviction. This was on the basis that he would be unable to afford treatment in Kenya and that his life would be at risk because of his HIV status due to hostility towards those with this condition in Kenya. His health status and conviction would be generally known because of Facebook posts on his account which had been placed by SH through unauthorised access to his account. In addition, the appellant relied on family life with his children and wife JM as well as a private life he has established here.

5. The Secretary of State refused the claim for reasons given in a letter dated 18 April 2017 which included certification under section 94B of the Nationality, Immigration and Asylum Act 2002. Following the decision of the Supreme Court in *Kiarie and Byndloss v SSHD* [2017] UKSC 42 the decision was reviewed and a further decision was made dated 23 October 2017 rejecting the claims.

6. As with the earlier decision, the Secretary of State certified the refugee claim by reference to section 72(2) of the 2002 Act and, furthermore, considered the appellant was excluded from a grant of humanitarian protection under paragraph 339D of the Immigration Rules because of his conviction and subsequent sentence. It was not considered there was a real risk of breach of Articles 2 and 3 of the Human Rights Convention and it was also considered that the appellant would need to provide evidence of "a very strong Article 8 claim" in the light of the length of sentence and significant public interest in his deportation. The appellant had not provided any evidence of his eldest children's domestic circumstances, of the nature of his relationship with them or what was in their best interests. It was not accepted that he had a genuine and subsisting parental relationship with them having provided no evidence of contact with them after he separated from their mother at the latest in 2011. The appellant

had confirmed he had not seen his daughter from SH. It would not be unduly harsh for the children to remain in the United Kingdom on deportation of the appellant. It was not accepted that there was family life with JM; the appellant had provided no evidence of her current location and had acknowledged that that relationship had ended. The appellant was not socially and culturally integrated in the United Kingdom in the light of his conviction or that there would be very significant obstacles to his integration in Kenya where he had lived until he was 25 years old, a country he had visited in January and February 2014 and where he has family.

7. First-tier Tribunal Judge Kelly dismissed the appeal against the Secretary of State's decision. He found the appellant had failed to rebut the presumption provisions in section 72(2). He did not address the exclusion point in relation to humanitarian protection but nevertheless considered the appeal on Articles 3 and 8 grounds. He found that the appellant would not be at risk of harm if returned to his home village and had failed to establish that he could not turn to the police for help. It would not be unduly harsh to expect him to relocate to another area of Kenya where his offending history and medical condition would be unknown. The fact of the appellant having HIV alone was insufficient to engage Article 3 and the judge considered it was likely the appellant would be able to access medication and treatment that he needs to stay well in Kenya. In respect of Article 8 the judge found the appellant did not have a genuine and subsisting parental relationship with his British citizen children. He had not met his youngest daughter and apart from speaking to them on the telephone the appellant had not provided any evidence that he had any involvement in making the important decisions about his elder children's education or care or that he supported them financially. Even if it were in the children's best interests for the appellant to remain, that consideration was outweighed by the public interest in deportation because of the seriousness of the offending. The appellant was unable to bring himself within the exceptions in sections 117C(4) and (5) of the 2002 Act and there were no very compelling circumstances in his case.

8. Although the appellant was unrepresented at the hearing of that appeal, counsel appeared at the hearing before the Upper Tribunal on 30 May 2018 following a grant of permission to appeal by First-tier Tribunal Judge Bird. The Upper Tribunal found error of law in its decision dated 31 May 2018; a copy is annexed. The grounds of challenge had been that there had been a failure by the First-tier Tribunal to give reasons for findings of fact and a failure to apply the relevant case law. As will be seen from the Upper Tribunal decision, permission was given at the hearing for the introduction of a second ground of appeal relating to a procedural unfairness based on the appellant's lack of representation before the First-tier Tribunal. No amendment was however permitted in relation to the section 72 certificate as the Upper Tribunal found nothing in the point raised.

9. The case was then transferred to the present panel. At the hearing on 17 August the appellant was again without representation. Duncan Lewis Solicitors had notified the Tribunal on the afternoon prior to the hearing that they were required to withdraw from the case. The appellant had been sent papers in connection with the case as an attachment to an e-mail; he had last seen his solicitors in April whilst in detention and otherwise the only previous contact had been on receipt of the notice of hearing. We decided that it was in the interests of justice for the appeal to be adjourned again for the appellant to obtain representation. He was not successful however and appeared before us accompanied by his current partner KK when he confirmed that he was ready to proceed. The appellant handed in a revised expert's report that had been provided to him by his previous solicitors together with a letter of support from Kevin Lovick, the Operations Manager of Kodiak Security Limited in Great Yarmouth, as well as notice of appointment for a flexible sigmoidoscopy at James Pagett University Hospital in Great Yarmouth on 9 November.

10. We took care to ensure the appellant's full participation. He gave evidence through an interpreter. We summarised for him the issues in the case at the outset as:

    (i) Whether his deportation would breach Article 3 by reference to his concerns over the availability of treatment for HIV in Kenya and,

    (ii) Whether he would be at risk of harm by virtue of previous disclosure of that condition or others becoming aware of it when seeking access to treatment in Kenya.

11. We reminded the appellant that the conclusion by the First-tier Tribunal Judge in respect of section 72(2) remains undisturbed. It was not argued at the hearing on 30 May that the First-tier Tribunal erred by failing to consider exclusion of humanitarian protection; on the evidence of the conviction, we are satisfied the Secretary of State was correct in this regard. There has been no challenge to the First-tier Tribunal's findings under Article 8.

12. We asked the appellant questions for clarification as to his life in Kenya where he had a partner and child before coming to the United Kingdom and for more detail on the identities of the parties to the Facebook posts as well as the current state of his health and related matters. Prior to cross-examination we obtained copies of two CIPN reports. The first is Kenya: Sexual Orientation and Gender Identity dated March 2017 and the second, Kenya: Background Information including Actors of Protection and Internal Relocation dated February 2018. We gave these to the appellant to read during the lunch adjournment together with a revision to his initial statement for him to double check its accuracy. As it transpired, we saw no need to refer to those reports in reaching our findings. Mr Deller made submissions on terms that deportation would not breach Article 3 and the appellant concluded with remarks after conferring with his partner

regarding the uncertainty over his state of health and how he would fare on return.

THE EXPERT AND COUNTRY EVIDENCE

13. We begin with the expert evidence of Professor Aguilar. He is Director of the Centre for the Study of Religion and Politics at University of St Andrews and explained that he had published extensively on Kenya where he lived between 1987 and 1990 as Registrar for Marriages in a Catholic Diocese and in 1992 working for the Catholic Church and Save the Children Fund Canada. He has published a range of material on Kenya and explains that he completed a PhD in Social Anthropology at SOAS, University of London, in 1994 on the study of social and religious practices among the Boorana of Northern Kenya.

14. The documents examined for his report were the decision of First-tier Tribunal Judge Kelly and the grant of permission to appeal by First-tier Tribunal Judge Bird. Professor Aguilar explains that he had been asked to comment on:

    (i) The level of risk faced by those suffering with HIV from the wider community in Kenya.

    (ii) The risk that the appellant might be perceived as gay due to his illness.

    (iii) Medical treatment available for HIV sufferers in Kenya.

    (iv) Additional risk factors by reference to the appellant's rape conviction.

    (v) Whether the appellant could relocate within Kenya to avoid or minimise risk.

    (vi) Whether the appellant could relocate within Kenya to avoid or minimise risk.

    (vii) Whether there was any possibility the appellant could seek protection in the event that he was targeted due to his illness or as a perceived homosexual.

15. Professor Aguilar makes extensive reference to a report by Avert which reveals that 1.6 million people are reported to be living with HIV in Kenya in 2016 where there is a 5.4% adult HIV prevalence. 64% of adults are receiving antiretroviral treatment. Professor Aguilar notes that according to Avert, HIV prevalence among men who have sex with men is almost three times that among the general population. The most recent statistics from 2010 estimate HIV prevalence among men who have sex with men at 18.2%. He refers to sodomy being illegal in Kenya carrying a prison sentence of up to fourteen years and legal and social attitudes lead to high levels of stigma and discrimination towards men who have sex with men as well as other members of the LGBT community. In 2016 around

940,000 adults and 60,000 children were accessing antiretroviral treatment. Professor Aguilar concludes that:

> "The level of risk faced by those who suffered from HIV from the wider community in Kenya is very significant and hide the effect that physical attacks by police and vigilante groups have on men who have sex with men and therefore associated by the Kenyan general public with HIV amounts to 24% at national level."

16. As to the risk the appellant may be perceived as gay due to his HIV status, he states:

> "Due to the high level of HIV/AIDS suffers among the gay community in Kenya it follows that there is a very probability [sic] that a person such as the appellant will be perceived as gay in Kenya."

17. As to the availability of medical treatment for HIV sufferers in Kenya, Professor Aguilar notes that in June 2017 the government upgraded the quality of treatment to HIV sufferers by introducing drugs that were only available within the private sector of high earning Kenyans. He acknowledges that this introduction of new drugs is an advancement but notes the UNITAID press release suggested only 60% of the Kenyan population receives treatment for HIV and of those only 27,000 are receiving the new drug introduced by them in 2017.

18. Professor Aguilar also contends that if disclosed, a person convicted of rape will run a grave danger of being attacked by the local neighbourhood where mob justice is a current phenomenon illustrated by reference to a recent mob lynching. He continues:

> "Internal relocation would not minimise any risk of discrimination and/or persecution against the appellant because of having HIV, and therefore being associated with the gay community of Kenya."

He notes that not only is homosexuality criminalised within Kenyan law "but also by the religious leaders of Islam and Christianity". He illustrates this by reference to a recent case in the High Court of Mombasa upholding the legality of anal examinations of men suspected of engaging in same sex sexual activity and references in the Human Rights Watch Report of 2017. He concludes that the appellant would be unable to live safely in Kenya if he is perceived as a member of LGBTI and consequently could not be open about his HIV due to risk of persecution for this reason.

19. The most recent version of his report has the following additional points:

    (i) With 64% of adults being able to access HIV treatment it is most likely the appellant will not have access to treatment as those who are already receiving treatment will continue to do so.

    (ii) The fact that the appellant having been abroad would not assist as he would need to register for treatment; any medical treatment is a lottery.

(iii) He could not comment professionally on the effects of not having HIV treatment as he was not a medical doctor.

(iv) The likelihood of the appellant being among the 36% who will not receive treatment is very high as he is not enrolled for treatment at the moment and would need to start by registering domicile with the police and checking with a local hospital on possible treatment.

(v) According to recent indicators Kenya had 11.5% unemployment in 2017.

(vi) Carriers of HIV still carry a stigma that relates to the fact that the illness has the same symptoms of lack of strength and lack of weight as victims of witchcraft have in cultural terms. Professor Aguilar acknowledges that it is not within his remit or instruction to expand on the issue in relation to witchcraft.

OUR ASSESSMENT OF THE EXPERT AND COUNTRY EVIDENCE

20. We have no doubt as to Professor Aguilar's academic expertise on Kenyan affairs, however his report does not provide any source or evidence for his conclusion on the risk that the appellant will be perceived as gay due to the high level of HIV sufferers among the gay community in Kenya. As submitted by Mr Deller, a leap is made in this respect which is insufficiently reasoned. The Avert report does not provide any support for his conclusion. Professor Aguilar refers to 18.2% of HIV prevalence amongst MSM as opposed to 5.9% by the population as a whole. Whilst it is more likely that a man with HIV based on those statistics could be gay, those statistics do not make it very probable that a man with HIV would be regarded as gay. The Avert report analyses the risk groups which includes sex workers, MSM, people who inject drugs and young people. Of the drug users, an estimated 18.3% who inject were living with HIV. This is comparable to and indeed may include the percentage of MSM who have HIV. There is no evidence showing that drug users by virtual of these statistics are at risk of being perceived as gay and are ill-treated as a result.

21. As to whether the appellant would be at risk simply by virtue of being known to have HIV, Professor Aguilar notes a very high level of discrimination against those having HIV and AIDS who are gay or perceived to be gay rather than against the HIV population as a whole. The Avert report explains in respect of stigma and discrimination:

> "Although awareness of HIV and AIDS is comparatively high in Kenya and there have been countrywide anti-stigma campaigns many people living with HIV continue to face high levels of stigma and discrimination. This deters many people living with HIV – particularly vulnerable groups – from seeking vital HIV services".

22. The source for this is not entirely clear from the footnotes to the report which includes a wide range of reports and material. We are assisted however from a further passage in the report:

> "Unfortunately people most at risk of HIV still faced stigma, discrimination and violence. This adds to their vulnerability. Research in 2014 shows that 44% of female sex workers, 24% of men who have sex with men and 57% of people who inject drugs were arrested or beaten up by police or city' askaris' (in the last six months)."

23. The appellant is in none of these risk categories.

24. We note from the Avert report that more than half of the 1.6 million people living with HIV in Kenya are unaware of their HIV status. This would seem to suggest that of those not receiving treatment, most were not doing so because they were unaware. This aspect is not considered by Professor Aguilar. A fair reading of the Avert report indicates that, having regard to the statistics in [15] above, most if not all of those who are aware of their HIV status are accessing medication and treatment.

25. Although he acknowledges the advances made with the introduction of new drugs, Professor Aguilar does not make it clear why he considers it most likely the appellant will not have access to treatment based on the fact of others already receiving treatment. The Avert report does not indicate that the doors are closed to those who had not previously received treatment. No source is given for his assertion that the appellant would need to register for treatment and, if he does, there is no evidence that this would be a barrier. The Kenyan government has taken a positive approach to not only prevention but also treatment which is generally available. We find on the evidence that if someone has HIV in Kenya, he or she will receive treatment if sought. It is not suggested by Professor Aguilar that the medication which the appellant receives to control his HIV status is not available in Kenya or that a similar medication would not be available if the specific drug is not.

THE APPELLANT'S EVIDENCE

26. We turn now to the evidence of the appellant. A key matter emerging from his Home Office interview in 2015 is a statement of his fear because he believed people are killed if they have HIV illustrated by a friend who had met such a fate. He also expressed concern over having to pay for medication and the absence of any trust from his family and friends. He knew that news of his HIV status had reached Kenya from a friend who had visited. He refers to his father's death in December 2014 and the previous visit which he had made to Kenya in January 2014. He did not talk to his two brothers and sisters.

27. In response to our questions the following evidence emerged material to this claim:

(i) The appellant receives check-ups every three months in Great Yarmouth and his HIV virus (CD load) is undetectable.

(ii) He is not gay.

(iii) The appellant left school at the age of 14. His father had been a kitchen porter. The appellant with others had learned to be an acrobat and had been informally trained. He also used to obtain paid work in hotels. When living in Mombasa after leaving school and working in his troupe, he had lived with his cousin. He is in touch with his brothers and sisters by telephone. They are younger than he is and all live with their mother. He used to support them financially and his current girlfriend used to send money. They are aware of his conviction and his HIV status. None has HIV themselves. He had not had contact with his cousin since he had his problems here. The appellant also has an uncle with whom he is not in communication and an aunt in Kenya.

28. Under cross-examination the appellant explained:

(i) His family are Christian except for one sister who is Muslim.

(ii) He would not be accepted (by his family) because of his illness. They had told him that if he sat next to them or his finger bled, they might catch it which he attributes to a lack of understanding on their part.

(iii) As to why people might think he is homosexual, the appellant attributed this to Professor Aguilar. He referred also to the operation on his back passage which would make people think he is homosexual.

29. In response to our further questions the appellant answered:

(i) He is in contact with his former partner in Kenya. Their child is 18. She lives in their village. Their child does sometimes. He described the size of his village as many more than Great Yarmouth and it was 45 minutes by car from Mombasa.

(ii) The Facebook account was closed in May 2018. He was not aware who had typed the record of posts in the evidence before us. Of the authors of the posts, most live in Kenya.

OUR FINDINGS AND CONCLUSIONS

30. We have already made our finding on the availability of HIV treatment in Kenya and now turn to our assessment of the evidence of the appellant. Unlike the position stated at interview, we find that the appellant is in regular contact with his family, his former partner and child as well as his friends in Kenya. Most of the posts put on Facebook by his friends are generally supportive him. The posts show that the contributors were aware that he was not the author of the declamatory statements regarding

his conviction and health status. We have no doubt that his family and former partner will have been upset by the discovery of his serious conviction and also his HIV status but, as time has passed particularly in the light of his evidence of recent more regular contact, we find that they will provide him with emotional support until he finds his feet.

31. We find that the appellant himself does not believe that he would be perceived as gay. Instead, he depends on this aspect of his claim which was not mentioned at interview, because of the report by Professor Aguilar. We are not satisfied that the risk of attribution as to the appellant's orientation is objectively well-founded. We accept that despite efforts by the Kenyan government, people with HIV face stigma and discrimination. However, the appellant is not in a group for which there is a reasonable likelihood of violence. He comes from a place near to Mombasa and most recently lived and worked in Mombasa itself. The evidence does not establish that someone living in a sophisticated urban environment faces a risk of stigma and discrimination that reaches the high threshold required for a claim to be established under Article 3.

32. Furthermore, we are satisfied that treatment for the appellant's HIV condition will be available in Kenya and that there are no barriers to the appellant accessing antiretroviral treatment. As noted in the Avert report, in 2015 Kenya adopted the World Health Organisation's recommendation to immediately offer treatment to people diagnosed with HIV and that as a result in 2016 around 940,000 adults and 60,000 children were accessing this treatment. The evidence does not establish that cost is a barrier to treatment. There is no evidence that the medication available would be unsuitable for the appellant. The appellant will be able to find employment. He has shown that he is resourceful and likeable. He will bring with him a better command of English than we suspect he had before leaving Kenya. The unemployment rate indicates that there is a realistic possibility he will find work and there is no risk of him being destitute.

33. In the light of these findings it is unnecessary for us to consider the consequences of the appellant being unable to access antiretroviral treatment in the context of the matters considered by the European Court of Human Rights in *Paposhvili* and considered by the Court of Appeal in *AM (Zimbabwe) v SSHD* [2018] 1 WLR 2933. There is no evidence that the appellant would be returning to a country which for economic reasons could not provide him with basic living standards.

34. By way of conclusion, the appellant has not demonstrated on the lower standard of proof there is a reasonable degree of likelihood that he would encounter any harm by virtue of publication of his HIV status. Accordingly, we are not satisfied that deportation of the appellant to Kenya would result in an infringement of his absolute rights under the Human Rights Convention.

NOTICE OF DECISION

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed Dated 6 November 2018

UTJ Dawson

Upper Tribunal Judge Dawson