



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/02643/2020 (V)

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 4 December 2020 by Skype**

**Decision & Reasons  
Promulgated**

**On 24 February 2021**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**JG  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr E. Pipi, Counsel instructed by Templeton Legal Services

For the Respondent: Mr S. Kotas, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The respondent's decision which is the subject of this appeal is that dated 2 March 2020, being a decision to refuse a protection and human rights claim by the appellant, a citizen of Kenya, born in 1960.
2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Oxlade ("the FtJ"), following a hearing before the First-tier Tribunal ("FtT") on 30 July 2020.

3. The appellant's claim, in summary, is that he would be at risk from the Mungiki sect on his return to Kenya, he having been a member of that group. He would be regarded as a defector. He was subjected to threats from the group before he left Kenya and his office was burnt down. He left in 2002.
4. He also claims that his removal would breach his right to family and private life.

### ***The appeal to the FtT***

5. The Ftj made a number of detailed findings. She did not accept the credibility of the appellant's claim to have been a member of the Mungiki. She found that there was significant inconsistency in his account, as well as it being inherently incredible in various respects.
6. In the alternative, she found that he would be afforded protection by the authorities, and that in any event he had the option of internal relocation.
7. As regards the Article 8 aspect of the claim, although she accepted that the appellant is the father of his child, D, that child is not a 'qualifying child' within the meaning of section 117D of the Nationality, Immigration and Asylum Act 2002. She did, however, accept that the appellant does have contact with his son, and that contact has been consistent. She further found that he has been a consistent and good force in his son's life. She did not, however, accept that his role in the child's life was one of co-parenting and co-decision making.
8. The Ftj noted that neither D nor his mother had any lawful basis of stay in the UK. The child's best interests would be served by his remaining with his mother and continuing contact with the appellant. That contact could be maintained when the appellant returns to Kenya, and more closely when D and his mother return there.
9. The Ftj concluded that there would not be very significant obstacles to the appellant's integration in Kenya. The appellant did not meet any of the Article 8 Rules and his was not a case in which there were very compelling circumstances meaning that it would be unduly harsh for him to be removed.

### ***The grant of permission***

10. The First-tier Tribunal judge who granted permission to appeal, in the headline to the grant, stated that "Permission to Appeal is GRANTED", not expressing any limitation on the grant.
11. In his reasons for granting permission the First-tier Tribunal Judge summarised the grounds and said as follows in the penultimate paragraph:

"Given the length of the decision the discussion of the Appellant's health issues is conspicuous by its absence. On that basis that ground is

arguable and permission is appropriate on that ground alone and is refused on the other grounds raised.”

12. Finally, he said: “The grounds disclose an arguable error of law and permission to appeal is granted.”
13. In the ‘rule’ 24 response, the Secretary of State contended that the grant of permission was only on the basis that it was arguable that the FtJ did not take into account the medical evidence submitted on behalf of the appellant.
14. The appellant’s skeleton argument for the hearing before the Upper Tribunal is also predicated on the basis of a limited grant of permission. The respondent’s skeleton argument cites *Safi and others (permission to appeal decisions)* [2018] UKUT 00388 (IAC) in support of the proposition that the grant of permission is a limited one. Relying on *Secretary of State for the Home Department v Rodriguez; Mandalia and Patel v SSHD* [2014] EWCA Civ 2, it is argued that the grant of permission is “unambiguously clear”.

### ***The scope of the grant of permission***

15. Before me, Mr Kotas reiterated the contention that the grounds of appeal were limited. It was submitted that the decision in *Safi* could be distinguished on the basis that in that case the grant of permission was not clear, whereas in the appeal before me it was clear.
16. Mr Pipi acknowledged that in his skeleton argument no issue was taken on behalf of the appellant in terms of the scope of the grant of permission, it having been accepted that the grant was limited. He confirmed on behalf of the appellant that it was only the ‘medical ground’ that was pursued before me but that the remaining grounds would be “left as they are”.
17. Notwithstanding Mr Kotas’ contention that the grant of permission is a limited one, and Mr Pipi’s implicit, if not express, acceptance of that position, I am satisfied that the grant of permission is not limited to the medical ground and that the grant of permission is to be construed as a grant on all grounds advanced.
18. In coming to that conclusion I have in mind the clear guidance in *Safi*, stated in the headnote at paragraph (2), which reflects [46] of the decision which states as follows:

“Henceforth, it is likely to be only in very exceptional circumstances that the Upper Tribunal will be persuaded to entertain a submission that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission. That is highly likely to be so, regardless of what may be said in the reasons for decision section of the document. “

19. In *Safi*, the scenario in terms of the grant of permission was very similar to that which arises in the present case. The first section of the grant of permission in that case, as in this, indicated an unrestricted grant. The 'reasons' section of the grant in *Safi* was found not to be 'unambiguous' as to the terms of the grant, which it was required to be. In *Safi*, the language used in the reasons section was in terms of the 'arguability' of certain grounds.
20. In the appeal before me, the permission judge stated that the 'health' ground was "arguable" and in relation to the other aspects of the grounds it was said that those matters (the judge's conduct or general reasoning) do not have any merit. The language of 'arguability' is absent from that part of the reasons section, although admittedly the grant did go on to state that permission was granted on the 'health' ground alone and refused on the other grounds. However, there is no escaping the fact that the headline of the grant is in unambiguous terms. As was also said in *Safi*, the reasons part of the permission decision is to be construed as just that, i.e. the reasons for the decision that has just been made.
21. Neither party suggested that *Safi* was wrongly decided. I respectfully agree with the reasoning in that case and adopt it. I do not accept that there is any reason to distinguish the decision in *Safi* from the facts in the appeal before me. I construe the grant of permission in this case as one that has no limitation.

### ***The grounds and submissions***

22. Given the view I have expressed as to the scope of the grant of permission, it is necessary to summarise all the grounds seeking permission. The grounds contend that the Ftj failed to give any consideration to the medical evidence. Although at [56] she acknowledged that the appellant had been prescribed medication for depression, that was only mentioned in the context of him as a witness. It is argued that there was no discussion of the impact on his mental health of his return to Kenya. The decision in *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 was in favour of the appellant.
23. It is also argued in the grounds that the video hearing was flawed. The appellant had asked for a face-to-face hearing in view of his vulnerability and the credibility issues arising. During the hearing there were technical difficulties in that the appellant's counsel could not connect to the hearing and the appellant was, therefore, left on his own at the hearing. It was wrong for the Ftj to state that there was no apparent difficulty at the hearing.
24. The appellant "did not have the ease of access and support of counsel that he would have had at a face-to-face hearing". The Ftj had a discretion to adjourn the hearing and re-list the matter as a face-to-face hearing.

25. It is further argued that the FtJ was wrong to draw adverse inferences from the fact that the appellant's wife did not undergo FGM, when in fact this supported his explanation as to why he and his wife fled from the Mungiki. The appellant's evidence in his witness statement was that he and his wife feared that the Mungiki would discover that his wife had not undergone FGM, which is one of the reasons that he left the Mungiki. In addition, it was unreasonable for the FtJ to expect the appellant to adduce evidence as to how his wife escaped FGM, as it was not for the appellant to testify on his wife's behalf.
26. Further, the FtJ incorrectly stated at [63] that the appellant was taunted by the Mungiki because he married a woman who could not give him a child and who did not undergo FGM. In fact, the appellant did not state that he was taunted by the Mungiki but that "he was taunted". There was also further clarification in his witness statement dated 30 April 2020 on the issues surrounding the threats of FGM to his wife.
27. The grounds also maintain that the appellant's difficulty in answering questions in relation to his wife is linked to his mental health, as he had explained in his witness statement, and taking into account that he was giving evidence of events that took place 19 years ago.
28. It is lastly said that the FtJ applied too high a standard of proof.
29. In the 'rule 24' response, the respondent argues that the FtJ expressly took into account the appellant's mental health in terms of return to Kenya, at [77]. Furthermore, the medical evidence before the FtJ was limited to two brief paragraphs in the appellant's witness statement and seven pages of evidence in the appellant's bundle, and some of that evidence only refers to medical appointments.
30. His medical conditions of type-2 diabetes and depression are ones that he could receive treatment for in Kenya, as the FtJ had said. It is pointed out by the respondent that there is no challenge in the grounds of appeal to that finding. Even if there was any error of law in the FtJ's decision in relation to the appellant's health, the error is not material given the lack of severity of the appellant's conditions, for which treatment is available in Kenya. There is plainly no Article 3 breach in terms of what was decided in *AM (Zimbabwe)*.
31. In submissions, Mr Papi confined his arguments to the health ground, although the other grounds were not disavowed. It was submitted that the FtJ did not properly engage with the medical report, or properly apply *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813 in relation to the appellant's integration in Kenya.
32. There were only two references to the appellant's medical conditions. The reference at [56] was in the context of reasonable adjustments in relation to the hearing, and at [77] there was just one sentence. The latter did not

represent the careful evaluation of the issue of integration that was required.

33. At page 20 of the appellant's bundle, the medical report dated 11 May 2020 from the GP's practice stated that his condition may be affected by his return to Kenya. The Ftj needed to decide whether his condition would be affected and whether he would be able to integrate.
34. The "expert report" at page 24 showed that the appellant received counselling and that if he was returned to Kenya he would not be able to see his son at all. There needed to be an assessment on the part of the Ftj in terms of how that would affect the appellant's mental health or his integration on return.
35. Mr Kotas relied on his skeleton argument in relation to all the grounds, including those not argued orally before me. It was submitted that it was for the appellant to show how his medical condition would prevent his integration.
36. The appellant's witness statement only contained three brief paragraphs on the issue of his health. At [28] he refers to his medical conditions and at [30] to his receiving talking therapies. The grounds suggest that the medical evidence is substantial but it is limited. The letter from the GP refers to stress, diabetes and hypertension. The Talking Therapies referral letter dated 11 March 2020 does not take the medical evidence any further, and pages 22-24 of the appellant's bundle are only a write-up of the notes of the sessions, which might in fact only relate to one session.
37. Mr Kotas reiterated that there was no challenge to the finding that treatment would be available to him in Kenya and there was no evidence to show that it was not. The Ftj had noted at [77] that he had lived in Kenya for 45 years. It was inconceivable that the Ftj could have concluded that there would be very significant obstacles to his integration on return. It was not said why he could not work or leave the house. Even if there was an error of law in the Ftj's assessment in this context, it was not material.
38. In reply, Mr Pipi submitted that it was for the Ftj to put the evidence within the appropriate legal framework, even if it was correct to say that the case was not argued in a particular way before the FtT. *Kamara* concluded that the question of integration is not limited to the question of earning a living. Although *Kamara* was referred to at [46] of the Ftj's decision, there was no conclusion in relation to it. The Ftj had then just jumped to refer to s.117B (of the Nationality, Immigration and Asylum Act 2002)("the 2002 Act").

### **Assessment and Conclusions**

39. I deal firstly with the grounds that were not the subject of oral submissions before me, those being the matters that were the subject of my analysis of *Safi* and my conclusion that permission was granted on all grounds.
40. First is the contention that the hearing before the FtJ was flawed by reason of it having been a remote hearing as opposed to a face-to-face hearing, and in terms of the asserted failures in the hearing that occurred on the day.
41. The grounds (not apparently drafted by Mr Pipi) assert that “On numerous occasions prior to the hearing, the Tribunal was invited to list the appeal for a face to face hearing in view of the appellant’s vulnerability and the issues of credibility”. It is true that on 24 April 2020 the appellant’s solicitors wrote to the FtT asking that the hearing be a face-to-face hearing and stating that the appellant did not feel comfortable having a hearing by remote means. However, at a case management review hearing (“CMR”) on 15 June 2020 (at which Mr Pipi appeared on behalf of the appellant) it was agreed on the appellant’s behalf that the hearing could proceed remotely. There was no subsequent objection to the hearing proceeding remotely in response to the directions sent after the CMR.
42. At the substantive hearing before the FtJ (at which Mr Pipi appeared), there was no objection to the hearing proceeding remotely. Nothing to that effect is evident from the FtJ’s decision and the grounds of appeal do not assert that to be the case.
43. At [21] of her decision, the FtJ noted that at the start of the hearing the parties successfully joined the hearing. She went on to state that there were some initial problems with hearing the appellant but fortunately his solicitors were on hand and able to ensure that he was able to mute and unmute the microphone and that there were no difficulties with the line dropping out or parties not being able to be heard. It appears from the FtJ’s written directions that followed the CMR, that the appellant was to be at the solicitors’ office during the remote substantive hearing.
44. The FtJ said at [56] that there was no apparent difficulty with the remote hearing. Whilst it is asserted in the grounds of appeal that there were technical difficulties which meant that the appellant’s counsel could not connect to the hearing, that the appellant was, therefore, effectively left alone, that he did not have the ease of access to counsel that a face-to-face hearing would afford, and that the hearing was prolonged, none of this is apparent from the FtJ’s decision. On the contrary.
45. Indeed, it is apparent from the FtJ’s decision that no submissions were made on behalf of the appellant, during the hearing or in closing submissions, to the effect that the hearing was flawed by reason of any technical difficulties. The grounds of appeal do not suggest otherwise. It is not apparent, either, that any application was made to the FtJ to adjourn the hearing because of technical difficulties with the remote hearing, and again, the grounds do not assert as much.

46. If, in fact, the appellant was at the office of his solicitors, as appears to be the case, the contention that he was left “on his own” is not borne out by the facts.
47. Lastly, I note that at [56] the Ftj said that she was not asked to make reasonable adjustments at the hearing (because of his depression), but nevertheless, breaks were regularly given.
48. I am not satisfied that there is any merit in the complaint made about the form or conduct of the hearing.
49. As regards the issue about FGM in relation to the appellant’s wife, the Ftj referred in detail to the matters that she had to bear in mind with regard to an assessment of the appellant’s credibility, namely that he gave evidence through an interpreter, that he gave interviews in English (rather than his first language, Kikuyu), that the hearing was conducted remotely, and that the appellant suffered from depression.
50. Between [60] and [67] she gave very thorough reasons for rejecting the credibility of his claim. At [63] specifically, she explained why she did not accept his explanation as to how his wife managed to avoid undergoing FGM, despite the rules of the Mungiki requiring it. Part of his explanation was that he had avoided introducing his wife to the group and they did not ask about her, but the Ftj pointed out that that was undermined by his claim that his cousin was a senior member who would know that he was married.
51. She rejected the explanation that although he went to the group for several years they had not got to the point of asking him (about his wife), given the conservatism of the group and their belief in FGM.
52. In addition, she pointed out that his claim not to have introduced his wife to the Mungiki, and so shielded her existence from them, was undermined by paragraph 7 one of his witness statements. The Ftj did not identify the witness statement but it is a statement dated 15 September (probably 2019) in the respondent’s bundle. The Ftj misquoted it but it states that “...I was being taunted because I married a woman who did not give me a child and she did not undergo Female Genital Mutilation (FGM).” The Ftj quoted that part of the witness statement as “I was taunted because...”.
53. Not only are the grounds wrong to say that the Ftj quoted the witness statement as ‘I was taunted **by them**’ and that he actually said only that ‘he was taunted’, the witness statement itself expressly states that he was taunted by the Mungiki. The Ftj was entitled to conclude that the appellant’s evidence in this respect was inconsistent, quite apart from the other inconsistencies to which she referred.
54. As regards the contention in the grounds that the Ftj applied too high a standard of proof, there is no merit in that contention. She gave an appropriate self-direction on the standard of proof at [49] and there is



nothing in her decision which indicates that she departed from that self-direction. She reiterated the appropriate standard of proof at [56].

55. The only remaining ground is that in relation to the appellant's health. The grounds make the bold assertion that the Ftj "failed to give any consideration to the appellant's medical evidence" in her decision. That assertion is patently incorrect. The skeleton argument before me, prepared by Mr Pipi, puts the matter in a more reasoned way.
56. The appellant's medical conditions and prescriptions are referred to in the skeleton argument, as is the Talking Therapies report. The skeleton argument refers to his being recorded as being anxious, having memory problems, being tired, with poor concentration and having broken sleep. The report refers to his worrying about not being able to see his son.
57. It is pointed out that there are only two references to his medical conditions, at [56] (in terms of reasonable adjustments at the hearing), and at [77] where the Ftj said that "he clearly has medical conditions but there is medical treatment and facilities available there." It is argued that this is inadequate in terms of the need for the "broad evaluative judgment" described at [14] of *Kamara*. It is also argued that the Ftj did not make any assessment of how his depression and complete severance of contact with his son would affect his ability to integrate in Kenya.
58. In submissions before me, [46] of the decision was criticised in its reference to *Kamara* but with no conclusion being expressed in relation to it, and in terms of the decision at that point simply then moving to a consideration of s.117B of the 2002 Act. In fact, that paragraph of the decision is the last paragraph in the summary of the submissions made on behalf of the appellant. It does not form any part of the Ftj's actual reasoning.
59. Before me, the Talking Therapies report was referred to as an expert report. However, as I pointed out, it is not an expert report but merely a record of what appears to have been two counselling sessions. The author of the report is not identified, nor are his or her qualifications. There is, in fact no, or very little, opinion offered in the report.
60. Nevertheless, the Ftj did accept that the appellant "clearly has medical conditions" [77]. However, she also found that there was treatment available for those conditions, a finding that is not disputed.
61. The Ftj referred at [77] to *Kamara* and, consistently with that decision, found that he would be "enough of an insider" in order to be able to reintegrate. She referred to his having lived in Kenya for 45 years and his understanding of how Kenyan society works. It was then that she referred to the availability of treatment in Kenya.
62. It is evident that the Ftj did undertake the broad evaluative judgment that was required. In terms of the effect on the appellant's mental health of a

lack of contact with his son, it is important to bear in mind that the FtJ pointed out at [74], [75] and [78] that his son (and his son's mother) have no right to remain in the UK and she concluded that eventually the appellant would be able to re-establish contact with his son in Kenya from where his son and the mother come. In the meantime, the telephone contact that he has could continue, she found.

63. The medical evidence in relation to the appellant's health, either physical or mental, plainly fell far short of establishing the high threshold for an Article 3 claim to succeed. Contrary to what is asserted in the grounds, the decision in *AM (Zimbabwe)* does not avail the appellant at all. Indeed, no such argument was advanced before the FtJ.
64. In all the circumstances, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal and its decision to dismiss the appeal must stand.

### ***Decision***

65. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal, therefore, stands.

### **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 his 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.

**A.M. Kopieczek**

Upper Tribunal Judge Kopieczek

22/02/21