IAC-AH- -V1

First-tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04147/2020

THE IMMIGRATION ACTS

Heard at Newport as a Hybrid
On 04.06.2021

Determination Promulgated

24th June 2021

…………………………………

Before
JUDGE OF THE FIRST TIER TRIBUNAL
MS L MENSAH

ANONYMITY DIRECTION IS NOT MADE
Between

MR KENNETH KARIUKI MACHARIA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Dr Chelvan (Counsel)
For the Respondent: Mr K Hibbs (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. The Appellant's date of birth is 19.03.1980. He came to the United Kingdom as a student in 2009 and held leave until 24.10.2016. He claimed asylum on the 04.05.2016 and his claim was refused by the Respondent and the Tribunal. He became appeal rights exhausted on the 03.07.2018. He lodged further submissions for a fresh claim. Although refused by letter dated 04.11.2019, the Respondent granted a right of appeal. It is that decision which generated this appeal. At the end of the hearing I informed the

parties that I reserved my decision. I completed this decision on the 22.06.2021. I do make an order for anonymity as Counsel asked me not to do so, and has referred me to the fact the Appellant's history and case is already in the public domain.

Appellant's case

2. The Appellant's case is summarised in the refusal letter. It is accepted the Appellant is a Gay man from Kenya. The parties have both used the term 'Gay' in pleadings as an acceptable label for the purposes of my decision. No offence is intended to the Appellant or anyone else by using this term. I have used this term and 'Homosexual' as they are referred to in the papers. Importantly, the Appellant does not raise any objection to it and approves its use as a description of his sexuality in his own statement. The Appellant says he cannot live openly as a Gay man as he fears both the Kenyan state and the general public. In a previous decision by First Tier Judge Woolley on the 19.12.2016, the Judge concluded the Appellant could live openly as a Gay man in Kenya because he found the country evidence did not show a well-founded fear of persecution and he concluded there was in any event a sufficiency of protection for openly Gay men in Kenya. I will return to those matters in due course.

3. At the start of the hearing I discussed the issues with the Representatives. The agreed issues are as follows:

(1) Do openly gay men objectively face a real risk of serious harm/persecution in Kenya?

4. There is a dispute between the parties as to what can constitute serious harm/persecution for the purposes of answering the first question. It is agreed serious harm can arise from the State (includes state entities) and society. Both Representatives agree this is settled law. The Refugee and Persons in Need of International Protection (Qualification) Regulations 2006, (The 2006 Qualification Regulations), which implements the European Council Directive 2004/83/EC ("the Qualification Directive"), confirms at Regulation 3,

"3. In deciding whether a person is a refugee or a person eligible for humanitarian protection, persecution or serious harm can be committed by:

(a) The State;

(b) Any party or organisation controlling the State or a substantial part of the territory of the State;

(c) Any non-State actor if it can be demonstrated that the actors mentioned in paragraphs (a) and (b), including any international organisation, are unable or unwilling to provide protection against persecution or serious harm."

5. Both parties also agree that if Kenyan actively prosecutes those who are in same-sex relationships, it is not only discriminatory but almost inevitably amounts to serious harm/ prosecution. Mr Hibbs refers back to Judge Woolley's decision, which was maintained by the Upper Tribunal and says the evidence shows the laws are discriminatory but they are not used. Dr Chelvan says there is evidence they are not a hangover from the colonial era, but actively implemented in modern Kenya.

6. However, Dr Chelvan also seeks to persuade me that the judicial measures which are in place in Kenya through its law are cumulatively so discriminatory they are sufficiently serious to constitute a severe violation of an individual's basic human right/s. In other words, they amount to serious harm/persecution whether or not they are enforced. The said Regulations state at Regulation 5,

"5.—(1) in deciding whether a person is a refugee an act of persecution must be:

(a)sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms(1); or

(b)an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).

7. Dr Chelvan argues the case law does not preclude a finding that even if there is no evidence of enforcement of those laws, they are together, or 'accumulatively', sufficiency serious to meet the definition of persecution under the Regulations. Mr Hibbs disagrees. They both ask me to interpret the law and evidence differently.

8. The further questions I am tasked to resolve are,

(b) Whether the Appellant faces a real risk of serious harm in Kenya on account of his individual profile, even if Gay men more generally are not at risk?

(c) Whether the Appellant faces very significant obstacles to integration in Kenya if now removed under 276ADE (6) of the Immigration Rules?

(d) Whether it would be a disproportionate interference with the Appellant's private life under Article 8 to remove him to Kenya?

9. The Representatives confirmed there were no other issues and no preliminary issues.

THE LAW

The Appellant claims to be a Refugee, from Kenya under the 1951 Geneva Convention relating to the Status of Refugees and the 1967 protocol thereto (The Refugee Convention). The Appellant therefore claims to be a refugee within, the 2006 Qualification Regulations.

10. The said Regulations specify that a person is a refugee if they have a well- founded fear of persecution or serious harm for any of the reasons specified in Regulation 6, (race, religion, nationality, particular social group or politics).

11. The Respondents accept being Gay amounts to belonging to a Particular Social Group or PSG in Kenya given the laws prohibit same-sex relationships and are discriminatory. The refusal letter confirms,

"7. Home Office guidance taken from paragraph 2.2.1 of Kenya: Sexual orientation and gender Identity dated March 2017 shows the following at paragraph 2.2.1; -

'LGBT persons in Kenya form a particular social group (PSG) within the meaning of the Refugee Convention because they share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to their identity or conscience that they should not be forced to renounce it, and have a distinct identity which is perceived as being different by the surrounding society.'

8. Furthermore, in the Court of Justice of the European Communities judgement for the Joined cases of C-199/12 to C-201/12, dated November 2013 (CJEC C-199/12 to C-201/12), the Court ruled that the existence of criminal laws which specifically target 'homosexuals', supports the finding that those persons must be regarded as forming a 'particular social group' (Paragraphs 48, 49)."

12. Therefore, the Appellant has established a convention reason within which he seeks to prove his case.

13. Serious harm is defined for the purposes of humanitarian protection, within paragraph 339CA of the Immigration Rules HC 395 (as amended) as:

"(i) The death penalty or execution;

(ii) Unlawful killing;

(iii) Torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

14. Regulation 5(2) states [highlighted for emphasis],

"(2) An act of persecution may, for example, take the form of:

(a) an act of physical or mental violence, including an act of sexual violence;

<u>(b) a legal, administrative, police, or judicial measure which in itself is discriminatory or</u> which is implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of 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 regulation 7.

(3) An act of persecution must be committed for at least one of the reasons in Article 1(A) of the Geneva Convention."

15. In the alternative, the Appellant claims Humanitarian Protection pursuant to paragraph 339C of the Immigration Rules and or that removal from the United Kingdom would breach its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms now incorporated into the Human Rights Act 1998.

"339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and

(iv) they are not excluded from a grant of humanitarian protection."

16. The Appellant will not qualify as a Refugee or as a person in need of Humanitarian Protection if he has available to him an internal relocation option, as defined within paragraph 339(O) of the Immigration Rules. 'If in part of the country he could reasonably be expected to stay and where he would not face a well-founded fear of persecution or a real risk of serious harm'. In this case there is no suggestion the Appellant has an internal relocation option if he establishes a well founded fear of serious harm from the Kenya State or the public at large. The Respondent does not specify any part of Kenyan where it says the position is any different than say, in the Cities or vice versa.

17. The burden of proof is on the Appellant to satisfy me, that to return him to Kenya will expose him to a real risk of persecution for a Refugee Convention reason. The standard of proof is a reasonable degree of likelihood, which has also been described as a reasonable chance, or a serious possibility, although those descriptions are one and the same.

18. In relation to the grant of Humanitarian Protection, the Appellant must show substantial grounds for believing; that if returned to Kenya he would face a real risk of suffering serious harm ( as defined

above) and would be unable or, owing to such a risk, unwilling to avail himself of the protection of the Kenyan authorities.

19. Regulation 2, of the said 2006 Regulations, makes it clear that the Appellant cannot qualify for Humanitarian Protection if he qualifies as a Refugee. In relation to Human Rights, in the limited occasions the claim is not covered by the above, I will have to decide whether there was a real risk of a breach of the Appellant's Human Rights, of which there is an absolute prohibition under Articles 2 and 3. Finally, I will consider (if applicable) whether the interference is proportionate as with Article 8.

The Evidence

20. I have a Home office bundle running to 573 electronic pages. The Respondent's Response is 3 pages. An Appellant bundle has been filed running to 145 indexed electronic pages. I also had the Appellant Skeleton Argument of 20 pages and a reply to the Response running to 8 pages. I have an Authorities bundle of 116 pages, an appellant Supplemental bundle '1', split into two parts (95 and 121 pages) and an appellant Supplemental bundle '2' of 214 pages. I have an historic witness statement for the Appellant filed separately dated 05.02.2018 and Dr Chelvan referred me to an amendment to the witness statement of Mr Chris White regarding his length of time working as a machinist, nothing of any great significance turns on that amendment.

21. Given the parties agree the Appellant is an accepted Gay man, who would seek to live openly as such in Kenya, and his profile is effectively documented as a matter of record, the Appellant was not called to give evidence. I agree it was unnecessary to hear from the Appellant in the light of the agreed facts and the issues. It was also agreed there was no real dispute regarding the evidence of Mr Chris Smith or Mr Colin White, so again they were not called. I will return to their evidence later. It was therefore agreed the case would proceed on submissions only. The case started at 10am and concluded at 13.23pm. I informed the parties I wished to reserve my decision.

The Submissions

22. I have recorded those submissions in my Record of Proceedings and carefully considered them before coming to a decision. The hearing was also recorded and so it is a matter of record as to what was said and either party is entitled to request the record at a fee.

The Findings

23. The background to this case can be fairly swiftly summarised. The Appellant appeared before Judge Woolley on the 19.12.2016. Judge Woolley's decision was upheld by the Upper Tribunal before Judge Grubb and the Respondent's position is summarised in the Respondents refusal letter as follows [underlined for emphasis],

"'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 discreetly 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, my judgement is 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 judgement, have been precisely the same if para 35 is excised from his reasoning.' (Para 43). 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.'
(Para 44)."

24. The Respondent maintains this position before me today. It follows, if I find openly Gay men are at risk there is no question of internal relocation. The only country guidance case is fairly aged,

", The most recent CG case is the 2011 determination in Jonathan Mana Sankale (Homosexual — Behaviour — Prosecution) Kenya CG [2001] UKIAT 0007, the Immigration Appeal Tribunal held at paragraph 11 [emphasis added' additional emphasis added:

'We agree with the Adjudicator that the evidence shows that discreet homosexuals are unlikely to face prosecution still less persecution in Kenya. The Tribunal accepts as set out in paragraph 5.25 of the CIPU Retort that although there is Strong social pressure against individual instances of homosexuality such as from family members, it is not an issue in the public domain. There is no strong antagonistic feeling towards homosexuals, but equally neither is there an active gay community to provoke it. Discreet homosexuals are unlikely to face prosecution or persecution. It is unlikely that criminal proceedings will be taken against a homosexual male unless some other offence is involved.'

25. The parties accept my starting point is the previous decision as summarised above. As set out in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702,

"37. We consider that the proper approach lies between that advocated by Mr Lewis and that advocated by Miss Giovanetti, but considerably nearer to the latter. The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.

38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained

previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not – or could not be – raised before the first Adjudicator; or evidence that was not – or could not have been – presented to the first Adjudicator."

26. To that extent the parties agree. The Respondent in the refusal letter refers back to their country policy as follows.

"The size, location and openness of an LGBT 'community' in Kenya Is unclear, although sources indicate that there is a LGBT community In parts of Nairobi where people are able to express their sexual/gender identities with some freedom (see Societal treatment). In general the level of discrimination and abuse faced by LGBT persons from non state actors is not such that it will reach the level of being persecutory or otherwise inhuman or degrading treatment."

27. I think it is fair to say one of the triggers for the Appellant's fresh claim arose out of a High Court decision in Kenya, commonly referred to by the parties as *EG &/others v Attorney General*. I have a copy of the decision in the Respondent bundle and it is difficult to follow what is the correct citation other than it states it is Petition number 150 and 234 of 2016 and was delivered on the 24th May 2019. The decision of the High court has been signed off by three High Court Judges identified as Judge Aburili, Judge Mwita and Judge Mativo. No offence is intended by the manner in which I refer to the Judges involved. I simply repeat how they are identified at the end of the decision as no other title is discernible.

28. I have carefully read this lengthy decision. The petitioners cite examples and evidence of instances of discriminatory behaviour, threats to kill, physical attacks, denial of access to employment, health care or other services; on the grounds of the petitioners' sexuality in Kenya. The perpetrators being cited as the public, police and even reference to some Parliamentarians calling for members of the public to arrest those they identify as "homosexual." Experts are called to give evidence regarding whether a person's sexuality is nature or nurture, the impact of discriminatory laws and behaviours on an individual's mental health and there is even evidence as to whether sexuality, other than between a man and a woman, is a mental health condition!

29. The focus of the case by the Petitioners, is to challenge the constitutionality of sections 162(n) (c) and 165 of the Kenyan Penal Code and a declaration that sexual and gender minorities are entitled to the right to the highest attainable standards including the right to health care services as guaranteed in Article 43 of the Constitution, an order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector. For those interested it is worth reading the full judgment and as a result of its length I am unable to replicate it here. The penal code is helpfully set out in the Appellant bundle in an 'Inspection of country of Origin" report, by the Independent Chief Inspector of Borders and Immigration dated September 2020.

'"4.1 The penal code

4.1.1 The laws relating to same-sex activity are contained in Chapter XV of the Kenyan Penal Code [revised 2014]:

‘162. Unnatural offences Any person who—
(a) has carnal knowledge of any person against the order of nature; or
(b) has carnal knowledge of an animal; or
(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years: Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—
(i) the offence was committed without the consent of the person who was carnally known; or
(ii) the offence was committed with that person’s consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

163. Attempt to commit unnatural offences. Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.

164. Deleted by Act No. 3 of 2006, Second Sch.

165. Indecent practices between males Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.’

30. It is worth reproducing some of what was said on behalf of the petitioners,

“104. The Petitioner's counsel in Petition No. 150 of2016 filed written submissions date 6th October 2016 and made oral highlights. They submitted that the Petition is founded upon the discrimination, prejudice and stigma because of attitudes of a section of Kenyans towards the LGBTIQ persons, who view them as criminals.

105. They submitted that government officials, law enforcement officers, healthcare professionals and commercial organizations subject the LGBTIQ people to ill treatment and demean them in their private and public life, which is promoted by existing laws specifically provisions of the Penal Code which criminalizes consensual same sex conduct between adults in private. They argued that the criminalization of the relevant conduct degrades the dignity of the LGBTIQ Kenyans and invades their privacy.

106. They argued that criminalization of the relevant conduct is unconstitutional in that it violates their right to equality, freedom from discrimination (Article 27), human dignity (Article 28), freedom and security of the person (Article 29), privacy (Article 31) and health (Article 43). They maintained that any Law that is inconsistent with the Constitution is void to that extent.

107. Counsel submitted that the impugned provisions foster and promote an environment in which LGBTIQ Kenyans are subjected to a risk of violence, intimidation, extortion, threats of prosecution,

discrimination and ill-treatment in connection with the provision of basic government services including health care."

29, and,

"112. They maintained that rejecting homosexuality on the basis that it is a western phenomenon, is misconceived, and that majority of the jurisdictions that criminalize homosexuality are former British colonies. They were concerned that although Britain repealed such laws because of the modern understanding of human sexuality and legal and human rights norms, Kenya continues to utilize the same laws imposed by the British over 150 years ago. Petitioner further relied on international law and norms as well as judgments from courts in other jurisdictions to support their Petition."

31. It is perhaps worth recording here what was said on behalf of the Attorney General as it reflects the tone of the entire decision,

"The Respondent filed grounds of opposition on 19th August 2016. He states that the preamble to the Constitution acknowledges the supremacy of the almighty God who is the objective moral law giver and that this informed the decision to retain the impugned provisions. He contended that the Petitioners have failed to lay clear grounds for the court to find the impugned sections unconstitutional. He maintained that the Constitution recognizes marriage as a union of two consenting adults, male and female, and, that the legislative function of the State is exercised by Parliament, hence, the court cannot compel the government to legalize homosexuality by amending the impugned provisions. He also stated that sexual orientation of an individual is fixed at the birth latest and cannot be changed by any means. The respondent further states that the court will be overstretching its mandate if it grants the orders sought, and, if granted, the orders would have a drastic impact on the cultural, religious, social policy and legislative functions in Kenya as it would amount to legalizing homosexuality through the back door. Finally, the Respondent contended that the Petition is incompetent, misconceived, misplaced and is an abuse of the process of the court as the Petitioners' rights and fundamental freedoms have not been violated."

32. The content and tone of the Kenyan Respondent's objections are offensive to those who exist in a more open environment. Mr Hibbs rightly, did not seek to defend them before me. The Kenyan court criticised the petitioners for failing to file any evidence to support the allegations of abuse and on that basis refused to accept they had occurred as alleged and so this case does not assist the Appellant in that regard. However, the key conclusions for the purposes of this appeal can be cited as follows [underlined for emphasis],

"393. The Petitioners advanced the argument that sexual orientation is innate, that they were born that way and that, that is the way they express themselves and therefore they should be allowed to express themselves the way they know best. They further argued that the prohibited conduct is done in private, is consensual, is among adults and hurts no one. Both sides tendered expert evidence in support of their respective positions. However, the expert evidence was unanimous that there is no conclusive scientific proof that LGBTIQ people are born that way.

394. We appreciate the Petitioners' concerns and arguments. We also appreciate that if they were born that way, they have rights like everyone else. In appreciating this position we must uphold the spirit and intention of the Constitution.

395. We have carefully examined the purport and import of sections 162 and 165 of the Penal Code vis-a-vis Articles 28 and 31 of the Constitution; we have also read the Constitution holistically. We are unable to agree with the Petitioners that the impugned provisions violate the Constitution or their rights to dignity and privacy. If we were to be persuaded that the Petitioners' rights are violated or threatened on grounds of sexual orientation, we find it difficult to rationalize this argument with the spirit, purpose and intention of Article 45(2) of Constitution.

396. Article 45(2) only recognizes marriage between adult persons of the opposite sex. In our view, decriminalizing same sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2). The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution."

"399. We are aware that all laws in existence as at 24th August 2010 must be construed with alterations, adaptations, qualifications and exceptions necessary so as to conform to the Constitution. Nonetheless, as observed above, the issue before us was alive during the constitution making process, and, therefore, if Kenyans desired to recognize and protect the right to same sex relationships, nothing prevented them from expressly doing so without offending the spirit of Article 45."

33. Dr Chelvan points out this decision, and what is said above, makes it clear the discriminatory laws in Kenya are not a hangover from the Colonial era, but a current reflection of the views of the Kenyan people through its recent Constitution, now affirmed by the High Court. I have been provided with a copy of Article 45 which seeks to recognise the right to marry, equal treatment for those entering into marriage and its recognition and protection under the Constitution. As Dr Chelvan also points out, the laws in Kenya specify a term of imprisonment of up to 14 years under the penal code for those found to have been in same sex relationship. There is not dispute such a penalty would amount to a serious violation of a basic human rights and would met the threshold for persecution.

34. Dr Chelvan was the reviewer before the Chief Inspector of Borders and Immigration in the report dated September 2020. What it records there is a good summary of his submission before me.

"32. The Court recognised that Article 45 (2) of the Constitution only allows for 'marriage union for adults of the opposite sex', and to decriminalise 'same sex on the grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2). Continued reasoning at paragraph 396 of the judgment held (emphasis added):

'The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or note, would be in violation of the tenor and spirit of the Constitution.'

33. The above makes quite clear, the judicial enforcement not only goes to uphold the constitutionality of the penal code provisions, but also marginalise, stigmatise and render as not protected or safeguarded by the Constitution, with respect to any internationally respected rights.

34. On this basis, the cumulative discrimination and lack of any Constitution, amounts to persecution."

35. Mr Hibbs refers me to the B AND C v. SWITZERLAND - 889/19 (Judgment: Struck out of the list: Third Section) [2020] ECHR 812 (17 November 2020). The points made can be reduce to the following:

(i) The laws criminalising homosexual acts remained in force and could be applied any time. He was thus at risk of ill-treatment at the hands of the authorities.

(ii) In view of the continued criminalisation of homosexual acts, the population maintained the conviction that homosexuality was something forbidden. There was a homophobic climate and no change in attitude in the population. Even assuming that the authorities no longer persecuted homosexuals, they were still far from willing and able to protect them against attacks from private individuals. The Swiss authorities essentially based their conclusion that he did not face a real risk of ill-treatment on the consideration that his sexual orientation was not known in the Gambia and that he could avoid ill-treatment by suppressing and hiding his sexual orientation. Yet, as his sexual orientation was a fundamental part of his identity, he could not be obliged to conceal it in order to avoid persecution (relying on *I.K. v. Switzerland* (dec.), no. 21417/17, § 24, 19 December 2017).

(iii) In the Gambia, there was a real risk that he would be subject to discrimination and ill-treatment by non-State actors based on his sexual orientation owing to the hatred that had been stirred up for years, with no State protection available to him. He relied on a judgement of the Austrian Federal Administrative Court of June 2017, in which such a finding had been made in a comparable case. The examining authorities were obliged to investigate *proprio motu* whether the authorities in the country of origin guaranteed protection against ill-treatment at the hands of non-State actors (*J.K. and Others v. Sweden* [GC], no. 59166/12, § 98, 23 August 2016), but had not done so in the present case, despite his submissions on that matter. This fell short of the procedural requirements under Article 3.

36. The Court considered the case of *X, Y and Z v Minister voor Immigratie en Asiel* (Joined Cases C-199/12 - C-201/12, judgment of 7 November 2013) concerned asylum-seekers, who claimed that they had reason to fear persecution in their respective countries of origin - Sierra Leone, Uganda and Senegal - on account of their homosexuality, which was a criminal offence in those countries. It had not been shown that they had already been persecuted or been subject to direct threats of persecution in the past. In its conclusions, the CJEU held:

"Article 9(1) of Directive 2004/83, read together with Article 9(2) (c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution.

However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment, which is disproportionate or discriminatory and thus constitutes an act of persecution.

Article 10(1) (d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."

37. Mr Hibbs argues the reference above to 9(1) being read together with 9(2)(c) of the Qualification Directive covers any reliance Dr Chelvan places before me on 9(2)(b)or (5(2)(b)). Effectively, he argues the fact discriminatory laws exist, even if extreme in their stated punishment, can never amount to persecution unless "actually applied." It is agreed the Appellant meets the *HJ Iran* point as he will live as an openly Gay men and cannot be expected to live discreetly to avoid persecution. Dr Chelvan points out the European court was not asked to consider, and did not consider whether the existence of discriminatory laws combined have such a serious impact on an individual's inherent dignity, they go to the very core of their means of self-expression in every aspect of their life including the ability to form and have private and intimate relationships, and this is '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.'

38. The European court in *B and C* actually concluded the State had not given proper attention to the risks of harm from rogue state actors and the general public and had not properly considered whether the Gambian government would provide protection when it criminalised same-sex relationships. So in that respect it does little to resolve the issue put before me.

39. I have carefully considered what has been said. I think the actual answer lies in the Qualification Directive. When one reads 9(2), it lists the potential forms persecution can take. However, it does so by reference back to 9(1). 9(1) requires the acts to be sufficiency serious to constitute a severe violation of basic human rights and 9(2) requires accumulated measures to reach a similar threshold. So whatever form the persecution takes, the threshold remains the same or similar. It requires a serious violation of basic human rights. It goes further and makes it clear it is particularly engaged with rights that cannot be derogated. I take this to mean Article 2 and 3. In other words, if Dr Chelvan is to succeed on this point, the existence of those discriminatory laws must reach that threshold. However, it is clear from the Court of Appeal in November 2009 in 00 (Sudan) and JM (Uganda) v. Secretary of State for the Home Department [2009] EWCA Civ. 1432, recorded the Respondent's concession on non-article 3 ECHR violations amounting to persecution:

'There is no dispute between the parties that Article 9(I)(b), dealing with cases where there is an accumulation of various measures, allows for persecution to be established where there is a violation of human rights, where those rights are not confined to the non-derogable rights referred to in.

Article 9(I) (a). Ms Collier, on behalf of the Secretary of State, accepts that. So a sufficiently serious violation of Article 8 rights in an applicant's home country might amount to persecution.'

40. I turn therefore to the country evidence as to the impact of the existence of those laws in Kenya. Firstly, I agree with Dr Chelvan, the evidence from the High Court decision in *EG & others*, demonstrates the current laws are not an overhang from the colonial era, but are the living representation of the views of the State and the general public in Kenya. If they were not, as the High court in Kenya made clear, the Constitution would have provided for it. The very approach of the High court to the petitioners' case and the Respondent's arguments, in my view demonstrates a societal pervasive attitude to same-sex relationships that does go to the heart of Kenyan society. It is clear Kenyan society does not recognise and does not wish to permit the very existence of same sex relationships, whether they are in private or public.

41. In the Respondents Country Policy Information Note on Sexual Orientation, gender identity and expression, April 2020, Version 3, they state,

"2.4.4 There have been a number of successful legal challenges in Kenyan courts against government practices. On 22 March 2018 the Court of Appeal ruled that forced anal examinations of those accused of same-sex relations is illegal, overturning a 2016 High Court case which had upheld the authorities' practise. On 22 March 2019 the Court of Appeal ruled that the government could not use the criminalisation of same-sex sexual relations to prevent the registration of a LGBTI rights NGO."

42. Dr Chelvan points out the very fact forced anal examination was being used on those accused of same-sex relationships at least until March 2018 is not a fact that was put before Judge Woolly or Judge Grubb. If that fact had been known the Appellant would have succeeded in his case as there can be little room for argument that such an act amounts to persecution, however he agrees I am not tasked to consider such an argument. What I do take from this evidence is it appears to reflect the attitude and behaviour of law enforcement officers as recently as 2018 in believing it was right to carry out such an examination and it suggests at least some active pursuit or implementation of the penal code by police officers. The fact the High court approved such behaviour in 2016 shows the level to which such views our fostered.

43. The reference to the decision by the Court of Appeal to registration of NGO organisations also appears a very small step. The existence of NGO's is borne out of need. I also note the case of *EG & Others* is being taken to the Court of Appeal. I can only assess the position as it stands before me. I cannot speculate about future litigation. What I found difficult to follow in the CIPN is whether there is any way of establishing with any accuracy the number of people arrested/detained by police and abused because of accusations of same-sex relationships or behaviour perceived as associated with the same. I note when the matter went before Judge Woolly and Upper Tribunal Judge Grubb, there appears to have been focus by the then representative on evidence of the arrest and charge of two Gay men in February 2015 and reference to a general comment by the Respondent in the CIPN that abuse was not systematic. I also found it rather unclear regarding the issue of prosecutions. It is said at,

"2.4.6 The police have arrested <u>some</u> LGBTI persons, particularly those involved in sex work and LGBTI refugees seeking asylum in Kenya, although exact figures are not available. Arrests usually

occurred under public order laws rather than same-sex legislation, with release shortly after. There have been reports of assaults by the police (including sexual), harassment, intimidation and physical abuse in custody, along with reports of blackmail and extortion from organised gangs, believed to be working with the police, and police themselves. However, the police do not generally target and prosecute LGBTI persons and there have been few, if any convictions for same-sex sexual activity. There have also been some occasions where the police have protected LGBTI persons against mob attacks (see State treatment)."

44. However, when you go to (See State treatment) it says [highlighted for Emphasis],

"5.2.1 The USSD report 2019 noted: 'NGOs reported police frequently harassed, intimidated, or physically abused LGBTI individuals in custody.'43

5.2.3 The GALCK report 2016 noted: 'Legal structures hardly mention LBQ women specifically, but this research highlighted that this does not withstand their harassment by state representatives in practice… Most participants … have developed different strategies to circumvent legal persecution and harassment by police.' 45 The same report further stated 'the State continues to discriminate against LBQ women through frequent arrests, denial of access to basic rights and amenities, and through all kinds of other exclusion mechanisms that hamper the participation of LBQ women as rightful citizens in Kenyan society.'

5.2.4 The GALCK report also noted: 'Participants all narrated different stories about random arrests of LBQ women who were kept in police lock-up overnight only to be released without charges the following morning. Most times, however, they had to pay hefty bribes in order to be released or to avoid being taken to court on trumped up charges. Some, participants claimed, they were raped by police as a form of bribe to ensure their release. They did not give further details.'47"

5.3.1 In relation to the application of the penal code and the criminalisation of same sex sexual relations the USSD report 2019 repeated its assessments for 201653 and 201754 and 201855:

'Police detained persons under these laws, particularly persons suspected of prostitution, but released them shortly afterward… LGBTI organizations reported police more frequently used public-order laws (for example, disturbing the peace) than same-sex legislation to arrest LGBTI individuals.

5.3.2 CNN noted: 'A 2014 parliamentary report found that between 2010-2014, the Kenyan government prosecuted 595 cases of homosexuality.' 57 The Guardian, noted 'Kenya arrested 534 people for having same-sex relations between 2013 and 2017.'

5.3.3 The 2015 submission to the United Nations Human Rights Council by the Equal Rights Trust (ERT), stated: 'Though there have been few prosecutions under any of these Penal Code provisions in recent years, 18 gay men interviewed by ERT reported being harassed by police seeking to blackmail or extort money from them.' 59"

Amongst sources consulted (see Bibliography) CPIT could not find further updated information or statistics on the prosecution or conviction of LGBTI persons for same-sex acts."

45. In the refusal letter, the Respondent refers to various extracts. I note,

> “. Paragraph 5.1.3 of the same report comments further: -
>
> The BBC, in an article dated 24 May 2019 noted: 'There are unofficial gay clubs and advertised events in Kenya's cities. '"The LGBT community in Kenya have created an amazing tribe and culture for themselves," says Brian Macharia, an activist for the Gay and Lesbian Coalition of Kenya. '"There is a ballroom scene, a drag scene - vibrant bisexual community, a lesbian scene. Young people are driving the community forward through social media." 'Gay men also use dating apps - although visitors with international roaming do get a warning about the legal status when logging in while In Kenya.' 66.The above report shows that although the Kenyan high court judgement was a set-back, there have been two previous (2018 and 2019) positive court cases for LGBTI rights.”

46. Overall, the CIPN paints a picture of a lack of clear record keeping of the frequency of arrests/ detentions and the stages of/pursuit of prosecutions. It is also unclear to me, how long a case takes to proceed from arrest to prosecution in a country like Kenya. What is meant by ‘few prosecutions’ and if 534 people were arrested between 2013 and 2017, are these the recorded arrests of those that face prosecution, where they realised, are they still in detention or are they all arrests documented as under the penal code. If there are ‘frequent’ arrests accompanied by physical and mental abuse, for which there is no accountability, it paints a very different picture on how the discriminatory laws are impacting on the ground than that before Judge Woolley or Judge Grubb.

47. Then the report appears to suggest significant under reporting and/or the need to hide ones sexual identity, due to the reaction of the general public, law enforcement and state agencies. The fact there exist an underground culture or ‘scene,’ in my view provides limited evidence when assessing the issue of risk to openly Gay men.

“5.4.3 The GALCK report 2016 noted: ‘Despite encountering frequent violence, LBQ women hardly report cases to the police. According to the NGLHRC 2014 report, 2222 cases of attacks on LBQ women were reported between January 2014 and November 2014. Out of these cases only six were reported to the police.”

“The Stonewall Global Workplace Briefing 2018, in an interview with a representative from GALCK, noted: ‘<u>People who don’t confirm to society’s expectations about gender and sexuality, particularly LGBTIQ persons, are immediately in danger. LGBTIQ persons are not only marginalised but often face violence and discrimination when they’re open about their sexual orientation and gender identity, and when they’re perceived to be anything other than heterosexual and/or cisgender. This can come from an individual’s family, community or even from state officials.</u>’ 108”

5.4.4 GALCK, in ‘Decriminalisation of Consensual Same Sex Sexual Conduct in Kenya’, 22 February 2018 noted: ‘… <u>incidents where individuals go to the police seeking help only to have the police attack them. In one such case where our client tried to report a robbery, he was pushed into a cell by police</u>

officers, forcibly undressed, beaten, choked and had his hair shaved and burnt off because he "was dressed very gay." These are not the national values Kenyans aspire to.'67

5.4.5 Harvard Law Today, in an article published 14 May 2018 on Eric Gitari, NGLHRC, Gitari noted: 'There are a lot of cases that we're not able to bring because the people who are affected don't want to be outed by the justice system… It becomes more complicated when our clients are entrapped or faced with blackmail or extortion. They go to seek justice, but they end up being the ones who are investigated, because the overtures that led to the blackmail are a crime.' 68"

48. The evidence in the CIPN gives the overall impression of violence from all facets of Kenyan society and includes the police. This appears different from the position in YD (Algeria) v Secretary of State for the Home Department [2020] EWCA Civ 1683 (14 December 2020) where there was said to be no evidence the State or state entitles took any action against Gay men. It also suggests significant under reporting because of the risks of violence and abuse from the police and officials and the behaviour of the police appears supported by the lack of accountability.

49. This does not sit well with the Respondent's position. This evidence appears to me to give some support to the proposition that the accumulation of the discriminatory laws on the ground is to give effect to pervasive and uncontrolled discrimination, violence and sexual and mental abuse. I see no reference to any victim support other than outside the State apparatus in the form of NGOs. The reference to police occasionally stopping mob attacks is not reassuring.

50. My impression is people labelled LGBTQI live in sustained fear of harm and abuse from state actors, family and the wider public in Kenya that is serious. Living in this way must place a significant weight on their well-being and fulfil the definition of degrading treatment when it occurs. I considered the Appellant's country evidence. Firstly, there is reference to the Respondent's guidance to British travellers in the form of the Foreign Office published advice which states.

"Homosexual activity is illegal. Public displays of homosexuality like holding hands or kissing in public places could lead to arrest and imprisonment. See our information and advice page (https://www.gov.uk/guidance/lesbian-gay-bisexual-and-transgender-foreign-travel-advice) for the LGBT community before you travel."

51. I do not believe anyone is suggesting this advice is because British homosexuals are more at risk than Kenyan nationals. Dr Chelvan asks me to accept the reason this advice is there because it is a real risk. On 23 August 2012 UNHCR issued the "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (HCR/GIP/12/09). They state, *inter alia*, the following (footnotes omitted):

"**Laws criminalizing same-sex relations**

26. Many lesbian, gay or bisexual applicants come from countries of origin in which consensual same-sex relations are criminalized. It is well established that such criminal laws are discriminatory and violate international human rights norms. Where persons are at risk of persecution or punishment such as by

the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.

27. Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.

28. Assessing the 'well-founded fear of being persecuted' in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant needs to be examined. The 'fear' element refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI [lesbian, gay, bisexual, transgender and intersex] persons are nevertheless being persecuted. ..."

52. Overall, applying the lower standard of proof, I find the Appellant has demonstrated that the current laws in Kenya are not only discriminatory, but do force Gay man to live in secret as a result of a genuine fear of a real risk of serious harm at the hands of the general public and officials including police officers. I do not accept the extracts in the refusal letter are evidence Gay men can live safely and openly. The reference to the comments made by a Mr Kevin Mwachiro who openly declared his sexuality in Kenya is of limited value, given it is couched in terms of him being 'brave', 'lucky' not to have been physically and verbally violated like 'many individuals from the community' and in circumstances where he identifies a 'real' threat of violence to his person. I find openly gay men in Kenya are at real risk of persecution by reason of discriminatory laws that create a hostile environment in which Gay men are exposed to a real risk of discrimination in employment, in housing, in having or developing a family life with their partners and to sexual, physical and mental abuse. The impact of the laws accumulatively, in my view amounts to persecution as so serious a violation of basic rights. However, the country evidence also demonstrates a real risk of actual physical and sexual harm that is also persecutory. I am also satisfied there is some evidence of police pursuit of individuals through prosecution, albeit the evidence is limited as to what happened to cases against individuals who were arrested and if the cases were dropped at some point.

53. The inability to even exist in the eyes of Kenyan society, pervades all aspects of a person's life and is not only degrading treatment under Article 3, but breaches the core of their private and family life under Article 8.

54. I accept the evidence before me does not demonstrate a sufficiency of protection to openly gay men. In fact I struggle to see any real margin of what one might see as protection. I do not accept the existence of NGO's is evidence the State provides effective protection. At best the evidence shows the

Crown Copyright 2021 

police are ineffective in dealing with Gay men who suffer persecution, at worst it shows they are unwilling to provide such protection. My findings are very different from those of Judge Woolley as I have fresh evidence that was not before him. The country guidance deals with discreet Gay man and so the parties agree it does not cover the position before me. Judge Grubb was dealing with an error of law, not a fresh claim as is before me.

55. In those circumstances, it follows I find the Appellant's asylum claim made out. However, had I not found openly Gay men at risk per se, I would have found the Appellant's profile placed him at risk as a man who has become so well know as an openly Gay man in the media reports in the United Kingdom and Kenya, that he faces an enhanced risk of serious harm at the hands of the general public, state officials and the police and there is no effective sufficiency of protection.

56. The evidence of Mr Macharia's increased profile as a gay man was set out in the Respondent and Appellant evidence. I agree he has a greatly heightened profile as a result of the large number of news stories that have been written about him and his sexuality. I had before me the following articles (not exhaustive):

• https://www.bbc.com/swahili/michezo-46276353 (Exhibit 4)
• https://nairobinews.nation.co.ke/sports/gay-kenyan-rugby-pl aver/ (Exhibit 5)
• https://www.the-star.co.ke/news/2018/1 1/21/gay-kenyan-rugby-player- fears-deportation-from-uk c1853935 (Exhibit 6) • http://nairobiwire.com/2018/1 1/aav-ruabv-plaver-kenneth-macharia-in-deportation-fear-from-uk.html (Exhibit 7)
• https://www.the-stanco.ke/news/2018/1 1/29/aav-kenvan-ruabv-player-at-risk-of-deportation-from-uk-aranted-bail cl 858203(Exhibit 8)

57. Some of these articles were published by Kenyan news sources, and are therefore intended for and read predominantly by a Kenyan audience and I accept his profile is known to Kenyan people who read the Kenyan media. As set out in the submissions,

"The Star, a Kenyan Newspaper, reported on the story in an article dated 21.11.2018, entitled 'Gay Kenyan rugby player fears deportation [sic] from UK' (Exhibit 4). A copy of that document and its comments section is enclosed with these representations. At the time of writing, the article has 92 comments. Those comments include a vast amount of homophobic insults and veiled threats against Mr Macharia. They tend to prove both his profile in Kenya and the risk of persecution he can expect on return."

58. The comments reproduced by the Appellant's solicitors are so offensive they do not warrant any further publication herein. The parties can read them as they have the evidence in the bundle. These are not simply uncontrolled posts but comments left up by news papers in Kenya and on social media platforms publically. They appear to be comments left by members of the Kenyan public and are consistent with what the High court said in *EG and others*, regarding the anti-Gay attitudes in Kenyan being reflected in the Constitution.

59. I therefore also find the Appellant is at real risk of serious harm as a Gay man with an enhanced public profile who will live as an openly gay man. I find there is no sufficiency of protection.

60. I have been provided with lots of evidence regarding the positive impact the Appellant has made in his community and with his former employer. The Employer has written letters in support and also as available to give evidence. In the end it was not required. There is no dispute the Appellant is a valued member of the community in the United Kingdom, who has made lots of friends, has lots of support here and his employer is very supportive of him remaining. He has his job to return to back to following this appeal.

• Letter of support from Greg Walker-Doyle dated 22 November 2018 along with his profile as Seamap, General Manager.
• Letter of support from Jody Feltham dated 19th November 2018.
• Letter of support from Asa Chilcott dated 19th November 2018
• Letter of support from Colin Thomas
• Letter of support from Mrs C A Vacher dated 17th November 2018
• Letter of support from Alan Tinkles dated 17th November 2018
• Letter of support from C Marina Van Vessem dated 17th November 2018
• Letter of support from Bristol Refugee Rights dated 19th November 2018
• Letter of support from Jennifer Hill dated 20th November 2018
• Letter of support from Kevin Bolt dated 19th November 2018
• Letter of support from Omar Sheitara
• Letter of support from Queer Arts dated 19th November 2018
• Letter of support from Penny Simons dated 15th November 2018
• Letter of support from Callum Humphries dated 19th November 2018
• Letter of support from Nathan Elsenstdat dated 20th November 2018
• Letter of support from Andy Berlin dated 18th November 2018
• Letter of support from Adem Yaver
• Letter of support from Donatas Vaitkus
• Letter of support from Joseph Butler dated 18th November 201
• Letter of support from Tom Marlow
• Letter of support from Douglas Grierson dated 20'h November 2018
• Letter of support from David Sully dated 19'h November 2018
• Letter of support from Alexander Mogarry
• Letter of support from Tomos Evans dated 19th November 2018
• Letter of support from Dr Andrew Holmes dated 25th November 2018
• Letter of support from Pierpaolo Piccinato •
• Letter of support from Philip Rogerson chairman of Bristol Bisons Rugby Football club dated 19th November 2018
• Letter of support froin Mary Todd dated 17th November 2018
• Letter of support from Angela Jeffry dated 19th November 2018
• Letter of support from Sara Guenther dated 17th November 2018
• Letter of support from Karen Davies (Bristol Refugee Rights) dated 19th November .2018
• Letter of support from Catherine Salisbury dated 18th November 2018
Letter of support from Rosemary Merson dated 18th November 2018

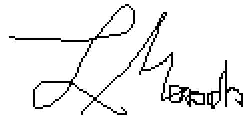
61. Turning to Paragraph 276ADE(6), clearly as a result of the above, I accept the Appellant faces very significant obstacles to integration in Kenya. This is not dependent upon my legal analysis, but on the country evidence couple with his individual profile proving he will not be accepted in Kenyan society, his overt lifestyle as a Gay man developed over the years in the United Kingdom and encouraged by our open society and values, will not be accepted or tolerated, his subjective fear of harm will also hinder his ability to integrate, and these matters will create very significant obstacles to his ability to integrate if now returned. I also agree with Dr Chelvan, the current position in Kenya makes it extremely difficult, if not almost impossible for the Appellant to develop a family life with another man in Kenya, to cohabit with them, to live and share a life with them, and all that entails when a human being wishes to develop relationships and interact with the wider community.

62. Dr Chelvan has argued, in the alternative, the Appellant's appeal under Article 8 should be allowed because his employer identifies the Appellant as being employed in a specialist engineering role within his company and they have not been able to find anyone else suitable in the job market. Given my findings above, this is academic and therefore, I am not obligated to consider it here. I would simply record there was no dispute between the parties as to what the employer has said about the difficulties in finding anyone with the same specialist skills as the Appellant to perform the role.

63. I also allow his appeal under Article 8, on the basis of his private life.

Notice of Decision

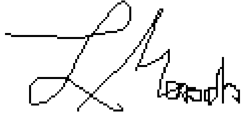
64. I allow the appeal as I find the Appellant is a refugee, and on the basis his human rights would be breached if he was removed to Kenya.



65. I make no anonymity direction.

Signed Date: 22.06.2021
Judge L Mensah
Judge of the First-tier Tribunal
TO THE RESPONDENT
FEE AWARD

A fee of £140 is shown as paid. I have considered whether or not to make a fee award. I have decided not to make a fee award because my decision was impacted by the further evidence and evolved legal argument pursued in the appeal.



Signed Date: 22.06.2021
Judge L Mensah
Judge of the First-tier Tribunal