Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05758/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2020	**On 25 March 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

EGG
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Dieu instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr S Walker Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Woolley promulgated on the 28 October 2019 in which the Judge dismissed the appellant's appeal on all grounds.

Background

2. The appellant is a citizen of Kenya born on 2 October 1979 whose claim for international protection was rejected by the Secretary of State.

3. Having considered the documentary and written evidence the Judge sets out his findings of fact from [36] of the decision under challenge.

4. The appellant, not being satisfied with the outcome, sought permission to appeal which was granted by a judge of the Upper Tribunal on a renewed application on 28 January 2020, the operative part of the grant being in the following terms: *Although it may be that ultimately the strengths of the adverse credibility findings overall is such as to make the point immaterial, it is arguable that the fact that it seems the experts response was sent to the Tribunal before the promulgation gives rise to an arguable error of law in that decision.*

Error of law

5. At [26] of the decision under challenge the Judge writes:

> "26. At the hearing an issue arose about the identity and date of the document (search warrant) which the expert had commented on in his verification report. I directed that a clarifying statement should be obtained from the expert and served on the tribunal and respondent within 5 working days of the hearing. In the event that no clarifying statement was produced within the timescale I indicated that I would proceed to decide the appeal on the evidence before me. As it happened no clarifying statement was received from the expert even though I waited for 9 working days after the hearing before promulgation (having checked first with the Tribunal to ensure that no statement had been received)."

6. The appellant in his application for permission to appeal wrote:

> "In reaching his decision the IJ found against the appellant on credibility grounds. The IJ did not accept that the appellant was Mungiki in particular that a warrant had been issued against him. At para 26 and 52 the IJ recounts that there had been identified at the hearing a discrepancy in relation to the date of the warrant. He allowed for 5 working days post hearing for the matter to be clarified. This meant that by the Friday 18.10.19. Unfortunately the response from the expert was not received until after the weekend, the Monday 21.10.19. It was faxed the same day to the tribunal. The appellant attaches proof of faxing to these grounds. The IJ states that despite the passing of the initial 5 working days, he waited a further 9 working days and even checked with the tribunal. It is respectfully submitted that the appellant having provided the clarification, albeit too late, was still within the timeframe that the IJ was willing to consider it. The tribunal was therefore seized of the additional evidence as of the 21.10.19. It is submitted that it is an error of law that the clarification report was not placed before the IJ by the Tribunal service, it is submitted that the appellant had used reasonable diligence in providing it (*Ladd v Marshall [1954] EWCA Civ 1*)."

7. At [52] the Judge writes:

> "52. In a supplementary report he comments on the arrest warrant faced by the appellant. His comments are however placed in doubt by his repeated references to the arrest warrant "dated

> January 2014" when the arrest warrant itself is said to date from 2005. He also refer to the appellant in the feminine at one point. I allowed the appellant 5 working days from the date of hearing to provide a clarifying statement from the expert. No such statement was received by me or the tribunal within the specified period, and I therefore waited for 9 working days after the hearing date for such a report before I had to promulgate within the required timescales. The expert concludes that the arrest warrant is an authentic document and is in proper format. The appellant is more likely than not to be subjected to the risks of harm. He does not describe any features of suspicion. He concludes that it is genuine. I consider the overall weight I can attached to the warrant and this report below, taking into account the discrepancies I have noted above."

8. The reference by the Judge to the need to promulgate a decision within the required timescales is a reference to the fact judges of the First-Tier Tribunal are required by that Tribunals procedure rules to promulgate a decision within 10 days of a hearing.

9. The chronology shows the appeal was heard on 11 October 2019, a Friday. Five working days from this date is Friday, 18 October 2019. The date of the decision, being the date the Judge sent the same for promulgation, is 20 October 2019 which is 9 actual days from the date of the hearing rather than 9 working days. The Judge therefore allowed the 5 days that he had directed for the documents to be produced before promulgation, yet the additional material had not been provided.

10. The Judge is a fee paid Judge who has no permanent presence at the Newport hearing centre but who will attend a centre when he is booked to undertake judicial duties there. It is clear the Judge checked with the administration at Newport to ascertain whether the additional report had been received before he promulgated his decision. The comment by the Judge that by the 20 October 2019 no further report had been received is factually correct. The additional report was sent to Newport on 21 October 2019 at 16:33 hours by fax.

11. The five-day period beyond the date of the hearing is to be found in a specific direction by Judge Woolley who also makes it clear that in the event that no such statement was produced within the timescale he would proceed to determine the appeal on the evidence he had available to him. This is clearly stated at [26].

12. Mr Dieu did not attempt to suggest that there had been an attempt to file the additional evidence earlier.

13. Mr Dieu was asked when those instructing him made it known to the expert the Judge granted the dispensation of additional time, but he was unaware of this information.

14. Mr Dieu was asked whether with the additional report, which the appellant's representatives would have been aware was filed outside

the time limit permitted by the Judge, an application was made to adduce the evidence late. The sanction contained within the direction given by the Judge at the hearing is clearly that unless the further report was filed by 18 October 2019 no further time will be permitted and the Judge will decide the merits on the basis of the evidence that was available, which is precisely what the Judge did. It is arguable that the report filed on 21 October 2019 would not have been taken into account by the Judge without an application for relief from sanctions which had been granted. Such an application will explain the reason for the delay and seek permission for the same to be taken into account. An application could have been made by correspondence prior to the expiration of the time limit or, at the latest, on 18 October 2019 explaining that the report may be late. No such application or request for an extension was made.

15. The decision was promulgated after the time limit allowed by the Judge had passed and no arguable legal error arises as a result of the same. The appellant fails to establish any procedural irregularity amounting to legal error on the basis of procedural fairness in the Judge proceeding as he did.

16. Mr Dieu when asked to comment on the materiality of the additional report. He indicated that if the inconsistency had not been there the Judge may have arrived at a different conclusion. I do not find such assertion made out.

17. This is a carefully written and considered determination of the type regularly produced by Judge Woolley when sitting. The Judge specifically considers the appellant's claim to be at risk on return to Kenya as a result of his being subject to an arrest warrant which the Judge specifically states at [52] was considered later in the decision. This specifically appears at [67 – 68] in the following terms:

> "67. The appellant has produced a warrant claiming to be issued by the Kenyan authorities and dated 14th of January 2005. The appellant was asked in an interview how he came by a copy of this warrant and he responded that it had been faxed to his representatives by his mother while he was in detention in 2012. As the respondent pointed out at the hearing, this explanation is at odds with his Bio-data form of 2002 which stated that his mother had died in 1994. When this was put to him at the hearing the appellant blamed it on poor interpretation. The responses to other questions are however clear and consistent, and it is unclear why an interpreter would have said that his mother had died in 1994 and had been born in 1956 unless this information had come from the appellant himself. I find that that is the information he did give in 2002.
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> 68. The expert has considered that this warrant is consistent with the usual forms in Kenya. His report is vitiated by a persistent reference to the warrant as being dated "January 2014", when no warrant of this date has been produced to this tribunal. It is uncertain, I find, that the expert had been considering the

> correct warrant. The case of **Tanveer Ahmed IAT [2002] UKAIT 00439** provides guidance on whether a document produced can be relied on. It is for the individual claimant to show that a document can be relied on. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. The warrant itself is a one page, type written pro forma with a stamp of "Chief magistrate Nairobi". The warrant itself was only produced in 2012 while the appellant was in detention. Its providence is uncertain. The appellant says that it was sent to him by his mother but this is contradicted by the Bio data form from 2002 which says she died in 1994. It is uncertain when this was sent from Kenya or by whom. Whenever it was sent the appellant only produced it in 2012 while he was in detention. While it may be in the correct form no original has been produced for the Home Office and there is no apparent security features such as a watermark. I have found that the appellant not to be credible in his assertion that he returned to Kenya in 2004 and therefore a warrant against him in that period must be regarded with a degree of circumspection. On all the evidence I find that the warrant of arrest he has produced can have little reliance placed on it."

18. The Judge applied the correct test to ascertain what weight could be placed upon the documentary evidence in light of the evidence considered as a whole. The Judge gives ample reasons for why little weight could be placed upon the arrest warrant, apart from the discrepancy in the experts report. Indeed whilst the issue surrounding the date may be relevant to the weight the Judge felt able to place upon the experts report regarding the validity of the arrest warrant any such opinion was clearly undermined by the other issues noted by the Judge and referred to at [68] above.

19. It is also important to consider the Judges global conclusions on the evidence set out at [71 – 72] of the decision under challenge which are in the following terms:

> "71 I have accepted that the appellant was a Kenyan national. I have not accepted that he has shown any relationship to Kamani Ruo. As his evidence is that he was introduced to the Mungiki by his uncle Kimani Ruo this part of his claim is in doubt. He has said that he was arrested and tortured by the Kenyan authorities from October 2000. As the respondent points out the Mungiki were only banned in 2002. The appellant addresses this in his witness statement by saying that it was only the meetings of the Mungiki that were banned and not the Mungiki themselves: he was arrested for not being a Mungiki but for attending a meeting. Mr Dieu did not bring my attention to any reference to this discrimination in the country information, and as prayer meetings were integral to the Mungiki belief system I find that it has not been explained how the meetings of the Mungiki could be banned but not the Mungiki themselves. There is no reference in the appellant's extensive interviews about this distinction and I find that it has

not been established by the appellant that meetings of the Mungiki were banned in 2000. The appellant's account that the police before 2002 asked him to renounce his membership of the Mungiki, when the Mungiki were not banned, lacks credibility. I have noted the appellant's account of his activities as a coordinator and have found this to be vague. I have noted the injuries remarked by Dr Shellens but have found that they could have been caused in other plausible ways which are not explored. I have not accepted that Dr Shellens was in a position to make any formal diagnosis of PTSD, but even if he did suffer from PTSD from his history in the UK (as Dr Shellens herself remarked on when she said that his PTSD could have been exasperated by his experiences in the UK). I have found that the appellant was not credible in his claim that he entered Kenya in 2004, and have not accepted the warrant produced from Kenya as a document on which reliance can be placed. I have found that the appellant's credibility has been damaged by factors under the 2004 Act, and that his whole account of torture and detention in Kenya is thereby undermined. While I have classed him as a vulnerable appellant I find that the inconsistencies and lack of credibility in his account go beyond the confusion and incoherency that may be expected to arise from such a vulnerability.

72. The appellant repeatedly blames interpretation problems for the inconsistencies in his account, but on assessment of all the interviews (where he accepts that he has understood the interpreter) I find that he has responded clearly to the questions asked of him and that any inconsistencies have arisen from the account which he himself has given. He similarly blames the Interviewing Officers for being oppressive but there is no complaint of this at the time and the record of the questioning does not support such a claim. His representatives had the opportunity to correct these interviews (and did so) and cannot be blamed for making incomplete corrections since they were acting on instructions from the appellant himself. Any allegation that they have been incompetent has not been supported by the necessary procedural steps outlined in **MM (out of time appeals) Burundi [2004] UKAIT 00182.** On an assessment of all the evidence I find that he is not established that he was ever a member of the Mungiki or at risk from the Kenyan State. As he was never a member of the Mungiki is not at risk from the Mungiki as a claimed deserter. I find instead that he is an economic migrant as he himself described in his 2007 application. He is not at risk of persecution on return to Kenya."

20. The Judge was entitled to dismiss the appeal on protection grounds. The finding the appellant as a civilian returning to Kenya will not face serious or individual threat to his life or person by reason of indiscriminate violence in a situation of internal armed conflict, as there is no conflict in Kenya, that the appellant was therefore not entitled to a grant of Humanitarian Protection is one open to the Judge on the evidence as is the dismissal of the claims pursuant to articles 2 and 3 ECHR, in line.

21. The Judge considers human rights aspects from [79] by reference to paragraph 276 ADE, section 55 in light of the presence of a child born on 20 January 2009 who is a British citizen through his mother, the appellant had not seen the child since 2014, and Appendix FM. The Judge considers article 8 from [85] adopting a structured approach to assessing the proportionality of the decision by reference to Razgar. The Judge sets out points both for and against the appellant from [93] resulting in the conclusion at [94] that the appellant had not produced a very strong or compelling case sufficient to outweigh the public interest in his removal.

22. As stated above, this is a very carefully considered and written determination in which the Judges conclusions are supported by adequate findings. The weight to be given to the evidence was a matter for the Judge. Whilst the appellant disagrees with the outcome and seeks a more favourable outcome to enable him to remain in the United Kingdom the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

23. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 16 March 2020