Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/02456/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 October 2019	**On 9 October 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

GEORGE [M]
(no anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:
For the Appellant: Mr Y Din, ADA Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Kenya. His date of birth is 1 January 1977. His application for leave to remain on human rights grounds was refused by the respondent on 22 August 2016. The appellant appealed. His appeal was dismissed by FTT Judge Hawden–Beale, following a hearing at on 1 November 2018. The appellant was granted permission to appeal by FTT Judge Easterman on 22 August 2018. Thus, the matter came before me to determine whether the FTT made an error of law.

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2. The appellant came here to study in 2003, having been granted leave as a student which was extended. His leave expired in 2010. He has been here since then as an overstayer.

The decision of the FTT

3. The appellant was not represented before the FTT. He attended with Mr Welsh who was acting as a McKenzie friend. He relied on a witness statement dated 1 October 2018 and grounds of appeal of the same date. He gave oral evidence. There were no other live witnesses. His evidence was that he studied here in 2003. He had gained a degree and a Masters. He wanted to work in the health sector. He raised tribal conflict in Kenya although he had not made a claim on protection grounds. His evidence was that his parents were living in an IDP camp, but he did not know whether they were still there. He had not had contact with them since 2014. They had been displaced in tribal clashes. He has no home to return to in Kenya. The family home was destroyed in tribal clashes and the family displaced. The family was attacked in 1992, 1997, 2002 and 2007. His siblings were in the UK with their families and they and the church supported him. He was aged 41 and would find it difficult to start again in Kenya. His sister, [C], came here in 2006. Siblings [B1] and [B2] were also here. In his grounds the appellant said that he was dependent on [B2] and [B1] with whom he lives. There was a letter from [B2] of 18 March 2018 stating that the appellant lived with her and that she is responsible for his accommodation expenses. Her evidence was that they have a "strong family relationship." There is another sibling, a brother in Kenya but he like their parents has been displaced and the appellant does not have contact with him.

4. In the appellant's witness statement he said that [C] has PTSD and that she is on medication and always needs help. He gives her emotional and physical support. He said that she cannot live independently. His evidence was that [C] lives with Mr Welsh. However, Mr Welsh attended the hearing as a McKenzie friend and he was not a witness. The appellant's oral evidence was that when Mr Welsh and [B2] are at work, the appellant looks after [C]. In oral evidence he said that the family has applied for social care for [C], but this had been refused. The care offered was not appropriate because it was at set times which does not accommodate her needs.

5. The appellant relied on a witness statement from his sister, [C], dated 2 January 2012. This statement was her evidence at her asylum appeal which was allowed. Her evidence is that she was at risk on return to Kenya. She feared her ex-husband, the Kalenjins and the Mingiki. She did not know her father's whereabouts, but her mother was in an IDP camp. She said that the appellant was in the UK, but that she had very little contact with him and that she does not have a good relationship with him. She said that none of her siblings are close to her. There is a report from Dr Roxanne Agnew- Davies dated 19 June 2010. She specialises in Mental

Health and Violence against women. She diagnosed [C] suffering from Post-Traumatic Stress Disorder (PTSD) with Major Depressive Disorder.

6. At the start of the hearing before the FTT the appellant explained to the judge that [C] was rushed to hospital for emergency surgery and would not be able to give oral evidence. He was distressed but did not want the matter to be adjourned. The judge proceeded in [C]'s absence. There is no challenge to this decision.

7. The judge correctly identified that the appellant could not meet paragraph 276ADE (1) (iii) because he had not been here for twenty years. She considered whether he had established very significant obstacles to integration into Kenya, pursuant to para 276ADE (1) (vi). At [24] she considered his evidence of inter-tribal conflict and that his family had been displaced and that he has no job, house or anyone in Kenya to support him. She decided that she could not consider [C]'s evidence or the medical evidence concerning her because the appellant had not made a claim on protection grounds and because there was no evidence before the judge that [C] had agreed to the disclosure of the evidence. At [25] the judge concluded that she was satisfied that the appellant could re-establish himself in Kenya having spent 29 year there. She said that the appellant realised when he came here as a student that that he would have to return. The judge said that he was born and raised in Kenya and he would understand life there and be able to participate in it. She questioned the appellant's evidence that he had not been in contact with his parents since 2014. She found at [18] that the relationship that the appellant has with [B2] or [B1] did not go beyond the usual emotional ties albeit he had been dependant on them since 2011. The judge considered s.117B of the 2002 Act and concluded that the decision was proportionate.

8. At the hearing before me a second witness statement/letter prepared by [C] dated 2 October 2018 was produced. I was told by Mr Din that it had been before the FTT. The appellant was not represented at the hearing before the FTT. Mr Melvin was not able to assist in establishing what evidence was before the judge. I was concerned because I could not find the statement in the file before me and there is no reference to it in the documents. The first time I became aware of it was at the hearing before me. The judge granting permission said that he understood that the statement in questions had been made for the purposes of the appeal before the FTT. The position is ambiguous. Looking at the decision of the Judge Hawden-Beale and the appellant's own grounds, I can see no reference to this specific piece of evidence. I would have expected it to be specifically mentioned at [12] of the grounds which were prepared by the appellant's solicitors. The judge does not mention the second statement in her decision. She does, however, refer to statements in the plural, albeit not consistently throughout the decision. The judge excluded [C]'s evidence because she had not agreed to be a witness and she had not consented to the evidence that she relied on her asylum appeal being produced by the appellant at the hearing before the FTT. This suggests that she overlooked the second statement or that it was not before her for

whatever reason. I was told by Mr Din, that as far as he was aware, having not represented the appellant at the hearing, the second statement/letter from [C] was or should have been before the judge. The position is far from clear. However, I proceed to determine the grounds on the basis that the judge had before her or should have had the evidence in question.

9. [C]'s second statement/letter is brief. The witness confirms her address, that the appellant is her brother, that their family suffered persecution (as a result of tribal clashes), that she "deemed it fit to submit my asylum notes, professional reports, witness statement and tribunal determination as my account of what transpired and affected by family also affected my brother"; and that she has lost two more relatives since coming to the UK. Her evidence is silent about her relationship with the appellant or any care needs she may. It does not disclose evidence of dependency. It does not corroborate what the appellant says about her care needs.

The grounds of appeal

10. The grounds challenge the decision of the judge to exclude [C]'s evidence. It is asserted that it corroborated the appellant's account of risk on return and insurmountable obstacles. There is a challenge to the decision under para 276ADE (1) (iv) and the assessment of proportionality outside of the rules. The grounds assert that the decision to exclude Carron's evidence was unfair. Mr Din submitted that the judge did not consider the appellant's relationship with [C] when assessing proportionality.

The Law

11. The UT considered the principles governing fairness in *MM (unfairness; E & R) Sudan [2014] UKUT 105* and said as follows:-

> "14. The matrix of this appeal, rehearsed above, prompts reflection on the content and reach of one of the cornerstones of the common law, namely the right of every litigant to a fair hearing. The right in play is properly described as fundamental, irreducible and inalienable.
>
> 15. The law reports and texts are replete with formulations and manifestations of this right. For present purposes, and bearing in mind the doctrine of precedent, we focus upon two of the leading decisions of the superior courts. The first of these is R – v – Chief Constable of Thames Valley Police, ex parte Cotton [1990] IRLR 344. It may be observed that, in both the reported cases and the leading text books, this decision has not received the prominence it plainly merits. This might be attributable to its appearance in one of the minority series of law reports. Having said that, Cotton has been recently quoted with approval and applied by Moses LJ in McCarthy v Visitors to Inns of Court and Bar Standards Board [2003] EWHC 3253 (Admin) and by Underhill J in R (Hill) v Institute of Chartered Accountants [2013] EWCA Civ 555. In Cotton, the issue, in a nutshell, was whether the decision of the Chief Constable to dismiss a police officer was vitiated by procedural unfairness on account of inadequate disclosure to the officer of the case against him. We distill the following principles from Cotton:

(i) The defect, or impropriety, must be procedural in nature. Cases of this kind are not concerned with the **merits** of the decision under review or appeal. Rather, the superior court's enquiry focuses on the process, or procedure, whereby the impugned decision was reached.

(ii) It is doctrinally incorrect to adopt the two-stage process of asking whether there was a procedural irregularity or impropriety giving rise to unfairness and, if so, whether this had any material bearing on the outcome. These are, rather, two elements of a single question, namely whether there was procedural unfairness.

(iii) Thus, if the reviewing or appellate Court identifies a procedural irregularity or impropriety which, in its view, made no difference to the outcome, the appropriate conclusion is that there was no unfairness to the party concerned.

(iv) The reviewing or appellate Court should exercise caution in concluding that the outcome would have been the same if the diagnosed procedural irregularity or impropriety had not occurred.

16. These last two propositions are expressed with admirable clarity in the judgment of Simon Brown J, which was under appeal (at page 13B/D):

> "It is sufficient if an Applicant can establish that there is a real, as opposed to a purely minimal, possibility that the outcome would have been different."

The complaint in Cotton was that certain information, damaging to the police officer's case, had not been disclosed to him. Simon Brown J concluded that even if this disclosure had taken place -

> "… there would have been no real, no sensible, no substantial chance of any further observation on the Applicant's part in any way altering the final decision in his case."

The Court of Appeal upheld both his conclusion and the governing principle which he formulated: see the uncritical rehearsal of the Applicant's argument in the judgment of Slade LJ (at pages 10 – 11) and the endorsement of the conclusion of Simon Brown J by all three members of the Court of Appeal. Slade LJ espoused the following formulation of the governing principle:

> "Natural justice is not concerned with the observance of technicalities, but with matters of substance."

[At page 14.]

In the second of the three judgments delivered, Stocker LJ considered the threshold for intervention by the Superior Court to be "a real risk of injustice or unfairness [page 15]".

Conclusions

12. The decision to exclude [C]'s evidence for the reasons given by the judge discloses a procedural irregularity. The second statement/letter supports [C] having consented to be a witness in the proceedings which undermines the judge's reason for excluding it. In addition, the judge did not give the

appellant the opportunity to address her before making the decision to exclude evidence. This amounts to a procedural impropriety.

13. I must consider whether there was unfairness caused to the appellant whilst reminding myself that if the reviewing or appellate Court identifies a procedural irregularity or impropriety it should exercise caution in concluding that the outcome would be the same if it had not occurred. In addition to, or as a result of, the procedural impropriety, Mr Din submitted that the judge did not give adequate consideration to the appellant's Article 8 rights in respect of [C].

14. The effect of removal on the family unit must be taken into account when considering Article 8 rights. In *Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39,* Lord Brown (with whom Lord Bingham, Lord Hope, Lord Scott and Lady Hale agreed) said at paragraph [20].*:*

> "[20]. [Section 65 of the Immigration and Asylum Act 1999] *allows, indeed requires, the appellate authorities, in determining whether the appellant's article 8 rights have been breached, to take into account the effect of his proposed removal upon all the members of his family unit. Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims.*"

Whether or not 'family life' exists between adult family members depends on the circumstances of the particular case and requires proof of dependency "*more than normal emotional ties*" (*per* Arden LJ in *Kugathas* [2003] EWCA Civ 31, at paragraph [35]). Financial dependency is a relevant factor but there is no case in which it alone has been held to be sufficient.

15. Whilst there was some evidence of financial dependency and that the appellant was accommodated by [B2], he is educated and able and willing (with permission) to work. Mr Welsh, with whom the appellant said [C] lives, came to the hearing to act as a McKenzie friend. There was no evidence from [C] or independent evidence that the appellant looked after her or that she has care needs. They do not live together. The medical report submitted was prepared in 2010 and is woefully out of date. The appellant said in his witness statement that she is not able to live independently; however, this is wholly unsupported. There was no evidence to support that the appellant cared for [C] when [B2] and Mr Welsh were at work. Furthermore, [C]'s evidence in 2012 does not support that she has any relationship with the appellant. The totality of the evidence was not capable of establishing that there was a relationship between the appellant and [C] or indeed between the appellant and any of his siblings that would engage Article 8.

16. The appellant's case was advanced on the basis that there are very significant obstacles to integration. There was evidence of historic persecution towards [C] and tribal problems effecting the family; however, this evidence was not capable of establishing that the appellant would face very significant obstacles in 2018. The second statement does not contain evidence about the situation now on return to Kenya. Whilst the appellant has been out of the country since 2003, there was no cogent evidence capable of establishing very significant obstacles on his return in 2018.

17. The appellant's evidence of the extent of family life here was unsupported. He is an overstayer. He has no employment here. Despite having been here since October 2003, evidence of his family and private life was lacking. The appellant could not meet the immigration rules. The evidence does not disclose compelling circumstances. The dismissal of his appeal was inevitable. The procedural irregularity identified made no difference to the outcome in this case. There was no unfairness. Any defect in the assessment of proportionality is not material.

18. The decision of the FTT to dismiss the appellant's appeal under Article 8 is maintained.

Signed Joanna McWilliam Date 2 October 2019

Upper Tribunal Judge McWilliam