Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01646/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 September 2019	**On 23 September 2019**
Prepared on 4 September 2019	

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

M. A.
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Aziz, Solicitor, Duncan Lewis & Co
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant entered the UK illegally and made a protection claim on the basis of a claim to Somali nationality and membership of a minority clan. He was said to fear persecution at the hands of members of majority clans and the Al-Shabab group. That protection claim was refused on 14 June 2007, and

his appeal against that refusal was dismissed by decision of Immigration Judge S Reed of 13 August 2007 [A1-].

2. Judge Reed made a series of adverse credibility findings in the course of that decision [#24]. The Appellant had lied at his screening interview, in his witness statement, at his full interview, and, during the course of his oral evidence. Judge Reed identified three different identities as having been used by the Appellant at different times. He noted that the Appellant had made a protection claim using a different identity to that in which he had applied for entry clearance to the UK in 2004. He also noted that a large number of biographical details provided then were materially different; place and date of birth, name, home area of Hargeisa in Somaliland rather than Mogadishu, travel to Ethiopia, occupation, and a British citizen father living in the UK rather than a Somali living in Kenya. Finally he concluded that the Appellant did not know basic details of the Ashraf clan, although he claimed to be a member of one of its sub-clans. In consequence Judge Reed concluded; (i) that the Appellant had not established that he was who he claimed to be, and, (ii) that he was not a member of the Ashraf as claimed, or indeed, any other minority Somali clan.

3. Judge Reed also went on to reject as a fiction the Appellant's claim to have been tortured by individuals who had perceived him to be a member of the Ashraf, notwithstanding the evidence of the scars that were visible upon his body, and, the medical evidence that was then relied upon. Although we were not referred to this report, it would appear from Judge Reed's decision (and we note this does not appear to have been subsequently challenged) that this medical evidence did not follow the Istanbul Protocol, and, the author offered no opinion evidence upon how the injuries that had led to those scars might have been occasioned. Thus the medical report produced to Judge Reed appears simply to have offered evidence of fact by way of the number, location, and appearance of the scars then visible upon the Appellant's body [#24(xi)].

4. Although his appeal rights against the decision of Judge Reeds were exhausted in January 2008, the Appellant was not removed from the UK. In December 2012 he lodged further submissions which were accepted by the Respondent as amounting to a fresh claim to protection. This too was refused on 12 January 2018, which prompted a further protection appeal that was heard and dismissed on all grounds by decision of First-tier Tribunal Judge Hanbury of 19 June 2019.

5. The Appellant was granted permission to appeal this decision by First-tier Tribunal Judge Grant-Hutchison because it was arguable that the Judge had overlooked the existence and content of a report by Dr Christopher Jensen of 18 March 2019 upon the scarring that could be found upon the Appellant's body.

6. No Rule 24 Notice had been lodged in response to the grant of permission to appeal. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before us.

The Judge's approach to the decision of Judge Reed

7. In the course of his decision, Judge Hanbury took the adverse findings of Judge Reed as his starting point. He noted however; (i) the passage of time since that hearing, (ii) that the Appellant now relied upon evidence from a country expert upon conditions within Somalia, and, (iii) that the Appellant now relied upon evidence from two individuals who claimed to be able to confirm from their own knowledge of him, that the Appellant was a member of a sub-clan to the Ashraf minority clan. Thus he directed himself that he should look at all of the currently available evidence.
8. Having conducted that exercise Judge Hanbury concluded that he could place no material weight upon the evidence of the two individuals who claimed to be able to confirm the Appellant's clan membership: neither had known the Appellant prior to meeting him during a spell of mutual immigration detention in the UK. His reasons for that conclusion were entirely adequate, and no challenge is offered within the grounds to it.
9. Judge Hanbury went on to dismiss the Appellant's claim to membership of the Ashraf clan, and to infer that the Appellant was a member of a majority clan, whose home area was Hargeisa in Somaliland, as indeed Judge Reed had done previously. It is unsurprising in the circumstances that no positive finding was made as to which clan the Appellant was in truth a member. Again, the reasons for that conclusion were entirely adequate, and no challenge is offered within the grounds to it.

The report of Dr Jensen

10. It is common ground before us that the Judge's decision contains no express reference to Dr Jensen's report. As indicated to Ms Aziz at the outset of the hearing we therefore considered the core complaint made out. On the face of the decision, the existence and content of Dr Jensen's report appeared to have been overlooked. We therefore invited Ms Aziz to address us upon whether this would amount to a material error of law, that required us to set the decision aside, since the grounds did not address this, and it was not immediately obvious that the error required such an approach, given Judge Hanbury's approach to the appeal.
11. Despite repeating that invitation on a number of occasions, we were left with the bald proposition that if Dr Jensen's report had been overlooked, we were necessarily obliged to set aside the decision of Judge Hanbury, and to remit the appeal to the FtT for complete rehearing with no findings of fact preserved. We are unable to accept that proposition for three reasons.
12. Perhaps the most obvious is that Judge Hanbury addressed in the course of his decision (albeit briefly) the issue of internal relocation in the event that the Appellant was in truth a member of a sub-clan of the Ashraf as he claimed to be [45-7]. His finding that members of the Ashraf clan could return to areas of Somalia without facing a real risk of inter clan violence, or persecution on the basis of their ethnicity alone, was entirely consistent with the available country guidance for Somalia, and the grounds of appeal offered no challenge to it.

13. Second, even taking Dr Jensen's report at its highest, its content offered no proper basis for re-opening Judge Reed's adverse findings about the Appellant's use of a false identity when claiming protection in 2007, and by extension continuing to use a false identity in his dealings with the Respondent and the Tribunal thereafter. Nor could its content offer an explanation for the Appellant's lack of knowledge of the clan of which he claimed membership, which both Judge Reed and Judge Hanbury had concluded was a false claim to membership of the Ashraf. Nor could its content offer an explanation for the Appellant's original claim to have been born, and to have lived his life in Hargeisa in Somaliland, rather than Mogadishu.
14. Third, what Dr Jensen provided in the course of his report was the usual mix of evidence of fact and opinion that is offered by an expert witness. He offered evidence of fact as to the location and appearance of nine scars to be found upon the Appellant's abdomen, both wrists, and both forearms [ApB p53-7]. That evidence was not in dispute, and there is nothing in Judge Hanbury's decision that is inconsistent with it.
15. Dr Jensen also offered opinion evidence, based upon his professional experience, and taking into account the location and appearance of these scars, in the context of the Appellant's explanation to him of how the injuries that had occasioned them had been sustained, as to the degree to which their location and appearance was consistent with his explanation. In so doing, he sought to apply the Istanbul Protocol.
16. It is perhaps important to note that even with the benefit of Dr Jensen's evidence this appeal was a very long way removed from the circumstances under consideration in KV (Sri Lanka) v SSHD [2019] UKSC 10 @ [20] or [25].
17. As Ms Aziz accepts, Dr Jensen did not conclude that the location and appearance of any of the scars were either "diagnostic", or, "typical" of the account given to him; the two highest degrees of consistency in the Istanbul Protocol between the appearance of scars and their attribution by the Appellant. Thus his opinion was not that their appearance meant they "*could not have been caused in anyway other than that described*", or, that their appearance was such "*that is usually found with this type of trauma, but there are other possible causes*".
18. When the scars were examined and reported upon by Dr Jensen individually, only the location and appearance of one of the nine scars was said to be "highly consistent" with the Appellant's account of how he had sustained the underlying injury (this being a burn scar to the abdomen 4.7). This scar was therefore in his opinion one that "*could have been caused by the trauma described, and there are a few other possible causes*".
19. The location and appearance of the other eight scars were only "consistent" with the account given by the Appellant of the injuries, the lowest degree of consistency; "*they could have been caused by the trauma described but they are non-specific and there are many other possible causes*".
20. Specifically Dr Jensen noted that each of the none scars could have been sustained as a result of an accidental injury. In his concluding remarks, Dr

Jensen sought to take a more holistic approach, albeit without reference to the lies that the Appellant had undoubtedly told, and thus he offered the following concluding opinion;

The scars present on As body, although not possible to be precise as to whether the injuries were caused accidentally, by self infliction, or not, are consistent with the events described by A ...

Given the type of injuries and the symptoms which A displays, my overall evaluation is that there is a reasonable likelihood that he was subjected to beating and torture in Somalia.

21. We are not able to accept that any Tribunal properly directing itself upon the applicable burden and standard of proof, and the proper approach to be taken to the findings of Judge Reed would in the circumstances be persuaded to accept that Dr Jensen's evidence required Judge Reed's adverse findings of fact to be re-opened and remade so that either the Appellant's account of his identity, his clan membership, or, the circumstances in which he had sustained the injuries that had led to this scarring would necessarily be accepted. It is in our judgement plain that even with the benefit of Dr Jensen's evidence no Tribunal properly directing itself would be able to conclude that the Appellant had told the truth about the circumstances in which he had sustained the injuries that led to any of these scars.

22. With the benefit of Dr Jensen's report we accept that the Appellant can establish upon the applicable low standard of proof that he had at some unknown date, and in some unknown circumstances, suffered burn and blunt trauma injuries, but that is beside the point. Both Judge Reed and Judge Hanbury were perfectly entitled to find that if he were genuinely a member of the Ashraf he would not have given the answers that he did when questioned about his knowledge of that clan. Indeed that was the only realistic inference open to them. Equally both were perfectly entitled to find that Appellant had lied about his true identity, and again that too was the only realistic inference open to them. In our judgement the only sensible inference that was open to the Tribunal was therefore that the Appellant had not yet disclosed the true circumstances in which he had sustained the injuries that had led to these scars, and in turn, the true identity of those who had inflicted them.

23. We note that the grounds do not dispute that if the Appellant is in truth a member of a majority clan whose home area is Hargeisa in Somaliland (as would appear to be overwhelmingly likely to be the case) he could be returned to that city directly from outside Somalia. Moreover he has not yet identified any reason why he could not be expected to return to that area, and live there in safety. Nor, given the current country guidance, has he identified within the grounds any reason why he could not be expected to make a life for himself in Mogadishu in safety if that were to be the point of return, and he was disinclined to travel onward to Hargeisa.

24. In the circumstances, whilst we accept that Judge Hanbury appears to have fallen into error through giving the appearance of having failed to take into account the evidence of Dr Jensen, we are satisfied that if he did, then this

was an error of no consequence. Such an error would not require us to set aside his decision, and we decline to do so. The submission that we are obliged to do so is misconceived; our powers are permissive and we decline to exercise them for the reasons given above.

25. The decision to dismiss the Appellant's appeal on all grounds is accordingly confirmed.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 19 June 2019 contained no material error of law in the decision to dismiss the Appellant's protection appeal on all grounds, and that decision is accordingly confirmed.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 4 September 2019