Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09723/2019

THE IMMIGRATION ACTS

Heard at Bradford by Skype	**Decision & Reasons Promulgated**
On 26 August 2020	**On 8 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

YAE
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Holmes instructed by Shawstone Associates
For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Howard ('the Judge') promulgated on 14 February 2020 in which the appellants appeal on protection and human rights grounds, relied upon as an exception to the respondents duty to deport him from the United Kingdom to Somalia, was dismissed.

Background

2. The appellant is a national of Somalia who entered the United Kingdom age 16 with his mother and siblings to join his father, a Somali national, already in the UK. It is accepted the appellant left Mogadishu aged 3 and lived with his family in Kenya and another neighbouring country before coming to the UK.

3. As a result of the appellants offending, he was sentenced to a term of imprisonment and subsequently made the subject of an order for his deportation from the United Kingdom pursuant to section 32(5) UK Borders Act 2007. In her sentencing remarks of 7 October 2016 Her Honour Judge Barrie stated:

> "… You're 27 years of age and you've been convicted after trial of the rape of [NS] and it's right that you'd known each other for about two years at the time of this incident through the local Somali community; and she in the past allowed you and your then girlfriend to stay at her home for a period of time.
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> But prior to the commission of this offence on the 20, sorry, on the 10 July 2014 she said she hadn't heard from you for about a year. She said that you rang her out of the blue to say that you were in the area with friends and it's apparent from the phone schedule that was produced in the trial that you were very persistent in trying to make contact with her. You said in your evidence this was because you and your friends wanted somewhere to stay the night. But in any event, whatever the reason, you arranged to pick her up from her sisters and you gave her a lift home.
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> It was apparent from [NS] evidence that she was happy to welcome visitors into her home and this occasion, indeed, was no exception. She had two guests staying at her address, along with two of her children and she invited you and your friends into her property, into her home to watch the end of the football match. And it's right that you'd all been drinking vodka and you continued to do so at her address until the early hours of the morning.
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> [NS] agreed to let you and your friends stay the night at her home because you're all been drinking and because she was concerned that you'd otherwise drive and she accommodated you and your friends in one of the bedrooms. She provided you with mattresses and blankets. In short, she offered you her home for the night and she trusted you in that respect.
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> [NS] went to sleep on the sofa in her lounge and she did so fully clothed. She was menstruating at the time and she was wearing a sanitary pad inside of her knickers and she described feeling knocked out and dead just before going to sleep. She awoke to the feeling of pain inside of her and she found herself on the floor of the living room with her trousers and knickers removed. You were naked on top of her and your penis was in her vagina. She said she had no recollection of how she came to be moved from the sofa to the floor or how her clothes were removed.
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> She described in her evidence how she was bleeding from her period and how she pushed you and screamed "what are you doing, why

> are you doing this". But you didn't stop, instead you said "it's just me, don't worry I'm using a condom". She continued to push and scream at you saying she didn't care what you were using, why were you doing this to her and to get off her and eventually you did so and left to get dressed in the bathroom.
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> She described to this court how she was shaking and panicking. She was in shock and she immediately called the Police. Your friends woke to the screaming and shouting and when you knew that [NS] was calling the Police you left the premises. It's right that the Police arrived within a matter of minutes and discovered [NS] in a highly distressed state. She'd taken a photograph of your car as you left and she identified you to the policeman and picked you out on Facebook.
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> You were later arrested and gave a prepared statement in which you asserted that you'd had consensual sexual intercourse, a position that you maintained in your trial.
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> The impact of this offending on [NS] has been considerable. In her victim personal statement she speaks of having nightmares and flashbacks and wanting to take her own life in the weeks after the attack. She's been ostracised by the Somali community who believe that she's brought shame on the community, notwithstanding, of course, that she is the victim of this offence. She has as a consequence had to leave her home with her children to live in a refuge. Her children have been disrupted - disrupted and had to change schools and she's gone from being a sociable, outgoing woman to someone who's mistrustful of others and rarely goes out. She speaks of having had her life turned upside down, which in my judgement is a fitting description for all that she's had to and continues to endure and in my judgement she showed tremendous courage in her speaking out and giving her evidence in court."

4. When undertaken the sentencing exercise the Judge concluded having regard to the multiple aggravating factors it was appropriate to take an increased starting point before mitigation within the category range of seven years. The Sentencing Judge took into account everything said on the appellants behalf, including in particular during the course of the trial the claim the appellants father had sadly passed away in Somalia and that he was unable to attend his funeral and had not had the opportunity to grieve for him with his family, which was said to have had a significant impact on both the appellant and his family. A sentence of seven years imprisonment was passed although the same was later amended by the Sentencing Judge herself to six years.

5. The appellant was unrepresented before Judge Howard. The Judge confirms in the decision having taken into account all the documentary evidence provided including a medical report provided by the appellant. The Judge summarises the evidence provided from [14].

6. The appellant was released in October 2019 and although having taken a number of educational courses during the time he was serving his prison sentence the Judge finds at [27] the appellant had not rebutted the presumption did he constitutes a danger to the community or that the notice pursuant to section 72 Nationality, Immigration and Asylum

Act 2002 should be set aside, the effect of which is that the appellant is excluded from the Refugee Convention.

7. The Judge sets out findings of fact from [28] of the decision which contains the core findings challenged by the appellant. Those findings are in the following terms:

> "28 In coming to my decision I have considered all the evidence before me, including the background material to which I was referred and is noted in the Record of Proceedings and including passages that I may not have specifically mentioned. I have looked at all the evidence in the round before making any findings, including my findings on credibility.
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> 29 The primary issue for me to determine is the credibility of the appellant's account. I must then consider whether it satisfies the criteria for international protection or humanitarian protection and whether he fulfils the criteria for deportation and/or falls within any of the exceptions.
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> 30 The appellant seeks to challenge the deportation decision by arguing that returning him to Somalia, would breach the United kingdoms obligations under the Refugee Convention, Humanitarian Protection provisions and Article 3 ECHR. He has raised a number of separate grounds and I discuss each in turn.
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> 31 The appellant told me that his family are of the Marehan clan. This is a sub clan of the Darod. The Darod are the largest clan in Somalia. The appellant also said he has no family in Somalia. This was exposed when his mother was asked about the death of her husband, as claimed by the appellant after trial. She stated that the person who died must have been a relative of her husbands as it was definitely not her husband or a brother in law. The only proper conclusion to draw from this is that there are family members still living in Somalia and as relatives of her husband of the Marehan. This is not the only family of whom his mother spoke. When asked about her family in Somalia she said, "None in Mogadishu". When telling me about her flight from Somalia she mentioned a sister who lived near the Somali Ethiopian border. She said the sister was dead, but claimed no knowledge of surviving children.
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> 32 The fact the appellant is of a majority clan and there are family members, albeit not immediate, paints a very different picture to that he invites me to accept. This also informs me about his claim to fear those his parents initially fled. I did not hear from his father and the evidence of his mother was vague on this point. Other member of the family have, on any view, been able to make a life in Somalia since the appellant's father left. The evidence before me does not invite the view he could not do the same.
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> 33 In addition to the existence of family and clam members in Somalia I have also taken note of the Voice of Africa report cited by the respondent in her refusal letter. It describes the experience of returnees to Somalia from various English-speaking countries. The picture the report paints is of a bustling city populated with many English-speaking returnees.

34 The existence of family and the presence of a great many English speaking returnees leads me to conclude that there is nothing about the appellant's obvious westernisation that that he said will result in persecution or other inhumane or degrading treatment. The claimed existence of non state actors such as Al Shabab is also described as non-existent in Mogadishu. This is all in line with the findings of the Tribunal in the country guidance case of **MOJ and others (Return to Mogadishu) Somalia CG [2014] UKUT 00442 [IAC**].

35 It is correct to observe that the appellant is currently being treated for anxiety/PTSD. When asked about the medication he takes he stated it helps him sleep. There is no evidence this medication is unavailable in Mogadishu.

36 The appellant fears retribution from fans of his victim. I have dealt with this earlier. In her victim personal statement, she describes herself as the one ostracised by Somalia society. I have already found that I accept this and as a consequence find no merit in the assertion by the appellant that he is at risk from her fans. The evidence the appellant produced, a Facebook page does not even satisfy me to the lowest standard that the woman spoken of on Facebook and his victim are one and the same person.

37 The appellant claims that his skills, such as they are, would have no application in Somalia. The respondent cites three reports which speak of the economic success of returns in establishing businesses more usually associated with the Europe and America. Further it suggests it is local Somalis who are losing out to returnees in securing the associated employment.

38 When I look at the mattress for which the appellant contends both individually and collectively I find nothing it what he says from which to conclude, even to the lowest standard, that by returning him to Mogadishu the respondent would be in breach of her obligation to the appellant under Article 3 of the 1951 Convention.

39 I have taken into account all of the oral and documentary evidence relied upon before arriving at my decision. I also take into account the submissions made by both representatives."

Grounds and submissions

8. The application for permission to appeal made by the appellant in person was refused by another judge of the First-tier Tribunal on the basis the grounds did not highlight any specific error of law in the Judge's decision and that the grounds appeared to re-argue the appellants case and nothing more.

9. The appellant renewed the application directly to the Upper Tribunal this time with the benefit of the assistance of a solicitor he had instructed in the interim. The appellant assert the Judges erred in law in failing to take into account his vulnerability and in failing to apply relevant guidance to the same, in failing to adequately consider the relevant case of MOJ, and in failing to consider Article 8 ECHR entirely for the

reasons set out in further detail in the pleadings attached to the renewed application.

10. Permission to appeal was granted by a judge of the Upper Tribunal, the operative part of the grant being in the following terms:

> "At paragraph 29 of his decision, First-tier Tribunal Judge Howard stated that the primary issue for him to determine was the credibility of the appellant's account. However, he failed to take into account the fact that that the Appellant suffered from PTSD, anxiety and panic attacks. He also failed to take into account the fact that the letter from Bradley Therapy Services, dated 31 July 2019, stated that he was suffering a severe level of distress.
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> In these circumstances the Judge should have applied AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123 and treated the Appellant as a vulnerable witness when assessing his credibility. It was not sufficient to consider whether medication will be available for him in Somalia.
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> The other grounds are also arguable, as the Appellant was not legally represented at his previous appeal hearing and it was unreasonable to draw a potential adverse inference from the fact that his father did not give evidence in light of the medical evidence which confirmed that he suffered from paranoid schizophrenia.
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> As a consequence, there were material errors of law in First-tier Tribunal Judge Howard's decision and it is appropriate to grant permission to appeal."

Error of law

11. It must be noted that the statement by the judge granting permission, that there were material errors of law in First-tier Tribunal Judge Howard's decision, is not a finding open to a judge at that stage where no submissions or arguments have been heard, the matter is not conceded, and the issue is whether the pleaded grounds are arguable, no more.

12. Although the appellant appeared as a litigant in person before the Judge this had not always been the case. The appellant was assisted by solicitor's, Fadiga & Co, in relation to the earlier applications.

13. Following the lodging of the appellants appeal the case was listed for a Case Management Review (CMR) hearing at Harmondsworth on 11 December 2019. The appellant was represented at that hearing by a barrister from Garden Court Chambers in London instructed by Fadiga & Co. The Record of Proceedings in relation to that hearing records the judge conducting the hearing being advised there were some health issues "*Not sure if amount to Article 3. Some issues*". At no time has there been any statement made to the First-tier Tribunal to the effect the appellant is a vulnerable individual for whom particular arrangements need to be made in relation to the manner in which the hearing is conducted or otherwise.

14. On 21st January 2020 Fadiga & Co wrote to the First-tier Tribunal indicating that they had had received no instructions from the appellant since the CMR on 11 December 2019 and were therefore unable to

represent him any further in relation to his appeal. For that reason, the appellant appeared before Judge Howard as a litigant in person.

15. The Judge's Record of Proceedings shows that he took great care to ensure that the appellant, as somebody without the benefit of legal representation, fully understood and was able to take part in the appeal process. The Judges notes start with a reference to the Judge taking the appellant through the elements of the appeal to ensure that he fully understood what was being considered and had the opportunity to respond. It is clear when the appellant was asked questions, he gave answers and there is no indication that he experienced any difficulty in relation to the appeal process.

16. In relation to his medical condition the appellant was asked about anxiety/PTSD to which he confirmed he was taking a prescribed tablet which he stated helped him sleep and that he had had counselling too. The appellant gave no other answer to this question.

17. In the case of AM (Afghanistan) the First-tier Tribunal had a letter from a psychologist setting out not only the difficulties experienced by AM but how any hearing should be conducted to ensure that AM was able to partake and the measures the judge needed to be aware of both in relation to the conduct of the hearing and assessment of the evidence. The Court of Appeal were critical of the First-tier Tribunal for ignoring that advice and in failing to conduct the hearing in a manner best suited to assisting the appellant.

18. In this appeal there was no medical evidence from a psychologist or psychiatrist or anything that indicated to the Judge that the appellant had a diagnosed mental health problem which would also set out the specific steps, if any, that were required. It was not disputed that the appellant received medication and the evidence that was given is clearly recorded by the Judge in the decision showing the same was properly taken into account.

19. Whilst the Judge does not mention AM (Afghanistan) in the decision or the Presidential guidance for vulnerable witnesses, it is not made out the Judge did not take that guidance into account when ensuring the appellant received a fair hearing.

20. It is also not made out that having taken such steps the Judge then completely ignored relevant issues when determining the merits of the appeal. It is important that the appeal is read carefully, and the adverse findings set out by the Judge between [31 – 38] considered. This is because a lot of the adverse findings made do not arise specifically from the evidence of the appellant but also from the evidence of others, including the appellant's mother. Although the mother herself has health issues there was nothing to show her evidence could not have the weight the Judge gave attached to it.

21. The claim by all family members regarding family and clan in Somalia was also accepted by the Judge by reference to country information provided. The comment there is no evidence the medication the appellant receives would not be available in Mogadishu is factually [35]. It was not made out there was anything in the evidence before the

Judge that required this element of the appeal to be assessed in a manner other than that in which it was.

22. This is not a case in which the medical evidence, including any expert reports, supported a claim the appellant will face a real risk of being exposed to a serious, rapid, and irreversible decline in his state of health resulting in intense suffering or a significant reduction in life expectancy and that any serious, rapid, or reversible decline in health leading to intense suffering or the substantial reduction in life expectancy will arise as a result of the absence of appropriate treatment in Somalia or the lack of access to such treatment.

23. I find the assertion the Judge erred in the manner in which the merits of the appeal were assessed, and the hearing conducted, not made out. A reading of the determinations shows the Judge did assess the merits of the appellants claim holistically taking all factors into account when undertaking the required assessment. The Judge was entitled to note that no issues were raised regarding vulnerability at the CMR nor at the hearing before him and that the appellant appeared to be able to engage with the appeal process without evidence of any difficulty. It is not made out that the procedure at the hearing denied the appellant a fair determination of the merits of the appeal.

24. The other grounds are, in effect, disagreement with the Judge's findings regarding the other aspects of the case. The Judge clearly took into account the country guidance case law and also the availability of family support in Somalia.

25. The appellant speaks both English and Somali and the information provided by the respondents shows those from the English-speaking diaspora have the opportunity to do well for themselves in Mogadishu.

26. The appellant is from a majority clan and it is not made out that if returned to Mogadishu he will not be able to make contact with members of that clan.

27. The clan structure, as recognised in MOJ, now provide practical assistance including support rather than protection in the modern Somalia. The appellant fails to make out he would not be entitled to the same.

28. The respondent in the Refusal referred to the appellant being able to benefit from the voluntary return scheme which if that were still available would provide him with a capital sum.

29. Although family members claimed to be reliant on state benefits and unable to work as a result of their own health needs in the UK and elsewhere, there was insufficient evidence before the Judge to show family members would not be able to make any contribution to assist the appellant, even if not a large. What may seem a small amount of money in the UK might be the opposite in a country such as Somalia or Mogadishu and be sufficient to assist a person whilst they get re-established.

30. In any event, the finding of the Judge is that the appellant will be able to re establish himself especially as he has transferable skills. It is accepted that as a result of the time the appellant has been out of Mogadishu any such adjustment will be difficult and may lead to initial

hardship but it was not made out that any such difficulties could not be overcome or that the same warrant a finding that the appellant is entitled to a grant of international protection on the basis of the humanitarian provisions or articles of ECHR.

31. The article 8 aspect of the claim was fully set out at [44] in which the Judge finds it was not made out it was appropriate in all the circumstances for the appeal to be allowed on that ground. Although the assessment is extremely brief, it shows the Judge did consider this matter and in light of the other findings the grounds fail to establish the overall conclusion that the respondents decision is proportionate is outside the range of those reasonably available to the Judge on the evidence.

32. There is no merit in the attempt to undermine the material considered by the Judge. No inadmissible material was considered and the weigh to be attributed to the same was a matter for the Judge. Whilst the manner in which the Voice of Africa article is written was commented upon by Mr Holmes, that is the way in which that publication writes, in language that enables readers in Africa to understand the reality of the news 'on the ground'. It is not made out it is an 'entertainment papers' as suggested or that that less weight should have been placed upon the same than the Judge did.

33. Even though Mr Holmes suggests other findings the Judge might have made, the findings that were made are within the range of those reasonably open to the Judge on the evidence. As such no material legal error is made out.

Decision

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

Anonymity.

35. 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 2 October 2020