



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004269
First-tier Tribunal No: PA/55717/2022
LP/00471/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

KH (Namibia)
(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain of Counsel

For the Respondent: Mr Diwynicz a Senior Home Office Presenting Officer

Heard at Phoenix House (Bradford) on 4 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant was born on 5 December 1989. He is a citizen of Namibia. He appealed against the decision of the Respondent dated 2 December 2022, refusing his claim for international protection.
2. He appeals against the decision of First-tier Tribunal Judge Ali, promulgated on 1 July 2023, dismissing the appeal.

Permission to appeal

3. Permission was granted by First-tier Tribunal Judge Dixon on 27 September 2023 who stated:

“2. The Judge did not find the appellant’s account to be credible but does not appear to have had regard to the Joint Presidential Guidance Note No 2 of 2010.

3. The grounds assert (as their fulcrum) that the appellant’s evidence has not been assessed through the prism of his being vulnerable, as it should have been. It is asserted that a request was made that the appellant be treated as vulnerable. It appears arguable that there was here a material error of law in not so treating the appellant and applying the relevant guidance which may have affected the credibility assessment.”

The First-tier Tribunal decision of 1 July 2023

4. Judge Ali made the following findings:

“25. The Respondent has accepted the following facts, that the Appellant is Namibian and that he was in a relationship with his partner [UK] and as these facts are not disputed I also find the same applies.

26. The core issues to be determined are as follows; firstly whether the Appellant’s account is credible and if I find him credible whether there would be sufficiency of protection and whether there would be a viable option of internal relocation.

27. Dealing with the first issue of credibility. The Appellant explains that he fears a man called Ambrose who is aged 70, because he was the cousin of his partner [UK] and he wanted to marry her. However, when asked questions about his he was unable to give any information, for example he was unable to explain which side of the family Ambrose was from, he did not know whether he was married previously, he did not know whether he had any children and he did not know how much bride money Ambrose paid and I find these omissions damage his account. The Appellant states that he was attacked on 3 occasions by people. He states that the attacks were instigated by Ambrose. He states that during the first attack his friend Verino was present and witnessed the attack but he has failed to provide any evidence from his friend, which I find undermines his account of being attacked. The Appellant states that the second attack involved the same people from the first attack, and that even though he did not know who the people were he could recognise them if he saw them. However, I find that there is no evidence that the attacks were linked to Ambrose or that he instigated them and I find that at its highest this is nothing more than speculation on behalf of the Appellant.

28. The Appellant had the opportunity to report those asserted attacks to the police but he did not do so. I find his failure to at a minimum report the matters to the police to be damaging in his case. The Appellant states that he was fearful to report the matters to the police but I simply do not accept that, first there is simply a lack of evidence to substantiate the assertions made by the Appellant that Ambrose is a powerful person and secondly I find it somewhat odd that if the Appellant was fearful of his life he would not at least report the matters to the police.

29. The Appellant also states that he did not report the matters to his family but I am baffled as to why he did not mention any of the problems to his family. The Appellant goes on to say eventually he did speak to his mum about these matters and the Appellant states that Ambrose approached his mother to indirectly warn her to tell the Appellant to stop, however the Appellant has produced no evidence to corroborate this asserted threat or that he talked to his mum. The Appellant has provided no evidence from his mother to corroborate this aspect of his claim, even though he is legally represented and had the opportunity to do to and so I find this undermines his claims that his mother was threatened by Ambrose.

30. The Appellant confirms that his partner passed away in the UK, but before she passed away, there were attempts to take her back to Namibia, but there is an absence of information in respect of this. There has been around 4 years from the

Appellant leaving Namibia to the appeal before me and there is no information about the current circumstances of Ambrose, whether he is still alive or where he is and there is no evidence that the Appellant remains of adverse interest to Ambrose. There is no evidence before me that the Appellant has been threatened any further since his arrival in the UK and I find that this is because he is no longer of interest to Ambrose. I find in any event if he was (a fact that I have not accepted) then the passing of his wife in the UK would simply eradicate and nullify that threat completely.

31. The Appellant states that there has been a development in his case since the passing of his partner in the UK. That being that his partner's family are now holding him responsible for her death. In his email which he sent to his solicitors on the 11th January 2023, he states that his family tried to attend his partner's funeral but they were turned away by her family and on the second occasion they were physically attacked and one of his brothers was hit on the head with a stick. The Appellant goes on to explain that there were further incidents where his family were threatened by his partner's family. The Appellant states that he knows all this information because he has been communicating with his partner's cousin and that he also spoke to his own sister to see how the matter could be resolved. However, any efforts were futile as his partner family through his partners cousin communicated to the Appellant's sister that they will do anything to make sure the Appellant shares the same fate as his partner which includes the use of black magic.

32. In reference to the developments I do not accept them as credible. The Appellant sent an email to his solicitors on the 11th January 2023, which was not uploaded onto the HMCTS Portal until 13th June 2023, the day of the hearing. The Appellant is legally represented and had sufficient time to provide evidence of those asserted developments. There is no evidence from his family who he says were attacked, there is no statement from his partners cousin with whom he says he has been communication since his partner was ill, and there is no statement from his sister to confirm her role and what has as the Appellant asserts taken place in Namibia. I find the absence of any such evidence to be damaging to the Appellant's case and I find that the developments have simply been put forward to create another facet to the Appellant's claimed risk on return and to enhance the prospects in his asylum claim.

33. The Appellant's failure to claim asylum at the earliest opportunity and the delay in claiming asylum I find does damage his case and this further undermines his credibility under section 8 (5) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. 34. In considering the evidence, the case in its totality and my findings at paragraphs 27 to 33, I do not accept the Appellant's account of events in Namibia as credible. Given that I have not found the Appellant's case credible, I find that he would not be at risk on return to Namibia. Given that is the case I do not need to go on to assess the issue of sufficiency of protection and/or internal relocation. I will simply add that in respect of the expert report that focuses on the generic information about Namibia and more so the issues of sufficiency of protection and internal relocation, given that I have not found the Appellant to be credible, I find that the expert report does not assist in taking the matter any further and as result attach little weight to the report."

The Appellants' grounds seeking permission to appeal

5. The grounds asserted that (my emphasis in bold):

"Ground 1; Failure to consider evidence as a potentially vulnerable witness/Procedural Irregularity

3. The Appellant's account was that he had been raped. His partner had died less than a before the hearing leaving him as the sole carer of a very young child. **The Appellant's mental health struggles were indicated at the commencement of the hearing and it was specifically requested that the Appellant be treated as a vulnerable witness. The FTJ notes the sexual assault and his mental health struggles in paragraphs 8 and 9 of his determination.**

At no point does the FTJ consider this issue. There is no evidence at all that she has considered his evidence through the prism of his vulnerability as

such and how it may affect his ability to recall or to give his account. This is therefore a procedural error which renders the FTJ's findings unsafe.

4. The Presidential Guidance on Vulnerable witnesses' states

Assessing Evidence: Be Aware

ii. Some forms of disability cause or result in impaired memory;

iii. The order and manner in which evidence is given may be affected

iv. Comprehension of questioning may have been impaired.

Determination

13. The weight to be placed upon factors of vulnerability may differ depending on the matter under appeal, the burden and standard of proof and whether the individual is a witness or an appellant.

5. It is submitted that a failure to give the issue of the Appellant's vulnerability in both assessing his evidence and reaching his conclusions is an error and it is clear from the FTJ's findings that it is material. He finds it damages his credibility that he didn't obtain any evidence from his friend who was with him when he was first attacked. He also notes that the Appellant had the opportunity to report the attacks to the police and did not do so. He finds that a failure to report the attacks is damaging to his case [28]. He finds it 'odd' that the Appellant who was in fear of his life would not at least report the matters to the police [28].

6. However, what the FTJ does not consider, is how being the victim of a sexual assault may have affected the Appellant's ability to disclose it. Late disclosures of sexual violence are common and in the criminal courts late disclosure is no longer to be of any evidential significance.

7. Moreover, at Q94 of the Appellant's interview, he expressly states:

The police took me to the hospital.

I came there and they said ... they asked me what had happened. I didn't want to say that someone had sex with me. I was ashamed. When they left me in the hospital they said If there is anything happened to you that the police should know you should let us know. When they are telling the nurse, we think that the person was dragged or fell out of a moving car or something. from recovering from that, that's why I now started to distance myself from my partner.

8. The Appellant therefore expressly says he was too ashamed to reveal the attack to the police and even his partner from whom he distanced himself to the extent that he left Namibia without her.

9. The FTJ then concludes that he did not report the matters to his family and the FTJ is 'baffled' as to why he did not mention any of the problems to his family. Again, it should have been obvious from what he said in interview and the fact he left his partner, without informing her he was leaving, that these were not matters he was able to talk about. The FTJ should have at least considered his vulnerability as a victim of sexual violence and the reasons he may not have felt able to share it.

Ground 2: Unsafe Credibility Findings

10. The FTJ notes the Appellant's inability to give information about Ambrose, the man his partner was going to be forced to marry. The FTJ concludes that this damages the Appellant's account [27]. He is also concludes that there is no evidence that the attacks were linked to Ambrose [27]. He later concludes [30] that:

There has been around 4 years from the Appellant leaving Namibia to the appeal before me and there is no information about the current circumstances of Ambrose, whether he is still alive or where he is and there is no evidence that the Appellant remains of adverse interest to Ambrose. There is no evidence before me that the Appellant has been threatened any further since his arrival in the UK and I find that this is because he is no longer of interest to Ambrose. I find in any event if he was (a fact that I have not accepted) then the passing of his wife in the UK would simply eradicate and nullify that threat completely.

11. It is submitted that the FTJ has fallen into the classic error of assuming that such information would be reliably available to the Appellant. The Appellant is clear in his statement and in his interview that he had limited knowledge about Ambrose save for that he was 70 and rich with political connections. The Court of Appeal has previously criticised reliance on speculation as to plausibility. In *HK v SSHD* [2006] EWCA Civ 1037, Neuberger LJ stated that

28 ... [I]n many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the appellant has said before, and with other factual evidence (where there is any).

29. *Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar. ..*

30. *Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in Awala -v- Secretary of State [2005] CSOH 73. At paragraph 22, he pointed out that it was "not proper to reject an applicant's account merely on the basis that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion" (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". He went on to emphasise, as did Pill LJ in Ghaisari, the entitlement of the fact-finder to rely "on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible". However, he accepted that "there will be cases where actions which may appear implausible if judged by...Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background".*

1.35D Chadwick LJ added that:

70. To my mind, the appeal illustrates - with unusual clarity - the very difficult task faced by decision makers in a case where the applicant gives an account of facts which, if they occurred, took place in an environment which is wholly outside the experience of the decision taker and in circumstances in which there is very little relevant in-country material or expert evidence against which the applicant's account can be tested.

71. The striking features of the applicant's account in the present case is that there is no evidence to contradict it; such in-country material and expert evidence as there is tends to support it (or, at the least, is not inconsistent with it); the applicant has, himself, been consistent throughout; and there is no finding that the applicant has shown himself otherwise to be an unreliable witness.

72. On analysis of the tribunal's reasoning, I am unable to avoid the conclusion that the applicant's account has been rejected simply because the facts that he describes are so unusual as to be thought unbelievable. But, as Lord Justice Neuberger has pointed out, that is not a safe basis upon which to reject the existence of facts which are said to have occurred within an environment and culture which is so wholly outside the experience of the decision maker as that in the present case. There is simply no yardstick against which the decision maker can test whether the facts are inherently incredible or not. The tribunal's failure to confront that problem must lead to the conclusion that they erred in law.

12. It is therefore clear that the FTJ is assessing the Appellant's actions and evidence in light of how he thinks he would act in a similar situation and in the UK. In any case, the above also feeds back into the original error in that given the Appellant's experiences, presumably it is plausible that he would choose not to make enquiries and instead distance himself from extremely traumatic events that are damaging to his mental health.

Conclusion

13. It is submitted that a lot is said about the Appellant's credibility. However, considering the fact he hasn't been treated as a vulnerable witness and none of the submissions on behalf of the Appellant appear to have been considered, it is submitted that the FTJ has fallen into error and the appeal re heard de novo. Permission to appeal is respectfully requested."

Rule 24 notice

6. There was no rule 24 notice.

Oral submissions

7. Mr Diwynicz acknowledged that there was no mention of the Appellant's vulnerability in the Judge's decision, and that the evidential assessment of credibility must be looked at through that prism.
8. Mr Hussain submitted that as Ms Cleghorn was Counsel at the hearing and drafted the grounds seeking permission to appeal, it was extremely unlikely she would have said that vulnerability was raised if it had not been.
9. Mr Diwynicz said that there was no challenge to the credibility of Ms Cleghorn.

Discussion

10. I accept that Ms Cleghorn raised the Appellant's vulnerability at the start of the hearing as she said she did. There is no indication within the decision that this has been factored into the evidential assessment of credibility which must be looked at through that prism. That is a material error of law. Both representative agreed that as the assessment of credibility was flawed, the Appellant had not had a fair hearing, the decision should be set aside, and the appeal should be remitted to be reheard de novo before a Judge other than Judge Ali at the Newcastle hearing centre.

Notice of Decision

11. The Judge made a material error of law. I set aside the decision. I remit the appeal to the First-tier Tribunal.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 December 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent” is that appearing on the covering letter or covering email.