



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004534
First-tier Tribunal No:
PA/53615/2022 IA/08933/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

HH (NAMIBIA)
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Kumar, consultant, Bassi Solicitors

For the Respondent: Mr S. Walker, Senior Home Office Presenting Officer

Heard at Field House on 23 November 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

Introduction

1. The Appellant appeals with permission from the decision of First-tier Tribunal Judge Parkes (“the Judge”) dated 30 August 2023 dismissing his appeal on protection and human rights grounds (“the FTT Decision”). That appeal was from a decision of the Respondent dated 24 August 2022, refusing the Appellant’s application for asylum, which he had made as long ago as 15 January 2020. In short summary, the basis of the Appellant’s claim for protection is that
2. The hearing before me took place remotely. I am satisfied that there were no technical issues that prevented the parties from fairly presenting their respective cases.
3. Notwithstanding the importance of open justice, I am satisfied given that this is a protection claim that it is appropriate to make an anonymity order, which I do in the terms above.

The FTT Decision

4. After having set out various legal principles and background matters, at paras. 8-10 the Judge noted in relation to what took place at the hearing that:
 - a. the Appellant’s counsel had not been sent the stitched bundle by his instructing solicitors. While that was unsatisfactory, “In the event, the Home Office Presenting Officer was able to provide the relevant page numbers when individual documents were referred to”; and,
 - b. there was no dispute about the background facts.
5. At paras. 11-23, the Judge set out his Discussion and Findings, as follows:

“11. The Appellant adopted his witness statements and amended his witness statement at page 74 to confirm that his uncle had not paid compensation which had been ordered. In cross-examination he said that it had been his intention to return to Namibia, he had come at his friend's invitation to clear his mind, he had not known he could claim asylum. He had spoken to his sister about his uncle, he could not recall when but thought it was before he made his claim.

12. The Appellant repeated that his uncle is a soldier and lived in Omaheke region in the same village. He did not know the uncle's rank but that he worked in a town. Asked what else his uncle did the Appellant said he did not know but then said he is a businessman with a shop in the village and that he employed people to run it. It remains the case that there is no evidence that the Appellant's uncle is in the army or, if he is, what rank he holds.

13. The willingness of the Police to arrest and keep him in detention suggests that whether he is in the army or not he has no influence over official bodies. The fact that no rank is recorded in the Police documentation for his uncle would suggest that he is not in the army. That, along with the Police's willingness to arrest and charge him, undermines any claims of malign influence.

”

14. The evidence that showed his uncle's influence was his witness statement to the Police. He accepted that his uncle had been arrested twice on his complaint and so the Police had done something about it and that it was the Appellant who had dropped the charges. He was not sure how long his uncle had been held for.

15. The Appellant maintains that he cannot return to Namibia having "been all over" and been followed everywhere, by the descriptions he was given it was his uncle and not others on his behalf. It is not clear how his uncle would have the time or opportunity to do so and the Appellant remained in Namibia for 7 months before coming to the UK and did so without difficulty. If it was his uncle always on his trail then that would suggest a lack of contacts or influence in official channels on his uncle's part.

16. The Appellant had not brought the documentation with him but it had been sent by his sister. She is now in the UK but was not present to give evidence, the Appellant explained that they are not in contact as he has lost her number. It would appear from that she has not made an effort to contact the Appellant and he would not appear to have had an address or know where she was living. Clearly there is no family life or dependency between them and there is no support from her about the events in Namibia or more information about their uncle.

17. The Appellant said he was invited to the UK by a friend and that was who he stayed with before he was granted accommodation by the Home Office. His friend, like the Appellant's, sister was not in attendance at the hearing and so evidence that might have supported the Appellant's case was not available. His absence also reduces the evidence that might support the Appellant's article 8 claim.

18. In submissions Mr Claire [counsel for the Appellant] relied on the US State Department report about the levels of official corruption in Namibia. While that is not in dispute that does not reflect the Appellant's evidence of his experience with the Namibian Police. Not only was the Appellant able to make formal complaints that were accepted they were acted on. As noted above that feature suggests that the Appellant's uncle has no influence on official bodies.

19. The fact that the Appellant's uncle was not ultimately taken to court was not through a lack of official action by the Police or brought about by his own personal contacts or influence but by the Appellant's declining to pursue the prosecution. The evidence relating to corruption in Namibia has no bearing on the Appellant's case as the Appellant's own evidence is that it had not played a part in the state's actions.

20. The Appellant's claim is not based on a convention reason as it does not fit into any of the categories. His problem is a specific family issue and he is not a member of particular social group. In any event the Appellant has not shown that he cannot relocate within Namibia but more significantly he has not shown that the state is either unable or unwilling to protect him. The evidence shows a willingness to employ state resources and that there is adequate protection for the Appellant.

21. Alternatively and separately from the above points, although the Appellant said that he had been all over Namibia that appeared to be something of a generalisation and it does not appear that he moved a significant distance from his home area. The evidence is limited but I am not satisfied that the evidence shows that Appellant could not safely live elsewhere in Namibia and that internal relocation would be available to him. On the evidence available the Appellant is not in need of international protection on any basis.

22. The Appellant relies on article 8 and it is argued that he has integrated into the UK. The Appellant appears to have lost contact with his sister and there is no evidence from her either in relation to events in Namibia or to support a claim to family life in the UK. The Appellant's friend who first invited him has not provided evidence in support of what he may have known about events in Namibia or to help with the Appellant's private life in the UK.

23. I assume that the Appellant has developed a social life while in the UK but there is nothing to suggest that it is of any strength or durability or that it would engage article 8 let alone that removal would involve a disproportionate disruption to it. The Appellant has family in Namibia, he lived there until recently and will be familiar with it culturally and economically. There is no evidence to show that the Appellant would face very significant obstacles to reintegration. The Appellant cannot meet the Immigration Rules and the Appellant's circumstances are not such that a grant of leave outside the Immigration Rules would be justified.”

Appeal to the Upper Tribunal

Grounds

11. The Appellant sought to appeal the FTT Decision. His grounds of appeal are not terribly well drafted and, as will be seen, this has unsatisfactorily led to permission being granted on a false premise. Before me however, Mr Kumar produced a helpful skeleton argument, which, notwithstanding that it said that all of the grounds continued to be relied on, he confirmed set out the grounds on which (subject to one further point) he sought to now rely. Those are, in summary, as follows:
- a. As to the finding in in para. 12 that the Appellant’s uncle is not in the army as claimed,
 - i. this finding is perverse;
 - ii. it was reached in an unfair manner, as the Appellant was not asked about it at the hearing; and
 - iii. it is ‘against the grain’ of concessions made by the Respondent;
 - b. The Judge has erred in finding, and/or failed to give reasons for finding, that there was no ‘convention reason’ in para. 20 of the FTT Decision; and,
 - c. The Judge failed to apply the lower standard of proof applicable in protection claims.

12. The further point on which the Appellant relies relates to his Article 8 claim. In the Grounds, it is said that the Judge's Article 8 assessment falls short of the balance sheet approach and makes no findings in relation to section 117B of the Nationality, Immigration and Asylum Act 2002.

Permission to appeal

13. FTT Judge Seelhoff granted permission to appeal on 11 October 2023. He considered that it was arguable that the Judge erred in finding that the Appellant's uncle was not a soldier by going behind the Respondent's concession, having apparently conducted the hearing on the basis of that concession, meaning that the Appellant had no opportunity to address the Judge's concerns. It was also considered arguable that the Judge had failed to give reasons for finding that there was no convention reason. He also noted that it was not clear what the merit was in any Article 8 claim, but that the consideration of it was brief. He granted permission on all grounds.

Rule 15(2A) applications

14. The Appellant has applied under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce evidence not before the Judge. The first such application relates to a letter from the Namibian police force, a news article and witness evidence from the Appellant's partner and a childhood friend. The second rule 15(2A) application was made shortly before the hearing and contains evidence relating to a recent claimed attack by the Appellant's uncle on the Appellant's brother.
15. There was no rule 24 response from the Respondent.

Discussion

16. It is convenient to structure this section as follows:
- a. the Rule 15(2A) applications;
 - b. the finding that his uncle was not a soldier;
 - c. the standard of proof;
 - d. the 'convention reason' ground;
 - e. Article 8;
 - f. materiality. I will consider the materiality of any errors found at the end, in accordance with the guidance given in at [59].

Rule 15(2A) applications

17. I refuse to admit the evidence filed with the Appellant's Rule 15(2A) applications for the purposes of this error of law decision. My task is to decide whether there is an error of law in the Judge's decision and evidence which was not before him cannot demonstrate such an error. Nor is the evidence relied on to show that any error alleged, if shown, is material. Mr Kumar acknowledged the force of this at the hearing and sensibly did not press the point.
18. This refusal should not be taken as precluding the Appellant's reliance at any further hearing, which will be a matter for the Judge hearing that matter.

The Appellant's uncle's army connection

19. It is unfortunately unclear from the FTT Decision whether the Judge in fact made a finding that the Appellant's uncle was not in the army, or not. At para. 12 he

suggested that there was “no evidence” that he was and in para. 13 he stated that the fact that the police did not record his rank “suggests” that he is not. The Judge does not go on to reach a clear conclusion on this issue. However, the Judge’s next sentence is “That, along with the Police’s willingness to arrest and charge him, undermines any claims of malign influence” and it appears that the “That” to which the Judge is referring is the fact presumably found that he is not in the army. I therefore proceed on the basis that this is what the Judge found.

20. I am conscious of the high threshold to be surpassed before a finding of fact can be overturned on grounds of perversity, however I have come to the conclusion that the Judge fell into error in this regard. This is essentially for two reasons. First, it is not correct, as the Judge suggested, that there was “no evidence” of the Appellant’s uncle being in the army. There was the Appellant’s evidence. In his asylum interview, the Appellant told the interviewer in Q51, Q70 and Q154 that his uncle was a soldier. This assertion was also contained in paragraph 10 of his witness statement adopted as his evidence in the appeal. Contrary to what Judge Seelhoff in granting permission thought (and as addressed more fully below), there was no concession by the Respondent to the effect that the Appellant’s uncle was a soldier, but the veracity of his evidence on this needed to be considered, including in light of the fact that the core of the Appellant’s account had been accepted by the Respondent. Second, I agree with the Mr Kumar that the Judge’s reasoning in para. 13 – that the lack of a rank stated on the police form indicated that the Appellant’s uncle was not a soldier – was not rationally open to him. There can be a fine line between common sense inference and undue speculation. However, this in my judgment fell into the latter category. I have not had my attention drawn to any evidence that was before the FTT indicating that in Namibia it is normally the case that the police would indicate someone’s formal title in paperwork. In the circumstances, the inference drawn was not permissible, particularly in light of the low standard of proof applicable in protection claims and the resulting room for doubt as to the truth of an appellant’s factual case.
21. Having concluded that this was not a finding open to the Judge, at least without having properly considered the Appellant’s own evidence on this issue, it is not strictly necessary to consider whether this finding was reached in a manner that was procedurally fair or contrary to or against the grain of the Respondent’s concessions. I therefore deal with these points more briefly:
- a. As to fairness, I do not consider that, in the absence of any evidence as to what was or was not said before the FTT, this is a submission which is open to the Appellant to make. Grounds of appeal do not prove themselves and no transcript of the hearing, witness statement from someone in attendance nor any other evidence of what occurred was adduced. Mr Kumar (who drafted the grounds as well as appearing before me) did not appear before the First-tier Tribunal and it is therefore wholly unclear to me on what evidential basis the submission is properly able to be made as to whether questions about the uncle’s job as a soldier (or not) were put to the Appellant. In the absence of any evidence of whether the Judge put her concerns as to the discrepancies between the version of the blog, this ground necessarily fails.
 - b. As to the Respondent’s concessions, it is not correct that the Respondent conceded that the Appellant’s uncle was a soldier. Various other aspects of the Appellant’s account were accepted, and as noted above, his claim in relation to his uncle’s employment had to be assessed against that undisputed factual matrix, but there was no specific concession in this

respect by the Respondent in either the decision letter of the Respondent's reconsideration. Indeed, on a careful reading of the Appellant's grounds, they do not in fact assert that this specific factual issue was conceded, rather they suggest that the Respondent made concessions about the core of the Appellant's factual case, which Judge Seelhoff has wrongly (but wholly understandably given the lack of clarity in the drafting) understood to include the fact that his uncle was in the army. Nonetheless, given that there is no concession about the Appellant's uncle being a soldier, this ground also fails.

Standard of proof

22. I do not accept that the Judge has applied the incorrect standard of proof. As very recently reiterated in ASO (Iraq) v Secretary of State for the Home Department [2023] EWCA Civ 1282, at [41], "An appellate court must assume, unless it detects an express misdirection, or unless it is confident, from the express reasoning, that it must be based on an implicit misdirection, that the specialist tribunal knows, and has applied, the relevant law." The Judge, at paras. 3-4 of the FTT Decision, correctly directed himself in relation to the standard of proof applicable in asylum and humanitarian protection claims and no criticism is made of that self-direction. There is nothing in the Judge's express reasoning that indicates that the Judge has not followed his own self-direction. This ground is therefore rejected.

Convention Reason

23. The grounds assert that the Judge erred in not considering the Appellant's imputed political opinion. It is not clear to me why it is thought the Judge was required to do so. The Appellant's case as to why he was at risk on return to Namibia was set out in his skeleton argument before the FTT as "due to the ongoing financial dispute" with his uncle. That has nothing to do with the Appellant's political opinion. When I asked Mr Kumar what the political opinion was that his uncle was imputing to him, he was unable to formulate one. He said that his political opinion was that he was "going against his uncle". That however in my judgment comes nowhere near to being a political opinion as that has been interpreted in the caselaw (as to which see EMAP (Gang violence - Convention Reason) El Salvador CG [2022] UKUT 00335 (IAC) at [60]-[89]). A financial dispute and 'going against' the Appellant's uncle are not opinions, let alone political ones. I therefore do not consider that the Judge erred in finding that the Appellant's fear is not because of a Convention Reason.
24. The Appellant criticises the adequacy of the Judge's reasons in relation to this issue. The reason given for the Judge for rejecting the existence of a Convention Reason was that the Appellant's "problem is a specific family issue". That is brief, but in my view sufficiently encapsulates and explains the reason that the Judge reached his conclusion on this issue. In any event, given my conclusion that there was no convention reason above, any lack of reasons is immaterial. This ground is therefore also rejected.

Article 8

25. I do not accept the challenge to the Judge's approach to Article 8. The Judge rejected that there was family life between the Appellant and his sister at para. 16 and gave adequate reasons why any interference with his private life would be proportionate. It is not an error of law not to apply a balance sheet approach. As noted above, I must assume that the Judge knew and applied the law unless there

is something in his reasoning that causes me to doubt that. There is nothing of that sort.

Materiality

26. I have found that the Judge erred in relation to his finding that the Appellant's uncle was not a soldier. The question now is whether that could make any difference to the ultimate outcome of the Appellant's appeal on the basis of the material that was before the Judge. For it to do so, I would need to be satisfied that it might make a difference to the Judge's conclusions on both sufficiency of protection and the possibility of internal relocation (as if the Appellant loses on either, his protection claims fail).
27. In an appropriate case, the fact that a private actor of persecution is in the military may be a significant factor in determining whether there is sufficiency of protection and the possibility of internal relocation, as someone in that position may be able to use their position to undermine protection that would otherwise be available and/or use their military connections to render the whole country unsafe for an individual. That is however not this case:
 - a. In relation to sufficiency of protection, at para.13 the Judge found that the Appellant was able to access police assistance and that "regardless of whether his uncle was a soldier or not" this showed that he had no influence over official bodies. The Appellant was able to access support, but chose not to pursue his uncle's prosecution. It was this, and not corruption as the Appellant suggested, that led to the Appellant's uncle not being prosecuted. Given that the fact of the uncle being (or not) a soldier played no role in this reasoning, it follows that the conclusion that there is sufficiency of protection for the Appellant is unaffected by the error I have identified and would inevitably have been the same.
 - b. Similarly, in relation to internal relocation, at para. 15 the Judge found that it was only the Appellant's uncle that was said to be on his tail. The Appellant did not claim to be at risk everywhere in Namibia because of any connections that his uncle might have through the military. Given that the Appellant had not, on the Judge's unchallenged finding, moved very far from his home area, it is unsurprising that the Judge concluded that the Appellant had not shown that he could not reasonably relocate within Namibia. Given that these findings are also unaffected by the finding in relation to the uncle's position in the army, it follows that the error identified is also not material to the question of internal relocation either.
28. It follows that although the FTT Decision did involve an error of law, it is not material and the appeal must therefore be dismissed.
29. I would note that, had I found the error material to the Judge's conclusion on relocation and protection, I would in any event have preserved the findings in relation to both Convention Reason and Article 8 which are also unaffected by the error the Judge made and directed a reconsideration of the Appellant's appeal on humanitarian protection and Article 2/3 grounds only.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and accordingly shall stand.

Case No: UI-2023-004534
First-tier Tribunal No: PA/53615/2022 IA/08933/2022

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 November 2023