Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03933/2017**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 28 February 2018	**On 29 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS A J
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Alban, counsel instructed by Fountain Solicitors
For the Respondent: Mr. K. Hibbs, Home Office Presenting Officer

ERROR OF LAW DECISION AND REASONS

1. The Appellant is a national of Gambia born on 6.6.77. She last arrived in the UK on 25.4.16 and claimed asylum on 13.10.16. The basis of her claim is that she fears she would be forced to marry her deceased husband's brother and her refusal so to do had resulted in threats of violence against her from her father. This application was refused by the Respondent and the Appellant appealed. Her appeal came before Judge of the First tier Tribunal Boyes for hearing on 6.6.17. In a decision and reasons promulgated on 8.6.17 he dismissed the appeal.

2. An application for permission to appeal to the Upper Tribunal was made, in time on the basis that the FtTJ had erred materially in law:

(i) in failing to make findings in respect of past persecution *viz* the Appellant's claim that she had been subjected to a forced marriage to her first husband whilst still a child;

(ii) in materially misdirecting himself in law in finding that the starting point for his consideration was the decision by the Respondent;

(iii) in taking irrelevant matters into account and making perverse findings, with regard to the Appellant's personality;

(iv) in failing to provide adequate reasoning as to sufficiency of protection and internal relocation in light of the Appellant's evidence that her father is the local governor;

(v) in failing to take into account material matters in relation to Article 8 and in failing to have proper regard to the best interests of the Appellant's child in the UK.

3. Permission to appeal to the Upper Tribunal was granted by Judge of the First tier Tribunal Hollingworth on the basis that:

(i) it was arguable that the fact that the Judge did not make a finding of fact as to the claim by the Appellant that she had been subjected to a forced child marriage to her first husband is relevant;

(ii) it was arguable that the Judge erred in taking the Respondent's decision as his starting point, which did not detract from the necessity of making findings on material issues;

(iii) it was arguable that the Judge erred in failing to set his finding that the Appellant is "no shrinking violet" against an assessment of the level of threat to the Appellant;

(iv) it was arguable that adequate findings should have been made on the issues of sufficiency of protection in light of the Appellant's evidence that her father is the local governor.

4. In a rule 24 response dated 13.11.17, the Respondent opposed the appeal on the basis that the Judge had directed himself appropriately.

Hearing

5. At the hearing before me, I heard submissions from Ms Alban on behalf of the Appellant. She relied upon the grounds of appeal in respect of which permission to appeal was granted. In addition, in respect of the fifth ground of appeal Ground 5, she submitted that the

Judge had failed to make an independent assessment of the best interests of the child in that, although he lists his findings he fails to consider the evidence before him. No finding was made as to the nationality of the child, despite the evidence at AB 77-78 which is a newspaper cutting dated 20.6.14 reporting his death, that the Appellant's first husband and father of child was domiciled in Sweden. Moreover, in her witness statement the Appellant is clear that her son T does not speak the native tongue in Gambia. In respect of the text messages and letter from the Appellant's daughter the Judge has an issue with these and found they did not come from a child but she is not a child but rather 18 years of age.

6. In his submissions, Mr Hibbs acknowledged that the Judge's determination could be better drafted. He sought to rely on the clear finding at [34] rejecting the Appellant's account and the fact that the Judge did not think the documents drafted by the father and daughter are genuine but are self-serving. He submitted that the finding that the Appellant is "no shrinking violet" is the starting point. The Appellant has come and gone from the UK since 2006 and her child has been in the UK since birth and not living with the father. Mr Hibbs submitted that, taken in the round there was a clear finding at [34].

7. In respect of the second ground of appeal, Mr Hibbs accepted that the Judge could have expressed himself better but effectively the starting point is the Respondent's decision. He submitted that whilst the language is peculiar the Judge has looked at the issue of Convention reason and at [34] at credibility and he submitted that, if there was an error, it was not material.

8. Mr Hibbs submitted that the Judge was entitled to take account of demeanour and the contents of letters which he considered to be self-serving along with the fact that the Appellant has been coming and going since 2006. Whilst it may be that her father is in a position of authority, Mr Hibbs queried whether the failure by the Judge to make a finding on this point was a material error given his clear findings on credibility. In any event, there was no evidence her father is a local governor within Gambia.

9. In respect of Article 8 and best interests, there is no evidence that her first husband had been in the UK even though he is on the child's birth certificate, however, the name is different from that in the newspaper article. In respect of the child's best interests Mr Hibbs accepted that it was arguable that the finding was deficient as the child had been brought up by his aunt. He queried, however, whether it was a material error given that the child was not part of the proceedings and had been staying with his aunt. The Appellant, his mother, has been in and out of the UK on a regular basis and the issue arises as to whether the aunt has taken on parental responsibility, however, no evidence to this effect was before the Judge.

10. In her response, Ms Alban stated that it appeared that the son is a dependant on the mother: [13] onwards of the refusal refers, which includes a detailed consideration of section 55 of the BCIA 2009. Ms Alban further submitted that the FtTJ appeared to accept that there was a dispute between the Appellant and her father but it was unclear what the Judge accepts as a dispute i.e. whether in respect of her current or past forced marriage and it was very unclear what findings of fact are made. With regard to the Respondent's claim that the child was left with the sister, in fact he was left with the father who then left the child with the sister and he then returned to Gambia and died. The evidence was that the Appellant had been going back and forth for several years but she was married to her husband who allowed her to do this and the Appellant's documents show she intended to return because she had shipped goods back to Gambia to be sold.

11. Ms Alban submitted that the crux of this case is the past persecution and whether the Appellant was a victim of forced marriage and if this was the case it is likely it could happen again in light of her Muslim religion and Sharia law and the fact that her father has forced this upon her in the past and would want her to remain part of this man's family. Notably polygamy is practiced. The Judge failed to make a finding on this core fact and the Appellant's claim has not been considered properly. No finding was made in respect of the position of the father, which is relevant to protection and internal relocation. She submitted that these findings of fact are clearly lacking and material.

12. I indicated that I found a material error in relation to the treatment of the Appellant's dependent child's best interests but I reserved my decision in respect of the asylum and Article 3 claim, which I now give with my reasons.

Decision

13. Dealing first with the last ground of appeal, that the Judge erred in his assessment of Article 8 and the best interests of the Appellant's dependent son, born on 11.4.08, the Judge considered this aspect of the appeal at [38]-[47], concluding that the Appellant cannot meet the requirements of the financial requirements of the Rules or the immigration status requirement as she is a visitor/overstayer and he did not accept that EX1 applies to the claim. The Judge held at [45]:

> *"45. I reach this conclusion for the following reasons; albeit the child is 9 he has lived his whole life in the culture and care of a Gambian family. He speaks the same languages as his mother. He is familiar with the food. He is able to attend school in Gambia. The appellant herself stating that there was not problem with his attending school with his siblings. His full siblings are in Gambia and the return of him together with his mother will be a reunification of the family unit.*

46. In addition, it is clearly in his best interests to live with his mother. The child is not a British citizen. The child can speak the language of the Gambia and will be able to attend school."

14. The grounds of appeal assert that there is no mention or weight given to the fact that the child has been under the day to day care of his auntie and living with her since birth; the impact on the child of separation from her and her child with whom he has grown up like a sibling. There is a letter from the Appellant's aunt, S J at page 1 of the supplementary bundle dated 16.5.17 in which she states *inter alia* that she has lived together with T since he was born and that he is viewed as a sibling by her son, who is aged 12 years and that her son would be devastated if T is forced to leave the UK. She also states that T's mental and social wellbeing will be immensely affected should he be taken to the Gambia. There is also a letter from the mother of one of T's close friends, both in and out of school, addressing the impact on both children if T has to leave the UK. The Appellant's witness statement at [14] asserts that T does not speak the local languages or know anything of the culture of Gambia, having been born and brought up in the UK at the wish of his father;

15. At [38] the Judge found that: "*I can assume for present purposes that the appellant has sole parental responsibility for the child. There is a question mark over whom has day to day care of the child, this seemingly being the appellant's sister.*" However, the Judge failed to make any clear finding on the issue of who is caring for the child and who has cared for him since birth, which is clearly material to a sustainable assessment of where his best interests lie. I find that this is a material error. I further find that the Judge erred materially in fact in asserting that the Appellant's son speaks the local languages, which is contrary to the evidence before him and that in making his best interests assessment he failed to take account of material evidence *viz* the letters in the supplementary bundle.

16. Turning to the other grounds of appeal, in respect of the assessment by the Judge of the Appellant's asylum claim, I find that this too contains material errors of law in the following respects:

16.1. It is clear from the Appellant's first witness statement at [6]-[10] that the Appellant's marriage to her first husband was a forced marriage when she was 17. Whilst at [16] the Judge noted that, in summary, the Appellant maintained that she had been forced to marry a man much older than herself, arranged by her father and that she was 17 years old, this assertion has not been determined by the Judge who has made no finding of fact on this aspect of the Appellant's evidence. It is clear from [27]-29] of the decision that, on the contrary, the Judge placed weight on the fact that the Appellant has, in respect of her second marriage, withstood pressure to marry without, it appears, taking account of the fact that the Appellant's account was that she was forced to marry her first husband. For the avoidance of doubt, I do not consider that the Judge's findings at [27]-

[29] cover the forced first marriage but reinforce my view that he failed to take that evidence into account in reaching his findings in respect of the second forced marriage.

16.2. At [34] the Judge found that the starting point is how the matter was decided by the Home Office. This was subject to challenge in the grounds of appeal on the basis that the decision making process should not be approached from the view that the Respondent's decision is correct as a starting point. Whilst I am not convinced that this is what the Judge intended by his finding, I accept that it has given rise to a risk that by utilising the Respondent's decision as the starting point it appears that the Judge was accepting the Respondent's position rather than reaching independent findings on the material issues.

16.3. At [25] the Judge made reference to the Appellant as being "*resolute, forthright and determined in her stance that his was something which qualifies for protection*." He repeated this at [27] further stating: "*The appellant is no shrinking violet.*" At [28] he held: "*these matters paint the picture of a woman who is independent, firm in her life's endeavours and someone for whom the concept of being coerced and bullied into something would not sit well."* These findings were subject to challenge on the basis that it was arguable that the Judge erred in failing to set his finding that the Appellant is "*no shrinking violet*" against an assessment of the level of threat to the Appellant. I find that there is merit in this assertion, particularly given that at [34] the FtTJ appeared to accept that there is a dispute between the Appellant and her father but that it did not reach the level of requiring international protection. I further consider that the Appellant's assertion that she had, aged 17, previously attempted to resist pressure to undergo a forced marriage but was beaten by her father and tied up with a rope and detained in the house to force her to agree is arguably consistent with her current resolute stance not to be forced to marry again, particularly given that she is now 40 years of age and runs her own business.

16.4. The fourth ground of appeal asserted that the Judge materially erred in failing to make findings as to the sufficiency of protection in light of the Appellant's evidence that her father is the local governor. It is the case that the Appellant in her witness statement clearly states that her father is the *Alkalo* or head of the village, but this evidence has neither been recorded by the Judge in his summary of the Appellant's case at [15]-[22] of the decision nor is there any finding on this aspect of the evidence at [34] when the Judge makes specific findings on the ability of the local police to provide sufficient protection for the Appellant. This is potentially clearly material not only to the issue of sufficiency of protection but also to the reasonableness of internal relocation, given the evidence that Gambia is a small country.

Decision

17. For the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Boyes. I set the decision aside and remit the appeal for a hearing *de novo* before a different Judge of the First tier Tribunal.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

26 March 2018