Upper Tribunal
(Immigration and Asylum Chamber) **UI-2021-001218** (PA/03413/2020)

THE IMMIGRATION ACTS

Heard at George House, Edinburgh
on 15 June 2022

Decisions & Reasons Promulgated
on 2 August 2022

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

R J

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by SJK, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. FtT Judge Green dismissed the appellant's appeal by a decision promulgated on 21 October 2021.

2. The appellant sought permission to appeal to the UT on grounds attached to her application dated 29 October 2021: ...

> 2. The Judge at [68] posits an alternative solution to the question of the appellant being forced to marry her older cousin, being that the appellant married her partner. It is submitted that it is unreasonable of the Judge to require individuals to enter into a marriage they otherwise would not enter into (at this time) in order to avoid persecution. That would be an impermissible requirement in light of *HJ (Iran)* and in having regard to that the Judge had regard to an irrelevant matter.

3. The substance of the Judge's decision is that the appellant could obtain a sufficiency of protection in Namibia and can internally flee. In each of those respects the Judge erred in law.

4. At [74] the Judge indicates the appellant had already been to the police (with her partner) in respect of a violent assault on her and her partner and the kidnapping (regardless of how that was described) of their child and that the police failed to take any action in that respect. In carrying out his overall assessment at [77] on that issue the Judge concluded that there was in place a criminal justice system and a state operated police force. The Judge required to assess whether those systems in combination provided a system of protection that was sufficient to exclude the appellant from a need for international protection. That such a system hypothetically exists does not provide protection to the appellant in a practical sense where repeated reports to the police are not responded to. In making his assessment the Judge looked to the systems hypothetically in place and not the practical effectiveness of those systems. That is a failure to have regard to relevant matters.

5. There can be little doubt that Namibia does operate, at least at a hypothetical level, a system of sufficient protection for its citizens. However, given that the Judge accepted the evidence of the appellant of repeated reports being made to the authorities without any effective response from those authorities the Judge left out of account a relevant matter in assessing whether at a practical level those systems were sufficient.

6. At [82] the Judge uses the phrase "does not inexorably lead to the conclusion". That is a clear indication that the wrong standard of proof has been applied. The correct standard being "real risk", means that assessing whether a conclusion is inexorably lead to is unlawful and is an error in law.

7. At [85] the Judge rejects Mr Caskie's "superficially attractive" submission to the effect of the combination of a centralised national identity card scheme in combination with high levels of corruption meant that the appellant could be located by the appellant's brother by identifying a corrupt official with access to the national identity card system. The Judge rejected that submission because the appellant was not located during the three months she was in hiding in Namibia. The context of that was that the appellant had moved to an alternative location for a brief period before she departed from Namibia. There was no evidence that during that period the appellant had updated her address details on the centralised computerised National Identity register. She could not be expected to behave in the same way i.e. avoid compulsory registration, if she were to take up life permanently in Namibia. The Judge left that out of account.

8. The Judge finally indicates that he does not accept the appellant is of any particular interest to her brother, despite his previous conduct. The Judge had accepted earlier in the determination the significance of a "bride price" having been paid but failed to explain why that "bride price" having been paid, and the substantial evidence of the significance of that in terms of standing within Namibian society, her brother would have lost interest in her. That is a failure to provide adequate reasons and\or a failure to have regard to relevant matters and therefore an error of law.

3. In a decision dated 17 December 2021, FtT Judge Veloso granted permission on the view that it was "arguable that the Judge erred in his assessment of sufficiency of protection, bearing in mind the appellant's previous reports to the police, and in his assessment of internal relocation, including the ability of the appellant's ability to locate her". (Permission was refused on [1] of the grounds, which is not reproduced above.)

4. The SHD responded to the grant of permission on 25 January 2022, along the lines that the grounds were disagreements; the Judge directed himself correctly on sufficiency of protection at [71–73] and applied that guidance at [74–77]; the appellant's complaints to the police and their reaction were taken into account; the risk of the appellant being found, if she were to relocate, was no more than theoretical; that conclusion was properly based on the evidence; and the decision should be upheld.

5. The FtT's decision at [68] says:

> Whilst I accept that customary marriage is commonplace in Namibia, it cannot be said that it is the only form of marriage that is open to the Appellant and EU [her partner]. They have said that if they enter a customary marriage [that] would not be recognised. They also have the option of a civil marriage and it is open to them to enter into one should they desire to. If the couple enter a civil marriage, the Appellant cannot be forced to marry her older cousin.

6. Submitting on [2] of the grounds, Mr Caskie said that passage offended against article 12 of the ECHR, the right to marry and to found a family as an individual might choose. This was the imposition by the Judge of an unlawful "alternative remedy", an error such that the decision could not stand.

7. That was an ingenious interpretation of [68], but I prefer the submission of Mr Mullen that it reads into the passage much more than the Judge intended. Nothing in it is factually inaccurate. He observes an option open to the appellant and her partner if they desire it. He observes that if civilly married the appellant could not be forced to marry her older cousin; but he does not say that, taking her case at highest, marriage would automatically end any problems with her brother. He does not say that the solution to the case is a legal obligation to take that option.

8. Ground [3] says nothing of substance. Representatives took [4] and [5] together.

9. At [74-77] of his decision the Judge noted the nature of the justice system and of measures against domestic violence in Namibia and that the appellant and her partner, EU, had been to the police. He concluded that legal sufficiency of protection is available.

10. The criticism in the grounds and submissions was that the Judge did not have regard to the fact that complaints were made and no action taken, which showed that protection was hypothetical only and practically ineffective.

11. I am not persuaded that the Judge looked at protection only in theory and not in practice. There is not said to be any inaccuracy in his self-directions on the law at [71 – 73]. The complaints to the police are noted several times in the decision, along with "little to suggest" that those complaints were not taken seriously. As Mr Mullen observed, nowhere in the world do

complaints to the police result in a 100% record of successful prosecutions. The absence of a conviction of the appellant's brother did not require an outcome in her favour.

12. I do not find in this part of the grounds any more than disagreement with where the Judge, applying the principles of case law, drew the line on the facts.

13. Nor do I accept the closing submission that the case was decided on general sufficiency of protection. The crucial question remained whether there was a real risk to the appellant; and the Judge found against her on the availability of internal flight.

14. At [82] the Judge deals with evidence about where the appellant might go in Namibia, and whether her brother might trace her. His concluding remark is that while Walvis Bay has more opportunities, that "does not inexorably lead to the conclusion" that her brother would move there to work.

15. Mr Caskie argued that the Judge was looking for evidence inexorably requiring a conclusion in the appellant's favour on that aspect of her case, an error so far removed from the rest of the decision that nothing else therein could correct it.

16. Here again, I prefer the submission for the SSHD that the grounds read too much into a passing comment (which was again accurate, in fact). The Judge directed himself correctly on the standard of proof, which is one of the best-known features of this jurisdiction. There is nothing to suggest that he did not apply that to the overall case. He clearly, on a fair reading of the whole decision, did not decide against the appellant because she fell short of establishing as a certainty that her brother would move to Walvis Bay.

17. Ground [7] says that the Judge at [85] left out of account that there was no evidence from the appellant of updating her address while "hiding" in Namibia, but that she would have to do so, in the longer term, if she returned. However, this is an elaboration of an argument which the appellant raised for the first time while putting her case to the FtT, see [84], where she had the opportunity to lay the foundation for it. Absence of evidence on a point within her knowledge and on which she now seeks to found is hardly in her favour. She lays no foundation for a duty on the Judge to enquire further into the matter. She does not say what her evidence might have been. This is an attempt to continue elaborating on a case after having had a fair opportunity to put it. Further, this attempt to build on the case leaves the Judge's other reasons on the point standing. The appellant's is a private citizen without power or influence to corrupt the authorities to obtain information.

18. Ground [8] is directed against the finding, also at [85], of the appellant being no longer of interest to her brother. The Judge's reasons there are

her absence of 2 years and the lack of problems during her last three months.

19. The first reason is unchallenged, although it may not be a strong one. The second reason not undermined, as ground [7] has failed.

20. Beyond that, Mr Caskie referred to the Judge's recording of the case concerning bride price at [26(i), 61 & 63], and submitted that the Judge failed to explain why, the appellant's case having been accepted to the extent it was, her brother would have lost interest.

21. I agree that the decision is incomplete in that respect. The finding of the appellant's brother having lost interest is not reconciled with the possibility of an ongoing financial grudge over bride price. However, the decision is not conditioned on that finding. It is based primarily on finding no reasonable likelihood of the appellant's brother tracking her down elsewhere in Namibia, and on it not being unduly harsh to expect her to relocate.

22. The decision of the FtT shall therefore stand.

23. The FtT made an anonymity direction. Anonymity is maintained at this stage.

H Macleman

16 June 2022
UT Judge Macleman

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.