IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005165
First-tier Tribunal Nos: PA/50298/2020
LP/00023/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

KK (NAMIBIA)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Patel, Counsel, Kenworthy's Chambers
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 27 July 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

Background

1. This matter concerns an appeal against the Respondent's decision letter of 28 May 2020, refusing the Appellant's asylum and protection claim initially made on 2 April 2019.

2. The Appellant's claim had been made on the basis of her fearing being forced into marriage by her father.

3. The Respondent refused the Appellant's claim due to alleged inconsistencies in her account, including with documentation provided in support of her claim, and because even if her account were accepted, she would be able to obtain sufficiency of protection or internally relocate within Namibia to escape the risk.

4. The Appellant appealed the refusal decision.

5. Her appeal was heard by First-tier Tribunal Judge Alis who dismissed the appeal in a decision dated 12 March 2021. The Appellant successfully appealed that decision to the Upper Tribunal who ordered that it be set aside and be remitted to the First-tier Tribunal for a de novo hearing.

6. The remitted appeal was heard afresh by First-tier Tribunal Judge Garratt ("the Judge") at Manchester on 17 March 2022, who later dismissed the appeal in its entirety in a decision promulgated on 14 April 2022. I note the Respondent was not represented at the hearing and the Appellant was represented by counsel Mr Greer.

7. The Appellant applied for permission to appeal to this Tribunal on four grounds as follows:

Ground 1: Irrational reasoning: Plausibility of the Appellant's account.

> The Appellant argued that her account of forced marriage was plausible when set against the background country material in respect of forced marriage in Namibia; the Respondent made a concession in respect of this as follows: "The Respondent acknowledges the arguments raised in the Appellants Skeleton Argument (ASA) and the explanations forwarded in the appellants witness statements… although it is accepted that there is a prevalence of forced marriage in Namibia that includes women being made to marry older men, and whilst it is also acknowledged that marriage between cousins is common to Herero culture, it is not accepted that the Appellant's account in that she is at risk as being a victim of a forced marriage from her father".
>
> There was therefore no serious dispute between the parties over the plausibility of the Appellant's account. The Judge's treatment of the Appellant's claim at [53] – [55], and conclusion that it fell outside the country information, was unlawful because:
>
> > i) the Judge adjudicated upon a matter that was specifically conceded by the Respondent, without putting the Appellant on notice or giving her a fair opportunity to respond. Such an approach is unlawful (see, for example, NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856 (05 August 2009)).

ii) The Judge's reasoning in finding against the Appellant's account appears to be that as she is older than 14 years of age, her claim of being forced into marriage is inherently implausible. The Judge misunderstood the evidence, which evidence did not support the view that only girls of a particular age are vulnerable to forced marriage. The Judge's reasoning is irrational and wrong in law.

Ground 2: Procedural unfairness: Duty to put matters

It is trite that a Judge should put to the Appellant any concerns about their evidence which have not been aired by the parties. At [57], the Judge said the Appellant, "has also given very little evidence to explain why it was that she could not seek the protection of her boyfriend when the claimed abuse from her father started". This point was not taken by the Respondent and the Appellant was not asked to provide any further evidence on it. This was procedurally unfair and wrong in law.

Ground 3: Failure to take into account material considerations: The Appellant's fluency in English

The Appellant is a native Otjiherero speaker who speaks English as a second language. Despite her preference to communicate with the aid of an Otjiherero interpreter in all formal settings, her Home Office interview was conducted in English without an interpreter and she had difficulties in expressing herself as a result (Witness statement, Paragraph 90, stitched Bundle, Page 37). She said this provided an explanation for difficulties identified by the Respondent.

The Judge rejected that explanation saying:

> "I appreciate that, in relation to evidence given in interview, the appellant has said that she was confused because the interview was conducted in English when her main language is Herero. If that was so, then I am surprised that the appellant made no objection to proceeding with the interview in English and was prepared to indicate, in concluding questions, that she had understood the questions and there was nothing she wished to add or clarify".

The mandatorily applicable Equal Treatment Bench Book, explains at Chapter 8:

> "It is unreliable to ask, 'Do you understand?' The person may incorrectly think they do understand, or may say 'yes' even though they do not understand, because they feel embarrassed or intimidated or do not want to disappoint you when you are being helpful or, in certain cultures, to save their face or your face (see paragraphs 89 and 90 above)".

and:

> "Many parties, witnesses and even representatives, who do not speak English as a first language but use it socially and at work, feel able to appear in court without an interpreter. Nevertheless they may be at a disadvantage when seeking to ask or answer questions and argue their case in the formal and artificial setting of a court hearing. The level of an individual's spoken English will vary greatly and assumptions cannot be made. Some individuals will have lived in the UK for a long time and will have achieved a high degree of fluency. On the other hand, it can be easy to over-estimate an individual's ability to cope with language as used in court and under the stress of proceedings. The

> fact that an individual can communicate perfectly well in their work context may not be a reliable guide to how well he or she can communicate in court. Equally, a person may appear entirely fluent at the start of a hearing, but the level of their fluency may reduce when overtaken by emotions or stress, as may happen under cross examination".

As such, it was improper to disregard the Appellant's explanation as to her difficulties during interview because she herself did not recognise and explain her difficulties immediately and during it. To do so was therefore contrary to the Bench Book and wrong in law.

Ground 4: Failure to resolve an issue in dispute between the parties: The Appellant's Injuries

The Appellant suffered numerous injuries at the hands of her persecutor which left her with scarring that was documented in medical records before the Tribunal. The Appellant argued this was capable of lending some weight to her claim that she was assaulted by her father prior to her flight from Namibia.

The Judge at [58] states, "Considered in the round, I reach the conclusion that the scarring to the appellant's back and facial injuries could have causes other than an attack by her father."

It is unclear from this what weight the Judge attached to this evidence if any. It is not necessary to demonstrate that an injury has only one possible cause and an injury may have other causes yet still be capable of lending weight to an Appellant's claim.

8. Permission to appeal was refused by First-tier Tribunal Judge Moon on 3 October 2022.

9. The Appellant applied to the Upper Tribunal for further permission to appeal on substantively the same grounds.

10. Permission to appeal was granted by Upper Tribunal Judge Owens on 1 June 2023, stating:

> "1. The appellant seeks permission to appeal against the decision of First–tier Tribunal Judge Garratt dated 14 April 2022.
>
> 2. The application was lodged on 24 October 2022. The application deadline was on 17 October 2022 and the application is therefore five days out of time. There is no explanation for the delay and the application form indicates that the application is in time. I have not been able to ascertain the date of service of the refusal of permission by the First-tier Tribunal. In any event the delay is not significant, and the appeal is of great importance to the appellant because it concerns a protection claim. In these circumstances I am satisfied that it is fair and in the interests of justice to extend time to admit the appeal.
>
> 3. It is at least arguable that the judge erred in his consideration of the background evidence at [53] in the context of the respondent's concession in her review that the appellant's claim of being forced into marriage with a relative is common in the appellant's culture.
>
> 4. It is also arguable that the judge failed to put his concerns about the appellant's boyfriend's inability to protect her to the appellant, when this had not been raised

as a reason for refusal and the appellant had addressed this issue in in her statement in any event.

5. It is further arguable that the judge erred in his approach to the medical evidence.

6. Permission is granted on all grounds."

11. The Respondent filed a rule 24 response on 22 February 2023 stating that she opposed the appeal and the Judge directed himself appropriately. She responded to the particular grounds of appeal as follows:

(a) Ground 1: The Respondent made no such concession but merely accepted the background evidence in showing there is a prevalence of forced marriage in Namibia; the Refusal Letter emphasised that the Appellant's account was disbelieved. The Judge referred to the Appellant now being 32 years old and so was dissimilar to those described in background evidence; this was a rational observation; age was only one of a plethora of other factors which the judge considered. The public law doctrine of irrationality sets a deliberately high threshold which is not met here.

(b) Ground 2: The Appellant said she had a boyfriend named [M] and that her father and family knew about him. As recorded at [31] she had explained that she did not want her boyfriend to have any problems with her difficulties. The Judge no doubt having this evidence in mind was merely noting at [57] that there was little evidence as to why the Appellant could not seek [M]'s help. There was no obligation for the Judge to enter the arena and request further evidence on this point.

(c) Ground 3: As highlighted in the Respondent's review, the Appellant had never requested an interpreter and confirmed after both interviews that she had understood all the questions asked; no issues were raised in the subsequent letter of 16 October 2019 sent on her behalf. Question 1.10 at A5 of the Home office bundle shows the Appellant was asked what her main language and dialect is. Her response was "English". The Judge's rejection of the Appellant's explanation is well reasoned and was open to him on the evidence.

(d) Ground 4: the Judge accurately summarises the evidence provided at [58]. There was one facial photograph which showed a slight marking on the Appellant's face, and no photographic evidence of the asserted injury to her back. There was no medical report, whether or not in compliance with Istanbul Protocol, to suggest that the injuries could have been caused by attacks from the Appellant's father. Considering the dearth of satisfactory medical evidence, and considering all the other evidence in the round it was clearly open for the Judge to have concluded that a myriad of reasons could have caused such "injuries".

The Hearing

12. The matter came before me for hearing on 27 July 2023.

13. It serves no purpose to recite the submissions in full here as they are a matter of record. I shall only set out the main points as follows.

14. Ms Patel said all grounds were maintained and took me through them.

15. As regards ground 3, I asked whether it had been set out anywhere which particular parts of the interview the Appellant considered she had not fully understood due to the lack of interpretative assistance. Ms Patel said the Appellant raised it in her witness statements, but accepted this was in general terms rather than setting out specific questions or answers.

16. As regards ground 4, I asked what it is that the Appellant is saying that weight was not given to, was it a specific medical record? Ms Patel said it was the GP records and photos of the scarring which the judge did not engage with.

17. In response, Mr Diwnycz said he relied on the rule 24 response and took me through it. In addition, he accepted an interpreter had been used for the hearing before Judge Garratt but said there were no specific instances raised by the Appellant or her Counsel as to actual questions she would have answered differently or had not understood; the Judge dealt with the linguistic problems as well as any judge could.

18. Ms Patel had no reply.

19. As this was the second time the appeal had reached the Upper Tribunal, both representatives were content for me to decide how the matter should be dealt with if any material error was found.

Discussion and Findings

Ground 1

20. The Judge sets out the Respondent's case at [4] - [21] which includes a recitation of the Appellant's account of events in Namibia. As such, it discusses when the Appellant's problems with her father started [6], the tradition of the "Ovaherero" tribe for women to marry cousins and sometimes at a young age but the allowance of children outside wedlock [7], the Appellant having a boyfriend to whom she had gone instead of meeting the cousin she was being asked to marry [8] and [11], the main attack by her father and seeking, but being refused, assistance from her uncle [9], her dealings with the police [10] and the circumstances surrounding her leaving Namibia at [11].

21. [13] – [21] set out the Respondent's reasons for rejecting the Appellant's claim; which included alleged instances of inconsistency and implausibility in her account, analysis of the police reports she had provided, and consideration of sufficiency of protection and internal relocation in light of country information. I cannot see there is specific mention in this section of that part of the country information said to have given rise to a concession by the Respondent. As the Respondent was unrepresented at the hearing, there was of course no one there to clarify whether there was such a concession or not.

22. The Appellant's case, including her evidence given at the hearing, is set out at [22] – [42]; her specific comments as regards the Refusal Letter are set out at [29] –[42]. These include her discussing that she was first approached by her father about marriage at age 19 [32] and why she in particular had been selected for marriage as opposed to her sisters [31][31]. I cannot see any description of her giving oral evidence about the age at which one would typically be married in her tribe's culture, other than at [37], [39] and [40] that there has been a

suggestion that her own eldest daughter who is `now nearly grown up' would be married to someone in her cousin's family.

23. The submissions made by Mr Greer at the hearing before the Judge are set out at [43] – [47]. I cannot see any description of him relying on a concession by the Respondent concerning country information.

24. The wording said to comprise a concession is contained in para 6 of the Respondent's review, as follows:

> "Respondent acknowledges the arguments raised in the Appellants Skeleton Argument and the explanations forwarded in the appellants witness statements It will be maintained that although it is accepted that there is a prevalence of forced marriage in Namibia that includes women being made to marry older men, and whilst it is also acknowledged that marriage between cousins is common to Herero culture, it is not accepted that the Appellants account in that she is at risk as being a victim of a forced marriage from her father."

25. I disagree that any concession is being made here as regards the Appellant's account or credibility. This paragraph is merely accepting that there is evidence of a prevalence of forced marriage in Namibia that includes women being made to marry older men, and that marriage between cousins is common to Herero culture. It expressly goes on to say that the Appellant's account is not accepted. In other words, it is saying the Appellant's account is not accepted despite there being evidence which supports it in general terms. Para 1 of the review had earlier stated that "The respondent continues to rely on the Reasons for Refusal Letter dated 28th May 2020". The Refusal Letter set out in detail the several reasons why the Appellant's account had been rejected, which, as above, the Judge set out in [13] – [21]. These reasons included inconsistency and implausibility as regards the Appellant's specific account of events. There *was* therefore a dispute between the parties over the plausibility of the Appellant's account.

26. Even if the Appellant's account had been found plausible, that is something different from finding it credible. An account being plausible means that it is believable, but it still remains to be proved (in protection claims, to the lower standard) in order to actually be believed. Ground 1 appears not to appreciate this distinction and is flawed as a result.

27. I therefore find there was no concession as to the Appellant's account, but an admission of what the country evidence showed i.e. that there is evidence of a prevalence of forced marriage in Namibia that includes women being made to marry older men, and that marriage between cousins is common to Herero culture.

28. I see nothing in the Judge's findings in [53]-[55] that goes behind this admission. In fact, the Judge agrees with it, stating at [53] that:

> "In reaching my conclusions on this matter, I accept the background evidence suggests that the authorities in Namibia have made significant progress on some gender issues since the country's independence although there has been limited progress on gender based violence (EU Human Rights Country Report). The Canadian report, referred to in paragraph 29 of the skeleton, states that young women are given away to uncles and cousins who are much older, and that young women in these communities do not have a choice. It appears that the purpose for such marriages is in order to "keep the wealth within the extended family"."

29. The remaining part of [53] and also [54]-[55] go on to set out the reasons why the Judge finds the Appellant not to fit within the picture created by the country evidence as regards someone who would typically be forced into marriage. Notably he says at [53] that "However, it is reasonable to conclude that the appellant's evidence describes a family where forced marriage was not a feature for the females in her own family" before describing why he found this to be the case, which included not just stating that the Appellant was 32, but that there was also no mention of wealth or social status as making the marriage between the Appellant and her cousin desirable. This is confirmed by his later stating at [56] that:

> "The Aunt's statements refer to the culture of marrying cousins which is not the same as the wider practice of arranged marriage for financial reasons to which I have already referred in my examination of the background material."

30. There is nothing irrational about this reasoning. The Judge was entitled to reach the findings he did.

31. Accordingly, ground 1 is not made out.

Ground 2

32. I agree that it appears the Appellant was not asked at the hearing to comment specifically on why she could not turn to her boyfriend from protection from her father. However, she was asked in her substantive asylum interview:

> Q76 "You mentioned earlier that you had as boyfriend at the time of the incident. Why could you not live with him?" Answer: "he was living with his parents".
>
> Q77 "Could you not get a place together?" Answer: "My father would say that I end the relationship with my boyfriend and marry my cousin. He knew I had a boyfriend but still wanted to marry me off".

33. The Judge refers to this evidence at [11], saying:

> "When the attacks took place, the appellant had a boyfriend, who her father knew about, but he still intended to marry her to a cousin. The appellant said that she was unable to move in with her boyfriend because he was living with his parents at the time"

34. I therefore consider the point had been taken by the Respondent, as it is unclear what the reason for the interview questions was unless it was to explore ways of the Appellant escaping the risk and thereby being protected from her father.

35. The Appellant had also somewhat addressed the point in para 31 of her witness statement of August 2020, describing how she had told [M] of her father's plans and that she would rather marry him and not a cousin she didn't know but that "[M] is Herero too and so he again repeated how important tradition was". She says at para 37 that she approached [M] again later and "He just repeated how difficult it is in our culture to get out of such forced marriages". The next para 38 describes how she also spoke to her elder sister who gave her the same message i.e. there was nothing anyone could to do stop it. Notably, she also says at para 42 of the same statement that:

> I also spoke to my sister [MA]. When I told her she sounded surprised. Again I said that I did not want to marry him. [MA] said that she had always feared something like this would happen to her and that is why she had moved out and lived with her boyfriend ".

36. This in itself raised the question of why the Appellant could not do the same thing.

37. Looking to a boyfriend for assistance was therefore not a concept with which the Appellant was unfamiliar. Based on the interview questions and witness statement, the Appellant had already answered the question as to why she could not look to [M] in any case, being that because he lived with his parents, considered the Herero tradition to be important and that it was very difficult to get out of forced marriages.

38. I therefore do not consider the Judge erred by not putting the matter to the Appellant at the hearing. Even if it was an error, I do not find it to have been material given this was only one amongst many factors considered concerning the Appellant's account such that it was not a determinative matter.

Ground 3

39. Those parts of the Judge's decision appertaining to the Appellant's understanding of English are as follows:

> [20] (describing the Respondent's position) "In her screening interview the appellant gave a different date of birth for her daughters to that in her asylum interview. In her witness statement the appellant claimed to have had difficulties with the language in interview and that her previous representatives had failed to read back her asylum interview. It had to be noted that the appellant had never requested an interpreter during interview and confirmed after both interviews that she had understood all the questions asked and no issue was raised by the appellant's representative in their letter of 16 October 2019. If an issue of misrepresentation by legal representatives was to be raised, then those representatives should have an opportunity to respond in line with BT Nepal [2004] UKIAT 00311".
>
> [23] "A Herero interpreter was available at the hearing. I ensured that the appellant could understand the interpreter and gave her a brief explanation of the procedures which would be followed during the hearing. I indicated to her that, if any difficulties arose, particularly in relation to interpretation, she should so state and I would take steps to remedy the problem. No such problems arose".
>
> [24] The appellant adopted, as evidence in chief, the content of her two statements of 3 August 2020 and 2 March 2022 commencing on pages 4 and 20 of the indexed bundle, respectively. I noted that the second statement bore an electronic signature for the appellant. She explained that it related to the conversation she had had with her aunt in Namibia. Her solicitor had taken down the statement from what she said, and then she had allowed the solicitor to sign it for her
>
> [25] The appellant claims that, during the asylum interview on 9 October 2019, she had difficulty in understanding the English used by the interviewer. She thought the English spoken in the UK was completely different to the English spoken in Namibia. Further, English was not her first language and she could express herself much better in "Otjiherero". As indicated, above, a Herero interpreter was provided for the hearing as the appellant requested in her statement

> [59] The appellant has given reasons for inconsistencies in evidence about the reports which she made to the police. The evidence is in the form of three statements stating that they were made on oath in English and dated 1 and 12 February and 14 March 2019.
>
> [61] I appreciate that, in relation to evidence given in interview, the appellant has said that she was confused because the interview was conducted in English when her main language is Herero. If that was so, then I am surprised that the appellant made no objection to proceeding with the interview in English and was prepared to indicate, in concluding questions, that she had understood the questions and there was nothing she wished to add or clarify.

40. I have reviewed the evidence that was before the Judge carefully. It is correct that both the screening interview and substantive asylum interview were conducted in English with no difficulties with the language being raised, and the Appellant herself having said at 1.10 of the screening interview that her main language and dialect was English. It is also correct that no issue was raised by the Appellant's representative in their letter of 16 October 2019 which followed both interviews. It is correct that the Appellant's witness statement raised the issue for the first time. The Judge also noted at [59] that the three police statements made in Namibia were made on oath in English.

41. Against this background, the Judge was absolutely right to find as he did in [61].

42. This is especially so since the Appellant's witness statement of August 2020 at para 90 simply makes a general assertion that she had problems understanding what people are saying to her and she found it difficult to give the answers she wanted to, to express herself. Ms Patel was unable to take me to any evidence before the Judge in which the Appellant indicated specific questions and answers which did not accurately reflect her understanding of what had taken place, or what she had actually wanted to say instead of what was written. Therefore, although the Appellant said she can express herself much better in Otjiherero, it is unclear what she would have said further or differently to what she did say.

43. As regards the extracts cited from the Equal Treatment Bench Book, this was clearly not a case of someone simply saying 'yes' on one or even repeated occasions in answer to whether they understood. The Appellant herself said her main language and dialect was English and she gave her police statements in English. She has therefore used English on more than one occasion in different settings and volunteered that it is her main language.

44. Accordingly, this ground is not made out.

Ground 4

45. Those parts of the Judge's decision relating to the Appellant's injuries are as follows:

> [20]…."Although the appellant had provided photographs to support the allegation of assault, the respondent thought it reasonable to expect that, if she had suffered such a vicious attack that resulted in a broken nose, there would be some form of collaborating medical evidence but there was none. The respondent maintained the view that the appellant had not given a credible account in line with the decision letter".

> [41] “At the hearing, I asked the appellant some questions of clarification, bearing in mind that the respondent’s representative was not present. The appellant described the injury she claimed to have sustained at the hands of her father, as caused by him hitting her with a belt on her back and also leaving a mark on the left-hand side of her nose. She pointed out that she had shown the injuries to her general practitioner in UK.”
>
> [42] “During re-examination the appellant said that she had not shown her facial injury to her doctor who had only examined her back. That was because the injury to her face had already healed.”
>
> [45] (Submissions) “My attention was drawn to the supporting evidence. The medical evidence (page 41 of the bundle) confirmed the extent of injury suffered by the appellant along with the information given by her about facial injuries. The appellant should be regarded as a truthful witness in that respect”.
>
> [58] “As to the photographs, there is one facial photograph of the appellant which shows slight marking on her face, but there is no photographic evidence of the injury to her back. Whilst I accept that the facial injury is referred to by the appellant’s general practitioner in notes, there is no medical report which attributes the injury, to any degree, with the appellant’s claims. Considered in the round, I reach the conclusion that the scarring to the appellant’s back and facial injuries could have causes other than an attack by her father.”

46. It can be seen from this that there was photographic evidence of the facial injury but the Appellant’s GP did not see this injury as it had healed by then. Conversely, there was no photographic evidence of the back injury but the injury site was shown to the GP. The Judge clearly read and considered the GP evidence as he says this in [58]. Nevertheless, he finds that both injuries could have been caused by something other than an attack from the Appellant’s father. The reason he gives is that there is no medical report attributing either injury to the Appellant’s claims. He makes this finding having expressly considered everything “in the round” which would have included the photos, the GP evidence, the police reports and all other evidence produced by the Appellant.

47. I fail to see what is not clear or reasoned about this finding, nor what issue remains unresolved by it. It is apparent to me that the Judge did attach weight to the GP report and the photos and takes no issue with what they show, but says it had not been proved that the injuries they showed were caused by the Appellant’s father. It follows that because they could have been caused by other things, weight was not attributed to them as supporting the Appellant’s account. I consider that much is obvious and did not need further expression.

48. Accordingly, this ground is not made out.

49. To conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

1. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Garratt promulgated on 14 April 2022 is maintained.

2. An anonymity direction is made due to the nature of the issues underlying the appeal.

L.Shepherd

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
7 August 2023