



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002124

First-tier Tribunal

No:PA/52281/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th October 2023

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellants

NAMT

(anonymity order made)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr Timson, Counsel instructed by Manchester Associates

Heard at Manchester Civil Justice Centre on 28 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent (the Appellant before the First-tier Tribunal) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Respondent (the Appellant before the First-tier Tribunal),

likely to lead members of the public to identify the Respondent (the Appellant before the First-tier Tribunal). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Respondent is a national of Namibia born in 1999. On the 18th May 2023 the First-tier Tribunal (Judge O. Williams) allowed her appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.

Background and Matters in Issue

2. The Respondent states that she arrived in the United Kingdom on the 20th December 2015 in possession of a visit visa. She had come here to see her sister. She claimed asylum on the 11th January 2017.
3. The basis of the Respondent's claim was that she feared return to Namibia because she had faced persecution there in the form of many years of serious and brutal sexual abuse by her older half-brother, and by another boy at school. She had become estranged from her family and could not safely live alone as a young woman in that country. Relevant to that matter was her assertion that she had been a victim of trafficking whilst living under the care of her sister, who had effectively treated her as an unpaid servant, subjected her to abuse, and required her to sleep with a strange man.
4. The Secretary of State refused to grant protection. In her letter of the 8th June 2022 she accepted the facts advanced by the Respondent, but found the claim to fall outwith the Refugee Convention. She concluded that given the passage of time, and the fact that the Respondent was now an adult, she would no longer face a real risk of abuse by either her brother or the boy at school; if she had any concerns about that she could receive protection by the Namibian authorities, and/or relocate away from her home area. The Secretary of State noted that the Competent Authority had found there to be conclusive grounds that the Respondent was a victim of trafficking, and that she was suffering from depression and anxiety to the extent that she had self-harmed, but found no substantial grounds for believing that the high threshold to be surpassed in an Article 3 health claim was met. Notwithstanding this conclusion, the Secretary of State did conclude that a grant of Discretionary Leave would be appropriate, until the 17th July 2023.
5. When the matter came before Judge Williams the parties were in agreement about the matters in issue. This was in effect an 'upgrade' appeal and Judge Williams was tasked with determining whether the Respondent was entitled to refugee status. He decided all of the questions raised by the refusal letter in the Respondent's favour, and allowed the appeal.
6. In her application for permission to appeal to the Upper Tribunal the Secretary of State took issue with those conclusions on a number of grounds. Permission was granted by First-tier Tribunal Judge Karbani on the 15th June 2023. Although Judge Karbani clearly thought some of the Secretary of State's grounds without merit the parties before us came to the pragmatic agreement that we should consider

them all. We intend no disrespect to the author of those lengthy and slightly discursive grounds that we have divided them into three main heads of challenge.

Issue 1: Particular Social Group

7. Having set out the background facts in this case, and noting that they are not in issue, the Tribunal proceeds to consider whether this is a claim that falls under the rubric of the Refugee Convention. The Tribunal states:

“11. I have had regard to DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 00223 (IAC).

1. The Geneva Convention relating to the Status of Refugees 1951 provides greater protection than the minimum standards imposed by a literal interpretation) of Article 10(1) (d) of the Qualification Directive (Particular Social Group). Article 10 (d) should be interpreted by replacing the word “and” between Article 10(1)(d)(i) and (ii) with the word “or”, creating an alternative rather than cumulative test.

2. Depending on the facts, a ‘person living with disability or mental ill health’ may qualify as a member of a Particular Social Group (“PSG”) either as (i) sharing an innate characteristic or a common background that cannot be changed, or (ii) because they may be perceived as being different by the surrounding society and thus have a distinct identity in their country of origin.

3. A person unable to secure a firm diagnosis of the nature of their mental health issues is not denied the right to international protection just because a label cannot be given to his or her condition, especially in a case where there is a satisfactory explanation for why this is so (e.g. the symptoms are too severe for accurate diagnosis).

4. The assessment of whether a person living with disability or mental illness constitutes a member of a PSG is fact specific to be decided at the date of decision or hearing. The key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering no, or a lesser degree of, disability or illness may also qualify as a PSG.

5. SB (PSG – Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 0002 and AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC) not followed.

12. I find that the appellant has established that she is a member of a particular social group, solely on the basis of being a victim of trafficking, without the need to show how she would be perceived in society in Namibia. I note that that conjunctive approach, rather than the previous disjunctive approach requiring both elements to be satisfied, was approved in the more recent case of EMAP (Gang violence, Convention Reason) [2022] UKUT 335.

8. The written grounds submit that this approach was wrong in law, in essence because the Tribunal determined, in line with Upper Tribunal authority, that there is no need for members of a particular social group to demonstrate that their group has any particular social visibility in the country from which they come: it is enough that they are bound by a common innate characteristic, or a common background that cannot be changed. This is the 'disjunctive' or 'alternative' reading explained in DH and EMAP, and referred to in the judge's decision. The Secretary of State disagrees with this approach, favouring the 'conjunctive' or 'cumulative' approach now reflected in statute which requires both limbs to be met: see s33 Nationality and Borders Act 2022. This appeal is not however one to which NABA 2022 has any application. It started in 2017 and as such must therefore be determined in light of the then applicable law. This means that the Tribunal was correct to take the disjunctive/alternative approach approved by their Lordships in Fornah, and followed in DH and EMAP.
9. Mr McVeety accepted that to be the case. He did not however accept that the decision below was free from error. He submitted that the decision was flawed for a lack of reasoning. In particular he asked us to find that Judge Williams had failed to identify how being a 'victim of trafficking' was enough to place the Appellant in a particular social group. Although 'victims of trafficking' had in other contexts been so recognised, he submitted that the Tribunal had not done enough to establish why, in the context of Namibia, the test was made out here.
10. This was not, strictly speaking, a matter expressly raised in the extensive written grounds. We are nevertheless prepared to deal with it.
11. The first thing to note is that neither party had hitherto defined the particular social group in this case as being 'victims of trafficking'. When the Respondent claimed asylum she explained that she was unable to live in her home area because of the abuse she had suffered there; she stated that she was afraid of the harm she might come to as a young 'single woman' living on her own without family support. It was on this basis that the Secretary of State considered the claim, explaining in her 8th June 2022 refusal letter:

36. Women are not considered to form a particular social group (PSG) in Namibia within the meaning of the Refugee Convention. This is because while they do share an innate characteristic that cannot be changed - being female - they do not have a distinct identity in Namibia due to their equality in law and its application in practice, and the sufficiency of state protection. In general, society does not discriminate against women, meaning the group is not perceived as being different by the surrounding society.
(CPIN Namibia Women fearing gender based violence September 2021 para 2.3.1)

37. I have considered your claim to be subjected to domestic violence from your brother and a boy at school and whether this means you are a member of a particular social group and cannot go back to Namibia because you are at risk of persecution on this basis. For any group to be considered as a particular social group, those who belong to that group must share an innate or immutable characteristic. Regulation 6(d) of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 defines membership of a particular social group as:

a. A group shall be considered to form a particular social group where, for example:

i. members of that group share an innate characteristic, or a common

background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

ii. that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

38. Regarding gender-based discrimination, the US State Department in its 2017 report on Human Rights states:

“Civil law prohibits gender-based discrimination, including employment discrimination. Women nonetheless experienced discrimination in such areas as access to credit, salary level, owning and managing businesses, education, and housing (see section 7.d.). Some elements of customary family law provide for different treatment of women. Civil law grants maternity leave to mothers but not paternity leave to fathers, bases marital property solely on the domicile of the husband at the time of the marriage, and sets grounds for divorce and divorce procedures differently for men and women. The law protects a widow’s right to remain on the land of her deceased husband, even if she remarries. Traditional practices in certain northern regions, however, permitted family members to confiscate the property of deceased men from their widows and children.”

39. Whilst the system is not perfect, this report highlights that the Namibian state have provided laws to prevent gender-based discrimination. The same report notes that rape – including spousal rape – is prohibited by law, and the government are focussing attention on reducing gender-based violence in the country. It goes on to discuss gender-based discrimination in employment and notes:

40. “The labor law prohibits discrimination in employment and occupation based on race, sex, religion, political opinion, national origin or citizenship, pregnancy, family responsibility, disability, age, language, social status, and HIV-positive status, and the government in general effectively enforced the law. The law requires equal pay for equal work.”

41. In light of the above it is clear that there are laws and protections in Namibia that would prevent you being treated differently upon return based on your profile as a woman who has been a victim of Domestic Violence from your brother and a boy at school. It has been concluded that being a woman from Namibia, and a female victim of domestic violence does not mean that you are perceived as being identifiable as different by the surrounding society in Namibia.

12. It is immediately apparent from this that the Secretary of State rejected ‘women’ as a proposed social group solely on the basis that they were not ‘socially visible’ in the sense that the state legislated against them (in contrast to the position of, for instance, Pakistani women: Shah and Islam [1999] UKHL 20).
13. By the time that the matter came before Judge Williams the Respondent’s representative had changed tack. They submitted that she was a member of a particular social group identified as “a victim of sexual abuse from her own family”. The Secretary of State rejected that proposed group on the grounds that it satisfied neither the ‘innate characteristic’ approach, nor the ‘social visibility’ one. It also ran the risk identified in A. v. Minister for Immigration and Ethnic Affairs and Anr (1997) 142 A.L.R. 331 of allowing the persecution to define the group. It is perhaps for these reasons that Judge Williams ignored this proposed social group altogether, in favour of ‘victims of trafficking’.

14. There is ample authority for the proposition that ‘victims of trafficking’ can constitute a particular social group. In SB (PSG - Protection Regulations - Reg 6) Moldova CG [2008] UKAIT 00002 the Upper Tribunal held that ‘former victims of trafficking’ and ‘former victims of trafficking for sexual exploitation’ are capable of being members of a particular social group because of their shared common background or past experience of having been trafficked: see also AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC), PO (Trafficked Women) Nigeria CG [2009] UKAIT 00046 (IAC) and HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC), HC & RC (Trafficked women) China CG [2009] UKAIT 00027, AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) and TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC).
15. Mr McVeety did not dispute that, but contended that in all of these cases the Tribunal had identified a particular feature of the evidence relating to the country of origin which meant that the terms of the definition were met. He submitted that in those circumstances Judge Williams had to point to some aspect life in Namibia, for instance societal discrimination, to find as he did. We do not agree. It is correct to say that in a number of the Upper Tribunal decisions we cite above the Tribunal accepted the ‘social visibility’ test to be met, but for the reasons the members of this panel have set out in, respectively, DH and EMAP, we do not accept that this was, as a matter of law, a prerequisite to recognition (at least in this pre-NABA appeal). The identifying feature of this particular social group was simply the shared history of having been trafficked. The Respondent, and others like her, are unable to change their own personal histories, which become in this context “immutable characteristics” for the purpose of the Convention. See Baroness Hale of Richmond in ex parte Hoxha [2005] UKHL 19 [at 37]: “women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment. They are certainly capable of constituting a particular social group under the Convention”. We do not read any of the authorities to introduce an additional requirement of discrimination in the relevant society to qualify under this limb. As UTJ Gill explains in SB (Moldova):

55. Furthermore, both men and women can be trafficked for the purposes of sexual exploitation. Both men and women can be victims of sexual violence. If discrimination in the wider sense is a necessary identifying characteristic of a social group whose members share a common background, it is difficult to see how men who have been subjected to sexual violence can be members of a particular social group by virtue of sharing a past experience. It is very difficult to how a man would be able to show that members of his gender are discriminated against in the wider sense in a particular society. We do not think that it would be suggested, in the case of a male who is a former victim of trafficking for sexual exploitation, that discrimination against men (in the wider sense) in the country in question must be shown to exist as a necessary identifying characteristic of the group. There is, therefore, no reason to insist that former victims of trafficking for sexual exploitation who happen to be women must establish that women are discriminated against in their country. The imposition of such a requirement runs the risk of being based on an assumption that only women would fall into this group. It would also conflate the characteristic which identifies the social group

(i.e. that they share a common background or past experience) with their gender.

16. Accordingly we are satisfied that Judge Williams did not err in law in treating victims of trafficking as a particular social group. For the sake of completeness, we would also note that in fact the judge does consider the specific circumstances relating to victims of trafficking in Namibia at his paragraphs 23-24.

Issue 2: Risk on Return

17. The second head of challenge is that the Tribunal's conclusion that the Respondent would face a real risk on return to Namibia "is flawed to the extent that it is unreliable". The grounds critique the Judge's findings of fact, and submit that in conducting its risk assessment the Tribunal failed to have regard to the Secretary of State's case on sufficiency protection and internal flight.
18. We address the facts first. In the course of his deliberations Judge Williams found that the Respondent's mother was complicit in her trafficking. The Secretary of State takes exception to this finding, pointing out that there is nothing to indicate that the mother knew that the sister in the UK would subsequently traffick the Respondent, and that on her own evidence the Respondent has maintains contact with her mother to this day. We accept that there was no clear line between the mother and the trafficking. We are however satisfied that it was an inference that Judge Williams was entitled to draw from the evidence. This was a woman who, when confronted with the prolonged and serious abuse of her daughter by her son, responded by physically assaulting her daughter herself. She rejected her daughter's claims; the cruelty of her reaction resulted in the Respondent trying to take her own life. She was then an active proponent in the Respondent being sent away to the United Kingdom, where, it is accepted, she was subject to yet further abuse at the hands of a family member. When confronted by that reality, she again chose to reject the Respondent's claims.
19. Moreover, as the Secretary of State has identified, the significance of Judge Williams' finding was that if she is returned to Namibia the Respondent will be unable to return home. That remains the case whether or not her mother was complicit in her trafficking. The Respondent cannot be required, even as a 24 year-old woman, to return to the home where she was raped and abused for many years by a close family member who continues to live in that house. We agree with Judge Williams' conclusion that the Respondent's mother failed to protect her from this abuse, and likely would do so again in the future.
20. As to the wider situation in Namibia, the Secretary of State's grounds contend that the Namibian government are making increased efforts to combat trafficking and that this needed to be taken into account when considering the likelihood that the Respondent could relocate away from her family and seek the support of the state if necessary. That case is expressly addressed by the First-tier Tribunal, which at its paragraphs 18 and 19 directs itself to the country background material including the US State Department *Trafficking In Persons Report 2021* in relation to Namibia and the CPIN relied upon by the HOPO. The policy statement in the CPIN advised that "in general...the state is willing and able to provide effective protection. However, an assessment of whether a person would be able

to access assistance and protection must be carefully considered on the facts of the case". Having had regard to that policy statement the Tribunal then go on to do just that:

20. As a starting point I am wholly satisfied, on the basis of this evidence, that the appellant's family members have consistently demonstrated that they are willing to exploit the appellant sexually/for work, and her mother could not protect her. There does not appear to have ever been any consideration of her best interests or her needs being met in Namibia or when she was put to work in the UK. If the appellant were to be returned today, this is the situation she would be facing once again, while older there is no 'bright line' regarding vulnerability in the transition to child/young adults, indeed the appellant continues to receive emotional support from therapists. There is nothing to suggest that her family/ brother have changed with regard to his hostility/sexual predator. She has a history of vulnerability as a victim of forced labour - it is reasonably likely that her mother knew she was being sent to work for her half-sister. In those circumstances it seems to me almost inevitable that the appellant will once again be sexually abused or sent out to work. In the past, the appellant has not demonstrated the capacity to resist or find a way out of her situation, I am satisfied that the appellant has experienced trauma and I find, given her profile, that it is reasonably likely that she would again not be able to manage to avoid exploitation.

21. In considering risk on return of being re trafficked I have had regard to HM Government Publication Modern Slavery Statutory Guidance England and Wales 3 March 23 with regards to risk: *Adults who are particularly susceptible to modern slavery* 13.5. Some adults are more susceptible to becoming victims of modern slavery. Based on her profile, although older, I find that there is no 'bright line' to indicate that she is not at risk to re trafficking. I reach that finding as she will be met by similar economic and social situations which made her vulnerable to trafficking in the first instance. The fact that she is a former victim of modern slavery increases the risk of trafficking. I find that is reasonably likely that she remains at risk on return based on her personal characteristics as a young adult; with a history of poor mental health which will make her less resilient - in that context I am satisfied that the appellant would return to the capital city of Windhoek as, "there is nowhere else that I can go"; with a lack of any trustworthy family, friends or support network; lack of education (she left school at 15 years); lack of job skills or experience (except forced labour); a history of abuse, exploitation and destitution; visible or discernible characteristics of vulnerability; her ongoing PTSD trauma and fear (as per therapist report); the fact that she left Namibia as child and never lived there as adult.

22. I am satisfied that she will be at risk on return from her brother/wider community. I have no reason to disbelieve the appellant's evidence that her brother sent threatening texts to

harm her if she was to her hometown (47-52), I have considered the texts in the round in line with Tanveer Ahmed and am satisfied they reflect serious risk of harm (“I will fuck you up...I silence you for good”). It is reasonably likely that he obtained her telephone number from family members and chose to start a fresh vendetta against the appellant out of malice and hate. It is reasonably likely that notwithstanding an intention to avoid harm (I note that the appellant told her councillor that she denied that she was planning to return to her hometown (110)) she is so vulnerable that she will have to return home, (“if I go back I don’t have anywhere except my parents’ house and that’s where he lives as well” (Q56)).

23. A return makes her extremely vulnerable, in her case the state will do little to intervene, as demonstrated by her years of being abused and of being trafficked in the context of state corruption (CPIN 7.2.1) and failure to initiating prosecutions of traffickers (CPIN 7.2.6) - she had no protection from her mother/wider family, and she has credibly described how notwithstanding making attempts to seek protection from the authorities, nothing happened, “the people at the police station kept quiet” (AIR Q 47). The prevalence of attitudes towards forced labour/sex trafficking in my judgement demonstrates a reluctance or inability to guard against the threats to the appellant, on return her future is bleak: *2022 Trafficking in Persons Report: Namibia US Dept of State Trafficking Profile* “As reported over the past five years, human traffickers exploit domestic and foreign victims in Namibia, and traffickers exploit victims from Namibia abroad....

21. We have set this reasoning out at length because it illustrates two things. First, contrary to the grounds, Judge Williams did expressly direct himself to the country background material relied upon by the Secretary of State. Second, because it demonstrates that Judge Williams did exactly what he was instructed to do by the CPIN: he carefully considered the case on its facts. We are not satisfied that there was any error of law in his approach.

Issue 3: Respondent’s Grounds of Appeal

22. In the final section of his decision Judge Williams purports to allow the appeal on human rights grounds. The Secretary of State submits that this is an error because the only grounds pursued by the Respondent were protection grounds. Mr Timpson accepts that this was an error. We substitute the decision to allow the appeal on human rights grounds with a decision to allow the appeal on protection grounds.

Decision

23. The appeal is allowed to the extent that the First-tier Tribunal’s decision to “allow the appeal on human rights grounds” is substituted with a decision to “allow the appeal on protection grounds”.

24. The decision of the First-tier Tribunal is otherwise upheld, and the Secretary of State's Appeal dismissed.
25. There is an order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
11th October 2023