IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003530

PA/01750/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
16th January 2025

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

BK
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 6 January 2025

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, who is a citizen of Namibia, appeals with permission against the decision for First-tier Tribunal Judge Shukla ("the judge") promulgated on 31 May

2024 dismissing the appellant's appeal against the respondent's decision dated 6 November 2023 to refuse her asylum claim.

2. The First-tier Tribunal made an order granting the appellant anonymity. No application has been made to set aside that order. While I take into account the strong public interest in open justice, I continue the anonymity order on the basis that the appellant's claim relates to a fear of persecution and claims of physical abuse and, for those reasons, the balance weighs in favour of protecting her identity.

Background

3. The appellant arrived in the UK on 31 October 2021 on a visit visa. She claimed asylum on 23 December 2021 on the basis that she feared her family in Namibia because they were trying to force her to marry her 70-year-old cousin. In a decision dated 6 November 2023, the respondent refused the appellant's claim. In doing so, the respondent did not accept that the appellant's claim was credible and, in any event, that there would be sufficiency of protection from the Namibian authorities and the option for the appellant to internally relocate to another part of the country to avoid her family.

The decision of the First-tier Tribunal

4. The appellant exercised her right of appeal to the First-tier Tribunal. However, in her decision promulgated on 31 May 2024, the judge dismissed the appellant's appeal. The judge's main findings on credibility are set out at [21]. There, the judge found that the appellant had given an inconsistent account of whether she had been physically assaulted by members of her family and whether she had gone to the police. Regarding the claim of physical assault, the judge said as follows at [21(a)(1)]:

> "The appellant has given inconsistent accounts about whether she was physically attacked or assaulted by her father, uncles or male cousin. The appellant said in her [asylum screening interview] that her cousin beat her; in her [asylum interview record] that he touched her in a way she was uncomfortable with; and her grounds of appeal state that "every time I refused to comply I would on a regular basis face hostility and ill-treatment in the form of beatings, sexually abused harassment [sic] and on occasions being threatened to be killed I don't comply with their demands". The [report by the] OTA [OvaMbanderu Traditional Authority] refers to attempted rape and "forced marriage assault". However, at the hearing the appellant said at the hearing she had not been physically attacked by her father and uncles, and she had not been physically attacked or physically harmed by her male cousin."

The appeal to the Upper Tribunal

5. The appellant's grounds of appeal raise the following points:

   (1) The judge made a material error of law in failing to treat the appellant as a vulnerable witness in circumstances where there was reason to believe that she had potentially been the victim of sexual abuse by her cousin and suffered from poor mental health.

(2) The judge made a material error of law when making findings about the lack of consistency in the appellant's evidence about the abuse she claimed to suffer without her having been given an opportunity to give an explanation for her inconsistent evidence during the hearing.

(3) The judge made a material error of law in finding that the appellant had continued living with her family until she left the country in October 2021 in circumstances where the appellant was not asked about this during the hearing.

6. The appellant was granted permission to appeal by Upper Tribunal Sheridan on 2 September 2024 on the following basis:

> "1. The judge arguably erred by failing to consider whether to treat the appellant as a vulnerable witness. An application to be treated as a vulnerable witness was not made. However, as the appellant was unrepresented, it was arguably incumbent on the judge to consider, in the light of the (albeit limited) evidence about the appellant's mental health, whether or not to treat her as a vulnerable witness.
>
> 2. It is arguable that had the appellant been treated as a vulnerable witness, the judge's approach to the oral evidence in respect of the abuse she claims to have suffered might have differed. Arguably, this might have affected the adverse credibility finding in paragraph 21(a)(i)(1)."

7. The appellant's appeal was first listed for an error of law hearing before Upper Tribunal Judge Gleeson on 18 November 2024. However, that hearing was adjourned on the basis that the appellant was unwell and an Otjiherero interpreter was also required.

8. During the course of the rescheduled error of law hearing, I heard submission from Ms Everett, on behalf of the respondent. I gave the appellant, who appeared in person, the opportunity to make her own submissions. However, she simply asked me to allow the appeal on the basis of her written grounds of appeal, which had been drafted by a charity called Praxis.

9. At the end of the hearing, I informed the appellant and Ms Everett that I would allow the appeal with written reasons to follow.

Findings – Error of Law

10. I have sympathy for the position that the judge found herself in. The appellant was acting in person and it appears that she produced her evidence at the last minute. Moreover, no application had been made for the appellant to be treated as a vulnerable witness. It also appears that there was limited, if any, medical evidence before the tribunal. Nevertheless, I am satisfied that there were clear indications that the appellant may have been vulnerable that the judge should have taken into account.

11. First, regardless of the apparent inconsistency of her evidence, the appellant had claimed in both her asylum screening interview and during her asylum interview that she had been beaten and/or inappropriately touched by her cousin.

She had also claimed to have been sexually abused in her grounds of appeal; and the OTA report also referred to an attempted rape.

12. Second, as recorded in the asylum interview record and the respondent's decision, the appellant had told the Home Office that she suffered from migraines, anxiety and depression for which she was treated with amitriptyline and nortriptyline. There appeared to be no challenge to that element of the appellant's case. As the Practice Direction on child, vulnerable adult and sensitives witnesses makes clear, a "vulnerable adult" has the same meaning as in the Safeguarding and Vulnerable Groups Act 2006. Section 60 of that Act says that ""vulnerable adult" means any adult to whom an activity which is a regulated activity relating to vulnerable adults by virtue of any paragraph of paragraph 7(1) of Schedule 4 is provided". Paragraph 7(1) of Schedule 4 includes at subparagraph (a) the provision to an adult of health care by, or under the supervision of, a health care professional; and paragraph (2) explains that "health care includes all forms of health care provided for individuals, whether relating to physical or mental health…".

13. Therefore, in circumstances where the appellant was not legally represented and had provided evidence that she was receiving treatment for mental health issues, the judge should have considered whether she met the definition of a "vulnerable adult". If the appellant had been found to be vulnerable, then the judge would have been required to make necessary adjustments to the hearing, including to the method of questioning, in order to assist her. The judge should also have had regard to whether the appellant's mental health issues, in particular her anxiety, could have accounted for the way she gave her evidence at the hearing, especially on a subject as sensitive as sexual abuse. Had the judge treated the appellant as a vulnerable witness, it is possible that her adverse credibility findings at [21(a)(1)] arising out the appellant's oral evidence may have been different; and this in turn may have affected the judge's findings at [22] that the appellant had not in fact been put under pressure by her family to marry her cousin.

14. Of course, there remained the questions of sufficiency of protection and internal relocation, which may have been determinative of the appeal. Findings on those issues may have led to the consequences arising from the failure to treat the appellant as a vulnerable witness being immaterial. However, the approach the judge took was to find at [23] that even if the appellant had faced family pressure to marry her cousin, she did not fall within the definition of a particular social group for the purposes of the Refugee Convention; and at [25] and [26] she found that the appellant was not entitled to humanitarian protection and that her removal would not breach Articles 2 and/or 3 of the European Convention on Human Rights for the same reasons she gave for rejecting the appellant's asylum claim. Consequently, the judge made no findings about whether the appellant could avail herself of the protection of the state and/or reasonably be expected to internally relocate to avoid her family.

15. For the above reasons, I am satisfied that the judge did make a material error of law in failing to consider whether to treat the appellant as a vulnerable witness.

Remaking

16. In the light of my findings above, it is evident that none of the judge's findings can be preserved. Taking into account the nature and extent of the findings of

fact required to remake the decision, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I am satisfied that remittal for a de novo hearing is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material errors on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Taylor House, to be remade afresh and heard by any judge other than Judge Shukla.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10th January 2025