Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07442/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 June 2019	**On 18 June 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

LEA [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Miah, Counsel, instructed by Immigration Legal Services
For the Respondent: Mr S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant a national of Namibia, has permission to challenge the decision of Judge Mayall of the First-tier Tribunal (FtT) sent on 1 March 2019 dismissing her appeal against the decision made by the respondent on 31 May 2018 refusing her protection claim. The basis of her claim was that she would be at risk of persecution on return at the hands of her abusive ex-husband who would be able to track her down whenever she went in Namibia as a result of the tribal system in Namibia (both were from the Otjherero tribe). The respondent accepted that she had suffered

violence and ill-treatment at the hands of her husband but considered she would be able to receive protection from the authorities both in her home area or if necessary, upon relocation. The judge agreed, stating at paragraphs 35 to 38:

> "35. Applying the above guidance to the materials before me, including that set out in the Refusal Letter, I am entirely satisfied that here is in place a system of domestic protection and machinery for the detection, persecution and punishment of actions such as those feared by the appellant. Quite obviously the system is not perfect and does not operate effectively in all cases. However I do not consider that the evidence demonstrates that there is any lack of willingness or ability on the part of the state to operate the system. This level of protection reaches, in my judgment, a reasonable level.
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> 36. I note, in reaching this decision, that the appellant herself has not sought to avail herself of state protection either by reporting the matter to the police or by making any enquiries as to the availability of places in the two shelters of which she is aware.
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> 37. I recognises, of course, that there are cultural factors which make reporting of such matters less prevalent but I must consider the position as it would be if she did seek protection.
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> 38. I also recognise that as set out above, conviction rates for offences such as rape may be low. Again, however, sadly, I am aware from my own fairly extensive experience of trying serious sexual offences in the UK that this is not a problem confined to Namibia."

2. The grounds contend that the judge fell into legal error by (1) failing to engage properly and accurately with the expert report of Dr Fumanti; (2) giving inadequate consideration to the background evidence; (3) relying on irrelevant considerations, in particular the fact that gender-based violence and underreporting of rape was a feature of many societies, including the UK; and (4) failing to take into account that the appellant would have to relocate in any event and whether this would be unreasonable or unduly harsh.

3. I am grateful to the submissions of both representatives.

4. I am persuaded that taken cumulatively the grounds disclose a material error of law.

5. Dealing with ground (1), the judge's assessment of the expert's report dated 1 March 2019 was set out at paragraph 29:

> "I have the benefit of the expert's report. The expert is clearly well qualified. I must say, however, that I did not derive a great deal of assistance from the report. The report, as it seems to me, concentrates very largely upon the public perception (and the perception of the appellant) of, for example, police corruption rather than upon particular evidence of the same. Examples of police corruption cited in the report to date back to 2006."

6. To reject the report on the basis that it "very largely … concentrates upon … public perception" is a misreading. The expert makes clear throughout that her assessment was based on both "perception and experience" as regards the capabilities of the Namibian police to protect (see e.g. paragraph 11). Subsequent paragraphs of the report do not deal with perception at all but rather the cultural, tribal and institutional factors affecting the system of protection. The judge's comment about the expert relying for assessing police corruption on an old report dated 2006 overlooks that the expert drew on a range of reports including ones dated July 2015 and January 2017.

7. As regards ground (2), the judge's approach to the background evidence was also flawed. In addition to appearing not to take account of the reports referred to by the expert, the judge failed to refer to several reports in the appellant's bundle relating to gender – related violence. This failure was particularly salient in the appellant's case because it was evidence indicating that whilst the Namibian authorities were able to provide sufficient protection generally, there were serious gaps in their protection of victims of gender-based violence. This was a central part also in the expert report at paragraph 17. In failing to address this gap the judge failed to follow the legal guidance he himself had highlighted at paragraph 34 citing the Court of Appeal guidance in **Bagdanavicius [2005]** EWCA Civ 1605:

> "34. … Notwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear but are unlikely to provide the additional protection his particular circumstances reasonably require … the threshold of risk required to engage Article 3 or reach the level of persecution depends on the circumstances of each case, including the magnitude of the risk, the nature and severity of the ill treatment risked and whether the risk emanates from the state agency or non state actors).

8. Whilst ground (3) on its own does not suffice to establish legal error, it adds to the problems with this determination, insofar as, by stating more than once that gender-based violence and underreporting of rape was a problem in many societies including the UK, the judge appeared to wrongly assume that assessment of the threshold of persecution was an exercise in comparison between the country of origin (Namibia) and other countries (the UK included). That is erroneous. By Article 9 of the Qualification Directive the assessment of the threshold of persecution has to be made by reference to objective human rights norms.

9. Ground 4 is also made out. Ordinarily the fact that a judge may have erred in analysing internal relocation would not give rise to a material error unless the assessment of risk in the home area was flawed, but here the terms of the judge's assessment of internal relocation actually called

into question his assessment of risk in the home area. At paragraph 40 he stated:

> "I should, perhaps, add that, had I been satisfied that the was an insufficiency of protection available to her, I would not have been satisfied she could have safely relocated to another part of Namibia. I found the expert report to be more compelling in relation to the likelihood of her being discovered by her husband wherever she might be in Namibia as a result of the tribal system outlined. Thus, whether or not it would have been reasonable for her to relocate, the relocation would not have been effective."

10. If there was a likelihood of the appellant being discovered by her husband "wherever she might be in Namibia", then in logic such a risk would obtain in her home area. In any event, the judge's treatment of internal relocation (even if one could somehow unscramble what was meant at paragraph 40) failed to address the issue of reasonableness (as opposed to safety) of relocation.

11. For the above reasons I conclude that the judge materially erred in law. I set aside the decision.

12. I see no alternative to the case being remitted to the FtT (not before Judge Mayall).

No anonymity direction is made.

Signed Date: 14 June 2019

H H Storey