



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04787/2019

THE IMMIGRATION ACTS

Heard at Edinburgh George House
On 17 January 2020

Decision & Reasons Promulgated
On 4 March 2020

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

N K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Farrell, Peter G Farrell Solicitors

For the Respondent: Mr Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Rea, promulgated on 4 July 2019, dismissing her appeal against the decision of the respondent to refuse her asylum and protection claim.
2. I make an anonymity order in this case as I am satisfied that it is in the interests of justice to do so, given that the evidence provided was given to the respondent on a confidential basis and due to the claims made. This is also a case in which the appellant has claimed protection.

3. The appellant is a citizen of Namibia. She grew up in a village with her uncle, aunt and cousins, having been taken from her parents by her uncle when she was very young. After leaving school, she had a relationship with a man with whom she had a child born in 2009. Her uncle was aware of the relationship, did not approve of it; and, in 2013 forced her to marry a 61 year old man when she was only 30. He was abusive to her, physically and mentally. In 2015 they went to Windhoek where the husband was to get medical treatment. While there, she reported her husband to the police but they did nothing, saying that they would not help as she was in a traditional marriage. They did, however, give her a letter so that she could go to hospital to get treatment for an injury to her eye which her husband had inflicted on her. Although the appellant reported what had happened to the tribal authority, they did nothing.
4. On 31 August 2016 the appellant's husband died. In early 2017, her family and her late husband's family decided that she should marry her late husband's younger brother, in order to keep the property in the family. She refused, and reported to the police in Gobabis that she was suffering violence and abuse from him; and, was being forced to marry him. They refused to help as, according to tradition, it was something she had to do. The brother-in-law would come to her house when he was drunk and beat her if she refused to sleep with him. Finally, in May 2018, having sold some cattle, she travelled to Windhoek, obtained a passport and flew to the United Kingdom, claiming asylum on arrival.
5. The Secretary of State accepted the appellant's account, and that she had a subjective fear of persecution but concluded that there would be a sufficiency of protection for her and/or that she could relocate internally within Namibia to an area where she would not be at risk.
6. The judge accepted the appellant's account; he did not say that he doubted her account that the police had not helped in the past.
7. The judge did, however, find that there was political will in Namibia to address issues of gender-based violence and forced marriage [24 (iv)], and that the police were under a duty to investigate and prosecute cases. He found that the appellant was not entitled to protection as the Namibian authorities had taken reasonable steps to prevent persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts the appellant feared. He also found that the evidence fell far short of demonstrating unwillingness or inability of the Namibian authorities to provide protection but that effective protection was more likely to be available in urban rather than rural areas and that consequently it may be necessary for the appellant to relocate.
8. The appellant has appealed to the Upper Tribunal on a number of grounds. The first is that the judge failed properly to make findings about the expert report when concluding that there would be a sufficiency of protection for the appellant and/or that she would be able to relocate internally were there a failure of protection in one area.

9. I consider that whilst the judge has set out the opinions of the expert and has also set out the other material looked at, what the judge has not done is explained why he preferred one part of the evidence to another. The report from Professor Burchill was detailed and set out the concerns over a number of paragraphs with regard to the sufficiency of protection and whether internal relocation would be a possibility and on that basis, I am satisfied that there was an error of law which is material because of the nature of the evidence.
10. Further, at paragraph 25 the judge appears not to be sure of the decision that effective protection would be available for the appellant in her home area because he says, "I accept that effective protection is more likely to be available in urban than rural area", which then begs the question of whether it would be available outside an urban area in the first place, which feeds into the areas about the assessment of the objective evidence and for these reasons, I consider that it would be necessary for the decision to be remade on the issues of sufficiency of protection and/or internal relocation.
11. Accordingly, I am satisfied that the decision involved the making of an error of law, and that it needs to be remade. I stated that at the hearing, then heard further submissions, having asked the representatives to address the case law that followed on from the test set out in Horvath [2000] UKHL 37.
12. Mr Farrell submitted that on a proper application of the law, it was evident from the expert reports that there was not a sufficiency of protection for this appellant. He drew attention in particular to the response of the police in this case, and the evidence that the uncle had been looking for her. He submitted that while there is legislation in place, the polices had not assisted, and that the abuse shelters were limited in what protection they could provide. He submitted that the respondent had erred in the refusal letter at [51] in that the appellant had already gone to the police who had refused to help.
13. Mr Farrell also drew my attention to the difficulties in relocation that the appellant would, as a single woman, face within Namibia.
14. Mr Govan accepted that it might be the case that, coming from a rural area, the appellant might be subject to forced marriage and further abuse there. He submitted that there was insufficient evidence to show that it would be unreasonable or unduly harsh to expect her to relocate, there being no suggestion that she could not work in the informal economy and obtain shelter for herself.

The law

15. It is for the appellant to show, to the lower standard of proof, that she has a well-founded fear of persecution or that to remove her from the United Kingdom would be in breach of this country's obligations pursuant to the Human Rights Convention.
16. The Qualification Directive provides:

Article 7 Actors of Protection

1. Protection can be provided by:

(a) the state; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State

2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.

17. The appellant in this case fears non-state actors, and thus regard must be paid to article 7 (2) of the Qualification Directive and to the test set out in Horvath, bearing in mind that was decided before the Qualification Directive came into force. It is necessary to consider carefully the case law that has come after Horvath and the entry into force of the Directive.

18. In AW (sufficiency of protection) Pakistan [2011] UKUT 31(IAC) the Upper Tribunal reviewed the law, stating at [23]:

“23. However, in my view Horvath and the directive only provides a starting point. As noted by the Tribunal in IM (Sufficiency of Protection) Malawi [2007] UKAIT 00071, in Bagdanavicius the House of Lords at [2005] UKHL 38 left undisturbed the proposition set out by Auld LJ on real risk and sufficiency of protection in the Court of Appeal [2005] EWCA Civ 1605. These propositions are in the following terms:

“54. Summary of conclusions on real risk/sufficiency of state protection.

The common threshold of risk

55. 1) The threshold of risk is the same in both categories of claim; the main reason for introducing section 65 to the 1999 Act was not to provide an alternative, lower threshold of risk and/or a higher level of protection against such risk through the medium of human rights claims, but to widen the reach of protection regardless of the motive giving rise to the persecution.

Asylum claims

2) An asylum seeker who claims to be in fear of persecution is entitled to asylum if he can show a well-founded fear of persecution for a Refugee Convention reason *and* that there would be insufficiency of state protection to meet it; Horvath [2001] 1 AC 489].

3) Fear of persecution is well-founded if there is a 'reasonable degree of likelihood' that it will materialise; R v SSHD ex p. Sivakumaran [1988] AC 956, per Lord Goff at 1000F-G.

4) Sufficiency of state protection, whether from state agents or non-state actors, means a willingness *and* ability on the part of the receiving state to provide through its legal system a reasonable level of protection from ill-treatment of which the claimant for asylum has a well-founded fear; Osman v UK [1999] 1 FLR 193], Horvath, Dhima [2002] EWHC 80 (Admin), [2002] Immigration Judge AR 394].

5) The effectiveness of the system provided is to be judged normally by its systemic ability to deter and/or to prevent the form of persecution of which there is a risk, not just punishment of it after the event; Horvath; Banomova [2001] EWCA Civ.807. McPherson [2001] EWCA Civ 1955 and Kinuthia [2001] EWCA Civ 2100.

6) 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; Osman.

Article 3 claims

...

24. Thus, while it will always be relevant to ask whether or not there is in general a sufficiency of protection in a country, the critical question will nevertheless remain in an asylum case as set out in the sixth proposition by Auld LJ and in an Article 3 case as set out in the fifteenth proposition. Thus under either head a judge must look, notwithstanding a general sufficiency of protection in a country, to the individual circumstances of the appellant and ask himself the above questions."

19. I have considered carefully the background evidence referred to in the refusal letter and the additional material provided by both parties in reaching my decision.

20. It is not disputed that the law of Namibia prohibits domestic violence including forced marriage. Nor is it disputed that it provides for the issuing of protection orders. There is also a network of shelters for women who have been subjected to or are at risk of gender-based violence. There is thus a system in place yet as the SSHD's Country Information Request of 12 March 2018 notes (quoting the US State Department Report for 2016) domestic violence is widespread [1.1.2], as is violence against women [1.2.1] there being criticism of the government's failure to enforce the country's progressive domestic violence laws. It is also noted that domestic violence cases increased sharply in 2016/17 [1.2.3] according to the Namibian police. While these does indicate a willingness on the part of the government, there is less evidence of the police being effective in a culture in which large parts of the

population believe that wife-beating is justified [1.2.2]. There is, however, little evidence in the material cited by the respondent as to the efficacy of any of the structures and legislation put in place.

21. In the report entitled "The Voice of the Survivors" published by the Regain Trust/Friedrich Ebert Stiftung in 2015, over 60% of those interviewed considered the police unhelpful, assistance and investigation being slow [5.1.1] thus endangering the lives of those in need. The satisfaction rate of those who had had to contact the police was very poor, and it is noted that 39% of survivors did not seek help from the police, being, it appears, discouraged from doing so, protection being seen as not effective. Further, the experience of women who were referred to Gender-Based violence Investigation Unit ("GBVIU") that not much support was given in the case of wife-beating [5.1.2], the conclusion being that "the malfunction of both institutions [the police] and the GBVIU, pushes the women back into their abusive relationships."
22. The same report also identified a failure of the police to deliver service and to give assistances [5.2.1] and that in most cases the police do not arrest the perpetrator or take evidence, there being evidence that in reporting a crime to the police, a woman is exposing herself to a high risk if that person finds out.
23. I consider that I can place weight on this report which provides evidence as to how the legislation is implemented by the Namibian authorities.
24. Turning next to the report of Professor Burchill, I am satisfied that he is a competent expert able to comment on the position in Namibia for women who are at risk of domestic violence. His evidence that domestic violence is common in Namibia is consistent with the sources referred to above. He notes that while the government has signed up to ending forced marriage, much of what has been signed has not been put into practices [30].
25. Professor Burchill describes gender-based violence in Namibia as being of endemic proportions [74] which is again consistent, rape being the most prevalent crime [75]. Much violence and rape is not reported and that redress through a protagonist being brought to trial is not common [87].
26. So far as state protection is concerned the report refers mainly to shelters rather than the police. He does, however, at [99]ff confirm that the GBVIU are not seen as effective and that the shelters are in their infancy, the number of women who can be assisted being quite low and in effect limited to the capital [121].
27. Taking all of these strands together, while there would appear to be a legal system in place to protect victims of domestic violence, it is limited in its ability to protect women who are victims of domestic violence and where, as here, there is a risk of further violence. This is seen most clearly in the evidence that there is no proper protection against the abuser for a woman who makes a complaint as the evidence is that they are unlikely to be arrested thus aggravating the risk to a woman whose partner learns of the complaint.

28. I accept that, as the appellant stated in her witness statement, that her uncle has been looking everywhere for her, and had found out where her son is living. This is, I find, evidence of persistence, and it is of note that the uncle is seeking to force the appellant to marry for a second time.
29. I conclude in the light of the above, and applying the principles set out at [18] above that there would not be an effective protection for the appellant on return to Namibia in her home area. Further, I am satisfied that she would, on the evidence, not receive effective protection from the police elsewhere, given that the evidence shows that the lack of effective protection by the police (eg failing to arrest perpetrators or take evidence) operates across Namibia.
30. In terms of relocation, I conclude that on the basis of the evidence in Prof. Burchill's report that it would be very difficult for a single woman to relocate or obtain employment without raising suspicion and in turn putting herself at risk, given that she would be seen to have transgressed against the norms of Namibian society – see first report at [page 37] and second report at page 6. Broadly, she would be at risk of harassment from men seeking her as a sexual partner. This, and the lack of ties in a new area as well as being a stranger would make it difficult to obtain employment and shelter for herself, let alone to support her and her child. I have considered whether she could go to live with her family, but I note that they have not protected her in the past, and that the uncle whom she fears has been able to find her son.
31. As to whether the appellant would be able to access a shelter Prof. Burchill notes, funding is a major issue and they tend to favour local women over those who have migrated into the area. That would make it difficult for the appellant to access any provision outside her own area. Any stay would, as the evidence shows, be limited to three weeks (Prof. Burchill, second report, page1) after which she would have to seek alternative accommodation and a source of income. Given her limited skills and given that she would be outside her own area, I consider that it is very unlikely that she would be able to do so, except in the informal economy which would not be secure. She would be at risk of destitution or harassment as a single woman, even in the capital.
32. Taking all of these factors into account, I conclude that the appellant is at risk of gender-based violence at the hands of her uncle and family of sufficient severity to constitute persecution and/or a breach of article 3. I am satisfied that given the lack of effectiveness of protection from the state, that she would be at risk in her home area and that given her particular circumstances, it would be unduly harsh to expect her to relocate to another part of Namibia.
33. Accordingly, as it is accepted by the respondent that the appellant's fear is for a convention reason, I find that the removal of the appellant from the United Kingdom would be in breach of this country's obligations under the Refugee Convention and article 3 of the Human Rights Convention. I therefore allow the appeal on that basis.

34. As I have found that the appellant is a refugee, she is not entitled to humanitarian protection. It is also unnecessary for me to consider whether her removal would be contrary to article 8 of the Human Rights Convention.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the decision by allowing the appeal on asylum and human rights grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 2 March 2020



Upper Tribunal Judge Rintoul