IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004806
UI-2022-004808
FtT No: PA/50776/2022
PA/50770/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 September 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

KANDJOMINI MBARUNGA & EDWARD KEZUMO
(no anonymity order)

Appellant

and

SSHD

Respondent

For the Appellant: Mr K Forrest, Advocate, instructed by Gray & Co, Solicitors, Glasgow
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 9 August 2023

DECISION AND REASONS

1. The appellants are citizens of Namibia. They travelled via Qatar and the Netherlands, arriving in the UK on 15th and seeking asylum on 16th December 2019. They said they were at risk from the first appellant's husband, Mr N Hiiho, a Herero chief. He had discovered their long-term affair and that he was not the father of the appellants' two children. The appellants had obtained DNA evidence of the second appellant's paternity and had the children's surnames changed on their birth certificates. They feared that Hiiho would kill them both and take the children.

2. In decisions refusing the claims, the respondent founded upon absence of any social group within the meaning of the Refugee Convention; no reason for Hiiho not to have taken reprisals while they were in Namibia; no credible account of the family history; discrepancies over how and when Hiiho came to know of the affair and the paternity issue; no sensible explanation for change of name on the birth certificates; unclear how the children, left in Namibia, were able to live there safely, but not if the appellants were to return; unlikely that they would leave the children; and by extension, no credible fear of the Herero tribe in general.

3. It was further noted that the appellants said they did not know they could claim asylum in Amsterdam, but they left Namibia with that intention, and were found with German visas on arrival in Glasgow. It was not accepted that they did not know they could claim other than in the UK. Their credibility was adversely affected under reference to section 8 of the 2002 Act.

4. The claim was also held to be defeated on grounds of sufficiency of protection and availability of internal relocation in Namibia.

5. FtT Judge Prudham dismissed the appellants' appeals by a decision dated 7 August 2022. He found at [37] "numerous discrepancies and inconsistencies in the evidence of both appellants"; [38], no sense in the explanation for changing the certificates; [39], conflicting evidence about the DNA report, said to have been destroyed, for no good reason, or handed to a government office and no copy retained, as thought to be of no importance; [40], various versions of the appellants' relationship; [41-42], allegations of threats from Hiiho and false charges instigated by him, but on dates when he would not have known of the affair; no sense in a powerful chief using the method of false charges of cattle theft; [43], appellants able to live in the same city as Hiiho, where the children still lived, without concerns; some of the evidence inconsistent with the claim that only the appellants, and not Hiiho or his family, knew where the children were; [44], not plausible that the children did not accompany the appellants because the passport office had no passport documents for children; even if so, no immediate threat and no reason not to wait for passports to be restocked; [45], section 8 applicable.

6. At [46], the Judge accepted that the appellants had two children in Namibia, living with their grandparents, but not that the first appellant was married to a tribal chief, or the conduct of an illicit affair for many years, finding it "far more likely" that the appellants "are (and have been for many years) a couple with two children". He gave little weight to a copy certificate of the marriage with Hiiho or to letters "said to be from the Ovaherero Traditional Authority".

7. At [47], the Judge said that issues of internal relocation and sufficiency of protection did not arise, given his findings, but "for the sake of completeness" adopted the respondent's decision on those issues.

8. The appellants sought permission to appeal to the UT, on grounds, in summary, as follows:

> 1. At [46], error in attaching little weight to the documents; error in failing to find that they were reliable in terms of *Tanveer Ahmed* UKIAT [2002] 00439; documents should have been given "significant evidential weight"; lack of anxious scrutiny.
>
> 2. Failure to give adequate reasons for finding that the first appellant was at any time married to a tribal chief or that she and the second appellant conducted an illicit affair for many years, despite having been provided with a copy of the marriage certificate.
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> 3. Failure to give reasons for the finding at [47].
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> 4. DNA report now produced and should be admitted to address the "conflicting" evidence referred to at [39].

9. On 27 September 2022 FtT Judge Elliott granted permission: …

> 3. The appellants seek to rely on a DNA report that was not before the Judge in evidence at the appeal hearing. They had given contradictory accounts about it and the Judge did not make a material error of law in making adverse credibility findings on that account.
>
> 4. The Judge's determination contains reasoned findings in relation to the appellants' credibility based principally on the discrepancies in their evidence. However, it is arguable that the Judge has erred in failing to provide reasons for giving little weight to the first appellant's marriage certificate or to a report from the traditional authority in Namibia and rejecting her claim to have been married to a tribal leader.
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> 5. The grounds disclose an arguable error of law and permission to appeal is granted on all grounds argued.

10. On 3 August 2023, the appellants filed a notice in terms of procedure rule 15(2A), seeking to rely on the DNA tests because they are "crucial and might even be determinative", and stating that the evidence was not before the FtT "because it was not available until after that date".

11. Mr Forrest submitted thus:

(i) On reflection, the DNA evidence was of no real significance, as the tribunal had accepted that the appellants are the parents of the two children.

(ii) The rest of the grounds raised two issues. The first is in grounds 1 and 2, run together. It was a critical issue whether the first appellant was ever married to a tribal chief. The decision "majored" on inconsistencies and discrepancies, but it was irrational to give little weight to the documents, only in light of those. There was an absence of reasoning and a failure directly to address the documents.

(iii) The second error was a failure by the tribunal to consider internal relocation and sufficiency of protection for itself. It was not enough to adopt by brief reference the reasoning of one party only.

12. Mr Mullen submitted that there was nothing in the documents to undermine the Judge's conclusions, which were thoroughly reasoned. It was beyond belief that the appellants would have left the children behind, if there was anything in their claimed fears. Their explanation of non-availability of passports was hopeless.

13. Mr Forrest in reply said that the claim about passports might be thought surprising, but that had misled the Judge into "not seeing the wood for the trees". He took his eye off the crucial matter, which was that the first appellant was not divorced. She remained married, and the tribal authority was concerned over her marital difficulties.

14. I reserved my decision.

15. Mr Forrest made a sensible concession. The DNA report does not advance the appellants' case beyond the second appellant being the father of the children, which has been accepted. The documents do nothing to clear up the confusion about their whereabouts or availability (and no explanation is offered for their late discovery).

16. The copy marriage certificate, item 1 (a) of the appellants' 1st inventory of productions in the FtT, bears to be issued by the Ovaherero Traditional Authority. It states that the first appellant and Hiiho married on 2 November 2003.

17. Item 1 (d) is "two letters" from the same authority, untranslated, but the same items as appear, with translations, in the 3rd inventory. The first, dated 15 October 2019, summons the first appellant to take part in the trial on 26 October 2019 between her and her husband. "Your absence will weaken the trial and for that reason your presence is of utmost importance". The second, dated 20 January 2020, is a "final summoning letter" to a trial on 3 February 2020; "If you do not attend again, the Authority will take a decision that might not be in your favour because you delay the work of the Authority." There are no details of what the authority intends to determine, or what the consequences might be.

18. Grounds 1 and 2 show errors over the documents. The Judge stated a clear conclusion before turning to them. He did not directly consider whether they have any apparent merit.

19. The reasoning at [46] is muddled. The Judge was entitled to find discrepancies and inconsistencies, but it is difficult to see that it followed that despite any documentary evidence the first appellant never had been, or was not still, married to a tribal chief. There was no evidence that a legal marriage and another relationship (open or clandestine) cannot exist at the same time in Namibia.

20. It was submitted for the appellants that proof of the marriage and of the existence of proceedings in the Traditional Authority would be determinative, or

nearly so. I do not uphold that argument. However, the absence of sustainable findings on those matters is enough to undermine the decision.

21. While it is not always an error simply to adopt the case of one party, it is seldom good practice. The tribunal should have shown that it had not merely been led by the respondent but that there had been judicial consideration of the materials before it on both internal relocation and sufficiency of protection. In absence of any analysis, it cannot be held that the appeals were doomed on either or both of those alternatives.

22. The issue is also intertwined with the precise extent to which the appellants' claims are eventually accepted.

23. Material error is shown on both points advanced by Mr Forrest.

24. The appeal to the UT is allowed. The decision of the FtT is set aside. It stands only as a record of what was said at the hearing. The case is remitted for fresh hearing, not before Judge Prudham.

25. No anonymity order has been requested or made.

Hugh Macleman
Judge of the Upper Tribunal, Immigration and Asylum Chamber
14 August 2023