**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Numbers: AA/00520/2015**

**AA/00521/2015**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7th April 2016** | **On 29th April 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY**

**Between**

**O A (FIRST APPELLANT)**
**L M T M (SECOND APPELLANT)**
(ANONYMITY DIRECTION MADE)

Appellants

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr Palmer, Counsel for Barnes Harrild & Dyer Solicitors, Croydon
For the Respondent: Mr Kandola, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Namibia born on 19th January 1981 and 7th April 2010 respectively. I shall refer to the first Appellant as "the Appellant" throughout this decision. They appealed against the decisions of the Respondent dated 12th December 2014 refusing to grant them asylum and refusing their claims on the humanitarian protection issue and on human rights grounds. Their appeals were heard by Judge of the First-tier Tribunal Roots on 15th January 2016. Their appeals were dismissed in a decision promulgated on 5th February 2016.

2. An application for permission to appeal was lodged and permission to appeal was granted by Judge of the First-tier Tribunal Pooler on 2nd March 2016. The permission was granted based on the grounds that the judge erred in law by refusing to adjourn the hearing, by misdirecting himself as to the standard of proof, by failing to consider expert evidence in reaching his findings on credibility and by failing to consider relevant matters in his assessment of future risk, sufficiency of protection and internal relocation. The permission states that the refusal to adjourn in order to obtain information about the continuing family proceedings must be assessed by reference to **Nwaigwe [2014] UKUT 00418 (IAC)** as the Tribunal is under a duty to have regard to the best interests of the child, the second Appellant. The grounds state that the judge's decision deprived the child of his right to a fair hearing. The permission goes on to state that the remaining grounds are less likely to disclose a material error of law. The judge accepted the general credibility of the Appellant's claims but found she would not be at risk on return. The grounds do not particularise in what way the expert evidence could have affected the outcome given the findings of fact but permission was granted on all grounds.

3. There is a Rule 24 response on file. This states that the Appellants' grounds fail to establish a material arguable error of law and are merely a disagreement with the negative outcome of the appeals. It states that contrary to the Appellants' grounds the First-tier Judge properly considered the Appellants' adjournment application as a preliminary issue noting that there were family proceedings in the Family Court which had started on 21st August 2015 and that there was a final hearing in March 2016 for a Child Arrangements Order. The response states that the Appellants' Counsel did not even know whose application was in the Family Court. The second Appellant has been living with his father since 15th July 2015. His father may have no status in the United Kingdom but may have an EEA partner. The response states that it was properly open to the First-tier Judge to refuse the Appellants' application and the judge provided adequate sustainable reasons to support his decision not to adjourn, bearing in mind the late application and the level of uncertainty surrounding the reasons for the adjournment request. The response states that there was no guarantee that the Tribunal would be in a better position on the next occasion and the application was not in compliance with the overriding objection to grant an adjournment request.

## The Hearing

4. Counsel for the Appellant submitted that permission has now been granted by the Family Court to release evidence to this Tribunal. He submitted that the court orders have not yet been received and I allowed him an adjournment of an hour to obtain more information about this. He also stated that a new bundle of 206 pages has been sent to the Tribunal and to the Respondent. Counsel did not have this bundle. Neither did I and neither did the Presenting Officer. He submitted that at page 152 of that bundle there is an email from the Appellants' family solicitors which sets out what occurred on 9th March 2016 at the Family Court. He

submitted that this email refers to two court orders of 22nd and 28th January 2016, statements by the Appellant, a letter from Dr Rikaby to the Appellant's general practitioner and a psychiatrist's report on the Appellant. He submitted that there is now an agreement relating to residence and there has to be contact between the Appellant and the second Appellant and that the immigration status of both parents has to be satisfactory. He submitted that the order states that the second Appellant will live with his father for a twelve month probationary period but the Appellant will have three days contact with him for three hours each day although the second Appellant will not stay with her overnight. He informed me that it was not unusual for the final orders not to be available yet, even though the decision was made on 9th March 2016. He submitted that it is clear that this Tribunal should have seen the orders before the decision was made. I asked him if he is suggesting a further adjournment. He appeared to be suggesting this.

5. The Presenting Officer opposed any adjournment as this matter has been ongoing since January 2016. He submitted that the Family Court proceedings were on 9th March 2016 and there is still no court order available. He submitted that the judge considered matters at the date of the hearing, dealt with the adjournment request and was correct in law to refuse this. He submitted that if there have been developments relating to the second Appellant, a proper application can be made by the Appellants rather than opening up this particular case.

6. He submitted that there is no material error of law in the First-tier Tribunal's decision.

7. Counsel for the Appellant submitted that this appeal should have been adjourned at the first hearing. He accepted that at that date there was no information about whether the Family Court would give permission for its documents to be released to the Immigration Tribunal and it was only after the First-tier hearing that permission was granted for this information to be disclosed. He accepted that when the judge heard the appeal there was no date as to when and if this information would be disclosed.

8. He submitted that the judge found that the Appellant was a victim of trafficking. He submitted that he should have given the Appellants an opportunity to provide evidence from the Family Court as there was no dispute about whether the family proceedings were ongoing. He submitted that it is arguable that there has been unfairness because of this decision of the judge and he submitted that the first ground is made out.

9. He submitted that the other grounds also have merit and that the judge used the wrong standard of proof. The judge stated that the Appellant must prove that there are substantial grounds to show that she meets the requirements for a refugee claim. He submitted that based on this the judge's decision must be unsafe and the asylum claim cannot stand as it is.

10. He then referred to the rights of the child and submitted that the child has been deprived of a fair hearing based on the First-tier Judge's decision.

11. Counsel submitted that the First-tier Judge was not given much information about the Appellant's mental health but that a psychiatric report was placed before the Family Court which is now available. He referred to evidence that was before the judge, of suicide attempts by the Appellant and he referred to the Appellant as a vulnerable person being at real risk of persecution for a Convention reason if she is returned to Namibia, as the judge found she had been trafficked before.

12. He submitted that based on what was before the judge the claim was quite weak but it has now been strengthened considerably because of new evidence which the judge was not aware of. He submitted that an adjournment should have been granted and that this was a material error of law.

13. The Presenting Officer submitted that the First-tier Judge was entitled to refuse the adjournment in the circumstances. He submitted that nothing was forthcoming at that time relating to the family proceedings and I was referred to the case of **RS India [2012] UKUT 00218 (IAC)** dealing with claims where there were outstanding family proceedings relating to a child. He submitted that the factors referred to in this case, which should have been considered by the judge were not before the judge and even now there is little before the Tribunal.

14. He submitted that this is a case where the Appellant should make a new application to the Secretary of State rather than open up the First-tier decision which contains no errors of law. With regard to the Appellant's mental health, the judge considered the medical evidence before him properly and the new medical evidence is not for this Tribunal to take a view on.

15. Counsel submitted that this error of law hearing could be adjourned for a short period until the documentation of the family proceedings is made available and at that time the materiality of the First-tier Judge not adjourning the case can be dealt with. He submitted that the status of the second Appellant's father has not been made forthcoming and he submitted that in this claim the second Appellant's rights have not been fully determined.

16. He submitted that the Appellant could make another application but there are material errors in the First-tier Judge's decision and I was asked to find that the claim should be remitted to the First-tier Tribunal for rehearing. He referred to the risk of the Appellant being re-trafficked and the wrong standard of proof being used.

## Decision and Reasons

17. The Appellant's application for asylum is based on her membership of a particular social group as a former victim of trafficking and a person who will be subject to forced marriage. Her last valid leave in the United Kingdom expired on 30th January 2012. She came to the United Kingdom on 29th June 2004.

18. The First-tier Tribunal Judge deals with the adjournment request at paragraphs 3 and 4 of his decision. The judge was informed that there was a final hearing in the Family Court in March 2016 but when her Counsel at that hearing was asked about the family proceedings she could not even say whose application was in the Family Court for the Child Arrangements Order, although she did tell the judge that the family proceedings were crucial as the Appellant is relying on her Article 8 rights. Her Counsel told the judge that the solicitors had no funding to make an application to the Family Court for permission to disclose information. The judge refused the request for an adjournment and her decision makes it clear why she refused this request. The judge at paragraph 5 states that there is no guarantee that a Tribunal would be in a better position on the next occasion and that the adjournment request was not in compliance with the overriding objective to grant an adjournment and so the judge refused it. This is not an error of law.

19. In the First-tier Tribunal judge's decision the judge considered the medical treatment before him adequately and the issue of re-trafficking. He also dealt with internal relocation adequately.

20. Counsel submitted that the judge used the wrong standard of proof. I have considered paragraph 21 of the decision. This states that the burden of proof is on the Appellant to show that there are substantial grounds for believing that she meets the requirements of the Qualification Regulations and that she has a well-founded fear of persecution for a reason recognised by the Refugee Convention.

21. This is not the correct standard of proof. When he deals with humanitarian protection the standard of proof of real risk is referred to. Although the judge has referred to the wrong standard of proof at paragraph 21 relating to the asylum claim, he goes on to refer to **Karanakaran [2000] EWCA Civ 00011** and when his decision is considered, although he has referred to the wrong standard of proof, he has used the standard of real risk when dealing with the asylum claim. The judge has dealt properly with risk on return, the risk of re-trafficking and internal relocation. He finds that this Appellant would not be at any risk on return to Namibia. I therefore do not find that this is a material error although it is an error.

22. Based on the evidence before him the judge has dealt properly with the best interests of the second Appellant at paragraphs 40 to 52 referring to the correct case law and he has made his conclusions relating to this clear, at paragraphs 53 to 56 of his decision.

23. The judge has also made proper findings relating to the Appellant's credibility and although he does not specifically mention the expert report it is clear that he has considered the medical evidence relating to her vulnerability and has found there to be credibility issues for a number of reasons. At paragraph 45 when the Appellant was pulled up for one of her answers she changed her answer. The judge refers to the lack of information given by the Appellant and at paragraph 55 refers to the Appellant having previously been untruthful about her two children and their whereabouts.

24. I find that there is no material error of law in the judge's decision based on what was before him and that both the Appellant and the child had a fair hearing. The burden of proof was on the Appellant and it was not discharged even to the low standard required in asylum hearings.

25. There is now additional evidence which was not before the judge and unfortunately was not before me but as suggested by the Presenting Officer a further application can be made to the Secretary of State based on this evidence.

26. I find that there is an error of law in the decision promulgated on 5th February 2016 relating to the standard of proof but it is not a material error of law. The decision by Judge of the First-tier Tribunal Roots dismissing these Appellants' appeals on asylum grounds, human rights grounds and on the humanitarian protection issue must stand.

27. Anonymity has been directed.

Signed Date

Deputy Upper Tribunal Judge I A M Murray