Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11013/2019 (V)**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Working Remotely by Skype
On 8 April 2021

Decision & Reasons Promulgated
On 29 April 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

U E K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bass of Duncan Lewis Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Namibia who was born on 25 June 1992.

3. The appellant arrived in the United Kingdom on 24 April 2018 with a student visa valid for six months. The appellant overstayed. On 20 November 2018, she was served with RED.0001. On 3 June 2019, the appellant claimed asylum. The basis of the appellant's claim was that she feared her uncle who, together with his friends, had sexually and physically abused her in Namibia.

4. On 26 October 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the European Convention on Human Rights.

5. The appellant appealed to the First-tier Tribunal. In a determination sent on 21 December 2020, Judge Trevaskis dismissed the appellant's appeal on all grounds. In particular, he made an adverse credibility finding and did not accept the appellant's account that she had been abused by her uncle in Namibia and would be at risk, as a consequence, on return.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal on the sole ground that the judge had misapplied s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") by unreasonably having regard to the fact that the appellant did not claim asylum on arrival in the UK.

7. On 29 January 2021, the First-tier Tribunal (Judge Adio) granted the appellant permission to appeal. In doing so, Judge Adio identified a number of other points, going beyond the appellant's sole ground of appeal, which he considered amounted to arguable errors of law. In addition to considering it was arguable that the judge placed undue weight on the appellant's failure to claim asylum at port, Judge Adio also considered it arguable that the judge erred in law by requiring corroboration of evidence from, for example, her boyfriend in Namibia and by failing to identify the inconsistencies in the evidence which the judge relied upon. In para 3 of his decision, Judge Adio said this:

> "Having read the decision and the grounds it is arguable that the judge placed undue weight on the failure of the Applicant to claim asylum at the port. The Judge also required corroboration and does not give any explanation as to why her delay in claiming asylum should count against her because she could not provide evidence from [her boyfriend] referred to at paragraph 64(ii). There are arguable grounds in the approach of the judge in resolving credibility issues particularly with the overemphasis on her failure to claim asylum on arrival and the corroboration being sought for part of her evidence. The Judge makes findings of credibility between paragraphs 64 and 65 without really engaging at that point with what the inconsistencies are and with an overemphasis on corroboration. Although the judge outlined the legal framework for credibility this application is undermined by the approach taken towards the late asylum claim and the requirements for corroborative evidence. All grounds are arguable".

8. Apart from the reliance upon s.8 of the 2004 Act, the appellant did not contend that the judge had erred in law by requiring corroboration (in the form of additional evidence) or by failing to identify the inconsistencies upon which he relied in his determination. Although the Upper Tribunal has cautioned against judges granting permission on a ground not advanced by an applicant in their application for permission (see AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC)), nevertheless the additional grounds advanced by Judge Adio remain a basis upon which permission was granted. That was accepted before me by the parties.

9. The appeal was listed at Cardiff Civil Justice Centre working remotely on 8 April 2021. The appellant was represented by Mr Bass and the Secretary of State was represented by Mr Avery both of whom joined the hearing by Skype.

10. Mr Bass relied upon his skeleton argument which he developed in his oral submissions covering the s.8 ground as well as those identified by Judge Adio in his grant of permission. Mr Bass' skeleton argument also contended that the judge had made impermissible findings on the implausibility of the appellant's account. No objection was raised to this latter ground being relied upon although its substance only appears in Mr Bass' skeleton argument. Mr Avery made oral submissions on each of the grounds now relied upon.

11. I will deal with those grounds as follows:

    (1) section 8 of the 2004 Act;

    (2) corroboration;

    (3) inconsistencies in the evidence; and

    (4) implausibility of the appellant's account.

Discussion

1. Section 8 of the 2004 Act

12. Section 8 of the 2004 Act sets out behaviour by an individual making an asylum or human rights claim which must be taken into account by a deciding authority (whether the Secretary of State or Tribunal) as "damaging" of a claimant's credibility. So far as relevant, ss.8(1), (2), (5) and (6) provide as follows:

> "8. **Claimant's credibility**
>
> (1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.
>
> (2) This section applies to any behaviour by the claimant that the deciding authority thinks –

> (a) is designed or likely to conceal information,
>
> (b) is designed or likely to mislead, or
>
> (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.
>
> ....
>
> (5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.
>
> (6) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless –
>
> (a) he had no reasonable opportunity to make the claim before the arrest, or
>
> (b) the claim relies wholly on matters arising after the arrest.
>
> ...."

13. It was not suggested by either representative that s.8 did not, in principle, apply to the appellant's behaviour in delaying making her asylum claim between her arrival in the UK on 24 April 2018 and her claim for asylum on 3 June 2019. That was a delay of over thirteen months and, included, notice of her entering illegally being served on 20 November 2018.

14. Instead, Mr Bass' submission is that the judge gave undue prominence to the issue of the appellant's delay and the application of s.8 of the 2004 Act, in particular dealing with it first in the section of his determination concerned with credibility. Mr Bass submitted that the judge had applied a 'tick box' approach and an 'over robotic approach' contrary to that emphasised as necessary by the Court of Appeal in MN v SSHD [2020] EWCA Civ 1746 at [127]. Mr Bass submitted that the judge had failed to engage with the appellant's reasons why she did not claim asylum at port, namely because she did not know anything about the asylum process and had leave to enter as a student. Mr Bass referred me to the cases of SM (Section 8: judge's process) Iran [2005] UKAIT 00116 and JT (Cameroon) v SSHD [2008] EWCA Civ 878 on the proper approach to s.8.

15. In SM the AIT said this at [7]–[10]:

> "7. The purpose of section 8 of the 2004 Act is no doubt to reverse dicta which have appeared from time to time suggesting that, contrary to what might be regarded as ordinary experience, certain matters have no impact at all on a person's credibility when it is assessed in an asylum claim. It has the incidental effect of interfering with the well-established rule that the finder of fact (in this case, the Adjudicator or Immigration Judge) should look at the evidence as a whole, giving each item of it such weight as he or she considers appropriate. That is unfortunate, and may in some circumstances be difficult to manage.

> 8. The impact of section 8 will no doubt be different in different types of case. In cases where there is some reason to doubt a variety of elements of the Appellant's story, the effect of section 8 may well be simply to reinforce the salutary principle that if a person does not appear to be telling the truth on those parts of his evidence that can be checked, there is no real reason for believing that he is telling the truth in those parts of his evidence that cannot be checked. Where, on the other hand, for example, a person appears to be telling the truth about having passed through a number of countries on his or her journey to the United Kingdom, the effect of section 8 on a deciding authority will be to draw clear and specific attention to certain features of the evidence as aspects which must (by statute) be regarded as casting some doubt upon the credibility of the Appellant's claim to be a refugee.
>
> 9. Given the terms of section 8, it is inevitable that the general fact-finding process is somewhat distorted, but that distortion must be kept to a minimum. There is no warrant at all for the claim, made in the grounds, that the matters identified by section 8 should be treated as the starting point of a decision on credibility. The matters mentioned in section 8 may or may not be part of any particular claim; and their importance will vary with the nature of the claim that is being made, and the other evidence that supports it or undermines it. In some cases, (of which the most obvious are perhaps those where there is contested evidence about the journey to the United Kingdom) it will simply not be possible to know whether section 8 applies until a preliminary view has been taken on the credibility of some other part of the evidence.
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> 10. In our judgment, although section 8 of the 2004 Act has the undeniably novel feature of requiring the deciding authority to treat certain aspects of the evidence in a particular way, it is not intended to, and does not, otherwise affect the general process of deriving facts from evidence. It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. Some aspects of the evidence may be matters to which section 8 applies. Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together; and, despite section 8, and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole."

16. The AIT emphasised the need for an holistic assessment of the issues relating to credibility and that s.8 does not require that behaviour to which it applies should be treated as a "starting point" for the assessment of credibility. In his skeleton argument, Mr Bass emphasises that latter point found in the AIT's determination at [9].

17. In JT, the Court of Appeal considered the proper application of s.8 to determining credibility issues. In his judgment, Pill LJ (with whom Laws and Carnwath LJJ agreed) said this at [19]–[21]:

> "19. Section 8 can, in my judgment, be construed in a way which does not offend against constitutional principles. It plainly has its dangers, first, if it is read as a direction as to how fact-finding should be conducted, which in my judgment it is not, and, in any event, in distorting the fact-finding exercise by an undue concentration on minutiae which may arise under the section at the expense of, and as a distraction from, an overall assessment. Decision-makers should guard against that. A global assessment of credibility is required

(*R (Sivakumar) v Secretary of State for the Home Department* 2003 UKHL 14, [2003] 1 WLR 840).

> 20. I am not prepared to read the word "shall" as meaning "may". The section 8 factors shall be taken into account in assessing credibility, and are capable of damaging it, but the section does not dictate that relevant damage to credibility inevitably results. Telling lies does damage credibility and the wording was adopted, probably with that in mind, by way of explanation. However, it is the "behaviour" of which "account" shall be taken and, in context, the qualifying word "potentially" can be read into an explanatory clause which reads: "as damaging the claimant's credibility". Alternatively, the explanatory clause may be read as: "when assessing any damage to the claimant's credibility". The form of the sub-section and Parliament's assumed regard for the principle of legality permit that construction.
>
> 21. Section 8 can thus be construed as not offending against constitutional principles. It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility. If there was a tendency for tribunals simply to ignore these matters when assessing credibility, they were in error. It is necessary to take account of them. However, at one end of the spectrum, there may, unusually, be cases in which conduct of the kind identified in section 8 is held to carry no weight at all in the overall assessment of credibility on the particular facts. I do not consider the section prevents that finding in an appropriate case. Subject to that, I respectfully agree with Baroness Scotland's assessment, when introducing the Bill, of the effect of section 8. Where section 8 matters are held to be entitled to some weight, the weight to be given to them is entirely a matter for the fact-finder."

18. At [24], Laws LJ added this brief point:

> "For my part I would read the adverb "potentially" into s.8(1), before the word "damaging". If that is done, the section does not affect the power and duty of the judicial decision-maker in every instance to reach his own conclusion upon the credibility of the claimant. It therefore offers no offence to the integrity of judicial impartiality. This approach, moreover, seems to me to accord with the view of the Asylum and Immigration Tribunal itself at paragraph 10 of its determination in *SM (Iran)* [2005] UKAIT 00116."

19. The Court of Appeal emphasised that the decision-maker must, as a result of s.8, consider the behaviour which is relied upon as damaging of the individual's credibility – sub-section (1) said the behaviour "shall" not "may" be taken into account. However, the Court went on to make plain that such behaviour was only "potentially" damaging of the claimant's credibility depending upon the circumstances and an overall assessment of the evidence and credibility issues. Where the behaviour under s.8 is entitled to be given some weight, the Court of Appeal emphasised that that was "entirely a matter for the fact finder".

20. The importance of taking into account any explanation by the individual for the behaviour potentially damaging of their credibility was pointed up by the Inner House of the Court of Session in AJ (Pakistan) [2011] CSIH 49. The Court was concerned with the application of s.8(4) of the 2004 Act because the individual had not claimed asylum in Greece – a safe third country – before coming to the UK. He relied upon the fact that he was under the control of an agent. The judge failed to

consider whether the individual had, in the terms of s.8(4) "a reasonable opportunity to make an asylum claim" in Greece and concluded that the individual's failure to claim asylum in Greece was a "serious credibility issue". The Court concluded that the judge had erred in applying s.8(4). Lord Clarke (with whom Lords Mackay and Wheatley agreed) said this at [9]:

> [9] The immigration judge does not address the qualifying words "reasonable opportunity" to be found in section 8(4). The applicant had claimed that he did not seek asylum before reaching the United Kingdom as he was under the control of an agent - see the respondent's decision letter at para. 17 and para. 22 of the immigration judge's determination. The immigration judge did not address this explanation. Moreover it has, at least in the past, been recognised that an asylum seeker is entitled to exercise some degree of choice over the country of destination. In *R* v *Uxbridge Magistrates' Court & Another ex parte Adimi* [1999] EWHC Admin 765, Simon Brown, LJ, as he then was, said at para. 18
>
> > "... I am persuaded ... that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found their protection *de jure* or *de facto* from the persecution they were fleeing".
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> It has to be noted, importantly, that those *dicta* pre-date the passing of section 8 of the 2004 Act. Nevertheless their content may still, to some extent, give some guidance as to the approach to be taken to the concept of "reasonable opportunity" contained in section 8(4). It has to be noted, in addition, that the immigration judge described the failure to claim asylum in Greece which she described as "a safe country" as a "serious credibility issue". Section 8(4) does not describe any such factor as being "serious". It simply directs that such a failure should be taken into account as damaging the claimant's credibility. No explanation or justification is given by the immigration judge for regarding this matter as a serious credibility issue in the overall context of this case. She appears to have isolated this factor as having some special status and effect of its own as opposed to placing it simply as one of the relevant factors in determining credibility. She thereby, in our judgment, has fallen into the error identified in the case of *JT (Cameroon)* v *Secretary of State for the Home Department* [2008] EWCA Civ 878, in the judgment of Pill LJ with whom the other judges in the Court of Appeal agreed. At para. 16 of his Lordship's judgment, he said:
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> > "I do, however, agree with the parties that there is a real risk that section 8 matters were given a status and a compartment of their own rather than taken into account, as they shall have been, as part of a global assessment of credibility."

21. The Court's approach mirrored, and approved, that of the Court of Appeal in JT. Again, the need for a holistic approach to the evidence in assessing credibility is recognised and that a s.8 point should not be isolated as having "special status" in assessing credibility.

22. In this appeal, Judge Trevaskis dealt with s.8 at paras 59–63 of his determination. There, he said this:

> "59. Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 provides that certain forms of behaviour by an appellant are to be considered as damaging credibility. The form of behaviour relevant to this appeal is that the appellant failed to make a claim for asylum on arrival in the United Kingdom.
>
> 60. Even where it is found that Section 8 applies to an appellant's claim, it is necessary to look at the evidence as a whole and decide which parts are more important and which less; Section 8 does not require the behaviour to which it applies to be treated as the starting point of the assessment of credibility.
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> 61. The appellant's explanation for this failure is that she did not know anything about the asylum process, and she had been granted a student visa. When she was detained seven months after her arrival she was ill and had to be admitted to hospital.
>
> 62. I am satisfied that she did fail to make an asylum claim on arrival, and I do not consider that her explanation is such that her failure cannot damage her credibility. She fled from Namibia because she claimed to fear her uncle, and she had no intention of returning there. The claimed grounds for her fear were fully established at the time she left Namibia and therefore there was no reason why she could not have made on arrival the same claims that she eventually made over a year later.
>
> 63. I shall consider the extent of that damage to her credibility in the context of my overall assessment of her credibility".

23. I do not accept Mr Bass' submission that the judge fell into error in his application of s.8.

24. In my judgment, Judge Trevaskis correctly directed himself as to the application of s.8 of the 2004 Act in accordance with SM and JT. He recognised that s.8 need not be treated as the starting point – of course, a judge has to start somewhere and to set out the s.8 issues first is not in itself improper providing that the judge goes on to consider those issues in the context of all the evidence. Judge Trevaskis did not "isolate" the s.8 point and specifically directed himself at para 63 that it must consider its effect on the appellant's credibility in the context of all the evidence. Then, in paras 64–74 considered other aspects of the appellant's evidence before reaching his overall finding that the appellant's account was not to be accepted as credible. Indeed, the additional points raised by Judge Adio only feature in Judge Trevaskis' reasoning after the passage in paras 59–63 concerned with s.8 of the 2004 Act.

25. Further, I do not accept Mr Bass' submission that the judge failed to consider properly or at all the appellant's explanation why she did not claim asylum until thirteen months after her arrival and some months after she had been detained on the basis of her illegal entry. Nothing in the case of R v Uxbridge Magistrates Court ex parte Adimi [1999] EWHC 765 (Admin) relied upon by Mr Bass in his skeleton required the judge to accept her explanation. Its continued relevance after the enactment of s.8 was acknowledge in AJ in that any explanations for behaviour potentially damaging of credibility must be assessed but not necessarily accepted.

26. The judge dealt with the appellant's explanation in para 62 of his determination. It was the appellant's case that she did not claim asylum because she did not know about the process and she already had leave to enter as a student. The judge was not required to accept that explanation taken at face value or, having considered the remainder of her evidence, looking at her explanation holistically and whether or not she was to be believed.

27. In addition to the judge's assessment of her explanation at para 62, the judge returned to it as part of his reasons in para 64(iv) where he said this:

> "I find she has not made an asylum claim or sought to establish that she is a person eligible for humanitarian protection or made a human rights claim at the earliest possible time, and has not demonstrated a good reason for not having done so; the evidence or attempts to report her uncle to the police and to obtain official confirmation regarding the disappearance of her claimed sister lacks weight because of her failure to seek it at the time of her arrival and the consequent inability to verify the copy documents".

28. Mr Bass placed some reliance upon the judge's statement in para 62 that she had "no intention of returning" to Namibia. Mr Bass submitted that that was unfair as she had not been given an opportunity to deal with that issue. However, the appellant, she accepts, came to the UK to avoid the abuse by her uncle and ultimately to remain in the UK as a recognised refugee if she could successfully do so. Apart from the fact that the appellant entered on a temporary student visa, the whole of the appellant's claim is premised on her seeking to obtain refuge in the UK on a long term basis. There is nothing in the evidence to suggest she intended to come to the UK only temporarily. If that was, indeed, part of her claim she had ample opportunity in her written and oral evidence to say so but she did not. It was properly open to the judge to infer that she was coming to the UK on a long term basis to avoid the fear from her uncle and that that was relevant in assessing whether she had, in fact, a basis for claiming asylum and upon which she did not seek to do so on entering the UK. Mr Bass' point, and objection to the judge's conclusion based upon the evidence, is tantamount to a suggestion that the appellant did not claim asylum because she was not seeking refuge in the UK. That, as I have said, is contrary to her case that she fled Namibia in order to avoid abuse by her uncle and that, having been apprehended in the UK by the authorities, was precisely what she did, namely claimed asylum.

29. For these reasons, I reject the sole ground upon which the appellant sought permission to appeal. The judge properly considered s.8 in the context of all the evidence and was entitled reasonably to take into account that the appellant's behaviour in not claiming asylum for thirteen months after she arrived in the UK was damaging of her credibility.

2. Corroboration

30. It is axiomatic that corroboration is not required in order to establish an asylum claim or a humanitarian protection claim or a human rights claim. To require it would amount to an error of law (see Kasolo) (13190), IAT cited in ST (Corroboration –

Kasolo) Ethiopia [2004] UKIAT 00119). However, requiring corroboration is materially different from taking into account that documentary evidence which could be produced has not been produced in assessing whether to believe an appellant or witness or in determining what weight to give that evidence and whether the evidence is sufficient to discharge the burden of proof upon the appellant.

31. It is the duty of an individual making an asylum, humanitarian protection or human rights claim to substantiate their claim, although the absence of supporting document will not necessarily be determinative (see para 339L of the Immigration Rules and art 4(5) of the Qualification Directive (2004/83)). The legal relevance of the absence of supporting documentation was recognised in the case of TK (Burundi) v SSHD [2009] EWCA Civ 40. At [20]–[21], Thomas LJ (as he then was) (with whom Waller and Moore-Bick LJJ agreed) said this:

> "20. The importance of the evidence that emerged in this Court is to demonstrate how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; that where there is no credible explanation for the failure to produce that supporting evidence it can be a very strong pointer that the account being given is not credible. It is clear in the circumstances of this case that the Judge was in fact right to disbelieve the appellant. If the appellant had asked the mother of his second child, Ms Ndagire to give evidence, the truth about her immigration status would have emerged and his claim to base an entitlement to family life on his relationship with her and the child by her would have failed. That that was the inevitable consequence was made clear by the fact that his counsel accepted before us that he could no longer rely upon the relationship with Ms Ndagire and her daughter and the sole ground on which an Article 8 claim could be advanced was the relationship to his daughter by his first partner.
>
> 21. The circumstances of this case in my view demonstrate that independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

32. In his skeleton argument, Mr Bass referred to a number of passages in Judge Trevaskis' decision where he had taken into account the appellant's failure to provide documentary evidence. Mr Bass submitted that the judge had wrongly overemphasised the absence of documentation and required corroboration.

33. First, at para 34 the judge refers to evidence concerning the appellant's sister and that she disappeared following which the abuse shifted from her sister to the appellant. The judge refers to the evidence in a newspaper article of a missing girl. At para 34 the judge said this:

> "The appellant does not have any further evidence to support her claim that the woman mentioned in the newspaper article is her sister".

34. In para 33, the immediately preceding paragraph, the judge notes that the newspaper report identified the father of the missing girl using a name which was different from that which would be expected and the appellant had said that "she explained that this was a sort of maiden name".

35. This was not a case of the judge requiring corroborative evidence. The judge's point is that if the newspaper report is to have any cogency, it must be shown that it relates to the appellant's sister. If it did not then it would have no relevance given the nature of the appellant's claim. Given that there was a discrepancy in the naming of the sister's claimed father, I see nothing improper in the judge observing, in determining what if any weight to give to the newspaper report, that there was no further evidence to link the appellant's sister to the woman referred to in the newspaper article.

36. Secondly, in para 37 of his determination Mr Bass criticised the judge for taking into account that there was no supporting evidence of threats made against the appellant by her uncle or a witness statement from her boyfriend whom she had sought assistance from to avoid her uncle, including going to South Africa for a short period of time. What the judge actually says in para 37, setting out the appellant's evidence, is that despite stating that her uncle had threatened her boyfriend, she had not produced any evidence to support that claim and observed that there was no letter or witness statement from her boyfriend whom she had left in Namibia and "with whom she no longer has contact". It is far from clear that the judge is other than observing the absence of this additional evidence but noting that she no longer has contact with her boyfriend.

37. Likewise in para 38, when setting out the appellant's evidence in her witness statement that her boyfriend had stayed in Namibia despite the risk of being found by her uncle and accused of kidnapping her (when they had both gone to South Africa) she "has no evidence that he was threatened". Again, set out in the judge's recitation of the evidence, it is, in truth, no more than a factual statement that there is an absence of supporting evidence when assessing the appellant's account.

38. Mr Bass, however, relies upon what the judge said in para 64(ii) in relation to the absence of this evidence where he said this:

> "I find that all material factors at her disposal have not been submitted, any satisfactory explanation regarding any lack of relevant material has not been given; she has not attempted to provide evidence from [her boyfriend] which would corroborate her account of her problems with her uncle. Because of her delay in making her claim, she says she has lost contact with him. It would have been obvious to her that such evidence would be important to her claim".

39. Mr Bass placed some reliance upon this passage as indicating that the judge had wrongly had regard to the absence of evidence despite the fact that the appellant was no longer in contact with her boyfriend. Whilst the judge's point may not have the greatest force, it was a matter which the judge could take into account that the appellant – on coming to the UK – could have provided evidence from her boyfriend

before she lost contact to support her claim, in particular that she and her boyfriend had been threatened by her uncle. Read in isolation that reasoning might well not support, in itself, an adverse finding in relation to the credibility of the appellant's account but it was, as was accepted before me, one of a number of reasons given by the judge for not believing the appellant.

40. Following the approach in TK(Burundi), these were not matters which it can properly be said were irrelevant to the judge's assessment of whether the appellant's account was to be accepted. Judge Trevaskis was, himself, clearly aware of the proper approach to the absence of supporting evidence when, at para 64(v), he said this:

> "The fact that corroboration was not required did not mean that the Adjudicator was required to leave out of account the absence of documentary evidence, which could reasonably be expected: the Adjudicator was entitled to comment that it would not have been difficult to provide the relevant documents in this case".

41. In my judgment, there is nothing in this additional point raised by Judge Adio in granting permission to appeal.

3. Inconsistencies

42. Mr Bass criticised the judge for his conclusion in para 64(iii) that:

> "There are numerous inconsistencies between her various accounts which have been identified above. I have considered her explanations for these inconsistencies and I do not find them to be convincing. Those inconsistencies which are remitted by the appellant are not minor and I find the inconsistencies as a whole are damaging to the core of her claim".

43. Mr Bass submitted that the judge had failed to give adequate reasons for concluding that the inconsistencies were relevant to the credibility of the appellant's account. He submitted, relying upon paras 21 onwards of his skeleton argument, that the judge dealt with inconsistencies in paras 33–40 of his determination and, he submitted, had failed to evaluate the inconsistencies before taking them into account. Mr Bass relied upon, in para 21 of his skeleton argument, seven paragraphs of the judge's determination, namely paras 33–39.

44. In para 33, the judge noted the discrepancy between the father's name of her sister in the newspaper report and that that which would be expected and her explanation that it was "a sort of maiden name". Para 34, as relied upon by Mr Bass in his skeleton argument, repeats the criticism of the judge's comment that there was no further evidence to support the appellant's claim that the woman mentioned in the newspaper article was her sister. That is not a challenge to the judge taking into account inconsistencies. Para 35, refers to different dates in various parts of the evidence concerning when her sister disappeared. Para 35 says this:

> "The police statement referring to the disappearance states of that it took place on 18 September 2015. The appellant said that was incorrect and it was 15 August 2015. The newspaper report was dated 11 September 2015 and stated the disappearance occurred

> on 20 August 2015. The appellant explained that her sister's father had not believed that she was missing and did not report it until two weeks later".

45. There are clear inconsistencies in the dates reporting the disappearance of the appellant's sister. The appellant's explanation that her sister's father (a different person from her own father) had not reported her missing for two weeks simply does not explain why the police statement gave the disappearance of her sister as over a month after the date that the appellant said was correct, namely 18 September 2015 rather than 15 August 2015. Likewise, there was a different date reported in the newspaper as 20 August 2015. That is a date different from that suggested by the appellant to be the correct date. It is difficult to see what evaluation could be made of this evidence other than it threw up inconsistencies in the detail of the appellant's account which was relevant to the assessment of whether her account was to be believed.

46. Mr Bass, in para 21 of his skeleton argument, also relies upon para 36 and that there is "no evaluation" of inconsistencies in the appellant's evidence. However, para 36 does not, on its face, set out any inconsistency in the evidence. It states:

> "The appellant was asked why her mother had not left the farm following the deaths of her father and both brothers by 2012 when the appellant was 19. Instead it was left to her uncle who already had work in the diamond industry. She said that she was in school when her mother died and her mother had not given the property to her uncle. She said that her culture expected that female children would continue to live with their parents until they were married. However, she moved away with her boyfriend because she had nowhere else to live and also lived with a female friend for a period of time".

47. Without further explanation on behalf of the appellant, it is difficult to see what inconsistency the judge is said to have taken into account but with "no evaluation" in this passage.

48. Reliance is also placed upon para 37 but, again, in this passage the judge comments on the absence of any supporting evidence from her boyfriend as to threats to him or the appellant from her uncle. It is not concerned with inconsistencies in the evidence and has already been dealt with in relation to the 'corroboration' ground.

49. The criticism made of para 38 is that the judge has misinterpreted a phrase in the appellant's statement. At para 38 the judge says this:

> "In her written statement paragraph 20 she said that she and her boyfriend had applied for visas for the United Kingdom but she had travelled here alone. She said that he had never intended to accompany her and she cannot remember saying that he had wanted to do so. It had been his decision to stay in Namibia despite the risk of being found by her uncle and accused of kidnapping her. She has no evidence that he was threatened".

50. Para 20 of her statement is as follows:

> "My boyfriend and I applied for a short term student visa to the UK. I didn't really know what I was going to do when I got there, I was just scared of my uncle and needed to get away from him".

51. It is unclear what is said to be the "misinterpretation" of her statement. If it is being suggested, implicitly but not explicitly, that only she applied for a student visa and not her boyfriend as well, the point made by the judge in para 38 is, of course, at root that despite claiming to be at risk from her uncle, the appellant's boyfriend remained in Namibia whether or not he had sought to obtain a visa to the UK. The point is that, despite the claimed risk to him, he remained there.

52. Finally, in relation to para 39, Mr Bass' skeleton argument asserts that the judge made "no evaluation" of the inconsistency. Para 39 is as follows:

> "It was put to her that if her uncle was in prison from January to April 2019 for raping his girlfriend, that makes it more likely that the police would believe her allegations against him. She said that it was easy to bribe the police in Namibia and the fact that he was only imprisoned for three months shows that he was able to influence them. His girlfriend had been able to make her complaint because she had parents to stand up for her".

53. The point made by the judge has to be seen in the context of his consideration of the background evidence, set out in the *US State Department 2019 Country Reports on Human Rights Practices – Namibia* at paras 42–44 of his determination concerning the Namibian authorities' responses to allegations of rape and sexual abuse.

54. Then at para 72, the judge said this:

> "However, the country information referred to above and in the bundles shows that the appellant's claim that she could not seek protection from the police in Namibia is not plausible".

55. Then at para 73 the judge said this:

> "On her own evidence, police took action against her uncle for sexual crime, which is consistent with country information and inconsistent with her own claim".

56. I will return to this point shortly under the 'implausibility' ground but, for present, it suffices to note that at para 39 the judge sets out the evidence concerning her claim that her uncle had been imprisoned for raping his girlfriend but for only three months and that she remained fearful, and could not look to the police in Namibia for protection, because he would be able to influence them. The judge dealt with this at para 70 as follows:

> "Her claim that her uncle has influence lacks plausibility. She states that he was arrested for rape and attempted murder, which is inconsistent with having influence over the police, as well as showing that police action is taken against perpetrators of sexual crime. She claims that she could not make her allegations because she had no family support, but I find that she had the support of her friend and boyfriend and she could have contacted her elder married sister for additional support".

57. Although pleaded as an issue concerned with inconsistency, in fact para 39 concerns plausibility and reading the paras of the judge's determination together including the background evidence at paras 42–44, 70 and 72. Mr Bass accepted in his submissions that the appellant had not said in her evidence that her uncle had been released because of his influence. It is plain that the judge was reasonably entitled to find,

based upon the evidence, that it was implausible that the appellant's uncle would have influence over the police such that she would not be able to obtain a sufficiency of protection from them.

58. The challenge made to the judge's evidence under the 'inconsistency' ground raised by Judge Adio is unsustainable. The weakness of this ground is, no doubt, reflected in the fact that the appellant's legal representatives did not seek to raise it in the grounds seeking permission to appeal.

59. It is clear that there were a number of inconsistencies in the appellant's evidence which the judge was entitled to take into account and reasonably reach his adverse credibility finding. In addition to the discrepancies in the evidence concerning the name of the father of the appellant's sister and the date of her disappearance, there was a further significant inconsistency concerning the older sister and whether she had married the mayor of Maharero. The judge dealt with this in para 40 of his determination. In her asylum interview (at Q11) she had said that was who her sister had married. However, before the judge she said that was incorrect, her sister had married into the Maharero clan but her sister's husband was not the mayor. Further, there were inconsistencies in her asylum interview and subsequent written evidence concerning when she had last had contact with her sister: in her asylum interview in 2012, in her witness statement when she left Namibia in 2011, and in her oral evidence in 2012. None of these inconsistencies are challenged in the skeleton argument.

60. For these reasons, I reject the additional ground based upon the judge's reliance upon inconsistencies in the appellant's evidence.

4. <u>Implausibility</u>

61. Mr Bass criticised the judge for taking an unreasonable view as to the implausibility of aspects of the appellant's account. In particular, he relied upon para 29 of the judge's determination where the judge had found it implausible that the appellant had been abused by her uncle as she alleges. There, the judge said this:

> "I find that she was leading an independent life during this period and she was not reliant on her uncle for her maintenance or accommodation. I find it implausible that she was being abused by her uncle as she alleges, or that she was harassed by him at the times in the way she alleges. Had she been so treated, she would have been able to go to the police and report his behaviour, which would have resulted in action being taken".

62. The latter point of course relates to the appellant's claim that her uncle had influence over the police as evidenced by the fact that he was released after three months having been arrested for rape and attempted murder of his girlfriend. I have already dealt with that issue above.

63. In relation to the point made about the appellant leading an independent life during this period and not being reliant on her uncle for her maintenance and accommodation, Mr Bass submitted that it was not implausible that her uncle might

sexually abuse her simply because she was not reliant upon him or dependent upon him; dependence was not a prerequisite of abuse.

64. Mr Bass placed reliance on what was said by Underhill LJ in MN at [127] as follows:

> "Likewise the term 'plausibility' is not a term of art. To say that a particular account, or element in that account, is implausible is simply to say that it seems to the decision-maker to be inherently surprising or the kind of thing that you would not normally expect to happen; and such an assessment will obviously feed in to the overall assessment of credibility, though the weight to be given to it will depend on the degree of unlikelihood and how confident the decision-maker can be about it. Perhaps both points are too obvious to need making: but if terms are used too regularly they sometimes get in the way of the process of common sense decision-making".

65. Mr Bass accepted that the judge had accurately paraphrased that approach at para 67 of his determination.

66. Whilst it is important for a judge not to assess the plausibility of an account by reference to considerations of the customs and ways of a different society to that from which the appellant originates (see Y v SSHD [2006] EWCA Civ 1223), the improbability (or indeed probability) of an account can be taken into account in assessing whether an appellant or witness is to be believed. In HK v SSHD [2006] EWCA Civ 1153, Neuberger LJ (as he then was), whilst counselling caution in adopting reasoning based upon improbability, said this (at [30]):

> "30. Inherent improbability in the context of asylum cases was discussed at some length by Lord Brodie in *Awala –v- Secretary of State* [2005] CSOH 73. At paragraph 22, he pointed out that it was "not proper to reject an applicant's account *merely* on the basis that it is not credible or not plausible. To say that an applicant's account is not credible is to state a conclusion" (emphasis added). At paragraph 24, he said that rejection of a story on grounds of implausibility must be done "on reasonably drawn inferences and not simply on conjecture or speculation". He went on to emphasise, as did Pill LJ in *Ghaisari*, the entitlement of the fact-finder to rely "on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible". However, he accepted that "there will be cases where actions which may appear implausible if judged by…Scottish standards, might be plausible when considered within the context of the applicant's social and cultural background"."

67. In para 69 of his determination, Judge Trevaskis was not saying that it was implausible that the appellant would be abused by her uncle because she was not reliant or dependent upon him. Rather, the judge was observing that the appellant was leading an independent life and not living with her uncle. After her sister left in 2015, and the appellant claimed that her uncle then abused her, she moved out in 2016 to live with a female friend. She refused to return to live with him even though he sought to persuade her to do so. The account, set out at para 68 of the determination, notes that her uncle then stopped harassing her and she reported him to the police. She remained in Namibia until late 2017 continuing to work but without further contact from her uncle. After she went to South Africa, she claimed that her uncle resumed harassing her until she left in April 2018. At this time, she had a boyfriend who was working as a lorry driver. It was in that context that the judge considered that it was implausible that she was abused or harassed by her

uncle "at the times or in the way she alleges". In my judgment, that was not a conclusion based upon societal-specific criteria and was not one based upon a simple premise that the appellant was neither reliant nor dependent upon her uncle. Rather, it was based upon the whole of her personal circumstances including that she was living independently, working and separated from her uncle's household where she had ceased to live in 2016. That was a proper inference that the judge was reasonably entitled to draw adopting his own common-sense.

68. For these reasons, I reject the ground based upon 'implausibility' identified by Judge Adio in his grant of permission.

69. Standing back, I am satisfied that Judge Trevaskis gave sustainable reasons for concluding that the appellant was not credible and rejecting her account to be at risk on return to Namibia because of previous abuse by her uncle.

Decision

70. For these reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal on all grounds did not involve the making of an error of law. That decision, therefore, stands.

71. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 April 2021