



**Upper Tribunal
(Immigration and Asylum Chamber)**
PA/04466/2019

Appeal Numbers:

PA/04467/2019

PA/04469/2019
PA/04471/2019

THE IMMIGRATION ACTS

**Heard at: Field House
On: 14 November 2019**

**Decision & Reasons
Promulgated
On: 21 November 2019**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

**RR
AR
MR1
MR2**

(ANONYMITY DIRECTION MADE)

and

Appellants

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr S Khan, instructed by Leonard & Co Solicitors
For the Respondent: Ms S Jones, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellants appeal, with permission, against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision to refuse their protection and human rights claims.
- 2.** The appellants are citizens of Afghanistan, born on 1 January 1988, 14 September 1946, 14 June 1981 and 15 May 1980 respectively. The second appellant is the father of the first appellant and the third and fourth appellants are the sisters of the first appellant. The appellants, together with the first appellant's wife, arrived in the UK on 26 June 2018 and claimed asylum on arrival. They were interviewed about their claim in November 2018. Their claims were refused on 5 April 2019 and their appeals against that decision were heard in the First-tier Tribunal on 13 June 2019 and dismissed in a decision of 28 June 2019.
- 3.** The appellants claimed to be Shia Muslims from Kabul who were attacked by members of the Taliban looking for the first appellant's brother, S. They claim that the first and second appellants were beaten and threatened and the first appellant's wife and his sisters were beaten and threatened with kidnapping and forced marriage. They fled Afghanistan as they feared the Taliban, because they were Shia and also because of their connection to S.
- 4.** The appellants' appeals against the respondent's decisions were heard by First-tier Tribunal Judge Davidson. The judge heard evidence from all the appellants, including the first appellant's wife. The first appellant's wife and sisters all stated that they were teachers in Afghanistan but experienced harassment and discrimination because they were women. The fourth appellant, MR2, gave evidence about her medical condition, which included high blood pressure and a kidney condition requiring dialysis three times a week.
- 5.** The judge found the appellants' evidence to be inconsistent and did not accept that they were at risk on return to Afghanistan on account of the Taliban's claimed interest in S, their Shia faith or on account of the women being teachers. The judge did not accept that MR2's medical condition met the threshold for establishing an Article 3 claim and she dismissed the appeals on all grounds.
- 6.** The appellants sought permission to appeal Judge Davidson's decision on two grounds, the first being the judge's failure to consider Article 8 in relation to the fourth appellant and the second being the judge's failure fully to appreciate the appellants' claim to fear persecution from the Taliban.
- 7.** Permission to appeal was granted by the First tier Tribunal with specific reference to the first ground, but stating that all grounds were arguable.

8. The appeals were listed for a hearing on 23 September 2019. Prior to the hearing, the appellants made a written request for an adjournment on the basis that they required legal representation but were unable to secure such representation as they were awaiting a legal aid certificate. That request was refused on 20 September 2019. At the hearing counsel appeared for the appellants on a pro bono basis to renew the adjournment request on the basis that the legal aid certificate was still awaited. He made clear that he was not able to represent the appellants for a full hearing without funding being in place and that the appellants would be in difficulty proceeding with the appeal as there was no interpreter available for them. The Home Office Presenting Officer, Mr Clarke, had no objection to an adjournment and accordingly, and in the interests of justice, I agreed to adjourn the matter and issued the following notice:

“NOTICE AND DIRECTIONS

1. Following a grant of permission to the appellants, this matter came before the Upper Tribunal today for an error of law hearing with respect to a decision of First-tier Tribunal Judge Davidson dismissing the appellants’ appeals against the Secretary of State’s decision to refuse their protection and human rights claim.
2. The case was adjourned, at the appellants’ request, owing to the delay in the Legal Aid Agency approving a Legal Aid Certificate to enable the appellants’ legal representatives to appear on their behalf. There was no objection to the adjournment request and accordingly the matter will be re-listed for a hearing on another date, when the Upper Tribunal will consider documentary evidence and submissions from both parties for the purpose of determining whether the First-tier Tribunal made an error of law.
3. If the Upper Tribunal decides to set aside the decision of the First-tier Tribunal, the Upper Tribunal may go on to re-make the decision without any further hearing, in particular if a material error of law is identified in respect to the first ground alone. The appellant is therefore directed to ensure that all relevant evidence upon which reliance is to be placed is available at the hearing, including, with respect to the first ground, updated medical reports for the appellant PA/04469/2019.
4. Not later than 7 days before the hearing, the appellants or their representatives are to file with the Tribunal and serve upon the respondent an indexed and paginated bundle containing all documentary evidence relied upon.”

9. The matter then came before me again today. No further evidence was submitted prior to the hearing, but at the hearing Mr Khan produced a bundle of supplementary evidence consisting of medical records for MR2. The medical records and letters, although not previously before the First-tier Tribunal Judge, in fact largely pre-dated the evidence before her, and the most recent detailed letter in that supplementary bundle had actually already been produced before the First-tier Tribunal.

10. Mr Khan made submissions on both grounds of appeal. With regard to the second ground, namely the judge's failure to appreciate the appellants' claim, he submitted that it was credible for the Taliban to have come to the appellants' house, contrary to the judge's findings at [38]; that the judge was wrong to make adverse credibility findings about the second appellant's level of Pashtu as he understood a little of the language; that the appellants' account of being targeted because they were Shia was credible; that the judge was wrong to make the adverse findings at [40] and [41] as it was credible that the women were targeted as defying convention by not being married; that the judge's finding at [42] was irrational as it was credible that the Taliban would flee when they heard gunshots since Kabul was under the control of the government; and that the appellants' account of the women being at risk as educators was credible and the judge had erred by finding that it was not. Mr Khan submitted that the judge's approach was irrational and unfair as the appellants' account could have been credible in all those respects.

11. As for the first ground, Mr Khan confirmed that the appellants had not been pursuing an Article 3 claim and that they accepted that they could not meet the Article 3 threshold in relation to MR2's condition. He confirmed further that it was accepted that there were renal dialysis clinics in Kabul and that MR2 had had treatment in Kabul. However the judge had failed to consider MR2's Article 8 rights in the context of the instability in Kabul and the relationship that she had developed with those treating her in the UK, not only for kidney failure but also bone marrow problems and DVT. There were very significant obstacles to MR2's integration in Afghanistan on that basis. The judge should have considered Article 8.

12. Ms Jones submitted that the judge had considered all matters relevant to Article 8 but in any event, even if she had erred by failing to consider Article 8 specifically, there was no material error given that MR2 had failed to discharge the burden of showing that she could not be treated in Afghanistan. It was clear from the supplementary evidence produced that she had been treated in Afghanistan before coming to the UK. As for the second ground, the judge had considered all relevant matters and had been entitled to conclude that the appellants' account was not credible.

Discussion.

13. Taking the second ground first, as Mr Khan did, it is to be noted that the First-tier Tribunal, in granting permission, did not specifically conclude that the ground raised an arguable challenge, but simply did not exclude it. The ground plainly has no merit and is simply a disagreement with the judge's adverse credibility findings and her findings on risk on return. The judge considered all the matters raised by the appellants and all the risk factors upon which they relied. She considered the account of the Taliban's attack on the family home but did not find the account credible for various reasons which she gave at [37], [38], [42] and [44]. The judge considered the appellants' claim to be at risk as Shias and properly addressed the matter at [39]; she considered the claim that the female appellants were targeted for being women, for being

teachers and for being unmarried, but provided cogent reasons for rejecting that claim. The judge had regard to the evidence as a whole when considering all elements of the appellants' claim to be at risk but was fully and properly entitled to conclude that there was no support for any of the claims in the background country evidence and the Home Office CPIN guidance. As such the judge's conclusion, that the appellants were at no risk on return to Afghanistan, was one which was properly open to her on the evidence before her.

14. As for the first ground, it is indeed the case that the judge did not make any particularised findings on Article 8. At [48] she concluded that MR2's medical issues did not meet the threshold to establish an Article 3 claim. That conclusion is not challenged and indeed the appellants accept that the Article 3 threshold could not be met and do not pursue such a claim. It would have been relevant and appropriate for the judge to then go on to address Article 8, given the matters raised about MR2's medical condition, but I am in agreement with Ms Jones that her failure to do so cannot be considered to be a material omission in light of the very limited evidence before her. The only recent and substantive medical evidence before the judge was a letter dated 11 June 2019 from a Dr M Uniacke, a Consultant Nephrologist, which the judge referred to at [11a] and plainly took into account when considering the impact of removal upon the appellants. That letter gave details of MR2's advanced kidney failure for which she received dialysis three times a week, as well as an investigation for bone marrow failure. However there was no evidence before the judge, aside from a brief reference by MR2 in her statement, of the availability of treatment in Afghanistan and nothing to support a claim that no such treatment was available. The respondent, on the contrary, had provided information about treatment available in Kabul, in the refusal decision of 5 April 2019, and that is indeed confirmed by the evidence now produced (although not before the judge at the time of the First-tier Tribunal hearing) confirming that MR2 had been diagnosed in Afghanistan two or three years previously (page 161, dated February 2019) and had been treated there. Accordingly the appellants had failed to provide any evidence to the judge to show a lack of available treatment in Afghanistan such that the impact on MR2's quality of life in Afghanistan could give rise to an arguable Article 8 claim.

15. In any event it is relevant to note that the Court of Appeal, in GS (India), & Ors v The Secretary of State for the Home Department [2015] EWCA Civ 40, made it clear that Article 8 could not be used in a medical case simply as a substitute to Article 3 where the higher threshold could not be met, but that there had to be additional factors: [86] *"If the Article 3 claim fails ... Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm - the capacity to form and enjoy relationships - or a state of affairs having some affinity with the paradigm."* In the appellants' case, there were no additional elements or factors. Mr Khan submitted that the unstable situation in Kabul and MR2's relationship with those treating her in the UK were sufficient to demonstrate very significant obstacles to integration in Afghanistan. However that was not an argument put to the judge and there was, and is, certainly no evidence submitted to support such an argument.

16. In the circumstances there was no arguable Article 8 claim before the judge on the evidence available and, whilst it would have been preferable for the judge to have specifically addressed Article 8, her failure to do so cannot in any way be said to be material to the outcome of the appeal and cannot require her otherwise sound decision to be set aside. There is, furthermore, and in any event, nothing in the evidence now produced by the appellants to suggest that there is still an arguable Article 8 case to be made.

17. For all of these reasons I find no material error of law in the judge's decision requiring it to be set aside. I uphold the judge's decision.

DECISION

18. The appellants' appeals are accordingly dismissed. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision to dismiss the appellants' appeals therefore stands.

Anonymity

The First-tier Tribunal made an order for anonymity. I maintain that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed 
Upper Tribunal Judge Kebede
November 2019

Dated: 14