



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10052/2019**

THE IMMIGRATION ACTS

**Heard at : Field House
On the 15 March 2022**

**Decision & Reasons Promulgated
On the 13 April 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ASIF KHAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Knight of Duncan Lewis Solicitors

For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision refusing his asylum and human rights claim.

3. The appellant is a citizen of Afghanistan whose date of birth is given as 1 January 1991. He entered the UK illegally in 2008 and claimed asylum on 18

September 2008. He did not maintain contact with the authorities and was considered to have absconded, as a result of which his claim was treated as withdrawn, on 12 March 2009. On 17 September 2013 he applied for an EEA residence card as a family member, but his application was refused on 26 February 2014. He made further submissions on 6 July 2015 which were considered as a fresh claim, and he was subsequently interviewed on 30 March 2017. His claim was refused on 1 October 2019. On 16 June 2020 he made further submissions in regard to his family life under Article 8 and the respondent then issued a supplementary refusal decision on 7 August 2020.

4. The appellant's asylum claim was made on the basis that he was at risk on return to Afghanistan owing to his father's work for a US company. He claimed that he would be perceived as having a political opinion and would be at risk from the Taliban. The respondent, in refusing the appellant's claim in the refusal decision of 1 October 2019, found there to be no evidence to show that the appellant had anything other than a low profile and concluded that he would be of no interest to the Taliban and at no risk on return. It was considered that he could, in any event, relocate to another part of Afghanistan which was not under Taliban control. As for the appellant's Article 8 claim, the respondent noted that he claimed to be in a relationship with Emma Farbridge and to have a parental relationship with their son Aryan (born on 26 May 2013), but in the absence of any supporting evidence it was not accepted that he had a genuine and subsisting relationship with either. The appellant's claim was also refused under the suitability provisions in S-LTR.1.5 and S-LTR.1.7 on the grounds, respectively, that his presence in the UK was not conducive to the public good owing to two convictions from 2017 and 2018, and that he had failed to attend his asylum interview in 2009 and failed to provide information and evidence about his relationship with his claimed partner and child.

5. In his further submissions of 16 June 2020, the appellant explained that he had married Emma Farbridge in 2012, in an Islamic wedding, and had registered their marriage in 2016. However, the relationship had broken down and his wife had filed a non-molestation order against him. He had since formed a new relationship with Malika Keane and had a son with her, Rashid Keane, born on 15 October 2019. The appellant claimed to be in a genuine and subsisting relationship with his children, that there was a pending child arrangement order for his first son Aryan and that it would be disproportionate to separate him from his children.

6. The respondent, in her supplementary decision, maintained the decision that the appellant could not meet the eligibility requirements of the immigration rules as a parent and that his removal would not be disproportionate.

7. The appellant's appeal against the respondent's decision was heard by First-tier Tribunal Judge Coll on 2 February 2021. The appeal was heard remotely by video-link. The only witness was the appellant. Reasons were given for the fact that his brother did not give evidence remotely from Germany in relation to his asylum claim and for the non-attendance by his current partner and his ex-wife

in relation to his Article 8 claim based on his relationship with his children. The judge did not accept the reasons given and inferred from the lack of attendance by those potential witnesses that the appellant was concerned what they would say under cross-examination. As a result, she found the credibility of the appellant's evidence to be very low on non-Refugee Convention matters and she used that finding to draw an inference that his credibility was very low also on matters relating to his Refugee Convention claim. The judge did not accept that the appellant's father worked for the US government and found that even if he did, the appellant's profile was low and as such the Taliban would have no interest in him. She did not accept that the appellant was at any risk on return to Afghanistan and she rejected his claim to have no contact with his family in Kabul and considered that he could return to Kabul. As for the appellant's Article 8 claim, the judge considered that the suitability provisions applied and that he could not meet the eligibility requirements of the immigration rules in any event. She did not accept that the appellant fulfilled any parental responsibilities with regard to either of his sons and did not accept that he had a genuine and subsisting relationship with either. She considered that there were no exceptional circumstances either within or outside the immigration rules and concluded that the appellant's removal would not be disproportionate. She accordingly dismissed the appeal on all grounds.

8. The appellant sought permission to appeal the decision to the Upper Tribunal on three grounds: that the judge erred by refusing his asylum claim purely on the basis of the adverse credibility findings relating to his Article 8 case; that the judge failed to consider how he would be able to integrate into Afghan society given that he left as a child and failed to consider the factors in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130; and that the judge erred in speculating about the reasons why the witnesses were absent.

9. Permission was refused in the First-tier Tribunal, but was subsequently granted in the Upper Tribunal. The matter came before me.

Hearing and Submissions

10. At the hearing I enquired of Mr Kotas as to the Home Office policy in dealing with Afghan cases in light of the changed circumstances in the country. He advised me that the position was, in general, that error of law appeals should proceed as previously. If an error of law was found and the decision set aside, directions could then be made by the Tribunal for the case to be re-assessed by the respondent in light of the changed circumstances. Alternatively, if no error of law was found, it was open to the appellant to make a fresh claim. Accordingly, the appeal proceeded and both parties made submissions on the error of law issue.

11. Mr Knight submitted that the judge had made clear errors of law. She had applied the wrong standard of proof to the appellant's asylum claim as she had applied her adverse credibility findings made on her Article 8 assessment to her assessment of credibility in relation to the asylum claim. By doing so she

had erred in law. The judge also erred by making inferences, without any valid reason, as to why the witnesses had not attended. The appellant's brother in Germany could not have added to the appellant's account of events in Afghanistan as he was not there. The appellant was not on good terms with the mother of his eldest child and the mother of the youngest child was in Morocco at the time. Those were all reasons why they did not give evidence, which the judge did not consider. Further the judge did not consider that video connections varied and wrongly jumped to conclusions about the absence of the witnesses.

12. Mr Kotas submitted that the judge had applied the right standard of proof to the appellant's asylum claim. She was entitled to take into account the appellant's credibility in other aspects of his case. The statements in the appellant's bundle said nothing about the appellant's asylum claim and were all about the family proceedings. Mr Kotas accepted that, in accordance with the relevant guidance at the time in Nare (evidence by electronic means) Zimbabwe [2011] UKUT 00443, the appellant's brother could not have given oral evidence from Germany as there was no evidence before the Tribunal that the German authorities had consented. However, that was immaterial, as the judge had considered the matter in the alternative, on the basis that his account was true, at [32], and had found that the appellant was at no risk owing to his low profile. That finding had not been challenged. As for the judge's Article 8 assessment, she had undertaken a detailed analysis of the appellant's ability to integrate into Afghan society and had considered all relevant matters. With regard to the challenge to her conclusions based on the absence of the witnesses, the judge was entitled to consider it important for there to be evidence from the mothers of the children, given the lack of other evidence, and she was entitled to draw adverse inferences from their non-attendance. In any event, the judge had made findings in the alternative, which had not been challenged. It was completely open to the judge to find that the appellant did not have a genuine relationship with his sons.

13. Mr Knight reiterated the points previously made in response and submitted that the judge had failed to consider if the appellant fell within the exceptions in AS.

Discussion

14. As Mr Kotas rightly pointed out, the judge's decision makes it absolutely clear that she was applying the appropriate standard of proof to the different parts of the appellant's case and Mr Knight was wrong to assert otherwise. At [11] the judge directed herself on the standard of proof in asylum claims and specifically referred to it being a lower standard of proof, as opposed to the civil standard of the balance of probabilities in Article 8 cases. She then went on to apply the relevant standard of proof to the claims made by the appellant, emphasising at [29] that, whilst she was taking her adverse credibility findings on the Article 8 claim into account in her assessment of the credibility of his asylum claim, she did so bearing in mind the lower standard of proof in such a

claim. I am entirely in agreement with Mr Kotas, therefore, that the judge made no legal error in regard to the standard of proof.

15. Likewise, I agree with Mr Kotas that there was no error otherwise made by the judge in taking her adverse credibility findings on the Article 8-related evidence into account when assessing the credibility of the appellant's asylum claim. It was not simply a matter of the judge rejecting the appellant's asylum claim because she had rejected his evidence about his family relationships. Rather, the judge took her previous adverse findings into account as part of her wider credibility assessment, noting other adverse matters which entitled her to reach the conclusions that she did.

16. As Mr Kotas submitted, the judge was faced with very limited evidence. The two witness statements relied upon said nothing about the appellant's substantive asylum claim but were all about the family relationships. There was otherwise no evidence to support the appellant's claim and nothing from his brother who could have confirmed their father's work and the circumstances leading them to leave the country. Even if the judge was wrong to draw adverse findings from his brother's failure to give live evidence from Germany (on the basis accepted by Mr Kotas), none of that is material, in any event, given the alternative findings made by the judge at [32] on the basis that the appellant's account was true. The judge, applying relevant caselaw, provided cogent reasons for concluding that the appellant, taking his claim at its highest, had not demonstrated that his profile was such as to put him at risk on return. As the judge noted at [32], he had had an opportunity to provide further evidence in that regard, but he had not done so. None of that was challenged in the grounds and there is simply no basis for concluding that the judge erred in law in finding that the appellant would not be at risk on return to Afghanistan.

17. As for the assertion that the judge had erred by making adverse inferences from the non-attendance of potential witnesses, again I agree with Mr Kotas that the judge was perfectly entitled to take that into account when assessing the credibility of the appellant's claim. The evidence before the judge was very limited and there was evidence which could reasonably have been expected to have been produced to support the appellant's claim as regards his relationship with his children, but which had not been produced. The judge was entitled to find that she had not been presented with a credible explanation for the absence of such evidence, particularly since the appellant had admitted that he had a good relationship with the mother of his eldest child and was claiming to be in an ongoing relationship with the mother of his youngest child, and considering the inconsistencies identified by the judge in his evidence when seeking to provide an explanation, as detailed at [25] to [27]. Whilst Mr Knight submitted that the judge had erred by speculating as to the reasons why the potential witnesses had not attended, he was likewise expecting the judge to speculate as to other reasons for their non-attendance such as Covid, access to the internet and inadequate video reception, when none of those reasons had been suggested or supported by evidence.

18. In any event, as Mr Kotas submitted, even if the judge was in error by speculating as to the reason for the non-attendance of potential witnesses, that was not material since the judge considered the matter in the alternative and was fully entitled to draw the adverse conclusions that he did from the absence of evidence which could reasonably have been provided. The judge made a number of findings on the overall lack of evidence of the appellant's relationship with his two children and, at [55] to [68], provided detailed and cogent reasons for rejecting the appellant's claim to have a genuine and subsisting relationship with his children. None of that has been challenged in the grounds and there is no basis for asserting that the judge erred in her findings and conclusions in that respect.

19. The final ground raised by Mr Knight for challenging Judge Coll's decision was a failure to consider the significant obstacles to the appellant's integration in Afghanistan in line with the factors identified in AS. However, that was a matter considered in detail by the judge, both in terms of the reasonableness of relocation at [38] to [42], and in the context of paragraph 276ADE(1)(vi) of the immigration rules and Article 8 outside the immigration rules at [73], [74] and [95]. The judge took careful account of the appellant's age at which he left Afghanistan, the length of time spent outside Afghanistan and in the UK, his previous and current ties to Afghanistan, his circumstances in the UK and the circumstances to which he would be returning in Afghanistan. There is no merit whatsoever in the assertion in the grounds that the judge failed to give consideration to such matters.

20. In all of the circumstances, the judge was perfectly entitled to conclude, at the time of the hearing and on the basis of the evidence before her, that the appellant was at no risk on return to Afghanistan and that his removal would not disproportionately interfere with his family and private life. Whilst the situation in Afghanistan has clearly changed significantly since the hearing, the judge made no errors of law in dismissing the appeal on the basis of the circumstances at that time. It is now open to the appellant to make a fresh claim on the basis of the changed circumstances, but the grounds of appeal do not identify any errors of law in the judge's decision as it was made at that time.

DECISION

21. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: S Kebede
2022
Upper Tribunal Judge Kebede

Dated: 16 March