Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/05612/2018 (V)**

THE IMMIGRATION ACTS

Heard at: Field House
On: 22 October 2020

Decision & Reasons Promulgated
On 29 October 2020

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

RJ
(Anonymity Direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Mohammad of Legis Chambers
For the Respondent: Mr T Melvin, 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 Skype for business. 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 is a citizen of Afghanistan, born on 1 February 1996. He arrived in the United Kingdom clandestinely on 15 September 2008 at the age of 12 years. He claimed asylum when he was detected and served with removal papers as an illegal entrant.

3. The appellant's asylum claim was based upon his fear of the Taliban who had killed his parents in a bomb attack on his home following accusations against his father of working with the government and had stabbed him in his hip and threatened to kill his uncle and his family if they continued having him staying at their house. The appellant's claim was refused on 24 February 2009 as the respondent did not believe his account, but he was granted discretionary leave to remain until 23 February 2012 owing to his age. He appealed against the decision but his appeal was dismissed on 22 April 2009 as the Tribunal, although accepting that his parents had been killed in a bomb blast, did not accept that it was by the Taliban or that his family was of any interest to the Taliban and did not accept his claim to have no family remaining in Afghanistan.

4. On 6 February 2012 the appellant submitted an application for further leave to remain in the UK and on 28 August 2014 he was granted indefinite leave to remain exceptionally, outside the immigration rules. That followed a conviction, on 17 March 2014, for possessing a controlled Class A drug with intent to supply, for which he received a community order. In March/April 2016 the appellant was attacked and his jaw was broken, and in February 2017 he was involved in a drugs-related assault which led to admission into hospital and a subsequent neurological condition for which he was prescribed anti-epileptic medication by Dr Thomas on 29 March 2017 (page 127 of the respondent's appeal bundle).

5. On 3 February 2017 the appellant was convicted of offences which occurred on 9 September 2016, namely possession with intent to supply a Class A controlled drug – cocaine and having a blade/ sharp pointed article in public and on 27 April 2017 he was sentenced to a total of 4 years and 6 months' imprisonment. In light of his conviction, the appellant was served with a notice of decision to make a deportation order on 4 October 2017 and his legal representatives made written representations on his behalf, on Articles 2, 3 and 8 grounds, on 8 November 2017.

6. The appellant's representations referred to him having arrived in the UK at the age of 11 years, being placed in foster care and becoming close to his foster family; being in a relationship with a British citizen for the past 7 years and planning on getting married once released from prison; having developed medical problems after being attacked and injured in March 2014 and awaiting operations in hospital; and having no one to turn to for support in Afghanistan if he was returned there. It was claimed that his deportation would breach his Article 8 human rights.

7. On 14 December 2017 the respondent invited the appellant to seek to rebut the presumption under section 72 of the Nationality, Immigration Act 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community. The appellant's legal representatives responded the same day, relying upon their previous representations of 8 November 2017.

8. On 16 April 2018 the respondent signed a deportation order pursuant to section 32(5) of the 2007 Act and made a decision to refuse the appellant's protection and human rights claim. In that decision, the respondent certified that the presumption in section 72(2) of the 2002 Act applied to the appellant in light of his conviction. His asylum claim was refused

on that basis. The respondent considered in any event that the appellant was at no risk on return to Afghanistan and could safely and reasonably relocate to Kabul, that he was not entitled to humanitarian protection and that his removal would not breach his Article 3 or 8 human rights. The respondent accepted the appellant's relationship with his British partner but noted a lack of evidence to show that they had been cohabiting for any period before he was imprisoned and did not consider that it would be unduly harsh for his partner to live in Afghanistan or to remain in the UK without him. The respondent did not accept that the appellant had been lawfully resident in the UK for most of his life, did not accept that he was socially and culturally integrated in the UK and did not accept that there would be very significant obstacles to his integration in Afghanistan. The respondent did not accept that there were any very compelling circumstances outweighing the public interest in the appellant's deportation.

9. The appellant appealed against that decision and his appeal was heard on 3 July 2019 by First-tier Tribunal Judge Andrew. Judge Andrew noted that no reliance was placed on the appellant's relationship with his former girlfriend. With regard to the section 72 certification, she concluded that the appellant constituted a danger to the community and that he had not rebutted the presumption in that regard. As such, the judge concluded that the appellant could not rely on asylum and she went on to consider Article 2 and 3. She considered the circumstances arising since the previous decision from Judge Buchanan in April 2009, which she took as her starting point, and noted that there was no new evidence of relevance. She refused an adjournment request made on behalf of the appellant in order to obtain a psychologist's report and concluded that the appellant was not at any risk on return to Afghanistan 'per se'. However, having considered the appellant's physical and mental health, which included a report from a retired consultant neurologist Dr Durward dated 19 November 2018 and references to seizures and epilepsy as well as to PTSD, she concluded that, whilst that was not in itself sufficient to meet the high threshold to make out an Article 3 or 8 claim, when taken together with other factors such as the fact that he was vulnerable and claimed to have no contact with any family in Afghanistan, it would not be reasonable for him to relocate to Kabul. She found that internal relocation would be unduly harsh and she allowed the appeal on Article 3 grounds in a decision promulgated on 8 July 2019.

10. The Secretary of State sought, and was granted, permission to appeal to the Upper Tribunal. The case came before me on 1 July 2020 for a remote hearing by way of Skype for business and I concluded that the judge had made material errors of law in her decision allowing the appeal on Article 3 grounds, on the following basis:

> "15. Having heard from both parties I have no hesitation in finding that the judge made material errors of law in her decision allowing the appeal on Article 3 grounds. I am entirely in agreement with the view taken in the Secretary of State's grounds of appeal and written submissions, and the submissions made by Ms Cunha, that the judge failed to provide any proper reasons as to why, having found at [49] that the appellant would not meet the high threshold to establish an Article 3 and 8 claim on account of his health difficulties, he nevertheless succeeded on Article 3 grounds on account of his "vulnerabilities". The "vulnerabilities" considered by the judge appeared, at [55], to be little more than the medical issues which she had already found not to be sufficient to meet the Article 3 test. It seems that the judge took the view that

the relevant issue was the reasonableness of return to Kabul which involved a lower test to that in Article 3, whereas what she should have considered was whether the appellant's return to Kabul would meet the high threshold of establishing an Article 3 claim.

16. The approach taken by Mr Mohammad in responding to the respondent's grounds was to challenge the grounds as an attempt to go behind the judge's findings on the medical evidence and the weight she accorded to that evidence in finding that the Article 3 threshold was met. He submitted that there had been no challenge to the medical evidence at the hearing before Judge Andrews and that the judge was entitled to give the weight that she did to that evidence. However, I find his approach to be mistaken as the grounds do not seek to challenge the medical evidence nor to go behind the judge's findings on the medical evidence. What the grounds challenge is the absence of reasoning by the judge as to why the medical evidence was not found to be sufficient to establish an Article 3 claim on health grounds, yet found that same evidence to be sufficient to establish an Article 3 claim on the basis of "vulnerabilities". The point made in the respondent's grounds at [3] and [4], in the written submissions at [5] and by Ms Cunha was that the judge's own finding at [51] and [54] was that the medical evidence was incomplete and that there was as yet no proper diagnosis of the appellant's condition. Indeed, that was the judge's observation at [53] when considering the medical report from Dr Durward of 19 November 2018 (page 284 of the appeal's bundle). In such circumstances it is difficult to see how she considered the appellant's medical condition to give rise to vulnerabilities sufficient to meet the Article 3 threshold. In addition, the respondent properly makes the point at [5] of the grounds that the judge made no findings as to whether the appellant would be able to access medical treatment in Kabul. The significance of such an assessment is set out in the respondent's written submissions at [9] to [11]. As such, I agree entirely with the respondent that the judge simply failed to explain the basis upon which she concluded that the Article 3 threshold had been met and it is impossible to determine from her findings how and why she allowed the appeal on the basis that she did.

17. Accordingly, I set aside Judge Andrew's decision allowing the appeal on Article 3 grounds. It was quite properly agreed by Ms Cunha that, whilst the appellant had not challenged the judge's findings on Article 3 at [49], an entirely new decision would have to be made on Article 3 given that the appellant's medical condition was essentially the main issue in this case. It was also noted that there had been a change in the jurisprudence concerning Article 3 medical cases, with the judgment of the Supreme Court in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and the evidence would need to be assessed in light of that judgment. In addition, no decision was made by the judge on Article 8, no doubt because the appeal was allowed on Article 3 grounds. A re-making of the decision would require arguments and evidence on Article 8 as well as Article 3. Both parties were content for the decision to be re-made on the basis of submissions and further medical evidence without the need for further oral evidence and for that to take place at a resumed hearing, again remotely by way of Skype for business. In regard to Mr Mohammad's reference to an intention to cross-appeal the judge's findings on the section 72 certification, it is too late for such an appeal. There was no previous cross-appeal in that regard and that was confirmed by Mr Mohammad at the commencement of this hearing. However, the question of the appellant's risk of re-offending may well be a relevant issue for consideration when assessing Article 8 and, as such, any evidence and submissions produced in that regard would be considered."

Hearing and Submissions

11. The case was then listed for a resumed, remote hearing and came before me again to re-make the decision. Both parties had prepared and submitted skeleton arguments for the hearing and a supplementary bundle had been produced for the appellant which included a further witness statement from the appellant, a country expert from Dr Giustozzi and a second medical report from Dr Durward, together with further information about the treatment of epilepsy in Afghanistan and the judgment of the Supreme Court in AM (Zimbabwe).

12. Mr Mohammad submitted that the focus of the re-making of the decision in the appeal was on Article 3 and Article 8, and the relevant test in AM (Zimbabwe) and Paposhvili v. Belgium - 41738/10 - Chamber Judgment (French Text) [[2016] ECHR 1113. He submitted that the second report from Dr Durward confirmed the diagnosis of epilepsy which had previously been only a putative diagnosis, and which was a continuing and permanent disability and would make it difficult for the appellant to find employment in Afghanistan. Likewise, for PTSD. Both were indefinite diagnoses and were related to mental health. Mr Mohammad relied on the country guidance in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 which found that internal relocation to Kabul would not be unduly harsh or unreasonable for a single adult male in good health. Since the appellant was not in good health, Mr Mohammad submitted that he did not fall within this category. He submitted that the appellant had been diagnosed with a lifelong illness which was controlled by medication and which the evidence showed was not available in Afghanistan.

13. Mr Mohammad relied upon the report of Dr Giustozzi which referred to the lack of medication in Afghanistan and to the evidence of a survey of students in Afghanistan on attitudes to epilepsy, both of which referred to people with such conditions being seen as being "possessed" by djins and at risk of being chained and sedated. The Secretary of State had an obligation to dispel any doubts as to the medication being available to the appellant in Afghanistan and had not done so. As such, the test in AM (Zimbabwe) and Paposhvili v. Belgium - 41738/10 - Chamber Judgment (French Text) [[2016] ECHR 1113, was met and the appellant had made out his claim under Article 3. As for Article 8, the appellant's private life, including the age he came to the UK, his relationship with his foster family, his job as a keyworker, his reformed character and his strong links to the UK, all outweighed the public interest in his deportation.

14. Mr Melvin submitted, in response, that the respondent had concerns about both diagnoses, of epilepsy and PTSD. With regard to epilepsy, the appellant was prescribed medication in 2017 by his doctor at that time, Dr Thomas, following the incident in 2016 when he was attacked, and that had not been reviewed since then. Dr Durward expressed his concerns about the diagnosis in his first report in 2018 and his current report confirming the diagnosis relied solely upon the evidence of the appellant's foster family in regard to the appellant's relapses. There was no psychiatric evidence confirming a diagnosis of PTSD and insufficient evidence overall to conclude that the appellant suffered from mental health problems. In any event, the evidence did not show that there was no medication available for epilepsy in Afghanistan. Even if the particular brand of

medication used by the appellant was not available, there was no evidence that another brand was unavailable. The appellant's condition was managed by drugs and he could lead a normal life in Kabul. As for Article 8, the appellant was unable to show that there were very significant obstacles to his return to Afghanistan. There was no definitive finding by Judge Andrew that the appellant had no family remaining in that country to provide him with support. It would be reasonable for him to relocate to Kabul.

15. Mr Mohammad reiterated his previous points in response.

Discussion and Findings

16. It is relevant to note, as a starting point, that there was no challenge to Judge Andrew's finding on Article 3 at [49], that there was insufficient reason, on the evidence available to her, to conclude that the appellant would meet the threshold for an Article 3 or 8 claim on the basis of his health difficulties alone.

17. Having again read all the documents in detail and had regard to the appellant's history, I can understand that Judge Andrew had some sympathy for the appellant and no doubt that was what led her to allow the appeal. However, for the same reasons that she erred in law in her decision, I have difficulty in being able to conclude that the evidence is sufficient to meet the high threshold for an Article 3 claim.

18. The main issue before me, in re-making the decision in the appeal, is whether the evidence now before me shows that the appellant's circumstances as a whole, including his medical condition, reach the high threshold to establish an Article 3 claim. In AM (Zimbabwe), the Supreme Court decided that it should depart from the well-known and long-standing test in N v. Secretary of State for the Home Department [2005] UKHL 31 and accepted the slightly lower threshold established in the case of Paposhvili. The test in medical cases for establishing an Article 3 case is therefore that set out at [183] of Paposhvili, namely:

> "substantial grounds … for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy."

19. It is asserted on behalf of the appellant that the appellant's mental health conditions are sufficiently debilitating to reach that threshold, when taken with the lack of support and lack of access to medication in Afghanistan. However, as was the case before Judge Andrew, the evidence is sadly lacking. Whether this is due to there being a lack of effort to obtain full and conclusive medical reports, or whether it is simply because the severity of the conditions claimed has been over-played, as Mr Melvin submitted, the fact is that there is no clear and recent confirmation of any diagnosis of either epilepsy or PTSD and no adequate recent evidence that medication equivalent to that taken by the appellant in the UK is not available if required. I note that this is despite the respondent and Tribunal having repeatedly referred to the lack of adequate medical evidence, in the grant of permission in September 2019 by Upper Tribunal Judge Martin, Mr Tufan's SSHD's response to directions from Upper Tribunal Judge Canavan dated 9 June 2020 (paragraphs

9 and 10) and my error of law decision of 14 July 2020, and despite the ample opportunity the appellant has had to provide further evidence in response to numerous directions given for such evidence to be adduced.

20. The only new medical evidence produced since the appeal before Judge Andrew is a second report from Dr Durward which, I have to agree with Mr Melvin, adds very little to his previous report. Although Dr Durward concludes that he is satisfied that the appellant has epilepsy, his reasons for so concluding are simply based upon observations from the appellant's foster parent, that he had witnessed incidents which he considered to be seizures, which appeared to be linked to the appellant not taking his medication. However, what is clear from Dr Durward's report is that the appellant has not been reviewed since he was first prescribed the medication three years ago, in March 2017, by Dr Thomas and Dr Durward therefore recommended that he be reviewed. It is relevant to consider the letter from Dr Thomas to which Dr Durward was referring, at page 127 of the respondent's appeal bundle and page 302 of the appellant's appeal bundle, because it is clear that Dr Thomas had little information before him when deciding what was causing the appellant's blackouts and he therefore recommended referral to a neurorehabilitation for further assessment, yet the following document at page 304 confirms that the appellant did not continue to attend the Neurorehab Clinic and so was discharged in July 2017.

21. Further, Dr Durward, in his first report, stated that the appellant's condition, leading to his appointment with Dr Thomas, could have been a result of the recent trauma he had suffered when he was assaulted and was not necessarily actually epilepsy. Accordingly, I would agree with Mr Melvin that Dr Durward's second report does not constitute a full and proper medically confirmed diagnosis of epilepsy. I fail to understand why the appellant has not sought to have his condition and medication reviewed since March 2017 and why he has not sought to obtain a medical report from a team actually reviewing and treating him, particularly given the evident significance of such evidence for his deportation appeal. It seems to me that the state of the evidence is such that it is not satisfactorily established that the appellant has a debilitating medical condition which requires medication that is not readily available in Afghanistan.

22. As for the assertion that the appellant has PTSD, again the evidence is significantly lacking. The only new medical evidence, from Dr Durwald, concedes that he is not a specialist in that field. Judge Andrew expressed concern in her decision that there was an absence of recent medical evidence and the situation is no different before me. The reports from Dr Komarzynska, an Inreach Psychologist at the prison where the appellant was incarcerated, are dated 13 June 2017 and 11 March 2019 (pages 297 and 278 of the appellant's appeal bundle) and refer to the appellant's immediate mental health issues following the traumatic incident of the assault, but there is nothing more recent to confirm a diagnosis of PTSD. Again, given the significance of such evidence in these proceedings, it is of some concern that no further evidence has been produced, and the indication is therefore that there are no serious mental health concerns requiring medical or other intervention.

23. In addition to the above concerns, the appellant is certainly not assisted by Dr Durward's observation at page 36 of the supplementary bundle that "*the writer does not*

discover substantial grounds at present that [RJ] deported to Afghanistan would face a real risk of "a serious, rapid and irreversible decline in his state of health" or "*a significant reduction in life expectancy*", albeit qualified by "*However, the writer requires to emphasise that [RJ] claims neither family nor friends who would support him in Afghanistan*."

24. I accept, from the evidence, as did Judge Andrew, that the appellant has suffered two traumatic incidents when he was attacked and badly injured, requiring hospitalisation, and has had trauma-based mental health struggles following the latter incident. However, on the basis of the very limited evidence I have before me, and the lack of any recent medical evidence of particular weight, I have to agree with Mr Melvin that the appellant comes nowhere near to meeting the high threshold to make out an Article 3 claim on medical grounds, even on the lower test in Paposhvili and AM (Zimbabwe).

25. Although Judge Andrew considered that there was otherwise a case to be met for Article 3, I have found already that she failed to identify what the further issues were that led to the threshold being met. Given that the appellant has failed to demonstrate that he would be at risk of persecution in his home area, even if it was accepted that he would not return there and that internal relocation to Kabul was the relevant issue, he would have to show that he would be at Article 3 risk in Kabul, which I do not consider that he is able to do.

26. I accept that the appellant has health issues and has suffered traumatic events in the past, having been violently assaulted on at least two occasions in the UK, and I have regard to the fact that the appellant has lived in the UK since the age of 12 years and has a close relationship with his foster family, but he is now an adult who is able to work in the UK and who would be able to re-establish himself in Kabul. It appears to be the case that the appellant's family have not been traced in Afghanistan, but there is no definitive finding that he has no family remaining there and it may be that he would have some support in that respect. However, even if he did not, he has his foster family in the UK who would no doubt be able to offer some support from the UK and there is no reason to believe that he would be destitute in Kabul. Whilst it would certainly not be easy for the appellant, I cannot see how he can show that his return to Kabul would breach Article 3 or that he would fall outside the category described in AS (Afghanistan) at (iii) to (v) of the headnote. I have of course considered Dr Giustozzi's report in that regard, but that is very much predicated upon the fact that the appellant has been diagnosed with epilepsy and mental health conditions, whilst I have stated above that there is insufficient evidence to confirm the appellant's medical and psychological state of health. Likewise with the Neurology Asia 2017 article submitted by Mr Mohammad, in relation to attitudes to epilepsy, which in any event is three years out of date and, being a survey of Afghan economics students, does nothing to add weight to the appellant's case.

27. Turning to Article 8, there is no suggestion that the appellant could meet the exceptions to deportation in paragraph 399 and 399A of the immigration rules, and in any event he could not benefit from the exceptions given the length of his sentence. The question is therefore whether there are any very compelling circumstances over and above the exceptions which outweigh the public interest in the appellant's deportation. I have to conclude, on the limited evidence before me, that there are none. I accept that the

appellant would face significant obstacles to integration in Afghanistan, given the length of time spent outside the country and the young age at which he left, together with his past experiences of trauma in the UK. I consider the impact of Covid 19 to which Dr Guistozzi refers in regard to limited employment opportunities in Kabul, but that is a matter which severely impacts upon life all over the world including the UK. I have regard to the close relationship the appellant has with his foster family, although I note that there has been no recent evidence produced for the resumed hearing before me. I also have regard to the previous finding, which was not challenged by way of a cross-appeal, that the appellant remains a risk to the community. I note that no further evidence has been produced in that regard, despite my indication at the end of [17] of my error of law decision. On the limited evidence before me, therefore, I simply cannot conclude that the appellant's circumstances, taken as a whole, amount to very compelling circumstances for the purposes of paragraph 398 of the immigration rules.

28. I would suggest that if the appellant's physical and mental health were as debilitating as claimed, any further resistance to deportation would have to be supported by strong evidence. However, such evidence is sadly lacking before me and on the limited evidence before me I can only conclude that the appellant has not demonstrated that his deportation would be in breach of Article 3 or 8 of the ECHR.

DECISION

29. The original Tribunal was found to have made an error of law in relation to the findings on Article 3 and the decision was set aside. I re-make the decision by dismissing the appellant's appeal on Article 3 and 8 human rights grounds.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed *S Kebede*
Upper Tribunal Judge Kebede Dated: 26 October 2020