



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: AA/02065/2015  
AA/07394/2015  
AA/07406/2015

**THE IMMIGRATION ACTS**

**Heard at Bennett House, Stoke on Trent  
On 8<sup>th</sup> June 2016**      **Decision &  
Promulgated  
On 22<sup>nd</sup> July 2016**      **Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**FY (1)  
FA (2)  
FA-Y (3)**

**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

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

Respondent

**Representation:**

For the Appellants: Mr B Hoshi (Counsel)  
For the Respondent: Mr A McVeety (HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Froom, promulgated on 3<sup>rd</sup> March 2016, following a hearing at Hatton Cross on 20<sup>th</sup> January 2016 and 17<sup>th</sup> February 2016. In the determination, the judge allowed the appeal of the first Appellant on human rights grounds (Article 3) but dismissed the appeals of the second and third Appellants on Article 3 grounds. The appeals of all three Appellants were dismissed on refugee, humanitarian and Article 8 grounds. The Appellants subsequently for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellants**

2. The Appellants are citizens of Afghanistan, aged 18, 19, and 16 respectively, and are brothers and the appeals of all of them relayed to a common fear of another family in Afghanistan. They belonged to the Hazara ethnic minority community and are members of the Shia Ismaili religious minority.

### **The Appellants' Claim**

3. The Appellants' claim is that they lived in the Baghlan Province in the north of Afghanistan. They lived with their parents and attended school. Their father rented a shop selling groceries. The older brothers would help their father in the shop from time to time. The family suffered discrimination. A local boy, Rashid Sadat, was particularly threatening and abusive. A fight developed and Rashid held a knife and the first Appellant managed to take this out of his hand in the struggle and the first Appellant then stabbed Rashid in the heart whereupon Rashid was taken to hospital. The first Appellant fled to Pakistan. The Appellants' father visited Rashid in hospital and met his parents. The local police was called. The first Appellant now faces punishment if he is caught. However, his main fear is of Rashid's family taking revenge. Rashid's father is a high ranking officer in the Afghan National Army and has influence in the government. Indeed, the first Appellant was told that the police and Rashid's family are looking for him. It is in these circumstances that his father sent money to arrange for him to be taken to a safe country (see paragraph 5 of the determination).
4. As far as the second and third Appellants are concerned they did not leave Afghanistan until much later. The second and third Appellants were attacked and beaten up by members of Rashid's family. They both required treatment in hospital. It was suggested that they go to Pakistan for a while and live a low profile life and they went and stayed there for about six months. They returned to Kabul to spend the new year with the family but the second Appellant was then attacked again some six months later. After this he and the third Appellant left Afghanistan. They took a

similar route to the first Appellant saying that they travelled overland to France and then entered the UK clandestinely in the back of a lorry (see paragraph 6).

### **The Judge's Findings**

5. The judge observed how the Respondent in the refusal letter of 20<sup>th</sup> January 2015 and of 22<sup>nd</sup> April 2015 has treated the Appellant's account as a fabrication. The judge looked at the Appellant's account given in their interviews and bore in mind the fact that they would have been nervous and were of a particularly young age which would affect their answers. However, the judge found that

“the Appellants were generally reliable as straightforward witnesses who sought to answer the questions put to them as fully as possible. They did not avoid any questions. They were not unsettled by challenges made during cross-examination” (paragraph 57).

In fact, the judge concluded that “compelling and detailed account” of the attack in July 2012 was given by the Appellants (paragraph 57). Moreover, “the Appellants have been able to produce numerous documents to support their account and that the contents of these documents are entirely consistent” (paragraph 53). Furthermore, “the Appellants were almost entirely consistent with each other” (paragraph 58).

6. The judge went on to consider the risk on return and properly observed that “much depends ..... on the level of inference and power held by Rashid's father and the family in general” (paragraph 68). He noted that

“the account suggests Rashid's brothers in Kabul are violent thugs who took two opportunities presented to inflict violence on the second and third Appellants, despite the third Appellant being only 12 years of age at the time ...” (paragraph 69).

It was noted that “Rashid's father has been described as a general and a very influential person”, although the judge's own view was that, “he was no more than a major in the logistics corps” (paragraph 70). It was in this context, that the judge also noted that “Afghan society structured along family lines and some families may be regarded as pre-imminent without the head of the family necessarily holding an elevated official post” (paragraph 72).

7. On the facts, the judge concluded that “the family of Rashid are not bent on pursuing the first Appellant's family so as to target them for serious ill-treatment. The risk is only that chance encounters with Rashid's brothers might result in a fight” (paragraph 77). The judge concluded that, “the circumstances do not give rise to a real risk of persecution or ill-treatment

contrary to Article 3 to engage the protection of the 1950 or 1951 Conventions” (paragraph 78). The judge moved on to consider that,

“as such the issues of sufficiency of protection and internal flight do not arise. However it is clear from what happens or it is clear from what the Appellants have said that the family been able to remain safely in Kabul by simply moving house” (paragraph 79).

In recording that the police had detained the Appellants’ father, but dropped the case against the people who had attacked them, the judge observed that, “they are unlikely to be willing to provide the protection which might be expected even with their limited resources” and that “the children of Colonel Hameedullah are able to act with a degree of impunity” (paragraph 80). Importantly, the judge here observed that, be as it may, “the point does not arise unless it has been shown that there is a risk reaching the threshold to engage international protection. In this case the risk does not, in my judgment, reach that threshold” (paragraph 80). It is observed that “the Appellants, who are not the authors of their own misfortune” deserved sympathy, and that “the beatings inflicted on the second and third Appellants were not trivial, so that, “they may well not be able to walk the streets without feeling concerned and they may bump into one of Rashid’s family members” (paragraph 82). However, this situation did not engage the UK’s international obligations.

8. The judge then went on to consider the first Appellant’s position and, observing that his account was true that he did stab Rashid, observed that he was reasonably likely to face discriminatory treatment on account of his ethnic minority status (paragraph 90) because the settlement proposed by the counsel of elders did not result in a successful resolution of the dispute (paragraph 90). In these circumstances, the first Appellant’s appeal was allowed on Article 3 grounds.
9. The second and third Appellants did not have their appeals allowed in this manner. Consideration was thereafter given to the application of Article 15(c) of the Qualification Directive (see paragraphs 95 to 108) and to Article 8 of the Human Rights Convention (see paragraphs 109 to 119) but the appeals of all three were dismissed on this basis.

### **Grounds of Application**

10. The grounds of application state that the judge erred in law in allowing the appeal of the third named Appellant under Article 3 of the ECHR because he misdirected himself as to the minimum level of severity required for ill-treatment to engage the protection of the Refugee Convention or Article 3 of the ECHR in relation to all three Appellants. This was important because the judge had accepted in his decision that the first and second of the Appellants had both been beaten to the point of hospitalisation when they were minors. One of them suffered hearing damage and erectile

dysfunction, whilst the other suffered a broken arm. Given that **Pretty v UK [2002] 35 EHRR 1** had established that ill-treatment must maintain a minimum level of severity and could involve actual bodily harm or mental suffering, the judge had erred in concluding that being hit over the head with a brick, or kicked in the testicles, were not sufficient to engage either Convention.

11. On 29<sup>th</sup> March 2016, permission to appeal was granted.

## **Submissions**

12. At the hearing before me, Mr Hoshi, appearing on behalf of the Appellant, submitted that in **Bagdanavicius [2005] 2 AC 668**, Lord Brown had held that, “if someone is beaten up and seriously injured by a criminal gang, the Member State will not be in breach of Article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts” and this was a case where the judge had accepted that the ability of the police to provide protection to the Appellants was considerably diminished in the circumstances of the case. That case also established that the level of mistreatment did not differ in its recognition, depending on whether the ill-treatment emanated from the State or from non-State agents, because the level remained the same, and ultimately the question was whether there was a sufficiency of State protection. The judge in this case had wrongly said that there was no issue arising from the sufficiency of State protection.
13. Second, the judge’s findings at paragraph 62 were inconsistent and unsustainable. He had accepted that the second and third Appellants were beaten to the point of hospitalisation by members of the aggressor family in or around 12<sup>th</sup> October 2012 (when they were both minors) causing them both to flee to Pakistan and to stay there for six months. Shortly after return to Afghanistan in March 2013 the second Appellant was set upon again and severely beaten by members of the aggressor family (when he was still a minor). Furthermore, on or around 11<sup>th</sup> October 2015 the Appellants’ father was set upon and beaten to the point of hospitalisation by members of the aggressor clan again. Despite these findings, the judge found (at paragraph 78) that, “whilst what has happened to the second and third Appellant and also their father is abhorrent and inexcusable, the circumstances do not give rise to a real risk of persecution or ill-treatment contrary to Article 3” and that “as such, the issue of sufficiency of protection and internal flight do not arise”. This was a plainly unsustainable conclusion to reach. It was particularly so given that the judge had held (at paragraph 80) that the police “are unlikely to be willing to provide the protection which might be expected even with their limited resources”.

14. The European Court had established in **Pretty v UK [2002] 35 EHRR 1** that “ill-treatment”, provided that it reaches the minimum level of severity test, “involves actual bodily injury or intends physical or mental suffering”.
15. For his part, Mr McVeety submitted that the judge was not saying that the injuries suffered by the Appellants were not serious (see paragraphs 77 to 78). What he was saying was that the injury was inflicted on a random basis and that it came from a source who were not a high profile family. It was not in dispute that there was a nasty situation between the two families. However, there was no blood feud. There was only really the one incident at the beginning and apart from that, there was sporadic instances whereupon the parties came face to face with each other and in that random situation violence arose and this could not be seen to be a systematic violation of the Appellants’ human rights. Mr McVeety submitted that some of the judge’s use of words was “oddly worded” but that essentially the decision could be pursuant.
16. In reply, Mr Hoshi submitted that this was not a case of two families fighting each other in a feud. It was one-sided. One family was attacking the other. This was the aggressor family. Whilst it was accepted that criminal acts do not involve the Refugee Convention, this was a case where the judge had accepted that the risk of such violence arising again was real, and the availability of protection was non-existent, which is why the conclusion that there was no reason to consider the “sufficiency of protection” issue was irrational.

### **Error of Law**

17. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the judge has accepted that violence was inflicted on the Appellants and on their father which led to hospitalisation of family members. As Mr McVeety also conceded, it was not tenable in these circumstances to suggest that this violence did not reach the minimum level of severity tested. The case of **Demirkaya** is longstanding authority for the proposition that brutal beatings can lead to the violation of fundamental human rights. The judge’s conclusion that this did not give rise to real risk of persecution or ill-treatment contrary to Article 3 was unsustainable (see paragraph 78). It was accordingly also wrong to state that the issues do not raise sufficiency of protection and internal flight considerations (at paragraph 79). This was especially so given that the judge had held that the police “are unlikely to be willing to provide the protection which might be expected”.

### **Re-Making the Decision**

18. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal only to the extent that it be remitted back to a First-tier Tribunal Judge other than Judge Froom, with all favourable findings preserved intact. This is because the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be remade is such that, "having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal (see Practice Statement 7.2(b)). This is a case where further evidence will be necessary, Mr Hoshi has submitted in the form of an expert report, this being so, it is appropriate that this matter return back to the First-tier Tribunal for a consideration of all the issues again, such as to the Appellants having the benefit of favourable findings preserved intact.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I accept the Tribunal's decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Froom.

An anonymity order is made.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Juss

20<sup>th</sup> July 2016