



**Upper Tribunal
(Immigration and Asylum Chamber)**
HU/07179/2018

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 5 February 2019

On 18 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M E T

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Home Office Presenting Officer

For the Respondent: Mr A. Pipe, Counsel instructed by Visa Inn
Immigration Specialists

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Turkmenistan, born on 10.1.82. She arrived in the United Kingdom in September 2008 with a valid student visa, which was subsequently extended to 9.5.12. Thereafter she overstayed and on 6.2.17 she made a human rights claim, based on her conversion to Christianity and very significant obstacles to integration in

Turkmenistan. This application was refused in a decision, dated 14.3.18.

2. The Claimant appealed against this decision and her appeal came before First tier Tribunal Judge Clarke for hearing on 10 October 2018. In a decision and reasons promulgated on 8 November 2018, the Judge allowed the appeal on the basis that the Secretary of State had failed to engage with the claim and it was thus disproportionate for that reason.

3. The Secretary of State sought permission to appeal to the Upper Tribunal on the following grounds:

(i) the Judge failed to give sufficient reasons for her decision; has entirely failed to outline the evidence provided by the Claimant to corroborate her assertions; assess her credibility or take account of the fact that the Claimant did not make an asylum claim and thus her protection claim has not been tested. Reliance was also placed on the decisions in MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC) and Budhathoki [2014] UKUT 00341 (IAC);

(ii) the Judge materially misdirected herself in law as the Appellant could not have held any reasonable expectation of being granted eventual settlement;

(iii) the Judge failed to consider section 117B of the NIAA 2002, either explicitly or in spirit and has thus failed to give any weight to the public interest in maintaining a firm immigration policy.

4. Permission to appeal to the Upper Tribunal was granted by First tier Tribunal Judge Birrell in a decision dated 21 December 2018, on the basis that there was arguably no assessment of the Appellant's claim that she would face insurmountable obstacles on return to Turkmenistan in practising her religion and that the Judge simply allowed the appeal on the basis that the Respondent had failed to give adequate reasons for rejecting the claim.

Hearing

5. Mr Pipe, on behalf of the Claimant, submitted a rule 24 response attempting to argue that the judgment of the First tier Tribunal Judge should be upheld. However, following my preliminary indication that the decision contained material errors of law, for the reasons set out in the grounds of appeal, particularly Grounds 1 and 3, Mr Pipe accepted that there had been no engagement by the Judge with the substance of the claim and that the decision appears to have been taken on the basis of Greenwood (No. 2) [2015] UKUT 00629 (IAC) an approach which had been found to be erroneous in Charles [2018] UKUT 00089 (IAC).

6. I proceeded to find that the decision of the First tier Tribunal Judge contained material errors of law and that I would re-make the decision. I put the appeal back until after lunch in order to provide Mr Lindsay with time to prepare for the resumed hearing.

7. At the resumed hearing of the appeal, Mr Lindsay handed up an extract from the Respondent's new Private Life guidance dated January 2019.

8. The Claimant was asked to adopt her statement, which was undated but had been signed prior to the hearing in October 2018. In examination in chief she said, when asked who is most hostile to her currently in Turkmenistan, that it was her brother, her sister and the rest of the relatives. When asked about her mother's position, the Claimant said that she now depends on her son, the Claimant's brother, so she does not have much right to do or to say anything.

9. In cross-examination by Mr Lindsay the Claimant confirmed that she attended a Church in Turkmenistan and that this was St Nicol's cathedral. The Claimant confirmed that this was a big church and around 100 people or 50 people would attend. She confirmed that it was still in existence now and that she had attended Church from the age of 16 until her last visit back home in 2011. The Claimant confirmed that the Church is registered with the government. The Claimant was asked to comment on the position of the Home Office that she should not be believed because she had not claimed asylum in the UK, to which she replied that she believed she had no right of freedom of speech nor any right to express religious beliefs which is why she had chosen to make a human rights claim, because she had no human rights in Turkmenistan.

10. Upon re-examination, the Claimant was asked whether she knew whether her Church had re-registered in 2016, to which she replied that the government had put so many restrictions even on visitor and control registration book i.e. who has been baptized and had banned religious books and expression and people are not allowed to celebrate Easter anymore. She said that she did not think it would be possible if she were to return to Turkmenistan that she could return to her old church and carry on worshipping.

11. In his submissions, Mr Lindsay submitted that section 8 of the 2004 act applies because the Claimant had a reasonable opportunity to make a claim via another route and that her credibility had been damaged because of that. He sought to rely on the refusal decision dated 14.3.18. He submitted that section 8(4) the failure to take advantage of the opportunity to make an asylum claim, was precisely intended to apply in the extant situation and this is why the reasons set out in the refusal decision are fairly brief.

12. Mr Lindsay asserted that his cross examination was not aimed at the Appellant's credibility as this is a matter for a substantive asylum interview and it remains open to her to make such an

application. He submitted that, in respect of the basic factual matrix of the claim, the Appellant has failed to make that out and section 8(4) fatally undermines her claim.

13. With regard to the country information, Mr Lindsay submitted that the gov.uk printout confirms that the constitution does not proscribe religion. Pages 63 and 70 establish that the regime does exert close control over the media. He submitted that the question is whether the Claimant is able to establish on return basic aspects of private life and on all the evidence she has not shown that she would not be able to do so. He drew attention to the fact that one of the references in the skeleton argument is to a 2003 document at pages 81-82, where it was accepted that there are significant problems for Jehovah Witnesses but that is not an issue for this Appellant.

14. Whilst religious groups must be registered with the authorities, Mr Lindsay submitted that there are churches of substantial size operating in Turkmenistan and the Claimant would be able to practice her religion on return. Whilst pages 90-91 refer to the teaching of Russian being banned, this is not from a reliable source. On the objective materials he has seen the Claimant would not have problems with language barrier. The Russian Orthodox population is 9% and it is reasonable to suppose the Claimant would be able to establish a private life. Mr Lindsay also took issue with the figures at page 118, which he said could not be taken as reliable as there is no methodology. He submitted that, following Kamara [2016] EWCA Civ 813 at [14] integration is not confined to the mere ability to find a job, but is a broad evaluative judgment: would the individual be enough of an insider so as to have a reasonable opportunity to integrate there? Given almost 10% practice Orthodox Christianity it can reasonably be supposed that the Claimant's church has permission to operate.

15. Mr Lindsay submitted that the Claimant has lived for the majority of her life in Turkmenistan and so is enough of an insider to know how life there works and can engage with it. He submitted that the Home Office's private life guidance is wholly consonant with Article 8 and the authorities at pages 58-59 when assessing very significant obstacles to return, which has to be something which would prevent or seriously inhibit integration on return eg the need to learn a new language or obtain employment. He submitted that the Claimant would be able to establish a private life on return and the standard of life would be reasonable compared to others living in Turkmenistan. He submitted that the Claimant would be able to return and attend church; that there is no likelihood of difficulties and no reason to suppose she would not be able to form relationships, thus there are no very significant obstacles to the Claimant's integration on return. He further submitted that there is nothing over and above this amounting to exceptional

circumstances to justify consideration outside the Rules and the appeal should be dismissed.

16. In his submissions, Mr Pipe sought to rely on his skeleton argument before the First tier Tribunal. In respect of the test for very significant obstacles, he sought to rely on the judgment in Parveen [2018] EWCA Civ 932 at [9] where Lord Justice Underhill disapproved the former President McCloskey J's gloss on the meaning of very significant obstacles and that it should be interpreted as the plain meaning of the words. He submitted that the Claimant made a proper application on Form FLR-FP, with regard to paragraph 276ADE(vi) of the Rules and Article 8. He drew attention to the fact that the Home Office guidance is cited on the third page of the application letter. Mr Pipe submitted that it is clear from the current guidance at page 38 that prosecution, significant harassment or discrimination as a result of religion faith or where the rights and freedoms would otherwise be so severely restricted as to affect their fundamental rights would constitute very significant obstacles to integration.

17. In respect of the fact that an asylum application has not been made, Mr Pipe submitted that there should be no stain on the Claimant's character. He submitted that it is clear that the Claimant was open to the possibility of claiming asylum, but the caseworker assured her that the private life route could be considered and that there were a number of factors which made it relevant to consider her case as a human rights claim. He submitted that the Secretary of State is placing an over reliance on section 8, as did the refusal decision and there was no *male fides* in the way it was being done.

18. In terms of the Claimant's claim, this is well set out in the Claimant's witness statement. It raises a number of cumulative factors: residence in the UK since 2009; there have been religious developments in Turkmenistan since her arrival; she has made short visits, most recently in 2011; the Claimant was educated in Russian and there is evidence that schools teaching Russian have been closed; she was subjected to domestic violence because of her behaviour and relationships; in respect of her relationship in the UK, her miscarriage and her former partner's sexuality were disclosed back to her family by her sister. Mr Pipe also drew attention to the fact that in 2016 there was a requirement to re-register Churches and that as a consequence, Orthodox priests were forced to flee the country.

19. Mr Pipe submitted that not only is there an absence of familial support but there is familial hostility. He submitted that the Claimant had been forced to sign away her rights to family property: AB pages 25-26. See also the Claimant's mother's statement at AB 9-12 as to enquiries being made of the Claimant and her Christian conversion, in 2013 and 2016. Mr Pipe submitted that it is not just

that the Claimant is a member of the Russian Orthodox church but rather a combination of all the circumstances.

20. In respect of the background evidence, the Human Rights Watch report describes Turkmenistan as one of the world's most oppressive countries, where all religious and political expression not approved of is banned and torture is used. He drew attention to the fact that, as is set out in his skeleton argument, only two groups have been permitted to re-register after the March 2016 registration law. Mr Pipe submitted that there is reliable evidence from the BBC to show that teaching in Russian is banned and clearly it is controlled. He submitted that there was also a breach of social mores and a gender aspect. The August 2016 United States State Department report states that no new religious groups were registered. Pages 94-97, Forum 18 and Refworld state that an Orthodox Church priest was forced to leave in June 2016 and that the authorities exercise control over the Orthodox Church. Mr Pipe submitted that the combination of factors put together render the obstacles to return very significant: the Claimant has issues with her family; signed over property in Turkmenistan; her Orthodox faith now has serious controls; she is a lone woman and is Russian ethnically and linguistically. He submitted that the requirements of paragraph 276ADE(vi) of the Rules were met and thus there was no need to consider Article 8 outside the Rules.

Findings and reasons

Decision of the FtT

21. In allowing the appeal, the FtTJ held as follows:

"5. I indicated the Respondent had failed to engage with the claim at all and no factual analysis was made or provided. I invited submissions on my suggestion that I allow the appeal because it is disproportionate for this reason. Mr Eaton took instructions and applied for an adjournment because the Respondent would not withdraw the decision and I refused this application to adjourn. My reason for so refusing is that it would not be fair on the Appellant because the Respondent has known the basis of her claim and there has been correspondence by her representatives to the Respondent trying to get the Respondent to engage with his human rights claim.

6. Therefore I find the Appellant has a human rights claim, there would be interference to her ability to practice her new religion and the decision by the Respondent is disproportionate because it fails to consider the claim made at all and the consequence to her should she be removed."

22. Given that this was the extent of the Judge's findings on the appeal, it is apparent that those findings lack adequate and sufficient reasons to justify allowing the appeal simply on the basis that the Respondent had failed to engage with the claim.

23. I set that decision aside. I heard evidence from the Claimant and submissions from both parties, in order to re-make the decision.

24. Dealing first with the Claimant's credibility, I find that there was nothing inherently implausible about her claim nor was her oral evidence inconsistent with that previously set out in her witness statement and in the representations made to the Secretary of State by her representatives. On the contrary, I find that her claim is plausible and consistent with the background evidence in respect of Turkmenistan. Mr Lindsay made much of the Claimant's failure to make an asylum claim and sought to rely on section 8(4) of the Asylum and Immigration (Treatment of Claimants) Act 2004 in support of his contention that this undermined her credibility and the veracity of her claim. However, section 8(4) provides: *"(4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country."* Given that the Claimant made a human rights claim of her own volition, albeit after a period of some years overstay, she is not obliged to make an asylum claim concomitant with a human rights claim. Both section 8(1) and 8(4) make provision for the making of either an asylum claim or a human rights claim. Thus no adverse inference can properly be drawn from the decision of the Claimant not to make an asylum claim because she had already made a human rights claim. Therefore, given that this was the only credibility issue raised by the Secretary of State in both the refusal decision and in Mr Lindsay's submissions, I proceed on the basis that the Claimant's account is credible.

25. The primary question I have to decide is whether there would be very significant obstacles to the Claimant's integration in Turkmenistan, pursuant to paragraph 276ADE(vi) of the Rules. The Home Office guidance in respect of Private Life in the UK, last updated on 23.1.19, provides that the starting point is to assume that the applicant will be able to integrate into their country of proposed return, unless they can demonstrate why that is not the case and that the onus is upon the applicant; that the threshold is high in that the applicant would need to show that establishing a private life in the country of return would entail very serious hardship for the applicant. Relevant country information should be referred to and a very significant obstacle may arise where the applicant would be at real risk of prosecution or significant harassment or discrimination as a result of their sexual or political orientation or faith or gender or where their rights and freedoms would otherwise be so severely restricted as to affect their fundamental rights and therefore their ability to establish a private life in that country [58-59 refer]. And at page 60:

“The decision maker must consider the degree of difficulty that would be faced as a result of the applicant’s faith, political or sexual orientation or gender identity based on the situation in practice in the country of return and not necessarily solely what is provided for in law.”

26. In Kamara [2016] EWCA Civ 813, Lord Justice Sales held as follows at [14]:

“The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”

27. At the heart of the claim is the Claimant’s conversion from Islam to Christianity, which occurred in Turkmenistan from the age of 16 and which resulted in the Claimant’s baptism on 20.12.03.

28. The gov.uk document updated on 21.1.15 provides at AB 45 that: *“Individuals and religious communities still experience administrative restrictions or various other forms of harassment.”* The United States State Department Report 2016 for 2015 makes reference to registered religious groups failing to report harassment for fear such reporting would prompt authorities to increase harassment or monitoring of their activities [AB 58]; registered Christian groups being required to obtain approval to carry out religious activities, including weekly services and Christian groups were monitored reportedly through telephone and undercover surveillance [AB 59] and that there was some societal criticism and harassment of those who deviated from traditional ethno-religious beliefs and practices and that members of registered Christian groups reported encountering hostility due to their religious affiliation.

29. There is specific reference to the priest, Fr Grigory Bochurov at the Church of St Nikolai in Ashgabad, who was forced to leave by the authorities in June 2016 because he is a Russian citizen: AB 94. This is reasonably likely to be the Church the Claimant formerly attended in Turkmenistan, given that there are only currently 12 operative Orthodox churches, all of which require re-registration under the 2016 law due to “errors”. I have also taken into consideration the letter from the Claimant’s mother dated 20.9.18 in which she states that she started receiving telephone calls on her landline in May 2013 from the “committee” [former KGB] questioning her as to the Claimant’s whereabouts and the fact that she has twice been summoned to the committee on 23.2.14 and

25.5.16 for interrogation about the Claimant and that her landline is being monitored. I accept this evidence, in the absence of any challenge to it by the Secretary of State and bearing in mind the background evidence at AB 59, noted at [28] above.

30. I make the following findings:

30.1. the Claimant was born in Turkmenistan and lived there until the age of 26 years. She arrived in the UK in September 2008, following two visits in 2007 and 2008 and has lived here since, last returning for a visit to Turkmenistan in 2011.

30.2. she is 37 years of age, unmarried and with no children and would be returned to Turkmenistan as a single woman.

30.3. the Claimant was educated in Russian [17], [41] and does not speak or read the Turkmen language [47], [88] which hampered her in obtaining employment and she was only able to do so in a supermarket and latterly in a Turkish company as a secretary.

30.4. she was subjected to domestic violence by her family because of a relationship when she was 19 as a result of which she was badly beaten and incarcerated in the family home for 6 months. She was subjected to a virginity test but believes the woman gynaecologist lied to her father as she did not tell her father the Claimant was no longer a virgin.

30.5. since coming to the UK, she became pregnant by a boyfriend and had a miscarriage, following which her boyfriend told her he was gay. This was all related back to the family in Turkmenistan by her sister as a result of which the Claimant was considered to have brought shame on her family.

30.6. her father has died; her mother remains in Turkmenistan but has been subject to scrutiny and interrogation by the authorities concerning the Claimant. This evidence was not challenged by Mr Lindsay. The Claimant's mother and the rest of the family are Muslim. The Claimants' grandmothers were Orthodox Christian but both have died. The Claimant no longer has any property rights in Turkmenistan, having been pressurised by the extended family to disavow these, as per the document at AB 25-26. It was not explained what the effect of this is, however, I find, in the absence of any evidence to the contrary, that the Claimant could reside with her mother.

30.7. I find that there has also been a change in circumstances since the Claimant came to the UK and that is the requirement pursuant to a new Religion Law adopted in March 2016 that religious groups are required to register and that anyone attending an unregistered religious groups will face penalties under the 2014 Administrative Code and criminal

charges. It would appear that this has resulted in Russian Orthodox priests being forced to flee the country and the 12 Russian Orthodox churches, having registered, having to apply to be re-registered.

31. In respect of the Claimant's ability to practice her religion, I have taken into consideration the judgment of Lord Dyson in RT (Zimbabwe) [2012] UKSC 38, applying the judgment in HJ (Iran) [2011] 1 AC 596 to the Convention reason of religion, stating at [28]:

28. In the context of religious belief, the United Nations High Commissioner for Refugees has said (in my view, rightly): "Applying the same standard as for other Convention grounds, religious belief, identity or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution": Guidelines on International Protection: Religion-Based Refugee Claims (2004) para 13."

32. Whilst I am not determining an asylum claim, as no application has been made, the major plank of the Claimant's human rights claim is her concern at her ability to practice her religion without harassment in Turkmenistan. I find that her concern in this respect has substance and that, in light of the background evidence, there is a risk that the Claimant would be subjected to harassment and discrimination on account of her Christian faith, which would directly impinge upon her ability to practice it. Thus, in accordance with the Home Office guidance [25 above refers] this amounts to a very significant obstacle to her integration, due to the impact on her private life.

33. The Claimant has been absent from Turkmenistan since 2008; she cannot speak, write or read the Turkmen language, which impacted on her ability to find employment before she came to the UK. According to the background evidence, the repression of minorities, including the ethnic Russian minority and the use of the Russian language has increased since she came to the UK. I find that, when taken together, along with my finding at [32] above as to the impact on the Claimant's ability to practice her Christian faith, these factors do amount to very significant obstacles to the Claimant's integration in Turkmenistan, within the meaning of paragraph 276ADE(vi) of the Immigration Rules.

34. I allow the appeal on the basis that removal of the Claimant would thus be disproportionate and contrary to Article 8, in light of the judgment of Lord Justice Longmore in TZ (Pakistan) [2018] EWCA Civ 1109 at [34]:

"... where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement,

then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1), for the very reason that it would then be disproportionate for that person to be removed."

Decision

35. The decision of First tier Tribunal Judge Clarke contained material errors of law. I set that decision aside and re-make the decision, allowing the Claimant's appeal. I make an anonymity order in order to protect the Claimant's private life.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

Dated 12 March 2019