IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06055/2014

THE IMMIGRATION ACTS

Heard at Field House
On 24 November 2014

Determination Promulgated
On 28 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NM (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr C Avery, Specialist Appeals Team
For the Respondent/Claimant: Mr R Halim, Counsel, instructed by Hammersmith and Fulham Community Law Centre

DETERMINATION AND REASONS

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Nightingale sitting at Hatton Cross on 24 September 2014) allowing his appeal on asylum and Article 3 grounds against a decision by the Secretary of State made on 6 August 2014 to refuse to vary his leave to remain in the United Kingdom, and to make directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal made an

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anonymity direction, and I consider that it is appropriate that the claimant should have anonymity for these proceedings in the Upper Tribunal.

2. The claimant is a national of Afghanistan, with an assessed date of birth of 1 January 1995. He is recorded as having been fingerprinted in Greece on 28 April 2009. He first came to the attention of the United Kingdom authorities when he claimed asylum at ASU Croydon on 29 September 2009. He said he was aged 14, according to what his paternal uncle had told him on his departure. He came from a village in Nangarhar Province, and his religion was Muslim (Sunni). His normal occupation was helping his uncle on his farm, and he had four years of schooling. Both his parents were deceased, and his paternal uncle had brought him up. He had left Afghanistan about two months ago. He had arrived in the UK by lorry and on the same day he had come to claim asylum. His reason for coming to the UK was that the Taliban had come to their village, and tried to recruit young boys to become suicide bombers. His uncle had arranged for him to come here.

3. The London Borough of Croydon conducted an age assessment on 29 October 2009. He stated that he was 14 years old, but his physical appearance presented slightly older. He was slim and tall. There was no evidence that he had been shaving any beard, but he had a moustache that was shaved. In interview, the claimant was confident and expressed himself well. He was very confident in talking with adults. The conclusion of the assessment was that his physical appearance and demeanour presented older than 14 years, but younger than 16 years. It was therefore decided by the assessing social worker to accept his claimed date of birth of 14 years, turning 15 years in January 2010.

4. The appellant's asylum claim was refused, but he was given discretionary leave to remain until the age of 17½ in accordance with the Secretary of State's policy for the treatment of unaccompanied asylum seeking children where adequate reception arrangements had not been established for them in Afghanistan.

5. In June 2012 the claimant applied for further leave to remain, and his application was refused on 29 July 2014. On the issue of internal relocation, it was noted that he was a 19 year old male. He had conducted his asylum interview in Pashtu which is one of the native Afghan languages, so language would not be a barrier to his relocation. He had been able to travel from Afghanistan to the United Kingdom with the use of agents. He had been able to adapt to life in the United Kingdom despite the differences in language and culture. Since his arrival in the UK, he had studied at various educational establishments, and he had provided various certificates. The skills that he had gained in the UK would assist him to find employment on return to Afghanistan. His actions demonstrated a degree of resourcefulness and an ability to adjust and adapt to his surrounding environment. This showed he could support himself with or without the help of his family on return to Afghanistan. There were organisations which could assist migrants who wished to return to their country of origin. If he contacted the Refugee Action Choices Scheme, he would have financial assistance available to him if he accepted voluntary return. This would enable him to continue his education in Afghanistan or to start a business there.

The Hearing Before, the Decision of, the First-tier Tribunal

6. Mr Halim represented the claimant before the First-tier Tribunal. In his skeleton argument, he submitted that the claimant was at risk on return to his home area in Nangarhar Province even if his historic account of past persecution was not accepted. He cited objective evidence to the effect that the claimant's home area was controlled and dominated by the Taliban. The claimant had endeavoured to trace his paternal uncle in whose care he had lived before fleeing Afghanistan. The details that the claimant had provided to the Red Cross as to his uncle's particulars were truthful, as it had led to the ICRC learning from shopkeepers and other residents that the claimant's paternal uncle and family had indeed lived there, but had moved away two years prior to the enquiries being made. The ICRC visited the area towards the end of 2011. The ICRC was unable to find out where the claimant's family had moved to. Thus the claimant would be returning to his home area as a young adult without any family to provide the primary means of protection.

7. On the question of internal relocation, he submitted that it was clear that internal relocation to Kabul would be unreasonable and unduly harsh. In support of this proposition, he cited the following dicta from Lord Bingham in **Januzi v SSHD [2006] UKHL 5** at paragraph 20: "If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable." He also cited paragraph 2.3.4 of the latest Operational Guidance Note on Afghanistan dated September 2014 as follows:

> It is important to note that the UNHCR guidelines emphasise the traditional extended family and community structures of Afghan society continue to constitute the main protection in coping mechanism, particularly rural areas where infrastructure is not as developed. Afghans rely on these structures and links for their safety and economic survival, including access to accommodation and adequate level of subsistence. Since protection provided by families and tribes is limited to areas where family or community links exist, Afghans, particularly unaccompanied women and children, and women single head of households with no male protection, will not be able to lead a life without undue hardship in areas with no social support networks, including in urban centres.

8. In her subsequent determination, the judge allowed the appeal on asylum and Article 3 ECHR grounds. She rejected the claimant's account in his asylum interview of being personally approached by the Taliban. But she accepted that his departure from his village, and subsequently from Afghanistan, was arranged for him by his uncle who feared that the claimant would be forcibly recruited into the Taliban. She also accepted that his uncle subsequently sold his property in the area and left, as this was supported by the investigation of the ICRC.

9. She found it reasonably likely that his home village was one of those in Sangim which was presently occupied by, and in the de facto control of, the Taliban. While the claimant was 19 years of age, she bore in mind the decision of the Court of Appeal in **KA** and the fact that assessment of risk on return was not subject to a

bright line rule. Accordingly, she found it reasonably likely that the claimant could face forced recruitment by the Taliban in his home area.

10. At paragraph 47 she turned to consider whether or not it would be unduly harsh to expect the claimant to relocate to a safer area, namely Kabul. She cited paragraph 2.3.4 of the Operational Guidance Note on Afghanistan dated September 2014.

11. She went on to observe in paragraph 48 that the claimant was not of course a minor any more. But there was a real risk that he was telling the truth that he had no family links in Kabul. He would be returning to Kabul in the absence of family links as a young adult male. She had considered **AK** and had taken into account the difficulties suffered in Kabul both by way of violence, but also poverty and the affect of so many internally displaced persons living there. But in **AK** it was noted that these considerations would not in general make return to Kabul unsafe or unreasonable.

12. At paragraph 49 the judge continued:

> I have considered the Upper Tribunal's decision in **JS (former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC)**. The point is made that it is necessary to take into account the guidance in **AA (unattended children) Afghanistan CG [2012] UKUT 0016 (IAC)** about the risks in the light of the reminder in **KA** there is no bright line across which the risk to, and the needs of, a child suddenly disappear. *The [claimant] is a slightly built young man who, in my view, might easily be mistaken for a younger person* (my emphasis). In his home area he was raised by, and supported by, his uncle. He has no such support in Kabul where, it is generally accepted, there is violence, poverty and, indeed, a large number of internally displaced persons seeking accommodation, employment and subsistence. The [claimant] will have nobody to help him in this regard. *I am far from persuaded that the fact that he has now achieved his 19th birthday has, to any great extent, lessened the vulnerabilities which he exhibited as an unaccompanied asylum seeking child on arrival* (my emphasis). While I accept that he has undertaken some education in the United Kingdom, including English language and mechanical courses, he is without the contacts in Kabul by way of family to assist him to obtain the basics for subsistence. Taking the evidence before me in the round, I find the combination of this [claimant's] particular characteristics, including his lack of family members or knowledge of Kabul and *relatively youthful appearance* (my emphasis), coupled with the background evidence of the circumstances in Kabul, including, but limited to, the violence, poverty and level of internally displaced persons, render the internal relocation alternative unduly harsh. I am therefore persuaded this is not a [claimant] who can reasonably be expected to internally relocate. I make it clear that it is the combination of all these factors upon which I have reached this view.

The Application for Permission to Appeal

13. A member of the Specialist Appeals Team settled an application for permission to appeal to the Upper Tribunal. The judge had provided no adequate reasons for the conclusion that the claimant was a refugee because the risk to unattended children set out by the Upper Tribunal in the country guidance case of **AA** would still apply to him, despite the fact that he was now 19. If having no previous experience of

living in Kabul or any relatives there to live with was adequate to establish a risk on return to that city for a 19 year old man, then the country guidance case of **AA** would have said so, because this scenario would apply to a very large proportion of appellants. It did not, but rather established a particular social group for the purposes of the Refugee Convention of "unattended children". While **KA** established there was no bright line such that this particular social group might include those beyond the age of 18, it was submitted that to find an appellant aged 19 years and 9 months should still belong in that category required "proper reasons pointing to some specific vulnerability". An imprecise observation that the claimant was of slight build was neither an adequate nor a rational basis for concluding that the claimant was at risk on return to Kabul.

The Grant for Permission to Appeal

14. On 21 October 2014 First-tier Tribunal Judge Parkes granted permission to appeal for the following reasons: "The point raised by the grounds is arguable otherwise **KA** could apply to a much larger group of individuals than previously indicated."

The Hearing in the Upper Tribunal

15. At the hearing before me, Mr Avery developed the argument raised in the grounds of appeal and submitted that the judge had failed to follow and apply **JS**.

16. On behalf of the claimant, Mr Halim distinguished **JS** on the facts. The crucial difference here was that there was a positive finding in the claimant's favour that he had no family to return to either in his home area or in Kabul. Before the First-tier Tribunal he had not sought to rely on the proposition that the claimant had a youthful appearance, and it was a red herring. What was pivotal to the judge's finding on internal relocation was the absence of family support in Kabul.

Reasons for Finding an Error of Law

17. As a general rule, reaching the age of majority is an absolute cut off point where the rights of a child are concerned. The UNCRC which underpins our domestic law and jurisprudence on the rights of the child (including the requirement that the best interests of the child shall be a primary concern in all actions concerning children) unequivocally does not apply to a child once he or she has reached the age of 18.

18. In **LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005**, the AIT found that the appellant, an orphan aged 15, would be subject to the risks of exploitation and ill-treatment, and was a member of a PSG. But he would be a refugee only whilst the risk to him as a child remained.

19. In **DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305** Lloyd LJ observed at [54]:

> That leaves a degree of uncertainty for the definition of a particular social group. Does membership cease on the day of the person's 18th birthday? It is not easy to see that risks of the relevant kind to who is a child would continue until the eve of that

birthday, and cease at once the next day. However, for present purposes it is sufficient that a particular social group is recognised consisting of Afghan citizens who are under 18 years old and who are orphans, whether strictly speaking or in practical terms.

20. In **KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014** at [18] Maurice Kay LJ said that the assessment of risk on return cannot be subject to a bright line Rule. He called it "the 18th birthday point", and cited with approval the first two sentences of what Lloyd LJ said at paragraph [54] of **DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305**. Maurice Kay LJ continued:

> Given that the kinds of risk in issue include the forced recruitment or the sexual exploitation of vulnerable young males, persecution is not respectful of birthdays – apparent or assumed age is more important than chronological age.

21. Maurice Kay LJ returned to the 18th birthday point theme in **EU (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 32** at paragraphs [8] and [9]. He said it would simply be inhumane to return an unaccompanied young child, specifically in cases such as the present, to Afghanistan, at least where there would be no family to take care of him or her on arrival in Kabul. But that rationale applied with less and less force with increasing age. He continued at paragraph [9]:

> In this connection, it is necessary to bear in mind that the birthday that has been asserted to a claimant is often arbitrary. For example, a claimant contending to have been aged 16 in June 2012, but who is unable to give his date of birth, may as a formality have been given the date of birth of 1 January 1996. If his age is disputed, and he is assessed as aged 18, he may be recorded as having been born on 1 January 1994. Thus, the Secretary of State's decision letter dated 28 January 2010 in relation to EU records his date of birth as '01 January 1995 (disputed) 01 January 1993 (assessed)'. I do not think that any one believed that he was born on 1 January of either year. That date was given as a formality to reflect his age as asserted and assessed. In such a case, the origin of the precise date of birth is a further reason why the achievement of adulthood cannot of itself necessarily change the assessment of risk on return.

22. In the same case, Maurice Kay LJ made the following observations about the facts of QA at paragraph [34]:

> In my judgment, the only criticism that can be made of the determination of the Upper Tribunal is that it treated QA's 18th birthday as a bright line, which is particularly inappropriate where, as in his case, there is doubt as to his precise date of birth. *However, no attempt was made before the First-tier Tribunal or the Upper Tribunal to suggest that by reason of his appearance or his conduct he should be regarded as vulnerable in Kabul* (my emphasis). There was no evidence that even children were at risk of forced recruitment in Kabul.

23. Turning to the decision of Judge Nightingale, I consider there was insufficient reasoning by her on the application of the 18th birthday principle to the question of the viability of the claimant internally relocating to Kabul. It was not the claimant's case that he was a vulnerable young adult, or that he would be vulnerable to persecutory harm in Kabul in the form of sexual exploitation or forced recruitment

by the Taliban. Moreover, at the date of the hearing the appellant was aged 19 years and 9 months according to his assessed date of birth of 1 January 1995. His uncle had told him on his departure that he was 14 years old, so even allowing for a margin of error of six months either way, he was on any view well passed the age of 18. So two of the main reasons given in the authorities for applying the 18th birthday principle (continuation of persecutory harm beyond the 18th birthday, and inbuilt imprecision as to the actual date of birth) did not apply.

24. In order to bring the claimant within the scope of the 18th birthday principle the judge made an observation that had not been relied on by the claimant's legal representatives, and had not been canvassed at the hearing. This observation was that, because of his slight build, the claimant looked younger than he actually was (a young adult aged 19) and thus, by implication, looked like a child under the age of 18. The observation was self-evidently tendentious, as it had not occurred to his legal representatives that the claimant looked younger than his chronological age. Its inherent subjectivity is highlighted by the fact that in the age assessment the social workers were of the opinion that the claimant looked older, not younger, than his asserted age of 14. The claimant's build did not cause them to believe he was younger than 14.

25. Furthermore, as with a **<u>Merton</u>** compliant age assessment, the question of whether the claimant was a vulnerable adult required an holistic assessment, which took into account all material factors including the claimant's emotional maturity and his ability to communicate confidently with adults. From the assessment of Social Services, the claimant already had a confidence in speaking to adults which made him present older than he was. There was no evidence before the judge which indicated that the claimant would present on return as a child under the age of 18, in terms of his demeanour and communication skills.

26. Mr Halim submits that the judge's finding about the claimant's youthful appearance is a red herring, for two reasons. Firstly, it was not part of his case before the First-tier Tribunal (either in the skeleton argument or in oral submissions) that the claimant looked younger than 18, and would thereby be vulnerable on that account. Secondly, he submits that the claimant's youthful appearance was only one of a number of factors relied on by the judge as cumulatively giving rise to an Article 3 risk, and as rendering internal relocation to Kabul unreasonable and unduly harsh. Accordingly, he submits, if the judge erred in her application of the "no bright lines" principle, the error was not material to the outcome.

27. While I accept that the absence of family in Kabul was a material factor in the judge's reasoning, it is clear that she also attached considerable weight to the finding that the claimant looked like a child.

28. In **<u>AK</u>**, the relevant headnote guidance given by the Tribunal is as follows:

> (iv) Whilst when assessing a claim in the context of Article 15(c) in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing safety and

reasonableness) not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many internally displaced persons (IDPs) living there, these considerations will not in general make return to Kabul unsafe or unreasonable.

(v) Nevertheless, this position is qualified (both in relation to Kabul and other potential places of internal relocation) for certain categories of women. The purport of the current Home Office OGN on Afghanistan is that whilst women with a male support network may be able to relocate internally, '...it would be unreasonable to expect lone women and female heads of household to relocate internally' (February 2012 OGN, 3.10.8) and the Tribunal sees no basis for taking a different view.

29. As Judge Nightingale recognised, the thrust of **AK** was that it was neither unsafe nor unreasonable for the claimant, a young adult male, to return to Kabul. So in order to find that it was unreasonable for the claimant to return to Kabul, she had to take up Mr Halim's invitation in his skeleton argument to apply the 18th birthday principle so as to treat the claimant as being the member of the same PSG as an orphaned child under the age of 18. Apart from the finding on the absence of family in Kabul or elsewhere, the only other relevant finding capable of taking the claimant outside the general thrust of **AK** is the finding that he largely retains the vulnerability which he had as a 14 year old, and this finding is squarely based on the finding that the claimant looks as if he under the age of 18.

30. The absence of family in Kabul or elsewhere is a highly material consideration, but it is not a trump card such as to render the judge's error an immaterial one. In **JS**, the Tribunal held at paragraph [43] as follows:

> But, in any event, if and when removed from the United Kingdom, the appellant would be returned to Kabul. We are not satisfied he is able to show that he would be at risk of serious harm or return there. The evidence tends to show that he is a relatively capable young man with no particular physical or psychological vulnerability. I do not accept that because he was classified as vulnerable in Social Services terms on arrival in the United Kingdom as an unaccompanied 15 year old, he does not have the ability to live in the capital of his own country without serious risk to his life or inhuman or degrading treatment; nor, on the hypothesis, that it would be unsafe for him to live in Nangarhar that it would be unreasonable for him in Kabul. He is not of an age where he is vulnerable to sexual exploitation, he has no physical or mental impairment or any other characteristic that would take him out of the general guidance given in **AK (Afghanistan)**."

31. In paragraph [48] the Tribunal said:

> In the absence of particular features and strong ties formed during his residence here as a child, Miss Cronin really has to rely on a very bold submission that it is disproportionate to return any 19 year old male to Afghanistan after four years' residence here as a child, unless there is satisfactory evidence of a family awaiting him there or similar satisfactory reception arrangements. Understandably she was reluctant to go that far, but stripped of the generalities arising from the Social Services background, that it is in substance all she is left with. We do not accept such a bold

submission. As we noted in the hearing it would have a very significant impact on the respondent's practice and successive policies in dealing with unaccompanied children by way of limited leave in assessing the circumstances after age 18.

32. Although in paragraph [48] of **JS** the Tribunal was addressing an argument under Article 8, their observations have ramifications for a refugee and/or Article 3 claim. The implication of the Tribunal's reasoning in **JS** is that prima facie it is not unreasonable for a young adult male to relocate to Kabul where he has no physical or mental impairment or any other characteristic that would take him out of the general guidance given in **AK (Afghanistan)**. The absence of family support in Kabul does not per se make return to Kabul either unsafe or unreasonable.

33. In conclusion, I find that the decision of the First-tier Tribunal is vitiated by a material error of law, such that it should be set aside and remade.

The Remaking of the Decision

34. Mr Halim accepted that the nature of his case was such that oral evidence was neither required nor appropriate for the purposes of the remaking of the decision. The claimant's case on remaking is the same as the case that had been presented to the First-tier Tribunal, which was that internal relocation to Kabul was unreasonable and unduly harsh simply because the claimant had no family there.

35. Accordingly, for the purposes of remaking the decision, I take into account all the evidence that was before the First-tier Tribunal, and I preserve Judge Nightingale's finding that the claimant has a well-founded fear of persecution on return to his former home area in Afghanistan. I also take into account the additional evidence which was served by Hammersmith and Fulham Law Centre under cover of a letter dated 14 November 2014. Of particular note is an article posted on the internet by Refugee Support Network UK about life for young returnees in Afghanistan. The article was posted on 29 September 2014, and was published on www.ein.org.uk. The article by Emily Bowerman entitled "Three Things You Need To Know About Life For Young Returnees In Afghanistan" reports on the outcome of interviews over a period of a month with young people in Afghanistan who have spent their formative years in the UK's care system before being forcibly removed to Afghanistan on turning 18. The interviews were conducted by RSN team member Bryony Norman, along with a Kabul based colleague. Ms Norman reports as follows:

> Only 43% of the young people I met with had been able to reconnect with a family member upon return to Afghanistan. 29% were living with friends they had either known in the UK, or whom they had met since returning to Afghanistan. One young person was living with a family friend who he had met for the first time since returning to Afghanistan, whilst in the most extreme example one young person was staying with a stranger – although he now describes him as a friend – who he had met at the airport. He described how he had no one there, and how this meant that he feared for his own safety.

36. The reason why it is in general reasonable and not unduly harsh for young adult males to return to Kabul, even if they do not have family there with whom they can reconnect, is because in general they are of sufficient maturity and resourcefulness to fend for themselves, make new friends and obtain access to informal social support networks. Having a family member in Kabul is not the sine qua non for accessing a social support network and obtaining the basics for subsistence, as the above report illustrates. The claimant used to worship at his local mosque in Nangahar province, and so seeking companionship and emotional and practical support from fellow adherents to his faith at a mosque in Kabul is an obvious avenue for him to pursue. He can also access financial support for the purposes of establishing himself in business, as stated in the refusal letter.

37. Having regard to the country guidance case of **AK**, I find that there is not a real risk of the claimant suffering Article 3 harm if he is returned to Kabul. There are also not substantial grounds for believing that the claimant qualifies in the alternative for humanitarian protection under paragraph 339C of the Immigration Rules, or for subsidiary protection under the Qualification Directive. Finally, I find that the claimant does not discharge the burden of proving that requiring him to internally relocate to Kabul is unduly harsh and unreasonable, on account of the absence of family there or for any other reason.

38. It was accepted before the First-tier Tribunal that the claimant did not have a viable Article 8 claim, and no Article 8 claim is pursued before me.

Decision

39. The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the claimant's appeal on asylum, humanitarian protection, subsidiary protection and Article 3 grounds is dismissed.

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 **27 November 2014**

Deputy Upper Tribunal Judge Monson