Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12482/2016**

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision promulgated &Reasons**
On 3 April 2018	**On 27 April 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Fitzsimons instructed by Hoole & Co Solicitors
For the Respondent: Mr D Mills – Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Robertson promulgated on 7 August 2017 in which the Judge dismissed the appellant's protection and human rights claims.
2. The Judge notes the appellant claims to be a national of Afghanistan, which was disputed by the Secretary of State, and clearly considered the evidence with the required degree of anxious scrutiny before setting out findings of fact from [45] of the decision under challenge, which can be summarised in the following terms:

    a. On the basis of the background evidence there was Taliban activity in Kunar Province and that that was an

American presence there as confirmed in the report of Tim Foxley. Notwithstanding, the details of the appellants claim fall to be assessed on the basis of the evidence in the round to the lower standard of proof [46].

b. The appeal is complicated by two factors, firstly the appellant's age at the time the events took place. The appellant was fingerprinted in Greece on 26 April 2012 and then in Dunkirk on 24 May 2012. The appellant claims to have been at school for four years from the age of 7 which meant he was 11 when he left school. Adding to this the two years the appellant claimed to have done nothing after finishing education it would make him 13 years of age when the events that caused him to flee allegedly took place. The appellant was a child when the claimed events took place but not a young child and could be expected to provide some details of where he lived when questioned. Throughout the assessment of the claim the Judge bore in mind his age and level of education [47]. The second complicating factor was said to be the appellants mental health. The Judge refers to a number of medical reports [48 I – V].
c. Having assessed the evidence as a whole the appellants mental health condition does not appear to have resulted in an inability to provide consistent information with regard to events that led him to flee his country of origin for the reasons set out at [55 I – VIII]. At [56] the Judge records that it was submitted on the appellant's behalf that in relation to inconsistencies in his account the benefit of the doubt should be extended to him because of his mental health condition although earlier letters regarding the diagnosis of PTSD did not establish the appellant was not able to concentrate or recall events or that he suffered from such severe PTSD that he had difficulties with his memory. The Judge sets out details of a passage from the Ardenleigh Report following an assault in January 2014 in which the appellant reported a worsening of his PTSD and that his primary PTSD "experience" then became related to this incident rather than the previous experiences in Afghanistan and his journey to the UK.
d. The Judge notes a further deterioration in the appellant's condition as a result of his being recalled to prison after he had breached the terms of his licence [58] and that although the appellant had displayed symptoms of psychiatric illness since he arrived in the UK the severity of the symptoms increased after he was assaulted in January 2014 and his recall to prison; but at no time had that resulted in him changing the

core details of his account with regard to his application for asylum [59].

e. The Judge notes the issue of credibility was not for the medical experts and that there was no reason why the journey alone could not have resulted in PTSD which was subsequently exasperated by the attack on the appellant in January 2014 [61].
f. The Judge did not find a lack of knowledge in relation to some aspects of Afghanistan determinative but did find the appellant's account undermined as a result of his inability to name his own tribe, the main tribe of his alleged village, or the names of families which were important within the village. The Judge did not find it plausible that a 13-year-old who had spent his whole life in the same village would not know the name of his own tribe or other tribes within the village, which would suggest he was not from the area he claims to be from. The Judge noted that one of the appellants experts Mr Foxley, who was asked to comment upon whether or not it was significant the appellant could not give dates for New Year's Day or Independence Day, was not asked how likely it was that someone who lived in their rural village until the age of 13 would not know the name of their tribe [63].
g. The Judge found the evidence of a Mr I Khan that the appellant was from Afghanistan lacked substance as he could not say if there were different dialects of Pushtu spoken in Afghanistan. The Judge placed little weight on this evidence [64 – 65].
h. The Judge found that little weight could be attached to the evidence of a second witness Mr B Khan who was unable to give cogent reasons as to why he believed the appellant was from Afghanistan [67].
i. At [68] the Judge writes *"On the evidence in the round, to the lower standard of proof, without giving significant weight to the evidence of Mr I Khan and Mr B Khan, whilst I find that the Appellant is likely to be from Afghanistan I am unable to find that the Appellant has established that he is from the rural village Mahgwal, in Kunar Province because he was not able to provide the name of his tribe or any other tribes in his village. In so deciding, I bear in mind his WS2 at para 6-7 (AB1, p2-3), but find that he would not need access to information the Respondent had in order to identify tribes in his home village. It will be information that he had grown up with. I also do not find it credible that he would forget such information even with the diagnosis of PTSD".*
j. The Judge considered the position in the alternative if the appellant was from the village he claims (which the Judge expressly stated she did not), but in any event

found the core the appellant's account that he was engaged to assist his brothers to spy on Americans lack credibility [69]. The Judge did not find the appellant had established that he and his brother were spying for the Americans and that the appellant's account of having done so and that his paternal uncle informed the Taliban because of a land dispute which resulted in his son being killed, is a claim fabricated solely to establish asylum in United Kingdom [70].

k. In relation to the appellant's health the Judge noted considerable emphasis being placed upon a need for international protection because of his vulnerability as the appellant will be returned to Afghanistan without family support. At [71] the Judge writes *"… However, there was no evidence of the information provided to the Red Cross. Even if the paperwork was given to the Appellant's social worker, there is no reason why enquiries could not have been made of the Red Cross to obtain copies of information provided. As I do not accept that the Appellant came from the area he stated that he came from, it cannot be accepted that he provided the Red Cross with the correct details. Furthermore, stated in the RL, on the basis of* ***HK****, the appellant's parents have spent a considerable sum of money to send him to the UK. I find that it is not establish that the Appellant has had no contact with them since he came to the UK or that he has no way of contacting them. Therefore, if he were to return to Afghanistan, he will be returning to his family.*

l. Having analysed the medical evidence written by Dr Stevens the Judge accepts that suicidal ideation exists and that the Appellant has self harmed although there was no evidence he attempted suicide at the hospital and the Ardenleigh Report does not refer to any suicide attempts. The Judge finds it is unclear why Dr Stevens is of the view that if the Appellant is returned to Afghanistan he "… will die, probably by killing himself" [77].

m. The Judge did not find it established that the appellant is at risk of suicide even when noting previous self-harm. It was found the appellant's actions had not crossed the line so as to be treated as a serious attempt at suicide. The Judge finds it is not established the Appellant has attempted suicide in the past and/or that it is reasonably likely that he would do so if returned to Afghanistan. Treatment in the UK and removal was discussed by the Judge by reference to the decision in *Balogun* [81].

n. In relation to the assessment of risk in Afghanistan; the Judge notes there was little evidence before her as to the provisions in Afghanistan for mental health other

than a few paragraphs in Mr Fox's report the Country of Origin Information Report on Afghanistan at paragraphs 28.46 – 28.50. The Judge concluded that the evidence before her did not confirm that treatment will not be available to the appellant and that whilst it is likely to be different from that received in the UK and more expensive, the appellant has family in Afghanistan who are wealthy enough to pay for his travel to the UK and that it cannot be assumed that they will be unwilling to help him access treatment on return [82].

o. In relation to Article 3 ECHR and the risk of suicide and/or risk of deterioration in the appellants mental health; the Judge finds the appellant is not at imminent risk of dying on return and that the evidence considered, in the round, did not establish an entitlement to be recognised as a refugee or protection pursuant to articles 2 and 3 ECHR.

p. The Judge, when considering Article 15(c), found the appellant had not established there was no part of Afghanistan that is safe for him to return to, that the Judge knew nothing of the appellant's home area and that the appellant had not established that with the assistance of his family he would not be able to live safely in Afghanistan due to any indiscriminate violence [87].

q. The Judge concluded by considering article 8 ECHR in relation to which it was not found the appellant had established entitlement to remain under either the Immigration Rules or outside the Rules for the reasons set out at [89 I-IX] of the decision under challenge.

3. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal for the following reasons:

> The decision of First-tier Tribunal Judge M Robertson ("the FtJ") is impressively detailed. However, the matters advanced in the grounds advance an arguable case for suggesting that she erred in law in her assessment of credibility, with reference to the medical and background evidence that was before her.
>
> The contention in relation to risk to the appellant as a result of his conviction, in the light of his mental state, is also a matter that requires further consideration by the Upper Tribunal.
>
> I also consider that there is arguable merit in the complaint about the FtJ's consideration of the medical evidence in terms of the asserted risk of suicide Article 3 generally. These issues also have an impact on the assessment of humanitarian protection.
>
> At the forthcoming hearing before the Upper Tribunal, the appellants representatives will be expected to deal with the argument that aspects of the grounds amount only to a disagreement with the FtJ's analysis of the evidence.

> I cannot see much to commend the complaint about the FtJ's consideration of Article 8, given the assessment that she undertook, in that respect, but I do not restrict the grounds that may be argued, as presently pleaded.

Background

4. The Judge records the appellants immigration history including the fact that on 10 April 2015 the appellant was convicted of attempted rape of a female aged 16 years or over for which he was sentenced to 3 years imprisonment in a Youth Offenders Institution, and made subject to a Sexual Offences Prevention Order for an indefinite period of time. The Judge notes at [5] the Crown Court sentencing remarks include the following comments:

> "You were 15 years old at the time of the offence of attempted rape. The offence was perpetrated against a young sex worker whom you forced to the ground and threatened to kill. You forced a glove into your victim's mouth with such force that it broke a tooth. You also struck her to the forehead with a stone. Fortunately, the latter blow does not seem to have involved extreme force. You then attempted to penetrate her, which activity was a (sic) particularly short duration due to your early ejaculation, however, it is likely this would have seemed longer to your victim. Full credit for plea is appropriate in your case with a plea at the first reasonable opportunity.
>
> …
>
> You have been diagnosed with Post-Traumatic Stress Disorder which arose amidst the terrible atrocities and strife in the war-torn country from which you have escaped. But psychiatrists initially reporting on you considered your mental disorder was not of the nature or degree to warrant hospital admission. There is no risk assessment from either psychiatrist. Soon before you are due to be sentenced, further psychiatric evidence suggested you might be treatable within the Mental Health Act. You were then confined to hospital under an interim hospital order. Sadly, it now transpires that no Mental Health Act disposal is available. The possibility of rehabilitation and treatment now has to give way to retribution and deterrence.
>
> …
>
> The Specialist Risk Assessment from the Probation Service shows medium concerns as to risk in future. You struggled with the custody regime when on remand in prison and there is no doubt that custody will be particularly difficult for you and you will continue to struggle to cope.
>
> …
>
> I place the offence itself within Category 2 of the definitive guidelines if perpetrated by an adult and that because of violence and threats of violence. I found that the violence would not have been of the extreme nature which would have placed it in Category 1 for an adult. The level of violence was, however, serious. The location and timing of the events are properly to be treated as aggravating features, along with the vulnerability of your victim…"

5. The appellant was released from custody on 15 September 2015 having been served with the decision to deport him from the United Kingdom on 9 September 2015. On 15 November 2015 the applicant

made an application for a further grant of Discretionary Leave which was refused. The appellant was referred by Social Services to the National Referral Hub as a potential victim of trafficking on 24 December 2015. The decision by the Competent Authority on 29 December 2015 was that there was no reason to conclude that the appellant was a potential victim of trafficking.

6. The appellant was recalled to prison on 11 March 2016 for inappropriate behaviour towards women which meant he was in breach of his licence. This related to the appellant approaching a 15-year-old girl outside her school. The Judge notes at [12] the appellant approached the girl. The girl became frightened by the appellant who had provided her with cannabis but who was clearly seeking sexual activity with her. At [13] the Judge refers to the fact the appellant's social media presence was the subject of police investigation as it showed he was grooming several girls; meaning there were several potential victims to be protected. Such behaviour was said to be a breach of the terms of the appellants licence.
7. The appellant appealed the deportation decision on protection and human rights grounds. This was the appeal that came before the Judge.

Error of law

8. The first ground relied upon by Miss Fitzsimons asserts the Judge erred in her approach to the medical evidence. It is argued that the Judge was wrong to place limited weight on the diagnosis of PTSD and that the Judge was wrong to reject the psychiatric evidence which provided the origin of the appellant's condition as his traumatic experiences in Afghanistan as well as subsequent journey to the United Kingdom.
9. The Judge accepted the diagnosis of PTSD and clearly considered all the medical evidence with the required degree of anxious scrutiny. The issue of credibility is not within the remit of the author of the medical reports but is a matter for the Judge having had the opportunity to consider all the evidence; including that not available to the medical practitioners. The Judge gives adequate reasons for findings made and therefore the weight to be given to the evidence was a matter for the Judge. So far as the grounds assert the Judge placed an incorrect weight on the diagnosis of PTSD no arguable legal error arises.
10. It has not been shown the findings are outside the range of findings available to the Judge or a finding that is in any way irrational to conclude that there are a number of causes of the appellants PTSD. The Judge sets out in detail the appellant's history including that relating to assaults in the United Kingdom in 2014 and weighs those findings in the balance in relation to assessing the appellant's condition. No arguable legal error is made out in relation to the approach taken by the Judge or findings made.
11. In any event, the Judge clearly considers the availability of medical treatment in Afghanistan on the basis that the appellant is suffering from PTSD and findings made in relation to the appellant's mental

health. The Judge finds there is no evidence that family will not be able to support him or that adequate provision to treat mental health will not be available. The Judge clearly deals with the allegation the appellant faces a real risk of suicide. No arguable legal error is made out in relation to the manner in which the Judge assesses the evidence. Even if the appellants experiences in Afghanistan contributed to his PTSD this does not undermine the Judge's findings in relation to the credibility of the core of the claim. It also does not suggest that the degree of PTSD is any greater than that disclosed in the medical reports considered by the Judge.

12. As noted by Mr Mills, the medical experts do not say only the combination of the factors they identify explain the appellants PTSD. The journey described by the Judge at [61] details a harrowing account capable of causing PTSD. This was recognised by the Appeal in *HM.*

13. It has not been made out that the findings set out in the determination are outside the range of those reasonably available to the Judge on the evidence; including those at [61] which was specifically challenged before the Upper Tribunal.

14. In relation to Ground 5, failure to take account of relevant considerations – disclosure of the appellant's offending; the assertion it was plausible that the appellant's conviction could easily become known creating a real risk contrary to the Taliban's moral code and exposing the appellant to risk of serious harm has no arguable merit. Firstly, it was not made out that anybody in Afghanistan, particularly the Taliban, will be aware of the appellant's conviction in the United Kingdom such that they would want to single him out or be interested in him sufficient to create a real risk on return. The only way an individual will be aware of what happened to the appellant and his offences in the United Kingdom would be if he told them, but it was not made out he will be likely to do so sufficient to create a real risk on return. It was submitted before the Upper Tribunal that the sexual offences may be construed as sex outside marriage but the conviction was not for actual rape or any form of penetration but rather attempted rape. As noted before the Upper Tribunal, whether the act for which the appellant was convicted would lead to any real risk in Afghanistan would require detailed consideration of the approach to women in that country which includes acts of domestic and sexual violence for which no effective remedies available for most women in that country against the perpetrators.

15. It also cannot be ignored that the submissions asserting risk to the appellant in his home area completely fail to engage with the finding by the Judge that the appellant had not proved, even to lower standard, where his home area was. The Judge was entitled to find that the lack of knowledge of fundamental aspects of the appellant's home area, specifically relating to a lack of knowledge of his tribe, undermined the claim. The fact the Judge accepted both the Taliban and US forces had active presence in Kunar at the relevant time does not necessarily establish that the appellant is from this area. This information is available in the public domain. No arguable legal error material to the findings of the Judge has been made out.

16. The Judge clearly took into account the appellants claimed attempt to trace his family but as the appellant was found to have misled the Tribunal in relation to his claimed home area the Judge could not be satisfied that accurate information had been given to the Red Cross. It was not disputed that evidence was given by the foster parents relating to attempts to contact the appellants parents but, as the Judge notes, copies of the information provided to the Red Cross had not been made available to the First-tier Tribunal [71]. No arguable legal error material to the findings in this respect is made out.
17. Ground 4 is mere disagreement with a finding reasonably open to the Judge on the evidence. No arguable legal error is made out.
18. The appellant asserts the Judge failed to engage with the evidence on internal location, asserting there was evidence before the First-tier Tribunal that the security situation in Kabul itself was deteriorating. The appellant asserts the Judge failed to deal with the evidence when assessing the reasonableness of relocation to Kabul. The Judge clearly considered the evidence with the required degree of anxious scrutiny and found that the appellant has an internal flight alternative to Kabul if required. The difficulty for the Judge was that as the appellant has failed to establish his home area he had not established that he would not be able to reside safely in Afghanistan in that place [87]. This is a finding reasonably open to the Judge on the evidence. If the appellant can return to his home area there is no need for any finding to be made in relation to the issue of internal relocation.
19. Although awaited, the latest country guidance case relating to returns to Kabul had not been published but the date of the hearing before the Upper Tribunal. This error of law decision stands from the date of promulgation and in the meantime the Upper Tribunal has handed down the most recent country guidance case relating to Kabul, *AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC),* in relation to which the header reads:

> Risk on return to Kabul from the Taliban
>
> (i) A person who is of lower-level interest for the Taliban (i.e. not a senior government or security services official, or a spy) is not at real risk of persecution from the Taliban in Kabul.
>
> Internal relocation to Kabul
>
> (ii) Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout may other parts of Afghanistan); it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul.
>
> (iii) However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above.

(iv) A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.

(v) Although Kabul suffered the highest number of civilian casualties (in the latest UNAMA figures from 2017) and the number of security incidents is increasing, the proportion of the population directly affected by the security situation is tiny. The current security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh.

Previous Country Guidance

(vi) The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to Article 15(c) of the Qualification Directive remains unaffected by this decision.

(vii) The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to the (un)reasonableness of internal relocation to Kabul (and other potential places of internal relocation) for certain categories of women remains unaffected by this decision.

(viii) The country guidance in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) also remains unaffected by this decision.

20. It is not necessary to reconvene the hearing as a result of this decision. The primary finding remains that the Judge was uncertain as to the appellant's home area as a result of discrepancies in his evidence, for the reasons given. The finding of a viable alternative internal flight option to Kabul remains available to the appellant. The Judge clearly considered the appellants mental health issues and behaviour but found he had family available who will be willing to assist him.
21. The challenge to the Judge's assessment of article 3 ECHR and the medical evidence has no arguable merit. The Judge clearly considered the evidence 'in the round' and the assertion the Judge failed to have regard to 2016 report published by Samuel Hall has no arguable merit. The Judge sets out the correct legal self-direction in relation to the test and assess the evidence with the required degree of anxious scrutiny, as noted above. It is not established that the conclusion article 3 will not be breached as a result of country conditions or the appellants mental health is outside the range of findings reasonably available to the Judge on the evidence. This is not a case similar to that identified in *YZ (Sri Lanka),* the case in which it was held that it was not reasonable for the two appellants to seek to avail themselves of medical treatment from the authorities in Sri Lanka as a result of the fact they had been tortured in their home state by organs of the State and therefore had a credible fear of approaching those they perceived to be part of the same organisation to secure the help they needed. It was accepted that lack of treatment would result in a severe deterioration in their mental state sufficient to engage article 3.
22. No arguable error is made out in relation to the Judge's approach to article 8 either within or outside the Immigration Rules.
23. Even the summary of the findings made by the Judge set out above shows that this is a matter in which the Judge took great care to ensure that the appellants position was clearly understood and proper

and adequate findings made. Whilst the appellant may disagree with a number of the findings made and seek a more favourable outcome, the appellant has failed to establish arguable legal error material to the decision to dismiss the appeal for the reasons given by the Judge.

24. When granting permission to appeal the Upper Tribunal specifically advised the appellant's representative that they will be expected to deal with the argument that aspects of the grounds amount only to a disagreement with the Judge's analysis of the evidence. Despite Miss Fitzsimons best efforts, it is clear that the majority of the grounds put forward are no more than a disagreement. Others put forward on the basis of an argument the Judge should have looked at the evidence in a different way are noted, but no arguable legal error is made out. The appellant has failed to establish anything, in relation to which a finding could be made in his favour, that would have made any difference to the outcome.

25. The appellant fails to establish the decision is outside the range of those available to the Judge or anything arguably perverse about the Judge's approach to the evidence or findings made. I therefore find there is no arguable legal error made out. The determination shall stand.

Decision

26. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

27. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 26 April 2018