Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00944/2019**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Wednesday 6th May 2021	**On Wednesday 30th June 2021**

Before

UPPER TRIBUNAL JUDGE J McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE R THOMAS

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iqbal, Counsel instructed by Courtland Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

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 his 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.

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born on 1st January 1999.

2. He arrived in the United Kingdom on 31st July 2015 and made a claim for asylum. His application was refused, but he was given leave to remain as an unaccompanied minor to the 30th June 2016. He then made a further application for leave to remain, renewing his asylum claim that he was at risk on return to Afghanistan of forcible recruitment by the Taliban and submitting he was at risk of destitution and of being a victim of indiscriminate violence. This application was refused by the Secretary of State. The Appellant appealed against that decision. In a ruling promulgated on 1st July 2019, First-Tier Tribunal Judge Manyarara:

   (i) Dismissed the appeal on asylum grounds, finding the Appellant's evidence about a specific threat faced by the Taliban was inconsistent and lacking in credibility. That finding has not been the subject of an appeal by either party.

   (ii) Allowed the appeal on the humanitarian protection grounds. Those findings were appealed by the Respondent.

   (iii) Made no findings relating to the Appellant's private and family life as protected by Article 8 ECHR.

3. The Secretary of State was granted permission to appeal against the decision to allow the appeal on humanitarian grounds. The decision was set aside on 6th November 2019 by the Upper Tribunal (Upper Tribunal Judge Jackson) on the grounds that it involved a material error of law, namely the appeal should not have been allowed on humanitarian protection grounds in the absence of any findings about the Appellant being at risk on return to his home area as defined in Article 15(c) of the Qualification Direction, and where the correct test insofar as internal relocation to Kabul is concerned had not been applied. That decision is appended below. Directions were made for a resumed hearing and that took place on a 'face-to-face' basis on 5th May 2020.

The Hearing

4. We were invited to treat the Appellant as a vulnerable adult. It was said by Ms Iqbal that the Appellant was a minor when he arrived in the UK and the medical evidence (as set out below) revealed he has been diagnosed with depression and PTSD. We indicated we were prepared to treat the Appellant as a vulnerable adult for the purposes of *The Joint Presidential Guidance Note 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant* and *Practice Direction (Child, Vulnerable Adult, and Sensitive Witness)*. Following discussion with both advocates, it was agreed the only necessary measures as a consequence were to ensure the Appellant was clear he could have a break on request and to ensure that questions were kept short and clear.

5. An interpreter attended. The Appellant indicated through his counsel that he wished to conduct the hearing in English but for the interpreter to remain in order to assist if necessary. In the event, the Appellant's evident endeavours in obtaining proficiency in the English language meant the interpreter was not called upon.

6. The scope of issues to be resolved at the hearing was clarified, namely:

   (i) *Asylum (risk from Taliban)*: The Appellant did not seek to cross-appeal against the First-tier Tribunal's dismissal of his asylum claim. The findings made by Judge Manyara as part of the rejection of the asylum claim stand. In particular, (a) the findings made that the Appellant was not at risk of recruitment by the Taliban and (b) the findings made rejecting the credibility of the Appellant's assertion he was not aware of the whereabouts of his family.

   (ii) *Asylum (mental health)*: On the morning of the hearing, Ms Iqbal sought to permission to rely on a ground of appeal that was not before the First-tier Tribunal, namely, that the Appellant he would face a risk of persecution on return given his diagnosed mental illness. This was not an application that was foreshadowed in her skeleton argument served the day before the hearing. We are told it arose as a result of a conversation with Ms Isherwood on the morning of the hearing in which Ms Isherwood raised the potential impact of the decision in DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC) that was promulgated on 24th August 2020. Given there was no objection from the Respondent, given that decision post-dated the error of law hearing in this appeal, and given the material on which we were invited to making a finding on this ground was already before us, we gave permission.

   (iii) *Humanitarian Protection*: We had to consider the evidence and resolve the appeal on Humanitarian Protection grounds, addressing both the risk on return to his home area and the risk on return to Kabul/reasonableness of such an internal relocation.

   (iv) *Article 8 ECHR*: Whatever uncertainty there may have been insofar as the Article 8 ECHR claim is concerned, that was resolved at the CMR on 12th January 2021 and both parties agreed the Appellant was permitted to pursue his appeal on this ground.

7. In support of his case, the Appellant relied upon, and we have considered carefully:

   (i) A bundle lodged with the Fist Tier Tribunal containing three sections (A1-118, B1-229, C1-52) ['FTT Bundle'].

   (ii) A supplementary bundle lodged with the First Tier Tribunal of 25 pages ['Supplementary FTT Bundle'].

(iii) A second supplementary bundle lodged with the First Tier Tribunal, unpaginated but with an index referring to 13 documents ['Second Supplementary FTT Bundle'].

(iv) A bundle lodged with the Upper Tribunal containing 113 pages ['The UT Bundle].

8. The Appellant's position (absent the amended asylum ground) was set out in a skeleton argument dated 6th May 2021.

9. The Respondent relied on, and we have considered carefully:

(i) A bundle without an index lodged with the FTT on 13th February 2019 ['The Respondent's Bundle'].

(ii) An e-mail from Ms Isherwood dated 4th May 2021 containing five web links to documents (two UNAMA reports, two CPIN reports and a Background Note).

10. There was no skeleton argument from the Respondent and, unhelpfully, no document identifying those passages in the aforementioned reports upon which the Respondent sought to rely. We sought clarification and were provided with some very limited paragraph references.

11. We heard evidence from the Appellant who adopted his witness statement dated 3rd May 2021. He was cross examined by Ms Isherwood.

12. The parties made submissions, and we reserved our judgment.

Asylum (Mental Health – Particular Social Group)

13. In DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC), the Appellant's mental illness led to sexually disinhibited behaviour. The Upper Tribunal in that case noted the factual findings of the Fist-Tier Tribunal:

> "12. The First-tier Tribunal allowed the appellant's appeal under Article 3 ECHR on the basis that the manifestation of the appellant's mental illness created a strong likelihood of sexually disinhibited behaviour that in Afghanistan would lead to serious harm, making the following finding:
>
> > "103. There is a real risk he would behave in a disinhibited fashion. The risk must increase in proportion to the deterioration in his mental state. His convictions relate to incidents taking place some years ago. However, the evidence of Ms Underhill and Dr Wootton shows that he continues to act inappropriately towards females. His mental health is very likely to deteriorate if he were returned. It is reasonable to infer from this that the risk of the appellant behaving in an unacceptable way would also increase.
> >
> > 104. Even if the strict letter of the law will not be applied to him, the consequence of the appellant behaving inappropriately towards a woman or touching himself in public would be to enrage

> onlookers. There is a real risk of mob violence. The risk is more than fanciful. The appellant's risky behaviours have endured in the UK for several years now.""

14. The issue before the Tribunal in DH was whether the Appellant should, on those findings, be entitled to protection for a Convention reason, namely as a member of a particular social group ('PSG'). It was not in dispute that DH was suffering serious mental health issues and lacked litigation capacity and did not have the capacity to give evidence. The Secretary of State accepted that his condition manifested itself with sexually disinhibited behaviour. The Tribunal found, insofar as mental health and PSG is concerned [our emphasis]:

> "78. People with mental disabilities can be said to share a common uniting characteristic that sets them apart from those within society who have no such concerns. People diagnosed as having a mental disability, such as schizophrenia, for example, form a cognisable group in terms of their particular social and medical status. Whether they are treated as a cognisable group is a question of a fact in each case. In many societies a person with a mental disability will suffer no adverse reaction from the society in which they live unless their behaviour, brought about as a result of their mental illness, causes them to transgress social norms or accepted rules of social conduct. In this appeal it is the appellant's disinhibited behaviour as a result of his mental health issues which give rise to a real risk on return to Afghanistan.
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> 79. Whilst I refer above to 'serious mental illness' I accept the key issue is how an individual is viewed in the eyes of a potential persecutor making it possible that those suffering a lesser degree of illness may also face a real risk. This requires a fact specific assessment depending upon the nature of the illness, how it manifests itself, and country conditions. It is also the case that many problems experienced by those suffering mental health issues are as a result of ignorance grounded in a lack of understanding of an individual's mental health problems and how the same will, ordinarily, manifest themselves."

15. The evidence on how DH would be viewed in the eyes of a potential perpetrator included the expert report of Dr. Ritu Mahendru, the key conclusions being recorded at paragraph 103 of the judgment:

> '7.1 Afghan society holds deeply-embedded stigma and discrimination against individuals with mental health problems [96];
>
> 7.2 There is a lack of institutional protection [96];
>
> 7.3 From her experience of working in Afghanistan men who perform any kind of sexual act in public, including masturbation and fondling of body parts, would be at high risk of physical violence from mob mentality [96]; In Afghanistan, she witnessed men with mental health problems being pelted with stones in broad daylight [96].'

16. It is not argued in this case that the Appellant would display any disinhibited behaviour (whether sexual or otherwise) as a result of his mental illness. The key issue identified in DH is how an individual is viewed in the eyes of a potential persecutor and there has to be a fact specific assessment in each case. The medical evidence in this case includes a Medical Report from Dr Hajioff dated 26th May 2019, a Medico Legal Report of Dr Syed Ali dated 3rd August 2020, and a Psychiatric Report of Dr Balasubramaniam dated 17th December 2020. There is a diagnosis of depression and Post Traumatic Stress Disorder. Those reports are reviewed more comprehensively below, but there is no evidence, expert or otherwise, that the Appellant's condition manifests itself in a way that will cause him to transgress social norms or accepted rules of social conduct such as to result in persecutory behaviour from others. The Appellant's mental health is relevant to this appeal, but he has not established that it results in persecution on the grounds of being a member of a PSG. The appeal is refused on asylum grounds.

Humanitarian Protection

Home area: Real risk of suffering serious harm

17. The Appellant's asylum claim, grounded in the risk he faced from the Taliban, was refused and is not in issue in this appeal. The Appellant nonetheless is entitled to humanitarian protection if he would face a real risk of suffering serious harm if returned to his country of origin. Article 15 of the Qualification Direction (QD) defines serious harm for the purposes of this appeal as a "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situation of international or internal armed conflict*".

18. The Court of Justice in Elgafaji v Staatssecretaris van Justitie (C-465/07); [2009] 2 CMLR 4 made clear that in order for the threshold in Article 15(c) QD to be reached, the degree of indiscriminate violence must be at:

> "[S]uch a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat." [para. 45]

19. This is now trite law having been confirmed subsequently on multiple occasions, most recently by the Upper Tribunal in SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC). As explained in HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC), the source of the threat to an individual need not come directly from the armed conflict.

> "[T]he threat to life or person of an individual need not come directly from armed conflict. It will suffice that the result of such conflict is a breakdown of law and order which has the effect of creating the necessary risk."

20. In addition, the assessment of risk is not limited to civilian casualty rates. At para. 114 of HM, in a paragraph cited with approval in SMO, it is stated:

> "One aspect of the inclusive approach is an appreciation that there are threats to the physical safety and integrity of civilians beyond those measured in the civilian casualty rates. As put by Michael Knights of the Washington Institute for Near East Policy in a report of 16 February, 2012 entitled "A Violent New Year in Iraq, The National Interest (cited at n. 217 of the May 2012 UNHCR Guidelines), "[m]ass casualty attacks tell only part of the story of violence in Iraq, and mortality statistics overlook the targeted nature of violence in today's Iraq, where a high proportion of victims are local progovernment community leaders. For every one person of this kind who is killed, an exponential number of others are intimidated into passive support for insurgent groups". Whilst our principal focus when examining levels of violence is physical harm causing death or injury, it is important that we also take account of indirect forms of violence such as threats, intimidation, blackmail, seizure of property, raids on homes and businesses, use of checkpoints to push out other factions, kidnapping and extortion. To adopt Mr Fordham's metaphor, these factors mean that most Iraqis (outside the KRG) l continue to "live under the shadow of violence"."

21. Ms Iqbal relies in particular on the fact that Article 15(c) QD encompasses a "sliding scale" whereby, as set out in paragraph 39 of Elgafaji:

> "The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required."

22. Given the emphasis in this appeal on the impact of the Appellant's personal characteristics (in particular his mental health), it is important to note the different ways in which they must be taken into account. At this stage, those characteristics are relevant to the unitary test of a risk of serious harm in his home area, applying, if necessary, the 'sliding scale'. If there is such a risk on return to the home area and it is necessary to go on to consider internal relocation to Kabul and Article 8(1) QD, then those personal characteristics are not relevant to the question of risk of serious harm in Kabul but instead form part of the assessment of whether this Appellant can reasonably be expected to relocate. This approach is consistent with the Tribunal's analysis in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) at paragraph 41:

> "We did not hear any submissions in relation to the "sliding scale" under Article 15(c) QD and both parties only addressed the personal circumstances of the appellant in submissions regarding reasonableness of relocation. We consider this the correct approach. Whilst the "sliding scale" will clearly be relevant in a case concerning subsidiary protection under Article 2(e) QD, in appeals concerning internal relocation the sliding-scale considerations are subsumed within the assessment of reasonableness."

The Appellant's evidence

23. The Appellant's unchallenged evidence is that he was born and brought up in the village of Alim Khail which is in Hessarak, Nangarhar Province.

24. Ms Iqbal relies on the factual findings made in AS as to the risk in Nangarhar being the most significant in Afghanistan:

> "94. The SIGAR report provides comparable figures for other provinces in Afghanistan, showing that many have significantly higher rates of casualties than Kabul, such as Nangarhar (0.81 per thousand), Kunar (0.52 per thousand), Uruzgan (0.51 per thousand) and Paktiya (0.48 per thousand). Langhman Province, from where the appellant originates, is recorded as having a casualty rate of 0.34 per thousand. In absolute terms, Kabul has the highest number of casualties (1,703). The only other province where there were more than 500 casualties is Nangahar, where the total is 1,517. The population in Nangarhar, however, is only 1,864,582 (approximately one third of Kabul).
>
> 95. A comparison of provinces, based on UNAMA figures, can be extracted from the 2019 EASO Guidance, which, like the SIGAR report, shows that several provinces have a substantially higher casualty rate than Kabul. The rate in 2018 for Nangarhar, for example, was recorded as 111 per 100,000 inhabitants and in Kunar was 82 per 100,000 inhabitants. This compares to 38 per 100,000 inhabitants in Kabul."

25. She further relies on the following evidence to highlight the particularly high risk faced in the Appellant's home area:

    (i) The Report of Dr Giustozzi [FTT Bundle, A16-49] in which the particular threat of conflict in Hissarak district is highlighted in circumstances where control of the district is divided between Daesh, Taliban and the authorities.

    (ii) Objective evidence contained in Section B of FTT Bundle

    (iii) EASO COI Report: Afghanistan Security Situation, December 2017 (pp. 195-201) [Second Supplementary FFT Bundle]

    (iv) EASO COI Report: Afghanistan Security Situation Update, May 2018 (pp. 111-118) [Second Supplementary FFT Bundle]

    (v) Nangarhar Report: 700-plus Civilians Killed, Hurt in '18' [Second Supplementary FFT Bundle]

26. Ms Iqbal also submitted that evidence from recent months of further withdrawal of US personnel would suggest the security situation will get worse, not better [UT Bundle, pp. 106-113].

27. The approach taken in the country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) remains unaffected by the decision in AS. In AK, the Tribunal accepted that a provincial approach was necessary:

> "216. It is right that we should place particular focus on the situation at the provincial level, not just because that is the approach taken by UNHCR and some national courts and/or authorities in several European countries, but because our previous summary of the background evidence has pinpointed that "much of the violence is concentrated in certain areas of the country" and, in the words of the February 2012 CSIS report (to take a very recent source), "most fighting is highly regional in Pashtun areas, rather than nationwide"."

28. The Tribunal in AK - giving its decision nearly a decade ago - did "*not think that bearing in mind their known populations the current evidence indicates that there is any province where the level of violence reaches the Article 15(c) threshold*". It did so with the following approach to the evidence before it:

> "217. … Thus according to the UNAMA 2011 report, the two provinces with the highest number of civilian deaths were in Kandahar and Helmand, with 290 civilians killed. The combined total of the south-eastern and eastern provinces (which Mr Vokes identified as the main hub of recent increases in the levels of violence) accounted for 446 deaths. In Ghazni province, even taking into account that it has seen a significant rise in violent incidents, the figure of the numbers of civilians killed are still relatively low (even assuming for the moment that the majority of the 446 deaths recorded by UNAMA for the five south-western and eastern provinces occurred in Ghazni).
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> 218. According to statistics we have been given, the population of Kandahar is 1,127,000 and that of Helmand 1,744,700. We do not consider that, viewed in the context of the provincial populations of Kandahar and Helmand, 290 civilian deaths is a figure indicative of an Article 15(c) threshold of violence for civilians generally. Similarly, bearing in mind that the population of Ghazni province is 1,149,400, we do not think that even if all the 446 deaths (for the south-eastern and eastern provinces) recorded by UNAMA were treated as having occurred in that province, such a figure is indicative of a level of violence giving rise to a real risk of Article 15(c) serious harm to civilians generally."

29. The test in Article 15(c) is of a threat to '*life or person*' and that is no doubt why the Tribunal in AS used the most recent UNAMA 'casualty' figures rather than using figures of those killed. It is plain the casualty rates identified by the Tribunal in AS insofar as Nangarhar is concerned are very significantly worse than the rates being considered by the Tribunal in AK in reaching its conclusions that the figures were not indicative of a level of violence giving rise to a real risk of serious harm.

30. Ms Iqbal's final submission on return to the home area is that not only is there a particular threat in Nangarhar, but that the Appellant's personal circumstances should be taken into account as part of the assessment. She submits that we should take into account that he left Afghanistan as a minor and has spent a significant period outside the country during his transition into adulthood. He

would be perceived as Westernised and, further, that he suffers from depression and PTSD.

The Respondent's evidence

31. Ms Isherwood sought to rely on:

    (i) UNAMA – Afghanistan – Protection of Civilian in Armed Conflict Report 2019, at page 5.

    (ii) UNAMA – Afghanistan – Protection of Civilians in Armed Conflict Report 2020.

    (iii) Country Policy and Information Note – Afghanistan Security and Humanitarian Situation, May 2020, paragraph 8.2.5

    (iv) Country Policy and Information Note – Afghanistan – Medical and Healthcare Provision – December 2020, paragraphs 3, 4 and 12.

    (v) Country Background Note – December 2020.

32. Whilst submitting that the Appellant could be returned to his home area, the thrust of Ms Isherwood's submissions related to the viability of internal relocation to Kabul. That was perhaps because the reports on which she sought to rely identified a particular threat in Nangarhar. Paragraph 8.2.5 of the May 2020 CPIN states '*The EASO Country Guidance Afghanistan map below summarised and illustrated the assessment of indiscriminate violence per province in Afghanistan, as of 28 February 2019*'. The map shows that Nangarhar is the one province where '*Mere presence would be considered sufficient in order to establish a real risk of serious harm under Article 15(c) QD*'. Page 3 of the UNAMA Report 2020 also contains a map showing the particularly high risk in province.

Findings

33. We have to decide this case taking into account the entirety of the evidence and bearing in mind that, whilst the burden of proof rests on the appellant, the standard of proof is a relatively low one and requires us to apply anxious scrutiny. Applying the provincial approach approved in AK and considering the evidential matters identified in AS along with the more recent material, in particular that highlighted by the Respondent, we conclude that the particular situation in Nangarhar means there is a real risk of the Appellant suffering serious harm as defined by Article 15(c) if returned to his home area. It is necessary therefore to consider whether there would be a real risk of the Appellant suffering serious harm in Kabul and whether the Appellant can reasonably be expected to stay in that part of the country.

34. We have not found it necessary to apply the 'sliding scale', but if it had been necessary, the fact the Appellant left Afghanistan as a minor and, more significantly, his mental illness, would have been relevant factors.

Kabul: Real risk of suffering serious harm and reasonableness of relocation

35. The Respondent is not required to provide subsidiary protection if the requirements in Article 8 of the Qualification Directive (QD) are met:

    1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

    2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

    3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

36. Article 8 QD is reflected in the Immigration Rules at Rule 339O(i), which provides:

    (i) The Secretary of State will not make:

        (a) a grant of refugee status if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

        (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

    (ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making a decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

    (iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return.

37. The language is clear: There are two limbs to Article 8(1) QD. The first limb concerns whether the person seeking protection will be exposed to a real risk of serious harm or persecution in the place of the proposed internal relocation, namely Kabul City. If there is such a risk, that is the end of the matter. If there is no such risk of harm, there then the reasonableness of such a relocation must be considered. (See AS at paragraphs 23-24.)

Risk of Suffering Serious Harm in Kabul

38. The situation in Kabul is dire but does not meet the high test required by Article 15 QD. The Tribunal in AS concluded, at paragraph 253:

    "**Risk of serious harm in Kabul**

> (ii) There is widespread and persistent conflict-related violence in Kabul. However, the proportion of the population affected by indiscriminate violence is small and not at a level where a returnee, even one with no family or other network and who has no experience living in Kabul, would face a serious and individual threat to their life or person by reason of indiscriminate violence."

39. The Appellant would not be at risk of serious harm if returned to Kabul. For the reasons set out above, the Appellant's personal circumstances are not relevant at this stage of the assessment. It is necessary however to go on to consider the reasonableness of relocation.

Reasonableness of internal relocation

40. The test to be applied is set out by the Tribunal in AS at paragraph 253, and it is at this stage the Appellant's personal characteristics must be taken into account:

> "**Reasonableness of internal relocation to Kabul**
>
> (iii) 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 many 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 and even if he does not have a Tazkera.
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> (iv) 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. Given the limited options for employment, capability to undertake manual work may be relevant.
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> (v) 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. A person without a network may be able to develop one following return. A person's familiarity with the cultural and societal norms of Afghanistan (which may be affected by the age at which he left the country and his length of absence) will be relevant to whether, and if so how quickly and successfully, he will be able to build a network."

41. The Appellant relies in particular on two aspects of the Appellant's personal characteristics as being relevant to the reasonableness assessment. Both are referenced in the test set out above and in the discussion at paragraphs 211-252 of AS, namely his mental health and the age at which he left Afghanistan. The Tribunal in AS made the following observations:

> "Mental Health

> 241. The Panel in the 2018 UT decision noted that EASO had recorded very high levels of mental health problems in Afghanistan, creating significant needs, but that there was a lack of trained professionals and inadequate infrastructure. It was noted that there was only one dedicated mental health hospital in Kabul.
>
> 242. The evidence before us is consistent with the Panel's findings: the conflict has resulted in mental health problems for many inhabitants of Kabul, but there is a lack of facilities (and professionals) available to provide treatment. There is no new evidence on this issue to warrant a departure from the findings of the Panel.
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> …
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> Age
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> 252. The Panel in the 2018 UT decision identified that a returnee's age, including the age at which he left Afghanistan, is relevant to reasonableness. We agree. Returnees of any age without a network will face significant challenges establishing themselves in Kabul. A person who left Afghanistan at a young age may, depending on individual circumstances, be less able than someone who spent their formative years in Afghanistan to navigate the challenges of the city by, for example, finding work and accommodation."

42. Dr Balasubramaniam, Consultant Psychiatrist, concluded that the Appellant is suffering from a Depressive Episode (ICD-10 Code F-32) of Moderate Severity evidenced by persistent low mood, feelings of hopelessness and helplessness, along with suicidal thoughts. He also concluded that the Appellant is suffering from Post-Traumatic Stress Disorder (ICD-10 Code 43.1). This includes flashbacks, intrusive thoughts, nightmares and avoidance behaviour. He suffers physical symptoms such as numbness and emotional blunting.

43. Dr Syed Ali, Consultant Psychiatrist, concluded that the Appellant has severe depression without psychotic symptoms and complex PTSD. In his opinion, if the Appellant was returned to Afghanistan this would result in a 'stress storm' that would exacerbate his already fragile state of mind, leading to complete collapse. This would result in a very high risk of suicide. He would also struggle to focus on finding work.

44. Both reports therefore concur with an earlier diagnosis of PTSD by Dr Hajioff. Both were of the opinion that, without treatment, his condition was likely to deteriorate.

45. Ms Isherwood did not challenge these findings, but she did cross-examine the Appellant on the limited extent to which he has sought treatment in the UK. The Appellant gave evidence that he had received therapy in the past but the health pandemic had slowed the way in which he had accessed treatment more recently. In the last few weeks, he been given phone counselling and also had further assistance from someone to help him with his low mood. He accepted this wasn't something that was in his witness statement. Ms Isherwood submits

that despite the findings in AS as regards lack of available treatment there was a basic package of health treatment available.

46. The Appellant's unchallenged evidence is that he was 16 when he left Afghanistan. He has lived in the United Kingdom with his father since 2015. The preserved findings are that his family live in Nangarhar Province. Ms Iqbal submits that given his transition from childhood to adulthood took place in the UK, and given that he has lived for a number of years in the UK, and given he has no family in Kabul, he would be less able to navigate what are very real challenges in that city.

47. Ms Isherwood explored in cross-examination the Appellant's father's previous visits to Kabul and the father's evidence that his family had been able to travel to Kabul to meet him. The Appellant gave evidence that his father last went to Afghanistan in 2018 and that he used to stay with a friend who at that time lived in Kabul. It was suggested to the Appellant that he would have someone to assist him in Kabul. He denied this was the case and said he didn't have anyone to stay with or assist him in Kabul. The Appellant agreed that he had Afghan friends in the United Kingdom and that he kept himself up to date with developments in Afghanistan. Ms Isherwood submitted that despite the Appellant leaving Afghanistan as a child, he knew Afghan culture and would be able to manage life in Kabul and had the skills to find work there. Furthermore, he wasn't a credible witness and would have connections in Kabul through his father's friend.

48. The Appellant's evidence about his current treatment in the UK was not entirely clear, but we accept his evidence that he has been having some telephone counselling and in the past he has had therapy. What is clear is that he is suffering from depression and Post-Traumatic Stress Disorder and that the impact of his mental illness on his ability to cope with life even in the UK was profound. We accept the medical evidence which establishes that there would be a serious exacerbation of his condition if returned to Afghanistan. Applying AS, this is something we must take into account when determining whether the Appellant falls into the 'general position' of a 'single adult male in good health'.

49. At its highest, the evidence on which Ms Isherwood sought to rely is that the Appellant's father had a friend in Kabul in 2018 and, from that, we might infer the Appellant might have access to some support. We accept the Appellant's evidence that he does not have family, a support network or meaningful connections in Kabul. The Appellant left Afghanistan as a child and has never lived in Kabul, and this would compound the difficulties he would face as a result of his mental illness and his lack of a support network

50. Given the particular circumstances of this Appellant, and given he is not in the general position of a single adult male in good health, it would not be reasonable to expect the Appellant to internally relocate to Kabul.

51. The appeal is allowed on Humanitarian Protection grounds.

Article 8

52. Ms Iqbal submitted that the requirement in paragraph 276ADE(1)(vi) of the Immigration Rules has been met, namely that the Appellant can demonstrate there would be very significant obstacles to the Appellant's integration into Afghanistan. It follows that his removal would be a disproportionate interference in his rights as protected by Article 8 ECHR (*TZ (Pakistan) v. Secretary of State for the Home Department* [2018] EWCA Civ 1109, [2018] Imm. A.R. 1301 and section 117B(1) Nationality, Immigration and Asylum Act 2002).

53. Ms Iqbal acknowledges the high test that must be met. She relies on the approach of of Lord Justice Underhill in Parveen v SSHD [2018] EWCA Civ 932:

> "8. Since the grant of permission this Court has had occasion to consider the meaning of the phrase "very significant obstacles to integration", not in fact in paragraph 276ADE (1) (vi) but as it appears in paragraph 399A of the Immigration Rules and in section 117C (4) of the Nationality Immigration and Asylum Act 2002, which relate to the deportation of foreign criminals. In *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, [2016] 4 WLR 152, Sales LJ said, at para. 14 of his judgment:
>
> > "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. 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."
>
> 9. That passage focuses more on the concept of integration than on what is meant by "very significant obstacles". The latter point was recently addressed by the Upper Tribunal (McCloskey J and UTJ Francis) in *Treebhawon v Secretary of State for the Home Department* [2017] UKUT 13 (IAC). At para. 37 of its judgment the UT said:
>
> > "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."

> I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".”

54. It is not in dispute that the Appellant has established a private life in the UK. Adopting Underhill LJ’s approach, we have focused not on concepts of integration if returned to Afghanistan, but on whether there were ‘obstacles’ to that integration and whether they are ‘very significant’. We accept Ms Isherwood’s submissions that the Appellant has good knowledge of Afghan culture and has kept himself appraised of developments in the country. However, for the same reasons given when considering the Humanitarian Protection claim, there would be obstacles to his integration, and they would be very significant. It follows that removal would be a disproportionate interference in the Appellant’s rights as protected by Article 8 ECHR and unlawful as contrary to Section 6 of the Human Rights Act 1998.

Decision

The appeal is refused on asylum grounds.

The appeal is allowed on Humanitarian Protection grounds.

The appeal is allowed on Human Rights grounds (Article 8 ECHR).

Signed *Richard Thomas*

Deputy Upper Tribunal Judge R Thomas Dated: 22nd June 2021

APPENDIX – ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00944/2019

THE IMMIGRATION ACTS

Heard at Field House
On 11th October 2019

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr M Allison of Counsel, instructed by Duncan Lewis & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Manyarara promulgated on 1 July 2019, in which MA's appeal against the decision to refuse his protection and human rights claims dated 30 November 2018 was allowed on humanitarian protection grounds. For ease I

continue to refer to the parties as they were before the First-tier Tribunal, with MA as the Appellant and the Secretary of State as the Respondent.

2. The Appellant is a national of Afghanistan, born on 1 January 1999, who arrived in the United Kingdom on 31 July 2015 and made a claim for asylum. Although this was refused he was given leave to remain as an unaccompanied asylum seeking minor to 30 June 2016 and subsequently made a further application for leave to remain, which included a renewal of his asylum claim that he was at risk on return to Afghanistan of forcible recruitment by the Taliban, at risk of destitution and of being a victim of indiscriminate violence.

3. The Respondent refused the application the basis that the Appellant was not at risk on return to Afghanistan, the letters the Appellant relied upon from the Taliban were not accepted by the Respondent and the claim was considered to be speculative. There was no risk of harm as a result of indiscriminate violence in accordance with Article 15(c) of the Qualification Directive, and the Appellant had not proved he would be destitute on return. In any event, there was no risk to the Appellant on return as a result of him being 'westernised' and the options of internal relocation to Kabul and a sufficiency of protection available to him. The Appellant had family in Afghanistan who could assist him to reintegrate there. Finally, the Appellant had not established family life in the United Kingdom, and he did not meet the requirements of paragraph 276ADE of the Immigration Rules for a grant of leave to remain on private life grounds. There were no exceptional circumstances to warrant a grant of leave to remain.

4. In a decision promulgated on 1 July 2019, Judge Manyarara dismissed the appeal on asylum grounds and allowed the appeal on humanitarian protection grounds. In essence, the First-tier Tribunal did not find the Appellant's asylum claim to be credible, in particular because the evidence was inconsistent, internally and with both the evidence of the Appellant's father and the Taliban letters relied upon. The Appellant has not sought to cross-appeal or challenge in any way the rejection of his asylum claim.

5. In relation to humanitarian protection, the test for this set out in paragraphs 74 to 76 of the decision, which is followed by reference to the Respondent's Country Policy Information Note Afghanistan: Fear of anti-government elements, dated December 2016. The First-tier Tribunal found that the Appellant has not established his claim to be of interest to the Taliban or the Arkabi forces and the Appellant's claim was found to be completely lacking in credibility. In paragraph 79, the decision continues as follows:

> *"79. … I am however satisfied that the appellant's home area is infiltrated by AGE's and the Taliban operate there. The appellant's ability to travel to his home area, where his family may or may not still be living, in the current situation in Afghanistan, is questionable. In relation to the appellant's ability to relocate to Kabul, I have had regard to the UNHCR Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan. … [Quote from these Guidelines]*

> *80. Whilst I have not accepted the appellant's account and whilst I am satisfied that the appellant's father has connections in Kabul, I find the appellant was a minor when he last lived in Afghanistan and he has not therefore lived an independent adult life there. The appellant has never lived in Kabul and he would be compelled to rely on the generosity of his father's friend for a significant period of time before he would be in any position to live in independent life himself as an IDP.*
>
> *81. … [Quote of the UNHCR Guidelines on International Protection 2003]*
>
> *82. In light of the precarious situation in Afghanistan, I am satisfied that the appellant's ability to establish life himself in Kabul is likely to be significantly hindered."*

6. The First-tier Tribunal concluded in paragraph 84 that the appellant had discharged the burden of proof to show that he would face a real risk of suffering "serious harm" by reference to paragraph 339C of the Immigration Rules (as amended).

7. The First-tier Tribunal's decision does not include any express decision on human rights grounds or more specifically on Article 8 of the European Convention on Human Rights, save for setting out the burden and standard of proof in such claims in paragraph 11. There is no reference to the Appellant's private or family life recorded in the evidence or oral submissions and no findings made on Article 8 at all.

The appeal

8. The Respondent appeals essentially on the ground that the First tier Tribunal has inexplicably allowed the appeal on humanitarian protection grounds, at odds with the findings on the asylum claim and for reasons which are entirely unexplained.

9. At the oral hearing, I indicated my preliminary view that there was a material error of law in the assessment of humanitarian protection in this case and the grounds of appeal on behalf of the Respondent were sufficiently clear on the point that no oral submissions were required from Mr Lindsay.

10. On behalf of the Appellant, Mr Allison submitted that the First-tier Tribunal had properly assessed the question of reasonableness of internal relocation in paragraph 79 to 82 of the decision in accordance with the correct test and given appropriate weight to the UNHCR Guidelines and the Appellant's personal circumstances. This followed an assessment of risk in the Appellant's home area which was consistent with the expert evidence before the First-tier Tribunal and with the June 2019 EASO Report which showed an Article 15(c) risk in the Appellant's home area in Nangahar. Although it was accepted that there were limitations in the reasoning given by the First-tier Tribunal, Mr Allison submitted that the reasoning and analysis was adequate.

Findings and reasons

11. In relation to the asylum claim, the First-tier Tribunal made clear findings that the Appellant's account was not credible, that it was inconsistent with evidence from his own father and with the evidence relied upon said to be from the Taliban.

Specifically, although accepted that the Taliban operate in the Appellant's home area, the claimed risk on return was not accepted, particularly because the Appellant's father (upon whose family connection the risk was predicated) has safely returned to Afghanistan on numerous occasions, including meeting his family in Kabul, most recently in 2018. The Appellant's father stated that the family have lived on the outskirts of Hesarak for a long time and it was not accepted that the Appellant was unaware of his family, in fact in this regard, the Appellant was found to have shown a willingness to mislead in his evidence. Further, the First-tier Tribunal did not accept that the Appellant has ever been of interest to the Taliban, nor had he been apprehended by them on any occasion, nor that the Arkabi forces were adversely interested in the Appellant either.

12. There are no specific findings by the First-tier Tribunal as to the risk on return to the Appellant in his home area for humanitarian protection purposes, only the finding in relation to the asylum claim that he is not at risk from the Taliban or Arkabi forces, there or elsewhere. There is, at its highest in paragraph 79, a finding that the Appellant's home area is infiltrated by AGE's and the Taliban. However, against the background evidence quoted in paragraph 77 and findings in paragraph 78 that only those who are well known or well-positioned opponents of the Taliban could be at real risk from AGEs because of their profile and/or activities and the Appellant has not established his claim to be of interest to either the Taliban or the Arkabi forces, that of itself does not indicate that the Appellant is specifically at risk and there is no reference at all to a more general Article 15(c) risk in the home area.

13. The First-tier Tribunal nonetheless go on to consider whether the Appellant could internally relocate to Kabul following the comment in paragraph 79 that his ability to travel to his home area is questionable, without any reasons given for this, and doubt expressed as to whether his family are still living there, contrary to the earlier reference to the Appellant's father's evidence of where they have lived for some time and his recent contact with them.

14. The appeal is then apparently allowed on humanitarian protection grounds on the basis of findings in paragraphs 80 and 82 of the decision, because the Appellant's ability to establish life himself in Kabul is likely to be significantly hindered. This bears no relation whatsoever to the requirements for a grant of humanitarian protection and under paragraph 339C of the Immigration Rules or under the Qualification Directive and fails to follow any of the self-direction given as to the requirements in paragraphs 74 to 76 of the decision. The decision can not arguable be said to be made according to the correct test or with adequate reasons.

15. For these reasons, the First-tier Tribunal materially erred in law in allowing the appeal on humanitarian protection grounds, in the absence of any findings at all that the Appellant being at risk on return to his home area, for the purposes of Article 15(c) or otherwise and in any event, in the absence of any findings in relation to the proper test for internal relocation to Kabul. The assessment of humanitarian protection in the decision under appeal simply failed to make any findings which could justify the appeal being allowed on humanitarian protection grounds. The decision of the First-tier Tribunal to allow the appeal on humanitarian protection

grounds must therefore be set aside and remade. In the absence of any challenge by either party to the findings in relation to the asylum claim, those factual findings are preserved, as is the dismissal of the appeal on asylum grounds.

16. At the oral hearing, the parties agreed that the further findings of fact required to remake the appeal on humanitarian protection grounds were limited, such that the appeal could appropriately be retained and remade in the Upper Tribunal in accordance with the practice direction. In light of first, the imminent re-hearing of the country guidance decision in AS (Afghanistan), AA/03491/2015 listed for this month and secondly, Mr Allison's indication that an updated medical report may be required as to the Appellant's current mental health; it is appropriate to stay listing of a further hearing to remake the decision until the new year. For the additional reasons that follow, a case management hearing will be listed initially to deal with any outstanding preliminary issues and to allow for further directions to be given for the re-making.

17. The issue of Article 8 of the European Convention on Human Rights was raised by Mr Allison on behalf of the Appellant, on the basis that before the First-tier Tribunal, it was said that the Appellant relied specifically on there being very significant obstacles to his reintegration in Afghanistan and the relevant provisions of paragraph 276ADE of the Immigration Rules, albeit no decision was made on this point by the First-tier Tribunal. This could be relevant if the appeal ultimately fails on humanitarian protection as well as asylum grounds, albeit the matter was not raised at all in the Rule 24 response nor has there been any application for permission to appeal on this basis.

18. The grounds of appeal to the First-tier Tribunal referred to section 6 of the Human Rights Act 1998, but the only particularised grounds were in relation to asylum and humanitarian protection. The skeleton argument on behalf of the Appellant before the First-tier Tribunal, did however specifically deal with Article 8 of the European Convention on Human Rights in paragraphs 52 to 56, in which it was asserted, without reference to any specific facts and only in light of all the circumstances, that there were very significant obstacles to the Appellant's reintegration in Afghanistan.

19. In accordance with the decision in Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC), the Appellant was not required to seek permission to appeal on the Article 8 point given that a determination in his favour on that issue would not have conferred on the Appellant any material or tangible benefit, compared to the benefit flowing from his appeal being allowed on humanitarian protection grounds. However, the matter should still have been raised in the Rule 24 response on behalf of the Appellant and it was not, the consequences of which will need to be considered further, as will the further issue of the fact that the First-tier Tribunal simply failed to make any decision on the Article 8/human rights appeal (as opposed to expressly declining to do so, as in Smith). It is appropriate for further submissions to be made by the parties on the scope of the re-hearing of this appeal and any required procedural formalities.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

Directions

1. The appeal be stayed pending the outcome of the re-hearing of the country guidance case of AS (Afghanistan), AA/03491/2015.

2. A case management hearing with a time estimate of 30 minutes to be listed on the first available date 14 days after the promulgation of the decision in AA/03491/2015, before UTJ Jackson with reference to the availability of the parties' representatives. That hearing to determine, inter alia, the scope of the re-hearing of the appeal with regard to human rights and Article 8 of the European Convention on Human Rights in particular; as well as any further evidence to be relied upon by either party.

3. The parties are required, no later than three days before the listed case management hearing to:

   (i) make written submissions as to the scope of the re-hearing of this appeal with regard to human rights grounds; and

   (ii) list any further directions required for the re-hearing of this appeal (including, but not limited to a time estimate, whether an interpreter is required, whether oral evidence is to be called and any further evidence to be relied upon);

irection 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 4th November 2019

Upper Tribunal Judge Jackson