



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/04567/2016

THE IMMIGRATION ACTS

Heard at Field House
On 19 June 2018

Decision & Reasons Promulgated
On 6 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

A S
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms F Shaw, Counsel instructed by Central England Law Centre

For the respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

Anonymity order

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission against the decision of First-tier Judge Broe to dismiss his appeal against the respondent's decision on 20 April 2016 to refuse him leave to remain in the United Kingdom on human rights grounds, or pursuant to the respondent's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and protect the welfare of children when carrying out her immigration functions. The applicant was born in June 1998 and is an Afghan citizen.
2. The section 55 ground is no longer relevant as the applicant is now 20 years old. This appeal is concerned with whether the applicant is entitled to leave to remain on human rights grounds with reference to paragraph 276ADE(vi) or on exceptional circumstances grounds outside the Rules.

Appellant's account

3. The appellant had no formal education in Afghanistan. He is a Sunni Muslim and a member of the Shinwari tribe. The appellant says that before he left Afghanistan, his father was decapitated and killed, and his 10-year old brother kidnapped, in pursuit of a land dispute in his home area, and that his mother died of a heart attack two days after his father's death. The basis of the alleged land dispute was that the appellant's paternal uncle wanted the family farm and killed his father to obtain it. The appellant gave the deeds to the disputed family land to a trusted farm worker whom his father had employed, and in return, the recipient helped find an agent and arrange for him to leave Afghanistan and come to the United Kingdom.
4. The appellant says that he buried his parents before coming to the United Kingdom and that it was the proceeds of sale of the farm which funded his journey. His agent in Afghanistan arranged a journey in which he was passed from one agent to another until he reached the United Kingdom, where he arrived clandestinely in a lorry and claimed asylum on arrival. His age (14 then) was accepted and he was placed in a foster family, who looked after him until he was 18. He has done well at school and also undertaken charity work. The appellant remains closely bonded to his foster family whom he regards as 'my family' and who think of him as a son.
5. Following the decision of the First-tier Tribunal on his asylum appeal in 2013, in 2014 the appellant approached the Red Cross for help in finding his brother, if he is still alive, in the appellant's former home area. There are two letters from the Red Cross, following a tracing request by the appellant on 17 February 2014. The first, dated 13 September 2016, states that the Red Cross has now begun enquiries. It asks whether the appellant would authorise the sending of a Red Cross Message to one of the people named on his form (an Imam, or his teacher) to ask if they know where his brother might be.
6. The second letter, dated 17 January 2018, says that

'...please be informed that, due to accessibility constraints, Kaga Markhekhail, Kogyani Zawa, Achin and Deh Bala districts of Nangarhar province, as well as Sawkai District of Kunar province are off-limits for both the International Committee of the Red Cross

(ICRC) and Afghan Red Crescent Society Field Officers. Therefore, they cannot conduct searches in those areas.

Unfortunately, the ICRC do not believe that their access to these areas will improve and regretfully have to consider this case as closed. However, this case could be reopened should the Enquirer be able to provide an alternative contact person/family member *in a different area in Afghanistan.*

7. The appellant is now a young adult, living alone in a flat, a short distance from his foster family. He works 15-20 hours a week in a Subway sandwich shop, and attends college three days a week. He has no contact with anyone in Afghanistan and considers his foster parents as his parents, and their family as his family. In return, his foster parents treat him like a son: although he moved out of their home two years ago, the relationship remains close. The appellant speaks to his foster family 3 or 4 times a week, and attends family events, barbecues, Christmas, birthdays, and visits his foster parents on Father's Day and Mothering Sunday.
8. The appellant's foster parents and their children are supportive of his application.

The Telford decision (2013)

9. The applicant arrived in the United Kingdom in August 2012, age 14, claiming asylum immediately, but that claim was unsuccessful, and the appellant was appeal rights exhausted on his asylum claim on 16 November 2013.
10. Judge Telford in his decision on international protection (the Telford decision), disbelieved the appellant's core account, in particular, noting that there was no corroboration of the alleged beheading of the appellant's father or the death of his mother by heart attack. He found that the appellant was not a credible witness; that he had not suffered past persecution from his uncle; that he was not sure who had kidnapped his father and that the policeman to whom he reported the ransom note had no idea who kidnapped the father. There were no documents with his father's name on and no indication that the paternal uncle was connected to the kidnapping of his father. When complaining to the police, the appellant had not mentioned that he thought his paternal uncle was involved. Nor was there any documentary evidence of the deaths of the appellant's father and mother, in the manner alleged or at all. The Judge expressed it as 'no evidence' but that was inaccurate as the appellant had given oral evidence of their deaths.
11. The appellant had time to arrange the burial of both his parents and hand over the land to a trusted manservant to sell, waiting for the sale before he left for the West. Judge Telford considered that the paternal uncle would have got wind of that and come to claim the land. The Judge also considered it implausible that the appellant would go to the police, despite his relative youth, and complain of his father's kidnapping.
12. Having disbelieved the core account, the Judge found the appellant would be returned to Afghanistan as an adult and would have the help of his paternal uncle and extended

family to resettle him. He found (without any evidential support) that the uncle 'does not appear to have the land or any money from it'.

13. Judge Telford made no criticism of the respondent for failing to trace the appellant's relatives in Afghanistan, instead criticising the appellant for failure to take any tracing steps himself.
14. The appellant was not an unaccompanied asylum-seeking child: his failure to contact his family should be regarded as linked to his having been the subject of 'the investment of much-needed family capital' for him to come to the United Kingdom as an economic migrant. Absence of evidence of contact was not evidence of absence of family members:

"23. ...This appellant although young was clearly supported by a network which had money, information, some power, influence and organisation in Afghanistan. He represents a considerable investment in the future economic betterment of this wider family based collective and is an asset worth protecting. He would not to my mind be a waif and stray without help and support when in Afghanistan. ...

25. ...He was incredible in his account for the reasons stated above. ...

30. It was agreed that [the appellant's] rights to a private and family life under Article 8 ECHR were not matters for this appeal. This is no doubt frustrating to the appellant and his foster carer."
15. Judge Telford considered the appellant to be an economic migrant and that he probably did still have family in Afghanistan which could help him resettle there. He dismissed the appeal on all grounds. That decision is the *Devaseelan* starting point for any subsequent examination of the appellant's account.

Discretionary leave

16. As he was then a minor, following dismissal of his asylum claim, the appellant was granted two years' discretionary leave to remain, to expire on 17 November 2015. On 16 November 2015, one day before the expiry of his discretionary leave, the appellant made the present application. The application was supported by a letter from the appellant's foster father, a bank statement, an HMRC letter, and an employment letter from a branch of the Subway sandwich chain dated 26 October 2015.
17. On 20 April 2015, the respondent refused the appellant's application for discretionary leave to remain, with an in-country right of appeal. He considered that it was in the appellant's best interests to rejoin his (presumed) extended family in Afghanistan. He did not consider that the appellant would have formed a considerable private life in the United Kingdom in such a short period.
18. The refusal letter said this about the appellant's family in Afghanistan:

"It is your claim that your parents are deceased and you have no other family in Afghanistan. It is also noted that you have not provided us with a completed family tracing pro forma, or any evidence of family tracing action you may have instigated with the Red Cross.

As summarised above, actions have been taken to endeavour to trace your family. However, at this time it has not been possible to obtain information to confirm your family's current location and circumstance, or to obtain information relevant to an assessment of whether there is a prospect of reuniting you safely with your family in the event of return.

The Secretary of State's failure to trace your family cannot be interpreted as evidence that there are no adequate reception arrangements for you on return. The particular circumstances of the case mean that only cursory steps were available to the Secretary of State to endeavour to trace your family, therefore little weight can be attached to the Secretary of State's unsuccessful tracing endeavours. The family tracing results should not be taken as meaning that your claim has been accepted. The family tracing results are one factor which have been taken into account and is not necessarily determinative of the outcome of your asylum claim. The results of the family tracing have been considered in the round with the other evidence available."

19. The respondent considered family and private life under Appendix FM and paragraphs 276ADE (1) – CE of the Immigration Rules HC 395 (as amended), and also outside the Rules on the basis of exceptional circumstances. The appellant's discretionary leave application was refused as he was over 17½ years of age and the respondent did not consider that he could bring himself within the Rules or that he had demonstrated exceptional circumstances by reason of which removal from the United Kingdom would not be appropriate.

The Broe decision (2017)

20. The appellant appealed to the First-tier Tribunal. In his grounds of appeal, he asserted that he remained an unaccompanied asylum-seeking child, arguing that he should not be returned to Afghanistan and should be granted humanitarian protection in the United Kingdom.
21. The appeal was heard by First-tier Judge Broe. The *Devaseelan* starting point for the Broe decision was the reasoning in the Telford decision in October 2013, an international protection decision which expressly excluded consideration of human rights. Judge Broe adopted the findings of fact and credibility in the Telford decision, but erroneously directed himself that the appeal before him included an application for international protection under the Refugee Convention, humanitarian protection, as well as leave to remain in the United Kingdom on human rights grounds. That was a material error of law. The appellant's Westernisation/risk on return submissions should have been treated only as relevant to the issue of significant obstacles to the appellant's reintegration in Afghanistan if he were to be returned now.
22. In submissions at the hearing, the appellant sought to rely on the international protection of his 2012 asylum claim, and in particular, an assertion that he would be at risk in Afghanistan as a person who had become Westernised while in the United Kingdom and for that reason would be regarded on his return as anti-Government and a traitor.

23. The First-tier Judge heard oral evidence from the appellant and his foster father, who had been looking after him for 4 years by then. The First-tier Tribunal relied on *AK* (Article 15(c)) *Afghanistan* CG [2012] UKUT 00163 (IAC) and held that there was no risk to the appellant in Afghanistan at the level of persecution or indiscriminate violence, because he would have access to his family and/or extended family there, which the previous Judge had found still existed in the 2013 decision.
24. The appellant appealed to the Upper Tribunal.

Permission to appeal

25. Permission to appeal was granted by Upper Tribunal Judge Blum on the following basis:

“...2. The appellant claimed to be at risk in Afghanistan on the basis that he has adopted Western values and/or a Western appearance and would be targeted by anti-government elements as a perceived ‘foreigner’ or a spy for a Western country. There is some background support for this contention in the UNHCR Eligibility Guidelines ([31] of the determination). The First-tier Judge considered that the appellant would not be at risk for this reason because he has a family network that is able and willing to provide him with genuine support ([32]-[33]). It is, however, unclear why having family support would remove a risk of ill-treatment for the reasons advanced by the applicant. It is arguable that the First-tier Judge failed adequately to consider whether the appellant would be perceived as a Westerner, and, if so, whether this would render him at risk of persecution despite having family support.”

Rule 24 Reply

26. The respondent filed a Rule 24 Reply, in which she submitted that the Judge had considered properly the potential risk in Afghanistan to the appellant as a Westernised young man, and that it was open to him to find that any risk was mitigated by the family support which had been found to be available to the appellant, based on the findings in the previous decision in 2013, that the appellant was ‘supported by a family network which had money, information, some power, influence and organisation in Afghanistan’.
27. That is the basis on which this appeal came before the Upper Tribunal.

Error of law

28. On 9 October 2017, I found there to be an error of law in the First-tier Tribunal decision. The First-tier Judge had not applied the guidance given by the Upper Tribunal in *JS* (Former unaccompanied child – durable solution) (*Afghanistan*) [2013] UKUT 568 (IAC) that:

“(4) Where the appellant is no longer a minor, the duty on the Secretary of State under s.55 of the Borders, Immigration and Citizenship Act 1999 no longer arises but when making the assessment of whether removal would lead to a breach of article 8, all relevant factors must be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs.”

29. I found that the First-tier Tribunal's negative credibility findings were inadequately reasoned, in relation to the appellant, and that there were no findings at all regarding the reliability of the evidence of his foster parents, particularly concerning his lack of contact with anyone outside the United Kingdom, nor about the difficulties experienced by the Red Cross in seeking to trace the appellant's brother. There was no real analysis of the Westernisation argument as an obstacle to reintegration in Afghanistan now. The First-tier Judge's reasoning was inadequate overall. I therefore set aside the findings of fact and credibility, to be remade in the Upper Tribunal.
30. That is the basis on which this appeal came before me for substantive remaking.

The Upper Tribunal hearing

31. The appeal came before the Upper Tribunal on 19 June 2018. Applying *Devaseelan*, I take the findings of the Telford Tribunal in 2013 as the starting point for remaking this decision. There was no finding as to the credibility of the evidence of the foster parents within the Telford or the Broe decisions, but their credibility was not disputed at the Upper Tribunal hearing or in the respondent's Rule 24 Reply to the grant of permission to appeal.
32. I therefore approach the remaking of this decision on the basis that the appellant's foster father's evidence fell to be treated as reliable, subject to any doubts which might arise from the evidence given before me.
33. I heard oral evidence from the appellant, based on an updated witness statement, and from his foster father, who relied on his previous witness statement. There was also a considerable amount of new country and individual evidence, and a new country guidance decision which had been handed down in March 2018 (AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC))

The appellant's evidence

34. The appellant adopted his witness statement of 13 June 2018, to stand as his evidence-in-chief. In his statement, he said he came from a village in Nangarhar Province, Afghanistan. The account of his parents' death and his brother's kidnapping is as already set out. The appellant's younger brother was 10½ years old when kidnapped, which makes him 3 or 4 years younger than the appellant. The family had never had good relations with his paternal uncle who was a 'very bad man' who wanted his father's farm and was the actor of persecution in the home area whom the appellant feared.
35. The appellant produced the Red Cross correspondence. He continued to assert that he had no family now in Afghanistan to support him on return. His parents were dead, his brother untraceable, and all his support networks were here in the United Kingdom.
36. The appellant said that with the help of his foster parents, he had gained 5 GCSEs and completed a BTEC Business qualification. On 3 July 2018, he was to be interviewed at

De Montfort University for an Article 26 scholarship: his dream was to go to university. The appellant denied being an economic migrant: he had not come to the United Kingdom for money, but to escape the violence in Afghanistan, and the Taliban. In Afghanistan, he would stand out as 'Westernised' and would be targeted as a foreigner and/or a spy. He asserted that he was a witness of truth.

37. In oral evidence, the appellant was asked some supplementary questions by Ms Shaw. He said (more than once) that he knew nothing of the situation in Afghanistan or in his home area, as he had not contacted anyone since leaving in 2012. His understanding was that Daesh and the Taliban were now in control of his home area, and that Afghanistan was a very corrupt country. If you did not know anyone or have someone to support you, you would be in difficulties. The police could not be trusted: they had done nothing about his father's death.
38. The appellant said that he had never been to Kabul and knew nothing of it, not even how far it was from his home area. He thought there was no university in Kabul: if he were returned now he would not be able to access tertiary education, nor get a job, because he did not know anyone there. The culture was completely different from that in the United Kingdom.
39. The appellant said that although he had been given a mobile telephone by his foster parents, he had not used it to call anyone in Afghanistan because he had no contacts there.
40. In answer to questions in cross-examination, the appellant explained that his paternal uncle was influential because he had close friends in the police, best friends, and this gave him influence in the government too. His uncle had wanted to take over the appellant's family farm. The appellant thought that his father, mother and brother had all died because they were causing the uncle a problem. He did not think his brother was still alive.
41. The appellant explained how he had come to the United Kingdom. The appellant had caused a trusted manservant to sell the family farm and pay an agent arrange the appellant's journey to the United Kingdom. He thought that the man got the farm in exchange, but he did not know whether his influential uncle had since taken it back. The original agent had passed him to another, and then another, but they were all connected. The appellant had travelled into the United Kingdom in a lorry: others jumped out, but he was too young and not bold enough to do so, so he was still in the lorry when the police came, and he was arrested. He did not know whether the agent had let his family know he arrived safely: he had not sought or had contact either with the original agent or his brother.
42. The appellant had been placed with a foster family (he referred to them as 'my family') from 22 August 2012, the first day he arrived in the United Kingdom, and had been close to them now for almost 6 years. They had a son of their own, but the appellant had been their sole foster son for four years. The appellant had no health issues: his foster family had persuaded him to go to the gym and eat healthily.

43. The foster family had only one spare bedroom, so that when the appellant grew too old to foster, he had to move out. The appellant confirmed that since 2016 he had been living alone: he worked, studied, cooked and cleaned for himself and washed his own clothes. His home now was in Kettering Town, not far from his foster fmy, in a flat provided by Social Services. He was attending college 3 days a week and working a zero hours contract in Subway, usually for 15/16 hours a week.
44. If the appellant struggled with anything, such as the washing machine breaking down or the television not working, he would ring his foster family. He cooked quick, easy food, for himself or when his British friends came round after the gym. The appellant needed to eat after the gym, his favourite meal being lamb. His foster parents would tell him what to put on it to make it taste good, and his friends would come home with him from the gym and share the food he had cooked for them all: he tried to make them happy too.
45. The appellant's foster parents were busy people, with work to do and they now had another foster child to look after, a British boy. The appellant stayed in touch by speaking to them on the telephone once or twice a week. He saw them when it was their birthday, or that of a niece or nephew, or for a barbecue or any family event. His foster parents had last visited him on 1 June 2018; the appellant went to see them sometimes on Fridays and had visited the previous Sunday for Father's Day. He looked on his foster father as a father.
46. The appellant spoke English and Pashtun, but not really any Dari. Since coming to the United Kingdom, the appellant had got to know a few Afghans in Wellingborough, where his foster family lived, but they did not discuss Afghanistan, or their families, or whether they were in contact with them. They did not ask him, and he did not ask them. The appellant considered such information to be too personal: he did not want others to know what had happened to him, or to remind his Afghan acquaintances of any problems they had. The appellant thought that others might be in the same unhappy situation as he was, and none of them wanted to remember the very sad time they had experienced before coming to the United Kingdom. In any case, most of his friends were British; the appellant spent his time with people he met at college or in the gym.
47. The appellant had kept up his Muslim observance. He went regularly on Fridays to the Kettering mosque, and on other days if he had free time and nothing to do. People simply prayed and walked out, although you could ask questions if you wished. The appellant never asked any questions. The appellant had fasted for the month of Ramadan in May and June 2018, doing his best although the days were very long at that time of year. He had attended some iftar suppers after the mosque during Ramadan, having been invited by people to do so. He also went to the mosque on the first day of Eid Al-Fitr, Friday 15 June 2018, because that was the main day to celebrate, although the Eid lasts for 3 days. On the Saturday he was with his friends, not at the mosque, and on the Sunday he visited his foster family to celebrate Father's Day with his foster father.

48. The appellant followed events in Afghanistan on social media and the BBC. It was bad news all the time, there were a lot of deaths in Kabul, all young men the same age as him. Asked whether he was aware of improvements in Afghanistan, or that in 2017, 8000 mostly young Afghan men had returned to Afghanistan, the appellant said that they probably had family support or contacts. The appellant had nothing which would enable him to live there forever.
49. Asked about the risk which his Westernisation would cause, the appellant said that in the United Kingdom he wore what he liked, did his hair however he pleased, went clubbing with his friends and drank alcohol if he wished. There was nobody to judge his lifestyle choices. It would not be the same in Kabul: he would not have a happy life because there were no clubs or parties there. In the United Kingdom, he had an on-off girlfriend, but the relationship was not a settled one. He did not want to stay too long with anyone; his relationships did not last as he did not want to trust his girlfriend with his 'personal stuff'. He had no children yet.
50. In re-examination, the appellant said that if he had status in the United Kingdom, he would take his relationship with his on-off British citizen girlfriend more seriously. As things were, he did not want to end up destroying her life if he was sent back, or she got pregnant.
51. The appellant confirmed that there was a mosque in the village in Afghanistan where he had lived, but you could not get food there. His father went regularly, but the appellant was young and did not really go much to the mosque before he left Afghanistan.
52. The appellant had no idea how things worked in Kabul as he had never been there; he did not know how he could get, or rent, accommodation in Kabul, or whether he could expect any help or refuge from the mosques there.

Appellant's foster father

53. The foster father relied on his previous witness statement made for the 2017 hearing: he had not made a new statement for the Upper Tribunal hearing. His wife, the foster mother, had made a statement in 2017 which mirrored that of her husband: she was not called to give evidence at the Upper Tribunal hearing, although she was present. The witness is a British citizen, married, and has three children, two daughters aged 31 and 26 and a son who in 2017 was age 16, just three years younger than this appellant. He had been a painter and decorator, but with his wife he had now been a foster parent for 8 years: altogether, they had fostered 4 children, one after the other. They had only one spare bedroom, so could never have more than one foster child at a time. The appellant had been their foster child for 4 years before he left their home to begin living independently in Kettering when he was 18.
54. On 22 August 2012, the day after his arrival, the appellant came to them with the shirt on his back and a carrier bag. Those were his only possessions and he spoke little or no English. He was shy, quiet, naïve and immature. The interpreter who introduced them to each other told the appellant that the foster parents would look after him as

his own parents would have done, had they lived. The appellant settled in quickly: the foster parents told him to call them 'mum' and 'dad'. The appellant lacked self-confidence at the beginning but was keen to learn English and to fit in. He was friendly, mild-mannered, and very sweet. He was polite and courteous to everyone in the extended family, and warm and helpful in the home. He was sensitive and caring about the feelings of others and soon became a valued member of the family.

55. The appellant had a mobile telephone, provided by his foster parents, once he was old enough. Itemised statements came to the foster parents and in two and a half years, there was never any overseas number on the statements.
56. The appellant was almost completely uneducated when he arrived, but once in school, he was found to be very clever and did well. He worked particularly hard on his English, at school and at home. The appellant was an outstanding student, winning the 'Champion of Young People Award 2015'. The witness was proud of the appellant's academic achievements and prospects.
57. The witness gave details of the appellant being interested in baking (but not very good at it) and good with his hands. He enjoyed shopping but was careful with money. The appellant was popular with the appellant's foster father's daughters and grandchildren, but protective of his 'brother' (the foster parents' own son) and made sure there were no conflicts between the grandchildren and his British brother. The witness had spoken to the appellant about safe sex and making sure his girlfriends did not get pregnant; he had taught him to respect them and also himself.
58. The foster family included the appellant in birthdays, Christmas, Mother's and Father's Days, and he enjoyed giving and receiving gifts. They had taken him on many family holidays and he had learned to fish (but almost fallen in the water as he was so engrossed). The whole family had been very sad when the appellant had reached 18 and had to move out, but they had no choice as they only had one spare bedroom and otherwise they would have had to give up fostering altogether.
59. The witness and his wife loved the appellant as a son; they had not felt that way about the other young people they fostered. The appellant was, simply, family to them. He was a British teenager, in every sense, and they were afraid for him if he were to go back now. They were continuing to enjoy a parental relationship with him and to watch him develop into a confident, happy, beautiful young man. The witness said that the appellant was frightened to return to Afghanistan; his home country was now 'foreign' to him and he had not lived there since he was 14 years old. The rest of his foster family could not bear to think of what might await him if he were returned.
60. In answer to supplementary questions from Ms Shaw, the appellant's foster father said that his own son was now 18 years old and his grandchildren were 5, 7, 11 and 13. He had 13 nephews and nieces too. The witness' son and daughters regarded the appellant as family and were in constant contact with him. His son still lived at home: the boys had grown up together as the foster parents' son was only 12, and the appellant 14, when he came to them. The boys started secondary school together and

had a 'first day at big school' photograph of them both on the first day, in their new uniforms.

61. The witness had seen the appellant develop from a quiet, withdrawn child with no English language ability to the lovely young man he was now, with much better English. However, the appellant was still just as naïve as the day he came to them: his friends would go to the appellant's flat and eat him out of house and home, but he never said anything. He had not learned to stand up for himself. They saw him every week, and kept in contact by telephone. The appellant (unlike their own children) never forgot the witness' birthday or Father's Day.
62. The appellant would come home to his foster family to get them to help him book appointments, organise a driving licence and his driving tests. He would be on the telephone from Kettering for any problems he had, whether practical, like the television not working, or emotional, like feeling down or having problems at college. In fact, he was constantly on the telephone to his foster parents asking for help in fixing or cooking things. The witness said that his 36-year-old daughter still telephoned her parents to ask similar questions.
63. The witness was particularly close to the appellant. He would absolutely trust the appellant to tell him the truth, and in particular, he trusted the appellant to have told him anything he knew about what had happened in Afghanistan after he left in 2012.
64. The witness said that he and his wife had fostered two other boys from Afghanistan. For the first one, the Red Cross located his brother in Afghanistan and he went home. He would telephone from Kabul and talk to them, but a year ago, there was a loud explosion in the background during a call, and they had been unable to reach him since, despite trying hard. The witness was very emotional, recounting this: it was clear he thought the boy had not survived.
65. In cross-examination, the witness confirmed that the appellant went to the mosque regularly on Fridays. When he still lived at their home in Wellingborough, the witness would walk up to the mosque with the appellant but not enter.
66. The foster parents had now been fostering for 10 years. They had fostered two other boys from Afghanistan, the one who returned to his brother there (but was now untraceable after the explosion) and another who moved out of their home, but stayed in the United Kingdom. They did not hear from that boy at all, unless he had a court case and wanted them to go with him. The witness would not go to court with that boy because he did not trust him and was not prepared to lie for him in Court.
67. Their relationship with the appellant was quite different. The appellant's demeanour was not that of other Afghan young asylum seekers and the Afghan interpreters whom the witness had encountered over the years. He was naïve and easy going, kind natured and would try to help anyone. When you began to undertake fostering, they told you not to get attached to the foster children, but in the appellant's case, the witness could not help it. The appellant felt like a son to him, he loved him very much.

The witness always went to court if the appellant had a hearing: he and his wife both went.

68. The appellant had moved to Kettering in 2016, about September, coming up to two years ago now. He was a 10-15 minute drive away from them and was in contact by telephone at least once a week. They had visited his flat, and he came home for birthdays, barbecues, Christmas and Father's Day. The appellant had been learning to drive for about a year and a half, starting when he turned 18. He had passed his theory test but failed the practical test a couple of times. He had no health problems nor difficulties with social services. He was coping in the flat on his own, but only because he had his foster family at the end of a telephone, and could come and see them or they him. The appellant saw his foster parents' son on quite a regular basis.
69. In re-examination, the foster father explained that the Afghan interpreters and other Afghans he had met over the years had told him what an unsafe country Afghanistan was in reality. Everyone said that Kabul was safe, but after what happened with the boy they fostered who returned there, foster father asked 'how could you ever want your child to return to that?'
70. That completed the oral evidence.

Appellant's documents

71. The original bundle contains a number of documents dealing with the appellant's educational accomplishments. Those are not disputed, and the appellant's education has already been summarised, so I will not deal with them in detail here. There are letters of support from the appellant's two foster sisters in the original First-tier Tribunal bundle.
72. A letter attached to the appellant's latest statement confirms that he has an interview for an Article 26 Scholarship at De Montfort University¹. De Montfort University's Article 26 Scholarship is a project of the Helena Kennedy Foundation, which states that

"The main aim of Article 26 is to promote access to Higher Education for people who have fled persecution and sought asylum in the United Kingdom."
73. The Red Cross evidence has already been summarised. There are two letters from the Red Cross, following a tracing request by the appellant on 17 February 2014. The final position is that the appellant's home area is:

"...off-limits for both the International Committee of the Red Cross (ICRC) and Afghan Red Crescent Society Field Officers. Therefore, they cannot conduct searches in those areas.

Unfortunately, the ICRC do not believe that their access to these areas will improve and regretfully have to consider this case as closed. However, this case could be reopened should the Enquirer be able to provide an alternative contact person/family member *in a different area in Afghanistan.*' [Emphasis added]

¹ <http://article26.hkf.org.uk/>

Country evidence

74. The appellant relies on a composite report entitled “Afghanistan: situation of young male ‘Westernised’ returnees to Kabul” prepared by Asylos², a pan-European body of volunteers who carry out research to support asylum claimants to prove persecution or support the credibility of their individual testimony.
75. The report brings together a range of source material which is relatively current and the sources are provided and are quoted. The following points emerge from the evidence in the Asylos report:
 - The German government considers Balkh Kabul and Herat safe in part for returns (although there is a heated domestic policy debate). Germany does not consider Kandahar, Khost, Maidan-Wardak, Uruzgan, Kunduz, Paktia, or Nangrahar (the appellant’s province) to be safe for returnees.
 - UNHCR monitors the arrival process. Police and customs officers at the airport on return often verbally abuse returnees for leaving the country and coming back as a burden. They may also be regarded as a security risk;
 - The returning government provides some financial resettlement assistance and IOM provides accommodation for 2 weeks, but no more. Very few returnees take up the offer: most go straight back to their families;
 - There is anecdotal evidence of boys with no Taskeras having difficulty, and those who look and behave ‘differently’ being regarded as a nuisance as they do not know much about Afghanistan;
 - Many young people are demoralised and have lost faith in NGOs. They do not wait at the airport or access the limited help which IOM provides. They have 3 months to contact IOM after their return, but most do not. They may be depressed and unable to carry out administrative tasks, or be too far away from their designated IOM office and unable to afford to travel to it, thus missing out on what reintegration is available;
 - The Jangalak reception centre in Kabul, funded and managed by IOM, is the first point of call for returnees after the airport. Reintegration provided by the IOM may include a couple of weeks’ accommodation, but the whole assisted return package typically lasts a maximum of 6 months, which is not very long, particularly for returnees with no social capital;
 - The Afghan government is supposed to provide legal aid, job placement, land and shelter, but very little of this actually materialises. Young male returnees are a financial burden to the state: they are often isolated from family, having sold everything to go abroad and come back as vulnerable individuals in need, in a system that cannot provide assistance;
 - Foreign ideas are not always welcome on return and despite their better education, many who return from Europe soon become discouraged and disillusioned. Returnees are stigmatised as failures, because they have not returned wealthy and

² <https://asylos.eu/>

successful from Europe. There is a perception that they would not have been removed from the host country if they had not done something wrong there. This affects their employment and marriage prospects, and they may end up re-migrating;

- The 2016 Afghanistan UNHCR report records that anti-government elements reportedly target individuals who are perceived to have adopted Western appearances or values, imputing to them pro-government support and attitudes. They may be kidnapped, tortured, or even killed for this reason. They may get into difficulty because they look or behave differently, because they have lost the habit of praying or fasting, and have learned to drink alcohol and speak to women;
- The presence of family or social networks is a key factor influencing returnees' successful resettlement in Afghanistan. Significant numbers of young people are unable to reintegrate into family units following forced return and may have little access to social networks, such that they cannot find employment. It can take up to 4 years for an individual to reintegrate into the job market;
- Urban areas, Kabul in particular, have a shortage of housing and apartments are normally rented to families, not single tenants, and are extremely expensive. The population of Kabul has exploded from 500,000 to over 5 million in less than 10 years as a result of "the largest repatriation operation in history". Basic infrastructure, including sanitation, education and health has not kept pace, with daily power cuts, contaminated water, and reduced access to education.
- The International Monetary Fund in January 2017 estimated that around 700,000 Afghans returned from the diaspora in 2016, primarily from Pakistan, often not voluntarily, and also from Iran and Europe. The mass returns of Afghans from Pakistan and Iran had strained Kabul's social services and there was no public housing available for returnees. Analysts projected that over 2.5 million were likely to follow in the next 18 months, adding nearly 10% to Afghanistan's population, as well as over a million internally displaced persons (IDPs). Prices for food, consumer goods, health services and housing were higher, negatively affecting the poor and reducing employment prospects and wages.
- A Human Rights Watch report entitled '*Pakistan coercion, UN complicity: the mass forced return of Afghan refugees*' (13 February 2017) concurred, and recommended that European Union states should exercise their discretion to defer deporting rejected asylum seekers 'until it is clear how Kabul and other parts of the country are able to cope with the mass forced return of Afghan refugees from Pakistan. ... Should European Union member states end up deporting tens of thousands of afghans, they will risk fuelling the very instability the European Union says it wants stopped'.

Submissions

76. For the respondent, Mr Melvin relied on his written submissions. Upper Tribunal Judge Dawson had identified key issues for this hearing: risk on return to the home area; family support on return; reasonableness of relocation to Kabul; risk arising from being perceived as Westernised; and Article 8 ECHR private life.

77. Mr Melvin noted that the evidence in AS was that internal relocation to Kabul was safe, for a single adult male in good health, even if he did not have any specific connections or support network there. The existence of a support network would render his position more advantageous, of course, and that might counter any particular vulnerability of an individual on return. Mr Melvin submitted that this appellant did not meet the criteria for the risk arising from seeming 'Westernised' and reminded me of Judge Telford's finding that the appellant had a large extended family in Afghanistan and that the family was sufficiently wealthy to have paid for his journey to the United Kingdom. The mobile telephone evidence was not decisive of the existence of any continuing links, or family members, in Afghanistan.
78. As regards family and private life, the appellant was now living independently and was an adult. Family life was not engaged. Private life was not sufficient to warrant leave being granted outside the Rules, on the facts of this appeal.
79. In his oral submissions, Mr Melvin did not accept that there had been any land dispute in the appellant's home area. The Tribunal should find that the appellant did have the support of members of his family and that there was no risk in the home area. This was a migratory case, where the appellant's family had funded his flight to the United Kingdom for economic reasons. Even if the core account were true, if the uncle was as wealthy and influential as the appellant contended, he would by now have the disputed land in his possession and thus no reason to pursue the appellant.
80. The appellant attended mosque regularly in the United Kingdom, spoke Pashtun and a little Dari, and had not lost his Afghan cultural links. There were no significant obstacles to reintegration into life in Afghanistan. The appellant was successful in his education and had friends in the United Kingdom. He spoke good English and had no health issues, nor any problems with the authorities of the United Kingdom.
81. Mr Melvin accepted that the appellant, who spent the first 14 years of his life in Afghanistan, but the latter 6 years in the United Kingdom, remained in regular contact with his British foster family. The contact which continued was not, at this appellant's age, sufficient to amount to family life. His foster parents remained ready to assist him but the appellant was living independently, working, cooking, cleaning, going to college and learning to drive. The requirements of Appendix FM were not met and there were no exceptional circumstances for which the appellant should be granted leave outside the Rules.
82. The removal of this appellant was not disproportionate and the appeal should be dismissed.
83. Ms Shaw relied on her skeleton argument, with the exception of paragraph 19, which is not now pursued. In her skeleton argument, she contended that taking the assessment of credibility in the asylum application as a starting point, with the additional evidence about the tracing efforts the appellant had made, he had done enough to displace the earlier adverse credibility findings and should now be treated as a reliable witness.

84. Ms Shaw asked the Tribunal to take account of UNHCR guidance from December 2014 as to the significant differences between children's and adults' autobiographical memory, as set out in 'The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union' (December 2014) and of observations in the respondent's own policy, 'Children's Asylum Claims' of 9 October 2017.
85. The appellant had undergone traumatic experiences and was interviewed on his asylum claim when only 14 years old. The appellant would rely on Herlihy and Turner's observations in 2013 in an article entitled '*What do we know so far about emotion and refugee law?*', and on paragraph 290 of the Istanbul Protocol.
86. The appellant had given names, places and details of the events he experienced. Any apparent inconsistencies as to time frames, peripheral details, and the motivations of adults in his life were not fatal to the reliability of his account overall, if proper account was taken of the guidance on trauma and on children's memory to which reference is made above. The submissions set out reasons why the appellant should be considered to need international protection and relevant caselaw (AS (safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC), AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC), and the evidence in the UNHCR Eligibility Guidelines of April 2016 that AGEs target Westernised individuals on the basis of their imputed support for the Afghan government and the West.
87. Ms Shaw said that the appellant was vulnerable, still a care leaver relying heavily on his British foster family, and noticeably Westernised. He would not have the street skills to cope on his own in Afghanistan. She sought to distinguish the decision in AS, where the appellant was a 31-year-old man from Langhman province with no health issues, who came to the United Kingdom as an adult and for whom the only question was the suitability of internal relocation.
88. The appellant did not have the personal connections in Kabul which were required to obtain employment, accommodation and other services. He would be unable to pursue his education there but would have to work, if he could: however, with his limited coping skills, he was at risk of chronic poverty, insecurity, ill health and a future with few or no prospects.
89. Ms Shaw argued that the appellant he should have been granted humanitarian protection on Article 15(c) grounds, alternatively leave to remain based on an Article 3 ECHR risk in Kabul and in Afghanistan as a whole, where the situation was deteriorating. On 9 March 2018, the French courts had found that forced return to Kabul created an unacceptable risk of treatment contrary to Article 15(c).
90. The appellant would rely on paragraph 276ADE(1)(9) of the Rules: he would face very significant obstacles to integration into Afghan society on return. The question of integration required a broad evaluative judgment as to whether the appellant was 'enough of an insider in terms of understanding how life in the society in [Afghanistan] was carried on'.

91. In her oral submissions, Ms Shaw argued that in reality, the appellant could not return to his home area. Unlike the appellant in *AS*, this appellant's home province was so unsafe that the Red Cross could not access it and had closed his file. He had never lived in Afghanistan as an adult, and had spent his formative years in the United Kingdom. The appellant would not know how the system worked on return. He would be recognised as Westernised, which would put him at risk on return. He was naïve and still vulnerable: his strong ties were to his United Kingdom life and his foster family here. He was fully integrated, with good prospects, and the exceptional circumstances test (if engaged) was met.

Discussion

92. As already stated, this is a human rights appeal and not an asylum appeal. Section 55 of the Borders, Citizenship and Immigration Act 2009 no longer applies to this appellant. He is not a child now, and the respondent no longer has a duty to safeguard and protect his welfare when carrying out her immigration functions. The applicant did not make an asylum or humanitarian protection fresh claim following the failure of his asylum claim. Instead, he accepted the 2 years' discretionary leave granted to him as a child, and then applied for discretionary leave on human rights grounds.
93. The appellant's claim is put in two ways: first, that he comes within paragraph 276ADE(vi) in that he has lived in the United Kingdom for less than 20 years, is over 18, and there would be 'very significant obstacles to [his] integration into the country to which he would have to go if required to leave the United Kingdom'; alternatively, outside the Rules, that there are exceptional circumstances such that his removal is not proportionate.
94. I must consider first what findings of fact and credibility are appropriate. the *Devaseelan* starting point is the decision of First-tier Judge Telford in 2013, the Broe decision having been set aside. The core of that decision is in the following paragraphs:
- "23. ...This appellant although young was clearly supported by a network which had money, information, some power, influence and organisation in Afghanistan. He represents a considerable investment in the future economic betterment of this wider family based collective and is an asset worth protecting. He would not to my mind be a waif and stray without help and support when in Afghanistan. ...
30. It was agreed that [the appellant's] rights to a private and family life under Article 8 ECHR were not matters for this appeal. This is no doubt frustrating to the appellant and his foster carer."
95. I have to say that the findings in the Telford decision in 2013 seem to conflate supposition with evidence in relation to the appellant's extended family in Afghanistan, but I accept that this decision is the *Devaseelan* starting point and that if I wish to depart from the sweepingly negative credibility findings in relation to the appellant, I need to explain why and there must be some new material on which to base a different assessment of this appellant's credibility.

96. I have seen and heard this appellant and his foster father give evidence before me. I conclude, having done so and having reviewed the evidence as it now stands, that to the lower standard of proof, this appellant is a credible witness.
97. There has never been any suggestion, before Judge Telford, Judge Broe or me, that the foster father is not a credible witness. The appellant's foster parents have now had the opportunity to observe his character for 6 years. I give significant weight to the foster father's assessment of the appellant's truthfulness, and also of his lacking the maturity to cope unsupported in Afghanistan.
98. I have had regard to the evidence of efforts to trace this appellant's family in Afghanistan, made through the Red Cross from 2014 onwards (beginning after the decision on the asylum claim in 2013), and the unhappy conclusion that his home area is unreachable to the Red Cross and likely to remain so, such that the enquiry had to be closed.
99. I treat as credible the appellant's assertion that he has no family network in Afghanistan to support him on return. I place weight on the appellant's not having made any telephone calls at all outside the United Kingdom, either on the home telephone or his mobile telephone when he had one.
100. I also have regard to the fact that when the appellant arrived he was completely uneducated. I do not consider that the finding by Judge Telford that the appellant comes from a large, wealthy family in Afghanistan and is an economic migrant is supported by any of the evidence before me (or indeed, any of the evidence before Judge Telford) and I expressly depart from that finding.
101. I assess the appellant as having a genuine subjective belief that his parents and brother are all dead and that his uncle wishes to harm him. In any event, it appears that the situation in his home area is not such that he could, or would, be able to return there. The evidence of the appellant's foster father that one of their other Afghan foster sons, returned to Afghanistan because the Red Cross located a brother to help him resettle in Kabul, appears to have been killed while on the telephone to them, reinforces the subjective fear.
102. I accept that the appellant has the strong connection to his foster family which both he and his foster father expressed at the hearing. His foster parents sat either side of the appellant when he was not giving evidence, holding his hands and supporting him. I accept that they all think of each other as 'family' and that the appellant's foster parents are continuing to parent him, although he is no longer a minor. Despite his having independent accommodation, the appellant is still very dependent on his foster family for support in his daily life and accordingly, I am satisfied that the *Kugathas* test is met and that he has family life, as well as private life, with them. The provisions of part VA of the Nationality, Immigration and Asylum Act 2002 (as amended) do not, therefore, require me to place little weight on that family life. I can give little weight to such private life as he has developed outside the foster family (his friends from the gym and college, and his contacts at the mosque): during the period when the

appellant was in the United Kingdom, he has always been here precariously, albeit with leave.

103. The question therefore is whether this young man can be expected to resettle in Kabul, or whether there are very significant obstacles to his doing so, or exceptional circumstances for which leave to remain ought to be granted. I am guided by the decision of the Upper Tribunal in *AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC)*, handed down on 28 March 2018:

“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 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.*

(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.”*

104. I have regard to this appellant’s age and to his lack of any accessible support network in Kabul. I note that the appellant is still an observant Muslim and does speak at least one of the languages spoken in Kabul. However, although he is physically healthy, he is young for his calendar age and not yet functioning independently. He is a naïve care leaver, who has never lived in Kabul and has no family connections or links to that city. I consider that he remains particularly vulnerable, noting the evidence that he exhausts his resources trying to please his friends from the gym, and that he cannot stand up to them, or manage his daily life without telephoning his foster family several times a week and going to see them to deal with forms and appointments and so forth.
105. I conclude that on the facts of this appeal there are very significant obstacles to the appellant’s integration into Afghanistan, specifically Kabul, on return, and that he is entitled to leave to remain on the grounds of private life, pursuant to paragraph 276ADE(vi).
106. In the alternative, I have considered whether there are exceptional circumstances for which leave to remain ought to be granted. I note the intensity of the appellant’s connection with his foster family, and his naivete and dependence, and conclude that

on the particular facts of this appeal, exceptional circumstances are present for which leave to remain should be granted.

DECISION

107. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

I remake the decision by allowing the appellant's appeal.

Date: 28 August 2018

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson