# Neutral Citation Number: [2016] EWCA Civ 876

Casee No. C4/2014/0588

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

ADMINISTRATIVE COURT LIST

(ROBIN PURCHAS QC)

Royal Courts of Justice

Strand London, WC2

Date: Tuesday, 12th July 2016

B E F O R E:

# LORD JUSTICE TOMLINSON

**LORD JUSTICE LEWISON**

**LORD JUSTICE VOS**

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| --- | --- | --- |
|  | **NO (AFGHANISTAN)** | **Claimant/Appellant** |
|  | v |  |
|  | **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant/Respondent** |

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**Mr I Palmer** (instructed by Camden Community Law Centre) appeared on behalf of the Applicant

**Mr G Lewis** (instructed by Government Legal Department) appeared on behalf of the Respondent

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# J U D G M E N T (Approved)

1. **LORD JUSTICE TOMLINSON**: This appeal against an order made by Mr Robin Purchas QC, sitting as a Deputy High Court Judge in the Administrative Court, refusing permission to apply for judicial review, raises no issue of principle but rather turns on a short one-off point concerning the manner in which a particular determination of the First-tier Tribunal is to be understood and what are the implications thereof.
2. The relevant order of Mr Purchas was made on 11th February 2014. By that order the Deputy Judge refused the Appellant, who is a young Afghan, permission to apply for judicial review of a decision made by the Secretary of State on 30th April 2013, to grant the Appellant discretionary leave to remain for 30 months thus expiring on 24th October 2015.
3. The decision of the Secretary of State was made in an effort to give effect to or to carry through the consequences of a determination of the First-tier Tribunal, in the shape of First-tier Tribunal Judge Phillips, promulgated on 15th April 2013.
4. What is said by the Appellant is that in the light of the findings made by Judge Phillips, it was unlawful for the Respondent Secretary of State not to have granted him 5 years leave to remain under Article 3 of her policy document, Humanitarian Protection.
5. Before dealing with the substance of the matter I should record that Arden LJ gave permission to appeal against the order made by Mr Purchas QC and although she did not overtly order that the matter be retained in this court, nor give permission to apply for judicial review, the parties are agreed that we should proceed today as if she had done both of those things.
6. I turn therefore to the Secretary of State's Humanitarian Protection policy. The version of that policy with which we have been supplied for the purposes of this hearing is that issued on 15th May 2013. As I have already indicated, the impugned decision of the Secretary of State was made on 30th April 2013. It has become apparent that the version of the policy which was in force at the date of the decision was not in identical terms to that which is before us but it is accepted, on both sides, that such differences as there are are minor textual differences and not differences of substance. With one exception therefore I will refer hereafter to the 15th May 2013 version of the policy. That policy states under the rubric “3. Grounds for the grant of Humanitarian Protection:

7.

Articles 15(a) and 15(b) of the Qualification Directive/Rule 339C/Articles 2 and 3 of the European Convention on Human Rights

* + Unless excluded under paragraph 339D of the Immigration Rules, Humanitarian Protection must be granted where there are substantial grounds for believing that there is a real risk of serious harm in the following situations....

3.3 Return that would expose a person to torture or inhuman or degrading treatment (Article 15(b))

* + The terms in this section reflect Article 3 ECHR which states that: 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'
  + Humanitarian Protection is to be granted where there is a reasonable likelihood of illtreatment contrary to Article 3 which cannot be linked to a Refugee Convention reason. Even if the more obvious reasons - race, religion, nationality, political opinion - may not apply, it could be that membership of a particular social group (PSG) is established, in which case the individual should qualify as a refugee... "

1. Article 15 of the Qualification Directive, to which reference is made in the heading to paragraph 3 of the policy provides, under the rubric "Serious harm":

9.

"Serious harm consists of:

* 1. ) the death penalty or execution or
  2. torture or inhuman or degrading treatment or punishment of [an applicant] in the country of origin."

1. It is accepted that the First-tier Tribunal judge did not in her conclusions or in the dispositive part of her determination expressly state that the Appellant was entitled to humanitarian protection. Indeed, the judge recorded in clear terms at paragraph 143 of her determination that the Appellant's appeal against the Respondent's decision made on 20th July 2012 to refuse to grant asylum and to remove the Appellant from the United Kingdom was dismissed on asylum grounds and dismissed under the Immigration Rules.
2. What is said however by the Appellant is that in the body of the determination express and unqualified findings of fact were made which indicate unequivocally that the Appellant would, if returned to Afghanistan, face a real risk of suffering inhuman or degrading treatment. The appeal was in fact allowed on human rights grounds and what is said is that the basis for allowing the appeal under Articles 3 and 8, particularly under Article 3, included factors satisfying the requirements for humanitarian protection. Whilst the situation may therefore be unusual, nonetheless it is said by the Appellant that the Respondent erred in failing properly to implement or to give effect to the determination or at any rate the clear implications thereof and acted unlawfully in failing in the light thereof to grant humanitarian protection as mandated by the policy to which I have referred.
3. The history of these proceedings can be shortly stated. The Appellant was born in Afghanistan on either 1st January 1993 or 1st January 1994. On 9th September 2008 he arrived in the United Kingdom. On 2nd October 2008 he claimed asylum. On 4th February 2009 the Respondent refused the Appellant's asylum claim but granted discretionary leave to remain until 30th June 2011, later amended to 30th June 2010.
4. On 28th June 2010, therefore two days before the expiry of that leave, the Appellant applied for an extension of the discretionary leave to remain. On 28th February 2011 the Respondent refused that application. On 11th April 2011 the First-tier Tribunal dismissed the Appellant's appeal against that determination.
5. On 30th May 2012 the Appellant made a fresh claim for asylum. On 20th July 2012 the Respondent accepted that a fresh claim had been properly made but nonetheless refused it but granted the Appellant a right of appeal.
6. On 15th November 2012 that appeal was allowed by First-tier Tribunal Judge Simpson on humanitarian protection and human rights grounds. On 18th March 2013 the Upper Tribunal set aside Judge Simpson's determination and directed a de novo rehearing. It was that hearing that took place on 19th March 2013 before First-tier Tribunal Judge Phillips which in due course gave rise to her determination of the 15th April 2013 to which I have already referred. It was in response to that decision that on 30th April 2013 the Respondent made her decision granting the Appellant discretionary leave to remain for 13 months.
7. The Appellant was in April 2013 either 19 or 20 years old. It was accepted at the hearing before the First-tier Tribunal that he suffered from complex post traumatic stress disorder ("PTSD") and major depression. The exact cause of that condition has not been established and the Appellant's account of the circumstances in which he left Afghanistan have not been accepted but the First-tier Tribunal judge did accept that his condition does not arise only from his experiences during his journey to the United Kingdom.
8. The First-tier Tribunal judge also found that the Appellant is at risk of suicide, a risk which was, as at the date of the hearing before her, being managed by careful skilled intervention and a supportive network in London. The First-tier Tribunal judge did not consider that that risk could be managed if the Appellant was told that the decision to remove him is final. The First-tier Tribunal judge also considered that the chances of his findings in Afghanistan of palliative and therapeutic care that would keep him from taking his own life are remote.
9. In that regard it had to be borne in mind that he would in Afghanistan have no known family support, no known home to which to travel, no evidenced chance of finding a secure base from which to seek treatment and no identified facility that would be able to provide it.
10. It was in the light of these considerations that the Secretary of State considered that her policy and the provisions to which it gave effect did not oblige her to grant humanitarian protection but rather gave her a discretion to grant leave to remain.
11. The Secretary of State's policy on humanitarian protection, to which I have already referred also provided:

"Where a person claims that their return would be in breach in Article 3 of the ECHR because of their medical condition they are not in need of international protection and are not eligible for humanitarian protection. The breach arises because the healthcare available to the applicant from the United Kingdom is not available in the country of return and for this reason he may qualify for discretionary leave that the threshold of establishing an Article 3 breach in such cases is very high."

1. In its current May 2013 version the equivalent provision is paragraph 3.6 which reads: 22.

"3.6 Medical cases.

* + Cases where it is claimed that removal would be a breach of Article 3 on medical grounds will not be considered eligible for Humanitarian Protection, given that (ECtHR, N. v. the United Kingdom) 'in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.' Instead they should be considered under the Discretionary Leave policy."

1. Before examining the substance of the contentions made I must fill in a little more of the regulatory and statutory framework. Council Directive 2004/83C "on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" provides:

"Article 1

Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2

1. Definitions

For the purposes of this Directive:

(a)‘international protection’ means the refugee and subsidiary protection status as defined in (d) and (f);

1. ‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;
2. ‘subsidiary protection status’ means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection."
3. The relevant parts of the UK parts of the UK Immigration Rules which implemented Council Directive 2004/83 provide:

"Grant of humanitarian protection

339C A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

* 1. he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
  2. he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
  3. substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
  4. he is not excluded from a grant of humanitarian protection."

1. "Serious harm consists of", I omit (i) and (ii):

"(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return..."

Then I omit subparagraph (iv) then the heading "Residence Permits." 339Q:

"(i) The Secretary of State will issue to a person granted refugee status in the United Kingdom a United Kingdom Residence Permit (UKRP) as soon as possible after the grant of refugee status. The UKRP may be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the applicant is a danger to the security of the UK or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the UK or the person’s character, conduct or associations otherwise require.

(ii) The Secretary of State will issue to a person granted humanitarian protection in the United Kingdom a UKRP as soon as possible after the grant of humanitarian protection. The UKRP may be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the person granted humanitarian protection is a danger to the security of the UK or having been convicted by a final judgment of a serious crime, this person constitutes a danger to the community of the UK or the person’s character, conduct or associations otherwise require."

1. The Refugee or Person in Need of International Protection Qualification Regulations 2006 states that:

"In these regulations a 'person eligible for a grant of humanitarian protection' means a person who is eligible for a grant of humanitarian protection under the Immigration Rules."

Which in turn is a reference to rule 339C(iii) which I have already set out.

1. The current version of the Secretary of State's policy on discretionary leave provides paragraph 2.1:

# "2.1 Medical cases.

* **This category applies to both asylum and non asylum cases.**
* The general principle is that a person cannot avoid return on the basis that they require medical, social or other form of assistance being provided in the UK. The improvement or stabilisation in an applicant's medical condition resulting from treatment in the UK and the prospect of serious or fatal relapse on expulsion will not in themselves render expulsion inhuman to Article 3.
* The threshold set by Article 3 is therefore a high one. It is **'whether the applicant's illness has reached such a critical stage (ie he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless care available there to enable him to meet that fate with dignity'** from the case of N(FC) v SSHD [2005] UKHL 31. To meet the very high Article 3 threshold therefore, an applicant will need to show exceptional circumstances that prevent return, namely that there are compelling humanitarian considerations, such as the applicant in the final stages of a terminal illness without prospect of medical care or family support on return."

1. In the light of all those provisions it is submitted by the Appellant that if it is established through an examination of the findings of fact made by the First-tier Tribunal judge that the Appellant is at risk of serious harm within the meaning of Article 15B of the Directive 2004/38 and paragraph 339C of the Immigration Rules, then the Appellant qualifies for humanitarian protection and is to be given such status and a grant of leave to remain for 5 years by the Secretary of State implementing that determination.
2. When the matter came back for rehearing before Judge Phillips the Appellant did not pursue his asylum claim but did pursue his claim on the basis of Articles 3 and 8 of the ECHR. The Appellant gave oral evidence, as did a consultant clinical psychologist, Ms Hughes. There was a written report from Professor Cornelius Katona, a consultant psychiatrist. There were various other medical reports and numerous testimonials and letters of support including one from his Member of Parliament, the Right Honourable Simon Hughes in whose office the Appellant had worked as a volunteer. One medical report assessed his condition in October 2011, after referral from the Royal Free Hospital, where he presented with lacerations and suicidal ideation.
3. I have already summarised some of the judge's conclusions. For present purposes the relevant paragraphs in her determination are as follows:

32.

"64. I was referred to the up to date extract COIR 1odged by the respondent. The terms of the 2011 Report are reproduced in part in the reasons for refusal which records that many Afghans suffering from mental health problems are believed to be possessed, some are chained in rooms and others are simply abandoned by their families.

65. The extract report sets out details of the few facilities that exist for the treatment of mental health patients in Afghanistan, the extent of the unmet need, the shortages of treatment facilities and the societal attitudes that hamper access to treatment for mental health problems in a country where inhumane and degrading exorcism regimes are used by many to treat relatives with mental hea1th problems and face to face contact with mental health professionals is at best possible for only for a very few and for a very restricted time before patients have to be discharged. The extent of unmet health needs in Afghanistan is illustrated by the fact that there is no treatment for cancer patients in Afghanistan apart from surgery...

1. The appellant has shown that the proposed return to Afghanistan will significantly increase the already present suicide risk arising from the appellant's complex PTSD and depression. In light of the general concurrence in the various reports and testimonials showing that the appellant's condition worsened following the dismissal of the appeal, it not is considered that his subjective fear is based only on anticipation of an event because this is not supported by any medical evidence. The appellant's subjective fear passes the threshold set in Y and Z.
2. The correct test under the Article 8 case law is not exceptionality. On the whole facts as found, the removal of the appellant would be an act or measure so severe as to interfere unlawfully with either his moral or physical integrity.
3. The respondent's conclusions that the appellant had demonstrated no reason why he would not be able to return to safely reside in Kabul, where a sufficiency of protection is considered to exist for him does not take full account of the appellant's accepted mental health issues.
4. The respondent's conclusions that the appellant would not face economic impoverishment or hardship sufficient to engage his rights under Article 3 of the ECHR as a consequence of returning to Afghanistan are not based on an investigation of the individual circumstances the appellant would face on return to Kabul."

I pause there to indicate that in addition to paragraph 64 and 65, which I have already reproduced the really critical paragraphs are the following:

"114. Going through the six tests set out in J, for foreign cases, l find that it is no longer suggested that the appellant's subjective fear of the Taliban is objectively well founded. However, his subjective fear remains. The severity of treatment relied upon is the deterioration in the appellant's PTSD on return to Afghanistan and societal attitudes to mental illness and the mentally ill.

1. The fact that events in Afghanistan may not be wholly responsible for the appellant's PTSD does not undermine the impact upon him of return there. l find that the deterioration in his mental health that would result from return to Afghanistan is not hypothetical; it is evidenced in the concurrence of the evidence including the medical reports of Ms Hughes and Prof Katona.
2. I find that there is a causal link between removal and the deterioration in the appellant's PTSD and increased risk of suicide- l take full account of the fact that the threshold is high because the alleged inhumane treatment is not the direct or indirect responsibility of the public authorities in Afghanistan but results from the appellant's mental illness. However, an article 3 claim in principle succeed in a suicide case.
3. The appellant's fear of ill-treatment in Afghanistan as a person suffering from mental illness is objectively well-founded in that although there are some medical facilities and medication there is also a prevalence of societally acceptable highly inhumane and degrading treatment of those believed to be possessed as set out in the COlR.
4. Without family support or a support network, on the basis of the psychiatric and psychological reports I find on the basis of the concurrence of the evidence that there is a real risk that the appellant will develop symptoms in Afghanistan due to the activation of an intense fear reaction, panic and depression and that as a result there is a real risk that he will be shunned, will become homeless and destitute or fall victim to those who use inhumane methods in order to attempt exorcism.
5. Although he is currently, superficially functioning in the United Kingdom on return he is highly likely to be traumatised by his symptoms to such an extent that he will be unable to access such treatment as may be available in Afghanistan."

Then paragraph 127 the heading to which is "Conclusions - Article 3":

"In all the circumstances looked at in the round I find that this appeal falls to be determined in the appellant's favour and on the basis that his return would reach the high threshold of inhuman treatment unconditionally prohibited by Article 3 because the evidence does not show that appellant's risk of suicide, that is at present being managed by careful, skilled intervention and a supportive network can be managed in the United Kingdom if he is told that the decision to remove him is final and because in Afghanistan the chance of the appellant finding the palliative and therapeutic care that will keep him from taking his own life, with no known family support, no known home to travel to and no evidenced chance of finding a secure base from which to seek treatment in Afghanistan or known facility to provide him with the therapeutic care that will keep him from taking his own life and provide a cure, is remote. For completeness I have gone on to consider the Immigration Rules, Article 8 and proportionality in case I am found to be wrong in my conclusion that Article 3 is engaged by a decision to remove the appellant to Afghanistan on both the domestic and foreign fronts."

Then under the rubric "Article 8" the determination continues:

"132. The appellant's mental health is a crucial part of his private life and to return the appellant mid-treatment for complex PTSD, when his prognosis is good if his treatment is completed, to a country when his treatment cannot be continued or replicated engages Article 8 because of the suicide risk, the lack of facilities in Afghanistan and the inhumane methods of neglect and exorcism that are considered societally acceptable.

133. I find that because the medical evidence and supporting evidence of responsible professionals all as set out above, reaches the high threshold required to show that Article 8 is engaged by the consequences for the appellant of a removal decision, not only in the United Kingdom but also in Afghanistan that the appellant qualifies for discretionary leave on medical grounds...

140. For all the reasons set out above and below, l find that the interference with the appellant's private life consequent upon his removal does reach the threshold required to engage Article 8 because the appellant is undergoing medical treatment in the United Kingdom, has been in the United Kingdom for 4.5 years since October 2008, has a social network essential to successful treatment for his mental health problems, a long-term girlfriend and network of supportive professionals all of whom are essential to his continued safety and wellbeing, is in education, has learnt English, obtained qualifications, been elected to the Centrepoint Parliament and has conditional offers of a place at four universities. For the avoidance of any doubt I find the appellant did not have the acknowledged mental health problems, 'then in light of case law, the combination of the other factors would not be sufficient for proportionality to favour the appellant."

That last sentence of paragraph 140 does not make sense. I think that it should probably read:

"For the avoidance of any doubt I find that if the appellant did not have the acknowledged mental health problems, then in light of case law, the combination of the other factors would not be sufficient for proportionality to favour the appellant."

1. Finally I have already referred to the fact that at paragraph 143 of her determination the First-tier Tribunal judge dismissed the appeal on asylum grounds and under the immigration rules, but allowed it on human rights grounds.
2. Mr Lewis, for the Secretary of State, submits that the decision must be read as a whole and that the references to "inhuman or degrading treatment" to which the Appellant might be subject in Afghanistan must be seen in their proper context which is the judge's assessment of the Appellant's prospects of receiving in Afghanistan adequate medical care for his mental health condition, not the question whether a claim for humanitarian protection was made. Mr Lewis points out that the judge nowhere mentions paragraph 339C of the Immigration Rules and he submits that the judge cannot have intended her observations to be read as tantamount to a conclusion that the Appellant is entitled to humanitarian protection.
3. Mr Lewis suggests that it is neither possible nor permissible to elevate these observations into a freestanding primary conclusion by the judge that the Appellant was entitled to humanitarian protection pursuant to paragraph 339C of the Immigration Rules when nowhere did the judge refer to the basis of allowing the appeal being that of humanitarian protection.
4. I agree with Mr Lewis that the judge does not appear to have addressed her mind directly, or at any rate expressly, to the legal tests relevant to the question whether humanitarian protection should be granted. Mr Lewis may well therefore be right in also submitting that the judge may not have intended her determination to be read in the manner contended for by the Appellant. However, paragraph 339C of the Immigration Rules states that a person "will" (my underlining) be granted humanitarian protection if the Secretary of State is satisfied that substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering inhuman or degrading treatment.
5. In that regard, whilst I agree with Mr Lewis that the Secretary of State was required to grant a form of leave that accorded with the substantive decision of the judge properly interpreted, it also seems to me that the Secretary of State must also reach a conclusion which accords with the substance of the decision of the tribunal judge.
6. In my view it is inescapable that in formulating her conclusions on the manner in which and the extent to which Article 3 and 8 were engaged, the judge identified factors which satisfied the criteria for humanitarian protection. I have in mind particularly the unequivocal findings at paragraphs 64, 65, 117 and 118 of her determination.
7. Those are to my mind the critical paragraphs rather than the inelegantly expressed paragraph 127. However, I note that the most easily comprehensible part of that paragraph is the judge's clearly expressed introductory conclusion:

40.

"In all the circumstances looked at in the round I find that this appeal falls to be determined in the appellant's favour and on the basis that his return would reach the high threshold of inhuman treatment unconditionally prohibited by Article 3..."

1. I agree that the somewhat clumsily expressed reasons thereafter introduced by the double use of the word "because" do not include the risk of inhuman or degrading treatment but in that respect they are an inadequate summary of the judge's findings set out in the preceding paragraph.
2. The Deputy Judge reached a different view. At paragraphs 4 and 5 of his short judgment he said this:

"4.However, the decision of the First Tier Tribunal concludes on Article 3 in paragraph 127, making absolutely clear that the high threshold of inhuman treatment engaged under Article 3 is wholly occasioned by his mental health condition, particularly the post traumatic stress disorder, and it is because of that, not only is he at risk of suicide if he does not have the proper care and support, but also is in danger of the ill treatment to which he refers if he is returned to Afghanistan.

5. In my judgment, there is no arguable case here that the Secretary of State was not in those circumstances entitled to treat this as a case where asylum was sought under Article 3 on the basis of the claimant's medical condition, and indeed to isolate the passages to which Mr Walsh refers in the decision from the decision as a whole, and in particular the caveat at paragraph 114, where the tribunal makes that absolutely clear that it is on the basis of his medical condition that the decision on Article 3 and 8 is reached would be taking an artificial and unreasonable approach to the findings of the tribunal."

1. The reference to paragraph 114 is I think a transcribing error. I suspect the Deputy Judge referred to paragraph 140. It is of course unfortunate that in that paragraph too there is an apparent error, as I have already remarked. However, turning to the substance, in my judgment the Deputy Judge took too narrow a view of the findings of the FTTJ. I do not consider that it is a fair reading of the judge's findings that the Appellant only faced the risk of ill treatment if he did not receive proper care and support in Afghanistan. In my judgment, a fair reading of the findings is that it is the very requirement for such care and support which leads to the risk of ill treatment.
2. But in any event the Deputy Judge, in my respectful view, missed the point. The Appellant does not simply claim that the healthcare available to him in the UK is not available in Afghanistan. Rather he submits that his condition, which generates the need for that care, of itself gives rise to a risk of ill treatment in Afghanistan. He is not complaining about the consequences of the lack of treatment in Afghanistan but about the consequences to which his condition gives rise in Afghanistan, that is to say the risk of inhuman or degrading treatment.
3. Whether it is right to regard those consequences as the Deputy Judge seems to have done as "wholly occasioned by his mental health condition" I rather doubt. I would have thought that the consequences are occasioned by a combination of his mental health condition and the societal attitudes thereto prevalent in Afghanistan. But I do not think it matters. It is a complete misreading of the regulatory and statutory materials and indeed of the Secretary of State's own policy to think that the risk of inhuman or degrading treatment does not generate an entitlement to humanitarian protection if caused by a medical condition. On the contrary, it is the risk of inhuman or degrading treatment which is capable of lifting those cases out of the category of mere "medical cases" into the category attracting, exceptionally, humanitarian protection.

1. Finally, it is suggested that the appropriate remedy here was for the Appellant to have appealed against the determination of the FTTJ. I suppose that in principle the Appellant could have sought permission to appeal on the basis that the FTTJ had erred in law in failing on the basis of facts found to have allowed the appeal on the basis of humanitarian protection or under the Immigration Rules.
2. However, to defeat the Appellant's challenge to the decision of the Secretary of State on that ground would be a triumph of form over substance. In my judgment, the Secretary of State was here obliged to acknowledge the reality of the situation and to grant leave to remain in a manner consistent with the judge's findings.
3. For all those reasons therefore, I would allow the appeal and invite counsel to address us on the appropriate form of order.
4. **LORD JUSTICE LEWISON**: I agree.
5. **LORD JUSTICE VOS**: I also agree.