



IAC-AH-CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04530/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 26 June 2015**

**Decision & Reasons Promulgated
On 13 June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**AZ (AFGHANISTAN)
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss G Brown, Counsel instructed by Kasar & Co Solicitors
For the Respondent: Miss Alex Everett, Specialist Appeals Team

DECISION AND REASONS

1. Both parties appeal to the Upper Tribunal from the decision of the First-tier Tribunal (Judge Boyd sitting at Hatton Cross on 7 August 2014) dismissing the appellant's appeal on international protection grounds against the decision to refuse to grant him further leave to remain, and to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006, but allowing his appeal on Article 8 grounds outside the Rules. The First-tier Tribunal made an anonymity direction in the appellant's favour, presumably because he was pursuing an

international protection claim, and on that ground I consider that the appellant should be accorded anonymity for these proceedings in the Upper Tribunal.

2. Although the Secretary of State appealed first, and the appellant then cross-appealed, it is convenient to maintain the same designation of the parties as was assigned to them in the First-tier Tribunal.

The Respondent's Appeal

3. The respondent appealed against the decision under Article 8 on the ground that the judge had erred in law in misapplying the guidance outlined in **Gulshan [2013] UKUT 00640** where the Upper Tribunal held that after applying the requirements of the Rules, "only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them".
4. The judge had incorrectly found the appellant's circumstances had been exceptional, and had applied too low a threshold in finding that his circumstances were compelling. He failed to take into account the fact that his circumstances were sufficiently recognised under the Immigration Rules. He was a single adult male with no dependants or family ties to the UK, and so his circumstances were not compelling. The judge materially erred in law by allowing his appeal on Article 8 grounds.
5. Permission to appeal was granted on 23 September 2014.

The Appellant's Cross-Appeal

6. In the meantime the appellant cross-appealed, and on 18 November 2014 Designated First-tier Tribunal Judge Murray gave his reasons for refusing permission:
 - "3. The grounds of application state the judge failed to use the **Devaseelan** principle as the appellant's brother's determination was not before the judge and it cannot be right to say that his brother is not at risk on return neither will the appellant be at risk, especially when the determination was not provided. They state the judge was wrong in his credibility findings and the appellant was a minor when he made his first appeal and the judge made no reference to the appellant's responses to the points raised in the refusal letter. They state the judge was wrong in his findings relating to the appellant's age and he gave no reasons for finding the appellant's claimed age was incorrect. They state the judge had not considered the objective evidence relating to the Taliban which supports the appellant's account. They state the judge erred in his findings of internal relocation, giving no reasons for finding it would not be unduly harsh for the appellant to relocate in Afghanistan. They state the judge erred in the way he dealt with paragraph 276ADE of the Rules as the appellant's evidence is that he has no ties to Afghanistan.
 4. Both parties must have been prepared to go ahead with the hearing without the appellant's brother's determination being before the judge. This is not an error. The judge makes some reference to his brother's evidence and the facts of his case at paragraph 37. Based on what was before him he refers to inconsistency of

the appellant's and his brother's evidence and the last sentence of that paragraph is a general finding. The judge refers to the appellant's age and to the age assessment being Merton compliant. It is clear that he was aware that the appellant was a minor when he came to the UK. He gives proper reasons to the appellant not being at risk on return to Afghanistan for a Convention reason, at paragraphs 23 to 38. At paragraph 4 he refers to all the evidence before him and nothing in the determination makes me believe he did not consider all of this evidence, including the objective evidence when he made his decision. The judge's findings on internal relocation are supported by the country guidance cases in the objective evidence. At paragraph 43 the judge deals adequately with paragraph 276ADE and gives reasons for finding its terms cannot be met. He then deals with public interest and Article 8, finding there is something exceptional in this claim in allowing the human rights appeal.

5. There is no arguable error of law in the judge's determination based on the matters raised in the grounds of application."
7. The appellant made a renewed application for permission to appeal to the Upper Tribunal, on 11 March 2015 Upper Tribunal Judge McGeachy granted permission to appeal for the following reasons:
 - "1. ... The appellant now appeals against the decision to dismiss his appeal on asylum grounds on the basis that the judge relied on evidence that was not before him: namely the evidence in the appellant's brother's appeal which had been dismissed.
 2. I considered the grounds of appeal are arguable."

The Background

8. The appellant is a national of Afghanistan, who has an assessed date of birth of 5 November 1995. He is recorded as having been encountered by the police at Dover on 6 January 2010, and to have been transferred on the same day into the care of Social Services. On 19 January 2010 he made a statement in support of his asylum claim. He came from Helmand Province. His father told him before he died that his date of birth was 5 November 1997. Three years ago his father had an office in Lashkagah with his business partner H. His older brother also worked with them. They had their own business. It was a money exchange and money transfer business. His father dealt with money transfers, and H dealt with money exchange. The Taliban visited his father and requested him to transfer their money to Dubai. His father refused and the next day the Taliban came to their house. They held a gun to his brother's head, and took his father away. They said that if his brother did not take care of the money transfer, they would kill their father. His brother was advised by H to report this matter to the police. He did so. The police commander said he would sort it out and told his brother not to worry. Next evening the Taliban brought his father and the money to their house and said that if his brother sent the money to Dubai, they would let his father go. This visit by the Taliban coincided with the police going to the house to make their enquiries (pursuant to the brother's complaint). The police and the Taliban started fighting each other. The appellant ran away in one direction, and his brother ran away in another direction. The appellant

went to the house of H. He stayed there for three nights and then went to visit his brother who was staying with a man whom they called uncle, and whose name was K.

9. H said that his father had died in the fighting as he had been hit in the crossfire. He also said that the Taliban thought that his brother had alerted the police, and so the Taliban blamed his brother for the police being there. He said that both he and his brother endangered the Taliban and they would need to leave the country. H had a better relationship with the Taliban than the appellant's family, so the Taliban did not blame H, who arranged for his brother to leave the country straightaway. The agent told his brother that the appellant would follow later by air as he was too young to travel overland. His brother was now in the UK, but the appellant did not know where he was.
10. The appellant stayed with H for the next six months. His house was about five to ten houses away from the appellant's family home. After about six months the Taliban came looking for him. H's wife hid him in the baking oven. The Taliban told H that if they found the appellant hiding in the house, they would kill him. The police also thought that the brother had brought them into a trap, and so the police were also looking for him and his brother. H decided to move to Griskh village, and he said that the appellant should pretend to be his son. They stayed in Griskh village for about ten months but they then left because they believed somebody had reported him to the Taliban saying that he was not H's son. The Taliban came to search the house in Griskh, but the appellant was hiding in the basement amongst the wood, and he was not found by the Taliban.
11. H then moved him to Musa Qala for about six months. While there, the Taliban came to look for him again. H's wife took him out of the backdoor, and he hid in a neighbour's house. So again the Taliban did not find him.
12. Finally, H moved to Lashkagar for about ten months, but he then said the appellant had to leave as he was putting his whole family in danger by staying with him. He was fed up lying for the appellant to both the Taliban and the police. The police contacted H many times and visited his business, accusing him of hiding the appellant and telling him to hand the appellant over to them. But the police never came to H's homes in the various places where they stayed.
13. The appellant attended a substantive asylum interview for children in February 2010, and an age assessment report was produced by Kent Social Services in March 2010. The report ran to twenty pages. The conclusion of the report was that A's emotional, social and physical presentation (as commented upon by, among others, Appledore Support Staff Group and the person who conducted a MCAS Educational Assessment) was consistent with a young person possibly in his 15th or 16th year: "The assessing team decided to give [A] the benefit of the doubt and assessed him as being in his 14th year." The appellant was thus assessed to have a date of birth of 5 November 1995.

14. On 30 June 2010 the Secretary of State gave her reasons for refusing to recognise him as a refugee. His brother (B) claimed asylum in the UK on 26 November 2006, and his claim was refused on 19 January 2007. The asylum claim was recorded as being appeal rights exhausted on 9 April 2008. Examining that part of the appellant's claim that alleged harassment by the Taliban, and a fight between the Taliban and the police, consideration had been given to the evidence given by his brother. The appellant's evidence was that he had run out of the backdoor while his brother had run out of the front door. But his brother stated in his evidence that he ran out of the backdoor, and he did not know what had happened to the appellant. His brother said that when he fled the village, it was then bombed by a British plane. This was inconsistent with the appellant's evidence that he went to stay at the house of H which was only ten houses away and was in the same village. The appellant had made no mention of the village being bombed.
15. The respondent refused to grant the appellant discretionary leave on the basis that he was free to return to Afghanistan with his adult brother.
16. The appellant's appeal came before Judge Vaudin d'Imecourt sitting at Taylor House 4 November 2010. At paragraph 7 of his subsequent decision, the judge noted that the appellant's older brother's asylum claim had been refused on the same basis as the appellant's claim and account. He found that the Secretary of State's decision was not in accordance with the law as the appellant's application had not been considered under the Home Office guidelines with regards to unaccompanied asylum seeking children in the United Kingdom. So the appeal was allowed on a limited basis, without consideration of the substantive claim.
17. The appellant's application for asylum was re-refused on 4 February 2011. The reasons given for rejecting the credibility of the core claim included the reasons given in the earlier refusal arising from an examination of his elder brother's claim. Home Office records showed that his brother was detained on 14 September 2010 and returned to Afghanistan on 5 October 2010. So it was accepted that his brother was now in Afghanistan.
18. The respondent said that consideration had been given to the evidence given by his brother at his appeal hearing heard on 19 March 2008. The brother's account was not accepted as credible by Immigration Judge Parker as his brother was unable to describe in any detail the workings in the exchange business. Furthermore, the judge did not accept his older brother's account that either the Taliban or drug barons would have found it necessary to bully an unwilling money exchanger into transferring money to Dubai for them. It was not accepted as being reasonably likely by the appeal judge, as it was more likely the money exchange office sympathetic to their cause could have been found amongst the twenty to 25 money exchanges, which according to his brother, operated in Helmond Province. Because of this finding, the appellant's account of his father's abduction was not accepted.
19. It was not accepted the Taliban or the police were looking for him. But even if this was accepted, in the year that he was living in Lashkar Gah he did not experience

any problems with the Taliban or the police. Furthermore, there was a sufficiency of protection in Kabul. As someone with no particular profile, he would not be at risk on return to Kabul.

20. The appellant was granted discretionary leave to remain as an unaccompanied asylum seeking minor to the age of 17½.
21. The appellant applied for further leave to remain before the expiry of his discretionary leave. He relied on a witness statement dated 23 April 2013 in which he sought to address the reasons given by the Secretary of State in the refusal letter of February 2011 for disbelieving his claim inter alia on the basis of a comparison of his account with that given by his brother. There was no material inconsistency. There were two backdoors to the house, and he ran out of one of them while his older brother ran out of the other backdoor. The reason why he had not mentioned the bombing was that he had not been asked the question in his asylum interview. There were bombardments of their village on a daily basis. The whole village would not have been destroyed as a result of one bomb from a British plane.
22. On 3 July 2014 the Secretary of State gave her reasons for refusing the appellant's application for further leave to remain. Consideration had been given as to whether the issues raised in his application for leave should be regarded as a fresh asylum claim. The contents of that application had been carefully examined and it had been decided not to treat his representations as a fresh asylum claim as he stated he wished to maintain his original claim for asylum and he had not adduced any further evidence in support of his application for further leave to remain that warranted further consideration.
23. He said in his statement that the age assessment conducted by Kent Social Services was unfair. But it was Home Office policy to accept the findings of a **Merton** compliant age assessment. He had provided no documentary evidence in support of his claimed date of birth as being 15 November 1997. Also his previous appeal against refusal of asylum was dealt with on the basis that it was accepted that he was an Afghan national with a date of birth of 5 November 1995.
24. His alleged fear of return was confined to certain areas of Afghanistan, namely Helmand Province. It was not accepted he was at risk in his home area, but if he felt uncomfortable in returning to his home village, then sufficiency of protection would be available to him a place of relocation such as Kabul.
25. It was noted from his previous appeal determination that his brother was an adult Afghan whose claim for asylum was refused on the same basis as his own claim. The supplementary statement raised concerns about him being forced to become a suicide bomber. He was now over 18 years old, and so he no longer fell into the age group usually targeted by the Taliban as a child recruit. Furthermore, background information indicated that many thousands of Afghans had already returned from abroad in circumstances very similar to his own, without incident. It was not

accepted he had demonstrated a well-founded fear of persecution from the Taliban, so he did not qualify for a grant of asylum for this reason.

26. The hearing of the appellant's appeal was scheduled for 7 August 2014. On 17 July 2014 the appellant's representatives wrote to the Home Office seeking disclosure of the determination and documents relating to his brother's asylum claim.
27. In the February 2010 letter, the respondent said that consideration had been given to the evidence given by his brother at his appeal hearing heard on 19 March 2008. The brother's account was not accepted as credible by Immigration Judge Parker as his brother was unable to describe in any detail the workings in the exchange business. Furthermore, the judge did not accept his older brother's account that either the Taliban or drug barons would have found it necessary to bully an unwilling money exchanger into transferring money to Dubai for them. It was not accepted as being reasonably likely by the appeal judge, as it was more likely the money exchange office sympathetic to their cause could have been found amongst the twenty to 25 money exchanges, which according to his brother, operated in Helmond Province. Because of this finding, the appellant's account of his father's abduction was not accepted.

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

28. At the hearing before Judge Boyd, the respondent was not represented. The appellant was represented by Mr Abdar of Kasar & Co Solicitors. In his skeleton argument, he argued that the respondent was debarred from relying on evidence which had not been disclosed to the appellant or to the Tribunal, namely the evidence given by the appellant's brother. The respondent was not permitted to give hearsay evidence from the appellant's brother. Accordingly, there was no evidence to find the appellant incredible. Also, the respondent was seeking to rely on the appellant's brother as a witness against the appellant. If that was the case, the appellant was entitled to test that evidence, perhaps even by cross-examining his brother as a hostile witness, which was not possible. For these reasons, the Tribunal was requested to disregard the brother's purported evidence altogether. Alternatively, the Tribunal was requested to attach very little weight to it and, in doing so, also to consider the cogent evidence of the appellant and what he said of his brother's evidence.
29. He went on to submit the appellant had given a consistent, detailed and entirely plausible account of the events leading to him fleeing Afghanistan in search of safety.
30. In his subsequent decision, Judge Boyd said at paragraph [37]:

"I note it was argued that the majority of the credibility issues are in relation to a comparison with the appellant's brother's claim and the documents in relation thereto have not been lodged but the appellant's brother's claim has been considered and refused. There is no evidence other than that the factual matrix is the same for both appeals. It is clear from the account given by the appellant that his brother was in the same position, the only difference being that his brother was older and therefore left Afghanistan earlier. Consistency alone in decision making would note that in the

circumstances the appellant's brother with the same factual matrix was not at risk upon return so neither could it be said the appellant would be and this in relation to the alleged incidents within Afghanistan."

31. The judge went on at paragraph [38] to hold that he was not satisfied that the appellant was of any interest to the Taliban or to the police and to that extent he would not be at any risk upon return to Afghanistan. At paragraphs [39] and [40] he addressed the question of whether the appellant was entitled to humanitarian protection, or whether there was a real risk on return to Afghanistan of the appellant facing ill-treatment of such severity as to violate Articles 2 or 3 ECHR. He answered these questions in the negative, and proceeded to address the appellant's claim under Article 8 ECHR.
32. At paragraph [43], he held that, having left Afghanistan at the age of 14, the appellant still remembered the language, and much of the culture of that country. He was sent to the United Kingdom by Mr G and Mr K (whom he referred to as his uncle, although he was not a blood uncle). So there was no evidence to suggest that they would not still be there for him. His brother, although untraced, was still in Afghanistan. The appellant would be returned as an 18 or 19 year old man, and so it was not shown he had no ties within the meaning of sub-paragraph (vi) of paragraph 276ADE.
33. The judge went on to consider an Article 8 claim outside the Rules, and he set out the considerations in Section 117B which he needed to take into account. The judge continued:
 - "47. Applying the foregoing to the appellant's case, the appellant has been in the United Kingdom for over four and a half years, he has been schooled here and spoke excellent English at the hearing. He has finished schooling and is now working part-time in a restaurant and is looking for other employment. He is also studying at college. He does not appear to be totally financially independent but is heading towards that. He appears to have fully integrated into British society. He lived with foster parents for four years and gets on well with all of their family as evidenced by the witnesses before me in their statements. He did well at school as confirmed by his supervising social worker, Mr Gumbrell. His private life was also established while his immigration status was precarious as much of this was established after he was [given] discretionary leave by the respondent.
 48. Accordingly, therefore, I am not satisfied that the requirements of Section 117B referred to above adversely affect the appellant's Article 8 claim ...
 51. The appellant's circumstances are verging on the exceptional for someone who speaks very good English and is fully integrated into British society such as him and has clearly formed very close relationships with his foster family who, although not family in terms of Appendix FM, have in effect become familial substitutes for him. It would be a very severe wrench to take this young man out of society with which he has integrated and away from the people he now knows as his family to return him to Afghanistan. Although not exceptional, his circumstances are certainly compelling and compassionate.

52. Whilst I note the terms of Section 117B in relation to public interest that the maintenance of effective immigration control is in the public interest, his circumstances do establish a good arguable case, in my opinion, outside the Rules such that his removal would be disproportionate and therefore a breach of Article 8 of the ECHR.”

The Error of Law Hearing

34. At the hearing before me, Miss Brown developed the arguments which she had advanced in the application for permission to appeal. She stated that the appellant did not know why his brother’s case was not believed, and his brother’s determination should have been in the Home Office bundle for the hearing before the First-tier Tribunal. She produced a letter from her instructing solicitors that had been sent to the Home Office a few weeks before the hearing. She agreed that the appellant’s representative at the hearing had not sought an adjournment on the ground that the documents requested in the letter had not been disclosed. But she submitted that this did not make any difference.
35. On behalf of the Secretary of State, Miss Everett relied on the Rule 24 response settled by her colleague, Karen Pal, on 14 April 2015:
- “3. The judge has made adequate findings of fact in respect of the appellant’s well-founded fear of persecution as set out in paragraphs 26 to 38. The judge may have referred to the appellant’s brother’s claim however the judge considered it independently of his brothers.
 4. The judge has also considered risk on return to Afghanistan as set out at paragraphs 39 to 40 of the determination.
 5. The judge has also considered whether the appellant meets the requirements of 276ADE. The judge adequately deals with this at paragraph 43 of the determination.”
36. Miss Brown submitted that, following **YM Uganda**, the judge should have been applying the latest version of Rule 276ADE, rather than the version of the Rules that was in force at the date of decision. Miss Everett submitted that arguably the new version of the Rules imposed a higher test, and any error by the judge was therefore not material.
37. In regard to the Secretary of State’s error of law challenge, Miss Everett submitted that paragraph [47] was the key paragraph, and that the judge had clearly erred in finding that the appellant’s private life was not established while his immigration status was precarious, in the light of **AM (Malawi)**. There were also more nuanced criticisms that could be made of the judge’s proportionality assessment, but this error alone was sufficient to vitiate the decision. On the facts there was only one possible outcome, which was that the Article 8 claim outside the Rules should be dismissed.
38. In reply, Miss Brown submitted that the Secretary of State should not be allowed to rely on the **AM (Malawi)** point as it had not been raised in the application for permission to appeal. Alternatively, there was no material error. The judge had

given adequate reasons for finding in the appellant's favour outside the Rules. The judge had applied the correct legal test in paragraphs [44] and [49], referring to Gulshan, and the grounds of appeal amounted to no more than an expression of disagreement with findings on Article 8 which were reasonably open to the judge.

Discussion

39. It is convenient to deal first with the error of law challenges mounted by the appellant. The strongest ground of challenge is that identified by Upper Tribunal Judge McGeachy when granting permission to appeal on a renewed application. This is ground 1, "failure to apply the case law of Devaseelan".
40. The central premise which underlies ground 1 is that Judge Boyd did not have any evidence before him (a) as to the brother's claim and (b) as the findings made by Judge Parker when dismissing brother B's appeal against the decision by the respondent to reject his claim. For Miss Brown submits in paragraph 14 of her permission application that Judge Boyd did not have "any evidence" in relation to the appellant's brother's claim/appeal before him.
41. This is only half true. The judge did not have the Reasons for Refusal Letter directed to B, nor did he have a copy of Judge Parker's determination dismissing B's appeal. But the judge had evidence of the brother's claim, and the outcome of the brother's appeal, from three different sources.
42. The appellant's brother was an inextricable part of the appellant's narrative, and it was not disputed before Judge Boyd, or before me, that B had advanced the same core claim (with minor variations on points of detail) as the appellant had done. Another important source was Judge Vaudin d'Imecourt, who had made an unappealed finding of fact in his decision of 2010 that the older brother's asylum claim had been refused "on the same basis as the appellant's claim and account", and that, upon exhaustion of the brother's rights of appeal, the brother had been removed from the United Kingdom to Afghanistan on or about 5 October 2010. The third source of evidence that Judge Boyd was able to draw upon was the evidence contained in the letter of February 2011, which not only reiterated the variations in the brother's account relied on as demonstrating that the appellant and his brother contradicted each other on some aspects of the core claim, but also some of the reasons given by Judge Parker for finding that the core claim was not credible.
43. The fact that the account of what the brother said, and the account of what Judge Parker found, is embedded in the refusal letter of February 2011 does not mean that the account has no probative value; or that on procedural fairness grounds the evidence should have been excluded. Clearly the best evidence of what the brother had said, and what Judge Parker had found, was to be found in Judge Parker's determination. But the same representatives had been acting for the appellant since the outset of his application for leave to remain, and the initial strategy which was adopted was an acceptance of the reliability of the account of the brother's claim given in the refusal letter of February 2011. Hence, a witness statement was taken from the appellant in support of the application for leave to remain in which he

sought to address the alleged inconsistencies between his account and his brother's account.

44. Accordingly, the request on 17 July represented a significant and inexcusably late change of strategy. For the first time the same representatives demanded production of the determination of Judge Parker, and other documents evidencing the brother's claim, on the ground that it was procedurally unfair for the appeal hearing to go ahead without such disclosure.
45. Whilst the disclosure request was a proper one to make by representatives exercising due diligence, it ought to have been made much sooner when the appellant's representatives were considering how best to take forward the asylum claim that had been rejected in February 2011 on the basis of, inter alia, the content and outcome of the older brother's claim.
46. In any event, Judge Boyd was not faced with the difficult decision of whether to grant an adjournment for the production of the determination of Judge Parker in response to a late request for its production. The appellant, through his representatives, was content to proceed with the hearing on the evidence as it stood.
47. There is a subtle, but important, inconsistency between the stance taken by Miss Brown in the application for permission, and the stance which she took before me in oral argument. In the application for permission, Miss Brown did not submit that the judge should have disregarded the evidence pertaining to the brother's claim altogether. It was argued that little weight should have been given to the respondent's reliance on the brother's evidence, and that, as Judge Parker's determination was not before the Tribunal, it should have been treated as only the starting point for any decision on the appellant's appeal, if in fact the factual matrix was identical). But in oral argument, she took the absolutist line that the judge should have disregarded altogether the evidence pertaining to the brother's claim and its outcome.
48. However, as indicated earlier in this error of law ruling, the absolutist stance only has traction if the underlying central premise is correct, which is that Judge Boyd did not have "any evidence" before him in relation to the appellant's brother's claim/appeal. This premise is wholly fallacious, for the reasons given above.
49. Accordingly, there was no procedural unfairness in the judge taking into account what was said in the refusal letter of February 2011 about the details of the brother's claim, or what was said about the findings made by Judge Parker. As Judge Boyd said at paragraph [26] of his decision, although the brother's account had not been "produced", there was no reason to doubt that the brother's account had not been accurately reported.
50. As the core claim of the brother was the same as the core claim of the appellant, and each of them was an inextricable part of the other brother's narrative, it was open to Judge Boyd to treat the rejection of the older brother's claim, and the dismissals of his appeal, as being significant and persuasive – both on the question of past persecution

and on the question of future risk. This is what the judge was indicating when he referred to "consistency in decision making" on a claim with the same factual matrix. He was not saying that the outcome of the brother's appeal was conclusive of the issues which he had to decide.

51. As submitted in the Rule 24 response, the judge also addressed the appellant's core claim on its own merits. At paragraph [27], he found that it was unlikely that there were two backdoors, as alleged by the appellant by way of explanation of his older brother's account. He found there was an inconsistency between the appellant stating at one point the Taliban came in the evening, and stating at another point that they had come during the day time, rather than at night. At paragraph [28], the judge explained at some length why he did not find it credible that the police believed that the appellant's brother had set a deliberate trap for them because the Taliban had arrived earlier than planned. On the contrary, the judge found, the police, who were lying in wait for the Taliban, would have seen that the appellant's father had been brought back to the property as a hostage to the Taliban, which in itself corroborated the account they had been given. Accordingly, the judge concluded at paragraph [29], the appellant had not shown to the lower standard of proof that the authorities were looking for him and his brother. At paragraph [30], the judge went on to observe that the alleged incident with the police and the Taliban occurred around September 2006, according to the appellant. On the appellant's account of his date of birth, he would only have been eight years old at the time. The judge found it extremely unlikely that either the Taliban or the police would have any interest in an 8 year old boy or (accepting the social worker's assessment of his age) that they would have any interest in a 10 year old boy.
52. Accordingly, ground 1 is not made out. The remaining grounds of appeal (grounds 2 to 6) were not singled out by Judge McGeachy as having intrinsic merit, and I find that they have no merit for the reasons succinctly stated by Designated Judge Murray.
53. I only find it necessary to elaborate on my reasons for rejecting ground 3 (failure to give reasons in assessing the appellant's age), as the appellant's true age was and is of pivotal importance to the question of risk on return, and in particular whether the appellant, unlike his older brother, could claim refugee status on **LQ** grounds.
54. The judge's reasoning on the question of the appellant's true age is very brief. At paragraph [24] he finds that a **Merton** compliant age assessment was carried out by Kent Social Services which found that his date of birth was 11 November 1995, making him now 18 years old, and, despite the appellant's insistence to the contrary, the judge pronounced himself satisfied on the evidence before him that the date of birth of 11 November 1995 was the more likely date.
55. As submitted by Miss Brown, the judge has not in terms engaged with the extensive submissions made in the skeleton argument that the age assessment was not **Merton** compliant, and that the judge should accept the appellant's "cogent evidence of his age". This alleged cogent evidence consisted of what the appellant claimed he had

been told by his father, as confirmed by his brother, and the fact that the appellant's foster parents along with other witnesses had confirmed that at the time of his entry to the UK, the appellant, "appeared, for all intents and purposes, as a minor of the claimed age or at least as being younger than 14, as assessed by Kent Social Services."

56. The weaker the case that is being advanced, the less that is required by way of reasoning by the judicial decision maker in disposing of that case. The grounds advanced for alleging that the age assessment was **Merton** non-compliant are simply untrue. The central criticism made in the skeleton argument is that the social workers did not take into account the history the appellant had given or at least make an assessment of his credibility. But the social workers explained in their report the difficulties they faced in this regard. At page 13 of the report, they said:
- "It was decided that given [A's] apparent confused demeanour, no further clarification or explanation for these moves [or] the conflicting information regarding the father's death, or [A's] age when his father died, was sought. [A] was not clear about why, or when, he left Afghanistan."
57. At page 9 of the report, it is recorded that A told social workers that his mother had died from an illness six years ago when he was aged 8 years of age. So on this basis A was now 14. The authors took into account that A said he knew that his correct date of birth was 5 November 1997, because his father had told him, but equally they took into account the fact that A had no documentation to support his stated age.
58. At page 10 of the report, seven different social workers are recorded as having reached the conclusion that, on the basis of his social presentation, the appellant was not as young as he claimed to be, but was at least in the 14 to 16 year age range. They were unanimous in this opinion.
59. For the reasons given elsewhere in Judge Boyd's decision, the appellant was not found to be a credible witness anymore than his brother was. So essentially the case for the appellant rested on the highly tendentious proposition that the judge should prefer the subjective evidence of lay people such as the appellant's foster carers over the evidence of professionals with experience and expertise in assessing the age of an asylum seeking child.
60. In the circumstances, I find the judge did not err in law in simply relying on the fact that when Social Services had conducted a thorough age assessment which was **Merton** compliant, and which had not been challenged by the solicitor who was acting for the appellant at the time (see page 2 of the age assessment report).

The Secretary of State's Appeal

61. The central criticism in the Secretary of State's appeal against the decision under Article 8 ECHR is that the judge conducted a flawed proportionality assessment. Although his approach to Section 117B is not singled out for particular criticism, I consider that the ground of appeal sufficiently broad to encompass the criticism of paragraph [37] advanced by Miss Everett at the hearing. The judge was clearly wrong to treat the appellant as not having built up his private life in the UK while his

status was precarious. The judge has failed to acknowledge that the appellant had no legitimate expectation of being able to extend his stay in the United Kingdom once the purpose for which he had been given discretionary leave to remain had been fulfilled, which was the protection of his interests as a minor. Now that he had reached the age of majority, little weight could be attached to the fact that he had resided in the United Kingdom for some four and a half years in circumstances where he only had discretionary leave to remain until he was aged 17½.

62. The specific error identified in the commissioned application is also made out. The judge muddled the intermediate or threshold test propounded in **Gulshan** with the higher test required for an Article 8 claim outside the Rules to actually succeed, after all relevant proportionality considerations had been taken into account.
63. Accordingly, I am satisfied that the judge's decision on Article 8 outside the Rules is vitiated by a material error of law, such that the decision should be set aside and remade.

The Remaking of the Decision under Article 8 ECHR

64. For the purpose of remaking the decision under Article 8 ECHR, I begin by considering whether the appellant can bring himself within the new version of Rule 276ADE of the Rules. The evidence relied upon before the First-tier Tribunal in support of the Article 8 claim was evidence heavily directed towards the life which the appellant had established here, rather than towards the obstacles which the appellant would face in reintegrating into life in Afghanistan on return. The Red Cross did not have sufficient information to be able to trace the appellant's brother in Kabul, which was the city to which he was removed. It does not follow that the appellant will not be able to find his brother in Kabul, but it is not essential that he should be able to do so. Prima facie, the appellant is sufficiently mature to establish himself in Kabul without the assistance of his brother or another close family member. The skills and qualifications which the appellant has acquired in the United Kingdom will enhance his employability or assist him in establishing himself in business. So I do not consider that the appellant can bring himself within Rule 276ADE.
65. Turning to an Article 8 claim outside the Rules, I accept that questions 1 and 2 of the **Razgar** test should be answered in the appellant's favour in respect of the establishment of private life in the United Kingdom. The appellant does not enjoy family life for the purposes of Article 8. He left the care of his foster parents at the end of June 2014, and has been living in independent accommodation ever since. While he remains part of the family in a loose sense, he does not enjoy family life with his foster parents and siblings for the purposes of Article 8.
66. I answer questions 3 and 4 of the **Razgar** test in the respondent's favour, and on the crucial question of proportionality I take into account the public interest considerations set out in Section 117B of the 2002 Act. As illuminated by the Upper Tribunal in **AM (Malawi)**, the considerations in the appellant's favour ultimately carry less weight than the public interest considerations which militate in favour of

his removal. On analysis, there are no compelling circumstances which tip the scales in the appellant's favour. Now that he has reached the age of majority, he has no legitimate expectation of being able to remain in the United Kingdom unless he can qualify for further leave to remain under a specific Immigration Rule, such as a Tier 4 (Student) Migrant. In common with other failed asylum seekers who have reached their age of majority, it is governmental policy as expressed inter alia in primary legislation that he should carry on his private life in his country of origin. The fact that he has integrated particularly well, or that he is particularly fluent in English, or that he has laudable aspirations, such as looking for a job at Barnardos because he wants to help other young people, does not, and indeed cannot in the light of established jurisprudence, tip the scales in his favour. The decision appealed against is proportionate to the legitimate public end sought to be achieved, namely the maintenance of firm and effective immigration controls.

Notice of Decision

The decision of the First-tier Tribunal dismissing the appellant's appeal on asylum, humanitarian protection and human rights (Articles 2 and 3) grounds did not contain an error of law, and accordingly the decision stands. However the First-tier Tribunal's decision to allow the claim under Article 8 ECHR did contain an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal on Article 8 grounds is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Monson