



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

Appeal Number: AA/08228/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 1 July and 3 September 2015**

**Decision & Reasons Promulgated  
On 17 September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**A M (AFGHANISTAN)  
(ANONYMITY DIRECTION MADE)**

Respondent/Claimant

**Representation:**

For the Appellant:

Mr S Kandola (01.07.15) and Mr P. Duffy  
(03.09.15), Specialist Appeals Team

For the Respondent/Claimant: Mr Iain Palmer, Counsel instructed by Barnes  
Harrild & Dyer Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals to the Upper Tribunal from the decision of the First-tier Tribunal allowing the claimant's appeal against the decision to remove him as an illegal entrant, on the ground that he has a well-founded fear of being persecuted in Kabul, or he cannot reasonably be expected to relocate to Kabul having regard to the general circumstances prevailing in Kabul and his personal circumstances. The First-tier Tribunal made an anonymity direction, and I consider that it is appropriate that the

claimant should continue to be accorded anonymity for these proceedings in the Upper Tribunal.

### **The Grant of Permission to Appeal**

2. First-tier Tribunal Judge P J G White granted the Secretary of State permission to appeal for the following reasons:
  1. The Respondent seeks permission to appeal against a decision of First-tier Tribunal Judge Foulkes-Jones who, in a Decision and Reasons promulgated on 19 February 2015 allowed the Appellant's appeal against the Respondent's decision to refuse to grant asylum.
  2. If necessary, I extend time for permission to appeal as I am satisfied that it is in the interests of justice to do so.
  3. Having had regard to the grounds for permission to appeal and the Decision and Reasons, I am satisfied that in reaching his decision the judge arguably made an error of law for the following reasons:-
    - a. It is arguable that the judge has given inadequate reasons for apparently departing from AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC) in regard to sufficiency of protection in Kabul.
    - b. It is arguable that the judge has given inadequate reasons for applying case law referable to children, when the Appellant was born on 14 February 1996 (paras 12-13, and 20).
    - c. It is arguable that in regard to the Appellant's health issues the judge has had inadequate regard to the cases of N and GS.

### **The Background**

3. The claimant's material history was accepted by the judge, and there is no challenge by the Secretary of State to this aspect of the judge's decision. The claimant was born on 14 February 1996 in Ghazni City. During the war between the Taliban and the Americans, the family home was bombed, killing his parents, his older brother, his older sister and his grandparents. He survived because he was in a different room, but he sustained injuries for which he was treated in hospital. After coming out of hospital, he was taken in by another older sister called S who lived with her husband and three children in the same area of Ghazni City[ - ].
4. His family all belonged to the Qazelbash ethnic group, which was part of the Muslim Shia sect. In [ - ], Shia Muslims were in a minority, and Sunni Muslims were part of the majority. As a young child, he faced discrimination because he was part of the Shia minority. Approximately a year and a half before he left Afghanistan, his father's paternal uncle was decapitated. His brother went to look for him and found his body. He saw that people were regularly questioned and stopped by the Taliban on the route that he was using, so he must have been targeted by the Taliban because he was Shia.

5. As a result of killings by the Taliban, a group called Engener Lutfallah was set up. This group started forcibly recruiting boys to fight the Taliban. The claimant was approached by some of his friends who were supporters of the group, and asked to join them. He told them that he did not want to join them. Around eight months after N was killed, he travelled to a district called Qarabag, and on the way back he was stopped by the Taliban. They spoke to him in Pashtu, and he was unable to respond to them clearly as his first language was Dari. They asked him whether he worked for the authorities, the police, the army or the Americans. The claimant lied, and said that he was part of the Sunni sect. He told his sister what had happened, and she thought that he would be targeted by the Taliban in the future, so it would be best for him to leave the country. She and her husband were also concerned that if he remained in the village, he would be targeted by Engener Lutfallah to fight against the Taliban.
6. He had flown from Afghanistan to Turkey, and he had then travelled through various countries and remained in Germany for some eleven months. He was fingerprinted in Germany and transferred to a camp. He was sent a letter to appear for an interview in Germany, but he did not attend because he wanted to go to the UK, as he had family residing there. He is recorded as having claimed asylum in the UK on 12 July 2013.
7. On 26 September 2014 the SSHD gave her reasons for refusing to recognise the claimant as a refugee, or as otherwise requiring international human rights protection. The Secretary of State took into account an interim psychological and development report from the Baobab Centre dated 11 March 2014. This report had been compiled by Kevin Perkins, a specialist in adult integrated, psychotherapy and child and adolescent integrative psychotherapy.
8. The claimant had provided an internally and consistent account regarding the rocket attack which hit his house when he was a child. It was accepted his house was destroyed and his family was killed during an air strike, and it was accepted that he had suffered some mental health problems as a result. It was accepted that he was a Shia, however it was not accepted he would actively practice his faith on a regular basis. It was also not accepted that he was continually targeted by the young boys in his village due to his religion. It was accepted that the bus back from Qarabagh had been stopped and he and other fellow passengers were questioned by the Taliban. It was not accepted he had any problems with Engener Lutfallah or that his friends had tried to get him to join them.
9. With regard to his claimed risk on return from the Taliban, it was considered that sufficiency of protection was available to him in Afghanistan and that internal relocation was a viable option. At paragraph [58], the respondent cited various passages from **AK Afghanistan CG [2012] UKUT 163 (IAC)**:

“Whilst when assessing a claim ... in which the respondent asserts that Kabul City would be a viable internal relocation alternative, it is necessary to

take into account (both in assessing safety and reasonableness) not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many IDPs [internally displaced persons] living there, these considerations will not in general make return to Kabul unsafe or unreasonable, although it would always be necessary to examine an applicant's individual circumstances." (Paragraph 243)

"We do not think the situation of UK returnees to Kabul (even limiting this category to persons whose home area is not Kabul) and IDPs in Kabul are wholly the same. As noted earlier ... there are return and reintegration packages available. It would be unwise to exaggerate the importance of such packages: they are chiefly designed to cushion against immediate travails on return. That said, by assisting the skills training enquiries related to employment opportunities, they clearly do help position returnees advantageously as compared to IDPs marooned in squatter settlements in outlying areas." (Paragraph 244)

10. The Secretary of State returned to the topic of an internal relocation at paragraph [79] onwards. At paragraph [80], she said:

"The legal principle of internal relocation, whether the Refugee Convention is considered to be engaged or not, was first considered in the case of **Robinson** where it was considered that internal relocation within any country can only be disregarded if it were to be unduly harsh."

This view was further strengthened in **Januzi [2006] UKHL 5**, where it was again established "For internal relocation to be regarded as unduly harsh any breach of fundamental rights must be established to be serious". In **AH [2007] UKHL 49** at paragraph 42 it stated that:

"Only proof that their lives on return would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum."

11. At paragraphs [115] following, the Secretary of State addressed a potential medical claim under either Articles 3 or 8 ECHR. He claimed to have ongoing psychological problems and that he had been under treatment. He claimed he was currently taking mirtazapine and lyricol tablets, which had been prescribed by his GP based on his psychologist's instructions. He had been receiving this treatment for six to seven months. He said he was also suffering from these psychological problems in Afghanistan, because they started during his childhood. His evidence was underpinned by documents from various NHS departments, and it was therefore accepted that he suffered from various mental health issues.
12. The Secretary of State went on to refer to the case law of **N v SSHD [2005] UKHL 31** and to **GS** and **EO (Article 3 - health cases) India [2012] UKUT 00397 (IAC)** where the headnote states:

"(i) The fact that life expectancy is dramatically shortened by withdrawal of medical treatment in the host state is in itself incapable of amounting to a highly exceptional case that engages the Article 3 duty.

- (ii) There are recognised departures from the high threshold approach in cases concerning children, discriminatory denial of treatment, absence of resources through civil war or similar human agency.
- (iii) Article 8 cases may also require a different approach and will do so where health questions arise in the context of obstacles of relocation.
- (iv) Any extension of principles set out in **N v SSHD [2005] UKHL 31** and **N v United Kingdom [2008] 47 EHRR 39** will be for the higher courts."

13. The Secretary of State cited information from the WHO updated in May 2011 to the effect that services and facilities had improved during recent years. She quoted the response from MedCOI dated 3 August 2012 on the topic of the availability of treatment for PTSD. The following were available:

- in and out patient treatment by a psychiatrist;
- in and out treatment by a psychologist or psychotherapist;
- individual and group psychotherapy, self help group therapy, family therapy, psychosocial counselling, narrative exposure therapy and cognitive behavioural therapy;
- these treatments were available at the following organisations: Mental Health Hospital at Serahi Allaudin, Kabul and Aliabad Hospital at Karte-Sachi, Kabul.

14. There was also an Afghanistane-Nawin psychosocial organisation in most districts of Kabul and an IPSO (International Psychosocial Organisation) near to Mili Buss Street, at Silo Road, Kabul.

15. At paragraph [120], the Secretary of State said that the background evidence above showed that medical treatment, including treatment for mental health issues was available in Afghanistan, and it was open to him to approach the relevant medical authorities there to seek any necessary treatment he might require either immediately on his return or at any time in the future. It was not accepted that he qualified for discretionary leave to remain on the basis of his medical problems.

16. On the topic of assisted voluntary return, reintegration support was available and this might be used for excess baggage, training and education, help in setting up a business, travel to find employment, housing, childcare, medical needs and mentoring opportunities. The aim of this assistance was to contribute to an improved and more sustainable return.

### **The Findings of the First-tier Tribunal Judge**

17. The judge addressed the question of internal relocation at paragraph 9(10) onwards. She began by setting out the UNHCR eligibility guidelines. She acknowledged that the claimant was now 18 years of age, but reminded herself that, following **KA (Afghanistan) [2012] EWCA Civ 1014**,

persecution was not respectful of birthdays, and apparent or assumed age was more important than chronological age. She also referred to **JS (former unaccompanied child - durable solution) Afghanistan [2013] UKUT 00568 (IAC)**, where the Upper Tribunal affirmed the principle that there is no bright line across which the risk to and the needs of a child suddenly disappear.

18. At paragraph 9(14), she cited the conclusions of Mr Perkins in his report at section E of the respondent's bundle. The report is undated, but it is apparent that the report was generated in the summer of 2014. The date of the referral to him was 11 March 2014, and twelve psychotherapy sessions had been attended by the claimant following this referral. The same report was referred to in the refusal decision of September 2014.
19. Mr Perkins' conclusions were that Mr M was a vulnerable young man. His experiences in Afghanistan had directly contributed to his unstable mental state. He continued to be in great need of psychotherapeutic social and educational support. Without these being in place, he would have great concerns about his mental state, in particular the risks posed by ongoing suicidal ideation. He had been receiving psychotherapy since 22 April 2014 on a weekly basis and, "this will continue on an open ended basis for the foreseeable future." He was taking mirtazapine at night, and pregabline daily. The judge continued:
  - "16. The Appellant has no extended family who can provide him with support in Kabul and there is no evidence that members of his ethnic group will be willing and able to provide genuine support. As indicated by UNHCR in the Eligibility Guidelines referred to above "... the presence of members of the same ethnic background as the applicant in the proposed area cannot itself be taken as evidence that the Appellant will benefit from meaningful support from such communities in the absence of specific pre-existing social relationships".
  17. The Appellant will have no access to pre-identified accommodation, sanitation or education and it would be difficult for him to secure work. Regarding healthcare as stated by Ms Majidi "in a 2013 survey, it was reported that more than half of surveyed youth reported the need for psychological counselling or help: 75% in Kabul wanted such counselling against 12% who had received any. In 2006, there were 50 trained Psychiatrists in Afghanistan and only 1% of doctors training involved mental health. The health sector is still poorly equipped to deal with mental health".
  18. The UNHCR Guidelines state that where the proposed area of relocation is an urban area where the Appellant has no access to pre-identified accommodation and livelihood options and where he cannot be expected to fall back on meaningful support networks, the Appellant would likely find himself in a situation comparable to other urban IDPs. IDPs are considered to be amongst the most vulnerable group in Afghanistan, many of whom are beyond the reach of humanitarian organisations; as well as available information to the effect that urban IDPs are more vulnerable than the non-displaced urban poor, as they are particularly affected by unemployment, limited access to adequate housing, limited access to water and sanitation and food insecurity.

19. Having regard to all the above and particularly the Appellant's mental health problems and lack of family support in Kabul I find that it would be unduly harsh for the Appellant to relocate to Kabul. He would also face the "stigma of contamination" and would find it difficult to access protection (see paragraphs 9(8) and 9(9) above). The Appellant therefore faces a real risk of persecution by reason of his religion / imputed religion / imputed political opinion.
20. In the absence of contact with his family the Appellant is an unaccompanied returnee and in the circumstances if returned to Afghanistan he would risk persecution as a result of being exploited and ill-treated LO (age: immutable characteristics) Afghanistan (2008) UKIAT 005, DS (Afghanistan) -v- SSHD (2011) EWCA Civ 305."
20. The judge went on to address an alternative claim under Article 3 ECHR. She said that for the reasons given in finding that he qualified for refugee status, she also found there would be a breach of the claimant's Article 3 rights if he was returned to Afghanistan. In addition, he would be at risk of recruitment by Engener Lutfallah in his home area.

### **The Error of Law Hearing**

21. At the hearing to decide whether an error of law was made out, Mr Palmer, who appeared for the claimant below, relied on the extensive Rule 24 response opposing the appeal. There was no merit in the submission that the judge failed to clearly explain the significance of the case law which she had cited, and the Secretary of State was clearly wrong to say that the case law was irrelevant because the claimant was an adult as opposed to being a minor. With regard to the application of **AK**, the Secretary of State's grounds amounted to no more than seeking to persuade the Tribunal that **AK** was authority for the general proposition that Kabul was neither unsafe, unreasonable and unduly harsh for any applicant, whatever their circumstances. With regard to the claimant's mental health, the evidence of his mental frailty was that one of the material issues before the judge when determining whether it would be safe and/or unduly harsh for the claimant to relocate to Kabul. The evidence relied upon in the refusal letter only went to show the existence of mental healthcare, not its adequacy. The country expert had addressed adequacy and availability of healthcare in her report, and the judge had referred to this at paragraph 9(17).

### **Reasons for finding an Error of Law**

22. The judge gave adequate reasons for finding that the claimant's account of his past experiences in Afghanistan was true, and for finding that he would be at risk on return to his home area. But the judge's finding on the viability of the internal relocation alternative was flawed, through a combination of (a) failing to engage with the relevant background evidence and country guidance relied on by the Secretary of State in the refusal letter and (b) inadequate reasoning.

23. Dealing first with the issue of safety in Kabul, the judge was right to have in mind the principle that there is no bright line across which the risk to and the needs of a child suddenly disappear. But at the time of the hearing before her, which was on 9<sup>th</sup> January 2015, some six months had elapsed since Mr Perkins had produced his interim report. The claimant's date of birth was not a crude estimate, but a precise date of birth which the claimant had given, and which had been accepted by the Secretary of State. So at the date of the hearing the claimant was very close to his 19<sup>th</sup> birthday. Of greater significance, in the context of his mental health condition, was that since the date of the interim report he had had a further six months' therapeutic treatment.
24. As a minor, he had displayed independence, resourcefulness and survival skills in refusing to be coerced by his peer group into fighting the Taliban, and in lying to the Taliban about his religious affiliation in order to protect himself from being identified by the Taliban as someone of adverse interest.
25. While Mr Perkins opined in his report that his symptom cluster severely impacted upon many areas of the claimant's day-to-day life, making it hard for him to engage socially, Mr Perkins explained that his difficulties were compounded by his poor English and inability both to comprehend the complexity of what was said to him and respond in ways which conveyed an understanding of what had been said and intention to respond satisfactorily. In Kabul, the claimant would be able to communicate in his first language, which is Dari. So the difficulties consequential upon his poor ability in English would not arise.
26. Given (a) the claimant's age at the date of the hearing, (b) the fact that his mental health difficulties were exacerbated by his inability to speak English, and (c) the fact that the claimant was likely to be considerably further down the road of recovery compared to where he was in the summer of 2014, the judge did not give adequate reasons for finding that the Appellant had a well-founded fear of persecution in Kabul on **LQ** grounds and/or on the basis that he was vulnerable to sexual exploitation or other ill-treatment consequential upon him appearing to be under the age of 18.
27. The lack of adequate reasoning on the claimant's safety in Kabul also undermines the judge's parallel finding that it would be unreasonable to expect him to relocate to Kabul, having regard inter alia to his youthful vulnerability.
28. There are two other errors. The first is a failure to engage with the background evidence relied on by the Secretary of State on the availability of treatment for PTSD in Kabul. If what the expert had said on this topic was broadly consistent with the background evidence cited by the Secretary of State, it would have been legitimate for the judge only to cite the evidence of the expert as underpinning the finding that the claimant would be unlikely to be able to access adequate treatment for PTSD in

Kabul. But as interpreted by the judge, there was a clear conflict between the thrust of the evidence of the expert and the thrust of the evidence relied on by the Secretary of State, and this was a conflict which the judge needed to resolve, or to give reasons as to why the evidence of the general survey quoted by the expert prevailed over the very specific evidence cited in the refusal decision as to where the claimant could go in Kabul to access psychiatric treatment or counselling for PTSD.

29. The survey did not purport to establish that half of surveyed youth in Kabul actually needed psychological counselling, still less that more than half actually suffered from PTSD. In short, it did not follow from the survey that someone such as the claimant who had been diagnosed by healthcare professionals as suffering from PTSD, and as requiring psychological counselling in consequence, would not be amongst the relatively small number of young adults who would be able to access adequate treatment in Kabul for PTSD.
30. Alternatively, if and insofar as it can be inferred that a substantial number of youthful IDPs in Kabul are suffering from PTSD, the judge does not explain why the claimant's life on return would be quite simply intolerable compared even to the problems and deprivations of so many of his fellow returnees/IDPs in Kabul.
31. In her report, the expert went on to say as follows at paragraph 17:  

“Young people in Afghanistan suffer from PTSD and little social support. M has the chance to get clinical support in the UK that he will never be able to access in Afghanistan. He started on such a programme and disrupting it, and returning him to Afghanistan, could increase his mental vulnerabilities.”
32. While this evidence might assist a claim under Article 8 ECHR, it is antithetical to the principle enunciated in **AH (Sudan)**.
33. Accordingly, for the reasons given above, the decision of the judge on internal relocation was vitiated by a material error of law, such that the decision should be set aside and remade.

### **Future Disposal**

34. Mr Kandola submitted that the decision should be remade on the evidence before the First-tier Tribunal. But Mr Palmer invited me to adjourn the remaking of the decision to a resumed hearing, at which the claimant could deploy up-to-date medical evidence and also up-to-date country of origin information which was not available at the time of the hearing at the First-tier Tribunal. That information included a warning posted on the internet on 28<sup>th</sup> February 2015 from the Afghan Minister for Refugees and Repatriation. He advised against forced returns of male returnees who originated from dangerous provinces. The claimant fell into this category. The announcement was included in the Rule 15(2A) bundle which the claimant's solicitors prepared for the error of law hearing.

35. In further discussion, Mr Kandola agreed that a resumed hearing would be appropriate. It was also agreed that the hearing would proceed by way of submissions only, on the evidence that was before the First-tier Tribunal and by reference to such additional documentary evidence as was filed by the claimant's solicitors in accordance with my directions (see below).

### **Directions for Remaking**

36. The judge's finding at paragraph 9(9) that the claimant would be at risk on return to his home would be preserved.
37. The issue to be addressed at the resumed hearing was the viability of the internal relocation alternative. The hearing would be submissions only, and evidence would be confined to the evidence that was before the First-tier Tribunal and the following additional evidence, provided that it was served on the Tribunal and the Specialist Appeals Team in a paginated and indexed bundle, no less than seven days before the resumed hearing.
38. The claimant's solicitors were permitted to adduce:
- (a) the evidence served for the error of law hearing pursuant to the Rule 15(2A) notice, which was contained in a supplementary bundle;
  - (b) up-to-date medical evidence relating to the claimant;
  - (c) up-to-date background evidence or country guidance appertaining to the viability of the claimant's relocation to Kabul.

### **The Resumed Hearing**

39. At the outset of the hearing, Mr Palmer renewed an application for an adjournment which had previously been refused by an Upper Tribunal Judge. Mr Palmer's principal reason for seeking an adjournment was to obtain a report from an expert on the current viability of internal relocation to Kabul. The subsidiary reason was that in **HN (Afghanistan) and Others**, case reference JR2772/2015, the Court of Appeal on 21 August 2015 had granted interim relief to a group of Afghan nationals whom the Secretary of State had been proposing to remove to Kabul on 26 August 2015. The order which was drawn to my attention provided inter alia as follows:

"2. The appellants' application for further interim relief is granted in the form of a stay on the removal from the UK until further order of the Court of Appeal for all other persons who are facing forced removal from the UK on the charter flight PVT081 to Kabul at 00:30 hours on Wednesday 26 August 2015 who were not habitually resident in the provinces of Baniya, Panjshir and Kabul."

40. Mr Tufan opposed the adjournment request, and after some further discussion I ruled in favour of the Secretary of State. There had been sufficient time since the promulgation of my error of law ruling for the claimant's representatives to obtain and adduce up-to-date background

evidence or country guidance appertaining to the viability of the claimant's relocation to Kabul (including, if pertinent, the evidence relied on in recent judicial review claims – see below), but nothing had been produced. So there was no reason to suppose that an expert could add anything to what had been said in the expert report relied on before the First-tier Tribunal.

41. As to the relief granted to the appellants in **HN and Others**, I did not consider that this impinged on the questions which I had to decide when remaking the decision under appeal. The background to the judicial review claim made by the appellants in **HN and Others** (and by other groups of failed asylum seekers whom the Secretary of State had sought to remove to Kabul on earlier flights) was the warning referred to in paragraph 34 above and the public announcement at the beginning of March 2015 as to the current stance of the Afghan Ministry of Migration and Repatriation Affairs. The Ministry announced that it had decided to reconsider the terms of the existing memorandums of understanding through diplomatic channels; and had requested partner countries, including the UK, to suspend the deportation of Afghan migrants until decided otherwise, where the Ministry could provide the necessary services to returning Afghans. Until that time, the Ministry could not accept responsibility regarding any Afghan deportee.
42. As elaborated in discussions around this time, which are in the public domain (see inter alia paragraph 34 above), the Minister's view was that only those who could be safely returned to their provinces of origin should be removed to Kabul. In his view, it was not reasonable to expect Kabul to be able to receive all those who were forcibly returned especially when they were from other provinces in Afghanistan which were not regarded as safe.
43. If this stance is still being maintained by the Afghan government, it calls into question the current practicality of removing Afghan nationals, such as AM, who do not originate from a "safe" province such as Kabul. But the decision in this appeal requires to be remade on the hypothesis that AM's removal is imminent and that the Afghan authorities would allow him to disembark.
44. I invited Mr Palmer to open his case. He referred me to his skeleton argument and to Mr Perkins' report dated 31 August 2015. While Mr Perkins fairly described an improving situation in the treatment for mental health conditions in Kabul at paragraphs 98 to 106 of his report, he opined that the claimant would be unlikely to have the capability of accessing care and that his return would precipitate a collapse in his mental health. He also opined that there was a real risk of suicide in the claimant should he be removed to Kabul. He continued to suffer from complex PTSD and he attended regular psychotherapy sessions at the Baobab Centre, and he continued to take prescribed medication. The claimant was clearly a vulnerable young person, and in his opinion he would be at risk of

inhuman and degrading treatment if returned to Kabul, and relocation there would therefore be unduly harsh.

45. In his oral submissions, Mr Palmer said that the claimant's vulnerability as a mentally ill person rather than his age was the key consideration. Mr Perkins, who was present in court, answered a query I raised about the claimant's current medication. He said that he was taking an antidepressant, and a drug to control the severe headaches which he suffered from as a result of his PTSD.

46. Mr Palmer acknowledged that at paragraph [224] of **AK**, the Tribunal had found that the situation of UK returnees to Kabul (even limiting this category to persons whose home area is not Kabul) and IDPs in Kabul was not wholly the same:

"As noted earlier (leaving to one side irregular migrant returnees), there are return and reintegration packages available."

47. On behalf of the Secretary of State, Mr Tufan referred me to **KH (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1354**. In that case, the appellant relied on a medical report prepared by Dr Bruce Owen, a consultant psychiatrist in whose care he had been. This report diagnosed him as suffering from a recurrent depressive disorder. The prognoses found in the report noted that the appellant had responded only minimally to medication. He was on medication at the time of fluoxetine and olanzapine. The medication had been adjusted since 2006. The lack of response said Dr Owen was in part the result of the resistant nature of his illness with additionally the result of ongoing stresses which he was under which were inhibiting any recovery. The stresses which he went on to identify centred upon the uncertainty surrounding the appellant's future and threat of removal, given that his appeal had failed. Dr Owen was concerned that relapses might occur in the event of future stress. He indicated the effect of stopping treatment would be adverse. He considered the impact of removal to Afghanistan and concluded that such removal would be a highly stressful experience. He anticipated that the high level of stress combined with the loss of support and treatment would lead to a high risk of relapses, depression and symptoms of PTSD. Should his depression deteriorate, clearly the risk of self-harm and indeed suicide would escalate, with the appellant being at particular risk of suicide in view of his previous self-harm. The appellant's current situation was that he was well-established in Newcastle with a good deal of medical and social service support which enabled him to live what appeared to be a relatively normal life.

48. The issue before the Court of Appeal was whether the Secretary of State was wrong to conclude that an Immigration Judge would necessarily dismiss an appeal advanced under Articles 3 and 8 of the ECHR. The judge at first instance found that the Secretary of State was entitled to conclude that any appeal on these grounds would be hopeless, having regard to the particularly high threshold in medical cases imposed by

**Razgar [2004] 2AC 368** and **N [2005] 2AC 296**. Giving the leading judgment of the court, Longmore LJ cited with approval the following passage in paragraph 42 of **N v the United Kingdom [2008] 47 EHRR 885**:

“The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling.”

49. At paragraph [33] Longmore LJ said:

“The truth is that the presence of mental illness among failed asylum seekers cannot really be regarded as exceptional. Sadly even asylum seekers with mental illness who have no families can hardly be regarded as very exceptional. If this case is to be regarded as a very exceptional one, there will inevitably be cases which will be distinguishable. A person with no family would have to be equated with a person who has a family but whose members are unwilling or unable to look after him or her. I cannot think that Baroness Hale had such a wide category in mind. In order for a case to be very exceptional it would have to be exceptional inside the class of person with mental illness without family support. Perhaps a very old or very young person would qualify but hardly an ordinary adult.”

50. Delivering a concurring judgment, Sedley LJ agreed that the Court of Appeal was compelled by authority to dismiss the appellant’s appeal. If the bare prospect of inhuman treatment were enough to secure the protection of Article 3, this appeal and many like it would succeed.
51. Mr Tufan submitted that AM’s case was not very exceptional, and it did not meet the threshold for relief on medical grounds under Article 3 or Article 8 ECHR. While it was not necessary for the claimant to establish a real risk of a breach of Article 3 in order to establish that his internal relocation to Kabul was unreasonable, the test of reasonableness was nonetheless a stringent one. He referred me to paragraph [212] of **AK**, where the Tribunal held there was a very significant level of support provided to the Afghan population by myriad aid and humanitarian agencies, domestic and international. By dint of high levels of international support in money and in kind, the economy was improving and the country’s GDP had nearly trebled in the past nine years. There was also no evidence of significant levels of destitution.
52. In reply, Mr Palmer distinguished **AK** and **KH** on the facts. In **AK**, the appellant was not vulnerable on account of his mental ill health. In **KH**, the appellant had not been found credible in his account of past persecution or future risk, and so the question of the viability of internal relocation to Kabul did not arise.

## **Discussion and Findings on Remaking**

53. In his interim report, which was before the First-tier Tribunal, Mr Perkins concluded that the claimant continued to be in great need of psychotherapeutic, social and educational support. Without these being in place, he would have great concerns about his mental state, in particular the risk posed by ongoing suicidal ideation.
54. Nonetheless, it does not appear to have been contended before the First-tier Tribunal that there was a real risk of the claimant committing suicide if he was removed to Kabul, and in any event this was not a finding made by the First-tier Tribunal Judge. It was also not a finding which Mr Palmer invites me to make in his written submissions, despite Mr Perkins' continuing concerns about the appellant's suicidal ideation. I do not in any event consider that the evidence is sufficiently cogent to establish such a real risk, even to the lower standard of proof. The claimant does not have a history of self-harm or actual suicide attempts, despite his removal being imminent following the decision in September 2014 by the Secretary of State to refuse to grant him asylum.
55. Mr Perkins says that the recently instituted requirement to report to the Home Office resulted in his suicidal thinking increasing to a level where he contemplated killing himself - only to be stopped by the thought that it was an act which if carried out would in faith terms mean he would be damned and sent to hell. Since the claimant reported suicidal ideation when he was first formally assessed by Mr Perkins in the spring of 2014, when no decision had yet been taken on his asylum claim, the claimant's reported response to the institution of a reporting requirement does not evince a deterioration in his mental state.
56. Mr Perkins concludes his latest report by underlining that the claimant survives in the UK, and sustains college attendance, only with the high level support provided by the Baobab Centre, including individual psychotherapy, a great deal of therapeutic support, regular home visits and extra casework. Nonetheless, Mr Perkins' account of the claimant's current social circumstances in the UK at the beginning of his report shows that AM is capable of living independently. He shares a house in West Croydon with two other young people who are seeking asylum. He attends John Ruskin College following a change from Croydon College. This has proved to be a positive change and has had the effect of making him feel more contained. He has developed good working relationships with his tutors and has made some academic progress. He has taken some steps to join a local refugee support group and to develop a small network of friends.
57. While the treatment available to the claimant in Kabul would not be as good or as comprehensive as that which he is able to access in the United Kingdom from the Baobab Centre, no new evidence has been brought forward which contradicts or casts doubt on the information on available treatment which is given in the refusal letter. As submitted by Mr Tufan, there is no reason to suppose that the claimant would not be able to access the medicines he requires to combat depression and suicidal

thoughts. Indeed it is Mr Perkins' understanding that mental health services in Afghanistan are predominantly medicalised, with what he describes as an overreliance on psychotropic medication such as antidepressants and benzodiazepines. Mr Perkins' concern is that psychosocial treatments and interventions have a lower profile in Afghanistan compared to the UK, which I accept is probably the case. But there are not substantial grounds for believing that the claimant will be unable to access therapy or psychosocial support in Kabul as asserted by the Secretary of State in the refusal letter, and there are also not substantial grounds for believing that the claimant's mental health condition will inhibit him from seeking out such treatment. The claimant engages fully with the treatment offered to him by the Baobab Centre, never missing his weekly therapy sessions - with the result that he has now attended 53 such sessions in the space of just over a year.

58. In conclusion, I find the claimant has not discharged the burden of proving that he faces a real risk of persecution or Article 3 harm as a result of his removal to Kabul, or that he cannot reasonably be expected to relocate to Kabul having regard to the general circumstances prevailing in Kabul and his personal circumstances.

### **Notice of Decision**

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The claimant's appeal against the decision to remove him as an illegal entrant is dismissed on all grounds raised.

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

Unless and until a Tribunal or court directs otherwise, the claimant 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 claimant and to the SSHD. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Monson

### **TO THE SECRETARY OF STATE** **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge Monson