



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01982/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 30 April 2019

Decision & Reasons Promulgated  
On 26 June 2019

Before

UPPER TRIBUNAL JUDGE RINTOUL  
DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

NA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D. Chirico, Counsel instructed by Wilsons Solicitors  
For the Respondent: Mr C. Avery, Home Office Presenting Officer

**Anonymity:**

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.

**DECISION AND REASONS**

1. By his decision promulgated on the 25 January 2019, Upper Tribunal Judge Rintoul set aside the decision of the First-tier Tribunal. A copy of that decision is attached as an annex to this decision. We now remake that decision.

### Introduction

2. The appellant is a citizen of Afghanistan against whom a deportation order was made in 2011 following his conviction in 2008 for committing a serious sexual offence. He is appealing against the decision of the respondent dated 19 October 2015 to refuse his protection and human rights claim.
3. The appellant's claim, in summary, is that:
  - (1) Even though he committed a serious crime, he should not be excluded from protection under Article 33(2) of the Refugee Convention (or Article 17 of the Qualification Directive in respect of subsidiary protection) because he is not a danger to the community in the UK;
  - (2) He is at risk of persecution in his home area of Afghanistan, arising from threats made by a former co-worker in the UK who returned to Afghanistan in or around 2011;
  - (3) The level of indiscriminate violence in his home area is such that the threshold of Article 15(c) of the Qualification Directive is met;
  - (4) Relocating to Kabul is not reasonable and would be unduly harsh;
  - (5) Removal from the UK would breach Article 3 ECHR because of the high risk he will commit suicide once returned to Afghanistan; and
  - (6) Removal from the UK would be contrary to Article 8 ECHR because the "very compelling circumstances" test in Section 117C (6) of the Nationality, Immigration and Asylum Act ("the 2002 Act") is met.

### Factual Background

4. The appellant is a citizen of Afghanistan born on 1 January 1984. His home area in Afghanistan is Jalalabad in Nangahar Province.
5. In 2001 he entered the UK and made an unsuccessful application for asylum. He was subsequently granted exceptional leave to remain and in 2005 was granted indefinite leave to remain.
6. In the summer of 2006, he met his wife (whom we shall refer to as NS). NS, who is originally from Somalia, became a British citizen in 2005.
7. In September 2006 the appellant committed the crime of having sex with a 15-year-old boy. He was subsequently (in July 2008) convicted at Snaresbrook Crown Court and given an indeterminate sentence, which, on appeal, was varied by the Court of

Appeal to five years' imprisonment. The trial judge's recommendation for deportation was upheld in the Court of Appeal where it was said that this was "the plainest case in which to make a recommendation for deportation".

8. In April 2007, the appellant entered into an Islamic marriage and began living with NS. The appellant and NS married in 2009 (whilst the appellant was in prison). They now have 3 children, aged 5, 3 and 6 months, all of whom are British citizens.
9. The appellant was released from prison in 2011. Since his release, he has not been arrested or convicted of any crimes. However, two incidents involving the police have occurred. In 2017 he slapped NS across her face because he heard her speaking to a male neighbour and in 2018 he placed a piece of paper with his phone number into the shopping basket of a woman at a supermarket. He was not arrested on either occasion.
10. NS suffers from mental health problems. The unchallenged opinion of consultant forensic psychiatrist Dr P Sen, as set out in a report dated 15 January 2019, is that NS has a combination of symptoms (including fluctuating moods and poor sleep) that satisfy the criteria of a diagnosis of emotionally unstable personality disorder of the borderline type; and that her most significant protective factor is the appellant. Dr Sen stated that without the appellant there is a risk of self-harm, which could seriously impact her ability to care for her children. This view is consistent with the unchallenged opinion of independent social worker Ms Pearce who, in a report dated 23 March 2019, expressed the view that separation from the appellant would likely lead to a significant deterioration in NS's mental health with the risk of the children needing to be placed in care.
11. The appellant also suffers from mental health problems. He has previously attempted suicide and is considered by his treating psychiatrist and two independent psychiatrists who prepared reports on his behalf to be at risk of committing suicide in the future. The appellant's mental health and suicide risk is discussed below.
12. The appellant's mother and siblings live in the UK. NS's family do not live in the UK.
13. The procedural background to this case is complex and it is not necessary to set out the full history as it is not material to the appeal. That said, in short, in 2011 the appellant appealed against the deportation decision. His appeal was dismissed, first in the First-tier Tribunal by First-tier Tribunal Judge Coates and then on remaking in the Upper Tribunal (Judge Coates' decision having been set aside) by Upper Tribunal Judge Goldstein in 2012. Following the commencement of judicial review proceeding, the respondent consented to reconsider further submissions by the appellant. This reconsideration is set out in the respondent's decision of 19 October 2015, which is now being appealed.
14. Before us, neither party placed any reliance upon (or even referred to) the decision of Judge Goldstein. We, too, have not found it necessary to refer to his decision in

detail, as although, consistent with the guidance in *Devaseelan* [2002] UKIAT 702 it is a starting point, nearly all of the facts and evidence that are material to our decision have arisen since Judge Goldstein's decision.

#### Witness Evidence and Findings of Fact

15. In addition to his own evidence, the appellant relied on the witness evidence of his wife, his elder brother (whom we shall refer to as KA), his mother, and two friends of his elder brother, whom we will refer to as NG and GA. The appellant, NS, KA and NG gave oral evidence at the hearing.
16. The factual background, as summarised above in paragraphs 4 - 12, is not in dispute.
17. There are, however, three areas where Mr Avery did not accept the evidence of the appellant and his witnesses.
18. The first area of contention is the appellant's relationship with his family and the extent to which they provide (or would, if asked, provide) him and NS with support and assistance. The appellant claims that he only sees his family infrequently (once every few months) and they are unable (or unwilling) to provide him and his family with significant assistance. The appellant's evidence was that, because of his mental health problems, it is difficult for him to travel; and because they are busy with their own lives (and his mother is unwell) his family visit only occasionally.
19. NS gave a similar account - of seeing the appellant's family only from time to time and not feeling able to ask (or rely on) them for day to day help.
20. KA's evidence was that he is busy with his own family and business, leaving little time to visit (or provide assistance to) the appellant and NS.
21. Mr Avery suggested that the witnesses were intentionally minimising the connection between the appellant and his family and he drew attention to the witness statement of the appellant's mother which indicated that she saw the appellant frequently. Mr Avery also maintained that if the visits by the appellant's family are infrequent, this is the choice of the appellant and his wife.
22. Having heard oral evidence from the appellant, NA and KA, we are satisfied that they have given a truthful and consistent account of the nature and extent of the relationship with the appellant's family. The statement of the appellant's mother was written several years ago (in May 2016) and circumstances (in particular in respect of the appellant's mental health) have changed since then. We find, therefore, that the appellant's wider family, although emotionally close to the appellant, see him and NA infrequently and do not provide any significant practical assistance as they are busy with their own lives (and in the case of the appellant's mother, elderly and unwell such that she is unable to provide meaningful assistance).

23. The second aspect of the factual evidence that was not accepted by Mr Avery was the statement by KA that if the appellant is deported he would not travel to Afghanistan to assist him. KA's explanation for this is that he has four children (ranging in age from 2 to 16), is busy with his family and business commitments, and Afghanistan is not safe. He acknowledged that he had recently travelled to Afghanistan to assist his mother-in-law with a medical emergency but maintained that he would not do the same for the appellant.
24. Mr Avery submitted that KA would be able to - and would - travel to Afghanistan to assist the appellant.
25. In our view, KA's significant family and business commitments in the UK mean that he would have only limited capacity to assist the appellant in Afghanistan and at the most he would make a brief trip to help the appellant in his first few weeks. He would not be in a position to provide the appellant with ongoing practical assistance in Afghanistan.
26. The third area of contention is the appellant's claim that a man with whom he previously worked and lived in the UK and who returned to Afghanistan in or around 2011 (referred to by him and his witnesses as "Habib") has been spreading rumours about his sexual offence and has threatened to either kill him or have him killed by the Taliban or other militia.
27. The basis for the appellant's claim is the evidence of KA, NG and GA about conversations they say they had with Habib. KA claims to have seen, and been threatened by, Habib in a bazaar in Jalalabad in 2012; and he stated that Habib said he wanted to kill the appellant because he had destroyed his life. KA also stated that he thought that Habib has links to the Taliban because of how he was dressed and who he was with.
28. GA, in his witness statement, described seeing Habib in 2014 in Peshawar. He stated that Habib said that if the appellant comes to Afghanistan he would kill him or have him killed.
29. NG stated in his statement that he saw Habib in the UK at KA's house and that Habib threatened to kill the appellant if he saw him again.
30. Although Mr Avery cross-examined KA about Habib, no reasons were advanced in his submissions as to why KA should not be believed. Rather than challenge the evidence, Mr Avery's contention (discussed below at paragraph 55) was that the evidence, even if accepted, was insufficient to establish the appellant's asylum claim.
31. Given that the witness evidence about Habib was consistent and not implausible - and that the challenge to it was very limited - we accept, and find as a fact, that in 2012 and 2014 a man in the appellant's home area of Afghanistan who knows about

his sexual offence threatened to spread rumours about the appellant and kill him (or take steps to have others kill or harm him).

### The Appellant's Mental Health and Suicide Risk

32. The appellant relies on:
  - (1) An expert report from Consultant Psychiatrist and General Practitioner Dr C Maloney, dated 19 April 2017;
  - (2) An expert report from Consultant Forensic Psychiatrist Dr P Sen, dated 22 January 2019; and
  - (3) A detailed letter from his treating Consultant Psychiatrist Dr H Rutherford, dated 24 April 2019.
33. The evidence of Dr Rutherford (who attended the hearing and gave oral evidence) is that the appellant, who is prescribed antidepressant medication (mirtazapine) and antipsychotic medication (risperidone and haloperidol), suffers from post-traumatic stress disorder and severe depression with psychotic symptoms (where he hears voices and has visual hallucinations).
34. She summarised a history of attempted suicide, comprising of four attempts as an inpatient in 2016 and an incident in February 2018 when the appellant purchased flammable liquid with the intent to set himself alight.
35. Her opinion, as expressed in her letter of 24 April 2019 and orally at the hearing, is that the appellant would deteriorate rapidly upon being removed from the UK and would be at risk of "completed suicide" in Afghanistan.
36. At the hearing, in response to questions from Mr Chirico, Dr Rutherford expressed the opinion that the appellant would find it challenging (and would be unlikely) to engage with any mental health provision available in Afghanistan because he would not have the support of his wife (or others) to encourage him to access it. She commented that the appellant had limited insight into his psychiatric condition and had been very reluctant to access services in the UK - only doing so because of the insistence of his wife, who ensures his attendance at appointments and that he takes his medication.
37. In response to questions from Mr Avery, Dr Rutherford stated that the appellant would need 1:1 supervision in a secure unit in Afghanistan to mitigate against the risk of suicide. She stated that the separation from his family and his fear of being harmed in Afghanistan were drivers of the risk and she was in no doubt that the appellant genuinely fears for his safety in Afghanistan. Dr Rutherford also expressed agreement with the opinions of Dr Maloney and Dr Sen.
38. Mr Avery did not challenge the core of Dr Rutherford's opinion but he did question whether she had improperly relied on her perception of the circumstances in Afghanistan. We see no evidence of this. She did not comment on the nature and

extent of psychiatric provision in Afghanistan. Rather, she expressed a view on the difficulty the appellant would face accessing or engaging with mental health services without the support and assistance of his wife. This falls within Dr Rutherford's expertise. Dr Rutherford was a clear and consistent witness whose assessment of the appellant is based on her experience of treating him as a patient, rather than merely meeting him on one occasion in order to prepare an expert report. We have no hesitation in accepting her evidence.

39. Dr Maloney's opinion, which was not challenged, is that the appellant suffers from a major depressive disorder and complex PTSD. Dr Maloney stated that he had no concern that the appellant was fabricating or exaggerating his symptoms. He described the appellant as having a "chronically high" risk of self harm or suicide which would become acute upon removal to Afghanistan appearing inevitable or the process of removal beginning. Dr Maloney stated that the appellant would need intensive supervision during the process of removal. He also stated that upon return to Afghanistan the suicide risk would be even higher because of the loss of protective factors (his wife and children) and the additional risk factors of loss, separation and social isolation.
40. Dr Sen's opinion, which was also not challenged, is that the appellant meets the criteria for a diagnosis of complex PTSD and severe depressive episode with psychotic symptoms. He described the appellant as being at risk of self harm. He stated that the appellant's relationship with his children is a protective factor and that the risk of suicide and self harm will be extremely high if the relationship is disrupted.
41. Dr Sen also expressed the opinion that the appellant's risk of self harm will be very high at the time he is served with concrete directions to leave the UK, during the process of deportation and on and after arrival in Afghanistan. At paragraph 5.8 of his report, Dr Sen stated:

"The mechanisms which could be put in place after removal to Afghanistan to reduce risk would be for [the appellant] to be assessed and immediately admitted to a psychiatric unit and kept on 1:1 observations without access to any risk items which he could use to self harm, which would mean nursing him in what we call a sterile environment with staff watching him at all times. This would be the only way to manage his high suicidal risk in Afghanistan. This would thus require prior planning and coordination with relevant services in Afghanistan, as it would be an extremely challenging endeavour."
42. Also relevant to our consideration of the appellant's mental health is the evidence of his wife (which was not challenged and which we accept) that the only time the appellant leaves the house is to take his children to school; and he is only able to do this because she accompanied him on the route until he was sufficiently comfortable to undertake the task himself.
43. Drawing together the evidence concerning the appellant's suicide risk we find that:

- (1) Although there is an ongoing risk that the appellant will attempt suicide, as he has done several times in the past, he is currently stable. This is because, at the current time, he is receiving appropriate mental health care, complying with a regime of therapy and medication, receiving support and encouragement from his wife, and benefiting from the protective factor of his involvement in the life of his children.
- (2) Upon the process of deportation starting (or the appellant reaching the conclusion that deportation is inevitable) the appellant will deteriorate rapidly and the risk of suicide will become acute and very high. It will be necessary, in order for the risk of suicide to be mitigated, for the appellant to be in a "sterile environment" with staff watching him at all times, as described by Dr Sen at paragraph 5.8 of his report (see paragraph 41 above).
- (3) The risk of suicide will remain very high during transit to Afghanistan, and therefore close 1:1 supervision will be required during this process.
- (4) Upon release from the UK authorities in Afghanistan, the risk of suicide will remain very high. Mitigation of the risk will require a "sterile environment" with staff watching the appellant at all times, as described by Dr Sen.
- (5) Without the support and encouragement of his wife (or another person who takes on her current role) the appellant is unlikely to have the insight, willingness and capability to take the practical and physical steps necessary (such as telephoning and travelling to a clinic) to access any mental health service provision in Afghanistan that would be available to him.

### Asylum

44. Article 33(2) of the Refugee Convention provides that:

"the benefit of the present provision [prohibition of refoulement] may not, however, be claimed by a refugee ... who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

45. Section 72(2) of the 2002 Act provides that:

"A person shall be presumed to have been convicted by a final judgment of a clearly serious crime and to constitute a danger to the community of the United Kingdom if he is (a) convicted in the United Kingdom of an offence, and (b) sentenced to a period of imprisonment of at least 2 years."

46. Section 72(6) of the 2002 Act provides that the presumption in Section 72(2) that a person constitutes a danger to the community is rebuttable.

47. The appellant seeks to rebut the presumption under Section 72(2) on the basis that even though he has been convicted of a particularly serious crime he does not constitute a danger to the community.

48. A substantial body of evidence was submitted by the appellant that supports his position. This includes:

- (i) A letter from his probation officer dated 27 August 2013 which describes the appellant as being at low risk of reoffending and states that his risk of harm continues to diminish. This is consistent with a risk assessment by his probation officer in December 2011 which found him to present a low risk of re-conviction. The 2011 risk assessment also stated that it is not considered the appellant has a sexual preference for children or that sexualised violence is a risk factor.
  - (ii) The appellant's treating psychiatrist Dr Rutherford in her letter dated 24 April 2019 described the appellant as posing a very low risk towards children.
  - (iii) A letter from the appellant's social worker dated 5 April 2019 did not express any concerns about the appellant's children being at risk because of his offence.
  - (iv) A child and family assessment by Hackney local authority dated 20 September 2018 stated in respect of the appellant's sexual offence with a child that "he is remorseful and there is no evidence to indicate he poses a risk to his children".
49. Mr Avery did not challenge any of the evidence described above. However, he argued that the presumption that the appellant constitutes a danger to the community has not been rebutted because although he has not been convicted of a crime since leaving prison in 2011, two incidents have occurred that involved the police. The first is where the appellant slapped his wife for talking to another man and the second is where he placed his phone number in a woman's shopping basket. Mr Avery also argued that the absence of offending may be linked to the fact that the appellant has been under scrutiny as any offence would undermine his attempts to resist deportation.
50. Mr Chirico argued that the two incidents relied upon by Mr Avery need to be understood in light of the appellant's mental health problems at the time they occurred and that, in any event, they fall a long way short of indicating a danger to the community.
51. We agree with Mr Chirico. The appellant has not been convicted of a crime since his release from prison in 2011. His social worker, psychiatrist and probation officer are consistent in their opinion that there is a low risk (Dr Rutherford describes the risk as "very low") of the appellant committing another offence against a child; and Social Services appear to have no concern as to the appellant posing a risk to his own children.
52. The incidents where the appellant hit his wife and left his phone number in a woman's shopping basket did not result in his arrest and fall short of the type of conduct that would indicate that he is a danger to the community in the UK. Moreover, the opinion of Dr Rutherford that the appellant poses a "very low" risk was given after, and in the knowledge of, these two incidents. In the light of the opinions of Dr Rutherford, Social Services and the appellant's probation officer, we are satisfied that the presumption under Section 72(2) of the 2002 Act that the appellant constitutes a danger to the community is rebutted. We find, therefore, that

the appellant is not excluded from protection against refoulement under Article 33(2) of the Refugee Convention.

53. It is therefore necessary for us to consider whether the appellant is at risk of persecution in his home area of Jalalabad in the Nangahar Province, as he claims.
54. The appellant claims to be at risk either directly from Habib, who has threatened to kill him; or via Habib who has (or will) spread rumours about him and may convince the authorities or the Taliban to take action against him because of the nature of his sexual offence which, amongst other things, could lead to the perception that he is gay.
55. We accept that the appellant has a genuine fear of Habib killing him, spreading rumours about him, and informing the authorities and the Taliban about the nature of his crime; and that he fears the authorities and Taliban as a consequence. However, it is not sufficient that the appellant's fear is genuine; it must also be well founded. In our view, it is not; as the evidence does not establish that there is a reasonable degree of likelihood that the appellant will be at risk in his home area. There are several reasons for this:
  - (1) Firstly, the evidence of Dr A Giustozzi, an expert on Afghanistan relied upon by the appellant, is that authorities in Afghanistan would be unlikely to prosecute the appellant for his sexual offence as there are no precedents, as far as he knows, of individuals being sentenced in Afghanistan for crimes committed abroad unless they relate to national security. Dr Giustozzi identified a potential risk of a Taliban court convicting the appellant. However, he stated that such a court would require witness evidence and Habib's word would not be enough to convict the appellant. In our view, the evidence of Dr Giustozzi indicates that Habib would be unlikely to influence either the government or the Taliban to take action against the appellant.
  - (2) Secondly, there is no evidence that Habib has any connection to the Taliban or other militia that would enable him to carry out his threat against the appellant. The appellant's brother speculated that Habib may have links to the Taliban but there was not a reasonable basis for this and he acknowledged that it was no more than a thought.
  - (3) Thirdly, Habib has not contacted or threatened the appellant in UK by letter, email or social media (even though he would know the appellant's brother's address and contact details).
  - (4) Fourthly, the last contact any of the witnesses had with Habib was in 2014 and his current whereabouts and circumstances are unknown.
56. Whilst it is possible that Habib is residing in the appellant's home area, would learn of his return to Afghanistan, would spread rumours about the appellant's sexual crime, and would be in a position to kill him or arrange for others to kill him; the likelihood of this occurring is, in our view, remote. The asylum appeal is therefore unable to succeed.

Humanitarian Protection

57. The appellant argues that he faces a real risk of serious harm by reason of indiscriminate violence in Jalalabad within the meaning of Article 15(c) of the Qualification Directive (2004/83/EC).
58. However, Article 17(1)(b) of the Qualification Directive (the wording of which corresponds to Paragraph 339D(iv) of the Immigration Rules) excludes from eligibility for subsidiary protection persons who have committed a serious crime. There is no need, in contrast to Section 33(2) of the Refugee Convention, to show the appellant is a danger to the community as well. It is sufficient that the appellant has committed a serious crime. The appellant, as he accepts, has committed a serious crime. He is therefore not eligible for subsidiary/humanitarian protection.

Article 3 ECHR

59. Although the appellant is excluded from humanitarian protection, nonetheless we must consider the conditions that will exist in Kabul on the appellant's deportation there. We accept that AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) has been set aside, but the information set out in that decision is still relevant in identifying any difficulties the appellant will face on arrival.
60. The Upper Tribunal in AS found that although it is relatively uncommon and outside the social norm for a man to live alone in Kabul, a man in good health can be expected to manage without family or a support network. However, this is not the case for a man in poor health, such as the appellant. In AS at [213] it is stated:
- “We do not find that it is an essential requirement for a person to have an existing support network in Kabul for them to be able to access housing or employment there and that conclusion is supported Dr Giustozzi's evidence and by the UNHCR's position that there are **possible exceptions to the need for a support network for single able-bodied men and married couples of working age without identified specific vulnerabilities** in urban and semi-urban areas with the necessary infrastructure and livelihood opportunities to meet the basic necessities of life and are under effective Government control. For the reasons set out below, we find that Kabul is such a place where a support network is not essential, and that internal relocation is generally reasonable without one for a **single male in good health**. [emphasis added]”
61. Even though unemployment in Kabul is high, the Upper Tribunal in AS found that a single male, even without connections, would most likely be able to find irregular unskilled work such as a day labourer. In AS at [228] the Upper Tribunal found:
- “We find that there are livelihood opportunities available for single men in good health on return to Kabul such that there is no real likelihood that they would be forced to turn to crime, be subject to exploitative work or join an armed AGE”.
62. However, the appellant is not a man in good health, and it is, in our view, unlikely that he would be able to obtain any form of employment.

63. Given the appellant's poor mental health, reliance on others (in particular his wife) to function even minimally in the UK, and the absence of any family or support network available to assist him in Kabul, we find that it is reasonably likely the appellant will not be able to access accommodation and employment in Kabul and will be destitute. It is against this backdrop that we turn to consider the appellant's mental health and suicide risk.
64. The unchallenged psychiatric evidence (which we have accepted) establishes that once the appellant believes that his deportation is inevitable, he will be at an acute high risk of suicide, the protection against which will require a "sterile environment" as described by Dr Sen (see above at paragraph 41). The need for substantial and intensive management of the suicide risk will continue whilst the appellant is in transit to Afghanistan (during which time the UK authorities will be in a position to manage the risk) and after he is released in Afghanistan (whereupon the UK authorities will no longer have the capacity to manage the suicide risk).
65. It is necessary to consider separately whether the UK will be in breach of Article 3 ECHR because of what may happen to the appellant whilst he is in the UK or in transit to Afghanistan (referred to in *J v SSHD* [2005] EWCA Civ 629 as a "domestic case") and after the appellant is released in Afghanistan (referred to in *J* as a "foreign case").
66. We are satisfied that there will not be a breach of Article 3 whilst the appellant remains in the UK or is in transit to Afghanistan. This is because, although the risk of suicide will be acute, the appellant's medical team in the UK (as well as the respondent) will be able to manage the risk. The appellant benefits from extensive and comprehensive medical care in the UK where the risks ensuing from deportation (and the ways to mitigate that risk) have been documented and considered. The appellant's psychiatrist will be able to implement appropriate mechanisms to manage the suicide risk whilst the appellant remains in the UK; and whilst on route to Afghanistan (and in any period of detention prior to departure) the respondent will be able to take appropriate steps through, for example, the provision of appropriately trained escorts.
67. Our conclusion in respect of the Article 3 "domestic case" is consistent with the analysis of Dyson LJ in *J* (paragraphs 57-62) where he found that the IAT was entitled to conclude that the risk of suicide in the UK would be adequately managed and to take judicial notice of the arrangements the respondent makes to escort vulnerable persons being removed from the UK.
68. The appellant's stronger argument (and the focus of Mr Chirico's submissions before us) concerns the "foreign case"; that is, whether the risk of suicide is such that Article 3 will be breached because of the appellant's suicide risk after he is released in Afghanistan.

69. It is well established that risk of suicide in the country of return can give rise to a breach of Article 3. The leading authority on Article 3 and suicide is *J* where, at paragraphs 25 – 31, Dyson LJ set out six factors to be applied in “foreign cases”. He stated:

“25. In our judgment, there is no doubt that in foreign cases the relevant test is, as Lord Bingham said in *Ullah*, whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment. Mr Middleton submits that a different test is required in cases where the article 3 breach relied on is a risk of suicide or other self-harm. But this submission is at odds with the Strasbourg jurisprudence: see, for example, para [40] in *Bensaid* and the suicide cases to which we refer at para 30 below. Mr Middleton makes two complaints about the real risk test. First, he says that it leaves out of account the need for a causal link between the act of removal and the ill-treatment relied on. Secondly, the test is too vague to be of any practical utility. But as we explain at para 27 below, a causal link is inherent in the real risk test. As regards the second complaint, it is possible to see what it entails from the way in which the test has been applied by the ECtHR in different circumstances. It should be stated at the outset that the phrase “real risk” imposes a more stringent test than merely that the risk must be more than “not fanciful”. The cases show that it is possible to amplify the test at least to the following extent.

26. First, the test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity. The court has said on a number of occasions that the assessment of its severity depends on all the circumstances of the case. But the ill-treatment must “necessarily be serious” such that it is “an affront to fundamental humanitarian principles to remove an individual to a country where he is at risk of serious ill-treatment”: see *Ullah* paras [38-39].

27. Secondly, a causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights. Thus in *Soering* at para [91], the court said:

“In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”(emphasis added).

See also para [108] of *Vilvarajah* where the court said that the examination of the article 3 issue “must focus on the foreseeable consequences of the removal of the applicants to Sri Lanka...”

28. Thirdly, in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. And it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from some naturally occurring illness, whether physical or mental. This is made clear in para [49] of *D* and para [40] of *Bensaid*.

29. Fourthly, an article 3 claim can in principle succeed in a suicide case (para [37] of Bensaid).
  30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.
  31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.
70. The fifth factor must be considered alongside paragraph 16 of *Y and Z (Sri Lanka)* [2009] EWCA Civ 392 where Sedley LJ stated:
- “One can accordingly add to the fifth principle in J that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return.”
71. We apply the factors set out in J, as modified by Y and Z, as follows:
- (a) The severity of harm the appellant may face on return to Afghanistan is very high as the evidence indicates that he is likely to commit suicide and die unless he is confined to a sterile environment with supervision, as described by Dr Sen (see above at paragraph 41). Moreover, the method by which he planned to commit suicide at his most recent attempt in 2018 (setting himself on fire) indicates that the consequence of a failed suicide attempt may be severe injury.
  - (b) There is a causal link between the appellant's deportation and the risk of suicide. The consistent view of the three psychiatrists who have assessed the appellant is that his suicide risk will increase significantly as a consequence of deportation, because, amongst other things, he will no longer have the protective factors of his wife and children and he will be in an environment where he believes he is in danger (even if that belief is not well founded).
  - (c) We recognise that the Article 3 threshold is particularly high because this is a “foreign case” and even higher because the alleged inhuman treatment stems from the appellant's mental illness rather than the conduct of the authorities in Afghanistan.
  - (d) We recognise that an Article 3 claim can in principle succeed in a suicide case.
  - (e) The appellant has a genuine fear of being persecuted and ill-treated in Afghanistan, but that fear is not objectively well founded.
  - (f) Effective mechanisms to reduce the risk of the appellant committing suicide are unlikely to be available in Afghanistan. In *AS*) it was stated at paragraph 142 that there was only one dedicated mental health hospital in Kabul and that a

study in 2016 referred to there being only three trained psychiatrists and ten psychologists in the whole of Afghanistan.

- (g) The appellant's lack of insight into his mental health, his reluctance to seek treatment in the UK, and his reliance on others to function outside of the home (as illustrated by his only leaving the family home to take his children to school because his wife has guided him in doing this) indicates that even if sufficient mental health provision were available in Afghanistan, it is not reasonably likely that the appellant would engage with and benefit from it.
- (h) The appellant does not have family or friends in Afghanistan who would support him. Whilst a sibling (most likely, his older brother) may travel to Afghanistan for a few weeks, there is no family member who will be able to provide the appellant with ongoing or substantial support. Moreover, even if a family member would spend a substantial period of time in Afghanistan with the appellant, he or she would not have the expertise or capability to provide the appellant with the type of "sterile environment" that will be necessary to prevent suicide. A family member could assist the appellant in accessing appropriate mental health services but, as stated above, it is not reasonably likely that there will be any such services to access.

72. Mr Chirico argued that the circumstances of the appellant are analogous to those of the appellants in *Y and Z*, a case in which the Court of Appeal, applying *J*, found that the Article 3 threshold was met because of the high risk that the appellants (a brother and sister) would commit suicide upon being returned to Sri Lanka. However, there is an important difference between the appellant and the appellants in *Y and Z*, which is that the appellants in *Y and Z* had been subjected to (and their subjective fear of return emanated from) brutal treatment of the most extreme kind by the authorities of the returning country. The appellant, in contrast, although he has had traumatic experiences in his life (both as a young child and in his journey to the UK from Afghanistan) has never suffered torture or abuse at the hands of the Afghan State.

73. Sedley LJ in *Y and Z* placed considerable weight on the fact that the appellants in that case had been brutally abused by the authorities. However, he did not find that it was necessary, in order to succeed under Article 3, for there to have been such abuse. What mattered (and underpinned the significance attached to the previous abuse) was whether the appellants had a genuine subjective fear of return to Sri Lanka (the fifth factor in *J*, as modified) and whether they would be able to access appropriate psychiatric care (the sixth factor). This is clear from paragraph 61, where Sedley LJ stated:

"The upshot of the material findings and of the expert evidence which (for reasons I have given) stood unshaken, is that, although some psychiatric care is available in Sri Lanka, these two appellants are so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they will not be capable of seeking the treatment they need. Assuming (what cannot be certain) that they come unscathed through interrogation at the airport, with no known family left in Sri Lanka and no home

to travel to, the chances of their finding a secure base from which to seek the palliative and therapeutic care that will keep them from taking their own lives are on any admissible view of the evidence remote.”

74. Although the appellant was not abused by the Afghan authorities, he, like the appellants in Y and Z, genuinely fears the authorities in his home country and would not be able to access appropriate psychiatric care. Therefore, the fifth and sixth factors in I (as supplemented by Y and Z) weigh in the appellant’s favour even though he was not tortured and abused by the Afghan authorities.
75. This is an appeal where there is a very high risk that the appellant, after being returned to Afghanistan, will die or suffer very serious injury because he will not receive the psychiatric care that, according to the undisputed evidence of three psychiatrists, will be needed to prevent him from committing (or attempting to commit) suicide. We consider also that, even were he not to commit suicide, his mental ill-health is likely to affect his ability to obtain accommodation and a means of sustenance to such an extent that, for the reasons set out above, he would be driven into destitution in any event.
76. In these circumstances, we find that the appellant’s return to Afghanistan would reach the high threshold of inhuman treatment that is prohibited unconditionally by Article 3 ECHR. We therefore allow the appeal under Article 3 ECHR.
77. As we have allowed the appeal under Article 3 ECHR, it is not necessary for us to address the appellant’s other human rights arguments.

#### Notice of Decision

1. The decision of the First tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by allowing the appeal on human rights grounds.

Signed



Deputy Upper Tribunal Judge Sheridan

Dated: 19 June 2019

ANNEX - ERROR OF LAW DECISION



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01982/2015

THE IMMIGRATION ACTS

Heard at Field House  
On 14 November 2018

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

NA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D Chirico, Counsel instructed by Wilson Solicitors LLP

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S Rodger promulgated on 13 June 2016 in which she dismissed his human rights and asylum appeal against a decision of the Secretary of State made on 19 October 2015 to refuse to revoke a deportation order, that deportation order having been issued on 13 October 2011. There is a long and complex history to this case

which is set out in Judge Rodger's decision from paragraphs 3 to 26, which is not in dispute.

2. The appellant is a citizen of Afghanistan who is married to a British citizen. They have three children. On 28 July 2008 the appellant was convicted at Snaresbrook Crown Court of sexual activity with a male child under 16 for which he received a sentence which was later varied by the Court of Appeal to a sentence of five years' imprisonment. After that the appellant was released from custody, he was on licence. This case raises a number of inter-related and complex issues arising out of the conviction and out of the mental health problems from which both the appellant and his wife suffer.
3. Briefly, Judge Rodger concluded:-
  - (1) that the Section 72 certificate should be upheld in this case as she was not satisfied that the relevant presumption had been rebutted
  - (2) that in any event the appellant was not at risk of serious ill-harm, that is harm of a sufficient severity to engage under the Refugee Convention or Article 3 of the Human Rights Convention in his home area;
  - (3) that even if that were so, there was no real barrier to him relocating elsewhere in Afghanistan.
4. The judge also concluded with regard to the Article 8 aspects of this case:-
  - (1) that this was a case which fell outside the Immigration Rules; and
  - (2) that removal in this case was proportionate.
5. It is important to note at this juncture that many of the findings with respect to Article 8 were predicated on assumptions about the ability of the appellant to continue to provide support to his wife and also her actual medical condition.
6. Subsequent to Judge Rodger's appeal the appellant sought permission to appeal which was refused, first by the First-tier Tribunal and then again by the Upper Tribunal. It was only after an application for permission for a judicial review that a "Cart" judicial review was brought culminating in a grant of permission in the Court of Appeal, the High Court having refused permission, that this matter was ordered to come back to the Upper Tribunal. It was at that point that Vice-President Ockelton directed that permission should be granted on all grounds and it is on that basis that this decision comes before me today.
7. I am grateful to both representatives today for assisting me in what is an exceptionally complex set of facts arising from the inter-related issues and the lengthy process that has taken for this case to come to the Upper Tribunal again on this occasion, both in the earlier proceedings ending in 2012 and in the current set of proceedings which began in 2015.
8. In terms of the challenges to Judge Rodger's decision, these fit broadly into three categories. First, that the judge erred in her assessment that the Section 72 certificate

was to be upheld; second, in her assessment that there was no serious harm of risk and/or a risk pursuant to Article 15(c) of the Directive; and third, in assessing that deportation would, on the facts of this case, be proportionate.

9. The first challenge proceeds from the submission that the judge erred owing to a mistake of fact with regard to when the index offence of which the appellant was convicted had been committed. The judge found that the appellant had not been consistent about this and this casts doubt, both on his reliability as a witness, carrying over both into the assessment of the risk on return when the Section 72 certificate was rebutted, and in respect of the Article 8 issue.
10. The judge made a number of findings with regard to this which are set out in her decision, but in brief she assumed that the appellant had not told the truth about the date of the incident. She noted at paragraphs [98] to [101] an inconsistency as to the date. The appellant was recorded as saying that the offence had taken place in 2006 prior to meeting his wife, whereas the evidence, she said, showed that the offence had been committed on 4 September 2007. It is not in dispute that the appellant had met his wife by that point.
11. On a careful examination of the material, in particular the probation report from 2011 at paragraph 4.4, it appears that the offence was reported on 4 September 2007 which resulted in the appellant being interviewed on 5 September. It is recorded in paragraph 4.4 that the victim had, in fact, after the incident, returned to the shop on a number of occasions and that some months had elapsed between the incident and him reporting it to the police. The delay in reporting a crime is relatively common in the case of sexual offences, and it appears that the appellant was correct about the offence occurring before he met his wife, and, that the judge did not make a proper appreciation of all the evidence in concluding without giving notice to the appellant or his representatives that inferences adverse to him were taken from the chronology, about which she was mistaken.
12. On that basis the finding as to the discrepancy in the appellant's evidence is unsafe and it renders unsafe the Section 72 analysis for that reason. The Section 72 assessment is also unsafe because although the judge did go on to consider what the position would be if the risk assessment had been correctly assessed as low (at paragraph [102]), she declined to make any findings stating that she was not an expert with regard to the assessment of risks and in effect failed to make findings of fact on a relevant issue. It follows from that that the assessment of the risk under Section 72 is flawed and that therefore the assessment that the certificate was made out and that humanitarian protection could not be considered was incorrect.
13. A second challenge is made again on the assessment of facts reached by the judge as to the risk to the appellant on return to Afghanistan, in particular to his home area of Nangarhar and/or that the appellant, were he at risk there, could be expected to return to Kabul. There are therefore two aspects to this issue.

14. The evidence regarding the risk came primarily from oral evidence of witnesses who were called to give evidence before the judge. Importantly on this occasion the Presenting Officer did not challenge that evidence and accordingly no submissions were made as to the reliability or otherwise of that. Whilst it may have been open to the judge to identify reasons why she did not accept the evidence of the witnesses, she could do so only by having notified the appellant and given him an opportunity to address those concerns given that they had not been put in doubt at that stage by the respondent and these are adversarial proceedings. It therefore follows that those findings are unsafe and must be set aside.
15. Equally, it is clear that the judge's failure to assess internal relocation expressed in the alternative is also flawed because the judge wrongly stated that because the appellant had been excluded from protection that internal relocation and the reasons of that were not matters which needed to be considered. That is a clear error of law and for these reasons the findings with respect to the risk on return to Afghanistan are flawed and need to be re-evaluated.
16. The third area of concern raised in the grounds is the judge's assessment of the difficulties that would flow in respect of the appellant's wife's mental ill-health and consequent ability or lack of ability to deal with the children were the appellant to be deported. The judge had a number of medical reports before her, but noted at paragraph [121] that the wife appeared to be comfortable in the presence of other family members that came into the room, did not appear to express any stress or concern, and did not appear to express a distress or concern when there was a direct reference to her mental health condition and possible consequences.
17. In essence, these findings which were taken into account, in particular at paragraph [123] and again at paragraphs [157] and [159] of assessing the risk on return of the protective elements that there may or may not be are flawed, because they are flawed from what is in effect an assessment of the appellant's wife's demeanour which, as the Court of Appeal has recently indicated, is something which is not safe and should not have been done.
18. Accordingly, I am satisfied that the findings with respect to Article 8 must also, for these reasons and the other reasons given, be set aside.
19. With regard to how this should be done and how this decision should be remade, I bear in mind the policy of the guidance whereby it is often the case that where there is an extensive fact-finding exercise that the matter should be remitted to the First-tier Tribunal. I conclude that that would be inappropriate in this case for several reasons. First, the history of this case where there has already been, albeit an earlier appeal, consideration of the matter by the Upper Tribunal. Second, this is a particularly complex matter which will require the evaluation of the mental health and possibly the capacity of the appellant and his wife which will need careful consideration of their ability properly to give evidence and consideration with regard to the relevant guidance as to what steps should be put in place to ensure that their testimony is properly received and considered by the Tribunal.

20. There are also a number of complex inter-relating legal issues which cross-cut between Article 3, Article 8 and the Refugee Convention which cannot easily be teased out and which will require a considerable analysis. The issue also raises a number of issues which arise out of the recent decision of the Supreme Court in **KO (Nigeria)** with regard to the proper approach to be taken where the index offence as is here, an offence where the sentence is over four years in duration.
21. Taking all of these considerations into account I conclude that it would be appropriate in the facts of this case to retain it within the Upper Tribunal on a date to be set.

### **Directions**

1. The appeal will be set down with a time estimate of two days.
2. The appellant is to produce updated witness statements of any witness on whose evidence he seeks to rely to be served, such statements to be served 14 days before the hearing.
3. The appellant is at liberty to adduce further expert and documentary evidence, such evidence to be served 14 days before the hearing.
4. The appellant must produce and serve a consolidated bundle to include all the material previously served and on which he still seeks to rely, and also any new material. It will be assumed that that the appellant no longer wishes to rely on any material not in the consolidated bundle. The consolidated bundle must be served 14 days before the hearing.
5. The Upper Tribunal would be assisted by the production of a schedule of issues to be agreed so far as is possible by both parties, the schedule to be served 5 days before the hearing.
6. Both parties must draft and serve skeleton arguments 5 days before the hearing

Signed

Date: 24 January 2019



Upper Tribunal Judge Rintoul