IAC-BH-PMP-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11225/2019 (V)**

THE IMMIGRATION ACTS

Heard at Bradford by Skype for Business
On the 4 November 2020

Decision & Reasons Promulgated
On 12 November 2020

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NK
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Howard, Solicitor instructed on behalf of the appellant
For the Respondent: Ms. R. Pettersen, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Afghanistan appeals with permission against the decision of the First-tier Tribunal (Judge Lodge) (hereinafter referred to as the "FtTJ") who dismissed his appeal in a decision promulgated on the 3 February 2020.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. The hearing took place on 4 November 2020, by means of *Skype for Business*. which has been consented to and not objected to by the parties. A face to face hearing was not held because it was not practicable and both parties agreed that all issues could be determined in a remote hearing. I conducted the hearing from court at Bradford IAC. The advocates attended remotely via video. Although there was an intermittent issue regarding sound, no substantial technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means. I am grateful to Mr Howard and Ms Pettersen for their clear oral and written submissions.

Background:

4. The appellant's immigration history is summarised in the decision of the FtTJ and in the decision letter.

5. The appellant arrived in the United Kingdom on 4 August 2016 as an unaccompanied minor. He applied for asylum on 25 August 2016 and the claim was refused on 19 February 2017, but he was given discretionary leave expiring on 18 August 2019.

6. The basis of his claim was that he feared the Taleban would harm in on return to Afghanistan for failing to accede to their request to recruit him.

7. He claimed that the Taleban had a regular presence in his village and further claimed that the Taleban instructed his father to allow them to take them away, in order that he be trained as a suicide bomber. The appellant claimed his father was killed by the Taliban for failing to hand him over. Following his father's killing, the appellant's mother reported the incident to the police; other than attending the village and are fighting seeming between the police and the Taliban, nothing further was done. Thereafter the appellant's mother, with the help of his uncle, made arrangements for the appellant to leave the country.

8. The appellant claimed that the Taleban forcefully recruit young children.

9. The decision letter at paragraphs 26 – 37 rejected the appellant's account that the Taleban sought to recruit him making reference to his factual claim and the background evidence. The respondent also rejected his claim that the Taleban had killed his father (paragraph 38 – 42 and dealt with the claim that he lost contact with his family in Afghanistan at paragraphs 43 – 46.

The decision of FtTJ Young-Harry:

10. The appellant appealed against this decision and it was dismissed by the First-tier Tribunal (Judge Young-Harry) in a decision promulgated on the 10 April 2017.

11. In that decision FtTJ made the following findings:

    (1) The FtTJ considered the objective material at paragraphs 15 – 16 but reached the conclusion that although force was used in exceptional circumstances, in general the Taleban do not force recruits to join. The judge found that the appellant had failed to satisfy him that his situation was so exceptional the Taleban would use force in his case. The judge found that the reference in the country evidence to family members being killed or punished, clearly related to the Taleban's failed attempts at coercion and the consequences faced by parents who failed to hand over their children. The judge did not find that it referred to forced recruitment.

    (2) The judge found that even if he accepted that the appellant situation was exceptional and the Taleban chose to use force to recruit him, which the judge did not, the inconsistencies in the rest of the appellant's evidence led the judge to doubt his claim that he was being forced to join or that his father was killed.

    (3) The judge made reference to the objective evidence which speaks of young recruits being indoctrinated from the age of six. The judge found that to be inconsistent with the appellant's claim and that his knowledge of the Taleban's recruiting methods was entirely inconsistent with the country evidence.

    (4) As to the death of his father, the appellant was unable to give the date of his father's death and was not even able to provide an approximate date. Even taking account of the appellant's young age the judge found that it was not unreasonable to have expected him to have provided an approximate date or time frame given the significance of the event.

    (5) The judge noted at question 68 of the substantive interview the appellant claimed that he was in the village at the time of his father's death, however in his most recent witness statement the appellant claimed that it is not in fact present when his father died. The judge found that the appellant sought to slightly alter his evidence to in order to explain why, if the Taliban had previously wanted to take it by force, they did not do so when they came to the village to kill his father.

    (6) When asked in an interview why he was not taken by the Taleban when they came to kill his father, the appellant failed to answer the question or provide an explanation. The judge found that the recent changes evidence that was contained in his new statement was simply an attempt to explain the discrepancy.

(7) Further inconsistency related to the length of time spent in France before coming to the UK (see paragraph 23).

(8) The judge rejected the appellant's claim that his father was killed by the Taliban for failing to hand him over (see 24).

(9) The judge also did not accept that the appellant's claim was consistent with the usual methods employed by the Taleban when recruiting young people, when considering the country evidence (at [24)).

(10) The judge found the appellant's account to be vague and lacking in detail in the various inconsistencies in his evidence that the judge to conclude that the appellant had failed to discharge the burden upon him.

(11) As to the claim that he had lost contact his family in Afghanistan the judge rejected that claim also. The judge found that the appellant had failed to provide any credible evidence of efforts to contact his family and the inability to meet and care for him on return. The judge found that there was nothing to suggest that his mother and siblings did not remain in the family home similarly the judge found that it was likely that his uncle remained in Kabul where the appellant left him a few months ago and that he would be able to meet the appellant on his return to Kabul (at [25]).

12. The appellant applied for permission to appeal the decision, but permission was refused on 10 April 2017 it is recorded that the appellant became "appeal rights exhausted" on 25 April 2017.

13. Further submissions were submitted on 17 October 2018 which were refused in a decision letter of 25 October 2019.

14. The further submissions claimed that the appellant maintained his initial asylum claim that he would fear the Taleban and that they would forcibly recruit or harm him on return to Afghanistan. It was further submitted that he was a member of a PSG "unaccompanied minor" as he had no family to return to in Afghanistan it was further claimed that you be at risk as he would be perceived by anti-government forces as being an individual who'd been westernised. It was said that he would be at risk of forced labour by the Taleban and also raised article 15 (c) the basis of the level of violence in Afghanistan placed at risk if he were to return there.

<u>The decision letter of 25 October 2019:</u>

15. The decision letter set out the previous findings of the FtTJ in 2017 at paragraphs 12 – 22, and that in light of those findings of fact claim to be at risk of forced labour and recruitment to the Taleban in addition to his claim of being an unaccompanied minor upon return was rejected.

16. As to the claim that he would be at risk on return as individual who had been westernised, the decision letter made reference to the objective material and that there had been anecdotal accounts of experiences of returnees, some of

which reportedly included violent incidents that there was no evidence that the alleged violent incidents were as a consequence of being westernised and that there was no general indication that incidents of violence against returnees were due to any apparent "westernised" demeanour (see targeted incidents against returnees). In contrast, the reports indicating that many returnees in the West are welcome back into their families and society, particularly if they are seen as having made a success of themselves. Further reference was made to the objective material at paragraphs 27 – 30. On that basis the respondent considered that the appellant had not provided any substantive evidence state that he would be targeted over and above any other Afghan civilian with his profile if he were to be returned to Afghanistan. His family in Afghanistan have been supportive of him and therefore is not accepted that he would be seen to have failed all that there would be any negativity towards him for economic reasons. Furthermore, the objective material showed that there was little evidence of any risk from returnees on account of having a "westernised" demeanour or otherwise.

17. As to the claim under Article 15 (c), the respondent addressed this at paragraphs 32 – 53 and by reference to the findings of fact of the FtTJ, and in the light of the country guidance case AS (safety of Kabul) Afghanistan CG [2018] UKUT 118 and the issue of internal relocation. In the light of the factors set out, the respondent considered that internal relocation to Kabul would be a viable option for the reasons set out at paragraph 51 – 53. It was set out in summary at [53] that he had provided no evidence to show that he would be at individual risk in the Taleban. Even if it were accepted that he would be at risk in his claim home province, it was considered that sufficiency of protection will be available to him in Kabul city and he could return their utilising the skills and resourcefulness and with his family support.

18. The appellant appealed that decision to the FtT.

The decision of FtTJ Lodge:

19. The basis of the case advanced before the FtTJ is set out at paragraph 25 that he would be at risk upon return to Afghanistan on the basis that he will be returning as an unaccompanied child. That he will be the object of forced recruitment by the Taleban and that he would be at risk on account of his membership of a particular social group, namely "children in Afghanistan" and that he would be at risk because he would be perceived to be a westernised Afghan there was also an article 15 (c) risk.

20. The FtTJ set out the evidence given by the appellant at [9] – [24]. As can be seen from the decision, much of his evidence related to the issue of contact with his family relatives in Afghanistan. The FtT also heard evidence from his "foster father" and again at paragraphs 21 – 23 much of his evidence related to contact with the appellant's family.

21. The FtTJ set out his analysis and factual findings from paragraphs [25 –49].

22. When making an assessment of the evidence, the FtTJ recorded at [26] that throughout he had borne in mind the appellant's age which was 17 at the date of the hearing.

23. At paragraphs [27 – 40] the FtTJ set out his analysis of the issue of whether the appellant would be returning to Afghanistan as an unaccompanied child. The judge began with the earlier findings made by FtTJ Young-Harry who found that the appellant had family in Afghanistan who he was in contact with, his mother, siblings and uncle in Kabul and whilst there was mention of his father who the judge did not accepted been killed in the circumstances of the appellant claimed, he was not mentioned as someone who could assist the appellant on his return (at [27]). The FtTJ referred to the finding made by the earlier judge that the appellant had failed to provide credible evidence and made efforts to contact his family in Afghanistan and that the judge was satisfied that even if the appellant had now demonstrated it made efforts to trace his family through the Red Cross, it would not negate the earlier findings. However, at [31] the judge found that the appellant had not made any significant efforts to trace his family. The judge considered the documentary evidence of the Red Cross at paragraphs 32 – 36 and at [37] he was satisfied on the evidence that the appellant had not made any serious attempt to contact his family in Afghanistan. The judge therefore concluded at [39] that he was satisfied that the appellant had produced nothing new which would allow him to overturn the findings of the previous judge that the appellant had lost contact with his family. Thus the judge found that he was not satisfied that the appellant was an unaccompanied child and that as the earlier judge had found on return to Kabul, he would be received by his uncle and/or his mother who could then continue to care for him (at [40]).

24. As to the question of whether on return the appellant was likely to be forcibly recruited to the Taleban, the FtTJ began by considering the decision made by FtTJ Young- Harry at paragraph [18], and that "I find, even if I am willing to accept that the appellant situation was exceptional and the Taleban chose to use force to recruiting, which I do not, the inconsistencies and the rest of the appellant's evidence led me to doubt his claim that he was being forced to join or that his father was killed."

25. At [42] the judge made reference to the appellant's submission that the use of the word "exceptional" and that the background information now demonstrated that it would not be exceptional but commonplace for young Afghans to be forcibly recruited to the Taleban.

26. At [43] the FtTJ's finding is as follows:

> "I am not prepared to accept that argument. The tenor of judge Young-Harry's determination is that the multiple inconsistencies in the appellant's account of such that his account of fearing recruitment (and the death of his

> father for not allowing it) is such that his account is not to be believed. No new evidence has been advanced to demonstrate that forcible recruitment is a real risk for this particular appellant."

27. At [44] the FtTJ addressed the issue as to whether the appellant would be at risk because he was a member of a PSG namely "children Afghanistan". The judge stated "there is no precedent for any general proposition that all children in Afghanistan form a particular social group irrespective of their particular family circumstances. The reality is that Miss Sepulveda is advancing a 15(c) case are nothing more than that. The problem however the appellant is that following AK, there is no 15 (c) risk in Kabul".

28. At [45] the FtTJ addressed the decision of Elgafaji, where it was emphasised that the summer to qualify for protection on the basis of indiscriminate violence without needing to show that they individually would be at risk, the level of violence would need to be so high that anyone returning to Afghanistan would be at risk "only on account of his presence in the territory of that country or region". That is probably not the case at present in Kabul.

29. At [46] the FtTJ set out that the appellant has a family to return to; he has an uncle in Kabul, and he had his mother and siblings in Laghman province. The FtTJ stated "I am obliged to note that on the appellant's own evidence there is no Article 15 (c) risk in Laghman province (see page 62 of appellant's bundle). But even if there were, the appellant will be returned to Kabul where he will have the support of his uncle".

30. At [47] the judge addressed the issue of whether he would be perceived to be "westernised" and at risk on account of that. The judge accepted that some Afghans returning from some Western states may face discrimination and social stigma. However, this would appear for the most part be due to their being perceived to have failed by being returned rather than being westernised. Such treatment is unlikely by its nature or repetition to amount to persecution or serious harm. There is no official country guidance which indicate that being westernised, if indeed the appellant has demonstrated that he is westernised, would lead to risk of violence or persecution in Kabul.

31. As to the appellant's own particular characteristics, the judge took into account that he had no health concerns and that whilst he had had some (minor) mental health input in 2018 there was no evidence of any mental health problems at the present time.

32. Thus the judge concluded that the fresh submissions had not provided him with any evidence that required the judge to revisit the findings of the previous judge and that it was not satisfied that the appellant had not established the low standard that he was at risk on return to Afghanistan.

33. The judge recorded that counsel for the appellant had indicated that Article 8 was not an issue (at [50]).

34. The FtTJ therefore dismissed his appeal. Permission to appeal was issued on a number of grounds and permission was refused and on 6 May 2020 permission was granted by UTJ Norton-Taylor.

The grant of permission:

35. The grant of permission was a limited grant and I set out below the ambit of the grant of permission:

> "The grounds of appeal can be categorised as follows (although ground 1 is, to an extent, interlinked with ground 2); first, it is said that the judge erred in finding that the appellant would not return as an unaccompanied/unattached minor; second, the judge failed to have regard to relevant country information relating to civilians (and children in particular); third, it is said that the judge failed to have regard to relevant materials relating to the assessment of evidence and the best interests of children.
>
> The first ground is unarguable. The judge had regard to all relevant evidence relating to the assertion that the appellant would return without any family support. This evidence included not simply the appellant's word (see below), but the evidence from the foster parent, the Red Cross, and, importantly, the previous decision of the First-tier Tribunal from 2017 in which relevant findings of fact had been made. The judge clearly did this evidence in the round. The essence of his finding was not focused on the particular strength of the relationship between the appellant and his uncle, but on the (undisputed) fact that the appellant had not even mentioned the uncle when interacting with the Red Cross.
>
> In respect of paragraph 3.1 of the grounds, it is correct that the judge has not specifically referred to the Joint Presidential Guidance Note No. 2 of 2010. However, he did specifically state at paragraph 26 that he was bearing in mind the appellant's age when assessing the evidence. The grounds have not put forward any particulars as to how/why the judge's assessment of the evidence in light of the appellant's age was even arguably flawed.
>
> In light of the above, I refuse permission in respect of ground 1. For the avoidance of any doubt, it is unarguable that the judge erred in law when finding that the appellant would not return to Afghanistan as an unaccompanied/unattached minor.
>
> Having said that, it is arguable that the judge has failed to take account of and/or provide adequate reasons in respect of country information before him and referred to in the appellant's skeleton argument (as asserted in paragraphs 1.9-2.3 of the grounds, and subject to what I said about ground 1, above). It is also arguable that the judge has failed to undertake an assessment of the appellant's best interests and factor this into his overall conclusions on the issue of return. I therefore grant permission on this limited basis.
>
> Whether any errors found to exist are material is of course a matter which the appellant must be in a position to address in due course".

The hearing before the Upper Tribunal:

36. In the light of the COVID-19 pandemic the Upper Tribunal issued directions, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face to face hearing and that this could take place via Skype. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties.

37. Mr Howard on behalf of the appellant, who appeared before the FtTJ relied upon the written grounds of appeal, the previous skeleton argument field before the FtTJ and written submissions sent and dated 2 July 2020.

38. No Rule 24 response was filed on behalf of the respondent.

39. I also heard oral submission from the advocates, and I am grateful for their assistance and their clear oral submissions.

The submissions on behalf of the appellant:

40. Dealing with ground 1, the written submissions made reference to the findings of fact made by the FtTJ that he would not be an unaccompanied minor upon return to Afghanistan (see paragraphs 1.1 – 1.8 of the written submissions). However as Mr Howard accepted, UTJ Norton-Taylor had expressly not granted permission on that ground stating that "for the avoidance of any doubt, it is unarguable that the judge erred in law when finding that the appellant would not return to Afghanistan as an unaccompanied/unattached minor." There had been no further submissions or application to challenge the grant of permission and therefore it is not necessary to consider that part of ground one.

41. As to the remainder of ground one, the written submissions and the oral submissions of Mr Howard submit that the FtTJ's assessment that there was no new evidence to support the appellant's account of the risk of forced recruitment to him by the Taliban upon return, failed to take into account background material which post-dated the previous FtTJ's decision.

42. Mr Howard submitted that this was set out at paragraphs 43 – 46 of the appellant's skeleton argument which demonstrated that forcible recruitment by the Taleban was a real risk for the appellant upon return. Thus, it is submitted that the judge had failed to acknowledge and consider the new background material when considering that issue.

43. Mr Howard directed the Tribunal to that material as set out in the skeleton argument where it was argued that "the background material strongly supports the children in Afghanistan are specifically targeted by AGE for recruitment, child labour and forced labour, and therefore being a child in Afghanistan is a lone single factor that places the child at risk of such persecution."

44. The first reference is UNHCR eligibility guidelines for assessing the international protection needs of asylum seekers from Afghanistan dated 30 August 2018 at pages 149 – 152.

45. The second reference is to the EASO report Afghanistan security situation dated June 2019 at pages 103 – 108.

46. The third reference is to children in armed conflict in Afghanistan United Nations Security Council dated September 2019 pages 22 – 28.

47. The fourth reference is to the EASO report Afghanistan security situation paragraph 1.4.5 relating to children.

48. The grounds refer to the background material supporting that the nature of roles of children recruited by such groups would amount to persecution and include, but are not limited to, carrying out suicide attacks, planting improvised explosive devices, acting as spies and being active in combat.

49. The material referred to in support of that is the same material set out above.

50. The skeleton argument also stated that the background material supported the children were specifically targeted for recruitment by such groups, on account of their age and their vulnerabilities attributed by their rage. Such recruitment methods including recruitment through deceitful means, using brainwashing ideology methods, and/or through forceful means. The background material identified there is the same as above namely the EAS oh report at pages 103 – 108 paragraphs 5.1 – 5.21.4.

51. Finally, it is submitted that the background material further supported that a child residing in a family unit in Afghanistan did not eliminate the risk of persecution on account of such recruitment. The background material in support of that submission was again said to be the EASO report at pages 103 – 108 paragraphs 5.1 – 5.2.1.4 and, the UNHCR eligibility guidelines dated August 2018 at page 149 – 150 (paragraph 3).

52. The same references were said to support the risk of persecution by state actors for example state security forces for child labour possibly recruitment through pressure means. Again, it is submitted that the background material supports the submission that a child residing in a family unit in Afghanistan did not eliminate the risk of persecution on account of such recruitment.

53. Mr Howard submitted that the judge failed to have regard to the objective material.

54. As to the second part of ground one, it was submitted that the FtTJ at paragraphs [45 – 46] gave inadequate reasons for finding that the situation in Afghanistan is such that the appellant is not entitled to humanitarian

protection. In particular, the FtTJ referred to the proposed areas of return, Laghman Province and Kabul.

55. In this context Mr Howard submits that the judge failed to consider the appellant's claim to humanitarian protection on the basis that the appellant is a vulnerable person due to his young age is not required to demonstrate as high a degree of indiscriminate violence as would be otherwise for a grant of subsidiary protection. He submitted that the appellant would be at an enhanced risk as a child and as he had lived in the UK for four years.

56. Mr Howard submits that the judge failed to consider the background material in assessing the risk of indiscriminate violence to the appellant in Laghman province.

57. That material was referred to as the EASO report pages 62 – 63, 48 – 52, and the UNHCR eligibility guidelines report dated 30 August 2018 at pages 209 – 2011 at section 4 entitled "internal flight or relocation alternative in Kabul."

58. The submissions made on behalf of the appellant assert that the UNHCR report considered internal flight and relocation in Kabul and found that "civilians who partake in day-to-day economic and social activities in Kabul are exposed to a real risk of falling victim to the generalised violence affects the city. Such activities include travelling to and from a place of work, travelling to hospitals and clinics, or travelling to school: livelihood activities that take place in the city's streets, such as street vending: it was going to markets, mosques and other places where people gather."

59. The submission of the appellant is that the UNHCR concluded that "given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city."

60. The written submissions relied upon by Mr Howard then go on to partially cite the decision of the tribunal in AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118 at paragraph 189 where it was found that "significant weight can and should be attached to such evidence from the UNHCR as the guidelines on international protection and the eligibility guidelines for assessing the international protection needs of asylum seekers from Afghanistan (2016)."

61. Mr Howard therefore submits the UNHCR report in the appellant's bundle post-dated AS (Afghanistan) ("AS1") and should have been given due weight and consideration in assessing relocation.

62. As to the issue of risk on account of "westernisation" Mr Howard referred to paragraph [47] of the FtTJ's decision and that was the judge accepted that they faced discrimination paragraph 34 of the skeleton argument provided background material that individuals who are perceived by AGE to be westernised are at risk of persecution in Afghanistan. The reference to the

background material was the UNHCR eligibility guidelines dated 30 August 2018 at page 143 – 144.

63. Mr Howard referred to the grant of permission and that the judge had stated that it was for the representatives to demonstrate that any errors were material. In this respect he made reference to AS ("AS2") and that in the headnote at (iv) the revised circumstances took into account the age of the returnee.

64. Mr Howard further argued that at [44] the FtTJ fell into error by finding that the appellant was not at risk of persecution due to his membership of a particular social group "children in Afghanistan".

65. He submitted that that was an irrational finding and that the judge had failed to engage with the appellant's arguments and had failed to acknowledge and consider any of the reliable sources referenced at paragraphs 40 – 60 of the skeleton argument.

The submissions made on behalf of the respondent:

66. Ms Pettersen on behalf of the respondent submitted that in the light of the FtTJ's finding that he would have support in Kabul with his uncle and that he would be put in touch with his mother and siblings, the characterisation of his young age is mitigated by those facts. She submitted that Mr Howard was unable to point to any risk factor that he would be at risk of individualised violence and therefore the threshold was not passed in his case. Ms Pettersen submitted that in light of AS1 and now AS2, the appellant would not be at risk of indiscriminate violence in Kabul nor had it been demonstrated that it will be unduly harsh for him to relocate there on the factual findings made by the FtTJ.

67. Ms Pettersen submitted that the FtTJ did address the issue of risk due to "westernisation" at [47] and that some returnees faced discrimination, there was no CG decision which supported such a risk. Thus, the judge gave adequate reasons for that finding.

68. Ms Pettersen on behalf of the respondent submitted that FtTJ did not fall into any material error. As to the risk from the Taleban or forced recruitment, the FtTJ made a firm finding that the appellant did have an uncle to return to in Kabul. Therefore, any failure to consider the objective material falls away because the appellant would be returning to Kabul with family support who would be able to provide protection. The appellant would be returning to Kabul as a young adult (after exceptional leave to remain ceases) and risks in terms of forced recruitment did not occur in Kabul. The references to the material in the skeleton argument did not assist the appellant as the appellant has someone he can return to in Kabul.

69. At the conclusion of the hearing I reserved my decision which I now give.

Decision on error of law:

70. The Upper Tribunal when granting permission made to plain that whether any errors are found to exist are material, is matter which the appellant must address. In the course of my assessment the two country guidance cases of AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) I shall refer to as "AS1") and AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC) as ("AS2").

71. Mr Howard argued that at [44] the FtTJ fell into error by finding that the appellant was not at risk of persecution due to his membership of a particular social group "children in Afghanistan".

72. He submitted that that was an irrational finding and that the judge had failed to engage with the appellant's arguments and had failed to acknowledge and consider any of the reliable sources referenced at paragraphs 40 – 60 of the skeleton argument.

73. When cross-referencing the submission made to the skeleton argument, that can be found at paragraph 40, it states "risk on return as a "child" in Afghanistan. "It is submitted that the appellant is at risk of persecution upon return to Afghanistan on account of his membership to the particular social group "children in Afghanistan."

74. No further elucidation is given as to that argument within the skeleton argument other than in the context of the other submissions relating to forced recruitment and forced labour which is set out as above.

75. The submission also has to be seen in the light of the factual findings of the FtTJ that he would not be returning as an unaccompanied child.

76. In the decision of LQ (Age; immutable characteristic) Afghanistan [2008] UKIAT the Tribunal found that age was an immutable characteristic for the purpose of considering whether a particular social group is shown when considering the Refugee Convention. In the circumstances of that particular case, the Tribunal found as follows:

> "In the light of the expert evidence, we conclude that the risk of severe harm to the appellant, as found by the Adjudicator, would be as a result of his membership of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group."

77. However, this is not to be regarded as any form of country guidance nor precedent for any general proposition that all children in Afghanistan form a particular social group irrespective of their particular family circumstances. There is no error in the FtTJ's assessment.

78. As to the risk of forced recruitment, the FtTJ considered this at paragraphs [41]-[43]. Whilst it is submitted that the FtTJ failed to have regard to the objective material cited within the skeleton argument. I have set out above the references made in the skeleton argument. The grounds refer to the background material supporting that the nature of roles of children recruited by such groups would amount to persecution and include, but are not limited to, carrying out suicide attacks, planting improvised explosive devices, acting as spies and being active in combat.

79. When considering that material, it is generalised objective material that makes reference to the recruitment and use of children by all parties in the conflict reported throughout Afghanistan (page 149). There are generalised references to the type of recruitment throughout those reports. The UNHCR report summarises at page 152 that the UNHCR considered that it depended on the specific circumstances of the case, men of fighting age and children community members into the ALP may be in need of international refugee protection on the basis of a well-founded fear of persecution for membership of their PSG. It states men of fighting age and children who resist forced recruitment by the state or nonstate actors may also be in the need of international refugee protection. Thus, the UNHCR make reference to the specific circumstances of the individuals concerned.

80. In the decision of HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) the headnote stated: While forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility.

81. There was no new subjective evidence advanced on behalf of the appellant to demonstrate that he was at risk of persecution or serious harm based on his earlier account relating to events in Afghanistan. Therefore, the findings of fact made by Judge Young-Harry remained as the basis of the factual assessment of the circumstances in relation to the appellant's home area. The FtTJ was entitled to consider those factual findings that he would not be at risk of forced recruitment.

82. On the evidence before the FtTJ, there was no risk identified to the appellant that was specific to him and therefore it was open to the judge to find that the evidence did not demonstrate the forcible recruitment of any kind was a real risk for this particular appellant (at [43]).

83. Whilst Mr Howard submitted that the background material further supported that a child residing in a family unit in Afghanistan did not eliminate the risk of persecution on account of such recruitment. The background material in support of that submission did not expressly state that a child living with the family unit did not provide any form of protection. Again, the background material was generalised material relating to recruitment by armed groups and

methods of recruitment such as for economic reasons and based on lack of opportunities (see page 106 and by the use of coercion which included means of pressure on the family) but it has not been demonstrated that there was any real risk for this particular appellant beyond " a mere possibility".

84. The grounds challenge the FtTJ's assessment of whether the appellant would be perceived to be "westernised" (see decision of the FtTJ at [47]). Whilst it is submitted that the judge failed to consider the objective material, it was open to the judge to find that some Afghans returning from some Western states may face discrimination social stigma as this reflected the objective material. It was further open the judge to find that there was no "country guidance" which indicated that being westernised, if indeed the appellant has demonstrated that he was westernised, would lead to a risk of violence or persecution in Kabul. As regards westernisation, AS (Safety of Kabul) Afghanistan CG [2018] ("HS1") found no real risk of persecution because of westernisation and held at paragraph 187:

> "187. We do not find a person on return to Kabul, or more widely to Afghanistan, to be at risk on the basis of 'Westernisation'. There is simply a lack of any cogent or consistent evidence of incidents of such harm on which it could be concluded that there was a real risk to a person who has spent time in the west being targeted for that reason, either because of appearance, perceived or actual attitudes of such a person. At most, there is some evidence of a possible adverse social impact or suspicion affecting social and family interactions, and evidence from a very small number of fear based on 'Westernisation', but we find that the evidence before us falls far short of establishing an objective fear of persecution on this basis for the purposes of the Refugee Convention."

85. In respect of westernisation AS (Safety of Kabul) Afghanistan CG [2020] ("HS2") identified the mere fact of being a returnee did not prevent someone from securing accommodation or work but acknowledged the challenges for returnees and held:

> "246. The UNHCR, in the 2019 COI UNHCR Report, cites extensively from a recent German study which found that returnees to Kabul from Germany have faced violence, suspicion and hostility. This study (which we have not seen) was based on only 55 individuals, and therefore caution must be exercised before drawing generalised conclusions from it. We accept that some people in Kabul are suspicious of and hostile towards returnees. However, the evidence before us, considered together and as a whole, points to returnees facing challenging circumstances not because they have returned from the west (risk from westernisation was categorically rejected in the 2018 UT decision (at para. 187) and this finding was not appealed), but primarily because of poverty, lack of accommodation and the absence of employment opportunities, as well as the security situation. The mere fact of being a returnee does not prevent a person accessing accommodation (the evidence is that the "tea house" accommodation is available to all males) or being taken on for day labour work in the informal market. Nor does it prevent a person establishing, or re-

> establishing, a network, although care would need to be taken to avoid people who are hostile to returnees."

86. In the light of both of those decisions, it is not been demonstrated that the FtTJ's decision was in error. In any event, the witness statement of the appellant makes no reference to any particular characteristics that would indicate that he was westernised or would be perceived as such (as referred to at [47] of the FtTJ's decision).

87. I now deal with the issue raised of Article 15 (c). As the Upper Tribunal noted in *AA (unattended children) Afghanistan CG* at [35], the starting point in considering a claim for humanitarian protection under Article 15(c) is the decision of the ECJ in *Elgafaji* (Case C-465/07), [2009] 1 WLR 2100. After reviewing the three types of 'serious harm' defined in Article 15, the judgment of the ECJ in *Elgafaji* continued:

> "35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by … the courts of a member state to which a decision refusing … an application [for subsidiary protection] is referred, reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence … face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive."

88. The personal circumstances of an individual were also addressed by the Court:

> "39. In that regard the more the applicant is able to show that he is specifically affected by reason of fact as particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection."

89. The FtTJ did not accept that this was a case in which the appellant would be able to show that his personal circumstances (apart from his age) would make him specifically liable to indiscriminate violence. The appellant was required to demonstrate that that he would have would 'solely on account of his presence' face a real risk of being subject to the serious threat of violence referred to in Article 15(c).

90. When looking at the appellant's specific circumstances as established before FtTJ Young-Harry and as before FtTJ Lodge, the FtT was entitled to find that he had failed to meet that test on the evidence that it heard and for the reasons it gave. Even if the FtTJ was wrong to state at [46] that there was no Article 15 (c) risk in Laghman Province, the FtTJ proceeded on the basis that he would be returned to Kabul and that the FtTJ properly applied the CG as it then was, in AS1 and as now confirmed in AS2 , that there is no Article 15 (c) risk in Kabul.

91. The grant of permission made it plain that the appellant would have to demonstrate the materiality of any errors. Both advocates agree that in establishing any materiality (if they were to be any errors) that a consideration of the new CG would be necessary (HS1 and HS2).

92. In the submissions made by Mr Howard (and in the written grounds) reliance is placed upon the UNHCR guidelines in the appellant's bundle (dated 2018). In AS (Safety of Kabul) (CG) [2020] UKUT 130, the Upper Tribunal considered a large amount of evidence regarding the Article 15(c) risk, including the 2018 UNHCR Guidelines, the 2019 UNHCR Submissions, the 2019 COI UNHCR Report, and EASO's Legal Analysis and Recommendations. All of which are relied upon in this appeal.

93. In AS2 at [152]-[193], the Tribunal considered in detail the UNHCR's position both in its 2018 Guidelines and in more recent documents in 2019. That evidence was not "presumptively binding" and so determinative of the judicial assessment of risk (see HF (Iraq) v SSHD [2013] EWCA Civ 1276 at [43]-[44] per Elias LJ). It formed "part of the overall examination of the particular circumstances of each of the appellant's case, no more no less" (see R (EM (Eritrea)) v SSHD [2014] UKSC 12 at [74] per Lord Kerr).

94. In its analysis as based on all the evidence, the Tribunal in AS2 stated that they did not reach the same conclusion in relation to the risk of indiscriminate violence in Kabul or as to internal relocation. At [209], the Tribunal stated:

> "Although violent crime is prevalent, the evidence does not point to it being at such a high level that the appellant would be at real risk merely on account of his presence in Kabul."

95. At [210] the Tribunal recognised its finding was different from the conclusion reached in the UNHCR documents, including the 2018 Guidelines. The Tribunal stated:

> "We recognise that we have reached a conclusion that is different from that expressed by UNHCR in the 2019 UNHCR submissions where (in contrast to the 2018 UNHCR Guidelines and 2019 UNHCR COI Report) it is stated in terms that UNHCR believes Kabul is not 'a relevant IFA'. We have based our assessment on the same statistical evidence relied upon by the UNHCR (casualty rates recorded by UNAMA). However, our approach to the UNAMA casualty figures appears to differ to UNHCR in two significant ways.
>
> a. Firstly, it appears that UNHCR have looked at the total number of casualties, compared these over time, but have not considered the casualty rate. We note that the approach we have adopted, of relying on the casualty rate rather than the absolute number of casualties, was also used by EASO, who in the 2019 EASO Guidance contextualised the number of civilian casualties in 2018 by noting that the total of 1,866 (as reported by UNAMA) corresponded to 38 per 100,000 inhabitants. In our view, once the total number of casualties in Kabul is set against the size of the population, the conclusion that

the risk is at a level where internal relocation is not an option (i.e. not relevant), becomes untenable.

b. Secondly, UNHCR appears to have interpreted the UNAMA figures as showing an upward trend, over the last several years, in the number of casualties in Kabul. However, as explained above, we do not agree that the data supports such a conclusion, as it appears to us that, since 2016, there has been a relatively steady and consistent number of casualties each year".

Having considered the UNHCR evidence, as summarised in the headnote, the Tribunal did not accept that the level of indiscriminate violence engaged Art 15(c). At para (ii) the UT said this:

"(ii) There is widespread and persistent conflict-related violence in Kabul. However, the proportion of the population affected by indiscriminate violence is small and not at a level where a returnee, even one with no family or other network and who has no experience living in Kabul, would face a serious and individual threat to their life or person by reason of indiscriminate violence".

96. In the light of AS2, it cannot be said that the UNHCR Guidelines, that were in the bundle would have led to any other outcome or to show that any return to Kabul(where he had family living) would breach Art 15(c) of the Qualification Directive. The Tribunal' country guidance in AS2 is that no such risk can be established despite the UNHCR's views.

97. Also, in so far as the UNHCR evidence proposed that it would be unreasonable or unduly harsh, such that internal relocation was not available, to return to Kabul, the UT's decision in AS2 reached a different conclusion "in general". At para (iii) of the headnote, the Upper Tribunal's position is summarised that:

"it will not, in general, be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul and even if he does not have a Tazkera".

98. Whilst at paras (iv) and (v) of the headnote, the UT recognised that the "particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation", there was no indication that this appellant had any physical or mental health difficulties (see FtTJ at [48]) and he would be returning to Kabul where he had family relatives. Thus, the conclusion reached that the appellant could not bring himself within the Qualification Directive was open to the FtTJ for the reasons given at [44-46]

99. The grounds do not expressly challenge the issue of relocation to Kabul. The factual findings made by the FtTJ make it plain that he would not be returning as an unaccompanied minor because he would have the assistance of his uncle to whom he could return in Kabul. Whilst Mr Howard relies upon his age. In AS (Afghanistan) 2018 (HS1), the Upper Tribunal stated:

> "232. We also consider the age at which a person left Afghanistan to be relevant as to whether this included their formative years. It is reasonable to infer that the older a person is when they leave, the more likely they are to be familiar with, for example, employment opportunities and living independently.
>
> 233. Although we find that it is reasonable for a person without a support network or specific connections in Kabul or elsewhere in Afghanistan to internally relocate to Kabul, a person will be in a more advantageous position if they do have such connections depending on where they are, the financial resources of such people and their status/connections. We have in mind that the availability of a support network may counter a particular vulnerability of an individual on return."

100. Drawing those matters together, I am satisfied that the FtTJ's decision that the appellant could not ring himself within the Qualification Directive and could return to Kabul in safety was open to the FtTJ for the reasons given at [44-46].

101. The last point relied upon by Mr Howard is that the FtTJ failed to apply the Joint Presidential Guidance Note number 2 of 2010 in assessing the appellant's evidence, in the light of the appellant being a child. Secondly, he submits that the judge failed to apply section 55 of the Borders, Citizenship and Immigration Act 2009 in assessing the appellant's claim.

102. There is no merit to the grounds on which is asserted that the judge failed to take into account the appellant's age. Whilst it is right that the decision does not specifically refer to the Joint Presidential Guidance Note, it is plain from reading the determination as a whole and specifically at paragraph 26 that the judge properly took into account the appellant's age when assessing the evidence. At [48] the judge was aware that he had no mental health problems and took that into account. The grounds and the submissions made by Mr Howard fail to particularise any grounds as to how or why the judge's assessment of the evidence in light of the appellant's age was flawed.

103. As set out earlier, the decision letter made reference to S55 in the context of the appellant's claim and in the context of his age, his maturity and his degree of mental development. Again, the grounds are silent as to how that impacted upon the appellant and the ROP shows that such a submission was not raised before the FtTJ. The judge's record of proceedings makes no reference to the appellant's advocate making any submissions concerning section 55 or providing any submissions as to how the evidence should be assessed in any particular way. Mr Howard accepted that the skeleton argument did not refer to section 55 either.

104. I can find no reference to any argument being advanced before the FtTJ that concerned s 55 and any "best interests" assessment. The best that Mr Howard could submit was that it was "Robinson obvious" because the appellant was a child. That may be so, but in the absence of any detailed and proper argument

as to how it affected the case, I am satisfied that the decision of the FtTJ properly considered the appellant's age when reaching the overall assessment (see paragraph 26). There is no error of approach as asserted in the grounds.

105. For those reasons, I am not satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law that was material to the outcome. I therefore dismiss the appeal. The decision of the FtTJ shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law and therefore the decision shall stand.

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

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

Signed *Upper Tribunal Judge Reeds*
Dated 9 November 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.