



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/09353/2017

THE IMMIGRATION ACTS

Heard at Field House
On 14 May 2021

Decision & Reasons Promulgated
On the 21st June 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

SR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mr Fripp of Counsel, instructed by Lawrence & Co Solicitors
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant is 23 years old (date of birth 15 October 1997). He is a national of Afghanistan and his home area is the Laghman province.
2. This is the remaking of the decision in the Appellant's protection and human rights appeal. In a decision promulgated on 15 November 2018, Deputy Upper Tribunal Judge Monson dismissed the Appellant's appeal against the decision of Judge Sammi of the First-tier Tribunal promulgated on 21 December 2017 ("FTT"). Judge Monson found that the FTT had erred in law but retained the findings of fact insofar as they relate to the Appellant facing a real risk of persecution from the Taliban in his home area (see paragraphs 12-17 of the decision of the FTT and paragraph 16 of the decision of Deputy Upper Tribunal Judge Monson). On remaking the decision, Judge Monson dismissed the appeal, finding that the Appellant could relocate to Kabul. The Appellant's appeal to the Court of Appeal was allowed by consent and the case remitted to the Upper Tribunal. The Court of Appeal's order set aside the decision of the deputy judge in its entirety, including the earlier finding that the FTT's decision involved the making of an error of law.
3. At a Case Management Review Hearing on 27 November 2020, Upper Tribunal Judge Stephen Smith heard submissions on whether it was necessary to redetermine whether the decision of the FTT involved the making of an error of law and, if so, whether it should be set aside. As set out in the note of that hearing at the Annex to this decision, it was common ground that the decision of the FTT involved the making of an error of law such that it needed to be set aside, with certain findings of fact preserved. Judge Stephen Smith set the FTT's decision aside, while retaining the FTT's findings of fact in relation to persecution in the Appellant's home area. It not being in issue that the Appellant would face a real risk of serious harm, as defined in Article 15(c) of the Qualification Directive, in his home province of Laghman, the Upper Tribunal identified the remaining issues for consideration on remaking as relating to relocation to Kabul.
4. It is the Appellant's case that he faces a real risk of persecution or serious harm in Kabul and that it would be unreasonable for him to relocate to Kabul.
5. In relation to the first limb, in summary the Appellant's case is that the risk flows from the preserved findings of fact reached by the FTT concerning his and his father's past association with the Taliban. His father, who was in the Taliban, disappeared in 2011. Shortly thereafter, the Taliban kidnapped the Appellant from his home. He was taken to the mountains, where he was detained against his will in the madrasa. He escaped when the madrasa was raided by the police and the Americans. The Appellant submits that on relocation to Kabul:

- (1) he faces a real risk of being detained by the Afghan authorities because of his past history and that, whilst in detention, he would face a real risk of torture; and/or
 - (2) there is a real risk that he will be identified by the Taliban, given the social structures in Kabul and his apparent Westernisation.
6. In relation to the second limb, in summary it is the Appellant's case that his personal circumstances are such that it would be unreasonable to expect him to relocate to Kabul:
- (1) he is a young man;
 - (2) he arrived in the UK in May 2013, when he was 15 years old, and so has lived in this country for approximately 8 years;
 - (3) he has never been to Kabul and does not know anyone there;
 - (4) his background needs to be hidden to ensure his safety and so he would have to avoid the those members of the community whose help he would otherwise have sought; and
 - (5) he suffers from mental health problems.
7. A separate point raised by Mr Fripp on behalf the Appellant is that there is a substantial risk that he will return to his home area to look for his uncle, where he faces an Article 15(c) risk and is at risk from Taliban as a result of his past history.
8. In the refusal decision, dated 12 September 2019, Respondent concluded:
- (1) that the Appellant would not be at risk from the Afghan authorities or the Taliban in Kabul; and
 - (2) it would not be unreasonable to expect the Appellant to relocate to Kabul given -
 - (i) he is a single adult male, who speaks Pashto and is in good health. He will therefore be able to find lawful employment;
 - (ii) he mother and maternal uncle are in Afghanistan; and
 - (iii) he was educated in Afghanistan and has previously been employed in his home country, which demonstrates that he can support himself without the assistance of others.

Hearing

9. We agreed to treat the Appellant as vulnerable given the evidence relating to his mental health. No particular adjustments to the hearing were requested, save that he be given time to respond to questions and special care be taken to avoid interrupting him during his evidence. We ensured that he understood that he could have a break at any point. At one point, whilst being cross-examined, he became distressed but was happy to continue without a break.

10. We heard oral evidence from the Appellant (who gave evidence with the assistance of a Pashto interpreter), Mr Abdul Nasir (who gave evidence in English) and Mr Mumtaz Oraykhil (who gave evidence in English).
11. In closing, Mr Whitwell relied upon the refusal decision and the skeleton argument drafted by his colleague, Mr Kotas. Mr Fripp relied upon his skeleton argument. Both advocates made helpful supplementary oral submissions and we are grateful to them for their assistance. During the course of this decision, we address the points they made.

Evidence

12. In reaching our decision we have taken into account the:
 - (1) Respondent's bundle, which includes the Appellant's witness statements, dated 3 July 2013 ("witness statement 1") and 2 February 2017 ("witness statement 2");
 - (2) Appellant's updated bundle (pages 1-332), which includes the Appellant's witness statement, dated 21 January 2021 ("witness statement 3");
 - (3) Appellant's bundle containing evidence in relation to his mental health (pages 1-113); and
 - (4) oral evidence of the Appellant and his witnesses.
13. We did not reach our findings of fact until we had considered the entirety of the evidence in the case, in the round, to the lower standard.

Legal framework

14. The burden of proof in protection claims is on the Appellant and the standard of proof is that of a reasonable degree of likelihood or a real risk.
15. Paragraph 339O of the Immigration Rules, reflecting Article 8 of the Qualification Directive, provides that the Secretary of State will not make:
 - (1) a grant of refugee status if in part of the country of origin a person would not have a well-founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
 - (2) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.
16. In assessing whether a person can reasonably be expected to relocate, the question to be answered is whether it would be unduly harsh to expect an appellant, who faces a real risk of serious harm in one part of his country, to move to a less hostile part. If the appellant can live a relatively normal life there, judged by the standards that

prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there (Januzi v SSHD [2006] UKHL 5).

17. Once the Respondent has identified a location for return, it is for the Appellant to prove why return to that location would be unduly harsh but within that burden, the evaluation exercise should be holistic.
18. In AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC), the Upper Tribunal gave guidance as to the factors relevant to the assessment of the reasonableness of relocation to Kabul at § 253(iii)-(v). Mr Fripp confirmed that he was not asking us to depart from this guidance.

Findings and conclusions

Risk of persecution/serious harm in Kabul

From the Afghan authorities

19. The Appellant's case, as set out in the skeleton argument of Mr Fripp, is that the Appellant would be at risk of detention and/or torture by the Afghan authorities by reason of his and his family's connection with the Taliban.
20. We find that the Appellant would not face a real risk of persecution or serious harm from the Afghan authorities on relocation to Kabul. We reach this conclusion for the following reasons.
21. We remind ourselves that pursuant to the FTT's unchallenged findings of fact, the Appellant's links with the Taliban are:
 - (1) the Appellant's father, who disappeared in 2011, was in the Taliban;
 - (2) the Taliban would visit the Appellant's father at the family home at night and be served tea;
 - (3) shortly after the Appellant's father disappeared, at which time the Appellant was 13 years old, the Appellant was kidnapped from his home by the Taliban and detained at a madrasa. He escaped after three months, when the Afghan authorities and the Americans raided the madrasa.
22. We consider first whether the appellant faces a real risk of being stopped and detained for questioning by the authorities at Kabul airport in circumstances that would amount to an act of persecution or serious harm.

23. Dr Giustozzi, at paragraph 6 of his report, states that the Appellant will be unable to get through the airport undetected because he will not be in possession of any identification. He also states that the Appellant will be detained if there is a report filed about him in his home district and/or if there is a warrant out in his name (paragraphs 5 and 6).
24. There is no evidence that any such report or warrant exists and Dr Giustozzi does not state that the circumstances of the Appellant's background are such that it should be inferred that such a report or warrant exists.
25. Dr Giustozzi's evidence about the Appellant being stopped and detained at the airport is in conflict with evidence in the report, dated August 2017, prepared by Asylos. In that report, the director of the Afghan Migrants Advice and Support Organisation ("AMASO") in Kabul stated:

"There is no question upon arrival, the only thing they say is okay, they check their names okay, you are this person and if they have tazkira ... they might register the name of the tazkira, that is it. There is no any immigration person in the airport and nothing happens ..."

26. In the same report, Dr Anicee Van Engeland stated:

"Upon arrival at the airport, returnees are met by the airport police. There is a centre located in the arrival lounge where returnees will firstly see a representative of the Ministry of Refugees and Repatriations office. They will be registered. Returnees can then speak to representatives from different ministries ... and from the IOM. Doctors are also present. Returnees are under no obligation to speak to anyone but for the Ministry of Refugees and Repatriations ... Many returnees report being verbally abused by the police and by custom officers at the airport: they say they were insulted for leaving the country and for becoming a burden now that they were back. The UNHCR monitors the whole arrival process."

27. We do not need to resolve the conflict because the Appellant's evidence was that he gave his Afghan identity document, namely his Tazkira, to the Home Office and therefore we find that it will be returned to him prior to him arriving at Kabul airport. Consequently, even on Dr Giustozzi's evidence, the Appellant will not be stopped at the airport by the Afghan authorities.
28. Mr Fripp submitted that, irrespective of whether the Appellant is stopped and detained at the airport, there will remain a risk throughout the Appellant's time in Kabul that his family connections with the Taliban will become known to the authorities. Mr Fripp gave the example of the Appellant disclosing his identity when seeking employment or housing. Again, as we find that the Appellant will be in possession of his Tazkira, we conclude there is no reason why he would need to disclose his family history in the circumstances described by Mr Fripp.

29. However, we consider there is a real risk that the authorities will become aware of his background in some other way, such as the Appellant discussing his past with somebody he meets in Kabul. The only evidence of the attitude of the authorities is contained within the report of Dr Giustozzi, at paragraphs 6-16.
30. Dr Giustozzi states that, if the police became aware of the Appellant's family background (paragraph 6), it is likely they would detain the Appellant for interrogation. At paragraph 12, he states that there is an assumption that young sons of Taliban fathers will follow in their father's footsteps and that, typically, a Taliban father would have sent his son to religious seminars, taught by teachers linked to the Taliban. Dr Giustozzi states that this profile fits the Appellant. Further, he quotes, what we assume are the words of the single police officer that a member of Dr Giustozzi's team interviewed, that "most times sons of these Taliban commanders and fighters have valuable information about the insurgents groups activities, which can help the security forces ..."
31. We find that the description of the family profile that has led Dr Giustozzi to conclude that the police will detain the Appellant, is not actually the profile of this Appellant because:
 - (1) at paragraph 15 of the report, Dr Giustozzi states that, "mostly it is relatives of commanders and leaders who are likely to be detained; cases of relatives of common fighters been detained a rare ..." Dr Giustozzi does not state that it is his opinion, from the evidence he is reviewed, that the Appellant's father was a Taliban commander or leader. The only evidence we have is from the Appellant and that is limited to the Taliban visiting the family home at night and being served tea. In our view, we cannot infer from this limited information the Appellant's father was a Taliban leader or commander;
 - (2) the Appellant's circumstances do not indicate that the assumption about young sons following in their father's footsteps would apply because the Appellant has not seen his father for 10 years and has not lived in Afghanistan for eight years; and
 - (3) the reference to Taliban fathers sending their sons for instruction by teachers linked to the Taliban does not apply in the Appellant's case. He was kidnapped by the Taliban and the ordeal ended approximately 10 years ago.
32. Dr Giustozzi states (paragraph 8) that the police officer who spoke to a member of his team stated that, if the police became aware that the Appellant "was with the Taliban for three months", the Appellant would definitely be detained (paragraph 8). We place little weight on this evidence, for the following reasons:
 - (1) it comes from a single source;

- (2) the police officer who provided this information, according to the summary of his career history at paragraph 7, has never served in Kabul and there is no reference in Dr Giustozzi's report to the officer purporting to have knowledge of police practice in Kabul;
 - (3) it is wholly unclear from the description of the Appellant as being "with the Taliban for three months", whether the police officer was informed that the Appellant was 13 years old the time, that he was kidnapped and that it was 10 years ago. We consider these factors to be relevant, given the statement was made by the officer in the context of his opinion about current investigations by the security forces into suspected insurgents.
33. Dr Giustozzi does not specify whether he considers the other risk factors he identified apply to this Appellant but in any event, we conclude that they do not, given they relate to the police taking revenge on the relatives of the Taliban when a close colleague is killed or detaining close relative the Taliban if, during a raid, the Taliban members themselves escape. The clear meaning of these events is that there is an immediacy and proximity between the attempt to detain the Taliban and the detention of the close family member.

Risk from the Taliban

34. It is the Appellant's case that the Appellant faces a real risk of persecution or serious harm at the hands of the Taliban because of the ease with which he will be identified, by reason of:
- (1) the extent to which identity in Kabul is determined by family and local connections and the relative proximity of Laghman to Kabul; and
 - (2) the Appellant's apparent Westernisation.
35. The Respondent submitted that AS (Kabul) is a complete answer to this point.
36. The relevant section of the country guidance is found at §253:
- "A person who is of lower-level interest for the Taliban (i.e. not a senior government or security services official, or a spy) is not at real risk of persecution from the Taliban in Kabul."
37. We conclude that we do not need to make a finding as to whether the Appellant will become known to the Taliban by reason of the social structures in Kabul or his apparent westernisation because we find that there is no evidence from which we conclude that the Taliban would have any interest in the Appellant over and above any other civilian living in Kabul.

38. We have reviewed the country information within the Appellant's bundle and the report of Dr Giustozzi with care. There is nothing within that evidence addressing the risk of persecution/serious harm of this Appellant by reason of his family history with the Taliban. We note in particular that Dr Giustozzi was given access to the particulars of these Appellant's case and dealt with the risk from the Taliban at paragraphs 3-5 of his report. His assessment was solely in terms of the general risk to civilians by reason of the activities of the Taliban.
39. Insofar as Mr Fripp argued westernisation as a stand-alone point, we reject it because the Upper Tribunal in AS (Kabul) concluded:

"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 paragraph. 187) and this finding was not appealed) ...".

40. We therefore conclude that the Appellant does not face a real risk of persecution/serious harm on relocation to Kabul and nor does he face, applying AS (Kabul), a real risk of a serious individual threat to his life or person by reason of indiscriminate violence.

Risk on return to Laghman Province

41. Mr Fripp submitted that there was a real risk that the Appellant would choose to return to his home area and thereby place himself at real risk of persecution or serious harm at the hands of the Taliban. In our view, it is unnecessary for us to assess such risk. The protection afforded to an individual is confined to the circumstances prescribed in the Refugee Convention and the Qualification Directive and this protection does not extend to circumstances in which an individual chooses to return to a place where he faces a real risk of persecution or serious harm.

Reasonableness of relocation to Kabul

Factual findings

42. The following facts are not in dispute:
- (1) the Appellant is from the Laghman Province;
 - (2) his home was in a village;
 - (3) he lived with his family, namely his mother, father and four younger siblings, until he was 13 years old;
 - (4) his father disappeared in 2011;

- (5) he was kidnapped by the Taliban shortly after his father's disappearance. During his three-month detention, he was abused and exploited. On escape, he fled Afghanistan with the assistance of his maternal uncle;
- (6) he arrived in the UK on 10 March 2013, having left Afghanistan approximately 11 months earlier;
- (7) he currently suffers from depression and is being treated with an anti-depressant;
- (8) he has a relatively recent history (2017) of chronic anxiety;
- (9) he speaks Pashto.

43. We accept the Appellant's account about his life in Afghanistan, given that there was no challenge to this part of his evidence by the Respondent and because we find it inherently plausible. We therefore make the following findings.

44. The Appellant lived in a village with his family. The only other relative with whom the Appellant had contact was his maternal uncle, who lived in the same district. His father had some land, upon which he grew wheat and vegetables. The Appellant went to school at the age of six but left after two years because, given his family's limited means, he had to help his father work the land. When he was approximately 11 years old, he worked as a shop assistant at a grocery shop and his income was used to support the family. During this period, his siblings worked the land with their father. After his father disappeared in 2011, his maternal uncle stepped in to help the family. He has never been to Kabul and does not know anybody who lives there.

45. The extent of the Appellant's contact with his family in Afghanistan is in dispute. It is the Appellant's case that, after he left Afghanistan, his maternal uncle took responsibility for his family and they all relocated because of their fear of the Taliban. He has given consistent accounts that, on arrival in the UK, he was able to maintain intermittent telephone contact with his uncle. His uncle refused to tell the Appellant where the family were living, partly because his uncle feared that if the Appellant returned, the family would be put at risk and partly to assist the Appellant's asylum claim. In witness statement 2, prepared in February 2017, the Appellant stated that he was not presently in contact with his family, with the last telephone call with his uncle having occurred 4 to 5 months earlier.

46. At the hearing at the FTT in October 2017, the Appellant said he was in contact with his uncle. At the remaking hearing at the Upper Tribunal in November 2018, the Appellant stated that he had last spoken to his uncle a month before and repeated his account of why his uncle would not disclose where the family were living.

47. In his witness statement, prepared in January 2021, the Appellant stated that he had lost contact with his uncle and that they had last spoken about a year before. He had

tried the telephone number but it no longer connected and his uncle had not telephoned him. He maintained this account in cross-examination.

48. The Respondent submits that it is implausible that the Appellant would have lost contact with his uncle, given the importance of that family connection and further, that the timing of the claim to have lost contact gives rise to the inference that it is a lie in order to assist the Appellant's asylum appeal.
49. Whilst the point made by the Respondent is a valid one, we find, apply the lower standard of proof, that we accept the Appellant is no longer in contact with his family. We reach this conclusion for the following reasons:
- (1) on previous occasions during the course of these asylum proceedings, the Appellant has been prepared to give evidence contrary to his case. At the FTT hearing and at the first remaking hearing at the Upper Tribunal, the Appellant disclosed that one of the reasons that his uncle did not want to disclose the family's location was in order to assist the Appellant's asylum claim;
 - (2) the relevance of the nature and extent of the Appellant's contact with his family in Afghanistan has always been a relevant issue. Consequently, if he was going to lie about this contact in order to improve the prospects of success of his asylum appeal, he could have lied at a much earlier stage; and
 - (3) it has never been in dispute that all of the Appellant's family, including his uncle, lived in the Laghman province nor that there was, and is, an Article 15C risk in this province. Given that there is no evidence from which we can conclude, applying the lower standard of proof, that when they fled their home district, the family fled the province, we consider it plausible that contact has been broken.
50. Even if, contrary to our findings, the Appellant were able to establish some form of communication with his family, we find that they would be unable to provide him with any financial support. We reach this conclusion for the following reasons:
- (1) we have accepted the Appellant's evidence about the financial circumstances of the Appellant's family, namely that they were of very limited means;
 - (2) we have reviewed the evidence given by the Appellant during the course of the asylum proceedings and can see no reference to the Appellant being questioned about the financial means of his uncle;
 - (3) in our view, it cannot be inferred, from the fact his uncle financed the Appellant's safe passage to the UK, that his uncle is a man of means. The ability to fund such a trip is just as consistent with his uncle using limited savings in an emergency, as it is with his uncle being financially comfortable.

51. We find that the Appellant's friends, who gave evidence in his case, cannot afford to send money to the Appellant. We find their evidence, that they are of limited means and that they send money to Afghanistan to support their own families, to be inherently plausible.
52. We find that the families of the Appellant's friends would not be willing to provide the Appellant with support, either financial or practical. We asked the witnesses about this and we accept their evidence, and that of the Appellant, that given his family's past association with the Taliban, they would not want to have anything to do with the Appellant.
53. As stated above, the fact of the Appellant's mental health is not in dispute. We find that the Appellant suffers a long-standing undiagnosed physical condition, namely pain in his stomach. We accept his evidence on this point because it is something he is consistently reported and described as having suffered prior to his arrival in the UK. We also accept his evidence that he has suffers from frequent headaches again, because he has consistently reported such a symptom.
54. We find that, on arrival in the UK, the Appellant did not attend school or college because the Respondent initially believed he was an adult. Based on the Appellant's evidence, we find that he currently lives on his own and works as a shop assistant. We find that his physical and mental health conditions have some impact on his day-to-day life. For example, both conditions affect his sleep and occasionally cause him to not be able to work a full day.
55. Whilst we have found that the Appellant does not face a real risk from the Taliban or the Afghan authorities, we find that he has a genuine subjective fear, given his life experiences in Afghanistan. We find, as a result of this subjective fear, the Appellant will not seek out help from people within the community who might otherwise have been able to help him.
56. As previously stated, we find that his Tazkira will be returned to him by the Respondent prior to him arriving in Kabul.

Conclusions

57. Applying this factual matrix to the country guidance in AS (Kabul), we conclude that it would be unduly harsh to expect the Appellant to relocate to Kabul. We reach this conclusion for the following reasons.
58. The Appellant would arrive in Kabul with no established social network nor any connections that could be fostered in order to develop such a network. His experience of life in Afghanistan was as a child, living in a farm setting, entirely

dependent upon his family. He has no experience of life as an adult in a city. Pursuant to the preserved findings of fact reached by the FTT, he experienced a traumatic detention at the hands of the Taliban, and continues to face being persecuted by them in Laghman Province; we find that that foundational experience of trauma significantly undermines his ability to form the relationships and networks he needs to be able to relocate to Kabul. Against that background, he will have no contact with his family, and even if such contact could be established they would be unable to support him financially.

59. He would have access to the basic level of support provided for returnees, in the form of temporary accommodation, which would last two weeks. He would be provided with limited funds, which he would need to use to pay for accommodation thereafter and to feed himself. The accommodation would be in a 'tea house'. Whilst this accommodation, as found in AS (Kabul), is adequate for most single male returnees, this Appellant - with his mental health difficulties and lack of knowledge of city life - would be vulnerable to the exploitation and violence described at § 75 of AS (Kabul). In AS (Kabul), the Upper Tribunal found that the funds available to returnees would be capable of lasting between four and six weeks, after which the returnee would need to find employment. However, the caveat identified, namely that if a person is not astute or lacks knowledge of local prices, applies in the case of this Appellant. He would therefore need to be able to find employment more quickly.
60. We conclude that there is no real prospect of the Appellant being able to secure employment, whether in the short or long term, including manual labour. Though he has his Tazkira, and some limited experience of working as a shop assistant, we find that his fear of drawing attention to himself, based on his genuine subjective fear of being the subject of the adverse attention of both the Taliban and the authorities, combined with his mental health condition, mean that he will be fearful of seeking employment and further, that his demeanour as a result of this fear will not make him an attractive prospect to employers.
61. Drawing this analysis together, we find to the lower standard that it would be unduly harsh for the appellant to relocate to Kabul. His conditions outlined above, and the reasonably likely particular circumstances of his return combine to prevent the appellant from being able to lead a relatively normal life there (cf Januzi). The unchallenged and preserved findings of fact reached by the FTT concerning the kidnapping, detention and flight he experienced during the formative stages of his childhood, when combined with his mental health conditions and likely circumstances upon his return, takes this appellant outside the category of those identified at Headnote (iii) of AS (Afghanistan). He does not enjoy the ability internally to relocate to Kabul and the appeal must be allowed on asylum grounds.

62. Given our findings and the preserved findings of fact reached by the FTT, we further conclude that the Appellant has demonstrated that there are very significant obstacles to integration into Afghanistan. Consequently, he meets the requirements of paragraph 276ADE(1)(vi) and therefore that his removal would be a disproportionate interference with his private life.

NOTICE OF DECISION

The appeal is allowed on the grounds of asylum and Article 8 of the ECHR.

TO THE RESPONDENT
FEE AWARD

No fee was paid or is due and we therefore make no fee award.

C Welsh

Signed
Deputy Upper Tribunal Judge Welsh

Date 9 June 2021

Annex

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

Appeal number: PA/09353/2017

THE IMMIGRATION ACTS

Between

**SR (AFGHANISTAN)
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

NOTE AND DIRECTIONS FOLLOWING CASE MANAGEMENT REVIEW

1. On 12 September 2017, the Secretary of State refused the appellant's asylum claim. His appeal against that refusal was dismissed by First-tier Tribunal Judge Samimi in a decision promulgated on 21 December 2017. The First-tier Tribunal accepted the core of the appellant's asylum claim but found that internal relocation was a viable option. On 13 August 2018, Deputy Upper Tribunal Judge Monson set aside Judge Samimi's decision, preserving the core findings concerning the appellant's persecution narrative, but setting aside her decision on internal relocation. On 22 November 2018, the deputy judge remade the appeal, dismissing it. By consent, an appeal against that decision to the Court of Appeal was allowed.
2. This matter came before me for a CMR today, having been remitted by the Court of Appeal pursuant to an order by Master Bancroft-Rimmer dated 5 February 2020. Mr Fripp, counsel, represented the appellant. The respondent was represented by Mr Kovats, Senior Home Office Presenting Officer.
3. At paragraph 2, the Court of Appeal's order set aside the decision of the Upper Tribunal dated 22 November 2018 in its entirety, directing that the matter be remitted to this tribunal "for a fresh determination of the Appellant's appeal, after the Upper Tribunal has handed down judgment in AS (Safety of Kabul) Afghanistan CG [[2020] UKUT 130 (IAC)]".
4. The operative terms of the deputy judge's "Notice of Decision" in the 22 November 2018 judgment were as follows:

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

The appeal is dismissed.”

5. Given the Court of Appeal order set aside the 22 November decision *in its entirety*, it follows that its earlier findings, initially set out in the 13 August 2018 decision, including the preserved findings of fact favourable to the appellant, were also set aside.

6. It matters not that the deputy judge’s “error of law” decision dated 13 August 2018 was not expressly set aside. As the Court of Appeal noted in Terzaghi v Secretary of State for the Home Department [2019] EWCA Civ 2017 per Lord Justice Dingemans at [40]:

“...if the UT finds an error of law in the decision of the FTT but then goes on to make its own decision (rather than remit the case to the FTT) the ‘error of law decision’ will be an intermediate decision only, see paragraph 25 of VOM; and thirdly once the final decision has been made by the Upper Tribunal, the intermediate decision of the Upper Tribunal will merge with the final decision of the Upper Tribunal generating a composite decision for the purposes of an appeal...”

See also VOM (Error of law - when appealable) Nigeria [2016] UKUT 410 (IAC), endorsed by the Court of Appeal, above.

7. It follows, therefore, that the 13 August decision “merged” with the 22 November decision, generating a composite decision, the entirety of which has now been set aside. The task of the Upper Tribunal as presently constituted is, therefore, to decide whether the decision of Judge Samimi involved the making of an error of law and, if so, whether it should be set aside.

8. It was common ground that, for the reasons given by Judge Monson in his 13 August 2018 decision, Judge Samimi’s decision did involve the making of an error of law, and fell to be set aside. It was clearly the intention of the parties, and the Court of Appeal, that the deputy judge’s findings in this regard be preserved, even if the operative terms of the Court of Appeal’s order had a different effect. I set the decision of Judge Samimi aside, preserving the same findings of fact as preserved by the deputy judge, and direct that the substantive hearing in this matter takes place in the Upper Tribunal to determine the issues identified by the deputy judge at [16] of his error of law decision dated 13 August 2018. Specifically, I preserve the findings of fact reached by the First-tier Tribunal on the issue of the appellant’s past persecution, and direct that the sole remaining protection issue for resolution is whether internal relocation to Kabul would be unduly harsh. Judge Samimi made no express Article 8 findings, meaning that the Article 8 assessment the Upper Tribunal will conduct will not need to take as its starting point any earlier preserved Article 8 findings.

9. At the CMR hearing, Mr Kovats confirmed that the respondent accepts that the appellant faces a real risk of being persecuted on Convention grounds in his home area of Laghman Province, as well as an Article 15(c) risk under the Qualification Directive.

10. [Directions given for resumed hearing]

Stephen H Smith

Upper Tribunal Judge Stephen Smith
27 November 2020