**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: RP/00002/2019**

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 18 August 2021** | **On 12 November 2021** |

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**
**DEPUTY UPPER TRIBUNAL JUDGE WILDING**

**Between**

**IBRAHIM AHMADI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the appellant: Mr O Richards, Counsel, instructed by Temple & Co
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

## DECISION AND REASONS

### Introduction

**1.** The appellant is a citizen of Afghanistan, born in 1992. He arrived in United Kingdom in 2007 and claimed asylum. Whilst the claim was refused, a subsequent appeal succeeded in the appellant was granted leave to remain as a refugee. In January 2014 he was then granted indefinite leave to remain. In 2015 appellant was convicted of assault and rape and was subsequently sentenced to 7 years' imprisonment, varied on

appeal to 5 years. The conviction and sentence triggered deportation action by the respondent. They then followed a fairly protracted series of events which an appeal before the First-tier Tribunal in June 2019.

**2.** This is the re-making of the decision in the appellant's appeal against the respondent's refusal of his protection and human rights claims and the decision to revoke his refugee status. This follows the previous decision of a panel of the Upper Tribunal (Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Harris), promulgated on 12 September 2019, by which it was found that the First-tier Tribunal had erred in law when allowing the appellant's appeal on Article 3 ECHR (Article 3) grounds and that the judge's decision should be set aside. In so doing, a number of findings were expressly preserved, namely:

(a) the certificate issued under section 72 of the Nationality, Immigration and Asylum Act 2002 was upheld, thereby excluding the appellant from the protection of the Refugee Convention and excluding him from humanitarian protection;

(b) the appellant was at risk of Article 3 ill-treatment by the Taliban in his home area in Maydan in Wardak Province;

(c) the appellant was not, as had been claimed at one stage, a convert to Christianity;

(d) there was no Article 8 ECHR claim.

**3.** A further and, as it has turned out to be, very important and undisputed fact is present in this case: the appellant is of the Hazara ethnic group and is a Shia Muslim.

**4.** Following the promulgation of the error of law decision and in light of subsequent Directions Notices, the parties prepared and set out their respective arguments on what were the core issues of whether the appellant would be at risk of Article 3 ill-treatment in Kabul, or whether, in the absence of such a risk, it would nonetheless be unduly harsh for him to relocate to the capital.

## Recent events in Afghanistan

**5.** Over the course of the two days immediately preceding the resumed hearing before us, dramatic events unfolded in Afghanistan. Whilst the progression of the Taliban in many regional areas of Afghanistan had been taking place over the course of a number of weeks, the speed with which complete control of Kabul itself was assumed was arguably unexpected.

**6.** In any event, as at the date of hearing we were of the view that the Taliban had, to all intents and purposes, overthrown the Afghan government and were in control of the entire country. Neither representative sought to dissuade us from this position.

**7.** The change in circumstances on the ground gave rise to an important initial consideration; could we fairly proceed to determine the appellant's appeal at this stage?

**8.** On the appellant's side, his industrious solicitors had sought and obtained an updated expert report from Mr Tim Foxley, MBE, who had provided to previous reports in this appeal. The latest report, dated 17 August 2021, included sections on the current state of affairs, with the author (in our view, quite properly) commenting that it was very difficult to provide a clear picture of the new security situation given the extremely short duration of the Taliban's control. In addition, an updated skeleton argument was drafted by the solicitors, which in essence submitted that in light of the preserved findings of fact in this case and the nature of the Taliban, the appeal should be allowed on Article 3 grounds.

**9.** Mr Lindsay, in his customary manner, put forward the respondent's position on fair and considered basis. He confirmed that there was as yet no policy in place in respect of ongoing appeals of Afghan nationals. He was not in a position to make any formal concessions. In all the circumstances, he deemed necessary to seek an adjournment on the grounds that: there was a dearth of evidence as to the current situation; that situation would be likely to become clearer over time; the appellant's case now was speculative; that the updated report from Mr Foxley had been served very late in the day (in fact, the day before the hearing).

**10.** Mr Richards opposed the application.

**11.** Having risen to consider the application, we refused it. Our reasons for doing so are as follows.

**12.** First, the situation in Afghanistan has significantly changed at very short notice and this clearly presents challenges to the parties and indeed the Tribunal. However, it was clear enough that the Taliban has assumed control of the entire country. Whilst it may be that the situation becomes clearer in due course, it is unclear whether this would be so within a number of weeks, several months, or perhaps a longer period. The Tribunal must be flexible and willing, where appropriate, to address changes in circumstances. In respect of the parties, there is in this particular case a preserved and/or undisputed factual matrix which can be applied to the current situation, together with appropriate submissions on the nature of the Taliban and the boundaries between reasonable inference on the one hand and impermissible speculation on the other.

**13.** Second, the absence of a formal policy position from the respondent is not of itself a sufficiently good reason to adjourn. We were certainly not expecting any concessions from Mr Lindsay at the hearing.

**14.** Third, Mr Lindsay did not object to the admitting in evidence of Mr Foxley's updated expert report (which we duly accede to). We indicated that we would give him additional time to consider the report and provided him with specific references to those sections of the document which made

reference to the current situation. Further, we highlighted to both representatives what we considered to be potentially relevant issues in this case, in order to assist in the presentation of their respective arguments. The issues were:

(a) the risk in the home area;

(b) the appellant as a returnee from the West;

(c) the criminal conviction in the United Kingdom;

(d) the appellant's Hazara ethnicity and Shia faith;

(e) that an individual cannot be expected to lie in answer to questions put by enquirers on or after return.

**15.** In this way, we concluded that it was fair on both parties to proceed with the hearing.

**16.** Another matter which arose was the applicability of the country guidance set out in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC). The appellant's updated skeleton argument asserts that recent events have rendered AS otiose. Mr Lindsay did not expressly argue the contrary.

**17.** In considering this issue for ourselves, we bear in mind what is said in paragraph 12 of the Practice Directions of the First-tier Tribunal and Upper Tribunal and the test set out in case-law to the effect that extant country guidance should only be departed from where there is "cogent evidence" to justify such a course of action.

**18.** We are satisfied that it is appropriate to depart from what is said in AS. We fully acknowledge the limited documentary evidence before us, which, at least in terms of the current situation, consists of the updated sections of Mr Foxley's latest report and to articles from The Guardian. Having said that, it would be wholly artificial for us to ignore the media reports of what has unfolded before over recent days. If this is to be described as taking judicial notice, then so be it. Further, we can see that the term "cogent" could be said to denote the need for a volume of "hard" evidence, or a more limited, but particularly detailed, body of such information. However, the term is not in our view one of art, but is capable of flexibility. In our judgment, the cogency of the evidence (both that before us and that in respect of which we take judicial notice) lies in its uncontroversial nature (i.e. there is no dispute that the Taliban have indeed assumed complete control of Afghanistan) and the obvious impact that this has on the issues addressed in AS (the ability of individuals to reasonably internally relocate to Kabul).

**19.** In our judgment, AS can no longer stand as authoritative country guidance.

## The evidence

**20.** For the sake of completeness, and having regard to what we have said, above, we set out the documentary evidence currently before us:

(a) an appellant's consolidated bundle, indexed and divided into four sections;

(b) the updated report of Mr Tim Foxley, MBE, dated 17 August 2021;

(c) two articles from The Guardian, dated 16 and 17 August 2021.

**21.** The appellant was not called to give oral evidence.

## Submissions

**22.** Mr Richards relied on the skeleton argument. He submitted that the appellant could not be expected to rely if questioned on return. It would become known that he was Hazara and Shia, had been deported from the West because of his conviction, and would have to disclose his family background which would in turn indicate that his family had had problems with the Taliban in the home area. It was submitted that information could be obtained from the home area through, at least, mobile telephone communications. It would be wrong to suggest that the Taliban was applying some form of an amnesty.

**23.** Mr Lindsay relied on the reasons for refusal letter and a previous skeleton argument. He submitted that there was no evidence on which the appeal could properly be allowed. Whilst he accepted Mr Foxley's credentials, he submitted that the recent update was speculative. He urged us to concentrate on the specific circumstances of the appellant and suggested that whilst there may be a risk in the home area, it was unlikely that any relevant information would be passed through to anyone in Kabul, particularly given the passage of time since the previous difficulties (some 13 years). People in the home area may not even recall the appellant or his father. If they did, transmission of that information would be unlikely. Issues relating to the appellant's ethnicity were speculative. Mr Lindsay suggested that the appellant could be expected to conceal his conviction and, by extension, the reason why he was being deported to Afghanistan. The submission was put on the basis that concealing a fact that might otherwise place an individual at risk, but where that fact did not go to any protected right, was not unreasonable. Mr Lindsay also suggested that the Taliban may not now behave as they had done when last in power in the 1990s.

**24.** At the end of the hearing we reserved our decision.

## Findings of fact and conclusions

**25.** We reiterate the preserved findings, as set out in paragraph 2, above.

**26.** The core factual matrix on which we proceed to conduct the assessment of risk on return is as follows:

(a) the appellant Hazara and a Shia Muslim;

(b) he would arrive in Afghanistan as a deportee from the United Kingdom, where he has lived for some 14 years;

(c) he has been convicted of rape and that is the underlying reason for his deportation;

(d) He would face a risk of Article 3 ill-treatment if he went to his home area. That risk was predicated on the refusal of the appellant's father to continue to assist the Taliban in transporting weapons, the groups kidnapping of the appellant himself by way of "leverage", the appellant's subsequent escape, and, from another side of the ethnic equation, the threat from other members of the local Hazara community who regarded the appellant's family as traitors.

**27.** Before turning to address the implications of these factual matters, we consider Mr Lindsay's submission that the appellant could be expected to conceal (in other words, lie) about certain aspects of his past, specifically the reasons why he left Afghanistan in 2007 and why he was being deported back to that country.

**28.** During the course of his submissions, we referred Mr Lindsay to the decision of the IAT in IK (Returnees – Records - IFA) Turkey CG [2004] UKIAT 00312, specifically what was said at paragraph 85 and 86:

> "85. Clearly further information may arise from the questioning of a returnee by the police in the airport police station. Mr Grieves submitted that a person should not be expected to lie to the authorities during questioning in order to avoid persecution. Ms Giovannetti in her written reply stated the Home Office position as follows.
>
> > "The Secretary of State accepts that an individual detained and transferred to the airport police station would be interrogated and that it is reasonably likely that further checks would be carried out. However, the nature and extent of such interrogation and checks is likely to be related to the reason that the individual was stopped. So, for example, a person who does not have valid documents is likely to be questioned in order to establish his identity. An individual who is thought to have left on false documents is likely to be questioned about how and from whom he obtained them.
> >
> > The Secretary of State does not suggest (and never has suggested) that Adjudicators should simply proceed on the basis that individual can lie about his background and circumstances. The right approach is to assess what questions are likely to be asked of the individual and what his responses are likely to be. "
>
> 86. We agree with the approach described by Ms Giovannetti. It will be for an Adjudicator in each case to assess what questions are likely to be asked and how a returnee would respond without being required to lie. The examples given by Ms Giovannetti above are examples only. Where and

> whether the questioning goes beyond the ambit of questioning described above, depends upon the circumstances of each case."

**29.** The best of our knowledge, the position adopted by the respondent in IK has never been formally resiled from.

**30.** We readily accept that concealing the fact of the conviction for rape in this country would not in any way go to a protected right and would not therefore benefit from established by HJ (Iran) [2010] 31; [2010] Imm AR 729. However, Mr Lindsay's position in the present case clearly does not sit well with what was said in IK to be a correct approach.

**31.** In our judgment, the position in IK remains sound and we follow it. This is not simply because the point has never been doubted or expressly disapproved. It is also right in principle. If a returnee is asked questions on or after return by the authorities of the country of origin, they should be expected to tell the truth. In some cases this may create or enhance risk, in others it may avoid or reduce risk. If tribunals proceeded from the premise that lies could be expected of the returnee, would it not then be necessary to assess how "good" individual might be at telling untruths, or are willing the enquirer might be to accept what is said at face value? What if answers were then checked and the truth disclosed? What if supplementary questions were then put and the individual was unable to maintain the initial lie in any coherent way? In the context of protection claims, the inherent dangers in adopting Mr Lindsay's approach are manifest.

**32.** For the avoidance of any doubt, there has been no suggestion that the appellant should seek to conceal his Hazara ethnicity and/or Shia faith. To do so would clearly engage the HJ (Iran) principle.

**33.** What then of the type of questions which the appellant would be reasonably likely to face on or after return? First, we have no hesitation in concluding that he would indeed be interrogated and that this would occur at the point of return or very soon thereafter. Similarly, it is clear that the "authorities" are now the Taliban, an organisation with a well-known brutal track record. To suggest that they would not want to know a certain amount of information about an individual who was (hypothetically) deported into their hands from the West is wholly unrealistic.

**34.** In terms of the type of questions which are reasonably likely to be put to the appellant, we find they will include: his basic personal details; his ethnicity; his home area and family background; why he left Afghanistan; why he was being deported back to that country after so long in the United Kingdom; and quite possibly whether he supported the Taliban's view of how Afghanistan should be governed.

**35.** We now consider the various factors outlined above, in turn.

***Ethnicity/faith***

**36.** The minority Hazara population in Afghanistan has long been the subject of targeting by the Taliban and other extremist groups. They have faced generalised discrimination from the majority Pashtoo population. Evidence to this effect had been contained in successive CPINs, although we note that all such guidance documents have now been withdrawn save for that relating to healthcare. Mr Foxley makes reference to the views expressed by UNOCHR on 10 August 2021 "very real risks of renewed atrocities against ethnic and religious minorities" (page 7 of his latest report) and a report published by Al Jazeera in February 2021 setting out the risks to the Hazara community (pages 16-17). Beyond that, he devotes an entire section to the potential risks faced by the Hazara population (pages 27-34). We find that his expert opinion and the sources cited are deserving of considerable weight. The evidence provides strong support for what we say at the beginning of this paragraph, with one passage in particular providing a concise summary of what we consider to be the reasonably likely series of events on the ground:

> "If Afghanistan slides backwards and the government fragments, the Hazara community could then, once again, be at the forefront of forms of targeted and systematic Sunni extremist violence. Kabul, with its growing Hazara community, would be a natural location for this intensified violence to play out."

The "If" has of course now become a reality.

**37.** We conclude that the appellant's ethnicity and faith constitute a very significant risk factor on return. Whilst it may be the case that Hazara's already living in Afghanistan could take steps to remain below the Taliban's radar, as it were, the appellant will, as a deportee, be placed directly into the hands of an extremist Sunni organisation with a history of persecutory treatment of Hazaras and/or Shias.

**38.** Drawing what we consider to be an entirely reasonable inference based on past conduct, nature of the Taliban, and its now total control of Afghanistan, together with an application of the lower standard of proof, we conclude that the appellant is at risk of Article 3 ill-treatment by virtue of his ethnicity and/or faith. On this basis alone, he is entitled to succeed in his appeal.

**39.** Whilst a consideration of the other factors may not be strictly necessary, it is best to address them in any event.

***The appellant's history in Afghanistan***

**40.** We find that when asked, the appellant cannot be expected to do anything other than tell the truth about his family background in his home area and the reason why he fled Afghanistan in 2007. From what we have set out earlier, the basic facts will speak for themselves, at least in the eyes of the Taliban interrogators. This will place the appellant at risk of Article 3 ill-treatment because of a political stance which will be imputed to him, as well as his ethnicity and faith. In our view, the passage of time will make

no material difference to the level of risk. Further, it is entirely possible that calls would be made from Kabul to the home area and that there exists a reasonable likelihood of pertinent information being forthcoming (although we emphasise that the absence of enquiries does not dispel the risk of the appellant truthfully disclosing relevant facts when questioned).

**41.** We find that, taken alone or in combination with ethnicity and/or faith, this factor would place the appellant at risk on return.

***Return from the West and the criminal conviction***

**42.** It will be obvious that the appellant will have spent many years residing in the West. It is apparent that he is accustomed to British society and has adapted to styles of dress and suchlike. It is equally apparent that he has not been a strict adherence to Islam, either by way of practice or appearance.

**43.** In our view, this factor is reasonably likely to cause significant suspicion and, whilst perhaps not a sufficiently strong risk in and of itself, it will undoubtedly enhance all other factors when viewed cumulatively. We do not regard this aspect of our assessment to be impermissibly speculative: rather, it is simply another reasonable inference to be drawn from all relevant circumstances.

**44.** There is, we accept, a degree of speculation in respect of the likely attitude taken by the Taliban to the appellant's conviction for rape in the United Kingdom. We do not have documentary evidence on the point, and are unaware of any consideration of it in previous CPINs or case-law. Nonetheless, we find it to be reasonably likely that the Taliban would take a dim view of an individual who had committed a violent sexual offence in a Western country. It would only add to an already significant adverse profile.

**45.** These two factors will enhance the risk already arising from the appellant's ethnicity/faith and/or his personal history in Afghanistan.

**46.** If we were wrong about this and the Taliban took no account of the conviction, it would make no material difference to our overall assessment of risk, given the other matters set out, above.

**The Refugee Convention**

**47.** The appellant is excluded from the protection of the Refugee Convention by virtue of the upholding of the section 72 certificate. However, this does not preclude him from being a refugee within the meaning of Article 1A(2) of the Convention. That status is declaratory in nature and exists separately from exclusion under Article 33(2).

**48.** On the basis of our conclusion that the primary reason why the appellant would be exposed to Article 3 ill-treatment is his Hazara ethnicity and/or his Shia faith, and that there would clearly be no sufficient state protection, it follows that he is, as matters currently stand, a refugee. The same applies in respect of our conclusion that he would be at risk because of an imputed political opinion regarding the history in the home area. This determination of status does not permit the appellant to succeed in his appeal (see, for example, Essa (Revocation of protection status appeals) [2018] UKUT 244 (IAC)).

## Final observations

**49.** We are allowing the appellant's appeal on Article 3 grounds because of the recent events in Afghanistan. The leave to be granted as a result of this is a matter for the respondent. Our assessment of risk now does not in any way alter the previous finding that the appellant represents a danger to the community of the United Kingdom as a result of his criminality and his ongoing protestations of innocence are notable. There remains a very strong public interest in deportation.

## Anonymity

**50.** No anonymity direction has been made in these proceedings thus far. Although the appellant's case involves protection issues, in all the circumstances including the significant public interest in knowing the identity of foreign nationals who have committed serious crimes in the United Kingdom, we do not deem it appropriate to make a direction at this stage.

## Notice of Decision

**51. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**

**52. We re-make the decision by:**

**a) Determining that the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention;**

**b) Dismissing the appeal on Refugee Convention grounds;**

**c) Dismissing the appeal on the Humanitarian Protection grounds;**

**d) Allowing the appeal on Article 3 ECHR and Article 8 ECHR grounds.**

Signed: H Norton-Taylor Date: 24 August 2021
Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed: H Norton-Taylor Date: 24 August 2021
Upper Tribunal Judge Norton-Taylor

**APPENDIX: ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: RP/00002/2019

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 5 September 2019**

**Decision & Reasons Promulgated**

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**Before**

**DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR**
**DEPUTY UPPER TRIBUNAL JUDGE D HARRIS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**IBRAHIM AHMADI**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr O Richards, Solicitor from Temple & Co Solicitors

**DECISION AND REASONS**

**Introduction**

1. For ease of reference, we shall refer to the Appellant in the proceedings before the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.

2. This is a challenge by the Secretary of State against the decision of First-tier Tribunal Judge Gibbs ("the judge"), promulgated on 24 July 2019, in which she allowed the Claimant's appeal on human rights grounds, specifically in relation to Article 3 ECHR.

3. The Claimant, a national of Afghanistan and an ethnic Hazara, had come to the United Kingdom in 2007 and had made an asylum claim. This claim

was predicated upon an asserted fear of the Taliban as result of his father's past activities, together with the contention that members of the Hazara community would seek revenge on him. The Secretary of State refused the claim. By a decision promulgated on 18 August 2008, First-tier Tribunal Judge Farrelly allowed the Appellant's appeal, concluding that he was at risk in his home area and Kabul, with the alternative finding that the Appellant could not reasonably relocate to the capital even if no risk existed there. As a result of his successful appeal, the Appellant was granted asylum and 5 years limited leave to remain in the United Kingdom. Upon application, the Appellant was then granted indefinite leave to remain in this country on 21 January 2014 on the basis that he was still a refugee.

4. On 13 October 2014 the Appellant, who was then living in Glasgow, was convicted of a public order offence and a domestic abuse aggravator. He was admonished for these offences. On 18 June 2015, the Appellant was convicted of sexual assault and rape for which he was initially sentenced to 7 years imprisonment. This was varied on appeal to 5 years. As result of this conviction, the Respondent instigated deportation proceedings. This eventually led to the signing of a Deportation Order on 8 January 2019 on the basis that section 32(5) of the UK Borders Act 2007 applied.

5. Prior to the Deportation Order, on 17 October 2018 the Appellant had made protection and human rights claims. By a decision dated 7 January 2019, the Respondent refused the protection and human rights claims and at the same time made a decision to revoke the Appellant's refugee status, with reference to paragraph 339AC of the Immigration Rules. In so doing, the Respondent asserted that section 72(2) of the Nationality, Immigration and Asylum Act 2002 applied on the basis that the Appellant had been convicted of a particularly serious crime and that he constituted a danger to the community of the United Kingdom. In consequence, the Appellant was not entitled to the protection of the Refugee Convention. It was said that, in any event, the Appellant would not be at risk on return to Afghanistan and, if necessary, could relocate to Kabul. As regards the Article 8 claim, the Respondent concluded that neither of the two exceptions contained in the relevant provisions of the Rules and section 117C of the 2002 Act applied, nor were there very compelling circumstances over and above the matters set out in those exceptions.

## The judge's decision

6. Before turning to the judge's substantive findings, we feel it necessary to make a point relating to the Appellant's 2015 conviction for sexual assault and rape. At para. 5 of her decision, the judge refers to the sentencing remarks of the trial judge. Those remarks named the victim. Unfortunately, Judge Gibbs quotes the passage in the remarks containing the victims full name. Whilst we appreciate that the criminal case was conducted in Scotland (which of course has its own legal system), the

naming of victims of sexual offences in decisions of the First-tier Tribunal (and for that matter the Upper Tribunal) must be avoided at all costs.

7. At paras 15 to 24, the judge deals with the section 72 certificate. It was accepted by the Appellant's representative (quite properly, in our view) that the Appellant had in fact been convicted of a particularly serious crime. In respect of the second rebuttable limb, the judge notes the passage of time since the index offence was committed and that there had been no further offending during this period. On the other side of the equation, the judge notes, amongst other matters, that the Appellant had continued to deny responsibility for the offence for which he had been convicted by a jury. Ultimately, she concludes that the Appellant had not rebutted the presumption that he was a danger to the community of this country. She therefore upheld the certificate and dismissed the appeal insofar as it related to the assertion that the Appellant's removal from the United Kingdom would breach this country's obligations under the Refugee Convention.

8. This conclusion has not been challenged by the Appellant and is no longer a live issue.

9. The judge then moves on to consider Article 3. Although the case concerned a decision to revoke the Appellant's refugee status, the Respondent's decision was also to refuse his protection and human rights claims. Therefore, the judge had jurisdiction to consider Article 3, and the Respondent has not sought to argue otherwise.

10. With reference to the conclusions of Judge Farrelly in 2008, at para. 26 the judge concludes that the Appellant would still be at risk of ill-treatment in his home area. This conclusion has not been challenged by the Respondent at any stage.

11. In para. 26, the judge also concludes that the risk present in the home area did not extend to Kabul. This conclusion has not been challenged by the Appellant by way of "cross-appeal" (contained within a rule 24 response).

12. On an initial reading of the judge's consideration of Article 3, we have the impression that she was concluding that there was a risk of ill-treatment in Kabul itself. However, for the reasons set out below, we are satisfied that she was in fact assessing the Appellant's situation on return to the capital in the context of internal relocation, an issue which arises as much under Article 3 as it does under the Refugee Convention.

13. First, once the judge had concluded that the Appellant was at risk in his home area, it logically follows that a consideration of Kabul involved the question of internal relocation. There was, as a matter of law, no need for the judge to conclude that was actually a risk to the Appellant there. Second, in paras. in 29 and 34, the judge makes specific reference to "relocation" and, "whether it would be unduly harsh for [the Appellant] to internally relocate to Kabul." Third, the judge had already found there to

be no risk in the capital, at least none based on matters relevant to the Appellant's situation in the home area.

14. In her analysis of the internal relocation issue, at para. 29 the judge discounts a number of factors that would have been relevant to the Appellant in the past, namely his minority, lack of education, and rural upbringing in Afghanistan. As at the date of hearing, the Appellant was an adult, had gone through the education system in this country, and had gained experienced in living in an urban environment (see also para. 34).

15. The central factor in the judge's assessment was the Appellant's Hazara ethnicity. Having cited country information and relied on AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) (which had by the time of the hearing been remitted to the Upper Tribunal by the Court of Appeal on a narrow issue: see AS (Afghanistan) [2019] EWCA Civ 873), she concluded that the Appellant would face discrimination in the capital, and this would have a bearing on his ability to find employment and in respect of his life in general. The lack of a support network, the length of residence in the United Kingdom, and apparent "westernisation" were also said to be of relevance, as was, albeit to a lesser extent, the Appellant's anxiety condition.

16. At para. 39, the judge states that, on a cumulative basis, the various factors led her to the conclusion that the Appellant's deportation would breach Article 3. The appeal was allowed on this basis only.

17. Whilst not expressly stated in her decision, it certainly does not appear as though any Article 8 case was run before the judge. In any event, this is not a live issue now.

## The grounds of appeal and grant of permission

18. In essence, the Secretary of State's complaint is that the factors relied on by the judge were insufficient to justify the conclusion that the Appellant's removal would breach Article 3. In particular, it is asserted that the judge failed to identify any matters beyond "possible discrimination and possible hardships". It is said that the Appellant's ethnicity was not a sufficiently strong factor, at least in respect of the evidence identified by the judge. The judge was wrong to have placed weight on the "westernisation" factor and the lack of a support network. Finally, it is asserted that the judge applied the "wrong legal test" when assessing whether the Appellant could achieve basic living standards in Kabul, and the judgment of the Court of Appeal in MS (Somalia) [2019] EWCA Civ 1345 is relied on.

19. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchinson on 14 August 2019.

## The hearing before us

20. Mr Walker relied on the grounds of appeal. He submitted that a number of the factors taken into account by the judge were either irrelevant or should not have attracted the significance attributed to them by her.

21. Mr Richards relied on his rule 24 response. This asserts that the judge was fully entitled to take into account the factors that she did and that the Secretary of State's grounds were misconceived. The judge had identified relevant country evidence relating to the Appellant's ethnicity in the case of MS (Somalia) was not material to the basis upon which the judge had in fact assessed the Appellant's situation on return to Kabul.

22. Mr Richards emphasised the judge's cumulative assessment in respect of the internal relocation issue. In summary, he submitted that judge's core conclusion was, on the evidence, open to her.

## Decision on error of law

23. For the reasons set out below, we conclude that the judge has materially erred in law.

24. The first point to make is that whilst it is not entirely clear, reading her decision as a whole, we are satisfied that the judge, when assessing the Appellant's circumstances on return to Kabul, was focusing on the issue of internal relocation and not risk (see paras. 12-13, above). It is clear enough that she concluded that there was no such risk of Article 3 ill-treatment in the capital. Certainly, the country information cited did not support a conclusion that there was a risk based simply upon Hazara ethnicity, at least in terms of the Appellant's particular profile.

25. Next, the judge has discounted the relevance of what had been the Appellant's young age when his case was considered by Judge Farrelly. The same applies to his previous lack of education and inexperience of living in an urban area.

26. We conclude that the judge was entitled to find that the Appellant would face discrimination as a Hazara. However, the country information cited in the decision does not, as far as we can see, deal with issues of material discrimination relating to, for example, employment, accommodation, or other basic requirements of a reasonable life (with reference to the general standards prevailing in Kabul). Given the centrality of the Appellant's ethnicity to the conclusion reached by the judge, we agree with the Respondent's challenge to the extent that there is insufficient reasoning as to why any discrimination would have a significant impact on the Appellant.

27. We fully appreciate that the judge's assessment was on a cumulative basis. Having said that, in our view the reliance placed on the

"westernisation" issue is misplaced. Assuming for present purposes that the judge was entitled to rely on the Upper Tribunal's decision in AS at all, para. 187 of that decision clearly states that as a general rule there is no risk as result of perceived "westernisation". It was said that, "at most" there was some evidence of "possible" adverse social impact of suspicion. We remind ourselves that the judge was not concluding that the Appellant was *at risk* in Kabul for any reason, and we note that the passage in AS just referred to is not cited in her decision. Therefore, on materials relied upon by the judge, there was no sound evidential basis for the "westernisation" factor to have played a relevant part in the conclusion that it would be unduly harsh for the Appellant to live in the capital.

28. The judge also relies on the absence of a social network. This matter too is dealt with in AS. It was concluded that this factor would not represent a barrier to internal relocation (see, for example, paras. 204-213). Thus, even on the basis of the materials relied on by the judge, this factor should not have played a significant role in the unduly harsh assessment.

29. In terms of the Appellant's length of residence in the United Kingdom, it was certainly not insignificant, and the judge was fully entitled to take it into account. She was also entitled to consider the Appellant's mental health, although she herself acknowledged that no significant weight was being placed upon this particular matter (para. 35).

30. Bringing all of the above together, we are satisfied that all but two of the factors deemed relevant by the judge in her assessment of the unduly harsh issue are, to a greater or lesser extent, flawed. If these are taken out of the equation, the remaining factors (the time spent in this country and the anxiety) are insufficient to sustain the ultimate conclusion that the Appellant could not internally relocate to Kabul. Therefore, the judge's errors are material.

31. We therefore set the judge's decision aside.

## Disposal

32. Having canvassed the views of the representatives on the question of disposal, we conclude that the appropriate course of action is to retain this appeal in the Upper Tribunal and set it down for a resumed hearing in due course. There are few, if any, material disputes on the essential factual matrix in this case.

33. The resumed hearing will not be concerned with either the Refugee Convention or Article 8. In respect of the former, the judge's conclusion on the section 72 certificate has not been challenged and is perfectly sound. As to the Article 8 issue, it is apparent that no case was put forward to the First-tier Tribunal whatsoever. There is no proper basis upon which to permit the Appellant to now attempt to run arguments that good and should have been addressed previously, but were not.

34. The judge's conclusion that the Appellant would be at risk of Article 3 ill-treatment in his home area has not been challenged by the Secretary of State and it is sound. This conclusion is preserved.

35. Thus, the single issue at the resumed hearing is whether the Appellant's return to Kabul would violate his Article 3 rights.

## Anonymity

36. The First-tier Tribunal did not make a direction. We have not been asked to make one. In the particular circumstances of this case, notwithstanding that it involves a protection claim, we do not make an anonymity direction.

## Notice of Decision

**The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

**We set aside the decision of the First-tier Tribunal.**

**We adjourn this appeal for a resumed hearing in the Upper Tribunal in due course.**

## Directions to the parties

1. The Appellant is, no later than 1 October 2019, to file and serve a consolidated bundle of all evidence relied on. This must relate to the Article 3 issue and must include an updated witness statement from the Appellant;

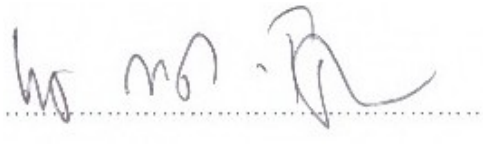
2. The Appellant shall, no later than 7 days before the resumed hearing, file and serve a skeleton argument dealing with all relevant matters;

3. Oral evidence on the Article 3 issue will be permitted at the resumed hearing, but only if an updated witness statement is provided, in compliance with direction 1;

4. No interpreter will be booked for the hearing;

5. The Respondent shall, no later than 11 October 2019, file and serve any additional evidence relied on;

6. Liberty to apply.

Signed  Date: 9 September 2019

Upper Tribunal Judge Norton-Taylor