IN THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006079
First-tier Tribunal No: HU/51824/2022 LH/00414/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 July 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

RK
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Stuart King, of Counsel, instructed by Rahman & Co Solicitors Ltd
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 20 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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Introduction

1. The appellant is a citizen of Afghanistan born in 1991. He arrived in the UK as an unaccompanied minor asylum seeker on 29th July 2002. He was granted exceptional leave to remain until January 2009, and then applied for indefinite leave to remain which was granted on 24th June 2009.

2. On 1st November 2019 the appellant was convicted of the index offence, namely possession with intent to supply Class A heroin and crack cocaine and given a prison sentence of 3 years and 3 months. A deportation order was signed against him on 5th March 2022, and his human rights claim in response was refused on 7th March 2022. His appeal against the refusal of his human rights submissions was dismissed by First-tier Tribunal Judge JK Thapar after a hearing on the 21st October 2022.

3. Permission to appeal was granted and I found that the First-tier Tribunal had erred in law. I set aside the decision and all of the findings relating to the appeal with reference to Article 3 ECHR, as set out in my error of law decision which is attached to this decision as Annex A.

4. I preserved the findings at paragraphs 12 to 14 of the decision of the First-tier Tribunal in relation to the separate Article 8 ECHR appeal, in short that the appellant is not integrated in the UK, as I found that it had been rationally open to the First-tier Tribunal to come to this conclusion, despite the appellant's residence in the UK since he was eleven years old, as it was open to the Tribunal to find, on the evidence before it, that the appellant was not in touch with family members in the UK or former carers, that he was not in education or work, and had not demonstrated that he had involvement with other community associations.

5. The matter comes back before me to remake the appeal. Ms Stuart King clarified that the appeal was being run on Article 3 ECHR grounds, and there was no updating evidence supporting a separate Article 8 ECHR appeal.

Evidence & Submissions – Remaking

6. The evidence of the appellant, who attended the Upper Tribunal, is in summary from his written statements and oral evidence as follows.

7. He is a citizen of Afghanistan born in 1991. The appellant lived in Kabul prior to leaving Afghanistan where he had two years' schooling. His father was a lorry driver. He says that his father was arrested by the Taliban in 1998 after a period of harassment during which they extorted money from him. After his father was released from Taliban detention in the year 2000 they both escaped Afghanistan, travelling first to Iran

where they remained for many months. The appellant lost contact with his father on route to the UK in Turkey after this period in Iran.

8. The appellant came to the UK illegally in July 2002 to claim asylum as he was afraid of being persecuted like his father as he was his father's oldest son and he thought he was at risk from the Taliban. He was granted exceptional leave to remain as a minor until August 2006, and this leave was extended until 2008. He was granted indefinite leave to remain on 24th June 2009.

9. The appellant says that he has not had contact with his family since leaving Afghanistan, and lost contact with his father in Turkey in 2002. After he came to the UK his uncle in the UK said he could not continue to care for him, so he was looked after by Social Services and placed with a foster family. He attended the Robert Napier School in Gillingham for two years where he was assessed as having learning difficulties and obtained some GCSEs although he could not remember which ones. He attended college for a period of time after this but was unclear what he studied. He has found it impossible to get stable employment due to his concentration problems, and so did work in pizza shops and other cash in hand work. He has been homeless in the UK from six months after leaving school and his foster placement. He had a place in a hostel for 6 months after foster care but then left it as he wanted to live in London rather than Kent. He has a daughter in the UK, and some contact with her mother, but none with his child who is in social services' care.

10. On 1st November 2019 the appellant was convicted of possession with intend to supply of class A drugs (heroin and crack cocaine) and sentenced to 40 months imprisonment. The appellant says he has not had any involvement with criminal activities since this time, and has remained "clean", but he accepts that he continues to smoke cannabis (weed) daily, and was arrested once for possession of weed since release on bail in 2021, and drinks alcohol (spirits) excessively every day. He accepts that he is an addict. He has recently been referred to a work restart programme and is hoping to do a course to work in security. He said in response to a question from Mr Melvin that he believes that if he got a job in security he would be able to address his substance addictions.

11. The appellant says that he is remains homeless in the UK: he stays with friends and is a sofa surfer. He has no family or other ties with Afghanistan, and he cannot read or write any Afghan language, but can speak Dari. He did get the Red Cross/ Red Crescent to try to find his family while he was in prison but they had no luck. He would struggle to survive in Afghanistan as he has not been there since he was a child, and feels he is westernised and is used to a different life. He thinks he would have problems due to his addiction to alcohol and weed/cannabis, and that he would be able to get hooch or homemade alcohol in Afghanistan despite it being officially illegal. He could not give up his addictions as it is not easy, and he had managed to obtain both cannabis and hooch in prison in the UK and so remain an addict during

his sentence. He is afraid of returning to Afghanistan because he is afraid of the Taliban because he is ethnically Tajik and because of his father's history. He also just got a tattoo of a bird on his hand which he thinks might also lead the Taliban to beat him up as they might not like it. He accepts that he is a Muslim by religion, and attends mosque from time to time and observes Muslim festivals such as Ramadan, but thinks the Taliban would force him with violence to pray five times a day.

12. The appellant's evidence regarding his medical problems is as follows. He suffers from abdominal and back pain for which he has been told to take paracetamol, which he finds ineffective. He accepted that pain relief is part of the reason for his cannabis use. In addition, he had medical treatment from a hospital in 2019 following an incident in Bristol. He was taken by ambulance, and was given 19 staples (a type of stich) on his head after being attacked at a night club in Bristol, where he had gone from London to meet some girls he had been in touch with online. He was attacked by someone with a baseball bat who was trying to rob him of money. While he was a child in Social Services care he believes that he was diagnosed as being bipolar, and with other conditions, as he could not concentrate, and got angry and frustrated. He has not managed to obtain any treatment for his mental health problems in the UK as he was without a GP but recently, in 2023, he has managed to register with a GP using his friend's mother's address, a woman he calls aunt out of respect but who is not a biological relation, and he has seen a therapist who has referred to him to another service as they found his condition too complex/ severe to deal with. He has thought that he wanted to commit suicide by jumping off a bridge recently, but he does not currently feel that way.

13. Mr Melvin relied upon the reasons for refusal letter dated 7th March 2022 and the Secretary of State's review by Mr N Wain and made oral submissions. In short summary it is argued for the respondent as follows.

14. The appellant has accepted that he is addicted to alcohol and cannabis, he has 8 convictions for the period 2010 to 2019 including the index offence, and it is likely that he will continue to offend due to these addictions, and he has accepted that he has been arrested in a matter relating to drugs once since he got bail in 2021.

15. There is no evidence meeting the high threshold for an Article 3 ECHR medical claim as there is no medical evidence that shows return to Afghanistan would result in serious, rapid and irreversible decline in the appellant's health which would cause intense suffering or a significant reduction in his life expectancy. This was because there is some healthcare provision in Afghanistan and no evidence of the appellant suffering from a medical condition which could cause such suffering. The medical report of Dr Sreedaran should be given little weight because there is no other medical evidence which was reviewed by Dr Sreedaran when he wrote his report, as the appellant claims he could not obtain a GP due to his homelessness, or which supports his

conclusions. It is just a report which reflects a one-off appointment. There is no evidence of a past diagnosis from a treating service, and the current, very recent, engagement with the GP and therapists should just be seen as an attempt to bolster the appellant's claim to remain in the UK.

16. It is further argued that the appellant is now 32 years old and has managed to fend for himself doing some sort of work in the UK, and so would be able to do so in Afghanistan, particularly as he can speak Dari, although it was accepted that the economic situation in Afghanistan is currently challenging. It is considered that he could also be provided with money by friends in the UK, and one of them, Wasil, offered a £2000 recognisance in support of his bail application in 2021. There are no statements from these friends to explain why they would not send remittances to help him. The appellant could also apply for a resettlement grant of between £750 and £1500 which would tide him over in Afghanistan for a period of about six months, and it would be speculative to guess what the situation in Afghanistan will be after this period of time. The appellant has said that he believes he could give up his addictions if he obtains work, and so drugs and alcohol would not be an issue on return to Afghanistan. Further, the Dr Giustozzi's report makes clear that the old issues that the appellant's father is said to have had with the Taliban and his Tajik ethnicity are not issues which would lead to his having problems on return to Afghanistan. It is not accepted that the appellant is westernised in a way which would cause him problems in Afghanistan as he is still practising his Muslim religion.

17. Ms Stuart King relied upon oral submissions, her skeleton argument from the First-tier Tribunal and the skeleton argument from Mr M Allison and argued for the appellant that he was at Article 3 ECHR risk on return to Afghanistan, in summary, for the following reasons. She accepted that his Tajik ethnicity and his father's previous anti-Taliban political profile were of no relevance given the opinion of Dr Giustozzi in his report.

18. Ms Stuart King argued the primary risk to the appellant was destitution. He would not be able to obtain sufficient work as a day labourer to survive as others in this position were not able to earn sufficient wages to avoid destitution given that wages from such work amounted to about $40 a month when to live cost about $113. Further the appellant was in a poor position to obtain such work, which is in short supply, for the following reasons: he has no family connections to help him; he is not familiar with Afghanistan having been absent since he was a child; he has learnings difficulties, mental health problems and addiction problems which would not be able to be addressed given the state of mental health services in Afghanistan. As the appellant would not be going back to a family or to friends it would not be practically possible to send financial help even if UK friends were willing to do this, and any money sent would, like any resettlement grant he was given, be quickly used up on illegal drugs and alcohol or be stolen by other desperate

people realising the appellant was vulnerable and not familiar with Afghanistan, particularly if he became homeless.

19. She argued that I should give weight to Dr Sreedaran's report because it was consistent with other older evidence, as well as the recent GP evidence. She referred me to the recent GP records, letter from the family who had fostered the appellant as a child, the school letter, and the OASys report which collectively assessed the appellant as having learning difficulties/ cognitive deficit, special education needs, being easily led and having poor problem-solving skills, having issues with anger and frustration, trauma, mental health and addiction issues. She also identified that Dr Sreedaran noted the appellant's convictions for drugs and being drunk and disorderly, and argued that the report was therefore written with these issues in mind. She argued that the totality of the evidence going to the appellant's mental health, addictions and learning difficulties was vital evidence regarding his compromised decision-making skills which meant it was absolutely clear, given the country of origin context, that the appellant would not be able to support himself and would be destitute.

20. Ms Stuart King argued that the report of Dr Giustozzi should be given weight, particularly as he had identified bits of the claim which he did not support showing his objectivity, once again, as an expert. The report provided key evidence about the economic situation in Afghanistan, and also the lack of any proper and humane support for those with addiction and mental health problems. In addition Ms Stuart King argued that the evidence from the EUAA Country Guidance Afghanistan report from January 2023 supported the contention the appellant would be at risk due to his being "westernised" as he has lived in the UK since he was 11 years old and would, as a result, have mannerisms and ways of expressing himself which made him stand out. The appellant's lack of familiarity with the culture and life there, and potentially his tattoo, would make him vulnerable to exploitation by criminal gangs and to brutal punishments for transgressing the Taliban's fundamentalist ideological regime. She placed reliance upon the CPIN "Afghanistan: fear of the Taliban" April 2022, and particularly material which supports the contention that those who are perceived as westernised are targeted; and that deportees who have committed criminal offences may be presented to a Taliban court to be processed. The CPIN: "Afghanistan: Medical treatment and healthcare" October 2021 was also relied upon to support the contention that the health system in Afghanistan is at risk of collapse, and particularly the mental health care system is totally lacking, and further as evidence of the social stigma of mental health conditions.

Conclusions – Remaking

21. The question I must determine is whether it would be a breach of the appellant's Article 3 ECHR rights to be returned to Afghanistan.

22. Ms Stuart King made it clear that this case was not argued as an Article 3 ECHR medical case, but on the basis of the appellant facing destitution on return to Afghanistan. The factors said to contribute to the risk of destitution are the appellant's statement of mind, addictions, lack of family and westernisation as well as the desperate state of the Afghan economy. As was held in OA (Somalia) Somalia CG [2022] UKUT 00033 (IAC): "In an Article 3 "living conditions" case, there must be a causal link between the Secretary of State's removal decision and any "intense suffering" feared by the returnee. This includes a requirement for temporal proximity between the removal decision and any "intense suffering" of which the returnee claims to be at real risk. This reflects the requirement in Paposhvili [2017] Imm AR 867 for intense suffering to be "serious, rapid and irreversible" in order to engage the returning State's obligations under Article 3 ECHR. A returnee fearing "intense suffering" on account of their prospective living conditions at some unknown point in the future is unlikely to be able to attribute responsibility for those living conditions to the Secretary of State, for to do so would be speculative." This is therefore a very high test to meet, and money from the Facilitated Returns Scheme should, following OA, be factored into the consideration of destitution on return.

23. With respect to the issue of westernisation, as found in YMKA and Ors ('westernisation') Iraq [2022] UKUT 00016 (IAC): "The Refugee Convention does not offer protection from social conservatism per se. There is no protected right to enjoy a socially liberal lifestyle". However, it is held that where there is a real risk that the individual concerned would be unable to mask his westernisation, and where actors of persecution would therefore impute political or religious opinions to him and persecute him as a result westernisation can be of relevance to showing an Article 3 ECHR risk of serious harm on return.

24. The appellant has a serious criminal record relating to a variety of offences including serious drugs crime. I approach his evidence therefore with caution. However, he was very candid about being addicted to alcohol and drugs, and volunteered information about an arrest since 2021 which did not appear in the respondent's records and did not claim any contact with his daughter, which might have assisted his case to remain, all of which I find go to his credit as a witness of truth. He was not always able to remember things that happened in the past (for instance details about his attendance at college) but I find that this is consistent with the evidence going to his learning difficulties, mental health problems and substance abuse. Mr Melvin did not suggest that he was not a credible witness, and I find that I can give weight to his oral and written evidence.

25. I find that the appellant is a poorly educated man: he had two years education in Afghanistan and two years schooling in the UK, at which point he obtained GCSEs in art and drama (possibly through cheating by getting a friend to do course work according to the OASys report), according to the letter to the respondent from his solicitors in 2006. He has since done only sporadic unskilled cash in hand work in the UK. The

conclusion of the probation officer who wrote his OASys report in 2021 (at Q13 of the respondent's bundle) was that he had never had full-time work, and had only done temporary jobs. The appellant is not literate in Dari but can speak that language and English. He is currently doing a security guard training. A number of documents from the time when he was a school child in the UK state that he has special educational needs and learning difficulties (for instance the letter from his foster carer Mr W at D5 of the respondent's bundle, the 2006 letter from Kent Social Services at D6 of the respondent's bundle, the Robert Napier School letter from 2006 at D7 of the respondent's bundle). The probation officer assessed that the appellant has significant cognitive deficits and poor problem-solving skills in the OASys report of 2021, as at Q20 of the respondent's bundle. I find that the appellant has no worthwhile qualifications, only intermittent unskilled work experience, cognitive deficits, learning difficulties and poor problem-solving skills having considered the totality of the evidence. He would only be likely to obtain unskilled work and would even then not be an attractive employee.

26. I find that the appellant is a long-term and current drug and alcohol addict. This is his own evidence. He has drugs convictions going back ten years. The OASys report describes him as a long-term drugs user, at Q14 of the respondent's bundle, and that he had acquired a drug debt in custody, at Q19, which supports his evidence that he continued to use cannabis and alcohol whilst in prison. It is clear that his drugs' use has included cocaine and heroin at times (see the OASys report at Q17 of the respondent's bundle), and that he has abused alcohol which resulted in him assaulting a police officer (see OASys report at Q18 of the respondent's bundle). There is reference to his being found to be under the influence of drugs, particularly "spice" (synthetic cannabis) whilst in custody at Q33 of the report. The probation officer writing the OASys report concludes that he has an addictive personality, see Q20 of the respondent's bundle, and that there is an immediate and high risk of his committing drugs crime on release due to his addictions – as reflected in the OASys report at Q36 of the respondent's bundle. The GP notes from April/May 2023 also include reference to the appellant smoking cannabis and drinking whisky on a daily basis. I find I can place weight on these notes, despite the submission of Mr Melvin, as the evidence contained within them is entirely consistent with the other evidence on this matter. The appellant said, in response to a question from Mr Melvin, that he felt he could give up his addictions if he were to get work in security following his course. I think that this response must be put in the context of his cognitive deficits and learning difficulties as set out above, and his mental health problems as detailed below. In the OASys report it is clear the appellant tried to convince the probation officer that he wanted to stop his consumption of drugs and alcohol but the writer of the OASys report concluded that the evidence showed he had no strategy to do so and was in fact continuing to abuse drugs and alcohol even in custody. I find that the appellant is likely to remain a drug and alcohol addict, and that whilst he may see

that to work successfully he needs to address his addictions, I do not find that this would happen without appropriate, intense and structured drug service support of a type which certainly does not exist in Afghanistan.

27. I find that the appellant suffers from mental health problems, and particularly depression, on the basis of the totality of the evidence outlined below. It is the assessment of the probation officer in 2021 in the OASys report (at Q15 of the respondent's bundle) that he suffers trauma as a result of what happened to him in Afghanistan and his time in care in the UK, and that untreated mental health problems are a factor in his offending. I acknowledge that the report of Dr Sreedaran is produced only on the basis of the interview with the appellant in June 2022, and so is not as valuable as a report that could also access GP notes and other evidence on his mental health. However, there is a good reason why there was no such evidence: the appellant did not have a GP, and therefore there were no GP notes at that time, as he was homeless and leading a chaotic life as a drug addict. I find that Dr Sreedaran is an appropriate expert consultant psychiatrist and the report contains a statement of truth. Dr Sreedaran observed deficits in concentration, memory and reasoning, and after applying an appropriate test concludes that the appellant has moderate cognitive impairment, which is consistent with the other evidence of learning difficulties outlined above. The diagnosis of depressive disorder made by Dr Sreedaran takes into account the presentation of the appellant at the interview as well his responses to the questionnaires, and Dr Sreedaran recommends that the appellant register with a GP and seek further help. The appellant did then manage to register with a GP and attend a service called Greenwich Time to Talk in 2023, using a friend's mother's address. I find I can place some weight on the notes from these services with respect to the appellant's mental health as they are consistent with the assessment of the probation officer and Dr Sreedaran: traumatic experiences in Afghanistan and in care in the UK are identified as having led to his current state of chronic medical depression.

28. With respect to the issue of westernisation I find that the appellant has retained his Afghan identity in some ways: he is a Muslim and attends mosque from time to time and observes Islamic festivals. He has friendships with people from an Afghan background. He speaks Dari and is part of a Diaspora community who help him by allowing him to sofa-surf. On the other hand he has grown up in the UK and is used to socialising in a westernised way such as going out to night clubs to meet women he has met online. He has lived in the UK since he was 11 years old, living with non-Afghan families whilst in foster care. I find that he will have acquired ways of expressing himself and subconscious behaviours which are likely to identify him as a person who has not grown up in Afghanistan, and whilst I find he will be consciously aware of generally appropriate Afghan etiquette when sober he will not be tuned into the fundamentalist mores of the Taliban theocracy and

particularly when drunk or under the influence of drugs will probably revert to behaviour and ways of expressing himself which would be viewed as western by the Taliban authorities in Afghanistan and conservative members of that society. Whilst he is unlikely to be taken seriously as an opponent due to his state of intoxication and cognitive deficit, he would be likely to be seen as a deviant and as an undesirable not worthy of help. The EUAA Country Guidance Afghanistan report from January 2023 also records drug addicts being forcibly rounded up and inhumanely treated, with some being subject to imprisonment and beatings, and that sentences to flogging and imprisonment for drinking alcohol have also been handed out.

29. I accept the evidence of the appellant that he has no family to return to in Afghanistan, and it is the preserved finding of the First-tier Tribunal that he has no contact with family in the UK. As he entered the UK at the age of 11 years I find he would also have no friends in Afghanistan. In all the circumstances I find that the appellant would be returning to Afghanistan with no support in terms of anyone to offer support, accommodation, food or money on return. I accept that he could be given money by the Facilitated Returns Scheme, which might amount to some £750 (it would be this amount as the scheme only pays £1500 if an application is made during a custodial sentence and that possibility has past). I also find that UK friends might be able to give him small amounts of money, but there is no evidence from the history or the documentations in this appeal which suggests anyone is able to provide the appellant with a regular income. There would also be issues of how the money could reach the appellant in Afghanistan given his lack of family, and the complication of the fact that the Taliban has banned the use of foreign currency in Afghanistan, see 3.2.12 of CPIN Afghanistan Humanitarian Situation April 2022. Standing surety, as one friend was willing to do, is not giving a person money but being prepared to lose it to the government if they do not comply with bail conditions, but with the obvious belief that they will comply and the money will remain in the ownership of the surety.

30. The economic situation in Afghanistan is current dire. As set out in the EUAA Country Guidance Afghanistan report from January 2023 there is an economic crisis, one of the world's largest food security crises and a malnutrition crisis of unparalleled proportions. The Human Rights Watch Report of 2023 finds that more than 90% of Afghans were food insecure throughout the year 2022. The respondent's CPIN Afghanistan Humanitarian Situation April 2022 commences by stating that: " the general humanitarian situation in Afghanistan is so severe that there are substantial grounds for believing that there is a real risk of serious harm because conditions amount to inhuman or degrading treatment as within paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3" It is noted there is predicted to be 29% unemployment with little casual work and 98% of people have insufficient food consumption, and that there is a lack of adequate housing. The report of Dr Antonio Giustozzi dated 11th June 2023 produced for this appeal is, I find, a

report on which I can place weight. Dr Giustozzi is an acknowledged expert on Afghanistan and his report complies with all requirements. His information is that casual labourers are earning so little due to low rates of pay and lack of work that they are unable to feed themselves and their families, there are serious problems with malnutrition and "skyrocketing" unemployment. It is Dr Giustozzi's opinion that given the appellant's lack of connections, his mental health difficulties, which he concludes will not be likely to be treated by the failing health system, and the job market in Afghanistan he will be at clear risk of destitution.

31. Drawing together my conclusions I find that the appellant would, on return to Afghanistan, immediately be able to pay for accommodation and food due to the facilitated returns scheme grant of £750 but that in a short period of time these funds would be used up because the appellant would not only need to pay for food and housing but would also have to fund his addiction to drugs and alcohol and so would become destitute. I assess the period where he would be able to keep himself would be less than six months as accommodation alone would cost between £36 to £72 a month according to the CPIN Afghanistan Humanitarian Situation April 2022 at 4.5.3. I find that given his cognitive deficits, learnings difficulties, poor problem solving skills, depression, lack of local knowledge due to his long absence from Afghanistan and lack of assistance in re-integrating into Afghan society and his current addicted state he would not be able to make the funds last anywhere as long as a person without these problems, even without paying for the drugs and alcohol he craves, as he would not be able to source the cheapest options and would be likely to be taken advantage of/ overcharged by desperate local people as a person who will be identifiable as having spent time abroad by his general presentation and lack of local orientation after nearly twenty one years in the UK. I find that there are no indicators in the country of origin materials that the dire economic situation is likely to change in Afghanistan in the foreseeable future. I find that it is very unlikely that the appellant would obtain casual work given the competitive market for such jobs, and that the country of origin evidence demonstrates that even if he did so he would not be able to earn enough to house and feed himself and so would be destitute. Without regular work the evidence is that the appellant will certainly remain a drug and alcohol addict, and I find that there is no possibility given his cognitive problems, lack of funds and addictions that he would obtain any assistance with his mental health from the failing Afghan health system let alone the intense structed programme I have found he would need to address his addiction problems. As a result I find that return to Afghanistan would be a breach of Article 3 ECHR on grounds of destitution.

32. I also find that the appellant would be at real risk of serious harm in the form of ill-treatment as a person addicted to drugs and alcohol in Taliban ruled Afghanistan, either in the form of informal rounding up of addicts with detention and beatings, or through the punishment system operated by the Taliban Emirate which uses inhuman and degrading

punishments such as floggings for offences such as drinking alcohol. He would be more likely to be targeted by the authorities for such behaviours due to his cognitive problems and lack of local knowledge which would mean he did not understand how to avoid those inclined to report him or contact with the Taliban enforcers.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I remake the appeal by allowing it on Article 3 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st June 2023

Annex A: Error of Law Decision:

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born in 1991. He arrived in the UK as an unaccompanied minor asylum seeker on 29th July 2002. He was granted exceptional leave to remain until January 2009, and then applied for indefinite leave to remain which was granted on 24th June 2009.

2. On 1st November 2019 the appellant was convicted of possession with intent to supply Class A heroin and crack cocaine and give a prison sentence of 3 years and 3 months. A deportation order was signed against him on 5th March 2022, and his human rights claim was refused on 7th March 2022. His appeal against the refusal of his human rights submissions was dismissed by First-tier Tribunal Judge JK Thapar after a hearing on the 21st October 2022.

3. Permission to appeal was granted by First-tier Tribunal Judge Singer on 20th December 2022 on the basis that it was arguable that the First-tier judge had erred in law in failing to consider the protection appeal under Article 3 ECHR, and only considering Article 8 ECHR, and in particular in failing to consider whether the appellant would be at real risk of serious harm due to being seen as westernised and due to his cognitive defects and mental health issues as identified in the OASys report. Permission was granted to argue all grounds.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error is material and the decision of the First-tier Tribunal should be set aside.

Submissions – Error of Law

5. In the grounds of appeal it is argued for the appellant in summary as follows.

6. Firstly, it is argued that the First-tier Tribunal erred in law by failing to consider the Article 3 ECHR appeal separately and adequately. The claim put forward was, in summary, that the appellant was at risk due to his Tajik ethnicity; due to his and his father’s anti-Taliban political profile; and due to his being “westernised” as he has lived in the UK since he was 10 years old, and thus is unfamiliar with the culture and life there, combined with not having family in Afghanistan and given the context of his learning difficulties and mental health problems. It is argued that the First-tier Tribunal also wrongly refused to give weight to the psychiatric report due to the psychiatrist recording the appellant’s fear of return to Afghanistan and the request that his application to remain be sympathetically considered, which did not, contrary to the finding of the First-tier Tribunal, indicate the psychiatrist was not an

appropriate expert witness. The report provided important evidence that the appellant suffers from moderate depressive disorder, and has recurrent thoughts of self-harm and suicide which require psychiatric intervention, which was relevant evidence the First-tier Tribunal did not consider. Further, there was a failure to have regard to relevant evidence in the OASys report about the appellant's cognitive defects, dyslexia, dyspraxia, ADHD and mental health problems.

7. Secondly, it is argued, that the First-tier Tribunal erred in law in the approach to whether the appellant is socially and culturally integrated in the UK, and thus the appeal with reference to the private life exception to deportation at s.117C(4) of the 2002 Act, in failing to apply CI (Nigeria) v SSHD [2019] EWCA Civ 2027 given the appellant's long residence since a young child in the UK and the importance of upbringing and education in the formation of a persons' social identity

8. Ms Cunha informed me that in a Rule 24 notice, which had not made it's way to the Tribunal file, that the Article 3 ECHR ground was conceded. She accepted that this included the challenge to the treatment of the psychiatric evidence.

9. Mr Alison confirmed that he only pursued the first ground of appeal, which was conceded by the respondent, and not the second one relating to Article 8 ECHR and the findings that the appellant was not socially and culturally integrated.

10. I indicated that I therefore found that the First-tier Tribunal had erred in law (for the reasons which I now set out in writing below) and set aside the decision. It was agreed that the findings in relation to Article 8 ECHR regarding the appellant having lived lawfully in the UK for more than half his life and not being socially and culturally integrated would be retained. However I clarified however that it would be possible for updating evidence to be provided to the Upper Tribunal relating to any events going to the social and cultural integration of the appellant which happening after October 2022. It was agreed that the appeal should be remade in the Upper Tribunal given that some findings were being retained.

11. Ms Cunha indicated that it was possible that the decision to remove the appellant/ refuse to grant leave to remain would be reviewed in light of the current policy of the respondent in relation to Afghan citizens. She could not given an assurance as to how quickly this would happen however. In light of this uncertainty I indicated that the remaking hearing would be relisted at the first available date.

Conclusions – Error of Law

12. Both parties agree that the decision with respect to Article 3 ECHR is insufficiently reasoned. I find that the decision with respect to the Article 3 ECHR protection claim, which amounts to two short paragraphs (18 and 19) within the Article 8 ECHR analysis of whether the appellant

would have very significant obstacles to integration, is insufficiently reasoned as there are no reasons given why it is not accepted that the appellant and his father are anti-Taliban, why his ethnicity is not an issue which would cause problems with the Taliban, and no consideration of whether a person such as the appellant who has lived in the UK since he was 10 years old (and would therefore plausibly be seen as a westernised person), with some learning difficulties and mental health problems (which would indicate a potential lack of ability to adapt) and who has a drugs conviction/cannabis addiction would be at risk of serious harm if returned to Afghanistan.

13. Further, I find that it was not rational for the First-tier Tribunal to have rejected Dr Sreedaran's diagnosis of the appellant's mental health conditions, and not to have given weight to the expert evidence at paragraphs 15 and 16 of the decision simply because the consultant psychiatrist was sympathetic to the appellant not being sent back to Afghanistan, and on the basis that he did not comment on the appellant's cannabis habit or have access to his GP notes. It is not reasonable to find the fact that the consultant psychiatrist does not review the appellant's GP notes as it is clear that the appellant is not registered with a GP from the report and that the psychiatrist advised him to register with one (pages 75 and 76 of the appellant's bundle). It is not the case that the psychiatrist did not consider the appellant's cannabis use as this is set out in the report (page 76 of the appellant's bundle). The First-tier Tribunal has no expert information or other rational basis for finding that this habit is relevant to causing the conditions of moderate depressive disorder or suicidal ideation which are diagnosed, and in any case, whatever the cause, the conditions still exist. Dr Sreedaran is acknowledged by the First-tier Tribunal as a suitably qualified expert, and the reasoning of the First-tier Tribunal does not rationally make his diagnosis inaccurate. It would have been appropriate for the First-tier Tribunal Judge to have taken no notice of the plea for sympathy from Dr Sreedaran, and to have noted this in the decision, but not to have discounted entirely proper and relevant expert evidence. Whilst the First-tier Tribunal was properly entitled to find, as is set out at paragraph 17 of the decision, that the appellant was not being treated for these mental health conditions the conditions still needed to be considered, along with the appellant's learning difficulties (which appear to be accepted as existing), when finding whether or not the appellant would have very significant obstacles to integration/ or would face Article 3 ECHR risks if returned to Afghanistan.

14. With respect to the second ground relating to the appeal under Article 8 ECHR, as I have noted above, this was not pursued by Mr Allison for the appellant. The findings that the appellant is not integrated in the UK at paragraphs 12 to 14 of the decision were, I find, rationally open to the First-tier Tribunal despite the appellant's residence in the UK since he was ten years old as it was open to the Tribunal to find, on the evidence before it, that he was not in touch with family members in the UK or former carers, that he was not in education or work, and had not

demonstrated that he had involvement with other community associations.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal.

3. I adjourn the remaking of the appeal.

Directions:

1. Any updating evidence relevant to the remaking of the appeal must be filed with the Upper Tribunal and served on the other party 10 days prior to the date of the remaking hearing.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I 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 original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st March 2023