IAC-AH-LEM-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/04305/2014

**THE IMMIGRATION ACTS**

| **Heard at Birmingham** | **Decision and Reasons Promulgated** |
|---|---|
| **On 9th October 2015** | **On 23rd October 2015** |

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**MR IDRIS ABDUL**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: In person
For the Respondent: Mr Mills, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a citizen of Afghanistan, appeals with permission against the Respondent's decision of 13th June 2014 refusing to grant him leave to remain in the United Kingdom and giving directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The Appellant's date of birth has been accepted as being 1st January 1996. He was born in the Paktia province of Afghanistan. He entered the UK in October 2009 when he was aged 13 and he claimed asylum. This was not

granted because much of what he had claimed, with respect to his contention that he would be at risk upon return to Afghanistan, was disbelieved by the Respondent. However, in view of his young age, he was, on 23rd February 2010, granted discretionary leave to remain in the United Kingdom until 22nd February 2013. That grant was in accordance with the Respondent's published policy on the handling of asylum applications from unaccompanied children. There was no appeal against the decision, made at the same time, to refuse to grant him asylum.

3. The Appellant, then assisted by Sultan Lloyd Solicitors, applied for further leave to remain in the United Kingdom. The application was sent, it appears, on 21st February 2013. The Respondent considered it and, indeed, it was that which led to the decision of 13th June 2014.

4. The Respondent's reasons for her decision of 13th June 2014 appear in a "reasons for refusal letter" which bears that date. In that letter, the Respondent noted that the Appellant had initially claimed that he was at risk because his father had been working as a driver for an American organisation and that, as a result, the family had become of adverse interest to the local Taliban. The Appellant was maintaining that contention. However, said the Respondent, there had been inconsistencies in the account given by the Appellant and that, in any event, on his own account his family had now relocated to Jalalabad and the Respondent thought there would be no risk there. Thus, whilst it was accepted that there had been some adverse interest in Paktia there would no longer be such interest given the family's relocation. The Respondent said that some attempts had been made to trace the Appellant's family in Afghanistan but that these attempts had been hampered by what was stated to be the Appellant's failure to provide sufficient information. It was not accepted that he would lack family to return to.

5. The Respondent noted that the Appellant had been convicted of a number of criminal offences between October 2012 and March 2014. This was, said the Respondent, relevant to a consideration under Article 8 of the ECHR within the Immigration Rules (Appendix FM) and it was said that the Appellant did not meet the requirements of Section S – LTR 1.2 – 1.7 of the Rules in light of his convictions. It was said he had not claimed a right to remain as a partner or a parent. He did not meet the requirements of Rule 276ADE with respect to private life.

6. The Appellant appealed to the First-tier Tribunal. In his Grounds of Appeal he asserted that he would be at risk upon return to Afghanistan and made a general assertion to the effect that he disagreed with the conclusions contained within the reasons for refusal letter.

7. The appeal was heard by the First-tier Tribunal (Judge Grimmett) on 4th September 2014. By that time, of course, the Appellant had attained adulthood. He was aged 18. He was represented at the appeal by Sultan Lloyd Solicitors and the Respondent was also represented. He gave oral evidence. It was contended that he would be risk upon return to

Afghanistan and that removal would represent a breach of Article 8, in part at least, on the basis of his claimed relationship with a British woman who was, it was said, pregnant with his child.

8. As to the claim to the effect that he would be at risk upon return, and as to the credibility of what he had to say about that, the First-tier Tribunal said this;

> "11. I am satisfied on the lower standard that the Appellant's family was visited by the Taliban, as that was accepted by the Respondent in the first refusal letter (paragraph 19) and Mr Lewis [the Presenting Officer] did not seek to withdraw that concession. Specifically the Respondent refers to questions 31 and 39 to 45 of the interview in which the Appellant said that he could not recall when they first came as he was at school but he and his brother were approached by men on motorbikes. After that they came to the house and the third time they saw him and threatened him, saying that if his father did not stop working for the Americans they would take the Appellant. That was the last time that they came to the house while he was in Afghanistan and his father then arranged for him to leave the country. That appears to have been in about the early or middle part of 2009.
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> 12. In his witness statement dated 11th November 2009 the Appellant said his family had had problems in Jalalabad. In his witness statement on 11th March 2013 made in support of his application for further leave to remain the Appellant said that at the time his case was determined, in February 2010, he was in contact with his family, particularly his mother who was living with his siblings in Jalalabad but for the last several months he had made several attempts to contact the family with no success. In his latest witness statement he said that he had only spoken to his family in Afghanistan on two occasions since his arrival in the United Kingdom and after the second occasion the number stopped working and then he lost his phone that contained the number. That does not appear to be consistent with the second witness statement where he suggests that it is only since about the end of 2012 that he lost contact with his family. In addition in his asylum interview, which took place in November 2009, the Appellant also said that he was at that time in contact with his family still.
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> 13. The Appellant said in interview that he had relatives of his father's in the United Kingdom but he did not know who they were. In his 2013 witness statement the Appellant said that he had two maternal uncles whom he saw on a regular basis, mainly during his holidays, but in his latest witness statement he said he had one paternal uncle in the United Kingdom. That uncle provided a witness statement but did not attend the hearing because it was said he was working at Heathrow Airport and could not get the time off. Bearing in mind the importance of this claim and the fact that notice of the hearing was sent out on 28th July 2014 I am not satisfied his uncle could not have attended in all the circumstances. I note that the appeal was adjourned on 28th July having been listed for that date on 27th June because the Appellant's paternal uncle said he could not attend as he planned Eid celebrations with his family in London. A copy of the witness statement was handed in at the hearing. The Appellant said that he went to London to get it

although it was dated the day before the hearing and he said he had gone the previous week. The Appellant said his uncle was busy today.

14. I am not satisfied that I have been given the true position about the Appellant's family members in the United Kingdom or his contact with the family in Afghanistan. The Appellant now says he has only a paternal uncle and paternal cousin in the United Kingdom but has not explained why he indicated he had maternal uncles. In the interview he denied knowing any relatives of his family at all save that he had three maternal uncles one of whom had passed away and that he did not know how many paternal uncles he had or where they were and that he did not know where his paternal grandmother lived and said his maternal grandmother lived in Jalalabad.

15. The Appellant says he was able to contact his uncle in the UK because after the asylum interview he spoke to his father who gave him the uncle's telephone number. It is not in my view credible that the Appellant's father would not have contacted his brother before the Appellant had arrived in the United Kingdom. The Appellant had a telephone but his father had no way of knowing whether the Appellant would be able to keep the phone during the long journey. It would be far more likely that the uncle would be warned of the Appellant's impending arrival than that the father would tell the Appellant after arrival of his relative in the UK.

16. I am satisfied that the inconsistencies and the lack of evidence from the Appellant's relatives in the United Kingdom, together with the inconsistent evidence about the contact he had with his family, show that the Appellant is not being open about the current circumstances of his family.

17. I am, however, satisfied that they are reasonably likely to be in Jalalabad as that is where they contacted him from and where one of his grandparents was living when the Appellant left Afghanistan. In addition, the Appellant's uncle said the last he heard was that his brother was living in Jalalabad. There is no evidence to suggest that the Appellant's family have had any problems in Jalalabad other than the Appellant's claim that that was what he was told. He gives no detail of what the trouble was.

18. I take into account that the Appellant has also been inconsistent in the first and second witness statements as to his departure from Afghanistan. He says that was because he was originally afraid, but that makes no sense as he was simply being asked to explain where he went to and there was no reason why he should say he had been taken to Jalalabad if he was taken at that time to unknown city, as he claimed in the second witness statement of 2013.

19. I am satisfied therefore that this Appellant still has family and that he knows where they are and there is no evidence to suggest that if he joins them in Jalalabad he will be at any risk."

9. The First-tier Tribunal then considered the situation with respect to Article 8 both within and outside of the Rules. It was said that, with respect to Section L – LTR of Appendix FM, the presence of the applicant in the UK was not conducive to the public good because, in light of matters including his convictions, it was undesirable to allow him to remain in the United

Kingdom. Those convictions were specified. As to the relationship, it was noted that he and his girlfriend had said they had been in a relationship since they were at school and that there was evidence of the pregnancy though not evidence that the Appellant was the prospective father. It was noted that the Appellant's girlfriend had said that if he were removed from the UK she would "probably" accompany him to Afghanistan such that there were not insurmountable obstacles to family life continuing outside the UK. It was also pointed out that, if she did not wish to travel to that country, he could seek entry clearance having been returned. The First-tier Tribunal then said this;

> "28. With regard to paragraph 276ADE the Appellant does not meet the requirements of S – LTR.1.5 or 1.6, he has only ever been given limited leave to remain in the United Kingdom and whilst he has been in the United Kingdom his private life seems to have been only the life he enjoys with his girlfriend. He has not been able to complete education or hold down a job apparently, according to his social worker in 2013, he has been unable to make the best of the opportunities presented to him and it remained doubtful that he would be able to sustain a reasonable commitment to an education placement and that he will often attempt improved behaviour if he perceives the reward for doing this but it lasts only until the reward is achieved.
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> 29. Although he was young when he arrived and has spent a significant proportion of his life in the United Kingdom he has no strong private life apart from his girlfriend and that part of his life can continue in Afghanistan as she has expressed the intention to be with him there. Even were the private life stronger than it is it would still be proportionate to remove the Appellant bearing in mind that he has not shown that he is at risk any longer, that he has not been honest in the evidence he has given about his family either in Afghanistan or in the United Kingdom and that his behaviour in the United Kingdom for one so young has been reprehensible."

10. The Appellant, still then represented by Sultan Lloyds Solicitors, applied for permission to appeal to the Upper Tribunal. Such was granted by Judge of the First-tier Tribunal Omotosho in these terms;

> "2. In the grounds seeking permission it was essentially contended that the judge erred in law by:
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> a. Failing to put specific inconsistent points to the Appellant to enable him the opportunity to address these.
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> b. Failure to direct herself in accordance with the duty identified by the court in **ML (Nigeria) v SSHD [2013] EWCA Civ 844** by having regard to and taking into account every factor which might tell in favour of an applicant.
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> c. Giving inadequate justification for dismissing the Appellant's claim as incredible especially his account of contact with his family was not necessarily inconsistent.
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> d. Failure to have proper regard to background evidence and case law in assessing the asylum claim of an unaccompanied minor.

e. Failure to address the arguments advanced in relations (sic) to the Respondent's failure in her duty to attempt to trace the Appellant's family.

f. In respect of Article 8 the judge erred in finding that failure to make a valid application for leave to remain was a bar to success under Appendix FM.

g. Failure to conduct a full proportionality assessment.

h. Failing to make findings regarding the genuineness of the Appellant's relationship.

i. Failing to adequately consider the impact of relocation to Afghanistan on the Appellant's girlfriend and their expected child.

3. The above grounds disclose arguable error of law. It is arguable that the judge had made inconsistent findings without full regard to the objective evidence and case law especially in assessing risk on return.

4. In addition the failure to conduct a full proportionality assessment and make findings regarding the genuineness of the Appellant's relationship with his girlfriend and their expected child makes the decision unsafe."

11. I have proceeded on the basis that the judge, at the end of paragraph 4, meant to say arguably unsafe because, of course, the judge was, at that stage, only considering whether permission should or should not be granted rather than whether the appeal to the Upper Tribunal should or should not be allowed.

12. In the normal way of things this appeal was listed for a hearing before the Upper Tribunal in order to determine whether or not the decision of the First-tier Tribunal involved an error of law such that that decision ought to be set aside. Prior to the matter coming before me, however, there had been two abortive hearings. The first one, in June 2015, was attended by the Appellant in person. It appears he explained that he was no longer represented by Sultan Lloyd Solicitors but, rather, by a firm called SKR. There was another hearing in August 2015 when no one attended but the Upper Tribunal was not satisfied, on that occasion, that proper service had been effected. On both occasions, therefore, matters had been adjourned.

13. The Appellant attended unrepresented before me. His girlfriend was in attendance and her child had already been born. Mr Mills was in attendance on behalf of the Respondent.

14. The Appellant, who clearly spoke and understood English without difficulty, and clearly did not require an interpreter albeit that one had been provided, asked me to adjourn the proceedings again. He explained to me that his social worker had advised him to obtain new solicitors so he had ceased to instruct Sultan Lloyd Solicitors. SKR Solicitors had told him that they would take his case but, after a couple of weeks, they had told him that they were no longer undertaking immigration work. Another firm of solicitors, Paragon Law, had told him that they would look at his case and would give him an answer as to whether they would represent him or not.

He did not know how long they would need to make up their minds about that. Mr Mills opposed the adjournment request, pointing out that there had been previous adjournments and that, on the basis of what the Appellant had very frankly indicated, there was no guarantee that Paragon Law would be prepared to take his case.

15. I decided not to adjourn. In so doing I took into account the general power to adjourn conferred by Rule 5(3)(h) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the "overriding objective" as set out in Rule 2 and general principles of fairness and natural justice.

16. The Appellant is not a lawyer and his wish to have the proceedings adjourned so that he could secure the services of one is entirely understandable. However, in this case, there had been previous adjournments (albeit that I do not blame the Appellant at all for them) and, had I been prepared to accede to his request, that would have been the third. Thus, there had been a degree of delay already. The Appellant had obtained permission to appeal on the basis of quite detailed grounds drafted by a competent and experienced firm of immigration solicitors so what was being said as to the claimed defects in the determination was clear. There was no certainty at all, on the basis of what the Appellant himself had to say, that the firm of solicitors he had most recently been in contact with would be prepared to take his case and there was nothing from them indicating, to the Upper Tribunal, what their position was. Putting all of that together I concluded it would be appropriate to proceed and that, indeed, it would be fair and just to do so.

17. The Appellant was then given some time so he could consider what to say. After that he told me that he had told the truth about his relatives in the UK and the First-tier Tribunal had been wrong to disbelieve him about that. He said that he now has a child and it would not be safe for the child or for him to go to Afghanistan. Further, if people in Afghanistan discovered he had had a child outside of marriage it would cause him problems.

18. Mr Mills submitted that the Grounds of Appeal amounted to mere disagreement with the First-tier Tribunal's findings and conclusions. Ample reasons for the conclusions had been given. The judge had correctly directed herself as to the relevant standard of proof. Nothing more than that was necessary stemming from the case of **ML**, cited above. The grounds made points relevant to unaccompanied minors but, by the date of the hearing before the First-tier Tribunal, the Appellant was an adult. He could not rely upon any alleged failure of the Respondent to seek to trace his relatives in Afghanistan as a result of what had been said in **TN and MA (Afghanistan) (Appellants) v Secretary of State for the Home Department (Respondent) [2015 UKSC 40**. As to Article 8, whilst Appendix FM of the Immigration Rules did not constitute a complete code for the consideration of Article 8 claims, the scope for allowing Article 8 applications outside the Rules was now quite narrow. Everything had been considered. The option of the Appellant applying for entry clearance from abroad had been identified in the determination. As to the new

circumstances, being the birth of the child, the Appellant might wish to contemplate making a fresh application under Article 8 as the father of a British born child but that was not a matter for the First-tier Tribunal.

19. The Appellant indicated he had nothing further to add.

20. I have concluded that the First-tier Tribunal did not make an error of law and that its decision shall stand. I set out my reasoning, in this regard, below.

21. In my judgment the assessment of the Appellant's credibility, as contained in the determination of the First-tier Tribunal, is a full and fair one. Complaint is made that what the Appellant had to say about contact with his family was not necessarily inconsistent so that the First-tier Tribunal was obliged to probe matters further with him and put any points it had regarding inconsistency to him. It was, however, open to the First-tier Tribunal to conclude that there was inconsistency in the various indications he had given as to his contact with family members in Afghanistan. In particular, his apparent indication that he had been in contact with them, particularly his mother, save for the last several months, as set out in his statement of 11th March 2013, seemed to sit unhappily with his more recent statements in which he had said that he had only spoken to his family on only two occasions since his arrival in the UK in 2009. I cannot see that the First-tier Tribunal was obliged to put each and every concern it might have with his evidence to him. In any event, its general conclusions as to credibility were based upon a range of factors and not limited to that point. The First-tier Tribunal did accept the truth of the initial part of his account with respect to the family experiencing some problems in Paktia but that did not mean it was obliged to accept the rest of what he had to say or that, as seems to be suggested in the grounds, this created some form of presumption that he was telling the truth about other matters. Its explanation as to why it did not believe the other matters was sufficiently full and sustainable.

22. Given the First-tier Tribunal's findings that the family had had no difficulty in Jalalabad and that he did have family there to return to, and that he was no longer a minor by the date it was considering his case, it was not necessary for it to make specific references neither to any background material regarding Afghanistan nor to case law. In any event, the failure to refer to decided cases is not, of itself, an error of law so long as the correct principles are applied. Whilst it is the case that the attainment of adulthood does not, of itself, mean that a young person will not be at risk because of youth, a point which I think the grounds might have been seeking to make, there was no evidence offered for any suggestion that, if the Appellant's account was largely incredible as it was found to be, and bearing in mind the absence of any problems the family had experienced in Jalalabad, that he would be at risk on return there though the First-tier Tribunal's alternative finding to the effect that he could safely relocate to Kabul has not been the subject of any specific challenge. As to the point about the case of **ML**, cited above, that was a case where the Court of

Appeal were concerned with a determination of the First-tier Tribunal which had contained numerous factual errors and it was said that, in that case, those errors undermined the determination and that the Upper Tribunal had been wrong to think that factual errors of that sort could not amount to arguable errors of law. This case, though, is far removed from that because it has not been alleged that there are any factual errors in the determination of the First-tier Tribunal. Further, as Mr Mills points out, the First-tier Tribunal correctly directed itself as to the relevant burden and standard of proof and then it made findings and reached conclusions according to that standard. Nothing more could have been required of it.

23. As to the point about the Secretary of State's duty to attempt to trace the family members of unaccompanied minors (which the Appellant was when he arrived), this is something which has been the subject of extensive litigation. However, it does not seem to me that given the very clear findings that the Appellant did have family to return to any allegation that the Secretary of State had failed in her tracing duty could have been relevant. Further, and perhaps more importantly, in **TN and MA** cited above, it was pointed out that in determining whether to accept a claimant's account, the Tribunal must act on the evidence before it with no presumption of credibility and the fact that the Respondent had failed, if that be the case, to properly discharge her tracing obligation does not affect that. In the particular cases with which the Supreme Court was concerned, it was said that given the accounts of the Claimants had been disbelieved their appeals should not have been allowed merely by reason of the breach of the tracing obligation. It seems to me that against that background the First-tier Tribunal did not err in law in adopting the approach it did.

24. I conclude, therefore, that the grounds which seek to challenge the parts of the determination concerning international protection do not demonstrate that the First-tier Tribunal erred in law.

25. The remainder of the challenges relate to the First-tier Tribunal's consideration of the arguments under the Immigration Rules and also under Article 8. The first contention, here, is that the First-tier Tribunal erred when considering the Immigration Rules, particularly Appendix FM, because it wrongly decided that the failure to make a valid application for leave to remain was a bar to success under Appendix FM.

26. On my reading of the determination, the First-tier Tribunal did not say that. The grounds do not take me to the relevant part of the determination where it is said that such an error was made. It seems to me that the real point, though, with respect to Appendix FM was this. The Respondent, on my reading of the reasons for refusal letter, had concluded that the Appellant did not meet the Suitability requirements as contained in Appendix FM. In particular, it seemed to be saying that the exclusion of the Appellant from the UK was conducive to the public good. The First-tier Tribunal, relying upon the convictions, reached the same view (see paragraph 22 of the determination). The First-tier Tribunal's

approach in this regard is not criticised or challenged in the grounds. Thus, the requirements under the Rules were not met. This meant, for example, he was unable to access EX.1.

27. The rest of the Article 8 challenge appears to relate to the adequacy of the consideration outside of the Rules.

28. What the First-tier Tribunal made of the Appellant's claimed relationship was, perhaps, not as clear as it might have been. It said at paragraph 21 that he had claimed to be in a relationship and noted that there was an absence of evidence to say that the, at that stage expected, child was his. At paragraph 26 it described her as being "his girlfriend" and did so again at paragraph 29. On my reading it did accept that there was a boyfriend and a girlfriend relationship between the two of them albeit that it did not make a clear finding as to whether the then expected child was his or not. It then considered a range of other matters relevant to Article 8 which it addressed, for the most part outside the Rules although there was a brief reference to 276ADE, in paragraphs 28 and 29 of its determination. It seems to have taken her word for it that she would probably accompany him to Afghanistan if he were to be removed there, without going into the viability of that but it also made the pertinent point that, if the two were to be separated, there would be the facility of the Appellant applying for entry clearance to rejoin her and having his arguments as to why the two should be reunited in the UK considered in that context. The First-tier Tribunal also mentioned, and commented in quite strong terms, upon his conduct in the UK, seemingly having in mind his convictions and information given about him by his social worker, and which it described as being "reprehensible".

29. The First-tier Tribunal did not set out its consideration outside of the Rules in the five-stage process set out in **Razgar [2004] UKHL 27**. However, it is clear from what it did say that that was, in substance what it was doing and that it accepted, uncontroversially it seems to me, that Article 8 was engaged, that any interference with Article 8 rights was lawful and in pursuance of a legitimate aim and that matters boiled down to a proportionality assessment. It is clear that it resolved that assessment against the Appellant, essentially, for the reasons it explained at paragraphs 28 and 29 of its determination and which I have set out above.

30. I conclude, therefore, that the First-tier Tribunal did not err in law with respect to its consideration of any of the aspects of this appeal.

## Notice of Decision

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

I do not set aside the decision.

## Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed Date

Upper Tribunal Judge Hemingway

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

No fee is paid or payable so there can be no fee award

Signed Date

Upper Tribunal Judge Hemingway