Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: PA/04891/2017

THE IMMIGRATION ACTS

Heard at: Field House
On 9 February 2018

Decision and Reasons promulgated
On 2 March 2018

Before

Upper Tribunal Judge Gill

Between

The Secretary of State for the Home Department Appellant

And

Master Admadzai Safi Respondent
(ANONYMITY ORDER NOT MADE)

Representation:
For the appellant: Ms Z Ahmad, Senior Home Office Presenting Officer.
For the respondent: Ms B McGovern, of Kesar & Co Solicitors.

Decision and Directions

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal Wright who, in a decision promulgated on 4 December 2017 following a hearing on 9 November 2017, allowed the appeal of Admadzai Safi (hereafter the "claimant"), a national of Afghanistan, against a decision of the respondent of 12 May 2017 to refuse his asylum, humanitarian protection and human rights claims.

2. The decision letter disputes the claimant's age. The claimant said he was born on 7 September 2000 but Kent County Council's Social Services had assessed him to be

an adult, with a date of birth of 7 September 1998. The decision letter also disputes the credibility of the claimant's account of the factual basis of his asylum claim. In addition, the Secretary of State refused the Article 8 claim.

3. In the section of the judge's decision entitled: "*Notice of decision*", the judge said that the appeal was allowed on human rights (para 62) and that it was allowed on asylum grounds (para 63). He did not state his decision on the humanitarian protection claim in this section of his decision although at para 59 of his decision, he said that the claim for humanitarian protection succeeds.

4. An issue which arises in this appeal is whether the judge made a mistake in allowing the appeal on asylum grounds at para 63 because, in the Secretary of State's submission, this is inconsistent with the fact that, at para 56, the judge rejected the claimant's version of the circumstances surrounding his departure from Afghanistan as he had found that account incredible.

5. It is the claimant's case that the judge did not make a mistake in allowing the appeal on asylum grounds at para 63.

6. If I were to conclude that the judge had made a mistake, the only option available to the Upper Tribunal to rectify any such mistake would be for it to set aside the judge's decision and re-make the decision on the appeal: Katsonga ("slip rule"; FtT's general powers) [2016] UKUT 228 (IAC). This is because the First-tier Tribunal no longer has power to correct accidental slips and omissions as a consequence of which it would not be open to the Upper Tribunal to refer the judge's decision back to the judge for him to correct any mistake.

Basis of asylum claim and the refusal

7. In summary, the claimant's asylum claim was based on his fear of the Taliban. He said that his father was a high ranking commander working for the Afghan government. In particular, he was involved in fighting against the Taliban. In around May 2015, his mother was informed that his father had been killed by the Taliban. The Taliban then came to look for the claimant on two occasions. As a result, the claimant left Afghanistan with the help of an agent.

The judge's decision

8. The judge accepted the claimant's evidence of his age. As stated earlier, he rejected the factual basis of the claimant's asylum claim. He dealt with the claimant's health concerns at para 57 and noted that "*there were ongoing issues*" in relation to the fact that the claimant's right kidney had been removed and that he had "*mental health issues*". At para 58, he began to deal with the humanitarian protection claim and the guidance of the Upper Tribunal in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC). At para 59, he said: *"… the [claimant's] health, age and vulnerabilities amount to exceptional circumstances and it would be unduly harsh for him to return to Afghanistan .. The country guidance in AA should be followed and accordingly, the claim for humanitarian protection succeeds."* At para 60, the judge said, in relation to Article 8, that the decision was disproportionate.

9. The judge's reasons for his findings are set out at para 47 onwards of his decision, which read:

> "Findings
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> 47. The burden of proof on the [claimant] is a low one, that of a reasonable degree of likelihood or a real risk of there being a breach, either under the Refugee Convention or the Human Rights Convention if he were to return to Afghanistan.
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> 48. The point which the Secretary of State made in submissions was a good one; why when the [claimant] claimed asylum did he say the reason was his fear of war and fighting; but he did not refer to his father's death or the threat he feels he is under from the Taliban. Unfortunately, this point was made in submissions and the [claimant] was not challenged upon it in cross-examination by the Secretary of State.
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> 49. The Secretary of State did not produce any evidence further to its contention in respect of the [claimant's] age; it relies on the Kent County Council's assessment. There was no explanation as to why the date of birth of 7th of September was decided upon, save that it means, if that date and month are correct and the year is 1998, as the [claimant] arrived in the UK on 8/9/2015 it was determined he was aged 17 upon arrival as he would have had his '17th' birthday the previous day.
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> 50. It was put to the [claimant] that Kent Social Services had deemed his year of birth to be 1998 and he maintained that he was born later, is aged 17 and had been 14 year *[sic]* and 9 months old when he left Afghanistan. He had no documents which could confirm his age or date of birth, but he said he relied upon what his mother had told him regarding his age.
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> 51. Whilst considering on the one hand the lack of documentation could lead to the conclusion that the [claimant] was avoiding confirming his age or date of birth, on the other hand, it is conceivable that due to the circumstances of his departure from Afghanistan, it was not possible for him to bring any documentation with him. Even if the Secretary of State's assessment is correct, he is still a young man, if not classed for the purposes of the legislation as a child.
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> 52, The Tribunal is not satisfied that the Secretary of State has discharged the burden of disputing the [claimant's] age and it has simply accepted Kent County Council's assessment. That assessment is clearly disputed. The Secretary of State makes much of the [claimant's] inconsistencies, yet in the arrival interview on 8/9/2015 he said he was 15 years old. In a statement dated 17/2/2016 he stated he believed he was 15 years old and there are other records of the [claimant] maintaining his year of birth was 2000.
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> 53. In respect of the inconsistencies which the Secretary of State identified, the Tribunal agrees with the [claimant's] submissions and finds that inconsistencies do not alone indicate a lack of credibility. Furthermore, the Tribunal accepts the [claimant's] explanations (that he was estimating the number of body guards, there was a reason behind what he said about the number of visits from the bodyguards and the period of time before he left home was simply an error).
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> 54. That said, the Tribunal does not accept the [claimant's] explanation regarding the circumstances as to how he came to leave Afghanistan. It was not plausible that the Taliban would kill his father, a high ranking

government official with numerous body guards, would then come looking for him and simply go away. As [the Secretary of State's representative] said, it would be expected that a family in that position would seek or expect the father's employer to come to their assistance. It may be that if the assistance was not provided, then other options would be considered. It would not be expected that the family would immediately remove the [claimant], a young boy aged 14, on the very first occasion. Or alternatively, if the [claimant] was at risk following his father's death, why other pre-emptive steps would not be taken to protect him as a first option.

55. Furthermore, the Tribunal does not accept that a family who went to such lengths to remove the [claimant] from harm's way, would not ask him to attempt to contact them once he was somewhere safe. It may be that the [claimant] is not able to contact them, but it is not accepted he would not be asked to do so.

56. The Tribunal makes allowances for the [claimant's] age, health and the fact that any inconsistencies in the [claimant's] story are not fatal. The [claimant's] version of the circumstances surrounding him leaving Afghanistan it [sic] is however rejected for the reason that it is not found to be credible.

57. In respect of the [claimant's] health, there were health concerns when he arrived in the UK. He has since had his right kidney removed and there are ongoing issues with that. The latest evidence being a referral for an ultrasound scan on his abdomen and renal tract. The [claimant] also has mental health issues. He is prescribed strong painkillers and anti-depressants. The [claimant's] mental health was assessed on 4/7/2017 and it was agreed he would benefit from psychology or counselling, but it was not beneficial to start psychological intervention if there was a possibility he may be removed. If he is granted leave to remain it was agreed he could be re-referred.

58. The [claimant] submits he should be afforded humanitarian protection, that AA should be followed and the Secretary of State has not discharged the burden to show that the country guidance in AA should not be followed. That is accepted. As per AA, unattached children returned to Afghanistan (depending upon the location) are vulnerable. Taking into account the [claimant's] best interests in determining a claim for humanitarian protection, consideration is given to his vulnerabilities and lack of family support. The Secretary of State submitted there was evidence of the [claimant] being in contact with his family; that was not the case however. There was at most a suspicion by a social worker that the [claimant] had absconded in order to contact his family; but no evidence. In view of the fact that the Red Cross has suspended its family contact service in Afghanistan, the [claimant] is not able to use this service to contact his family.

59. The Tribunal finds the [claimant's] health, age and vulnerabilities amount to exceptional circumstances and it would be unduly harsh for him to return to Afghanistan. The country guidance in AA should be followed and accordingly, the claim for humanitarian protection succeeds.

60. In respect of Article 8, the [claimant] has established a private life in terms of his education and medical needs. It would be a disproportionate interference with that life were he to be removed from the UK.

61. For these reasons, the appeal is allowed.

Notice of Decision

62. The appeal is allowed on human rights grounds.

63. The appeal is allowed on asylum grounds."

The grounds

10. There are five grounds, as follows:

(i) (Ground 1) There was no reasoning to support the judge's decision, at para 63, to allow the appeal on asylum grounds. The findings of fact at paras 54, 55 and 56 strongly suggest that this was most likely a typographical error.

(ii) (Ground 2) The judge erred in his approach to the assessment of the claimant's age, in that:

(a) the judge said at para 52 that he was not satisfied that the Secretary of State had discharged the burden of disputing the claimant's age whereas the burden was upon the claimant to establish his age.

(b) The only evidence of his age that the claimant had was his own assertion, whereas the Secretary of State relied upon the assessment of Kent County Council's Social Services who, the grounds contend, are professionals in the field. There was no evidence that the age assessment of Kent County Council had been formally challenged in judicial review proceedings, a fact which was itself telling given that Kent County Council's decision on the claimant's age impacted on the support that he received from the council.

(iii) (Ground 3) The judge's reasoning as to the claimant's contact with his family was inadequate and unclear. Whilst the judge said, at para 55, that he did not accept that the claimant was not asked to contact his family on arrival and, at para 58 that there was, at most, a suspicion by a social worker that the reason for the claimant's disappearance for two days was that he had attempted to contact friends, family or the agent, he had erred by ignoring the fact that social services had also reported that the claimant had asked for access to Facebook in order to contact his cousin. The grounds therefore contend that the judge failed to make a balanced assessment of the evidence.

(iv) (Ground 4) The assessment of the claimant's case under AA is inadequate. There should have been a detailed assessment of the claimant's circumstances on return and the impact of his medical issues.

(v) (Ground 5) No reasons were given for the judge's finding that the decision on the claimant's Article 8 claim was disproportionate.

Submissions

11. In relation to ground 1 and in response to a question from me, Ms McGovern submitted that the claimant's case on ground 1 is that the judge allowed his appeal on asylum grounds on the ground that he is a member of a particular social group, the particular social group being unattended children, in reliance upon AA.

12. Ms Ahmad submitted that this inference could not be properly drawn, as the judge failed to make any findings as to whether the claimant was a member of a particular

social group and whether he would be at real risk of persecution by reason of his membership of a particular social group.

13. Ms Ahmad submitted that para 59 of the judge's decision strengthens the Secretary of State's case, that para 62 allowing the appeal on asylum grounds, was a mistake on the part of the judge. This is because the judge said at para 59 that the humanitarian protection claim succeeds but failed to deal with humanitarian protection in the part of his decision entitled: "*Notice of decision*".

14. I asked the parties to address me on the question whether, if the judge had intended to allow the appeal on asylum grounds, it would have been open to him to allow the appeal also on humanitarian protection grounds. The parties were referred to para 339C of the Immigration Rules. In Ms McGovern's submission, para 339C did not preclude the judge from allowing the claimant's appeal on both asylum and humanitarian protection grounds because the issue in a refugee claim is whether the individual has a well-founded fear of persecution whereas the issue in a humanitarian protection claim is whether the individual is at real risk of suffering serious harm. She submitted that the threshold was different.

15. In relation to ground 2, Ms Ahmad submitted that the judge's consideration of the claimant's age was flawed. Firstly, he did not appreciate that Kent County Council's Social Services have experience and skills in assessing age. They had decided that the claimant was an adult. The claimant did not challenge that decision. The decision of Kent County Council on the claimant's age was relied upon at the hearing before the judge. Ms Ahmad accepted that the full age assessment report of Kent County Council's Social Services was not submitted to the judge.

16. Secondly, Ms Ahmad submitted that the judge erred, in that, he failed to take into account relevant evidence. A "*Case Note Report*" from Kent County Council was submitted. The Case Note Report stated that the claimant had asked social services for access to a computer in order to go on to Facebook and make contact with his cousin so that his cousin could inform his mother that he was in the United Kingdom. The judge failed to take this evidence into account.

17. Thirdly, the judge erred in placing upon the Secretary of State the burden of disproving the claimant's age, whereas the burden of proof was upon the claimant to establish his age.

18. In relation to ground 3, Ms Ahmad referred me to the fact that the judge said at para 55 that he did not accept that the claimant's family would not have asked him to attempt to contact them. At para 58, the judge said that at most, there was a suspicion by a social worker that the claimant had absconded for two days in order to contact his family. However, Ms Ahmad submitted that para 58 concerned the judge's assessment of the guidance in AA. It did not concern the judge's assessment of credibility. There was therefore nothing to show that the judge took into account the fact that the claimant had absconded for two days in his assessment of the claimant's credibility. In other words, there were two occasions which gave rise to concerns on the part of Kent County Council that the claimant had tried or wished to contact his family, whereas the judge only took into account one of those events.

19. In relation to ground 4, Ms Ahmad submitted that the judge's assessment of humanitarian protection was inadequate. Firstly, there are no findings in relation to the claimant's health at paras 58 or 59. Even para 57, where the judge considered the claimant's "*health concerns*" and "*mental health issues*", there were no findings. For example, he made no findings as to the claimant's condition, no findings as to the treatment he receives and the treatment he requires and whether such treatment would be available in Afghanistan. Secondly, the judge's reference to lack of family support in para 58 does not sit well with his reasoning at paragraph 55, where he said that he did not believe that the claimant's family would not have asked him to contact them.

20. Thirdly, the judge states at para 58, that unattended children *are* vulnerable, whereas AA states at judicial head-note (2) that they *may* be exposed to risk of serious harm. AA makes it clear that whether or not an unattended child is at real risk of serious harm is a question of fact. Ms Ahmad submitted that the judge simply concluded that the claimant was at real risk of serious harm. There was no proper assessment under the guidance in AA at para 58 or at para 57.

21. In relation to ground 5, Ms Ahmad submitted that the judge did not give any reasons at all for his finding that the decision was disproportionate. A proper assessment of Article 8 necessitated an assessment of the Article 8 claim under the Immigration Rules followed by an assessment outside the Rules. It was necessary to take into account the public interest considerations in s.117B of the Nationality, Immigration and Asylum Act 2002.

22. Ms McGovern relied on her Reply. She submitted that the judge did give reasons for allowing the asylum claim. He applied AA and decided that, pursuant to AA, the claimant's asylum claim succeeded as well as his humanitarian protection claim. Ms McGovern submitted that AA does state that unattached children are vulnerable but that whether or not they will be exposed to a real risk of serious harm depends on the circumstances. The Secretary of State had accepted before the judge that AA continued to apply, as para 58 of the judge's decision shows.

23. In referring to the claimant's vulnerabilities at para 58, the judge was referring to the claimant's age, his medical condition, in that, he had had a kidney removed and had *"ongoing issues"* in that regard, his mental health condition, and the lack of family support. AA concerned refugee protection. At para 59, the judge in effect said that the claimant was a refugee and also qualified for humanitarian protection. She submitted that para 339C concerned the grant by the Secretary of State of leave. It did not preclude a judge from allowing an appeal on both asylum grounds and on humanitarian protection grounds.

24. Ms McGovern submitted that it was not the case that the judge's "Notice of Decision" fails to deal with the humanitarian protection claim. She submitted that, in allowing the appeal on human rights grounds at para 62, the judge meant "*Article 3, Article 8 and humanitarian protection*".

25. In relation to ground 2, Ms McGovern submitted that, as the Secretary of State had asserted that the claimant was born in 1998 and the claimant asserted that he was born in 2000, it was for the Secretary of State to establish the former as a fact and for the claimant to establish the latter as a fact. She submitted that the judge decided

that the Secretary of State had not established the fact that she asserted. Accordingly, the judge did not err in law.

26. Ms McGovern relied upon para 5 of her reply. The judge's findings on the age issue were well reasoned and did not involve any error of law. The age assessment report from Kent County Council was not before the judge. The judge was therefore unable to consider the age assessment by Kent County Council. For example, whether it was undertaken by persons who were qualified to do so and whether it was *Merton* compliant. Accordingly, she submitted that the judge had correctly stated that the Secretary of State had not discharged her burden of proving her assertion that the claimant was 18 years old. The judge had considered whether the claimant had established his case and found that his evidence about his age had been consistent. He accepted the claimant's explanation as to why there was no documentary evidence regarding his age. The judge had correctly set out at para 47 that the burden of proof was on the claimant. At para 49, he referred to the fact that the Secretary of State had not produced the age assessment report by Kent County Council. There was no explanation for the Secretary of State's asserted date of birth. At para 50, he noted that it was put to the claimant that Kent County Council's Social Services had assessed him to have been born in 1998. At para 52, he reviewed the evidence as a whole. He took into account the claimant's oral evidence.

27. In relation to ground 3, Ms McGovern relied upon para 9 of her Reply. The judge heard submissions on the fact that Kent County Council's Social Services had contended that the claimant had requested access to Facebook. The claimant denied that this event had happened. It was submitted on the claimant's behalf that it was highly unlikely that this conversation had taken place due to the complexity of English that it would have required. Ms McGovern asked me to infer that the judge had considered this evidence by reason of the fact that it was referred to at paras 23 and 33. In any event, she submitted that there was no actual evidence that the claimant had made contact with his family via Facebook. She submitted that, at best, this evidence only amounted to evidence of an attempt by the claimant to make contact with his family in Afghanistan.

28. In relation to the social workers' belief that the claimant had disappeared for two days in order to contact his family, the claimant had explained that he had not intentionally run away. The judge was entitled to find that the social worker's belief amounted to no more than speculation.

29. In relation to ground 4, Ms McGovern submitted that the judge had considered and applied AA, i.e. whether the claimant was a child and whether he had contact with his family. She submitted that the judge found that the claimant was a child and that he had no contact with his family in Afghanistan.

30. Ms McGovern submitted that the judge's rejection of claimant's account concerning his father and the risk to him from the Taliban did not affect the assessment of the risk to the claimant as an unaccompanied child.

31. In relation to the judge's findings on the claimant's health, Ms McGovern took me through the medical evidence at pages 6 to 29 of the claimant's bundle. Page 6 shows that he had a scan on 2 November 2017. There are medical notes on page 8 which refer to the claimant being prescribed medication. Ms McGovern accepted that

the documents did not provide any diagnosis or prognosis but she submitted that was sufficient evidence before the judge for him to conclude that the claimant was prescribed strong painkillers. She accepted that the judge did not consider whether the medication was available to him in Afghanistan. However, she submitted that it was not necessary for the judge to consider the availability of medication in Afghanistan because the case was based on vulnerability of the claimant as an unattended child and not a human rights claim based on his medical condition.

32. In relation to ground 5, Ms McGovern relied upon paras 11-13 of her reply. She submitted that I should consider para 60 of the judge's decision in light of the fact that the judge had accepted that the claimant was a child, that he had ongoing health issues and mental health issues and that he did not have contact with his family in Afghanistan. She submitted that the judge's assessment at para 59 related not only to humanitarian protection but also Articles 3 and 8 of the ECHR, which was further supported by the fact that he specifically referred to "*exceptional circumstances*" at para 59.

33. In response, Ms Ahmad submitted that the judge did not assess the medical evidence at all, at para 57 or at para 58. There was no assessment and no reasons. Para 60 refers to the claimant's "*medical needs*" but the judge did not explain what *"medical needs"* the claimant had.

34. Ms Ahmad asked me to note that para 25 of the judge's decision shows that the Secretary of State's representative had specifically said that there was no up-to-date medical evidence. This issue had therefore been raised before the judge.

35. Ms Ahmad submitted that Ms McGovern was asking me to infer that the judge had made the Article 8 proportionality assessment at para 59. She submitted that this could not be correct because para 59 only set out the judge's bare conclusions. There was no assessment of the fact that he speaks the language and had lived in Afghanistan from birth. It was not enough to simply say that the claim succeeds because of the claimant's "*vulnerabilities*" and lack of family support.

Assessment

36. The first question is whether the judge made a mistake when he said at para 63 that the appeal was allowed on asylum grounds.

37. There are potentially two reasons why it may be thought that the judge made a mistake at para 63 and that he in fact intended to dismiss the appeal on asylum grounds, as follows:

(i) Firstly, the existence of para 339C of the Immigration Rules, if (contrary to Ms McGovern's submission) this precludes a judge from allowing an appeal on humanitarian protection grounds if a claimant was a refugee.

(ii) Secondly, the Secretary of State contends that the judge's decision at para 63 to allow the appeal on asylum grounds contradicts para 56 where he rejected the credibility of the claimant's account of the reasons why he left Afghanistan and why he would be at real risk of persecution from the Taliban if returned to Afghanistan.

38. In relation to (i), I do not accept Ms McGovern's submission that para 339C of the Immigration Rules does not preclude a judge from allowing an appeal on both asylum grounds and humanitarian protection grounds. The relevant part of paragraph 339C reads:

> "339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) …;
>
> (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;…"

39. Ms McGovern submitted that the wording of para 339C shows that para 339C is only concerned with the grant of leave by the Secretary of State. In other words, if a judge allows an appeal on both asylum grounds and humanitarian protection grounds, which in her submission judges are entitled to do, it would be open to the Secretary of State not to grant humanitarian protection if the individual is a refugee.

40. I reject this submission. It makes no sense, given that the Secretary of State is obliged to implement the decision of a judge if an appeal against her decision is ultimately successful. A decision by a judge to allow an appeal on both asylum grounds and humanitarian protection grounds simply cannot be implemented by the Secretary of State in view of the clear terms of para 339C.

41. Furthermore, Ms McGovern's submission ignores the definition of "*person eligible for humanitarian protection*" under regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006. This defines a "*person eligible for humanitarian protection*" as "*a person who is eligible for a grant of humanitarian protection under the immigration rules*". Given the wording of para 339C, a person who is a refugee is therefore, by definition, <u>not</u> "*a person who is eligible for a grant of humanitarian protection under the immigration rules".* It follows that a person who is a refugee is not, by definition, eligible for humanitarian protection. _

42. Accordingly, in my judgment, para 339C read together with regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 does preclude judges from allowing an appeal on both asylum grounds and humanitarian protection grounds.

43. This does not mean that the judge did not intend to allow the appeal on both asylum grounds and humanitarian protection grounds. If he did intend to allow the appeal on both asylum grounds and humanitarian protection grounds, he was wrong to do so, for the reasons given above. If he did not intend to allow the appeal on both asylum grounds and humanitarian protection grounds, i.e. if para 63 was simply a mistake and there were no other material errors of law, it would be sufficient for me to set aside para 63 and substitute it with a decision dismissing the appeal on asylum grounds.

44. I turn to consider whether the judge intended to allow the appeal on asylum grounds, i.e. I turn to consider the Secretary of State's submission summarised at my para 37 (ii) above.

45. Ms McGovern submitted that the judge allowed the appeal on the ground that the claimant is a member of a particular social group, the particular social group being unattended children in reliance on AA. However, the difficulty with this submission is not only that it was not argued before the judge that the claimant was a member of a particular social group, but also that the judge did not make any finding to the effect that the claimant would be at real risk as a member of a particular social group. Ms McGovern's submission that the judge decided to allow the appeal on asylum grounds because he had found that the claimant was a member of a particular social group, the social group in question being unattended children, would require the Upper Tribunal to read into the judge's decision the entirety of this reasoning, reasoning which is not only entirely absent from the judge's decision but reasoning which could not have been in his mind given that it had not been the subject of submissions before him.

46. In my judgment, the inference which Ms McGovern submits I should draw from the decision, to the effect that the judge had allowed claimant's on asylum grounds because he had found that the claimant is a member of a particular social group, is wholly unwarranted and would be tantamount to my inferring reasoning and findings that were simply not intended by the judge.

47. Taking this into account, together with the fact that the judge rejected the credibility of the claimant's account about the circumstances which led to his departure from Afghanistan and that the claimant's asylum claim was based on his alleged fear of the Taliban for reasons which were found incredible by the judge, I have concluded that the judge did not intend to allow the appeal on asylum grounds and that para 63 was a mistake. He intended to dismiss the appeal on asylum grounds.

48. I agree with Ms Ahmad that the fact that the judge did not deal, in terms, with the humanitarian protection claim, in the section of his decision under the heading: "*Notice of decision"* supports the conclusion that he made a mistake at para 63. This is because his failure to deal with the humanitarian protection ground in this section of his decision is plainly a mistake, given his conclusion at para 59 that the claim for humanitarian protection succeeds. I have no hesitation in rejecting Ms McGovern's submission that para 62, where the judge said: "*The appeal is allowed on human rights grounds*" should be read as: "*The appeal is allowed under Article 3, Article 8 and humanitarian protection*". It does violence to the judge's language at para 62 to include "*humanitarian protection*" when para 62 only refers to human rights.

49. Ground 1 is therefore established. However, as will be seen from my reasoning below, this is not the only error. Ground 1 therefore cannot be dealt with simply by setting aside para 63 of the judge's decision and subsisting it with a decision dismissing the appeal on asylum grounds.

50. I turn to ground 2 which concerns the judge's assessment of the evidence as to the claimant's age.

51. There are two aspects to ground 2, as set out at my para 10 above. Ms Ahmad submitted that the judge materially erred in law at para 52 of his decision when he said that the Secretary of State had not discharged the burden of disputing the claimant's age. In this regard, Ms McGovern submitted that, given the principle in civil courts that he who asserts must prove, it was for the claimant to establish that his

age was as claimed by him and for the Secretary of State to establish that the claimant's age was as claimed by her. She submitted that the judge was correct in this regard and that he had correctly stated at para 47 that the burden was on the claimant to establish his claimed age and at para 52 that the burden was on Secretary of State to establish the age she contended. Ms McGovern submitted that the judge did not err in reaching his conclusion that the claimant had established the age he claimed.

52. However, the fact is that Ms McGovern is simply wrong in asserting that the principle that he who asserts must prove applies in asylum cases where age is disputed. The mere fact that the Secretary of State disputes an individual's evidence of his/her age and/or advances a different date of birth does not detract from the fact that the burden remains on the claimant to establish his or her age. This is so well-established that it is unnecessary, in my view, to refer to any authority.

53. Whilst it is correct that para 47 of the judge's decision shows that the judge was aware that the burden of proof was on the claimant, it is clear from the wording of para 47 that he was referring to the burden of establishing the likelihood of there being a breach of the Refugee Convention or the ECHR if the claimant is returned to Afghanistan. In any event, even if the judge's self-direction as to the burden of proof at para 47 extended to the disputed age issue, para 47 is impossible to reconcile with para 52 which incorrectly states that it was for the Secretary of State "*to discharge the burden of disputing the claimant's age".*

54. I am also satisfied that the judge's error in placing on the Secretary of State the burden of proof on the disputed age issue is fatal to his finding on the age issue, irrespective of the quality of the evidence as to age. This is because there are some errors which are of such magnitude that they are, *ipso facto*, fatal. A misdirection as to the burden of proof on a disputed material issue of fact is such an error. However, even if I am wrong about this, I am nevertheless satisfied that the error is material. Although the judge's reasoning shows that he accepted the claimant's evidence about his age, he may have taken a different view if he had not incorrectly placed the burden of proof upon the Secretary of State, especially when ground 3 (which is also established, for the reasons given below) is taken into account.

55. Accordingly, not only is ground 2 established, the judge's error in placing a burden on the Secretary of State to dispute the claimant's age was material to his decision to allow the appeal on asylum grounds (if he intended to allow it on asylum grounds) as well as his decision to allow the appeal on humanitarian protection grounds and on human rights grounds. The finding that the claimant was the age he claimed, i.e. that he was still a child at the date of the hearing, was plainly material to both grounds as the judge decided that he was an unattended child and came within the guidance in AA.

56. I turn to grounds 3, 4 and 5.

57. In relation to ground 3, it is clear that, in his assessment at para 48 onwards of credibility, the judge did not mention *in terms* that the Secretary of State's representative had relied upon the fact that the Kent County Council's Social Services had said that the claimant had requested the use of a computer in order to access Facebook so that he could get in a touch with a cousin.

58. Ms McGovern asked me to infer, from paras 23 and 33 of the judge's decision, that the judge had assessed the evidence. I reject the submission that paras 23 and 33 show that the judge had assessed this evidence. Para 23 of the judge's decision merely records the submission by the Secretary of State's representative that evidence had been produced at the hearing that showed that the claimant had maintained contact with his family and para 33 merely records the claimant's evidence that he did not have the conversation with Kent County Council's Social Services which they said had taken place when he said he wanted to use a computer to contact his family.

59. It was incumbent upon the judge to consider this evidence and decide whether the conversation had taken place and, if it did, the relevance of this evidence to the claimant's evidence that he did not have contact with his family. On the face of it, there is no reason for social workers to falsify this evidence whereas the claimant has much to gain by denying that the conversation took place. If the judge had accepted that the conversation had taken place, this was capable of being material not only to the credibility of the claimant's evidence that he did not have contact with his family in Afghanistan but also his credibility generally, including the credibility of his evidence of his claimed date of birth.

60. Ground 3 is therefore established. I am satisfied that, taken on its own, ground 3 is itself material not only to the credibility of the claimant's evidence that he was not in contact with his family in Afghanistan but also the credibility of his evidence about his claimed date of birth. Thus, ground 3 is itself material to the judge's decision to allow the appeal on asylum grounds (if he intended to allow it) as well as his decision to allow the appeal on humanitarian protection grounds and on human rights grounds.

61. In relation to ground 4, I have already said above that grounds 2 and 3 are material to the judge's decision to allow the appeal on humanitarian protection grounds.

62. However, the reality is that the judge also materially erred in law in his assessment at paras 57-59. It was specifically submitted to the judge by the Secretary of State's representative and which the judge recorded at para 25 of his decision, that there was no up-to-date medical evidence. Ms McGovern did not resile from this before me. Although she took me through the medical evidence that was before the judge, she accepted that there was no diagnosis or prognosis. The most recent evidence in relation to the situation concerning the removal of his right kidney was that there had been a referral for an ultrasound scan, as the judge said at para 57. Although the judge referred to there being "*ongoing issues*" in relation to the claimant's kidney, there was no explanation what those "*ongoing issues*" were, nor was there any evidence. All that could be said is that there had been a recent scan, on 2 November 2017.

63. I agree with Ms Ahmad that, whilst the judge referred at para 57 to the claimant having "*health concerns*" and "*mental health issues*" and at para 58 to the claimant having "*medical needs*", he made no findings as to what he found were the claimant's "*health concerns*", "*mental health issues*" and "*medical needs*". One is left to draw such inferences about the claimant's condition as one is able to draw from the fact that, as at the date of the hearing, the claimant had been prescribed strong painkillers and anti-depressants. However, the fact that the claimant had been prescribed strong painkillers and anti-depressants tells one nothing of any material significance about

the situation concerning the claimant's remaining kidney. Yet, it is clear that the judge took into account, in the claimant's favour, the fact that he had some "*ongoing issues with that*".

64. In addition, the judge's finding at para 58 that the claimant did not have family support, cannot stand, given the material error of law established by ground 3.

65. Ground 4 is therefore also established.

66. I can deal with ground 5 briefly. It is clear that the judge made no assessment at all of Article 8. He simply stated his conclusion that the claimant had established "*private life in terms of his education and medical needs*" and that the decision would be a "*disproportionate interference with that life*". Ground 5 is therefore also established.

67. It only remains for me to deal with Ms McGovern's submission, which does not neatly fit into any particular ground, that the judge also allowed the appeal under Article 3 and that para 62 of the judge's decision includes a decision to allow the appeal under Article 3.

68. If this is a reference to a claim under Article 3 based on the applicant's medical condition, I do not accept that the judge dealt with an Article 3 claim based on the claimant's medical condition. Para 27 of the judge's decision shows that the Secretary of State's representative submitted before the judge that the Articles 2 and 3 claims stand or fall with the asylum claim. There is nothing in the judge's summary at paras 29-46 of the submissions advanced before him on the claimant's behalf that shows that the claimant's representative did not agree with the Secretary of State's submission to the effect that there was no independent Article 3 claim. Para 45 shows that the claimant's medical condition was relied upon in relation to guidance in AA. There was therefore no reason for the judge to consider Article 3 in relation to the claimant's medical condition.

69. Furthermore, any assessment of an Article 3 claim based on the claimant's medical condition would have necessitated some indication that the judge was aware of the relevant applicable threshold for such claims and an assessment of the background material concerning the availability of painkillers and anti-depressants in Afghanistan. There is no such indication and no such assessment in the judge's decision.

70. I therefore reject Ms McGovern's submission that the judge had also allowed the appeal under Article 3 based on the claimant's medical condition.

71. For all of the above reasons, I set aside the decision of Judge Wright in its entirety. For the avoidance of doubt, this includes his assessment of the claimant's credibility. None of his assessment and findings shall stand.

72. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

"(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

73. In my judgment this case falls within para 7.2 (b). In addition, given that the claimant won his appeal before the First-tier Tribunal and having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

74. At the time of my writing this decision, it is of course not known whether the claimant will succeed in his appeal before the First-tier Tribunal on the next occasion. Given that he succeeded before Judge Wright and in view of my decision to set out the parties' submissions before me in full, at paras 11-35 above.

Notice of Decision

The decision of Judge of the First-tier Tribunal Wright involved the making of errors on points of law such that his decision is set aside in its entirety. This case is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Wright.

Upper Tribunal Judge Gill Date: 25 February 2018