IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22935/2018 (V)

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Decision & Reasons Promulgated**
On 19 August 2019 (in person)	**On 14 September 2020**
And at Field House	
On 1 September 2020 via Skype	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

RAZ MOHAMMED JABAKAHEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss B Asanovic, (19/09/19) and
Mr E Fripp (01/09/2020), both instructed by Duncan Lewis & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge O'Keeffe promulgated on 9 May 2019. That decision was, for the reasons set out in a decision annexed to this decision, set aside

although the findings of fact were preserved (see paragraph [16] of that decision).

2. The remaking of the decision was, however, delayed pending a new Country Guidance decision on Afghanistan and by the restrictions imposed by COVID.

Background to the appeal

3. The appellant is a citizen of Afghanistan who entered the United Kingdom in 2006 and was eventually granted indefinite leave to remain on 7 February 2011. On 20 October 2017 he was sentenced to 32 months' imprisonment for supplying class A drugs, a conviction which caused the Secretary of State to deem his deportation as conducive to the public good in accordance with Section 32(5) of the UK Borders Act 2007.

4. As noted above, the appeal against that decision was dismissed but, despite the sentencing of the appellant to a term of imprisonment of over two years, at no stage was the issue of whether section 72 of the Nationality, Immigration and Asylum Act 2002 or paragraph 339D of the Immigration Rules was applicable. For that reason, I directed when giving my reasons for setting aside the decision of the First-tier Tribunal that this be addressed by the parties

The hearing

5. The appellant did not attend the hearing remotely. Mr Fripp explained that the appellant been made aware that he could attend, but did not make any submission that the hearing be postponed to await the appellant's arrival or that it be adjourned. He was content for the hearing to proceed in the appellant's absence.

6. In addition to the material which had been placed before the First-tier Tribunal, I have the following before me:-

   (i) Additional bundle from the appellant including witness statement and an expert report from a psychologist.

   (ii) Skeleton argument from Mr Fripp.

The Appellant's Case

7. The appellant's case is that he is at risk on return to Afghanistan on account of his father's activities and involvement with Hezb-e-Islami and that he had been killed in fighting for the Northern Alliance. He also claimed that he was entitled to humanitarian protection and that on the particular facts of this case internal relocation would not be appropriate.

8. The argument as put forward by Mr Fripp is that the appellant has rebutted any presumption applicable under Section 72 of the Immigration and Asylum Act 1999; that paragraph 339D of the Immigration Rules did not apply to him for the same reasons, based on a proper interpretation of Article 17(1)(b) of the Qualification Directive. It is submitted also that,

given the acceptance that the appellant is at risk of an Article 15(1)(c) risk in his home area, that the remaining issue is whether it is reasonable to expect him to relocate to Kabul. It is further submitted that the appellant would be at risk in his home area for a Convention reason given the extent to which he would be perceived as a westernised person, albeit that that might not be applicable to the same extent in Kabul. It is also submitted that it would not be reasonable for him to relocate to Kabul given his lack of a tazkera, his current mental ill health, lack of support and contacts in Kabul, his lack of relevant skills and a network there, the length of time he has spent in the United Kingdom and the age at which he left Afghanistan, mean that taken cumulatively it would not be reasonable to expect him to relocate there.

9. It is also submitted that, if the appellant falls to be excluded under paragraph 339D or that he is not pursuant to Section 72 of the 1999 Act, his removal would be in breach of Article 3 of the Human Rights Convention.

10. It is also submitted that his removal would be in breach of Article 8, there being very compelling circumstances in this case such that deportation would not be proportionate.

Respondent's Case

11. The respondent did not accept the appellant's account of what had happened to him in Afghanistan, nor his account of his return there in 2015. Although accepting that there was an article 15 (c) risk in his home province, Nangarhar, she concluded that the appellant is not at risk in his home area for a Convention reason nor, on a proper construction of AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130. and in consideration of the background evidence, could it be said that it would be unreasonable to expect him to return there or go to Kabul.

12. The respondent also argues that section 72 does apply to the appellant, given that he has committed a particularly serious crime as defined, presents a danger to the community; and, that he can thus be deported to Afghanistan, irrespective of whether or not he is a refugee. She submits also that he is, on account of his conviction and the danger he presents, not entitled to humanitarian protection.

13. Attention is also drawn to the credibility findings which have been preserved and it is submitted that the appellant's account of not having a tazkera should not be believed and that in any event this is unlikely to pose significant difficulties for this appellant.

14. It is submitted that Article 3 would not be applicable in any event and that deportation would be proportionate.

15. As regards article 8, the respondent submitted that the appellant did not meet the requirements of the Immigration Rules; nor did he fall within the exceptions set out in section 117C of the 2002 Act. She submits that the

there are not very compelling circumstances such that deportation is disproportionate.

Re-making the Decision

16. I now turn to remaking the decision, addressing first the interlinked issues of section 72 and paragraph 339D before addressing the factual issues which remain.

Section 72 and Paragraph 339D

17. I am satisfied that the appellant is a person to whom Section 72(2) of the Nationality, Immigration and Asylum Act 2002 applies as he has been convicted of an offence and sentenced to a period of imprisonment of at least two years. That leads to presumptions (a) that he has been convicted of a particularly serious crime and (b) that this constitutes a danger to the community of the United Kingdom. Although I am not required to deal with this first it does appear sensible to do so as it covers the rest of the decision. With regards to the interpretation of Section 72, the Court of Appeal in **EN (Serbia) v SSHD [2009] EWCA Civ 630** said this at [46] to [47]:

> "46. The Appellants submitted that Article 33(2) requires that the danger to the community must be causally connected to the particularly serious crime of which the person has been convicted. I would accept that normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or of the recurrence of a similar offence. I would also accept that the wording of Article 33(2) reflects that expectation. But it does not expressly require a causal connection, and I do not think that one is to be implied. By way of example, I do not see why a person who has been convicted of a particularly serious offence of violence and who the State can establish is a significant drug dealer should not be liable to refouled under Article 33(2). In any event, it seems to me that a disregard for the law, demonstrated by the conviction, would be sufficient to establish a causal connection between the conviction and the danger. If so, the suggested added requirement of a causal connection has little if any practical consequence.
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> 47. I would add that I have no doubt that particularly serious crimes are not restricted to offences against the person. Frauds, thefts and offences against property, for example, are capable of being particularly serious crimes, as may drug offences, particularly those involving class A drugs. In addition, matters such as frequent repetition or a sophisticated system or the participation of a number of offenders may aggravate the seriousness of an offence. It is also of note that at [62] the Secretary of State accepted that the relevant provisions of the Qualification Directive are directly effective."

18. The court said this at [66] and at [80]:

> "66. I see no reason why a rebuttable presumption, imposed for the purposes of a decision as to whether removal would be in breach of Article 33(1), should be incompatible with Article 33(2) of the Convention, at least in cases in which it may reasonably be inferred that a conviction gives rise to a reasonable likelihood that a person's conviction is of a particularly serious crime and that he constitutes a danger to the community. The Convention does not prescribe the procedure by which the conditions required by Article 33(2) are to be established; and the creation of a rebuttable presumption is a matter of procedure rather than of substance. I accept that the Convention places an onus on the State of refuge. Under section 72, it is for the Secretary of State to establish that the person in question has been convicted of a relevant offence. In practice, once the State has established that a person has been convicted of what is on the face of it a particularly serious crime, it will be for him to show either that it was not in fact particularly serious, because of mitigating factors associated with its commission, or that because there is no danger of its repetition he does not constitute a danger to the community.
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> ...
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> 80. I conclude that section 72 can be and is to be interpreted conformably with Article 14(4) of the Directive, and therefore as creating rebuttable presumptions in relation to both of the relevant requirements of Article 33(2), i.e. in relation to the seriousness of the crime and in relation to danger to the community, and I would reject the Secretary of State's submission to the contrary. Parenthetically, it is interesting to note that this result is consistent with the Explanatory Notes to the Bill, which stated at paragraph 198 in relation to section 72:
>
> > A person may rebut the presumption that they have committed a particularly serious crime and are a danger to the community.
>
> We were told that this was an error, corrected by the Minister during the course of the Parliamentary proceedings on the Bill"

19. Paragraph 339D of the Immigration Rules provides as follows:

> '339D. A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C (iv) where the Secretary of State is satisfied that:
>
> (i) there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
>
> (ii) there are serious reasons for considering that they have guilty of acts contrary to the purposes and principles of the United Nations or have committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate such acts;
>
> (iii) there are serious reasons for considering that they constitute a danger to the community or to the security of the United Kingdom; or
>
> (iv) there are serious reasons for considering that they have committed a serious crime; or

(v) prior to their admission to the United Kingdom the person committed a crime outside the scope of (i) and (iv) that would be punishable by imprisonment were it committed in the United Kingdom and the person left their country of origin solely in order to avoid sanctions resulting from the crime.'

20. The respondent's policy on the issue regarding paragraph 339D provides as follows:-

'Serious crimes

This must be interpreted in a manner consistent with the policy on Exclusion under Article 1F and 33(2) of the Refugee Convention, see section 'particularly serious crime'. A serious crime for the purpose of exclusion from HP was previously interpreted to mean one for which a custodial sentence of at least 12months had been imposed in the UK, but it is now accepted that a 12 month sentence (or more) should not alone determine the seriousness of the offence for exclusion purposes. In AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395, Lord Justice Ward noted that the sentence is a material factor but not a benchmark.

in deciding whether a crime is serious enough to justify loss of protection, the tribunal must take all facts and matters into account, with regard to the nature of the crime, the part played by the accused in its commission, any mitigating or aggravating features and the eventual penalty imposed. Therefore, caseworkers must consider the sentence together with the nature of the crime, the actual harm inflicted and whether most jurisdictions would consider the offence a serious crime. Examples of serious crimes include, but are not limited to, murder, rape, arson, and armed robbery. Other offences which might be regarded as serious can include those which are accompanied by the use of deadly weapons, involve serious injury to persons, or if there is evidence of serious habitual criminal conduct. Other crimes, though not accompanied by violence, such as large-scale fraud, may also be regarded as serious for the purposes of exclusion.

Danger to security or the community

Where a person has been convicted of a criminal offence, the court may have considered whether they represent a danger to the community or the security of the UK as part of the sentencing. In addition, depending on the facts of the case, an individual who has not been convicted may also be excluded from HP. People who may represent a danger to the community or to the security of the UK can include:

- those included on the Sex Offenders Register (this would apply to those convicted of an offence after 1997)
- those whose presence in the UK is not conducive to the public good, for example, on national security grounds or due to their character, conduct or associations
- those who engage in one or more unacceptable behaviours in the UK or abroad, see section on extremism'

It is of note that in this case although the appellant had been convicted of a crime for which he was sentenced to two years and eight months, the respondent did not invoke Section 72 in the refusal letter or indeed

paragraph 339D but equally these issues to do not appear to have been live at the time. Asylum and humanitarian protection were, however, raised in the grounds of appeal.

21. With regard to paragraph 339D and the Qualification Directive, it is about the apparent difference between the Directive and the cessation clause and Article 1F and for that matter Article 33(2) of the Refugee Convention the decision of the ECJ in Ahmed [2018] EUECJ C-369/17 indicates that they are to be read in the same way. Although Ahmed is to an extent based on the recitals set out in the 2011 Directive, it has not been submitted to me, nor would I consider that there are, any material differences between the recitals in the Qualification Directive of 2004 and the re-cast Directive of 2011.

22. In her decision Judge O'Keeffe said this:-

> "53. The appellant was sentenced to a term of imprisonment of two years and eight months for supplying class A drugs. The judge described his role as significant. The appellant's sentence was reduced because of his early guilty plea. In evidence before me the appellant sought to downplay the seriousness of his offending behaviour by suggesting that he had been coerced into committing offences by being threatened at knifepoint. The appellant said that he had raised this at his trial. His explanation for that was that he had explained this to his solicitor and if his solicitor had not told the judge then that was not his fault. That assertion is undermined by the fact that the appellant pleaded guilty to the offences.
>
> 54. The record shows that the appellant was given credit for his early guilty plea. The OASys assessment does not record the appellant saying that he acted because of threats. His case now that he was acting under duress is in my judgment nothing more than an attempt to disassociate himself from his serious offending behaviour. His failure to acknowledge and now take responsibility for the gravity of his offending does colour the risk of him reoffending as it means that there is a risk he will be unable to identify and respond to the triggers for his offending behaviour. I take into account that this is the appellant's only conviction and that he has been assessed as a low risk of reoffending. He has taken opportunities in prison to undertake courses to assist him with rehabilitation."

23. The judge considered that the respondent was right to draw attention to the adverse impact that drug dealing has upon the wider community. The appellant was dealing in the most serious class A drugs and his sentence reflects that. The judge did not, however, make any findings as to whether this was a particularly serious crime or whether the appellant continues to present a danger to the community; in neither case did she consider whether the presumptions had been rebutted.

24. I accept that there is no evidence of the appellant committing any further crime since the offences of which he was convicted in September 2017. The OASys Report is now of some vintage and it is of note that the

appellant was assessed as being of low risk of reoffending and of danger to the community. Those are points in his favour.

25. I have considered also the report of Ms Sarah Beddows, a chartered clinical psychologist. I am satisfied that she has the relevant experience and credentials to be an expert psychologist particularly in the area of forensic psychology and I note that she has for some years now worked at Rampton Secure Hospital. With regard to the assessment of the risk the appellant presents, it is of note that she did have sight of Judge O'Keeffe's decision. It is of note that when reciting the appellant's forensic history at paragraph [3.2.3] Ms Beddows also refers to the appellant explaining that he had been threatened by "some people" with a knife to "make me sell drugs". She also notes that:-

> "3.2.4 It is noted that in his interview with Probation, he remained non-committal about his role in the offences despite entering a guilty plea. He did not deny drug dealing however he stated he was forced to do it and was threatened with a knife. He reported that as he was scared for his life, he did not tell the police, even though on reflection he knows he should have done."

26. At [3.2.7], Ms Beddows notes with concern the appellant's inability to share more details about the individuals with whom he was involved when committing the offence and she notes that in the OASys statement it is said that "he felt pressured into being involved with the offence by his friends in Swindon, he was clearly influenced by criminal associates. He mentioned a number of time he would not want to go back to Swindon when he is released because he feels that his friends from Swindon would coerce him into – reoffending – they would "bully him into doing it". This shows that he has some intention to avoid criminogenic peers that could encourage him to reoffend.

27. To that extent less weight can be attached to Judge O'Keeffe's observation about the appellant changing his mind.

28. At section 4 of her report Ms Beddows deals with the appellant's offending risk noting that the risk would be reduced in the event that he maintains absence from drugs, maintains distance from other drug users and negative peer associations and remains in stable employment and accommodation. As regards the assessment of protective factors at section 5 it is noted that he is in paid employment [5.2.1], that he does not use alcohol and has abstained from drug use since 2017 [5.1.2]; it is also noted [5.3.1] that was an enhanced prisoner indicating compliance.

29. I am satisfied that the appellant's offending was, given that he was dealing in class A drugs, a particularly serious crime. It was done for gain, albeit seeing that his reasons for doing so appear motivated by peer pressure. The reference to being threatened by a knife appears to be an exaggeration but otherwise there was a consistent pattern of peer pressure from antisocial individuals and it appears from the sentencing remarks that this was not a one-off offence. It was part of an organised

drug dealing operation. To that end, I conclude that the presumption that this was a particularly serious crime has not been rebutted. I am, however, persuaded in light of the OASys Report and the detailed report of Ms Beddows that the appellant no longer presents a danger to the public in that his offending is unlikely to recur.

The Tazkera

30. Whether or not the appellant now has a tazkera is relevant in the light of AS (Afghanistan CG [2020] UKUT 130 at paragraphs [237] to [240].

31. In the appellant's most recent witness statement he states at [2] that he has never been issued with any Afghan identity documents before he came to the United Kingdom but he does accept that he later obtained an Afghan passport from the Afghan Embassy in London and used this to travel back to Afghanistan in 2015. He no longer has the passport.

32. In his screening interview the appellant is recorded as having said in response to Q7.37 "Afg. ID card issued in Thesarak (provincial office) six to seven months ago".

33. This is in direct contradiction with what the appellant now says. It is also recorded in the appellant's initial self-completion statement at [30] that he was not aware of the documents he used in his journey to the United Kingdom. That in my view makes sense given his age at the time.

34. It is evident from AS (Afghanistan) that what is in issue is whether somebody has a tazkera in their possession otherwise it would not be necessary for them to travel to a home area to obtain a new one. The appellant did not attend to give evidence or adopt this witness statement and it is difficult to attach much weight to it. I could accept that given the appellant arrived in the United Kingdom in 2006 that any documents he had with him had been lost over the years. The statement provides no rational explanation as to why it would have been recorded that a card had been issued he had not said so. Further, the appellant in his most recent statement at paragraphs [4] and [5] seeks to change his account of his journey to add in details which, with respect, add little although appear to fit with the narrative described in the UNHCR document entitled "Trees only move in the wind: A study of unaccompanied Afghan children in Europe" published in 2010 which has been admitted in evidence. Mr Fripp did not seek to rely on that document and there is little value in the appellant seeking now to explain, having discussed with other people, the route he must have taken and the countries he must have passed through at a young age to reach the United Kingdom. The new witness statement does not, in reality, clarify matters.

35. In assessing whether the appellant has a tazkera or not, I bear in mind the negative findings reached by Judge O'Keeffe which are preserved. I bear in mind the dangers of disbelieving a piece of evidence merely because an appellant has not told the truth in other places but bearing in mind the length of time that has passed since the appellant arrived in the United

Kingdom, his irregular arrival in this country and the somewhat chaotic nature of his life since his arrival, passing through foster care and subsequently being imprisoned, I consider it more likely than not that he did not have in his possession a tazkera. There is no evidence it would be necessary to obtain an Afghan passport and so, despite the misgivings I have about the appellant's credibility, I do accept that he would be returned to Afghanistan without a tazkera as he no longer has one. I do not, however, accept that he was never issued with one, and as indicated in AS (Afghanistan) to obtain one, he would need to travel to his home area.

Family Connections

36. The appellant's account of connections with his family was disbelieved by Judge O'Keeffe. She noted [42] that the assertion the appellant had gone back to Afghanistan to look for his mother was inconsistent with his account given in his asylum interview in 2008 and also [43] with the information provided to the probation officer compiling the OASys Report. She also found [44] of his account of how he spent time in Afghanistan was inconsistent, concluding at [46]:

> "On the evidence before me considered as a whole and applying the lower standard of proof applicable, I find that I have not been given a credible account of the appellant's family circumstances in Afghanistan. I find that I have not been given a credible account of the appellant's journey to Afghanistan in 2015 and the reasons for it. I find the appellant was able to travel safely to Afghanistan in 2015 and to remain there for a substantial period of time".

37. The judge also found [47] there was no reason why the appellant could not be supported financially by his family in the UK and no reason why he could not look to friends for support on return. She also found [48] "I find that I have not been presented with an accurate picture of the level of support available to him in Afghanistan. The appellant has not demonstrated that he would not have access to accommodation and financial support in Kabul".

38. There is nothing material in the new evidence which would, even had I not upheld these findings, have led me to a different conclusion.

The Appellant's Mental Health

39. I accept from the evidence provided to me that the appellant suffers from a moderate to severe depression. That is consistent with him being prescribed Sertraline. Ms Beddows does not set out much detail of what she thinks would happen to the appellant on return to Afghanistan which given her expertise is understandable. She says that it may be retraumatising for him [6.0.8] given the loss of supportive relationships but she did not accept that he suffers from PTSD. She notes also that although he had suicidal ideation in the past, noting [6.2.22] that his current mental health functioning could indicate future problems given his current depressive mood. There is, however, insufficient evidence to show

that he is at risk of committing suicide on return, albeit that there is a possibility that he might self-harm in some way. It is of note also that Ms Beddows said at [8.0.5] that "Mr Jabakahel's current mental health difficulties (depressed mood, anxieties) are assessed as being moderate in nature and should not significantly affect his ability to provide a credible, complete and consistent testimony". She said also at [8.0.7]:

> "Mr Jabakahel has expressed how he would cope with the possible impact of the threat of removal/actual removal. He has indicated a likely increase in the presence of suicidal ideations, most likely related to the hopelessness he would experience and separation from sources of emotional support. Mr Jabakahel is at increased risk for suicide given his past suicide attempt. ... Mr Jabakahel is not assessed as being at imminent risk of suicide but close monitoring is advisable following any adverse outcome to the current proceedings when his suicide risk could increase as a result of a rise in feelings of hopelessness".

40. There is here insufficient evidence to show any risk of him reaching the threshold set out in **J v SSHD**.

41. The findings of Ms Beddows are predicated on a lack of family or other support for the appellant on return to Afghanistan but it is difficult in light of Judge O'Keeffe's findings to discern what family support would be available for the appellant on return to Afghanistan either in his home area or elsewhere. What is certain is that he returned there in 2015 and stayed for some time. It is reasonable to suppose given the explanation of trying to find out whether his mother was alive or not was discounted, it in turn cast doubt on his entire account why he went there in the first place.

42. Having made these findings of fact, I must consider whether in light of the facts as identified in AS (Afghanistan), the appellant has demonstrated a well-founded fear of persecution or that he is entitled to humanitarian protection before going on to consider the Human Rights Convention.

Risk in the Home Area

43. Mr Fripp submits on behalf of the appellant that he is at risk of ill-treatment of sufficient severity to engage the Refugee Convention on account of being perceived as westernised, that risk being over and above the accepted risk such that Article 15(c) is engaged. The primary basis on which this is advanced is that the appellant will be seen as "Westernised".

44. An amount of material on this issue is set out in the CPIN "Afghanistan: Afghans perceived as 'Westernised'", of January 2018. Contrasting views emanating from a report by EASO are cited at [5.1.1] to [5.2.3]. It is evident that what is acceptable in terms of learned behaviour in Kabul is different from that in rural areas. It would appear that what is accepted or at best tolerated in Kabul in certain circles would not be tolerated in home areas. The extent to which there would be any sanctions for perceived western behaviour in a rural area is more difficult to assess. At [5.2.3] Ali Latifi is quoted as saying that those who do not adhere to local customs

can “play it off as being urbanised” as the reason they do not know the local custom. Dr Schuster quoted at [5.2.1] remarks that a person in Afghanistan must be constantly conscious about one’s actions, body language and how and what one is saying and how one is perceived. Someone who comes back from Europe and does not know the unspoken rules, forgets, errs, or makes mistakes, could be perceived to be “cheeky”, rude or disrespectful. Equally, at [5.1.2] Dr Schuster opined that the development of a critical stance on Islam whilst in the West is what puts people at most risk. And that it will all turn on the specific location where a person is returning to, the nature and attitudes of their immediate community and family in assessing whether the person would encounter problems.

45. It is in this case difficult to assess how the appellant would be received on return to his home area in Nangarhar, it being unclear what family he has there. It is also not entirely clear the extent to which he has become “westernised” in his habits but I do note that, for example, he does not drink. There is nothing to suggest that he has a critical stance towards Islam but equally he left the country at the age of 14 and whilst he has contact with relatives in the United Kingdom and has associated with Afghan people, it does not follow that he has any idea about how to behave in Nangarhar as an adult. Equally, that province is one in which owing to the presence of the Taliban and also the self-styled Islamic state, it is reasonable to expect people to be more circumspect and to avoid trouble, people self-censure to a significant degree and adherence to more conservative norms are expected, given the evidence that rumours of perceived non-Islamic behaviour being passed on to the Taliban and others.

46. I have, as I indicated I would during the hearing, looked at the EASO Report that the CPIN is based on in more detail. The report does indicate at section 8 the documented instances of the individual targeting of returning Afghans is scarce and also those who return from the West indicate a sense of bleak desperation for future prospects [8.3]. As regards attitudes towards those in receiving communities, at [8.6] it said that most Afghans return to Kabul due to the relatively better opportunities there. Equally, at [8.7] some sources state that deportees and returnees are seen with suspicion and that local mistrust and community gossip generate a fear of problems. Rumours may also circulate, it being usual for when a young man returns, to family and relatives will welcome him and everyone from their neighbourhood, that is the men, who want to see how he has changed. Ali Latifi who takes a more relaxed view said that in rural areas if a person does not try to adhere to local customs and standards, that person will stand out even more.

47. At section 8.8 Dr Schuster is reported as indicating that those youth who grow up in Europe learn different habits and behaviours and are not familiar with where it is safe and who can be trusted.

48. In the context of Nangarhar where it is accepted that there is an Article 15(c) risk, I accept that there may well be a greater risk to those like the appellant who have returned from the West are unfamiliar with the customs that this may put them at greater risk from insurgents such as the Taliban and/or Islamic State. There is a fine line to be drawn between the enhanced risk to certain groups to be considered in an Article 15(c) case and persecution but I am satisfied that there is a real risk given the circumstances in Nangarhar where there is for everybody an Article 15(c) risk that the enhanced risk from being perceived as Westernised would, in some cases, put an individual at risk of persecution for that reason.

49. While the term used in the report is "Westernised", I conclude that in many, if not all cases, this is shorthand for ceasing to follow the expected norms of Islam. I accept that there is a risk of this applicant, given the length of time he has spent outside Afghanistan and given the likelihood of it becoming known that he had been deported from the United Kingdom for drugs offences, that this may put him at risk of ill-treatment sufficient to amount to persecution. At least one element of the reason for that would be his perceived attitude towards Islam and thus, on a narrow basis, I am satisfied that he is at risk in his home area of persecution for a Convention reason.

Internal Relocation

50. As both parties are agreed, the core issue is whether it would be reasonable to expect the appellant to relocate to Kabul, I have had regard to AS (Afghanistan) which, so far as is relevant to the issues in its headnote provides as follows:-

> *"**Reasonableness of internal relocation to Kabul***
>
> *(iii) Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan) it will not, in general, be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul and even if he does not have a Tazkera.*
>
> *(iv) However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above. Given the limited options for employment, capability to undertake manual work may be relevant.*

(v) A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return. A person without a network may be able to develop one following return. A person's familiarity with the cultural and societal norms of Afghanistan (which may be affected by the age at which he left the country and his length of absence) will be relevant to whether, and if so how quickly and successfully, he will be able to build a network.

Previous Country Guidance

(vi) The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to Article 15(c) of the Qualification Directive remains unaffected by this decision.

(vii) The country guidance in AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC) in relation to the (un)reasonableness of internal relocation to Kabul (and other potential places of internal relocation) for certain categories of women remains unaffected by this decision.

(viii) The country guidance in AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC) also remains unaffected by this decision."

51. In assessing the appellant's return, I bear in mind that he will have some financial support in the form of grant on return and that this would assist him so that he would be able to find inexpensive accommodation in a "chai khana"[tea house] and be able to work as a day labourer. I accept that the appellant does speak English and I accept the submission that this would not assist him in getting work as a day labourer and that he has no other employable skills gained from the United Kingdom. I accept that speaking English is unlikely to be of assistance in such a job. I accept also that the appellant has moderate depression and this may make it difficult for him to return but I am not satisfied on the basis of the material before me that this would prevent him from getting work as a day labourer or some similar work and I accept that he does not have a tazkera. There is, I accept, only one mental hospital in Kabul but there is no indication that the appellant requires in-patient treatment or anything more than he is currently receiving.

52. The difficulty in this situation in assessing the appellant's position is that neither I nor Judge O'Keeffe have been satisfied as to the appellant's account as to what family he has in Afghanistan and what support he has there. He has not given an accurate account of his family and he has not given an accurate account of the reasons he travelled to Afghanistan in 2015. It is in the circumstances reasonable to infer that he has some contacts within Afghanistan.

53. Viewing the evidence as a whole and taking into account the negative credibility findings made by Judge O'Keeffe, in reality there is no reliable

evidence as to what support from family or other networks the appellant has either in Kabul or his home area. It is, in my view, important to bear in mind that the appellant was found not to have told the truth about a significant aspect of his case, that is, what he was doing in Afghanistan in 2015 and also about what family continue to live there as that goes to the core of what resources he could draw upon on return. Similarly, he has put forward, without attending to give evidence and without giving any explanation an account of what happened in an interview which is equally unreliable and appears directed to avoid the fact that he may or may not have a tazkera.

54. It is for the appellant to prove his case, albeit to a lower standard but in the circumstances, I cannot be satisfied that the appellant does not have access to a network of support and family in Afghanistan., I have only his word for it that the links which existed in the past are no longer there or available to him and I note the preserved findings that he will get support from family and friends in the United Kingdom. In the circumstances, I am not satisfied that any difficulties that may arise from his mental ill health would not be solved by support he may receive from the United Kingdom or support that may exist for him in Afghanistan. Accordingly, I am not satisfied that it would be unduly harsh or unreasonable to expect him to relocate to Kabul.

55. Having made that finding of fact, it follows that he is not entitled to recognition as a refugee. Similarly, I find that he is not entitled to humanitarian protection as it would be reasonable to expect him to relocate to Kabul where there is not, as was noted in AS (Afghanistan), an Article 15(c) risk.

56. Turning next to the Human Rights Convention, I find that returning the appellant to Afghanistan would not, for the same reasons, amount to a breach of Article 3 of the Human Rights Convention, Mr Fripp accepting in submissions that this issue would arise only if I were to find that the appellant were excluded from protection under the Refugee Convention or from humanitarian protection. It is not suggested that the threat of suicide or his mental ill health is of such seriousness to engage article 3.

57. I turn finally to Article 8 of the Human Rights Convention.

58. The first hurdle that Mr Fripp faces is that Judge O'Keeffe's findings with regard to Article 8 were not challenged in the appeal to the Upper Tribunal. Further, the findings of fact made by Judge O'Keeffe were preserved, the sole issue of which the appeal was to be re-made was the application of AS (Afghanistan). Accordingly, despite Mr Fripp's submissions, I am not satisfied that this is an issue before me. That said, and out of an abundance of caution, I have considered it in the alternative.

59. It is not in dispute that the appellant does not meet the requirements of the Immigration Rules or the exceptions set out in Section 117C of the Immigration Rules.

60. Mr Fripp submits that the appellant comes close to the requirements set out in paragraph 399A and that this is a factor to be taken into account in assessing whether there are very compelling circumstances.

61. Although I would have accepted that the appellant has some degree of cultural and social integration into the United Kingdom, he has not spent over half of his life here. Further, I would not have been satisfied in light of the findings above that there would be significant obstacles to his integration into Afghanistan. In reaching that conclusion I do note Mr Fripp's submissions that the test is not the same as undue harshness. I bear in mind that the appellant speaks Pushtu and will be able to find employment. Although he suffers from some degree of mental ill health, this is not severe and viewing the evidence as a whole, in light of Kamara, I would not have been satisfied that the test is met.

62. There are, in this case, few compelling circumstances. The appellant was convicted of a serious offence for which he was sentenced to two years and eight months.

63. I accept that the appellant has lived in the United Kingdom since the age of 14 but he has no family life here and his private life is relatively limited. He does, I accept, have employment and has a network of friends and has some family here, but he is a single man with a criminal conviction who does not have a well-founded fear of persecution in Afghanistan. Accordingly, even were this in issue, I am not satisfied that there are very compelling circumstances such that his deportation is disproportionate.

64. Accordingly, I dismiss the appeal on all grounds.

Notice of Decision

65. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I re-make the appeal by dismissing the appeal on all grounds.

No anonymity direction is made.

Signed Date 10 September 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW DECISION

IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22935/2018

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice
On 19 August 2019

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

RAZ MOHAMMED JABAKAHEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss B Asanovic, instructed by Duncan Lewis, solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge O'Keeffe promulgated on 9 May 2019.

2. The appellant is a citizen of Afghanistan who entered the United Kingdom in 2006 and was eventually granted indefinite leave to remain on 7 February 2011. On 20 October 2017 he was sentenced to 32 months' imprisonment for supplying class A drugs, a conviction which caused the

Secretary of State to deem his deportation as conducive to the public good in accordance with Section 32(5) of the UK Borders Act 2007.

3. The appellant's case is that he is at risk on return to Afghanistan on account of his father's activities and involvement with Hezb-e-Islami and that he had been killed in fighting for the Northern Alliance. He also claimed that he was entitled to humanitarian protection and that on the particular facts of this case internal relocation would not be appropriate.

4. In addition, it is also the appellant's case that his removal would be in breach of Article 8 of the Human Rights Convention.

5. The Secretary of State did not accept that the appellant was at risk of persecution on return to Afghanistan or that his removal would be a breach of article 8.

6. The judge found at [31] that the appellant was not a refugee and had not shown a well-founded fear of persecution on the basis that he had not given a credible account of the events which precipitated his departure from Afghanistan [30] nor, even taking his case at its highest, had he demonstrated that he is currently at risk of persecution either from the authorities or any other actors of persecution on return.

7. The judge went on next to consider the appellant's claim to humanitarian protection accepting that internal relocation to Nangarhar province would not be appropriate.

8. The judge then noted that **AS (Afghanistan)** is a country guidance case and should be followed unless there is a good reason to depart from it [33]. He then went on to consider the UNCHR eligibility guidelines for assessing the internal protection needs of asylum seekers issued on 30 August 2018.

9. Turning to the appellant's particular circumstances [36] the judge accepted that the appellant had not worked in Afghanistan but had some work experience in the United Kingdom and found that his ability to speak English may assist him in finding work in Afghanistan. She found the evidence about his family to be inconsistent noting that the evidence of whether he had left Afghanistan with his brother was inconsistent [38] and that his account of travelling to Afghanistan in 2015 to try to find his mother [39] was inconsistent with his statement of the probation officer compiling the OASys Assessment that his mother had been killed when she tried to escape with him [43].

10. The judge did not find the evidence of the appellant's aunt [his mother's sister] to be reliable. The judge also found the appellant's account of how he spent time in Afghanistan in 2015 was inconsistent [44] concluding that the appellant's account of his journey into Afghanistan in 2015 and the reasons for it were not credible finding that he was able to travel safely there in 2015 and remain for a substantial period of time [46]. She also

found [48] the appellant had not demonstrated he would not have access to accommodation and financial support in Kabul thus had not demonstrated it would be unreasonable or unduly harsh to expect him to relocate there [49].

11. The appellant sought permission to appeal on the grounds that the judge had erred:-

    (1) in following AS (Afghanistan) in the light of the decisions of the Court of Appeal in AS (Afghanistan) v SSHD [2019] EWCA Civ 873 and AS (Afghanistan) v SSHD [2019] EWCA Civ 208, it being accepted that the former had not been handed down at the date of decision;

    (2) that the judge had failed properly to apply the UNHCR guidance at paragraphs 35 and 36;

    (3) the judge had erred in her assessment of the appellant's credibility concerning family circumstances in Afghanistan at [40] to [46] in speculating an excessive reliance on the absence of corroboration whilst failing to consider the corroborative evidence of the applicant's aunt and uncle.

12. I am satisfied that the judge did err in her approach to AS (Afghanistan) in the light of the subsequent decision of the Court of Appeal. But I am not satisfied that her approach to the UNHCR guidelines was impermissible, contrary to what is averred in the grounds of appeal. That her approach to the UNHCR eligibility guidelines was necessarily flawed.

13. It is interesting that the grounds of appeal seek to challenge only the findings at paragraphs 40 to 46 omitting the following passage:

> "39. The appellant gave evidence that he had travelled back to Afghanistan in 2015 to try and find his mother. The evidence of Miss Jabbarkhel was that the appellant's mother had died in Pakistan in 2008. She had not told the appellant about this as she did not dare tell him what had happened. She said that she had not wanted to tell him but then he went to Afghanistan in search of his mother. Miss Jabbarkhel said that the appellant's mother had come to Pakistan to get treatment but she died after approximately one week."

14. Even allowing for the fact that the appellant was 12 when he left Afghanistan, on any view his evidence is inconsistent with what he told the probation officer, which is that his mother had been killed when she tried to escape Afghanistan with him. This too is inconsistent with Miss Jabbarkhel's evidence that the mother had died in Pakistan. In these circumstances and in that context it cannot be argued that the judge erred in concluding that Miss Jabbarkhel's evidence was not reliable or credible. Insofar as the judge drew any inferences adverse from the absence of an official record, the point is that the answer given was that "death had occurred in the house" which is not a proper explanation.

15. This, in any event, is only one factor to be taken into account in the assessment of the witnesses which the judge was entitled to view as a whole. Contrary to the submissions the judge was manifestly entitled to reach adverse credibility findings both as to whether there were relatives remaining in Afghanistan and to the explanation of the appellant as to how he had spent his time in Afghanistan in 2015. It is also of note that there is no challenge to the discrepancies in the evidence and the narrative identified by the judge at [28], the appellant giving an inconsistent account as to how his father had been killed. That account also had been inconsistent with the evidence given by the appellant's uncle. Inconsistencies with the aunt's evidence were also noted. There appear also to be inconsistencies [37] as to which of his brothers is dead.

16. Accordingly, I am not satisfied that the judge erred in her findings of fact although I do accept that there was a misapplication of **AS (Afghanistan)** which requires that issue to be remade.

Additional Issue

17. Since the hearing, I have noted that neither party appears to have taken into account the fact that the appellant has been sentenced to a term of imprisonment in excess of two years. Accordingly, it is not clear how the appellant would be entitled to humanitarian protection and this matter will need to be addressed at the renewed hearing.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal will be listed for 2 hours.

3. If any of the parties wish to adduce further evidence, oral or otherwise, they must make an application pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least 21 days before the hearing, such application to be accompanied by the evidence upon which it is sought to rely.

Signed Date 27 August 2019

Upper Tribunal Judge Rintoul