Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00939/2020**

THE IMMIGRATION ACTS

Heard at Bradford IAC	**Decision & Reasons Promulgated**
On the 24 September 2021	**On the 09 November 2021**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

A G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz**, Senior** Presenting Officer
For the Respondent: Ms A. Childs, Counsel instructed on behalf of AG.

DECISION AND REASONS

Introduction**:**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Oliver) (hereinafter referred to as the "FtTJ") who allowed his appeal on asylum grounds.

2. Whilst this is the appeal brought on behalf of the Secretary of State, for sake of convenience I intend to refer to the parties as they were before the FtT.

3. The FtT did make an anonymity order and no grounds have been raised by the Secretary of State for the order to be discharged during these proceedings. I therefore continue the anonymity direction set out at the end of this decision.

4. The hearing took place on 24 September 2020. The appellant was unable to attend the hearing in person, but a video-link was set up so that would be able to follow the proceedings and hear the submissions of the advocates.

5. I am grateful to both advocates for their clear and helpful submissions during the hearing.

Background:

6. The appellant's immigration history and background is summarised in the decision of the FtTJ at paragraphs [12-17] and the decision letter of the 14 January 2020.

7. The appellant is a national of Afghanistan. He was born in Parwan and lived in Kabul.

8. The appellant had earlier come to the United Kingdom on 22 June 2001 hidden in a lorry and claimed asylum on arrival. He said that he feared the Taliban, who seized control of his home area just outside Kabul on 30 September 1996 and seized his father 3 nights later because of his involvement with the previous government. His mother used to visit him in prison, but in 1998 she was told that there was no one of that name, It was not known what had happened him. The appellant was kept safe from the Taliban by hiding until 2001, when his mother and grandfather paid for an agent to bring him clandestinely via Uzbekistan to the UK. His fears were enhanced because he was a Tajik from the north.

9. The appellant was granted 5 years exceptional leave to remain until 22 January 2006. However he was issued with a travel document and went to Pakistan in 2003 to marry a fellow Afghan. She returned to Afghanistan, and he returned to the United Kingdom but when he was unable to sponsor her to join him and his own mother became ill he returned to Afghanistan in 2005 and set up a business as a small currency exchange trader.

10. The appellant had several children, but her brother and their 8-year-old daughter were killed in a bomb explosion in Kabul on 31 May 2017.

11. The appellant claimed that when in Afghanistan he was kidnapped on 29 August 2018 after shutting his shop and getting stuck in traffic. The driver of a passing car, dressed in police uniform, told him to stop. 2 armed men in uniforms got out. He was handcuffed. They did not show any identification,

but he believed they were the police. He now knew that they were not genuine. He was put in a police car and blindfolded. He was taken to a basement and remained there for 5 days. On the next day he was made to telephone his business partner to arrange a hundred thousand dollar ransom and was allowed to phone his wife briefly. After 5 days he was released, he flagged down a car and got a lift home. On the next day he made a complaint to the police but 2 days later his wife and business partner were contacted by the abductors. At the station his wife was told that he had to withdraw the complaint, but he refused.

12. The appellant took his family into hiding with his father-in-law when they stayed 4 days before moving to another place in Kabul.

13. The appellant, his wife and children came to United Kingdom by Russia on 22 March 2019 and claimed asylum on the same day.

14. A decision was made on 14 January 2020 to refuse a protection and human rights claim. The respondent accepted the appellant's identity and nationality but disbelieved his account that he had been abducted as he had claimed because of inconsistencies in his account of the abduction. Thus he was found not to have a genuine subjective fear on return. The respondent concluded that the death of his daughter had been caused by a random act as he failed to show that she had been targeted. The respondent considered that he previously established family life in Afghanistan would be able to re-establish the family there. He was in good health and family had no medical problems. He previously ran a business and his wife's family could support them on return.

15. The respondent referred to the decision AS (Afghanistan) v SSHD [2019] EWCA Civ 873 but that Article 15 (c) did not apply, particularly in Kabul, despite the level of violence.

16. The remainder of the letter referred to the Article 8 claim.

17. The appellant appealed that decision, and it came before the FtT on 11 February 2021. In a decision promulgated on 4 March 2021 the FtTJ, having undertaken an assessment of the appellant's credibility in the context of a medical legal report and an expert report from Dr Giustozzi, accepted the appellant's account that he was abducted and forced to pay a ransom. The judge found that the complaint had reached the ears of his kidnappers which indicated that the appellant could expect no protection on return from the authorities and that the kidnappers might well be able to locate him wherever in Afghanistan he returned (at [51 – 52]).

18. The FtTJ applied the CG decision of AS (safety in Kabul) Afghanistan [2020] UKUT 130 in the context of the expert evidence but that the medical assistance was not in any way comparable to what he would expect in the United Kingdom. The judge however did not find the severity of his condition reached the threshold required for a medical claim under either Articles 3 or 8 but was a

significant factor in the "individual risk he would face on return". The judge also considered that it would "seriously impact on his ability to resume his old profession and therefore provide a livelihood for his family" (at [53]). The FtTJ concluded that he was someone "who could reasonably be thought be rich and worth kidnapping again, however far from the truth that might be" and that his fear was objectively based and "his asylum appeal must succeed" (at [54]).

19. As to Article 8, the FtTJ considered that he made no claim for family life under Appendix FM as the family would be returning as a unit. He did not qualify under paragraph 276 ADE and although he would face harsh consequences on return, the judge did not accept that they would be "unduly harsh".

20. The FtTJ therefore allowed the appeal on asylum grounds but dismissed the appeal on human rights grounds.

The Appeal before the Upper Tribunal:

21. The Secretary of State sought permission to appeal that decision and permission was granted on 27 April 2021 by Judge Chohan stating:

> "It is clear from the decision that the judge accepted that the appellant had been kidnapped and that a ransom had been paid. The judge goes on to allow the asylum appeal. However, it is not clear what ground it was allowed under the Refugee Convention. The human rights claims dismissed. It is trite law that to allow an appeal under the Refugee Convention, and appellant must have a well-founded fear of persecution for one of the grounds specified that Convention. That appears to be lacking here. Accordingly, there is an arguable error of law."

22. The Secretary of State was represented by Mr Diwnycz, Senior Presenting Officer. The appellant was represented by Ms Childs of Counsel. I am grateful to both advocates for their clear and helpful submissions.

23. An application was made by Mr Diwnycz for an adjournment as set out in a letter to the Tribunal. It was stated "that the SSHD continues to aver that her position in respect of Afghanistan and the risk factors affecting those applying for protection, is not delineated in published policy. That she requires time to grasp the situation on the ground which is still in flux. Although the Taliban have taken de-facto control over the government of Afghanistan, that the situation resulting is not clear and neither are the risks therein.

24. The Secretary of State accepts the Taliban has taken back control of the majority of the country, including Kabul, however what this means in terms of the risk on return for those currently seeking asylum in the UK is unclear. Given the fluidity of the situation on the ground at present it will be difficult for both parties to provide the Tribunal with accurate information with which to come to a decision in the coming days. In these circumstances the Respondent respectfully requests that the Tribunal adjourns this appeal for a 4 – week period to allow both parties time to assess the situation and submit additional evidence in light of this fundamental change in country circumstances. It will

also allow the Respondent to review her policy position on Afghan asylum cases."

25. Ms Childs objected to the appeal being adjourned given that this was an error of law hearing and that the circumstances that were relevant with those at the time of the decision.

26. I refused the application for an adjournment. As Ms Childs submitted, the issue that the tribunal was to consider was whether the judge erred in law based on the material before him at the time of his decision. The grounds seek to challenge that evidence. On that basis, it seems to me that the appeal should proceed.

The submissions:

27. Mr Diwnycz relied upon the written grounds. No further written submissions had been filed on behalf of the respondent.

28. He submitted that ground 1 was a "simple and focused ground" that the judge had made a material misdirection by failing to identify the Convention reason. The appellant as a person of wealth could not be described as having an "immutable characteristic". As to ground 2, he submitted that the judge failed to give adequate reasons in considering the medicolegal report. The FtTJ referred to this at paragraph [52] but the consideration was "thin". Mr Diwnycz accepted that the author of the medicolegal report was a qualified expert, but the judge should have said what he had found from his reading of the expert evidence.

29. Furthermore he submitted the background evidence was "generic" and the judge should have engaged with it in greater detail.

30. Ms Childs on behalf of the appellant relied upon her Rule 24 response dated 15 June 2021.

31. Ground One: The SSHD contests that the Judge failed to identify a Convention reason when determining that AG has refugee status. However, at §20 of the Reasons for Refusal letter ("RFRL") the SSHD sets out that AG claims to have a well-founded fear of persecution on the basis of his imputed political opinion. When deciding that AG should not be included in the Refugee Convention, the SSHD just states that there do not believe that AG would be persecuted on return (RFRL §39). Therefore, the SSHD does not appear to have disputed that AGs claim raises a fear on the basis of his imputed political opinion. Furthermore, the Judge was clearly aware of the relevant law as set out at §4 of his determination. In any event, AG was persecuted as a result of his imputed political opinion. Therefore, there is no material error of law in the Judge's determination.

32. In her oral submissions Ms Childs submitted that that the judge did not identify the Convention reason because it was accepted that it was on the basis of imputed political opinion. The respondent should not be able to change their case now and to do so would prejudice the appellant.

33. However, the key issues in dispute were whether AG was abducted by an unknown group, and whether he would be at risk on return. The Judge has given detailed reasons for believing AG's account of his abduction at §41-52. The Judge has gone on to give clear reasons why he has found that AG would face risk on return to Afghanistan at §53-54. In her oral submissions, she stated that the appellant was targeted because he reported them to the police and that wealth would be connected to politics. In Afghanistan there are different political factions and as the appellant is a Tajik and working as a money changer extortion is the way of funding anti-government groups. She referred me to the UNHCR report at page 214 of the appellant's bundle and page 215 and that political opinion was imputed to him because he did not support the Taliban and ISIS and would therefore be seen as a target. Thus she submitted there was a political element which was imputed to him. She submitted that political opinion is a broad concept and that there are "warring factions" in Afghanistan and that those involved in kidnapping have connections to the government, referring to page 17 of the report of Dr Giustozzi. In the alternative she submitted that he would be targeted as a member of a particular social group.

34. Ms Childs argued that in the alternative should an error of law be found on either of the SSHD's ground set out above, then AG contests the decision in relation to Humanitarian Protection, Article 15(c), and Articles 3 and 8. As AG's appeal was allowed on refugee grounds, allowing the appeal on any other grounds would not have provided AG with any tangible benefit. Therefore, she submitted that the provision of grounds of cross appeal in a Rule 24 is the most appropriate course of action (applying Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC) headnote §2).

35. In this context she submits that the Judge has entirely failed to consider whether AG was entitled to Humanitarian Protection. This is understandable in light of his finding that AG is entitled to refugee status. However, should the SSHD be successful in their appeal on ground one, then AG should succeed on his appeal on the basis of Humanitarian Protection. If (which is not accepted) there is no convention reason for AG's persecution, the Judge did not err in finding that AG would be at risk of persecution on return. Therefore, AG's appeal should be allowed on this basis.

36. Further and alternatively, the Judge has found that AG's mental health and the lack of treatment available for it in Afghanistan is a significant factor in the risk that AG would face on return (§53). In light of AS (Safety of Kabul)

Afghanistan [2020] UKUT 130 (§252), AG would be entitled to Humanitarian Protection on the basis of Article 15(c) too.

37. The Judge failed to provide adequate reasons for refusing AG's claim on the basis of Articles 3 and 8 in terms of AG's health. The Judge merely comments that *I do not, however, find that the severity of his condition reaches the threshold required for a medical claim under article 3 or 8…* (§53). This does not demonstrate a proper consideration of the factors involved in an Article 3 and Article 8 assessment on this basis.

38. The Judge has erred in his assessment of AG's article 8 rights. The Judge has found that AG does not qualify under paragraph 276ADE of the immigration rules (§55). However, he has applied the incorrect test, stating that it would not be unduly harsh. Immigration rule 276ADE(1)(vi) sets out the relevant requirements for leave to remain on the basis of A's private life in the UK: that there would be very significant obstacles to A's integration into Afghanistan. The appellant would face very significant obstacles to his integration into Afghanistan. He relies on the stark current security situation in Afghanistan. Even if it does not satisfy the (higher) Article 15(c) threshold, the same factors should be considered as very significant obstacles to reintegration. A's wife and children would also be most affected by the indiscriminate violence.

39. A's mental health means that he lacks motivation, is hopeless *about the future and a strong negative bias towards one's own abilities with a severe loss of confidence are typical signs of depression. In addition, extreme fatigue and lack of interest in life is typical of the symptoms of depression. Given that these are all present in Mr AG to a severe extent, makes the probability of him seeking employment, etc. even further reduced* [AB:36-37 §48.5.2]. A worries excessively about his children and return to Afghanistan. He said that *in Afghanistan humans are treated like animals, life is meaningless and the focus in the country is on money* [AB:21 §20.7]. In addition, the poor living conditions, high unemployment, ongoing violence, endemic corruption, and a general climate of impunity means that there are very significant obstacles to integration. The Judge has also failed to set out the factors that he has weighed in the balance in a proportionality assessment.

40. The Judge has failed to consider the best interests of AG's children. It is emphasised that, at all stages of the Tribunal's analysis, A's children's best interests are a primary (albeit not paramount) consideration. It would not be in their best interests to be removed from the stability they experience in the United Kingdom to be returned to a country in a state of war. A would struggle to offer his children any support in Afghanistan in light of his mental health issues. Even in the United Kingdom A has *lost interest and was no longer helping his wife to run the home. He said he would only go out if he was with a family member as he had lost his confidence.* He has also developed difficulties with alcohol [AB:20 §17] which would impede his ability to find work and care for his children.

41. In her oral submissions and by reference to ground 2, she submitted that the judge gave adequate reasons for his decision and addressed the respondent's decision letter when considering credibility. He also considered the medical legal report and that there was no reason in that report to doubt what the appellant had stated in his claim. What the FtTJ was referring to was that there was nothing in the medical report undermine what the appellant had said. Importantly, the Dr properly considered whether the appellant was feigning his account but did not find that he was. Consequently there was no need to go into detail when considering that report given the judge accepted his credibility and gave adequate reasons for reaching that view.

42. Ms Childs submitted that in the light of the matters above, and any further development by oral submissions the SSHD's appeal should be dismissed. In the alternative, AG's appeal should succeed.

43. At the conclusion of the hearing I reserved my decision which I now give.

Discussion:

44. I have given careful consideration to the submissions of the advocates and have done so in the light of the decision of the FtTJ and the material that was before the tribunal.

Ground 2:

45. I intend to deal with the 2nd ground advanced on behalf of the respondent. It is argued that the FtTJ erred in law by failing to give reasons. The written grounds assert that the judge did not provide adequate reasoning for his findings on the evidence as presented. The medico-legal report [40] asserts that the appellant is suffering from PTSD, however few details were given on what therapy he was receiving, if any, and it stated that he presents a low suicide risk (paragraph 40). It is further asserted that the country expert report is generic and failed to address the appellant's particular circumstances. Furthermore the appellant has family in Afghanistan and therefore there will be support for the appellant's family on return.

46. The grounds are couched in the most generalised of terms and fail to provide any proper particularisation in the grounds as to how the FtTJ fell into error. The oral submissions made also did not in my view adequately engage with the factual findings made by the FtTJ in the light of the evidence before him. The grounds therefore remain un-particularised beyond what is set out in writing and as recited above.

47. Dealing with the FtTJ's factual findings, they are set out at paragraphs [44 – 54]. At [44] the FtTJ expressly engaged with the credibility issues identified in the decision letter and relied upon by the respondent where he recorded "the respondent rejected his evidence because of claimed inconsistencies in 6 specific parts of his account. I take each issue in turn." The FtTJ then proceeded to

undertake an analysis of the evidence which included the expert evidence of Dr Giustozzi and the medicolegal report. The grounds do not challenge the factual assessment of the appellant's credibility but seeks to argue that the medicolegal report asserted that the appellant was suffering from PTSD however few details were given as to what therapy was necessary. In my judgement that provides no proper basis for seeking to undermine the factual findings in the assessment of the evidence.

48. The FtTJ set out a brief summary of the medicolegal report at paragraph [40]. At [52] the FtTJ reached the conclusion that the "medicolegal report discloses no reason to doubt the appellant's account". I accept the submission made by Ms Childs that there had been little challenge, if any, to the medicolegal report. The doctor had undertaken an assessment of the appellant by way of undertaking a clinical examination, he considered the information provided by the appellant and documents that have been provided for the consultation alongside the standard assessment tools. The doctor did not only consider the appellant's account as given to him but also considered it in the light of other professionals including the appellant's GP who had made a referral to the CMHT as the GP had suspected trauma in June 2019. The appellant in fact had 6 sessions of therapy and had been prescribed antidepressant medication prior to seeing the doctor commissioned for the report. Furthermore the doctor considered whether the appellant was malingering, feigning or exaggerating his symptoms at paragraphs 23 – 26 but reached the conclusion that the appellant had not exaggerated or feigned any mental health symptoms.

49. The doctor then undertook a diagnostic assessment of PTSD in accordance with the recognised checklist "DSM-5" and assessed the symptoms against the criteria.

50. It was therefore open to the judge to give weight to that report and that in his view it provided support for the appellant's account, and the opinion of the doctor was that the appellant had met the criteria PTSD and also having a major depressive disorder.

51. In my view the grounds do not seek to make any proper criticism of the report. Whilst the reasons given for placing weight on the report are brief, in the light of the contents of the report it was open to the judge to accept its contents as supportive of the appellant's account.

52. The grounds assert that the country expert report is "generic" and fails to address the appellant circumstances. Again those submissions are not particularised any further or how the report is "generic". The report refers to the general circumstances in Afghanistan in the context of kidnapping and mental health and risks on return. However the report also referred expressly to the appellant's particular circumstances such as identifying the likely profile of the gang who targeted the appellant and his family and why he would be at risk on return. In my view the grounds provide no sensible basis to challenge

the reliance on the report. Consequently the judge was entitled to reach the view that the expert evidence of Dr Giustozzi was relevant evidence in assessing the appellant's claim.

53. I therefore reject the respondent's grounds that the judge had given "inadequate reasons" for the findings on material matters. I have reached the conclusion that the grounds provide no proper basis to undermine the FtTJ's assessment of the evidence and the factual findings made an assessment of risk on return. I therefore find no error on the basis asserted by ground 2.

Ground 1:

54. I now turn to ground one. The respondent submits that the judge made a material misdirection in law. It is submitted that the appellant was kidnapped for ransom and feared his kidnappers as a result of his business interests working in the money exchange business. Mr Diwnycz submits that the FtTJ failed to state which Convention reason applied and on the facts of the appellant's case it did not fall within imputed political opinion, nor did it fall within a particular social group ("PSG") as being a person of wealth was not an immutable characteristic such that the appellant could be described as belonging to such a PSG (by reference to paragraph 54).

55. Ms Childs in her role 24 response and her oral submissions responded to the ground by submitting that at paragraph [20] of the decision letter the respondent set out the appellant's claim to have a well-founded fear of persecution on the basis of imputed political opinion and therefore the respondent did not appear to have disputed that AG's claim raised the fear on the basis of his imputed political opinion.

56. In her oral submissions, she submitted that the respondent therefore made a concession in the decision letter and that this was the way that the case was argued, and that the secretary of state could not change its case now. She submitted there would be prejudice to the appellant in doing that at this stage.

57. Dealing with that point, I am satisfied that Mr Diwnycz is correct to point to the wording used by the respondent in the decision letter. At paragraph 20 the respondent states "you claim to have a well-founded fear of persecution in Afghanistan on the basis of your imputed political opinion." Then at paragraphs 26 – 32 the respondent sets out why she considered his factual claim was inconsistent and therefore was rejected. At paragraphs 35-38 the respondent undertook an assessment of future fear and at paragraph [39] under the heading "inclusion in the Refugee Convention" the respondent stated, "I have carefully considered your claim together with the evidence provided in relevant information considered above, I have decided that there is no reasonable degree of likelihood that you will be persecuted on return to Afghanistan."

58. When reading paragraph 20 in the context of the rest of the decision letter, in my judgement the respondent has not made any concession concerning whether the appellant would be persecuted for a Convention reason. In fact the words used that "you claim to have a well-founded fear of persecution Afghanistan on the basis of your imputed political opinion "make it clear in my view that this is what the appellant claimed and therefore there was no concession in the decision letter.

59. Furthermore the appellant's claim referred to a whole raft of potential persecutors from warlords, general abductors, the Taleban or ISIS. This is reflected in the interview at question 41. Whilst the interviewer sought to clarify those whom he asserted were his persecutors, the appellant could not say that it was ISIS who targeted him (see Q 45). At Q 49 he said he had not been targeted by "warlords" and at Q 51 when expressly asked to identify which group had wanted to kill him, he stated "I don't know". Then the interviewer gave the appellant the opportunity to clarify his evidence and stated "to be clear you are assuming it must be ISI S, warlords or the Taleban but you do not know? The appellant replied "yes".

60. A careful consideration of the evidence demonstrates the appellant could not identify the group responsible and this had led to the respondent in the decision letter to refer to the parents claim to have been abducted by an "unknown group" (see paragraph 26).

61. The FtTJ also recorded the appellant's evidence in cross-examination at paragraph [30] where the appellant was unable to say whether he had been abducted by the Mafia, warlords government MPs or professional kidnappers and also the appellant did not think that the kidnappers were the police (at [30]). The evidence in the expert report referred to the issue of kidnapping generally in Afghanistan and that this had turned into an "industry" after 2001 with many groups including former militia men turning to criminal activities after their combat units had been disbanded by the authorities. The report refers to the kidnapping industry and that "the gangs remained very active in Kabul." When looking at the profile of those involved in kidnapping Dr Giustozzi refers to the chief of police being linked to kidnappers. Ms Childs referred the Tribunal to page 8 where a reference made is to the chief police of Wardak province however in my judgement the report does not assist in identifying those who are involved in the appellant's abduction. In fact at page 52 Dr Giustozzi refers to the number of gangs in Kabul increasing due to the large number of "micro-gangs of kidnapping amateurs who operate without having much information about their targets and relying simply unlimited direct observation. These micro-gangs are not worried about the police, as they assume that the police will be too busy dealing with insurgents and large gangs. They operate with limited infrastructure and content themselves with ransoms of a few tens of thousands of dollars (the large gangs will not target anybody under $200,000)."

62. Whilst paragraph 10 (p.52) refers to larger groups, Dr Giustozzi identifies at paragraph [12] that when considering the appellant's description of kidnappings, the appellant was probably targeted by a small gang. When looking at the report, the small gangs appear to fall within the description at paragraph 9 and the "micro-gangs of kidnapping amateurs". That in my judgement is consistent with the factual finding made by the FtTJ at [51] and that the appellant was abducted for ransom and "quite who the actors were remain unclear". Also at [54] the FtTJ found that "the appellant would be returning as someone who would reasonably be thought to be rich and worth kidnapping again."

63. Set against that background I do not accept the submission made by Miss Childs that the appellant was targeted because he went to the police. That ignores the factual context of his account, that he was targeted because he had the money exchange and therefore was someone he was considered to be a person with money who could provide a ransom (see Dr Giustozzi report at paragraph 12). His circumstances were not connected to politics as she submitted but was connected to his perceived wealth and occupation.

64. In her submissions Miss Childs referred to his ethnicity as a Tajik but the appellant's account was not that he was targeted due to his ethnicity but because of his job as a money changer.

65. Ms Childs also refers to the UNHCR report set out at page 214 of the bundle under the heading "businesspeople, and the people of means and their family members". The pages that she has referred me to at page 214 set out that pro-government armed groups are also reported to subject the civilian population to illegal taxation, and harass, threaten or even kill civilians who failed to pay the illegal taxation imposed by these groups." The section refers to illegal taxation, but this is not the factual matrix of this appellant's claim. Later on in that section at page 215 it refers to civilians being targeted in Kunduz by pro-government militias. Again the factual account of the appellant does not correspond to this material. At page 216 the UNHCR refer to the methods of extortion which may rise to the level of persecution and make reference to individual targets for extortion and for kidnapping and ransom as the basis of imputed political opinion, (for example, they are perceived to be associated with the government). Again in my judgement that does not accurately reflect the circumstances of the appellant or his factual claim.

66. Nor do I accept the submission that he falls within a PSG. In her submissions Miss Childs made no reference to the law relevant to PSG's beyond her references to the UNHCR document which is a generalised document which does not set out any analysis as to the Convention ground or assess what is the relevant law. In my judgement Mr Diwnycz is correct to state that the circumstances as advanced by the appellant and as found by the FtTJ do not fall within either imputed political opinion nor could the appellant point to being a member of a PSG.

67. The FtTJ did not identify any Convention reason and having considered the evidence in the expert report and the view of the profile of the kidnappers (small group) and that he did not provide any evidence of any links to any other group, that the appellant was targeted and kidnapped as a result of his employment.

68. Consequently I am satisfied that it is not demonstrated that a Convention ground did arise on the particular factual matrix. To that extent the respondent is correct that the judge erred in law by allowing the appeal on asylum grounds. However having considered the remaining grounds of challenge, where it is argued that there was an inadequacy of reasoning in relation to the medical report in the expert report, I am satisfied for the reasons I have given that those grounds have no merit and therefore even if the judge was wrong to find that the appellant could succeed on asylum grounds, on the facts as he found them to be the appellant would be entitled to a grant of humanitarian protection.

69. The Immigration Rules cover humanitarian protection under paragraphs 339C and 339CA. To be granted humanitarian protection the appellant must therefore establish that he faces a real risk of serious harm if returned to his country of origin. The definition of serious harm is taken from Article 15 of the EU Qualification Directive which has been retained as part of UK law by section 3 (1) of the European Union (Withdrawal Act) 2018.

> 339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom.
>
> (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.
>
> (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
>
> (iv) they are not excluded from a grant of humanitarian protection.
>
> 339CA. For the purposes of paragraph 339C, serious harm consists of:
>
> (i) the death penalty or execution.
>
> (ii) unlawful killing.

(iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; o

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

70. As the Upper Tribunal noted in *AA (unattended children) Afghanistan CG* at [35], the starting point in considering a claim for humanitarian protection under Article 15(c) is the decision of the ECJ in *Elgafaji* (Case C-465/07), [2009] 1 WLR 2100. After reviewing the three types of 'serious harm' defined in Article 15, the judgment of the ECJ in *Elgafaji* continued:

> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by … the courts of a member state to which a decision refusing … an application [for subsidiary protection] is referred, reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence … face a real risk of being subject to the serious threat referred to in Article 15(c) of the Directive.

71. The personal circumstances of an individual were also addressed by the Court:

> 39. In that regard the more the applicant is able to show that he is specifically affected by reason of fact as particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

72. On the facts as found by the FtTJ the appellant has established that he faces a real risk of serious harm and that he would not be able to obtain the protection of the authorities in Afghanistan (I refer to paragraphs 44 and 52 of his decision).

73. In the alternative, the FtTJ did make reference to the CG decision in AS (safety in Kabul) Afghanistan CG [2020] at [53]. Ms Childs submitted that this paragraph in essence was an assessment of Article 15 (c) applying the "sliding scale" based on the appellant's mental health for which he would be unable to obtain medical treatment.

74. The assessment undertaken is consistent with the evidence set out in AS (Kabul) concerning the lack of mental health provision for someone in the position of this appellant. The Tribunal in AS having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there, found it would 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 but nonetheless, that the particular circumstances of an individual applicant must be taken into account.

75. The evidence of Dr Ahmad as set out in the decision in AS is also reported in the CPIN. Dr Ahmed's view of the lack of mental health assistance in Kabul was described as consistent with the views expressed by the UNCHR and other objective material and in particular that there were a large number of people who suffered from undiagnosed and untreated mental health problems, [146], that public healthcare is poor quality medications frequently counterfeit and that the psychiatric services are "inadequate". Her evidence was that there is "little understanding of mental health" and "people with mental health conditions are stigmatised and socially ostracised" (at [83]).

76. Dr Ahmed set out at [83] that there were inadequate psychiatric services and only one mental health hospital in Afghanistan which has only 60 beds for inpatients and 40 in a separate facility for drug addicts. That assessment is not undermined by the recent CPIN.

77. Based on that evidence, it is likely that the appellant will not be able to access the type of medical health provision for his condition that he requires as evidenced in the medico-legal report. As the appellant would be at risk of harm on return as found by the judge at paragraph [54] and that there can be no internal relocation for the appellant given that the events he relies upon occurred in Kabul and that the only place of relocation identified by the respondent was Kabul and in the light of the appellant circumstances being a family man with 4 children with mental health problems, on the factual findings made the appellant was also entitled to succeed on humanitarian protection grounds (Article 15(c).)

78. For those reasons, I am satisfied that the FtTJ erred in law in allowing the appeal on Refugee Convention grounds, but on the basis of the factual findings made and the assessment of the evidence, I am satisfied that the appeal would have been allowed on humanitarian protection grounds. It is therefore not necessary to consider the alternative arguments put forward by way of cross-appeal.

79. I therefore set aside the decision of the FtTJ to allow the appeal on asylum grounds and remake the appeal; the appeal is allowed on humanitarian protection grounds.

Notice of Decision

80. I therefore set aside the decision of the FtTJ and remake the appeal; the appeal is allowed on humanitarian protection grounds (Article 15 (b) and (c)).

Signed

Dated 27 September 2021

Upper Tribunal Judge Reeds

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday, or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email