Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02747/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 19 November 2021	**On The 23 November 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A S
(anonymity order in force)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr M Mahmood Legal Representative from Thompson & Co Solicitors

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent, also called "the Claimant". Breach of this order can be punished as a contempt of court. We make this order because the Claimant seeks international protection and has a history of mental illness. Publicity might put him at risk.

2. The Respondent, hereinafter "the Claimant" is a citizen of Afghanistan. He appealed a decision of the Respondent refusing him international protection and leave to remain on human rights grounds.

3. The First-tier Tribunal found that the claimant was not entitled to protection under the Refugee Convention but risked serious ill treatment in his home area from the Taliban and could not be returned to Kabul.

4. I set aside that decision because it was wrong in law. My reasons are attached but, essentially, I found the explanation for the conclusion that he could not be returned to Kabul inadequate.

5. It is well known that the Taliban now control Afghanistan.

6. Ms Isherwood had considered her position and, with the permission of the Tribunal, withdrew her case.

7. It follows that the claimant's appeal should be allowed with reference to article 3 of the European Convention on Human Rights.

8. In the circumstances Mr Mahmood did not address us.

9. <u>Notice of Decision</u>

10. The claimant's appeal against the Secretary of State's decision is allowed to the extent that it succeeds on human rights grounds with reference to article 3 of the European Convention on Human Rights.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 19 November 2021

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA 02747 2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 November 2020	.....

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms C Capel, Counsel instructed by Thompson & Co Solicitors

REASONS FOR FINDING ERROR OF LAW

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also "the claimant"). I make this order because the respondent is an asylum seeker and is entitled to privacy.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against a decision of the Secretary of State on 6 February 2019 refusing his claim for international protection.
3. The claimant is subject to deportation. On 17 January 2014 he was fined for handling stolen goods. More significantly on 17 July 2018 he was sent to prison

for 28 months for the offence of assault occasioning actual bodily harm. He had pleaded guilty but unsuccessfully contested a **Newton** hearing.

4. The First-tier Tribunal found that the claimant would be at risk in the event of his return to Kabul but dismissed the appeal on Refugee Convention grounds because the claimant had not rebutted the presumption under Section 72 of the Nationality, Immigration and Asylum Act 2002 that by reason of his sentence he was a danger to the community. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Coker who said:

> "It is just about arguable the First-tier Tribunal Judge failed to have adequate regard to the [claimant's] trips to Afghanistan, that his mental health problems were under control and that his description of the [claimant's] mental health was not supported by the evidence before him".

5. I begin by considering in more care exactly what the First-tier Tribunal decided.

6. The claimant is a citizen of Afghanistan born in 1995. In July 2018 he was served with a Decision to Make a Deportation Order for the reasons outlined above and he responded by making a protection claim leading to the decision complained of.

7. It is the claimant's case that the claimant and his father are the only members of their family who are settled in the United Kingdom. The claimant was living in Pakistan with his mother and younger siblings when he was given a settlement visa in September 2012. It is his case that his mother and younger siblings remain in Pakistan. The claimant was originally from the Kandahar Province and his family relocated to Pakistan to avoid the risk of forced recruitment by the Taliban. It was the claimant's case that he had no family in Afghanistan and if returned there would be returned without any kind of support which would give rise to a risk of persecution and/or inhuman and degrading treatment.

8. The First-tier Tribunal Judge noted that the claimant did rely on medical evidence but "the only medical evidence relied upon by the [claimant]" was set out in full and it was the "Discharge Summary" dated 7 June 2019 following the claimant being taken to hospital whilst a serving prisoner. This evidence is important in order to understand the appeal before me and, like the First-tier Tribunal Judge, I have decided to set all nine paragraphs of the "Opinions/Plan" contained in the report. It states:

> "1. [The claimant] is a 24 year old man with a diagnosis of depression with psychotic symptoms. He is currently admitted under Section 47/49 of the MHA on Derby Ward, where he has been since [X] February 2019. Is [his?] index offence was ABH for which she [he?] was given a 28 month sentence. His sentence ends on [X] August 2019.
>
> 2. On admission his symptoms comprised of low mood, poverty of speech, auditory hallucinations, paranoid thoughts, self-neglect and suicidal thoughts and attempts. Since increasing the dose of Quetiapine, his mental state has shown improvement, where his mood appears euthymic, he is engaging with staff and peers more confidently and conversing openly. He also denied experiencing any further psychotic symptoms and there have been no further self-harming or suicidal thoughts.

3. Since this admission, he has been successfully treated with a combination of medications using Quetiapine (antipsychotic), Mirtazipine and Sertraline (antidepressants). During the admission, he was also offered a range of occupational therapy sessions, which he engaged well in. He has also engaged in a variety of psychological assessments too. Following the psychological assessment, there was a recommendation for him to take part in the CBT for psychosis group programme. He has also engaged well with the Drug and Alcohol Support team and has taken part in the 'Thinking About Change' group.

4. Once the sentence is completed, he ought to be followed up by the Hounslow community health team – Hounslow Recovery Team East.

5. He would need to continue complying with the medical treatment until he is followed up and reviewed by the professionals in the community. In the community team on their review Will be able to assess the ongoing duration of treatment.

6. As [the claimant's] move to prison is imminent and he has been able to take part in the CBT for psychosis group programme, it will be recommended this is commenced in the community.

7. [The claimant] has an Immigration Tribunal set for 20th August 2019 to discuss his appeal against the deportation back to Afghanistan. He will likely find this meeting is stressful and may require more staff support, before and after this meeting.

8. Moving forward, in view of the improvement in his mental state, the plan is for [the claimant] to be transferred to Wormwood Scrubs Prison to complete the remainder of his sentence, which ends on 29th August 2019. This move back to prison Will take place on 9th July 2019.

9. Prior to be released from prison, the Hounslow Recovery East Team I Have agreed they will carry out a care needs assessment".

9. The judge noted that drug abuse appears to be a feature in the commission of the offence and although the claimant said that he has dissociated himself from the company that he enjoyed at the time of committing the offence and says that he is drug fee, he also said in evidence that he is using controlled substances.

10. The judge noted that the claimant had had taken educational courses whilst in custody.

11. At paragraph 27 of the Decision and Reasons the judge noted that the case was "a straightforward one". The claimant relied only on his version of events. The Secretary of State had rejected his claim but the main reason given was that he had not completed an earlier application for asylum and was never interviewed and the judge was satisfied with the claimant's answer that he did not proceed with the asylum claim because he already had indefinite leave to remain, something the judge described as "undoubtedly true".

12. The judge did say that the claimant was a vulnerable witness and had mental health issues.

13. At paragraph 28 the judge noted a strand of evidence suggesting the claimant had claimed to have a wife and child in Afghanistan but the judge regarded that evidence as unreliable because it was based on a hospital note made at a time when the claimant was suffering from "amongst other things, psychosis".

14. At paragraph 29 the judge noted the claimant made two trips to Kabul after arriving in the United Kingdom. The claimant said that they were both of limited duration. One was to attend the wedding of a friend. The claimant said that he had no association with Afghanistan after leaving for Pakistan as a child and the judge found a considerable body of evidence that the claimant's family had indeed relocated to Pakistan. The judge found the claimant a credible witness.

15. It was the Secretary of State's case that the claimant would be returned to Kabul. The judge directed himself at paragraph 32 that the claimant is from Kandahar Province and could not be returned there. The judge found that it was under Taliban control. The judge found that the claimant had no family in Kabul or Kandahar. His father was settled in the United Kingdom, his mother had died, and a stepmother and five stepsiblings were in Pakistan.

16. The judge then applied his mind to whether the claimant could be returned to Kabul and particularly reminded himself of the decision of this Tribunal in **AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC)**. This included the observation that it would not in general be unreasonable or unduly harsh for a single adult man in good health to relocate to Kabul even if he had no connections or support network in Kabul. However that came with the qualification that the general position did not exclude the possibility of a particular person needing protection or being impossible to return there having regard to that person's age, connections and physical and mental health and other factors.

17. However the judge also set out in some length a UNHCR Report that postdated the decision in **AS**. The judge then sets out at length a quotation from the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (August 2018) which appears under section C of that report and begins at page 256 of the bundle. I see no point in setting it out in full. The report recognised concerns in the UNHCR about anyone going to Afghanistan in an area controlled by the Anti-Government Elements. Where a person was expected to avoid such an area by internal flight or relocation care was needed to make sure they could indeed access there and function there. There was a need to assess if shelter was available, if the basic infrastructure of life was available such as water and sanitation and healthcare and access to education, and whether there were livelihood opportunities. Section 4 of that report (258 in the bundle) dealt particularly with internal flight or relocation alternative in Kabul. At part c (page 259), internal page 38 of 135, it is said "UNHCR considers that given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city".

18. The last passage from the judge's quotation from the report says:

> "Against the background of the considerations relating to the relevance and reasonableness analysis for Kabul as a proposed area of IFA/IRA, and taking into account the overall situation of conflict and human rights violations, as well as the adverse impact this has on the broader socio-economic context, UNHCR considers that an IFA/IRA is generally not available in Kabul".

19. After directing himself thus the judge decided that the claimant has no family in Afghanistan and has been out of the country for many years and will have become to an extent westernised, has no workplace to derive skills or financial assets and significant mental health problems. The judge decided life in Kabul would be unduly harsh. He then went on to allow the appeal.

20. This decision was attacked in grounds drawn by Mr E Tufan who I know to be an experienced Senior Home Office Presenting Officer. The grounds assert that the judge, correctly, addressed and set out paragraph 339C of HC 395 which provides the conditions necessary for a person to be awarded humanitarian protection. The judge then dismissed the appeal on humanitarian protection grounds.

21. The grounds then summarised the medical evidence in front of the judge, mainly the discharge summary that I have set out. It is pointed out the summary showed the claimant had been treated successfully. There was no evidence that he needed further mental health treatment in Afghanistan or that it was not available if he did. It was established that an Article 15(c) risk did not generally exist in Afghanistan, that is the nature of the risk that it is something that exists generally. This was established in **AK (Article 15(c)) Afghanistan CG [2012] UKUT 163** and not undermined by subsequent decisions of the Tribunal. Further, the claimant had returned to Afghanistan and the grounds claim he had not explained adequately why he would not be able to cope.

22. The grounds then asserted, correctly, that only a very unusual set of conditions made it contrary to a person's human rights to return them to a country because medical treatment was not available and they did not, according to the grounds, exist here.

23. The grounds of appeal to the First-tier Tribunal also drew on **KH (Afghanistan) v SSHD [2009] EWCA Civ 1354** which concerned an appellant who had suffered from depression and some post-traumatic stress disorder. It was found in that case that there was no Article 3 case preventing that person's return to Afghanistan and that it had said this was not heeded when the First-tier Tribunal refused permission. A similar complaint is made about the First-tier Tribunal Judge's alleged failure to follow **AK (Article 15(c))** or to deal with the complaint in the grounds.

24. The renewal grounds also contend that the First-tier Tribunal Judge refusing permission did not engage with the complaint that the claimant had returned to Afghanistan on more than one occasion and, according to the grounds, "clearly knows people who could if need be assist him".

25. It is perfectly clear why the judge allowed the appeal. The judge was satisfied that the appellant could not live safely in his home province because it was under Taliban control and that internal relocation to Kabul, given his lack of connections, general life experience and propensity for mental ill health made internal relocation unreasonable or unduly harsh. He reached that conclusion because that is what he thought the most up-to-date UNHCR evidence, postdating relevant country guidance, concluded and it is the conclusion that he adopted. The interesting challenge is to see if that was a permissible decision or not.

26. I consider Ms Capel submissions. I particularly consider the "Respondent's Rule 24 Submissions and Cross-Appeal dated 12 June 2020". I set aside for the time being issues relating to the cross-appeal.

27. There the Secretary of State's grounds are summarised and answers given. She drew attention to the medical evidence that was available which she said supported the judge's conclusion that the claimant suffered from severe mental illness. Although the First-tier Tribunal Judge had before him the discharge report of Dr Sannah Awan dated 7 June 2019 she points out that the appellant's "full medical records" were before the judge. That is almost certainly right. There is certainly a substantial bundle. There is also in a supplementary bundle the entire text of Dr Awan's report which includes the information that "there has been previous self-harming behaviour by cutting his wrists and an attempt to hang himself using bed sheets whilst in prison".

28. Ms Capel submitted that the judge's conclusion that the claimant was suffering from severe mental health problems was "plainly rational".

29. The same report said how the claimant was diagnosed with "severe depression". At page 1 of the supplementary bundle under the heading "discharge summary" it does indeed say that the diagnosis was "severe depression with psychotic symptoms".

30. Mr Clarke submitted there were concerning aspects to the First-tier Tribunal's decision.

31. However he submitted that the claimant clearly was not entitled to humanitarian protection. That was the finding of the judge. Broadly he would be excluded from humanitarian protection for the same reason that he was excluded from the Refugee Convention and there was no challenge to that part of the decision. This much I think is uncontroversial but perhaps worth emphasising.

32. He submitted that the summary of the UNHCR Report was not sufficient to go behind the finding in **AS** that people can ordinarily be returned. It identified categories of people who would be at risk or might be at risk so that they could not be expected to establish themselves in Kabul but that was not enough to show that this claimant was such a person.

33. Mr Clarke then challenged the judge's approach to the medical evidence. Clearly the judge had been impressed by the discharge report which was set out in full. However page 6 of 93 in the prison record (page 60 in the bundle) is dated 17 July 2018 and deals with aspects of the claimant's health on arrival at prison. He had not self-harmed or attempted suicide in the last twelve months and he had not overdosed with his medication. He had not received treatment from a psychiatrist outside prison and the impression of his behaviour and mental state is said to be "suffered from depression but not on any medication. Stayed on and off thoughts of SH (self-harm?) but not at present and denied thoughts of suicide. He appeared low in mood and unpredictable". Mr Clarke's point was that the medical evidence as a whole might be thought to show that the claimant has a propensity towards depressive illness but not in a way that permits the extrapolation of the observations at the time of discharge to a prediction of his likely state in the event of his return to Afghanistan. It just

does not follow, he said, that the concerning observations then could properly be construed as evidence of his mental health at the time of the hearing.

34. Mr Clarke submitted too that the notes on admission were relevant to the finding that the claimant had no family in Afghanistan. It is recorded (page 9 of 193 – page 19 of bundle) that the claimant has a 2 year old daughter who lives with her mother in Afghanistan. Mr Clarke submitted that this contrasted with the judge's finding at paragraph 28 of the decision and reasons that the suggestion that the claimant had a wife and child in Afghanistan "is recorded in a hospital note created at a time he was admitted to hospital suffering from, amongst other things, psychosis".

35. I appreciate that psychosis is a mental disorder where the patient loses contact with reality. It follows that I accept that suffering from psychosis could be a reason for saying things that were wrong. The difficulty is the evidence can be traced here to something said during general enquiries on 17 July 2018 when the claimant was admitted to prison or very soon afterwards. The reason given for disbelieving the claimant's own evidence that he had a wife and child in Afghanistan do not clearly work. The very serious mental health problems did not manifest themselves until a suicide attempt on 9 November 2018 and I have not found any evidence that justifies a conclusion that the appellant was psychotic in July. This point can be revisited when the case is reheard. It is not my only reason for setting aside the decision but I am not satisfied that the judge's conclusion that the appellant suffered from psychosis in July 2018 so that his own account of his family circumstances should be disregarded is explained adequately.

36. Mr Clarke was careful to point out that the consequence of the judge's unchallengeable finding that the claimant has excluded himself from protection of the Refugee Convention is that conditions of return have to be assessed on the Article 3 grounds and that the judge should not have been concerning himself with whether it was "unduly harsh" or whether there was a sufficiency of protection but whether there was an Article 3 risk. He also submitted that that risk ought to be illuminated by the judgment in **AM (Zimbabwe) v SSHD UKSC [2018] 0048** and this had just not happened.

37. I have considered Ms Capel's oral as well as her written submissions.

38. I do take the point that there is evidence that this claimant has been very ill indeed and the fact that he has on two occasions quite seriously tried to take his life is something that perhaps should feature still more prominently in the decision. Nevertheless, I have to agree with Mr Clarke that the evidence does not compel the conclusion that the history reflects the claimant's state at the time of the hearing. It is a gap which the judge did not fill properly.

39. Second, I cannot agree with Ms Capel that the judge has given proper reasons for discounting the claimant's evidence that he has a wife and child in Afghanistan. The reason the judge gave is, I find, based on a false premise about the appellant's state of mind when the incriminating admissions were made.

40. Further, I find it is clear that the judge has not applied his mind correctly to the relevant test. He should have been looking at Article 3 conditions, not questions of reasonableness.

41. I decide in all the circumstances to allow the Secretary of State's appeal.

42. I can deal with the cross-appeal briefly. It generated a lot of energy at an early stage because the contention was misunderstood. The claimant was clearly right not to challenge the decision. He had no interest in doing that until the Secretary of State put the matter in issue. I can see no sensible basis for dismissing the appeal on Article 8 grounds and allowing it on Article 3 grounds. Indeed, it will only be in unusual circumstances where such a finding would be other than perverse. Normally it is sufficient if the appeal is being allowed on Article 3 grounds to make no separate finding on Article 8 because it is the human rights grounds that count.

43. Both parties agree that in the event of my finding an error of law then I should order a further hearing to enable the best present evidence to be prepared about the claimant's condition.

44. Some findings are sound. I preserve the finding that the claimant is disqualified from protection under the Refugee Convention and with it the implied finding that he is excluded from protection on humanitarian protection grounds. Certainly I do not permit the humanitarian claim to be revived. It was dismissed and the decision not challenged.

45. That aside, I find none of the points to be preserved and I order the case to be determined again in the Upper Tribunal on the basis of the best evidence then before the Tribunal probably before me. I can see no reason for an interpreter and none will be provided unless the claimant makes an application for an interpreter, and I estimate the hearing to last one and a half hours. Any application to serve additional evidence from either party must be made in accordance with the Rules no later than 21 days before the day listed for hearing of the appeal. This is because it is entirely possible that there will be further evidence that needs to be considered carefully and it is not in anyone's interest that it is rushed before the hearing.

46. It follows that the Secretary of State's appeal is allowed to the extent that I find that the First-tier Tribunal erred in law. I set aside the decision and I direct that the appeal be heard again in the Upper Tribunal before me if reasonably practicable.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 28 May 2021