Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00151/2017

THE IMMIGRATION ACTS

Heard at Field House (face to face hearing)	**Decision & Reasons Promulgated**
On Wednesday 10 March 2021	**On Thursday 29 April 2021**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE SMITH

Between

HSB
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Capel, Counsel instructed by Simman solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
This appeal is brought in part on protection grounds. Accordingly, it is appropriate that the Appellant's details be protected. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the Appellant or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND DIRECTIONS

PROCEDURAL BACKGROUND AND THE HEARING

1. By a decision promulgated on 25 January 2019, the Tribunal (the Hon Lord Beckett and Upper Tribunal Judge Freeman) found an error of law in the decision of First-tier Tribunal Judge Swaney promulgated on 16 October 2018. By her decision, Judge Swaney allowed the Appellant's appeal against the Respondent's decision dated 23 November 2017 revoking the Appellant's protection status, and refusing his human rights claim made in the context of a decision to deport the Appellant to Afghanistan.

2. On 3 December 2019, the Tribunal (UTJJ Reeds and Smith) gave directions for the preparation of the appeal for a resumed hearing. Those included a requirement for the Respondent to disclose documents relating to the recognition of the Appellant's father as a refugee which were or might be relevant to the issues we have to determine (see below). The Appellant was also directed to file further evidence in the form of an updated medical report and expert report in relation to the country situation in Afghanistan. Although the country expert was to be instructed by the Appellant, the Respondent was directed to provide questions for the expert to consider. The Tribunal directed that the appeal should not be heard until after the determination of the country guidance case pending in relation to safety of return to Kabul.

3. On 17 November 2020, following the promulgation of the decision in AS (Safety of Kabul) Afghanistan (CG) [2020] UKUT 130 ("AS (Afghanistan)"), this appeal was relisted for a case management hearing before UTJ Smith. We note as an aside that the Court of Appeal has recently refused permission to appeal the Tribunal's decision in AS (Afghanistan). The issues which required to be determined were agreed between the parties. We set those out below. It was agreed that it would be preferable if the resumed hearing were conducted on a face-to-face basis. The Appellant and his father were to be the only witnesses. The Appellant's father required an interpreter for his evidence. The Appellant and his father did not have access to technology at home.

4. So it was that this appeal came before us for the resumed hearing. We had a consolidated bundle for the hearing to which we refer below as [AB/xx]. That contains the updated report from Mr Thomas J Sobel, MA, MBACP dated 17 February 2020 ("the Medical Report") in relation to the Appellant's mental health ([AB/618-633]) and the updated report of Dr Antonio Giustozzi dated 30 January 2020 ("the Expert Report") in relation to the situation in Afghanistan ([AB/567-610]). We also have a Respondent's bundle to which we refer below as [RB/xx].

5. We also had before us a detailed skeleton argument from Ms Capel. Ms Cunha explained that she had been unable to complete her written submissions in reply

as she did not have a copy of the consolidated bundle. We therefore allowed her to use one of the Tribunal's copies of the bundle which was unmarked and gave her some time to refamiliarize herself with the documentation before beginning the hearing. Although Ms Cunha indicated that she had drafted some of her submissions in writing in advance of the hearing, we declined her invitation to receive the incomplete submissions and instead allowed her to use those as a speaking note in her submissions.

6. When the hearing resumed, Ms Cunha indicated that she did not wish to cross-examine the Appellant's father. There was short cross-examination of the Appellant. We deal with his evidence below so far as it is necessary for us to do so.

7. Following Ms Cunha's submissions, we adjourned to consider whether we needed to hear from Ms Capel since we had carefully considered her written submissions in advance of the hearing. We concluded that we did not need to hear from her. We indicated, having also carefully considered Ms Cunha's oral submissions that we would allow the Appellant's appeal. We indicated that we would provide the reasons for our decision in writing which we now turn to do.

FACTUAL BACKGROUND

8. The Appellant's father was recognised as a refugee on 26 November 2004. He has since been naturalised as a British citizen. His claim for asylum was based on the ill-treatment of him and his family by Islamic fundamentalists in their home area of Nangarhar, Afghanistan due to their Sikh religion.

9. On 22 September 2006, the Appellant entered the UK. He was then aged fifteen years. He was granted indefinite leave to enter. His passport was stamped "Visa family reunion" ([RB/A1]). Although the Appellant has not seen any information disclosed by the Respondent showing whether the Respondent had at that time given consideration to the Appellant's potential status as a refugee, the Appellant draws attention to a letter dated 12 July 2016 at [RB/I1; AB/456] which states that "[i]t is noted that you have been recognised as a refugee by the United Kingdom".

10. On 18 November 2011, the Appellant, having completed five years with leave to remain in the UK, applied for naturalisation. That was refused as he declared a conviction for driving without insurance on 7 October 2010. We note that the remainder of the Appellant's family are naturalised as British citizens and, but for that conviction, it is likely that he too would have become a British citizen at that time.

11. On 2 December 2015, the Appellant was convicted of conspiracy to handle stolen goods and concealing, disguising, converting, transferring or removing criminal property. He was sentenced to terms of eighteen months and three years in prison, those sentences to run concurrently.

12. Thereafter, the Respondent notified the Appellant of her intention to deport him to Afghanistan. She invited him to make representations why he should not be deported. On 12 July 2016, the Respondent informed the Appellant that section 72 Nationality, Immigration and Asylum Act 2002 ("Section 72") applied to him and the Appellant was invited to rebut the presumption that he was not a danger to the community. Representations were made on 7 March 2016, 5 May 2016 and 31 July 2016. Representations were also made on 25 March 2017 dealing with the proposed revocation of the Appellant's refugee status as set out in the Respondent's letter dated 10 March 2017 ([AB/403-410]).

13. On 23 November 2017, the Respondent made the decision which is under appeal ([AB/241-262]) and signed a deportation order against the Appellant ([AB/263]). The decision included a certificate under Section 72. It also revoked the Appellant's refugee status applying Article 1C (5) of the Refugee Convention. The Appellant's claim to be at risk on return was rejected. His claim for humanitarian protection was also rejected. Finally, the letter also refused the Appellant's claim under Article 8 ECHR. We note that the decision letter is extremely detailed. We have paid careful regard to what is said, in particular in the letter dated 10 March 2017 ([RB/K1-7]) dealing with cessation of refugee status when reaching our decision.

THE ISSUES

14. It was agreed by the parties that the issues for the Tribunal to determine are as follows:

    Issue One: Should the certificate made under Section 72 be upheld? If so, the Appellant cannot benefit from the protection against refoulement in the Refugee Convention (although risk on return would remain relevant under Article 3 ECHR).
    Issue Two: If not, on what basis was the Appellant granted status in the UK in the past? Did that amount to recognition as a refugee? If it did not, then the issue of cessation does not arise.
    Issue Three: If the Appellant was recognised as a refugee, is the Respondent entitled to cease the Appellant's status under Article 1C(5) of the Refugee Convention ("Article 1C(5)")?
    Issue Four: Whatever, the answers to the first three issues, is the Appellant at risk on return to Afghanistan whether on the basis that he has a well-founded fear of persecution there (if he is entitled to benefit from the Refugee Convention) or under Article 3 ECHR?
    Issue Five: Also, whatever the answers to the first four issues, would the Appellant's deportation be disproportionate under Article 8 ECHR?

15. We deal below with each of those issues in turn, making reference to the relevant legal framework and evidence which relates to that issue.

ISSUE ONE: SECTION 72 CERTIFICATE

16. Section 72 reads as follows (so far as relevant):

> **"Serious criminal**
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—
> (a) convicted in the United Kingdom of an offence, and
> (b) sentenced to a period of imprisonment of at least two years.
> …
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.
> …
> (9) Subsection (10) applies where—
> (a) a person appeals under section 82 of this Act … wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and
> (b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).
> (10) The Tribunal or Commission hearing the appeal—
> (a) must begin substantive deliberation on the appeal by considering the certificate, and
> (b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).
> (10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007…"

17. Section 72 therefore provides for a presumption of certification where, as here, there is a sentence of more than two years, but that presumption is rebuttable. The Tribunal is required to begin its deliberations with the Section 72 certificate. We note, in this case, that this only becomes a live issue if we accept that the Appellant has been recognised as a refugee and/or if we accept that he is at risk on return as otherwise the Refugee Convention does not and could not apply to him in any event. However, as we will come to, we accept that the Refugee Convention does apply in this case. We therefore turn to consider Section 72 as it applies here.

18. The Respondent relies on the length of sentence coupled with the Judge's sentencing remarks as showing that the crime was a particularly serious one. Those remarks are at [RB/D2-7] and are as follows (so far as relevant):

> "[HSB] and [MK] …As you have heard me say, I suppose there is something to be said that you did not go into the witness box and try and give a jury some absolutely ridiculous account of where you said you got these phones or any sort of justification for where you might have got these phones.
> Necessarily, those who steal phones by whatever means have no incentive to steal them unless they can sell them on, get rid of them, for money. That is what this is all about. Huge amounts of money. Of course, it is no accident, I am afraid, [MK], that others knew about you so that you could go to the Big Yellow Storage Company. Of course, your cut in relation to each deal, as in fact the [Bs'] cut, was not the full value of the phone. You had to pay others, other dishonest people who you knew were dishonestly obtaining these phones by various means. The rest of society suffers as a result of that.
> The great pity is that neither of you had the strength of character to own up to it. There was no defence here, shamefully. Society welcomes you here. Hopefully you can make a better life, a life, for you and your dependants. You have elected to abuse that in this way and it is a huge shame. Custodial sentences are inevitable. There is absolutely no mitigation.
> So far as the [Bs] are concerned, [HSB], you may have a completely dependent mother. That in itself may be thought to be an extremely sad state of affairs, but that is your business, not this court's. They, of course, suffer as a result. That brings about shame. It may well be that you have managed to better yourself.
> I do not know how much your father was involved in the income that you received, but it was your telephone that had the IMEI numbers and there is no doubt at all from the overwhelming visual evidence. It would not have been thought for a moment that you were casually there playing on a mobile phone while they were selling these phones and taking the money or that you were unaware of what was happening or the fact that you put in a signed defence statement saying that, of course, you were the driver. You were saying that is the reason they got there. You did not dare go into the witness box and try and tell the jury that. I do not know what they would have thought. Who knows?...
> [HSB], so far as you are concerned, it is a sentence of three years' imprisonment on count 1. It is 18 months concurrent on count 2. There is no sentence obviously on count 3.
> So far as you are concerned, [MK] in fact I do think that you were lesser involved than the [Bs]. …"

19. The Appellant said in his oral evidence that he had pleaded guilty to the offence. However, as the sentencing remarks show and as the Appellant subsequently clarified, he pleaded guilty at the end of the trial before sentencing. He did not do so at the outset.

20. We have before us, at [AB/180-211] documents from the National Probation Service and the OASys report dated 25 March 2016. A letter from the Appellant's offender manager, Ms Nicole John at [AB/182-183] records that the Appellant has been released on licence since 21 February 2017. He has reported regularly to the Probation Service. The Appellant has employment working for his brother-in-law. Ms John sets out her views on the risk posed by the Appellant as follows:

> "Regarding [HSB]'s risk, I have utilised the Offender Group Reconviction Scale (OGRS). This is an actuarial tool that estimates the probability of an individual committing a further offence based on their age, previous convictions, age at first contact with the Police and other static factors. OGRS has calculated that [HSB] is 13% likely of committing another general offence within one year of community sentence/discharge, and 24% within two years. This indicates that there is a low risk of reconvictions; [HSB] was therefore assessed as a low risk of serious harm. It is my assessment that [HSB] is not a danger to society and he has completed the relevant work to ensure he desists from crime.
> Overall, it is my assessment that [HSB] has completed the rehabilitative work to reduce his risk to society. I believe that given the opportunity, he will desist from crime and continue his life in accordance with the law."

Nothing in the papers we have before us indicates that the Appellant has reoffended since his release.

21. We accept Ms Capel's submission that we must consider as a fact whether the Appellant was convicted of a particularly serious crime and whether he is in fact (presently) a danger (see IH (s.72 Particularly Serious Crime) Eritrea [2009] UKAIT 00012).

22. The Appellant points out that the offences of which he was convicted are not ones involving violence. The Respondent has provided no evidence that harm was caused or the extent to which the Appellant benefitted from his crime. We do not consider that it can be said based on the sentencing remarks that the Appellant played any lesser role in the offending, as was contended by the Appellant. His co-defendant was said by the Judge to bear less responsibility than the Appellant and possibly also members of the Appellant's family who appear to have been involved.

23. We accept that the length of sentence imposed is not determinative of the issue whether the crime is a particularly serious one (AH (Algeria) v Secretary of State for the Home Department [2012] EWCA Civ 395). Nonetheless, simply because the offence was not one involving violence does not mean it is not particularly serious. As the sentencing Judge pointed out, the incentive for those who steal phones is to make money from them. We take judicial notice of the fact that the stealing of mobile phones often includes violence. Whilst the offence of handling and converting those stolen phones does not itself involve violence it is indirectly linked to such violence. We accept that we do not have evidence as to the extent of the benefit which the Appellant individually received. However, Ms Cunha took us to the Statement of Offences which showed that the Appellant and his co-accused were said to be in possession of £122,000 cash, said to be the proceeds of the criminal enterprise. We record again that the Appellant pleaded guilty, albeit at a late stage, to the offences of which he was accused. £122,000 is a not insignificant sum.

24. For those reasons, we accept that the crime is one which is particularly serious. However, we do not accept that the Appellant continues to pose a danger. Ms Cunha accepted that the letter from Ms John to which we have referred shows that the Appellant is a low risk of serious harm. However, she said that the risk is managed because the Appellant remains on licence, is the subject of a deportation order and has been appealing against deportation since 2017, not long after his release. She asserted that the risk would be likely to be reignited if his appeal were allowed. She drew our attention to what was said by the Appellant in his oral evidence and submitted that this did not show contrition.

25. The Appellant deals with his offending in his statement dated 29 September 2018 ([AB/8-15] as follows:

> "18. If given the opportunity to build my life again in the UK, once I am mentally stable, I am hoping to join our family business and/or start my own business. At present, given the support from the family I work part-time with my brother-in-law at [B] London Ltd…
> 19. I am deeply remorseful for my actions in relation to the criminal charges against me whilst in this employment but I have served the appropriate sentence and have not been involved in any other wrong doings. I have also complied with all probation conditions. I acted out of immaturity and have been punished for same. I submit that my conviction should not be termed as serious crime which makes me a danger to the community. I have been working hard in the UK and unfortunately I got caught in this web of deceit as a result of bad influence. I cannot reverse the situation but there are very compelling circumstances that apply to me and outweigh the public interest which would make my removal to Afghanistan undesirable. I accept that I was convicted of an offence of theft/dishonesty. It is not an offence such as terrorism, sexual offence, violent offence or murder which are all serious offences which present a physical threat to the public. I have family in the UK who are dependent on me and vice versa and we share normal and emotional ties. I have learnt from my mistakes and I just want to become a better person…"

26. We accept that, at one point during his oral evidence, the Appellant did appear to disclaim responsibility but, having re-read our notes, we are satisfied that the Appellant was simply pointing out that he had not stolen the phones and not that he had not committed the crime of which he was accused and convicted. He accepted that he had known that the phones were stolen, and he expressed his remorse. We consider that remorse to have been genuinely expressed.

27. Having considered the available evidence and placing weight on the views expressed by Ms John, we are satisfied that the Appellant does not pose a danger to the public. The Appellant has successfully rebutted the presumption. We therefore find that the conditions for the Section 72 certificate are not made out.

ISSUE TWO: RECOGNITION AS A REFUGEE

28. As we indicated at [2] above, the Respondent was directed to serve on the Appellant documents relating to his father's asylum claim. Although the

Respondent was unable to provide a statement made by the Appellant's father at the time due, it appears, to it having gone missing from the file, the Respondent complied in substance with the disclosure direction. The documents appear at [AB/26-114] and show the following.

29. The Appellant's father, [PB], arrived in the UK illegally on 2 March 2002 and claimed asylum on the same day. That claim was refused by the Respondent on 23 March 2004. PB appealed. His appeal came before Adjudicator Mr K St J Wiseman who, in a decision promulgated on 9 November 2004 allowed the appeal on asylum and human rights grounds. The Adjudicator's decision appears at [AB/102-113]. The following parts of the decision are of particular relevance to the issue we have to decide:
(a) PB fled Afghanistan with his whole family but became separated from them during the journey ([2]);
(b) The essence of PB's claim was that he was harassed by the Mujahideen for money because they thought he was wealthy. He was ill-treated if he failed to pay. When the Taliban came to power, they also started to harass the family. They were ordered to wear different colour clothes to differentiate them from other groups. PB said that he was detained by the Taliban who sought money for his release ([3]);
(c) PB claimed in his witness statement that "[h]e was a devout practising Sikh and he and his family had always been subjected to persecution and harassment at the hands of the Islamic fundamentalists" ([7.2]);
(d) Adjudicator Wiseman had some doubts about PB's history but found the core of his evidence was credible (although also observed that "it would not matter very much if it was not") ([10.9];
(d) Having had regard to background material and relevant country guidance, Adjudicator Wiseman said this:

> "10.10 Both of the most recent cases clearly strongly assist this appellant; whilst the Tribunal has been at pains to say that each case has to be looked at on its individual facts, with respect that is not an easy exercise. None of the Sikhs in these important cases were leaders or controversial in any way; if they were discriminated against or ill-treated or prevented from following their religion properly it was simply because they were Sikhs; they were attacked at random because they had that one identifying feature.
> 10.11 A Convention reason is therefore clearly involved in the way that they are treated and either they are safe or they are not. The thrust of these most recent authorities is that they are not and where there is any significant doubt it must obviously be exercised in favour of an appellant; such an individual after all only has to show (in the context of his return) that there is a significant likelihood of persecution.
> 10.12 The thrust of these recent authorities is that the treatment of Sikhs in Afghanistan has moved from a sometimes unpleasant existence involving discrimination across the borderline that carries their treatment into persecution.
> 10.13 As the risk of whatever treatment is involved seems to me to derive simply from being a Sikh I am not entirely sure that the past history of an individual actually takes one very far; as a member of a clearly identifiable group an individual

> would obviously be at risk on return whatever had or had not happened to him personally before.
> 10.14 It may be that the position for Sikhs in Afghanistan is hovering at the moment on something of a borderline between just about tolerable discrimination and persecution. However even in that situation an appellant is entitled to the benefit of the doubt, and particularly for a Sikh from Jalalabad both the recent decided cases that I have referred to carry him in view across the borderline in question with relocation in Kabul being inappropriate or 'unduly harsh'."

30. Also of relevance to this issue is the way in which the Appellant himself was treated by the Respondent on arrival to the UK. The visa in his passport is stamped as for "family reunion" with PB ([AB/122]). The Appellant was on that basis given indefinite leave to enter. The Home Office GCID case records in relation to the Appellant (at [AB/124-179]) indicate that the caseworkers involved gave consideration to the issue whether to cease the Appellant's refugee status on the basis that the Appellant's refugee status was "recognised through his father". There is no apparent prior consideration to whether the Appellant had been recognised as a refugee and nor have any documents been disclosed dating back to the time when the Appellant was given a visa to enter the UK. A letter from the Home Office to the Appellant on 12 July 2016 ([RB/I1]) adopts the same position, stating that the Appellant had "been recognised as a refugee by the United Kingdom". The notes and that letter are supportive of the Appellant's case that the Respondent had recognised him as a refugee and intended to do so.

31. We would in any event have reached the same conclusion based on the legal test which applies. We can deal with the legal framework quite shortly as both parties agree as to the relevant case-law and what it has to say about the test.

32. The parties agree that, for our purposes, the relevant case is JS (Uganda) v Secretary of State for the Home Department [2019] EWCA Civ 1670 ("JS (Uganda)"). In that case, the appellant had come to the UK to join his mother who had been recognised as a refugee due to ill-treatment by the authorities in Uganda arising from political opinions which had been imputed to her. The Court of Appeal accepted (at [75] to [78] of the judgment) that the appellant in that case had been recognised as if he were a refugee based on the Respondent's family reunion policy and on his relationship with his mother. He was not recognised as a refugee in his own right. As an aside, we note that, in that case, the appellant was himself said to have been recognised as a refugee and therefore that his status had to be withdrawn. That is the same position as was adopted by the Respondent in correspondence in this case.

33. The Appellant in JS (Uganda) argued that a "derivative refugee" in the category of the appellant was also entitled to protection of the Refugee Convention. The Court rejected that submission, concluding at [125] that those who themselves had a well-founded fear of persecution for a Convention reason represented the entire class to whom the Refugee Convention applies. However, Underhill LJ (with whom Newey LJ agreed) pointed out at [190] that "this issue only arises in

cases where the risk of persecution which leads to the grant of protection to the 'primary' refugee does not also extend to his or her family members: very often of course it will, either because they share the same characteristic as gives rise to the risk or because the persecutor will extend his persecution of, say, a political activist to his or her family members irrespective of their own conduct or opinions."

34. We accept the point made by the Respondent that this issue depends on the facts of the case. We accept that the recognition of the Appellant's father as a refugee does not automatically confer a right to the Appellant. However, what is said by Underhill LJ in JS (Uganda) is highly pertinent to the instant case. The characteristics which were found to give rise to the risk to PB, namely that he was a practising Sikh from Jalalabad, at risk from discrimination amounting to persecution in that area and unable reasonably to relocate to Kabul apply equally to his son, the Appellant in this appeal. That is not the same factual scenario as existed in JS (Uganda) where the risks faced by the appellant's mother were based on her own political opinions which were not (on the face of the judgment) also imputed to the appellant.

35. For those reasons, we accept that the Refugee Convention applies to the Appellant. He was recognised as a refugee and, before the Respondent can return him to Afghanistan, the continuation of that status has to be considered.

ISSUE THREE: ARTICLE 1C (5) REFUGEE CONVENTION; ISSUE FOUR: RISK ON RETURN TO AFGHANISTAN

36. As we understood Ms Cunha to accept, once it is accepted that the Appellant is entitled to the protection of the Refugee Convention, the burden is on the Respondent to show that the circumstances which formed the basis of recognition of him as a refugee have changed. If we had reached the opposite conclusion, it would be for the Appellant to show that he has a well-founded fear of persecution on return. As it is, and based on the conclusion we reached on issue two, the relevant question is "whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would have been held to be a refugee" (MA (Somalia) v Secretary of State for the Home Department [2018] EWCA Civ 994 at [2(1)] – "MA (Somalia)").

37. We pause to note that it is not suggested by the Respondent that the Appellant falls to be excluded from the Refugee Convention by Article 1F. That is mentioned as an issue in the Appellant's skeleton argument but does not arise for determination.

38. The Court of Appeal in MA (Somalia) endorsed the "mirror image" approach to cessation. The Court of Appeal was referred to MM (Zimbabwe) v Secretary of State for the Home Department [2017] EWCA 757 on which judgment Ms Cunha

relied. Paragraph [24] of that judgment neatly encapsulates the approach to the Article 1C (5) issue as follows:

> "However, Article 1C (5) is framed more widely than this, and requires examination of whether there has been a relevant change in 'the circumstances in connexion with which [a person] has been recognised as a refugee'. The circumstances in connection with which a person has been recognised as a refugee are likely to be a combination of the general political conditions in that person's home country and some aspect of that person's personal characteristics. Accordingly, a relevant change in circumstances for the purposes of Article 1C (5) might in a particular case also arise from a combination of changes in the general political conditions in the home country and in the individual's personal characteristics, or even from a change just in the individual's personal characteristics, if that change means that he now falls outside a group likely to be persecuted by the authorities of the home state. The relevant change must in each case be durable in nature."

39. In this case, given the characteristics on which PB's asylum claim was based and which we have concluded also gave rise to recognition of the Appellant as a refugee, our consideration is necessarily more limited. The Appellant remains a practising Sikh. The issue is therefore in reality a limited one. We have to consider whether the situation for Sikhs in Afghanistan has undergone a "significant and non-temporary" change so that the Appellant no longer needs international protection and can return to his home country.

40. Ms Cunha drew our attention to the case of TG and others (Afghan Sikhs persecuted) Afghanistan CG [2015] UKUT 00595 ("TG"). The headnote in that case reads as follows:

> "**Risk to followers of the Sikh and Hindu faiths in Afghanistan:**
> (i) Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.
> (ii) Members of the Sikh and Hindu communities in Afghanistan do not face a real risk of persecution or ill-treatment such as to entitle them to a grant of international protection on the basis of their ethnic or religious identity, per se. Neither can it be said that the cumulative impact of discrimination suffered by the Sikh and Hindu communities in general reaches the threshold of persecution.
> (iii) A consideration of whether an individual member of the Sikh and Hindu communities is at risk real of persecution upon return to Afghanistan is fact-sensitive. All the relevant circumstances must be considered but careful attention should be paid to the following:
> a. women are particularly vulnerable in the absence of appropriate protection from a male member of the family;
> b. likely financial circumstances and ability to access basic accommodation bearing in mind
> - Muslims are generally unlikely to employ a member of the Sikh and Hindu communities
> - such individuals may face difficulties (including threats, extortion, seizure of land and acts of violence) in retaining property and / or pursuing their remaining traditional pursuit, that of a shopkeeper / trader

- the traditional source of support for such individuals, the Gurdwara is much less able to provide adequate support;

c. the level of religious devotion and the practical accessibility to a suitable place of religious worship in light of declining numbers and the evidence that some have been subjected to harm and threats to harm whilst accessing the Gurdwara;

d. access to appropriate education for children in light of discrimination against Sikh and Hindu children and the shortage of adequate education facilities for them.

(iv) Although it appears there is a willingness at governmental level to provide protection, it is not established on the evidence that at a local level the police are willing, even if able, to provide the necessary level of protection required in Refugee Convention/Qualification Directive terms, to those members of the Sikh and Hindu communities who experience serious harm or harassment amounting to persecution.

(v) Whether it is reasonable to expect a member of the Sikh or Hindu communities to relocate is a fact sensitive assessment. The relevant factors to be considered include those set out at (iii) above. Given their particular circumstances and declining number, the practicability of settling elsewhere for members of the Sikh and Hindu communities must be carefully considered. Those without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms.

(vi) This replaces the county guidance provided in the cases of K (Risk - Sikh - Women) Afghanistan CG [2003] UKIAT 00057 and SL and Others (Returning Sikhs and Hindus) Afghanistan CG [2005] UKAIT 00137."

41. We accept, as Ms Cunha submitted, that this guidance does not suggest that all Sikhs are at risk on return. As we observed however it is rare that country guidance suggests that all individuals in a particular category are at risk. Consideration of an asylum claim is inevitably a fact sensitive assessment. Neither do we accept her submission that, had this been the country guidance at the time of PB's appeal in 2006, the outcome would not have been the same. As the passage which we have cited at [29] above shows, even at that time it was not accepted that all Sikhs from Afghanistan would be able to establish a well-founded fear of persecution on return. We remind ourselves again, of course, that in this case, and when considering the cessation issue, the burden is not on the Appellant to establish that he has a well-founded fear of persecution but on the Respondent to show that the circumstances have changed.

42. We turn then to the expert evidence. The most recent country expert evidence is the Expert Report at [AB/567-610]. In addition to the Expert Report, the country expert, Dr Giustozzi, has provided two further reports in this appeal on 18 March 2017 ([AB/369-402]) and 2 October 2018 ([AB/611-617]). We accept that Dr Giustozzi, is recognised as a leading country expert on Afghanistan. He is described as such at [17] of the decision in TG.

43. We have focussed on the Expert Report dated 30 January 2020 as the most recent. However, before turning to that report, we mention the following aspects of the earlier reports to which our attention was drawn and provide our comment on those aspects:

(a) Mistreatment of Sikhs by the authorities. The paragraphs of the earlier reports to which our attention was drawn ([AB/382 and AB/399-400]) refer to incidents in 2012. Those incidents are too historic to be of relevance. The Expert Report records an improving position regarding treatment of Afghan Sikhs by the authorities (see below).
(b) Similarly, we do not consider it appropriate to consider the levels of violence based on a 2013 report or the position in 2014 ([AB/391]) or harassment and abuse based on the position in 2014 ([AB/390] and [AB/402]). We have regard below to the more recent situation as set out in the Expert Report.
(c) The targeting of Sikhs by criminal gangs in conjunction with the police as referred to at [AB/387-390] is similarly historic (footnotes date from 2002-2016). Again, we have regard to the position as set out in the Expert Report below.

44. As Ms Cunha accepted in the course of her submissions, Dr Giustozzi reports a "dramatic decline" in the number of Sikhs in Afghanistan. The numbers vary as Dr Giustozzi acknowledges but, in 2019 were said to comprise somewhere between 220 and 250 families of 1000-1800 members. As Dr Giustozzi points out, the sample of incidents of violence recorded in his report has to be looked at in the context of the very small numbers of those available to be targeted.

45. The Appellant and his family emanate from Jalalabad. Dr Giustozzi draws attention to a targeted suicide attack against a Sikh community in that area in July 2018 which killed nineteen people, including thirteen Sikhs. Dr Giustozzi records that "[t]his attack was the bloodiest ever carried out against Sikhs in Afghanistan and is likely to have strong repercussions on the Sikh community in Jalalabad. According to two community leaders, after the attack several local families fled to India and the Jalalabad community is now down to just a few families."

46. This attack was thought to be the work of the Islamic State. However, Dr Giustozzi also reports on continuing threats and attacks by the Taliban and abuse from the wider population.

47. On a more positive note, Dr Giustozzi acknowledges that there has been an improvement in the attitudes of the police under the direction of President Ghani who ordered the police to prevent street abuse against Sikhs. As a result, the behaviour of the wider population in terms of harassment and discrimination is said to have improved albeit Sikhs are still referred to as "kafirs". Dr Giustozzi also records that "[s]ystematic extortion seems to be in decline" but points out that this may be due to the declining wealth of the Sikh community. He also records a July 2019 interview reporting a wave of armed robberies against Sikh shops.

48. Notwithstanding those more positive developments, Dr Giustozzi is of the opinion that "[t]he police would not be able to protect [the Appellant] even if they wanted to". He records reports of police bribery and corruption on the part of the

law enforcement agencies in Afghanistan and of ineffectiveness in providing protection.

49. Dr Giustozzi also reports that "[t]here has been no significant progress after 2017 in reclaiming ownership of properties taken from the Sikh community" although we do not understand this to be put forward as a relevant factor in this case. There is no suggestion that PB has any property to which he or the Appellant would wish to lay claim.

50. Dealing with the particular circumstances of the Appellant, Dr Giustozzi points out that "[v]irtually all Sikhs in Afghanistan have their own business, as they are unemployable". The Appellant's lack of language skills in Dari and Pashto would, in Dr Giustozzi's opinion, render the Appellant "completely unemployable". If the Appellant cannot find work, and has no family support, without any assistance to refugees in Afghanistan, he would probably have to look to the Sikh community for assistance and accommodation (in the Gurdwara). As he points out, "[a]s 80% of the remaining Sikh population is displaced, any help coming from members of the Sikh community is inevitably going to be very limited". Even if the Appellant could find employment, he would face difficulties in obtaining accommodation as Muslims would not wish to rent to a Sikh. He would not be allowed to reside in the Gurdwara indefinitely.

51. Ms Cunha drew our attention to what is said in the Expert Report about the Home Office's Country Policy and Information Note entitled "Afghanistan: Sikhs" dated May 2019 ("the 2019 CPIN"). Dr Giustozzi cites the following passage from the 2019 CPIN ([26] of the Expert Report):

> "There are not very strong grounds supported by cogent evidence to justify a departure from the conclusions of TG and others. Whilst there have been attacks on Sikhs and Hindus, notably the July 2018 suicide bomb attack in Jalalabad, they do not appear to have escalated to the point that the conclusion at (ii) above should change. Similarly, whilst Sikhs and Hindus also continue to experience discrimination, it has not escalated or changed to the extent that the conclusion at (ii) above should change."

Although the 2019 CPIN no longer appears on the Home Office website and is not produced in evidence, we understand the conclusion there mentioned to refer to the guidance given in TG about the general risk to Afghan Sikhs.

52. Dr Giustozzi takes issue with the 2019 CPIN passage which we have cited for the following reasons:
(a) The dramatic decline in the population of the Sikh population in Afghanistan. He points out that the Rohingya in Myanmar has not suffered such a dramatic decline in numbers and yet is accepted to be a persecuted minority.
(b) Although harassment in Kabul at least may have diminished, the level of violence against Afghan Sikhs is very high when judged against the decreasing numbers of that community.

(c) Hardly any Sikhs have returned to Afghanistan from India. Only 40-50 families have done so.
(d) The level of indiscriminate violence even in Kabul has prompted UNHCR in 2018 to state that internal relocation to Kabul is no longer viable. We disregard this reason as running contrary to the recent guidance given in AS (Afghanistan). We note however Dr Giustozzi's view that "[the Appellant] would be at risk from Muslim zealots anywhere in Afghanistan and likely from insurgents too if they returned to Jalalabad".
(e) The Appellant has no source of livelihood or home in Afghanistan. As we have already referred to, Dr Giustozzi is of the view that the Appellant is virtually unemployable other than by other Afghan Sikhs.
(f) The Khost community disappeared a few years ago. The Lashkargah and Kunduz communities have recently been "pushed out by the violence". The Ghazni community is "on the verge of disappearing" and the Jalalabad community is "seriously imperilled".
(g) It is not safe for Afghan Sikhs in Kabul. Plans to set up a development area on the outskirts of Kabul for the Sikh community has been opposed by local communities. We note the reference to this plan in the Respondent's letter dealing with cessation of status ([RB/K3]). According to Dr Giustozzi, a ceremony which took place to transfer control of the area to Sikhs was disrupted forcing the government representatives and Sikhs to flee. Those who disrupted the ceremony "held hundreds of Sikhs for hours and warned them never to come back". The plan is also opposed by the Sikhs due to the quality of the area. The area is also "subject to significant Taliban infiltration".

53. Although we were not taken to it in the course of submissions, we have regard to the view expressed by UNHCR which was consulted by the Respondent in relation to the cessation of the Appellant's refugee status. UNHCR's views are contained in a letter dated 17 May 2017 at [RB/O1-8]. UNHCR draws attention to the situation for civilians in Afghanistan generally. The salient paragraphs for our purposes, concerning the plight for Afghan Sikhs in particular are as follows:

> "UNHCR notes that there are increased tensions between minority Sikh and Muslim communities, and UNHCR wishes to draw the HO's attention to the fact that [HSB] may be additionally targeted as a Sikh in Afghanistan. The *HO Policy and Information Note on Afghanistan: Hindus and Sikhs* [2017] highlights the discriminatory societal treatment that Sikhs face in Afghanistan.
> *'There are reports that the Sikh and Hindu communities face societal intolerance which some commentators have attributed to 'extremist elements' who have moved from the provinces to Kabul and other cities.'*
> *'Some members of the Sikh and Hindu communities in Afghanistan continue to suffer harassment at the hands of Muslim zealots.'*

54. We also consider the evidence regarding the position in Kabul in the event of the Appellant being unable to return to Jalalabad. The country guidance given in AS (Afghanistan) was not concerned with Afghan Sikhs per se. It did however give guidance on factors which might be relevant to the situation for a person with

other characteristics possessed by the Appellant. Those characteristics are "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".

55. We do not understand it to be disputed that the Appellant does not have continuing connections to Afghanistan, whether to his home area or Kabul. He came to the UK in 2006 when he was aged only fifteen. He has lived in the UK for nearly fifteen years. We have already pointed to Dr Giustozzi's view that the Appellant would be "virtually unemployable" other than by Afghan Sikhs. The Appellant does not speak Dari or Pashto.

56. In addition, the Appellant has mental health difficulties. The latest report which we have in that regard is the Medical Report at [AB/618-633]. The author of the Medical Report is Mr Thomas J Sobel, MA, MBACB. He is a specialist in mental health and trauma. He has fifteen years' experience in those fields. The Medical Report offers a balanced assessment of the Appellant's difficulties. We give it weight. The Medical Report provides the following insight into the Appellant's problems:

> "31. [HSB's] depression and anxiety continue to be exacerbated by fear and worry surrounding his forthcoming immigration status hearing, as well as the possibility of being returned to Afghanistan. He still suffers flashbacks related to bullying from his ex-wife and her parents, as well as fears of religious persecution and possible death if he is returned to Afghanistan.
> 32. Additionally, since I first saw [HSB], he has begun to misuse pain medication as means of coping with chronic pain, as well as his anxiety and depression.
> 33. During the assessment, [HSB] was hyper verbal and his speech pressured. At times, it was difficult to keep him on task and he needed redirection. This may be due to his anxiety, or perhaps another underlying condition. Again, I would recommend he visit a psychiatrist to rule out any further underlying conditions, such as Adult Attention Deficit Disorder.
> 34. Due to his difficulties remaining on task may impact his ability to provide clear and concise response to questioning, it is important to speak clearly and directly to [HSB]. In addition, if [HSB] is still taking a higher than recommended dose of pain medications, this may also affect his ability to concentrate and provide accurate answers to questions. Despite [HSB]'s having difficulties concentrating and remaining on task, I do not believe [HSB] should not be considered vulnerable based on the Presidential Guidance Note No 2 of 2010.
> 35. The International Classification of Diseases (ICD-10) is the classification used since 1994 by the World Health Organization (WHO). It has become the international standard diagnostic classification for most epidemiological purposes. [HSB]'s clinical impression appears to conclude that he suffers from Post-traumatic Stress disorder, as well as moderate depression and mild anxiety based on clinical assessments administered. In addition, I would recommend a follow up consultation with a psychiatrist to rule out Adult Attention Deficit Disorder based on my observed interactions and difficulties with attention section of the Mental Status Exam.

> …
> 36. [HSB] states previously experiencing suicidal thoughts. He has previously stated that "*If they deport me, I would rather kill myself because they [religious extremists] will abuse and torture me. If I go back, it's the end for me.*" [HSB] states he would use a kitchen knife or a razor blade to kill himself. When asked what keeps him safe for now, [HSB] states his worry about what would happen to his mother is what keeps him from acting on his suicidal ideations.
> 37. [HSB] states he last experienced suicidal ideations in December 2019 after his last hearing regarding his asylum case.
> 38. At this time, [HSB] appears rational and is not impulsive. However, whilst he has no previous suicide attempts, he has expressed concrete plans as to how he would suicide [sic]. If returned to Afghanistan, [HSB]'s mental health and wellbeing may decompensate and thus increase the risk of him harming himself. Additionally, he would not have the community and family support that he has here in the UK.
> 39. If he is allowed to remain, [HSB] will be able to access appropriate mental health and substance misuse treatment and have an access [sic] to an established primary support network in the UK. Along with psychological treatment, including counselling, CBT, substance counselling and detox, and possibly Eye Movement Desensitization and Reprocessing (EMDR) therapy, he stands a better chance of a positive outcome in his mental health stability and recovery.
> 40. As indicated by World Health Organisation's Mental Health Atlas country profile 2014, I am concerned [HSB] would not have access to, or receive the specialised psychological treatment required if he is returned to Afghanistan."

57. Our attention was also drawn to a letter dated 6 July 2020 from Bhajan Singh Kapoor, the chairman of Khalsa Diwan Afghanistan, a registered charity based in the UK ([AB/747-754]. That letter is interesting for the details of the various attacks which have occurred in Afghanistan, against Sikhs and more generally. Specifically, our attention is drawn to an incident in March 2020 (post-dating the Expert Report) where Islamic State gunmen stormed a Gurdwara in Kabul and killed twenty-seven worshippers there. The funeral procession which took place on the following day was also targeted with rocket attacks and land mines along the route.

58. Finally, we have regard to the guidance given in TG at (v) that "[t]hose without access to an independent income are unlikely to be able to reasonably relocate because of depleted support mechanisms".

59. We end our consideration where we started. It is for the Respondent to show that there has been a significant and non-temporary change in the conditions which led to the recognition of refugee status. The recognition was based on the Appellant's position as a practising Afghan Sikh.

60. We accept Dr Giustozzi's evidence that the population of Afghan Sikhs has dramatically declined. Ms Cunha did not dispute that evidence and it is consistent with the 2019 CPIN. As such, the evidence about attacks and abuses has to be seen against the backdrop of a very small population of targets. We

have drawn attention to the evidence about the 2018 attack in Jalalabad and a more recent attack on a gurdwara in 2020 (see [45] and [57] above). Although those attacks killed a total of forty Sikhs, that number has to be seen in the context of a population of less than two thousand. Whilst we accept that this is evidence of only two major attacks in a two year period, those are in addition to the general level of violence in Afghanistan and also smaller, random incidents of abuse and threats.

61. We accept that the position in relation to discrimination may have improved to some extent and that the police themselves may no longer harass and discriminate Afghan Sikhs. However, as Dr Giustozzi concludes, even if the police are willing to provide protection, they are unable to do so. Again, that position appears consistent with the Home Office's own policy guidance.

62. We accept also that the position in relation to systemic extortion may have improved. That may well be, as Dr Giustozzi opines, because the wealth of the Sikh community has diminished. In any event, however, it has little bearing on this case as it is not suggested that the Appellant would return with any wealth.

63. We have regard also to the effect which that factor would have on internal relocation. It is accepted by the Respondent, based on the guidance in TG that, without independent income, it is unlikely to be reasonable for the Appellant to relocate. We would in any event have reached the same conclusion based on the guidance in AS (Afghanistan) having regard to the Appellant's age he was when he left Afghanistan, lack of familiarity with Kabul, lack of any support mechanisms there and his mental health.

64. We remind ourselves that the burden is on the Respondent to show that the circumstances in Afghanistan for the Appellant have changed to a significant and non-temporary degree. Taking into account the totality of the evidence, the Respondent has not discharged that burden. We accept therefore that the Appellant continues to have a well-founded fear of persecution for a Convention reason. In those circumstances, the Appellant's status as a refugee cannot be ceased.

65. As we indicated at the outset of this section, if we reached the conclusion that the Appellant's status could not be ceased based on the current circumstances in Afghanistan, it would not be necessary for us to reach any further conclusion on Issue Four as that would be determinative as to the risk on return.

66. We do not consider it necessary either to consider Issue Five. The Appellant is and remains a recognised refugee and cannot be returned to Afghanistan. There is no purpose in considering the impact on his family and private life in the event of return.

DECISION

The appeal is allowed on protection grounds. The Appellant's deportation to Afghanistan would breach the Refugee Convention.

Signed *L K Smith* Dated: 29 April 2021
Upper Tribunal Judge Smith