



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/04381/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 11th December 2014**

**Decision & Reasons Promulgated
On 6th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

**MR FAHIM JAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bandegani - Counsel

For the Respondent: Mr Tufan - Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by Fahim Jan, a citizen of Afghanistan born 10th July 1995. He appeals against the decision of the Respondent made on 7th May 2013 to refuse to vary his leave to remain in the United Kingdom and to remove him to Afghanistan. The Appellant's appeal against that decision was heard on 9th September 2013 by First-tier Tribunal Judge Youngerwood and was dismissed on asylum, human rights and humanitarian protection grounds.

2. On 19th February 2014 having heard submissions I found that there was a material error of law in the determination of Judge Youngerwood and I set his decision aside insofar as it related to Article 8 and humanitarian protection. With regard to the Article 8 issue I found that Judge Youngerwood had failed to take account of the medical evidence, in particular a medical report from Dr Perrin, a Consultant Clinical Psychologist who found the Appellant to be suffering from post-traumatic stress disorder (PTSD) the approximate cause of which was the murder of his parents in Afghanistan.
3. I have a statement from the Appellant which is undated but which I believe was prepared for the hearing before Judge Youngerwood. Much of this statement is in relation to the Appellant's asylum claim which is not an issue before me. The Appellant states the following. He was the oldest child in the family and was very close to his mother. He lived in Seghani village. He points out that there are a lot of differences between Afghanistan and the UK such as the fact that there are postcodes here and everyone knows where everywhere is. That is not the case in Afghanistan. Also he did not know when he was growing up that Afghanistan was at war. He just thought it was what happened there. It was only after he came to the UK when he was 13 that he realised that we refer to the situation there as "a war". He describes what would happen near his village on a day-to-day basis. The American Army was in Baghram and would send the army to different towns where there was violence. Afghanis like him knew there were French people there too but they only knew they were French because their cars were a different colour from the cars belonging to the American soldiers. He would see helicopters flying over the mountains and planes. He remembers someone having their hands cut off for working for the Americans. His father went to work for the Americans but he did not really know anything about what his father did. He knew the Taliban were bad but he did not know much else about them. He knew they liked killing people. He was at his grandma's when his uncle told him that his family had been killed by a bomb.
4. At the time the Appellant prepared that statement he was living with a carer called Trina. He calls her "mum". He understood that he would be there at least until he turned 18 but could stay until he was 21. Trina is very important to him. He misses his family. He has a girlfriend Laura who he met about three years prior to the preparation of the statement. They met at school. They were in the same class. She has helped him with his English. It is a serious relationship. They have made plans for everything. As soon as he can travel they will go on holiday. They will then get engaged. He wants to be an interpreter.
5. The Appellant provided an updated statement for the hearing before me in which he states that he felt hopeless when his appeal before the First-tier Tribunal was dismissed. He went to Laura. He talked to Trina as well and to Laura's mum. When he was 18 he had to move out of Trina's house although he did not want to. Trina also wanted him to remain but Social Services would not allow it. Since then he has moved four times. He was sent to Dover initially and was really unhappy because he has family in Margate. That is where he has grown up and the place that is home for him. They eventually did move him to Margate but the place they housed him

was awful. It was like a rubbish tip. He stopped eating. He had no energy. He could not sleep. He could not wash his clothes. He felt like finishing with life. He felt as if no-one cared about him. He started to hear voices. He thought about hanging himself or taking poison. He discussed this with Laura and she told him not to be stupid. They had moved him back to Dover a few weeks previously but he hates being separated from his family and so has been spending nights in Margate instead. He sees Trina once or twice a week and speaks to her a lot. He still thinks of her as his mum more than his carer. His relationship with Laura has become more serious.

6. I have two statements from Katrina Etheridge (Trina). She states the following. She is a foster carer and has been for about fifteen years. The Appellant came to live with her in August 2013. He is a good boy and respectful. When he first arrived he was difficult. He was rude. He always seemed like he was carrying the world on his shoulders. He says he cannot go back to Afghanistan because it is not safe for him. He needs someone to look after him. He is not just your average 17 year old boy. He is not in contact with anyone in Afghanistan and has no-one there. She was told this by his social worker. The loss of his family has definitely affected him though he does not openly show it. She is very close to him. His girlfriend Laura has a good effect on him. She is a lovely girl. He received a letter from Afghanistan that came to his previous carer Vicki. It was a letter from his uncle about the Taliban. His uncle had told him he was leaving the country because it was so dangerous. The Appellant cannot understand how he can go back when he has no family there. He is settled in the UK. He has always called her mum from when he first arrived. They have their ups and downs like all parents do. He is very very worried and concerned about going back to Afghanistan. He does not know what would happen to him. It is very hard for him. He has been having bad dreams.
7. In her updated statement she says that she has been seeing the Appellant regularly over the last year, maybe every week and they speak on the phone. She sees him with Laura. When you see one you see the other. They seem happy and he treats Laura well. His mind however always seems to be elsewhere like he has a weight on his shoulders. She wants to be there for him. She is due to go into hospital for surgery and the Appellant is very worried about her. He is panicking about it.
8. I have two statements from Laura Garratt who was born on 25th October 1995. She is a British citizen and lives in Ramsgate. She is doing a hair and beauty GCSE at East Kent College - a one year full-time course. She was planning to do Art and Design level 2 then A levels. She met the Appellant at school. They have discussed getting married. They want to wait until they have lived together and have the money to afford it. They learn a lot from each other. He is different. He is fun to be around. At the beginning of their relationship it did not occur to her that the fact that he was from Afghanistan would be a problem. By the time his application was refused their relationship had become really serious and she does not know what she would do if he got sent back. She cannot move to Afghanistan. She is still young and needs an education. All her family are in the UK. She does not understand the culture of

Afghanistan. Sometimes the Appellant phones her in the middle of the night because he cannot sleep and is worried about everything.

9. I have two statements from Kim Kirby who was the first person who cared for the Appellant on his arrival in the UK on 1st July 2009. She says he was very very quiet and very scared. He was totally bewildered. He did not understand that he was in England until the interpreter made it clear to him. He told them about his journey and that his family had been killed in an attack on their car. He should have been in the car that day and the only reason he was not was because he went to see his grandma. Ms Kirby says she and her husband were due to go away on holiday on 31st July 2009. The holiday was paid for. They tried to explain to the Appellant that they were having to go and that they would take him and another boy who was staying with them to respite care but the Appellant would not accept that. He was adamant that he would run away as soon as they left him. He called them every day while they were in Italy and kept complaining and saying he would not stay. He was very unhappy. He obviously felt left out. They spoke to him as much as they could while they were away and after they came back he settled down fine. She gives details of other difficulties that the Appellant had. He would talk sometimes about having lost his family. He left her home in November that year but has stayed in touch since, popping round whenever he fancies. He has improved a lot since he met Laura. He has grown up a lot. He was angry when he was with them at the fact that he had lost his family and struggled a lot. He always wanted to fight with other boys. He would trash his room or break things but is very different now. He attends lots of family occasions with them. He has learned a lot. He understands that he behaved badly. He knows that her family are all there for him. He has grown up into a lovely young man. He does comment on the fact that he has had nine different foster families since he left her care. He speaks of the mistakes he made and how stupid he was. She understands however that he was very young, in strange surroundings and without his family. He was very confused. He is more independent and does not really mix with the other Afghani boys in the area.
10. In her updated statement she says that she has been seeing the Appellant over the last year. He was indeed coming round the night she prepared the statement. She still does fostering. It has been a difficult year because he does not know what is happening with his case and was unhappy about being moved to Dover away from everyone he knew, but she and her husband will always support him.
11. The final statement is from Ms Anna-Maria Victoria Bernadette Andrews who was the Appellant's foster carer for over a year from February 2010. Their relationship ended after her husband had a serious argument with the Appellant. He could no longer tolerate the Appellant's behaviour and they felt they had to let him go. The Appellant was very very upset about that. He was traumatised. They felt he had mental health problems and they spoke to the social worker about it. He once punched a door so hard that he broke it. He did not want to go to the counselling sessions. After he moved out they received a couple of things in the post for him. There was a letter from Afghanistan. He picked it up and was excited about it. They stayed in touch but do not talk very often. She has a lot of sympathy for his

situation. He is terrified about going back. He has been ruined for his own society and she cannot see how he would fit in in Afghanistan. He would not understand the rules there and his aggression could get him into a very difficult situation.

12. I have a report from Dr Rachel C Thomas, a Consultant Clinical Psychologist, which was prepared following a meeting and an interview with the Appellant on 10th July 2014. She sets out the documents that were before her and the questions that she was asked by the Appellant's solicitors who instructed the report. These included a request for her view of his prognosis and what the effect would be on him of return to Afghanistan. The report is very comprehensive and thorough and contains comments on his capacity to give evidence. She describes the Appellant as a "significantly psychiatrically unwell young man". She gives recommendations for procedures to be adopted at the hearing in order to make things easier for him. She recommends treatment for him.
13. Her conclusion is that the Appellant is:

"A highly traumatised and psychiatrically ill young man, currently suffering from moderate-severe symptoms of major Depressive Disorder with additional symptoms of PTSD following a series of reportedly cumulatively traumatic life events as described above. His recent deterioration has been prompted by problems with where he is living as well as fears regarding his future. However the objective symptoms I observed when we met as well as what he recounted to me gave me reason to believe that his current situation is exacerbating a previous condition caused by the traumatic life event of the deaths of his immediate family members as reported. The severity of his mental condition is not what I would expect from the effects of exile, separation from family and uncertainty alone."

She says that if he is returned to Afghanistan in his current psychiatric condition the prognosis for psychiatric recovery will be extremely poor. He is indeed likely to suffer a significant psychiatric deterioration. She anticipates that he is likely either to commit suicide or to require long term in-patient psychiatric care. In the UK he will have the benefit of feeling safe and of being able to receive the psychotherapeutic and medical help that he clearly urgently requires for the treatment of his psychiatric symptoms.

14. There is also a report from Dr Sean Perrin, also a Consultant Clinical Psychologist, who met with the Appellant on 27th August 2013. He too lists the documents he had before him. He noted that the Appellant was complaining of symptoms of anxiety and depression consistent with him having been exposed to a traumatic event in Afghanistan and having a genuine fear of further traumatic exposure/harm should he be returned there. He describes these symptoms in detail. He says that the intrusive thoughts that the Appellant has and his nightmares are specifically about the traumatic loss of his parents. The doctor did consider whether any other incident could have caused this but considered not. He suggests treatment by way of trauma-focussed cognitive behavioural therapy. He too says that deportation before treatment has been completed successfully would significantly increase the

Appellant's risk of a suicide attempt, particularly given his propensity to become angry.

15. I have an expert report from Dr Antonio Giustozzi which I have taken into account. His view is that the Appellant would be likely to find earning a living challenging and that it would be hard for him to get accommodation in Kabul.

Evidence at the hearing

16. I heard oral evidence from the Appellant. In the course of cross examination he said that he sees his girlfriend two or three times a week. They spend as much time together as possible. She is at college. I heard evidence too from Laura Garrett, who said she had never heard the Appellant talk to anyone in Afghanistan on the phone and believes that he has no family there. Their plan is to save money, work towards being able to live together and eventually marry. She does not understand Afghani culture and feels it is a dangerous country. Katrina Etheridge confirmed her close relationship with the Appellant, saying he is constantly there for her and always will be. She needs him and wants him to stay in the UK.
17. I have a skeleton argument from the Appellant's representatives in which it is submitted that without family support in Afghanistan the Appellant is at real risk of serious harm. He will be homeless and destitute. His health is a relevant factor. He would not be able to access treatment in Afghanistan.
18. In oral submissions Mr Tufan accepted that the Appellant has psychiatric problems but relied on paragraph 20 of **AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163** in which it is said that 60% of the Afghani population suffer from mental health problems. He relied to on the following comments made by the Tribunal in **AK -**
 - i) there is little evidence of significant numbers of the urban poor and IDP population suffering destitution or inability to survive at subsistence levels.
 - ii) there are reintegration packages available for returnees
 - iii) it is likely that shared accommodation would be available in Kabul to a young single man with no family support who could live there in safety and without undue hardship.
 - iv) there is a significant level of support available from domestic and international aid and humanitarian organisations.
19. Mr Tufan also relied on **KH (Afghanistan) v SSHD [2009] EWCA Civ 1354C** in which the Court of Appeal considered the return to Afghanistan of a young man with psychological problems including symptoms of PTSD. The Court of Appeal found that the Appellant's case was not one of those 'very exceptional cases' envisaged in the applicable caselaw. Mr Tufan relied on paragraph 33 in which the Court said that the truth is that the presence of mental illness among failed asylum seekers cannot really be regarded as exceptional. Mr Tufan concluded that the only

door open to the Appellant is Article 8 ECHR and that must fail. There is nothing exceptional either in his relationship with Laura Garrett or that with Ms Etheridge.

20. In response Mr Bandegani submitted that it is the substance of the Appellant's relationships that is important. He has a genuine family relationship with both Ms Garrett and Ms Etheridge. He submitted that **KH** has no application to the Appellant's case. He asked me to take account of the fact that the Appellant has been in the UK since he was 13 years old. It has been accepted by the Secretary of State that the situation in Afghanistan has deteriorated. The conditions are really bad. The Appellant will return to destitution. The Appellant is integrated into the British way of life. He is not a Muslim. He is failing to remember his own language. The facts of this case are unique.

My findings

21. I have given very careful consideration to all the evidence put before me in this case.
22. I accept that the Appellant's parents were killed in Afghanistan and that it is more likely than not that he has no family there. I have evidence from three of his foster carers and there is no suggestion from any of them of any contact with Afghanistan apart from the one letter from his uncle who I accept is no longer there. I accept that the death of his parents is to a large extent responsible for his current psychological problems. I give particular weight to the report by Dr Thomas. Her diagnosis of the Appellant's condition and the reasons for it are very clear. I also take account of her opinion on the difficulties he would face on return to Afghanistan.
23. This is an unusual case in that a very detailed insight into the Appellant's arrival in the UK and how it affected him. A great deal of information has been provided by his three foster mothers, all of whom it seems have been candid about how difficult he was and how his behaviour and attitude have changed. All of them paint a picture of a rather lost young man desperate for a mother figure and for security. Clearly he requires and relies on a lot of support from at least two of his previous foster parents and moving him away from his friends and family in the UK affected him badly.
24. I accept that the Appellant can be said to be a young man who has had the benefit of an education in the UK. He is physically healthy. I accept that he would only be one of many in Afghanistan suffering from psychological problems in Afghanistan, given the state of war that has been ongoing and the vast number of lives lost.
25. On the issue of Humanitarian Protection Mr Bandegani submitted that **AK** can be distinguished as the situation in Afghanistan is worse than it was in 2012 and it would be unduly harsh for the Appellant to have to return to Kabul as he has no family there.
26. The current reports on Afghanistan say that there were increased numbers of civilian casualties in Afghanistan in the first half of 2014. There is reference to more civilians having been killed and injured in ground engagements and crossfire between anti-government elements and Afghan national security forces. The majority of these

incidents involved improvised explosive devices. A 17% increase in civilian deaths and 28% increase in injuries were recorded. A report in May 2014 by the International Crisis Group refers to the overall trend being one of escalating violence and insurgent attacks.

27. So far as Humanitarian Protection is concerned the Upper Tribunal said the following in **AG** :

(ii) Despite a rise in the number of civilian deaths and casualties and (particularly in the 2010-2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person.

(iii) Nor is the level of indiscriminate violence, even in the provinces worst affected by the violence (which may now be taken to include Ghazni but not to include Kabul), at such a level.

28. Although the background information states that there has been an increase in civilian deaths and injuries the figures do not in my view justify a departure from the conclusions reached by the Upper Tribunal in 2012 and taking into account the submissions of Mr Tufan, I find that the Appellant has not established a right to Humanitarian Protection in the UK.

29. I turn now to Article 8 ECHR.

30. In **Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 (17 June 2004)** the court said that there are 5 questions that must be asked in considering the question of a breach of Article 8,

(1) Is there an interference with the right to respect for private life (which includes the right to respect for physical and moral integrity) and family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) Is that interference in accordance with the law?

(4) Does that interference have a legitimate aim?

(5) Is the interference proportionate in a democratic society to the legitimate aim to be achieved.

31. I have considered whether the Appellant has a family life in the UK.

32. In **Kugathas v SSHD [2003] EWCA Civ 31**, a case which concerned an adult's relationship with his mother and adult siblings, the Court of Appeal thought that the following passage in **S v United Kingdom [1984] 40 DR 196** was still relevant:

“... generally, the protection of family life under Article 8 involves cohabiting dependants, such as parents and their dependent minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults ... would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties.”

33. However, the Court of Appeal considered that the further element of dependency did not have to be economic. Accordingly, in the case of the “other relationships” referred to, it will be necessary to show that ties of support, either emotional or economic, are in existence and go beyond the ordinary and natural ties of affection that would accompany a relationship of that kind. I accept that the Appellant has a family life of sorts with Ms Etheridge but find that it is not a relationship that engages Article 8. I accept that he has a relationship with Ms Garrett but they are not living together and although their relationship may be emotionally close I find it is not one that engages Article 8.
34. I accept that the Appellant has developed a private life in the UK. His relationships with his former foster parents, and his girlfriend and her family are part of that as are the other social connections he has made and the support he is getting for his psychological problems.
35. The starting point so far as the Appellant’s private life is concerned is paragraph 276ADE of the Immigration Rules. This states,

PARA 276ADE

that at the date of the application the applicant

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

36. The Appellant does not meet any of these criteria apart from arguably para (vi). I cite the original version of this paragraph as that is the one in force at the date of the application and indeed the decision. The new version requires there to be 'significant obstacles to the Appellant's reintegration' into Afghanistan. Although I accept that the Appellant has no family in Afghanistan I do not accept that he has lost his cultural ties to the country in which he was brought up until he was 13 years old. I believe that he would eventually be able to re adapt to life there.
37. I do think however that there are factors in this case that give rise to doubts about the proportionality of the removal of the Appellant.
38. In **MM (Tier 1 PSW; Art 8; private life) Zimbabwe [2009] UKAIT 00037**, the Tribunal summarise the higher courts' indication of the process that the Tribunal must undertake in making the proportionality assessment as follows (at [66]):
- “...each case must necessarily depend upon its specific facts and it is essential that a judicial decision is reached applying an ‘even-handed application of the proportionality tests’ (*WB (Pakistan) v SSHD [2009] EWCA Civ 215* at [16] *per* Sedley LJ). There can be no *a priori* conclusion or presumption about the outcome based, for example, upon the premise that successful cases will be rare or exceptional (*WB (Pakistan)* at [16] *per* Sedley LJ). What has been described as the ‘difficult evaluative exercise’ entailed in the proportionality test must always be undertaken (*EB (Kosovo) v SSHD [2008] UKHL 41* at [12] *per* Lord Bingham of Cornhill).”
39. I therefore now proceed to consider the proportionality of the Appellant's removal.
40. I must take account of paragraph 117B of the of the Nationality Immigration and Asylum Act 2002 which sets out the following considerations of the public interest to be taken into account in considering whether to grant leave to remain under Article 8. These considerations are,
- (1) The maintenance of effective immigration controls is in the public interest.
 - (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
 - (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom

41. The Appellant speaks English and I have no doubt that he would try to get a job if he were allowed to work here. He has formed a relationship in the UK with a British citizen but he did that whilst still at school and while he had discretionary leave to remain here. I accept that he has integrated into the British way of life and has not remained within the Afghan community. I must accept that it is in the public interest that minors from Afghanistan who are given the protection of the UK as children should in general return to Afghanistan when they are adults and able to look after themselves. I have had some difficulty with this case because it is clear from the evidence that I have that the effect of removal on the Appellant would be considerable. I accept that it would be unreasonable to expect Ms Garrett to go with him to Afghanistan. I accept that he could return and make an application to return here as a fiancé but I have concerns about his ability to do that even with the support of friends in the UK, given the situation in Afghanistan and there would of course be cost implications. The fact of the matter is that the Appellant came here when he was 13 having lost both his parents. He had no idea where he was. He was clearly immature, frightened and confused. He was cared for by strangers who worked very hard to help him settle. He has been passed from pillar to post and sent to live far from the people he has come to rely on in the UK. It seems clear that depriving him of the little security he has would affect him badly. Apart from that accepted above there is no public interest in his removal. His psychological issues are unchallenged and accepted to have emanated from events in Afghanistan. The report of Dr Tomas is clear. It seems to me that in all the circumstances, the interference with his private life that would be inevitable if he had to return alone to Afghanistan would be disproportionate to the need for effective immigration control in the UK.

Notice of Decision

The appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed

Date: 27th February 2015

N A Baird
Deputy Judge of the Upper Tribunal