Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05122/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 30th January 2015	**On 4th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LINDSLEY

Between

F H
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iqbal, Counsel, instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Afghanistan born on 10th November 1995. He first came to the UK on 21st December 2008, when he was 13 years old. His initial asylum claim was refused on 20th March 2009, but he was granted discretionary leave from 20th April 2009 to 20th April 2012. He appealed the refusal of asylum, and this appeal was dismissed on 9th June 2009. On 19th April 2012 the appellant applied for further leave to remain on asylum and human rights grounds. His application was

refused on 17th June 2014, and he appealed once again. His appeal was dismissed by Judge of the First-tier Tribunal Stokes following a hearing on 26th August 2014.

2. In a decision and reasons promulgated on 5th December 2014 I found that Judge Stokes had erred in law, and set aside his decision dismissing the appeal under Article 8 ECHR whilst preserving his unchallenged determination dismissing the asylum appeal. My reasons for this decision are appended as Annex A to this determination. I preserved the finding that the appellant had family in Afghanistan but made it clear that further evidence and submissions could be put forward on the current nature of the appellant's relationship with that family by both parties.

3. The matter came back before me to re-make the appeal under Article 8 ECHR.

Evidence & Submissions

4. The appellant attended the Tribunal and adopted his two statements which he confirmed were true and correct and his evidence to the Tribunal. Mr Shilliday did not wish to cross-examine the appellant.

5. In summary, in relation to Article 8 ECHR the appellant says the following in his statements. He has been in the UK since 2008. He lived with Ms P A from the age of 13 years to 18 years. He now visits her every two or three weeks. She provides him with financial and emotional support. He has attended The [ ] Academy and [ ] College, where he is currently studying for a BTEC Level 3 in civil engineering. His course will finish in the summer of 2016, and he hopes to start a university degree in civil engineering in autumn 2016. He has friends in the UK through college, school, youth and sports clubs and by attending his local mosque.

6. The appellant has genuinely lost contact with his family in Afghanistan. He has been to the Red Cross about trying to trace them on three occasions, once in 2012 and twice in 2014. He had also asked Social Services to do this before these visits but they had not done anything. He would not be able to contact his family if he were to return to Afghanistan. He would feel like a stranger if he were sent back there.

7. He has friends who have been granted indefinite leave to remain having been in the UK for six years with discretionary leave and feels it is unfair if he is forced to return to Afghanistan given his period of discretionary leave and residence in the UK.

8. Ms Iqbal relied upon her skeleton argument and oral submissions.

9. In summary she submits that as the appellant's application was made prior to the 9th July 2012 that transitional provisions mean that it falls to be determined under the general law relating to Article 8 ECHR, with

consideration given to s.117B of the Nationality, Immigration and Asylum 2002 Act. This could be seen to be the case from Edgehill v SSHD [2014] EWCA Civ 402 at paragraph 32. The appellant had made a renewed application for asylum (which was a matter under the Immigration Rules) prior to 9th July 2012, and simultaneously for leave to remain on the basis of his Article 8 ECHR rights.

10. Further even if the Immigration Rules did apply and were found not to assist the appellant in relation to his claim to have family life in the UK there was no interim test of exceptionality before an assessment under the general law of Article 8 ECHR was carried out (see MM (Lebanon) v SSHD [2014] EWCA Civ at paragraph 131). It was just necessary to show that there were elements not considered under the Immigration Rules. This could easily be done given the appellant's claimed relationship with a foster mother, which was not a relationship dealt with under the Immigration Rules, and the fact that discretionary leave was not a type of leave considered by the Immigration Rules.

11. Ms Iqbal submits that the appellant's age had never been disputed by the respondent. He arrived in the UK a month after his 13th birthday. The respondent had failed in her duty to trace the appellant's family in Afghanistan, and he has been unable to do so via contacting the Red Cross or in any other way. The appellant is a nineteen year old young man, and there is no "bright line" between his being a child and adult. If he were forced to return he would have grave difficulties. The family may well exist in Afghanistan but it should be accepted that the appellant did not have current contact with them as this had not been challenged at any point. Ms Iqbal accepted the weight to be given to the failure to trace was unclear after EU (Afghanistan) v SSHD [2013] EWCA Civ 32 but argued it was a relevant factor in the appellant's favour when considering the proportionality of removal under Article 8 ECHR.

12. The appellant had family and private life in the UK. He has family life with his foster carer who brought him up from the age of 13 years and with whom he maintains a relationship. There is a letter in the respondent's bundle from Ms A, and it is to be noted that at the last hearing Ms A had attended with the appellant. There were a number of cases since Kugathas v SSHD [2003] EWCA Civ 31 which have made it clear that young people keep their family life relationships with their original family after the age of 18 years unless they founded a new family, see HK (Turkey) v SSHD [2010] EWCA Civ 583. This appellant had only moved out from Ms A's home because of the way Social Services contracts work.

13. The appellant has made an extensive private life for himself in the UK, including significant studies. Documents relating to his qualifications and current studies are in the appellant's bundle. The relationships he has made and the private life he has established have all been whilst lawfully present in the UK with discretionary leave.

14. If the appellant's private life was considered under the Immigration Rules then it should be found that there would be very significant obstacles to his integration in Afghanistan given that he had left as a young child and given the situation in that country. As was said in Ogundimu (Article 8, new Rules) Nigeria [2013] UKUT 60, the enquiries were to go beyond social, cultural and family issues.

15. In relation to matters raised under s.117B of the Nationality, Immigration and Asylum 2002 Act the appellant speaks good English and will in the future be able to support himself financially given the nature of the studies he is doing and the qualifications he is in the process of acquiring. He should be seen as a person who has integrated into British society. The appellant's status should not be seen as precarious as discretionary leave could lead to settlement if granted for six years, and was not a type of leave (for instance like that as a student) for which there was no expectation of staying permanently.

16. Mr Shilliday said that it was not relevant that no tracing had been carried out in the appellant's case. It was not possible to argue that the appellant had no family network to return to as I was bound by the previous two determinations under Devaseelan (second appeals, ECHR, extraterritorial effect) [2002] UKAIT 702 and so had to find this existed. (I drew Mr Shilliday's attention to my error of law decision in which I said that the finding that the appellant had family in Afghanistan was preserved from the determination of Judge Stokes but it was a matter for submissions as to the nature of the current relationship, if any, that the appellant had with that family.) Mr Shilliday said there was insufficient evidence that the appellant had no family contact, and two previous Judges had not believed that the appellant had no contact with his family in Afghanistan. The appellant would be seen as an adult as in Afghan culture, so he should be seen as an adult being returned. It was in the best interests of the appellant to be brought up in his culture with his family, see EA (Article 8 best interests of the child) Nigeria [2011] UKUT 00315.

17. Mr Shilliday maintained that Article 8 ECHR as embodied in the Immigration Rules at Appendix FM and paragraph 276ADE was what I should apply to the appellant's case. He said this was the case as the transitional arrangements whereby applications made prior to 9th July 2012 were dealt with under the general law did not apply in this case as the appellant had not made "an application". This could be seen to be the case from paragraph A277 inserted in the Immigration Rules by HC 194 which means that the transitional provisions only apply to applications made under part 8 of the Immigration Rules. The appellant's application had not been made under part 8 of the Immigration Rules, even though it had been made prior to 9th July 2012, so the transitional provision did not apply.

18. Mr Shilliday maintained that the appellant could not meet the requirements of paragraph 276ADE on the basis of his private life as he

could not show that there were very significant obstacles to his re-integration on return to Afghanistan. The point of this Rule was that people should not be removed to a place where they would be destitute. This would not be the case for the appellant. He had spent a lot of his childhood in Afghanistan and so had ingrained knowledge about the culture. Things might be difficult for the appellant on return but the test was higher than this. More than inconvenience was needed. The appellant had not had seven years in the UK as a child, he had not been in the UK half of his life and could not meet the high threshold of private life Article 8 ECHR. Whilst it was to the appellant's credit he was in education, as was said in EV Philippines v SSHD [2014] EWCA Civ 874 the UK could not educate the world. In relation to CDS (PBS Available Article 8) Brazil [2010] UKUT 305 and the fact the appellant was part way through a course Mr Shilliday argued that Nasim and others (Article 8) [2014] UKUT 25 was wrongly decided in maintaining CDS Brazil had any current relevance, but in any case this case should be seen differently as the appellant was not a points based migrant.

19. The appellant could not meet the Immigration Rules at Appendix FM as his foster mother was not a parent, and he was not under the age of 18 years. Even if looked at outside of Appendix FM (which Mr Shilliday argued was not necessary or the correct thing to do) it was not the case that there was a family life relationship between the appellant and his foster mother. Kugathas meant that there was no family life between the appellant and Ms A so Article 8 ECHR was not engaged in this case on the basis of family life. In any case it would not be a disproportionate to interference to remove the appellant even if there were found to be a family life relationship. The appellant no longer lived with Ms A and he could keep in contact with her from Afghanistan.

20. In relation to the issues raised by s.117B of Nationality, Immigration and Asylum 2002 Act I should not determine this issue at this point in time as there would be a reported Upper Tribunal authority on precariousness shortly. Mr Shilliday argued strongly that the appellant's discretionary leave should be seen as precarious as the appellant had no proper expectation of further leave of this nature after he was seventeen and a half. Precarious leave should mean any leave that was not indefinite leave to remain, and for which directions can be given under s.10(1)(a) of the Immigration and Asylum Act 1999. Precarious obviously did not mean those who were in the UK unlawfully as they are dealt with separately in s.117B of the Nationality, Immigration and Asylum 2002 Act. It was also speculative that the appellant would earn money in the future.

21. At the end of the hearing I reserved my determination.

Conclusions

22. I must first determine whether the appellant's case needs to be assessed against the Immigration Rules as currently in force or whether

it is covered by transitional provisions in HC 194, and thus that it is the general law relating to Article 8 ECHR which applies in this appeal. It is accepted by both sides that the application was made prior to 9th July 2012 when Appendix FM and paragraph 276ADE were introduced; it is the extent of the transitional provisions that is in dispute.

23. I find that in accordance with Edgehill at paragraph 32 the transitional provisions are to be given the natural and normal meaning of the words and that they are statement of the Secretary of State's policy not to apply the new Rules to applications made prior to 9th July 2012. The argument put forward by Mr Shilliday that Article 8 ECHR applications prior to 9th July 2012 were not made under the Immigration Rules and so were not covered by the transitional provisions was put forward by Counsel for the Secretary of State in Edgehill and was specifically rejected.

24. I find it clear therefore that it is the general law relating to Article 8 ECHR against which the appellant's case must be judged. Ultimately in relation to this appellant's claim to remain on the basis of his private life this may however make little difference: I understood Ms Iqbal to be arguing that the appellant should be allowed to remain, in part at least, given the very significant difficulties the appellant would have in reintegrating in Afghan society.

25. I proceed to establish the position with respect to the appellant's family in Afghanistan. As Mr Shilliday has submitted, I am bound by Devaseelan principles in relation to the findings of the previous First-tier Tribunal Judges on this matter. This means that I am to take previous judges determinations as the starting point and authoritative of the position at the time when they were made. I do not have the determination of the Immigration Judge made in 2009, however references are made to it in the determination of Judge Stokes, which I have preserved in relation to the asylum determination.

26. The evidence of the appellant before both of these Tribunal, and before me, was that he had had no contact with his family since leaving Afghanistan. He had tried to ring his mother's mobile number but that this no longer connected. He had talked to Social Services and the Red Cross about tracing but this had not been done. The Secretary of State accepted that she had not initially fulfilled her legal duty to trace either but has now made enquiries which evidently have produced no further material.

27. It is recorded at paragraph 30 of Judge Stokes' determination that the 2009 Immigration Judge had found however that: "there would be reception facilities by members of the appellant's family if he were returned to Afghanistan". I have not preserved Judge Stokes' findings about reception conditions. However, in relation to the asylum claim Judge Stokes did find that the appellant: "has not demonstrated that he has no family remaining there. He will not on return, therefore, fall into

the category of a street child.", see paragraph 41 of his determination. This latter finding is preserved.

28. I have no new evidence on the issue of family in Afghanistan from the appellant. Looking at the evidence as a whole before me I find that the appellant has family in Afghanistan who may theoretically be able to help him but accept his consistent evidence that he has no current contact with them.

29. My conclusion on this matter is supported by the fact that the respondent stated in the refusal letter dated 17th June 2014 that they realised that they had tracing obligations to the appellant and had contacted the FCO office in Kabul to carry these out. The solicitor's representations at page 50 of the appellant's bundle indicate these FCO enquiries were put in motion in February 2014. The refusal letter indicated that the respondent would inform the appellant of any response with information regarding the location of his family. Clearly the respondent has not found the appellant's family, who were last said to be in Kabul prior to his leaving in 2008, despite eleven months having elapsed since commencing enquiries. The respondent has also not responded with anything indicating that the appellant has provided inadequate or false information in relation to these enquiries to thwart this process. I find that the position I should take is therefore that the appellant will have to survive initially without family support, but with the possibility that this may become available in the medium term if he were on the ground able to do more extensive face to face enquiries.

30. In accordance with JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 568 I find given the appellant is no longer a child and in an Article 8 ECHR assessment: "all relevant factors must be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs." I note in relation to the appellant being 19 years old that: "the risks to unattached children in the light of the reminder in KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014 in the judgment of Maurice Kay LJ at [18] that there is no bright line across which the risks to and the needs of a child suddenly disappear."

31. I now consider whether the appellant has family and private life in the UK or just private life. I have had regard to the case law the representatives have referred to in their submissions. I start from the position that in the case of a 19 year old any family life that existed prior to his 18th birthday would not cease to exist simply because of crossing the line to adulthood. The appellant had lived with his foster carer from January 2009, when it is clear she attended the appellant's asylum interview with him. It is accepted that he ceased to live with her when he became 18 years old and funding to his foster mother for being

his carer ended. Ms A did not give evidence before me or before Judge Stokes. Her letter, whilst extremely complementary about the appellant, does not indicate that she sees the appellant as a family member or has a strong bond of love with him. There is nothing in the appellant's own statement which indicates he has this level of emotional bond with Ms A either.

32. In the circumstances I find it appropriate to treat the bond between Ms A and the appellant as a significant part of his private life ties to the UK. I accept that she actively supported him through school and college, and is clearly very proud of his academic progress. I accept the evidence of the appellant that since leaving her home he sees her every two or three weeks for a visit, and that she continues to provide him with some financial and emotional support. I find the relationship which could not be replicated through occasional telephone contact.

33. I find that the appellant has spent a very significant period of his life in the UK. He has grown up from being a child who had just turned 13 years to a young adult in this country. His age was not contested by Social Services or the respondent at any point. My attention has been drawn to EA (Nigeria) which states: "During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well -being."

34. I find that this strengthens the importance of the five years of time spent in the UK by the appellant between 13 and 18 years. These were ones where private life ties are made particularly strongly by the young person, to prepare them for their transition to independent life. The appellant clearly threw himself in to full participation in school and social life. Letters from his teachers at [ ] Academy indicate a student who was fully engaged with adults and peers, who worked from a starting point of a complete beginner in English to one who sat for eight GCSEs. One of his British citizen friends (Mr L A) wrote a letter in support of his remaining in the UK and attended the Tribunal before Judge Stokes, and indicated that he had a full social life with friends in the UK, and again emphasised that he was highly ambitious to build a career in civil engineering in the UK.

35. I do find it of some significance that the appellant is part way through his BTEC civil engineering course. The appellant started his BTEC whilst lawfully present having discretionary leave to remain and is able to meet the fees (which are waived in his case), and has built up a private life worthy of respect as is set out above. I have noted what was said in Nasim however and find that alone this is not a factor which could lead to his succeeding in his appeal.

36. I thus find that the appellant has private life requiring respect in the UK as set out above and that to remove him from the UK would significantly

interfere with that private life. The interference would be in accordance with the law as the appellant cannot meet any of the Immigration Rules as they stood on 8th July 2012 and it would be for a legitimate purpose, namely the economic well-being of the UK through the upholding of a consistent system of immigration control. There is no contention by the respondent that this appellant has a criminal record or is otherwise not of good character.

37. It remains to consider whether the significant interference with the appellant's private life rights that refusal of further leave to remain represents is justified as proportionate, and a fair balance between the competing considerations of the appellant's private life and the respondent's desire to maintain economic order by applying a consistent system of immigration control.

38. In favour of the respondent's position is as follows. I accept that the appellant has shown himself to be an intelligent and polite young man capable of academic learning. It is not contended that he has any health problems. As stated above I accept he has family in Afghanistan whom he may find in the medium term. I accept that he has Dari language skills, and thus is proficient in a language spoken in Afghanistan. I find that his cultural understanding however will be considerably diminished given his significant absence of six years, and his having left Afghanistan as a twelve year old child, and given that his foster placement was not with an ethnically Afghan family.

39. In accordance with s.117B of the Nationality, Immigration and Asylum Act 2002 I also note in the respondent's favour is that it is in the public interest to uphold immigration controls. I accept that the appellant is not currently able to be financially independent, although I also accept that through his studies in civil engineering he is pursuing the goal of integration in UK society and financial independence, which is likely to be met in his early twenties if he is allowed to remain in the UK.

40. I do not find the appellant's status in the UK became precarious until he was refused leave to remain on 19th June 2014. I am not aware of any forthcoming case giving guidance on this issue from the Upper Tribunal in the very near future and have not been instructed to wait for any such guidance before determining appeals by the Tribunal. I interpret precarious leave to equate to continuation leave once a person has been refused on an application and whilst an appeal is conducted: clearly at this point an appellant is aware that he or she may not be allowed to remain and that their status is precarious. I therefore find the private life the appellant had between his arrival in December 2008 and his refusal in June 2014 was not formed during precarious leave, and thus that all of the appellant's private life ties were formed whilst his status was not precarious.

41. In favour of the appellant is that he has grown up in the UK and formed very strong private life bonds with this country over the past six years.

He is part way through a BTEC engineering course in this country. His cultural references are now very largely those of the UK, having had his entire teenage and young adult years in this country. His private life ties ought to be given due weight as they were not formed during precarious leave. The appellant is well integrated into British society with a significant relationship with his English foster mother, able to speak good English and pursuing studies which will ultimately lead to it being most unlikely he would be a burden on the British tax payer. Indeed I find it likely that he will contribute positively to the UK economy in the future. This is clearly also the view of his foster mother and his friend Mr A, who have provided letters in his support.

42. The situation to which the appellant will be returning in Afghanistan, I find can be accurately described as one which places significant obstacles in the way of his integration, and definitely obstacles which are a lot more serious than inconvenience. I do not find that "significant obstacles" equates to a test requiring destitution which is what Mr Shilliday has contended: significant obstacles to integration implies real difficulties in establishing some semblance of normal life. I note the research carried out by Ms Bryony Norman and Mr Abdul Ghafoor of the Refugee Support Network into those who were returned to Afghanistan having spent their teenager years in the UK with discretionary leave to remain, set out in an article by Ms Bowerman dated 30th September 2014 at pages 15 to 17 of the appellant's newest bundle.

43. Ms Bowerman notes three recurring themes from the interviews with returnees: issues of a deterioration in safety and security since 2013; the harsh economic environment was worsening and they were forced to adopt a survival mentality simply looking for the means to survive rather than pursuing any studies or having regular work - with even temporary work very hard to find; "not being known" and thus being treated as foreign and finding it difficult to re-integrate due to the changes that Afghanistan has gone through since their departure. Only 43% of these young people in the study had managed to connect with family members.

44. This research is in line with the material in UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan dated 6th August 2013 at pages 278 to 407 of the appellant's original bundle, see particularly sections D and E at pages 294 and 295. 40% of all returning refugees have been unable to reintegrate in their home communities and 60% had difficulties rebuilding their lives, with many ending up as IDPs in urban areas. "Urban IDPs are more vulnerable than the non-displaced urban poor, as they are particularly affected by unemployment, limited access to adequate housing, limited access to water and sanitation, and food insecurity." Humanitarian indicators are in any case critically low in Afghanistan with 36% of the population living below the poverty line and 34% being food insecure.

45. In the light of the country of origin materials I find that the appellant will on the balance of probabilities, as he claims, be returned to a situation where he struggles to find sufficient work to feed and house himself in a situation where he is treated as a foreigner and lives outside normal Afghan society due to the difficulties of re-integration.

46. This is a finely balanced case however I conclude that given the strength of the appellant's private life ties to the UK built since the age of 13 years; the lack of currently contactable family support on return to Kabul; and the current socio-economic situation for young forced returnees that this would make the appellant's removal a disproportionate interference with his right to respect for his private life.

Decision

47. The decision of the First-tier Tribunal involved the making of an error on a point of law.

48. The decision of the First-tier Tribunal under Article 8 ECHR is set aside (although the decision dismissing the asylum appeal is preserved).

49. The decision is re-made allowing the appeal under Article 8 of the ECHR.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Deputy Upper Tribunal Judge Lindsley

2nd February 2015

Fee Award

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007). I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). I have decided not make a fee award as I was not asked to do so by the appellant's

representative and a large amount of supporting documentation was produced during the appeal process.

Deputy Upper Tribunal Judge Lindsley

2nd February 2015

Annex A

DECISION AND DIRECTIONS

Introduction

1. The appellant is a citizen of Afghanistan born on 10th November 1995. He first came to the UK on 21st December 2008. His initial asylum claim was refused on 20th March 2009. He was granted discretionary leave to remain from 20th April 2009 to 20th April 2012. His appeal against refusal of asylum was dismissed after a hearing on 9th June 2009. The appellant applied for further leave to remain on 19th April 2012. His application was refused on 17th June 2014 and he appealed. His appeal was dismissed in a determination of Judge of the First-tier Tribunal Stokes following a hearing on 26th August 2014.

2. On 27th October 2014 Judge of the First-tier Tribunal Ford found that there was an arguable error of law in the determination of the appeal under Article 8 ECHR because of the application of s.117B of the Nationality, Immigration and Asylum Act 2002.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions

4. Mr Turner submitted that he relied upon the grounds of appeal. There were two errors: firstly an error of fact creating unfairness regarding the appellant's age and secondly an error with respect to the fact that he had leave to remain from 2009 to 2012. He did not pursue the argument in the grounds about the duty to trace.

5. Judge Stokes had started his conclusion sections of the determination at paragraph 35 by setting out that in accordance with KA (Afghanistan) [2012] EWCA Civ 1014 and JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 that there was no bright line when the needs of a child suddenly disappear and that he was proceeding on the notional basis that the appellant was under the age of 18 years. However Judge Stokes then in determining the appeal looks at the appellant as a 20 year old (see paragraph 45 and 52).

6. Judge Stokes states at paragraph 60 of the determination that the appellant's private life should be given little weight in accordance with s.117B of the Nationality, Immigration and Asylum Act 2002 as his status has been precarious. This was not accurate. Precarious was not an appropriate way of describing the discretionary leave the appellant had held from April 2009 to April 2012.

7. I asked Mr Turner to address me on Judge Stokes' conclusions on family life. Mr Bramble objected to this as he said this was not a ground of appeal. I clarified to Mr Bramble that I was interested in Mr Turner's

submissions on this point as I felt it may be relevant to whether any errors with respect to the age of the appellant and the nature of his leave to remain were material errors of law as oppose to just errors. I also indicated to Mr Bramble that it was open to me to take note of any Robinson obvious errors of law with respect to a human rights matter. (Indeed as is set out in Nixon (permission to appeal: grounds) [2014] UKUT 00368 at paragraph 7 there is a duty for me to do this when important human rights are engaged).

8. Mr Turner submitted that it was not clear whether Judge Stokes had found that the appellant had family life in the UK: at paragraph 55 he states that he has family life in the UK with his foster carer but at paragraph 57.1 he indicates this is not the case. He made it clear that he did not wish to apply to vary his grounds of appeal to include this point however and that this submission went simply to the materiality of the other errors in the grounds of appeal.

9. Mr Bramble argued that Judge Stokes had been aware of the appellant's correct age as he referred to the appellant returning to Afghanistan as a 20 year old at paragraph 45 of his determination. Further even if there was a miscalculation of the appellant's age (Mr Bramble accepted he was 18 years old at the date of hearing) then this was a very narrow issue. Likewise he argued that the appellant's leave could be seen as precarious and that it was only a matter that Judge Stokes had born in mind so this was not a material error of law in the context of the other matters which led to the conclusion that any Article 8 ECHR interference was proportionate.

10. Mr Turner submitted in reply that s.117B of Nationality, Immigration and Asylum Act 2002 and the precarious nature of the appellant's leave was a matter Judge Stokes said he had taken into account in coming to his decision at paragraph 60 of the determination. It was not only something he had borne in mind. As a result little weight had been given to the private life the appellant had in the UK. The definition of precariousness argued for by Mr Bramble would mean all private life had little weight unless the person had indefinite leave to remain and could not be correct. There had also been repeated references to the appellant returning as a 20 year old in the determination which was a material error as it would be appropriate to have seen the appellant as someone who came as a child, had leave as a child and was not cut off from such consideration as a child by any bright line.

11. Mr Turner submitted that this appeal could and would succeed if remade under Article 8 ECHR particularly given that there were some positive findings at paragraph 58 of the determination and the fact that the lack of weight to private life had led to other matters (such as the appellant's achievements and assimilation in the UK) being given insufficient weight.

12. At the end of the hearing I told the parties that I found that Judge Stokes had erred in law in the determination of the appeal under Article 8 ECHR. My reasons are set out below. I informed the parties that I was setting the part of the determination dealing with Article 8 ECHR aside. The appellant was not at the Tribunal and Mr Turner applied to have the re-making hearing adjourned. Mr Bramble did not object to this adjournment, and I agreed that this should happen.

Conclusions – Error of Law

13. I do not consider the grant of permission by First-tier Tribunal Ford as one which limited the grant simply to the ground relating to s.117B of the Nationality, Immigration and Asylum Act 2002. He does state that the "remaining grounds are not arguable" but he did not follow the procedure to limit the grounds of appeal or state that permission was refused on them as is required by Ferrer (Limited Appeal Grounds; Alvi) [2012] UKUT 304. Mr Bramble did not argue that the appellant was only limited to arguing the ground relating to s.117B of the Nationality, Immigration and Asylum Act 2002.

14. When the determination is read as a whole it appears that whilst Judge Stokes had directed himself in accordance with KA and JS to consider the fact that the appellant may have the same needs as a child as he was only 18 years old at the time of hearing, he then addressed his position on return to Afghanistan on the basis that he would be 20 years old. There are references to the appellant returning as a 20 year old at paragraphs 41, 45 and 52. Judge Stokes was obliged to consider all grounds of appeal for this appellant as of the date of hearing and the appellant was in no way a 20 year old at that point. I find this to be a significant error of fact for which the appellant and his advisers were not responsible which impacted on the fairness of the assessment of his appeal under Article 8 ECHR.

15. In addition Judge Stokes, at paragraph 60 of his determination, takes into consideration in coming to his decision on Article 8 ECHR that the appellant's immigration status is precarious and little weight should be given to his private life as this was the case. This does not give consideration to the three years discretionary leave the appellant held between 2009 and 2012 which I find could not be described as "precarious" leave. It follows logically that positive matters (such as his wide circle of friends and good friends and his studies leading to qualifications – referred to at paragraphs 57.2 and 57.4 of the determination) and his lawful presence in the UK as a child between the ages of 13 and 16 years have erroneously been given little weight.

16. I am satisfied that these two errors suffice to mean that the determination must be set aside and re-made as it cannot be said that had they not been made the outcome when conducting the proportionality assessment under Article 8 ECHR would necessarily have been the same.

17. I find it appropriate to set aside the determination with respect to Article 8 ECHR in its entirety in the light of these errors and also because it is entirely unclear whether Judge Stokes found that the appellant had family life in the UK. At paragraph 55 he finds that the appellant has family life with his foster mother and her family. Whereas at paragraph 57.1 Judge Stokes finds that applying Kugathas v SSHD [2003] EWCA Civ 31 that there is not. It is clearly a matter of importance to understand whether this is a case only about the appellant's private life in the UK or one which also concerned an interference with family life in the UK as well.

18. The finding, which is an integral part of the unchallenged asylum determination, that the appellant has family in Afghanistan is retained but it is open to either party to apply to adduce further evidence (if done in accordance with the Procedure Rules) and make further submissions as to the nature of the appellant's relationship with that family.

Decision

1. The First-tier Tribunal erred in law in the determination of the appeal under Article 8 ECHR
2. The determination of the First-tier Tribunal under Article 8 ECHR is set aside.
3. The decision of the First-tier Tribunal dismissing the asylum and humanitarian protection appeals is retained.

Directions

1. The article 8 ECHR appeal is to be remade de novo before me on 30th January 2015.
2. The hearing is listed for 2 hours.
3. Any new evidence that the parties wish to adduce should be filed with the Tribunal and served on the other party in accordance with paragraph 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least seven days prior to the hearing.

Direction Regarding Anonymity

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed Date 28th November 2014

Judge Lindsley

Deputy Upper Tribunal Judge