UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: AA/05170/2014**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
on 11 February 2016	**On 18 March 2016**

Before

Deputy Upper Tribunal Judge Mailer

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SAYED AHMED SULTANI
NO ANONYMITY DIRECTION MADE

Respondent

Representation

For the Appellant: **Mr N Bramble, Senior Home Office Presenting Officer**
For the Respondent: **Mr D Bazini, counsel, (instructed by Lawrence and Co Solicitors)**

DECISION AND REASONS

1. I shall refer to the appellant as the "secretary of state" and to the respondent as "the claimant."

2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge K Lester, who allowed the claimant's appeal on asylum grounds in a decision promulgated on 3 August 2015.

3. The claimant is a national of Afghanistan. He appealed against the decision of the secretary of state dated 8 July 2014 refusing his application for asylum and humanitarian protection. His age was the subject of dispute.

4. He arrived in the UK clandestinely on 30 October 2009 having left Afghanistan in June 2009. He claimed asylum several days later on the basis that he feared the government and the Taliban [2]. His application was refused in February 2010 but he was granted discretionary leave to remain until 3 July 2010. He claimed that he was born in 1996 and that he would thus have been 13 at the time of his arrival. There was an age assessment by the Coventry City Council dated 18 November 2009. There was some dispute as to whether the assessment was Merton compliant.

5. His application for further leave to remain was refused on 11 October 2010. He appealed that refusal. The appeal was dismissed by Immigration Judge Tipping who in a determination dated 30 November 2010 found the claimant's account implausible and inconsistent in various aspects.

6. On 16 March 2012, his solicitors made a fresh claim for asylum on his behalf. That was refused in July 2014 after the commencement of judicial review proceedings [4].

7. In support of his claim that he was born in 1996, he submitted a copy of an identity document, a Taskira, stating that according to his physical appearance, he was 13 years old in 2009. That document was examined by an independent expert, Dr Zadeh, who concluded in his report dated January 2015 that the document was genuinely issued to the claimant.

8. Coventry Social Services assessed his age on the basis of an age assessment interview in November 2009. His cousin, Mr Mohammed Rafi, was also his guardian and wrote to the team 'explaining' that he concluded that the claimant was 13 [7].

9. In due course, the Enfield council became appraised of the claimant's situation. There was a further age assessment undertaken by Enfield council. That assessment did not appear to have been before Judge Tipping [9].

10. Judge Lester noted that there was no copy of that age assessment in the file. There was however correspondence referring to their assessment and the council's undertaking to be responsible for him which post dated that decision. A letter from Ms Wallace of the Enfield Council Adolescent and Leaving Care team confirmed that he was in a placement with his cousin, Mr Sultani, that he is in full time education and that he would be supported by the borough until he reached 21. The headings to the letter gave his date of birth as 1 January 1996. Accordingly for the

purpose of his education and support, it appeared that the Enfield council was 'content' to accept his birth date as 1 January 1996 [9].

11. Judge Lester noted that in addition to the Enfield age assessment, there were other documents that were not before Judge Tipping and which formed the basis of the fresh claim [10]. The letter from his solicitors dated May 2012 in relation to the detention of the claimant referred to documents which were not referred to by Judge Tipping, namely two letters of summons from the Baghalan Police dated 8 November 2007 and 12 November 2007 [10].

12. Judge Lester also referred at [11] to other evidence forming the basis "of the fresh claim", including the letter from Ms Ayed Rashid dated May 2011 sent to the claimant's cousin and guardian. There were also letters from the Palmers Green Mosque confirming the claimant's knowledge of the Koran; a statement from a Mr Amazai who knew the claimant's father and of his involvement with the Taliban; a letter from the office of the Attorney General of Afghanistan dated 27 March 2012; a letter from the Taliban, Baghalan Province dated 7 February 2012; a letter from Mr Mohammed Rafi to the claimant's solicitors explaining how he instructed his friend Said Rashid to visit the claimant's home town to find out about his family; evidence of the claimant's unsuccessful attempts to trace his family through the Red Cross and finally an expert report prepared by Dr Giustozzi dated 11 March 2012.

13. She set out the findings from Dr Giustozzi's report, noting that the Taliban agitation in Baghlan had stepped up greatly from 2008 and that the security situation was recently worsening. The bomb attack in which the claimant's father was killed has been attributed to various elements including the Taliban. It is highly plausible that the claimant's father might be suspected as a culprit. Arresting male relatives is common practice. It is unusual to arrest female relatives. The claimant would very likely be seen by the authorities as being involved with the insurgency because of his family background and his madrasa education in Pakistan even if they lacked evidence of his own personal involvement [12].

14. Judge Lester referred to the claimant's stay in Kabul. Dr Giustozzi averred that he could only escape detention there if he did not have to seek accommodation or look for employment, i.e., if he could stay in hiding [13].

15. The Judge set out in full a summary of the respondent's reasons for refusal dated 8 July 2014. She also set out the evidence in support of the appeal at [17] onwards. That included the statement prepared by Mr Kholozai who knew the claimant's father. He regarded the claimant's father as a very influential Taliban because of his close relationship with Mr Mohammed Essa and his position as Director to promote virtue and prevent evils [24].

16. She had regard to a statement from Mr Rafi, the Kinship Foster Carer of the claimant, his cousin. He stated that the claimant's social worker from Enfield council informed him that he had been under pressure from the Home Office to agree that the claimant was born in 1993. He claimed that the Coventry assessment was not Merton compliant. He knew about the claimant's father and knew the claimant when he was very young as they grew up in the same compound. His father was with Hesb-I-Islami and later with the Taliban. He learned that he died when he travelled to Pakistan to see his family in 2009.

17. Mr Rafi stated that they had had no contact with the claimant's mother and siblings. He had tried to contact them or obtain information through his friend without success. He travelled to Afghanistan to see whether he could find out any information without success. The Red Cross have not succeeded in tracing the family.

18. Judge Lester referred to an additional report prepared by Dr Guistozzi dated 15 January 2015 for the purpose of the appeal. Baghlan had seen a further intensification of violence with the Taliban claiming back most of the northern part of the province during 2014. If the Taliban saw the appellant as a deserter or were seen to approach the authorities, they would target him and he would be at "extreme risk." [28] The repressive activities of the government remained intense with an increasing number of suspected insurgents being arrested and further evidence of the use of torture and arbitrary detention. The Taliban have increased and intensified their activities in Kabul [28].

19. Dr Giustozzi concluded that he confirmed his previous assessment that the claimant would be at risk from the authorities more than the Taliban. The latter will represent a physical danger to the claimant if they will consider him as a deserter. The authorities will be inclined to suspect him of being linked to the insurgency. Because of the weak rule of law, even an arrest for the purpose of interrogation can lead to long detention without trial, torture and other abuses. The refusal letter of 2105 had not considered the material in his previous report [29].

20. Finally, Judge Lester referred to further evidence provided by the claimant's solicitors relating to the return to Afghanistan [30]. She summarised the claimant's evidence at his hearing and that given by Mr Rafi and Mr Kholozai.

21. She had regard to the submissions on behalf of the secretary of state and the claimant, referring to a skeleton argument produced by counsel - not Mr Bazini - who represented the claimant at the hearing.

22. Judge Lester directed herself regarding asylum claims by unaccompanied children. She referred to paragraph 351 of the Immigration Rules, noting that account should be taken of the claimant's maturity and in assessing the claim of a child, more

weight should be given to objective indications of risk than to the child's state of mind and understanding of the situation [50].

23. She stated at [51] that she had set out the evidence in support of the appeal in some length, largely because most of it was not available to Judge Tipping when he made his decision. Nor was the fact that Enfield Council had made their own age assessment of the claimant and found him to have been born in 1996. Even though at a later date, Enfield had felt compelled to accept the age assessment as determined by Judge Tipping, nevertheless, they have continued to support the claimant and will continue to do so on the basis that he was born in 1996 [51].

24. She found that on any view the claimant was a very young person when things happened to him in Afghanistan and was a very young person to have undertaken such a journey.

25. He had provided a Taskira which purports to show that he was born in 1996. That document is a genuine document and has been authenticated by Dr Zadeh. She noted that the appellant had not been present when the Taskira was drawn up. His uncle obtained the document on the basis of his word and a photograph [53].

26. The claimant obtained summonses from the police department of Doshi dated 12 November 2007 '….requiring his re-arrest, having escaped from custody for involvement with his father….. in the suicide attack at a sugar factory in Baghlan'. The summonses were obtained by a friend of Mr Rafi in May 2011. The originals were lodged with the Home Office, but despite directions on two occasions, the Home Office had not been returned for authentication. The summonses were obtained by a friend of Mr Rafi in May 2011 [54].

27. She noted a catch-22 situation relating to such documents. If no documents are produced, the secretary of state will say that the appellant's assertion that he is wanted by the police is uncorroborated, and a fabrication. If they are produced however, they are said to be self serving and not genuine [55].

28. She noted that the secretary of state does accept that the bombing incident took place. The investigations were not successful but the police came under heavy pressure to find culprits because of the death of six MPs. It is therefore plausible that the claimant's father might have been suspected [56]. Accordingly it is plausible that the claimant, as the oldest son, had been arrested for interrogation which no doubt would involve beatings and other physical abuse. Dr Giustozzi confirmed that his release by bribe “to a totally corrupt police force” was also quite plausible [57] She accepted that the claimant had been sent to a madrassa in Pakistan. There is evidence of his having learned the Koran to a high standard [58].

29. She also accepted that the claimant left the Taliban in Kandahar because he did not wish to become involved in jihad. His fear of reprisals by the Taliban is genuine. The fact that his father was with the Taliban would be seen by the security forces as a matter of the pro-insurgency inclinations of the whole family, even if the authorities lacked any evidence of his involvement. The Judge "inclined to the view" that the claimant has much more to fear from the police and security forces rather than the government, although the Taliban would be able to exert significant psychological pressure on him [59].

30. She relied at [60] on Dr Giustozzis's report that it was plausible that the claimant was able to remain for seven months in Kabul without being found by either the security forces or the Taliban.

31. She noted that the claimant with the assistance of his cousin had attempted through the Red Cross to trace his family. There were also attempts by Mr Rafi to locate the claimant's mother and siblings. These attempts had thus far been fruitless [61].

32. She found in the circumstances that it would not be reasonable to expect the claimant to live in Kabul. Her reasons are set out at [62]. She also "considered" for the sake of completeness that forcibly to return the claimant would breach his right to respect for family and private life [64].

33. On 20 August 2015, Designated Judge of the First-tier Tribunal Garrett granted the secretary of state permission to appeal on the grounds that the Judge arguably failed to apply the Devaseelan guidelines [2002] UKIAT 00702, without giving adequate reasons for any departure from the earlier determination. Moreover, it is arguable that the Judge did not engage fully with the credibility issues raised in the secretary of state's refusal letter relating to the arrest and detention, continued risk and recruitment by the Taliban.

34. Mr Bramble relied on the grounds seeking permission to appeal. All the alleged facts in the appeal relating to issues of protection were identical to those determined by Judge Tipping. There were significant discrepancies found by Judge Tipping and the claimant was not found to be credible. That decision remains the starting point for the assessment of the account and is relevant to general issues of credibility.

35. In addition, a number of discrepancies which the secretary of state contended damaged the claimant's account were not adequately engaged with by the Judge and no reasons were given to explain the key points raised in the refusal.

36. He submitted that there were only fleeting references to the determination of Judge Tipping at [35] and [51]. She dealt in a cursory manner with the issues raised in the reasons for refusal as referred to in Judge Tipping's determination. Even if she had

properly departed from his decision, she had not properly engaged or dealt with the issues set out in the reasons for refusal.

37. Nor were the matters raised under s.8 of the 2004 Act addressed at all. The contentions had been set out at paragraphs 43-45 of the reasons for refusal letter. Mr Bramble acknowledged however that this "was not the most compelling ground." He asserted that she had failed to address the issue.

38. On behalf of the claimant, Mr Bazini, who represented him before the First-tier Tribunal, referred to the decision of the Upper Tribunal in VV (Grounds of appeal) Lithuania [2016] UKUT 53 (IAC). The Upper Tribunal stated that an application for permission to appeal on the grounds of adequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments to be placed before that Tribunal that the matter involved a substantial issue between the parties at first instance; and that the Tribunal either failed to deal with that matter at all, or to give reasons on that point which are so unclear that they may well conceal an error of law.

39. At paragraph 2, the Tribunal stated that given that the parties are under a duty to help further the overriding objective and to cooperate with the Upper Tribunal those drafting grounds of appeal should proceed on the basis that decisions of the First-tier Tribunal are to be read fairly and as a whole and without excessive legalism and should not seek to argue that a particular consideration was not taken into account by the Tribunal when it can be seen from the decision read fairly as a whole that it was (and the real disagreement is with the Tribunal's assessment of the evidence or the merits). They should not challenge the adequacy of the reasons given by the First-tier Tribunal without demonstrating how the principles referred to above have been breached by reference to the materials placed before that Tribunal and the important or substantial issues which it was asked to determine in that particular case.

40. He submitted that from the decision of the First-tier Tribunal read as a whole, there is no error of law. It is clear that the Judge was aware of the determination of Judge Tipping. She gave a detailed decision, recognising that the whole nature of the case was different. She has in reality applied Devalseelan properly

41. What was significant in this appeal is the age of the claimant. Judge Tipping found on the evidence before him that the appellant had lied about his age. He was not 13 years old as claimed, but 16. He found that the consequence was that the claimant had not told the truth and would be expected to know more.

42. Judge Lester concluded however that Judge Tipping, through no fault of his own, had been wrong about the age. This went to the issue of credibility, having regard to the age of the claimant. In support of his claim he had submitted a copy of an

identity document which stated that according to his physical appearance he is 13 years old in 2009. Judge Tipping then noted at [8] that a full age assessment was carried out by Coventry City Council, as a result of which it concluded that the claimant is now about 17.

43. The significance of age is clear. Judge Tipping found that his conclusion as to the appellant's true age further calls into question the credibility of his account of events. He has sought to embellish his claim by understating his age and therefore overstating his vulnerability.

44. Mr Bazini submitted that if the appellant had in fact only been 13, the Judge would have had to deal with the claimant differently. There were various procedures in place which would be taken into account, having regard to the potential vulnerability of such a person. [23]. Judge Tipping found that the claimant was, during his journey to the UK, about 16 years old. [24]. He stated that in reaching his conclusion as to the credibility of the claimant's evidence, he has had careful regard to his age.

45. Accordingly the claimant's age is very important. He was a minor.

46. In section D of the secretary of state's bundle before Judge Lester, there was evidence from Enfield Council which made it clear that his date of birth was accepted as showing that he was 13 when he came to the UK. A letter dated 14 April 2011 from Enfield Council is disclosed. The claimant had been referred to the Service for Adolescents and Families in Enfield in December 2010. He had since been attending therapy sessions with a CAMHS practitioner/psychotherapist for migrant communities and asylum seekers. Ms Sani, who prepared and signed the document, noted there has been destabilisation due to a request for age assessment conducted on the claimant for Home Office procedural purposes and this has been considered not necessary. She has recently been informed that he has now been proved to be 14 years of age and from her dealings with him he appears to fit this age range by virtue of how he presents generally in her sessions.

47. In a letter from the social worker of Enfield Council dated 2 November 2011, there is reference to the dispute concerning his age. Enfield has now decided that no further age assessment will be carried out and that they have accepted his age to be 1 January 1996, which was the age provided on health and educational records when he first came to Enfield. He is acting age appropriately and is achieving well with the support of the local authority and his family and carer, Mr Rafi.

48. The deputy team manager sent a letter to the claimant and Mr Rafi on 20 March 2012. She informed them that the Assistant Director in Enfield has read the papers relating to the claimant's age. His view is that they have to accept the decision made

"by the High Court." (This is accepted to be a reference to Judge Tipping's determination.)

49. There is a further letter from Enfield Council signed by Ms Sani, the psychotherapist, dated 21 March 2012. She was "….concerned about his level of anxiety around what has been recurring questions relating to what authorities perceive as his actual age and what is actuality (sic) his age assessing it from a variety of dimensions".

50. She stated that she had a thorough conversation with the claimant's cousin and carer who explained that Coventry social services which he was previously under "had come up with a mistaken assessment as to his age but unfortunately it has not been possible for Enfield to dispute this and that Enfield is likely to go along with what the Home Office now holds which is treating him as a 19 year old man".

51. As she has worked closely in the psychological context with the claimant for over a year she felt the need to present her views as to how she perceives the claimant. She set out various facts relating to his physical, emotional, intellectual, cognitive and behaviour characteristics, the result being that in her opinion these characteristics "do not match that of a 19 year old man that he is claimed to be". She accordingly stated that it is appropriate that this case become subject to another review to determine his "most appropriate age."

52. The claimant's solicitors corresponded with Enfield Council. On 12 December 2012 the senior lawyer of Enfield Council stated that "my clients do not believe that their age assessment was fundamentally flawed. However, for pragmatic reasons, my clients are prepared to accept your client as having a date of birth of 1 January 1996 as they have done previously. He will therefore revert to having the status of a looked after child with immediate effect."

53. In a letter dated 11 December 2013, the allocated social worker from the Enfield Council sent a letter "to whom it may concern" stating that the claimant's age was disputed by the borough and a decision was made to support the claimant as a young person. Since his age dispute has settled, it has been noticed that there are positive changes in him.

54. Counsel submitted that Judge Lester had proper regard to the determination of Judge Tipping at [3]. She noted that his age was a matter of controversy. She referred to the evidence in the secretary of state's bundle from Enfield Council. She dealt with the identity document, the Taskira, which set out his date of birth as 13 years old in 2009 [6]. She also had regard to other documents which were not before Judge Tipping and which formed the basis of the fresh claim. This included the examination of the Taskira by an independent expert, Dr Zadeh. She also had regard to the Enfield evidence referred to at [9].

55. Mr Bazini accordingly submitted that the secretary of state cannot simply assert that Judge Lester paid no regard to the Devaseelan principles. This was all post-decision evidence which has not been disputed as being credible. She was entitled to take it into account. She has also considered the Coventry Social Services assessment [7].

56. He also referred to paragraph 4 of the reasons for refusal where it is noted that the Home Office received further submissions by post. In August 2013 there was an application for a judicial review lodged on behalf of the claimant. Mr Bazini informed me that as a consequence it was agreed to look at the claim again. It was in effect a fresh claim with new evidence. Most of this was in the secretary of state's bundle.

57. He submitted that Judge Lester had regard at [8] to a letter dated 16 March 2011 from the claimant's social worker noting that there had been some discrepancy regarding his age, however, through observations and from working with him, they have no grounds at this time to dispute "that science date of birth is 8 September 1996, making him 14 years of age." Judge Lester noted that this had not been before Judge Tipping [9].

58. He stated that at the hearing on 20 January 2015, he had presented a full skeleton argument settled by other counsel to Judge Lester. There were detailed arguments relating to the claimant's age. There was express reference at paragraph 10 to the operation of Devaseelan. The contention was that the factual matrix had moved on considerably since the previous appeal hearing allowing the Tribunal to depart from previous findings.

59. Judge Lester noted that in addition to the Enfield age assessment, there were other documents not before him and which formed the basis of the fresh claim. There were the two letters of summons from the Baghlan police.

60. Moreover, she looked at the expert report of Dr Giustozzi dated 11 March 2012 to the effect that it was plausible that the claimant's father might be suspected as one of the participants in the 6 November bomb attack.

61. She considered the evidence in support of the claimant's appeal. He had prepared a statement in January 2015 responding to the observations of the secretary of state in the refusal letter. He contended that the original age assessment by Coventry was not Merton compliant as there was no appropriate adult present.

62. She had full regard to the evidence of Mr Kholozai, Mr Rafi, and Dr Guistozzi's reports, including his additional report dated 15 January 2015.

63. She referred to the identity card that he produced and his claim that as the son of an active insurgent implicated in a widely publicised incident, the authorities would consider the claimant to be part of the Taliban. She also referred to his evidence of his education in the madrassa, the reasons why he did not claim asylum in France and to his contentions relating to internal relocation and in particular that he would be at risk in Kabul. She noted that the claimant gave evidence at the hearing [31]. She has summarised the evidence given by the claimant and by Mr Rafi and Mr Kholozai.

64. She referred in closing to the Home Office Presenting Officer's reliance on the reasons for refusal and the determination of Judge Tipping that the claimant was neither plausible nor credible [35]. She was invited to consider the documents in the round and in the light of the general lack of credibility of the claimant. The expert report threw some light on the situation, but it was clear that the Taliban did not practice forced recruitment [36].

65. She was referred by Mr Bazini to the documentation and the case law, as set out at [42-46]. At [38] she noted that Mr Bazini relied on the skeleton argument presented.

66. Mr Bazini also submitted additional authorities including A, R (on the application of) AAJR [2013] UKUT 342 (IAC). At [55] the Tribunal noted that it had been referred to authorities on the issue of whether reliance could be placed on an age assessment carried out in breach of the requirement that a young person must be asked whether he wished to bring an appropriate adult in advance of the interview. In AAM v SSHD [2012] EWHC 2567 Lang J found that the age assessment in that case failed to comply with the Merton standards of good practice in that there was no appropriate adult present.

67. He submitted that the age assessment relied on by Judge Tipping has been acknowledged by the Enfield local authority to be incorrect. The claimant is in fact three years younger. There was also the Taskira as well as other evidence relating to his age.

68. He referred to the Court of Appeal decision in JA (Afghanistan) v SSHD [2014] EWCA Civ 45 from [28-34]. This related to provisions designed to safeguard the interests of children. He referred to R (FZ) v SSHD and the London Borough of Croydon [2011] EWCA Civ 59 [23-28]. Reference is made at [23] to the fact that it is generally accepted in a variety of contexts that where children or other vulnerable people are to be interviewed, they should have the opportunity to have an appropriate adult present.

69. Mr Bazini also relied on KS (Benefit of the doubt) [2014] UKUT 552 (IAC) at [106]. The Upper Tribunal there dealt with some of the reasons given by the Judge in that appeal for dis-applying the liberal application of the notion of applying a liberal

benefit of the doubt rule to that appellant, which they found to be tenuous. These failures of explanation were of particular importance because the Judge should have started from the position that at least in relation to the appellant's recounting of events when he was a minor, paragraph 351 had potential application and hence in assessing the claim of the child, more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. That in turn would have enhanced the position and the potential of the expert report of Dr Giustozzi.

70. Mr Bazini submitted that in the claimant's case Judge Tipping dealt with his age but found that he was lying about his age and was much older. Judge Tipping never had any of the evidence which became available.

71. In reply Mr Bramble submitted that it is clear that Judge Tipping regarded the claimant as still being a minor. As such he found that there were nevertheless discrepancies which were taken into account and which affected the credibility of his account.

72. He submitted that Judge Lester approached the appeal on the basis that the earlier decision had never occurred. She had not given proper reasons as to why "she stepped aside from it." Nor did she engage with the reasons for refusal letter.

Assessment

73. The secretary of state has contended that the First-tier Tribunal Judge failed to apply the Devaseelan guidelines.

74. I have set out in some detail the decision and reasons from the decisions of both Judge Lester as well as those from the earlier decision of Judge Tipping.

75. The Devaseelan guidelines were approved by the Court of Appeal in Djebbar v SSHD [2004] EWCA Civ 804. The provision of guidance on how appellate bodies should deal with the fact of an earlier unsuccessful application when deciding a later one was "essential to ensure consistency of approach." The Court emphasised that the most important feature of the guidance is that the fundamental obligation of every immigration judge independently to decide each new application on its own individual merits was preserved; the guidelines were not written in the language of *res judicata* or estoppel: Djebbar, *supra* at [15].

76. The guidelines provide that matters arising since the first appellate decision and facts which were not relevant to the issues before the first Immigration Judge can be determined by the second. The first determination is generally to be regarded by the second Immigration Judge as an authoritative determination of the issues of facts that were before the first appellate body. Generally, the second Judge should

not revisit findings of fact made by the first on the basis of evidence that was available to the appellant at the time of the first hearing. Those facts may be revisited in the light of evidence that was not available to the appellant at the time of the first appeal. There may be revisited where the circumstances of the first appeal were such that it would be right for the second appellant body to treat the first determination as if it had never been made.

77. It may also be appropriate for the second appellate body to revisit earlier credibility findings if the issue of credibility remains arguably live.

78. If the second appeal contains asylum or human rights grounds, the second appellate body in applying the Devaseelan guidelines would have to be mindful of the obligations to take account of all relevant material and to consider the case with the most anxious scrutiny[1].

79. Although it might have been more helpful for Judge Lester to have set out the basis on which she applied the principles set out in Devaseelan to the claimant's appeal before her, it is evident that she had before her the detailed skeleton argument prepared on behalf of the claimant, which referred to that decision.

80. As already noted, there was express reference to Devaseelan in the skeleton at paragraph 10. It had been contended before Judge Lester that the age assessment before Judge Tipping had not been Merton compliant as no appropriate adult had been present. The relevant authorities were cited in support. It was accepted that he was a minor at the time and no reasons had been given for that failure.

81. It is evident that Judge Lester in fact reminded herself on several occasions in the course of a lengthy decision that the earlier refusal had been the subject of an appeal determined by Judge Tipping in November 2010 who found that his account was implausible and inconsistent in many critical aspects [3].

82. Moreover she expressly stated that there were further documents and evidence subsequently produced which had not been available at the time of the earlier decision. This in particular related to the Enfield Council's concerns as to the age of the claimant, resulting in its acceptance that his date of birth was 8 September 1996.

83. Judge Lester stated that that age assessment was not before Judge Tipping at the appeal on 23 November 2010. Nor could it have been. I have referred to the documentation from the Enfield Council, and in particular reports from the social worker and others which post dated Judge Tipping's decision. Such evidence has been referred to by Judge Lester at [8] and [9].

[1] Macdonald's Immigration Law and Practice, 8th Edition, Volume 1, 19.106.

84. In addition, Judge Lester noted that there were other documents not before Judge Tipping and which formed the basis of the fresh claim [10]. There were two letters of summons from the Baghlan police dated 8 November 2007 and 12 November 2007. There was further evidence including a letter from Mr Rashid to the claimant's cousin and guardian, Mr Rafi, as well as a letter from the Imam of the Palmer's Green mosque confirming the claimant's knowledge of the Koran, a statement from Haji Amazi who knew the claimant's father and his involvement with the Taliban, and a letter from the Office of the Attorney General of Afghanistan dated 27 March 2012. This evidence as well as further evidence set out at [11] formed the basis of the fresh claim.

85. She had regard to the expert report of Dr Guistozzi as well as his further report dated 7 March 2012 and 15 January 2015 respectively.

86. At [35] the presenting officer expressly relied on the secretary of state's reasons for refusal and the determination of Judge Tipping who found the claimant was neither plausible nor credible [35]. As noted, the Judge was invited to consider the documents in the round in the light of the general lack of credibility of the claimant.

87. Mr Bazini relied on the skeleton argument to which I have referred [38]. He submitted that this had been a fresh claim. The determination of Judge Tipping was no longer sustainable in the light of the evidence and the expert report. Nor was the Coventry age assessment Merton compliant. There had been no appropriate adult present.

88. It was contended that taking into account his age, vulnerability and the trauma he had suffered, that this was a 13 year old who was being interviewed and was dealing with what he had witnessed as an 11 year old. The letter from Ms Sani at Annex D of the respondent's bundle, who was the claimant's psychotherapist, was clear that the claimant was 14 years old in April 2011 and this was the way he presented in sessions with her. He was considered a looked after child by the council and treating his evidence in any other way would be contrary to UNHCR guidelines [38].

89. There had been a concession by the secretary of state that the bombing referred to as part of the claimant's appeal had occurred in 2007. The fact that the authorities were interested in the claimant had been confirmed by Dr Giustozzi [40]. She found that all the elements of his account were consistent with the situation in Afghanistan as confirmed by Dr Giustozzi. It had been possible to obtain an identity document through personal connections. It was also submitted that the ability of the claimant to avoid detection in Kabul for seven months had not been damaging to his claim.

90. Judge Lester in a thorough and detailed decision has properly directed herself with regard to the assessment of an asylum claim [48-49]. She referred to the approach to be adopted in respect of asylum claims by unaccompanied children [50]. She again stated at [51] that she set out the evidence in support of his appeal at some length largely because most of it was not available to Judge Tipping when he made his decision.

91. She further stated that on any view, he was a very young person when things happened to him in Afghanistan and was a very young person to have undertaken such a journey. He had attempted to substantiate his account and the provision of documentary evidence with the assistance of his cousins.

92. She had regard to the fact that he had provided a Taskira purporting to show that he was born in 1996. That document, she accepted, was genuine and was authenticated by Dr Zadeh. There had been no contention otherwise by the presenting officer. She noted the problem raised with that document, namely that the claimant by his own admission was not present when the document was drawn up. The document had been obtained on the basis of his word and the photograph [53].

93. She noted that the claimant's representatives lodged the original of the summonses from the police in 2007 requiring his re-arrest after he escaped from custody, for involvement with his father in a suicide attack in Baghlan. Those documents however had not been returned for authentication, notwithstanding directions on two occasions. The documents were obtained by a friend of Mr Rafi, his guardian, on the journey to Afghanistan in May 2011.

94. The Judge at [55] also had proper regard to the potential shortcomings of such documents.

95. She accordingly turned to the other evidence, including the acceptance by the secretary of state that the bombing incident did take place. She found from the expert report that it is therefore plausible that the claimant's father might have been suspected [56]. It was therefore plausible that the claimant as the oldest son would have been arrested for interrogation which involved beatings and other physical abuse. His release by bribe was also quite plausible on the evidence [57]. She accepted that the claimant was then sent to a madrassa. There was good evidence of his having learned the Koran to a high standard [58].

96. She accepted that he left the Taliban in Kandahar as he did not wish to become involved in jihad. Dr Giustozzi doubted that he would be targeted by the Taliban for having left the group. She accordingly "inclined to the view" that he had much more to fear from the police and security forces rather than the government, although the Taliban would be able to exert significant psychological pressure on

him. She relied on Dr Giustozzi's report of the plausibility of the claimant's assertion that he was able to remain for seven months in Kabul without being found by either the security forces or the Taliban.

97. She also noted that there was ample evidence of the attempt to trace his family through the Red Cross as well as attempts made by Mr Rafi to locate his mother and siblings [61].

98. She found for proper reasons that it would not be reasonable to expect the claimant to live in Kabul [62].

99. In the light of this lengthy assessment, I find that Judge Lester made more than "a passing reference" to the earlier decision of Judge Tipping. She has on several occasions referred to his findings. The contention that she "also omits to apply the guidance set out in Devaseelan by making the first decision a starting point before giving adequate reasons for any departure from it, is accordingly misplaced.

100. It is evident, having regard to the approach and reasoning of the Judge as a whole, that she was well aware of Devaseelan and she has provided cogent reasons justifying the departure, and in particular those arising from the flawed age assessment that had been available to Judge Tipping.

101. It is evident that the Coventry council age assessment was flawed and was not Merton compliant for the reasons set out. In the event, Enfield Council adopted an approach with regard to their duties towards the claimant on the basis that he was three years younger.

102. In this respect the Judge had the benefit of the Taskira document albeit that the claimant had not been present when it was issued but that the document was issued on the basis of a photograph of the claimant that was produced.

103. In the circumstances, the claimant's credibility had to be assessed in the light of the approach to be taken with regard to asylum claims by unaccompanied children. Judge Lester approached the evidence on the basis that the claimant had been 13 years old when he was being interviewed and that he dealt with what he had witnessed as an 11 year old.

104. In the light of the further evidence, the findings by the Judge are sustainable. She has given proper reasons for accepting the plausibility of his account as well as his ultimate credibility.

105. Her conclusion that he has established "on the balance of probabilities" a reasonable likelihood that he would be at risk particularly from the authorities were

he to be returned, was justified and appropriate having regard to Dr Giostozzi's opinion in that respect.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error on a point of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed Date 4/3/2016

Deputy Upper Tribunal Judge Mailer