Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/20209/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 2nd March 2016	**On: 8th April 2016**

Before

THE HON LORD BURNS
(sitting as an Upper Tribunal Judge)

UPPER TRIBUNAL JUDGE BRUCE

Between

BK
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr P. Lewis, Counsel instructed by Fisher Jones Greenwood Solicitors
For the Respondent: Mr D. Clarke Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Afghanistan born on the 1st January 1977. He appeals with permission[1] the decision of the First-tier Tribunal (Judge Denson)[2] to dismiss his appeal against a decision to

[1] Permission granted on the 11th August 2015 by First-tier Tribunal Judge Parkes
[2] Determination promulgated 26th May 2015

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refuse him leave to enter the United Kingdom[3], and in so doing cancel his indefinite leave to remain.

Background and Matters in Issue

2. The Appellant arrived in the United Kingdom in 2002 and sought asylum. He thereafter failed to attend an interview and the claim was rejected on non-compliance grounds. The Appellant lodged an appeal with the First-tier Tribunal, and when he attended the hearing in October 2004 he did so on his own with no legal representation. The Adjudicator was Mrs P.M Hands. Having heard the Appellant's evidence, she found that he had been a member of the Taliban, whose duties had included "harassing, detaining and killing people". Mrs Hands found the Appellant to be a credible witness, but did not find his fear of return to Afghanistan to be well-founded. The country background material indicated that the situation for rank and file members, "particularly those coerced into working for the Taliban to save their lives and livelihood", was that they were being accepted back into Afghan society. She found that there was no risk of serious harm, and dismissed the appeal.

3. The Appellant did not seek to challenge that decision. In January 2007 he was removed from the United Kingdom. Once back in Afghanistan, he made an application for entry clearance as the spouse of a person present and settled here, namely his British wife CH. That application was successful and he re-entered the United Kingdom on the 2nd August 2007. On the 22nd September 2009 he was granted indefinite leave to remain (ILR).

4. The Appellant subsequently made an application to naturalise as a British citizen. By way of letter dated 20th December 2011 this was refused on the following grounds:

> *"The evidence you gave at your asylum appeal was that whilst serving the Taliban you were responsible for the detention, beating, torture and murder of people on the orders of your commander.*
>
> *These acts amount to war crimes of: murder, torture, unlawful confinement, wilfully causing great suffering, or serious injury to body or health. In addition, these acts amounted to crimes against humanity of: murder, imprisonment and torture. As a result of your personal involvement in war crimes and crimes against humanity, the Secretary of State is not satisfied that you are a person of 'good character' for the purpose of the British Nationality Act 1981.*

[3] Decision dated 17th April 2014

> *You admitted to participation in the torture of prisoners. Acts of torture are outlawed under the United Nations 'Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment. As a result of your personal involvement in torture, the Secretary of State is not satisfied that you are a person of 'good character' for the purpose of the British Nationality Act 1981.*
>
> *The Secretary of State has considered your claim to have carried out these crimes on the orders of your superior officer. However, the Secretary of State does not consider this to be a defence for your actions on the grounds that the orders to detain, torture and murder people were manifestly unlawful, as set out in Article 30 of the Rome Statute (1998)."*

5. Notwithstanding the terms of that letter, it would seem that the Secretary of State took no action to curtail or cancel the Appellant's leave to remain in the United Kingdom.

6. In 2012 the Appellant, now divorced from CH, flew back to Afghanistan to get married. He returned to the United Kingdom, from where he sponsored an application made by his new wife for entry clearance. In September 2013 he went back to Afghanistan to be there for the birth of his daughter.

7. On the 24th September 2013 he flew back to Heathrow. On arrival he was questioned by an Immigration Officer about the circumstances that led to his obtaining settlement in the United Kingdom. The Officer suspended the Appellant's ILR pursuant to Schedule 2 of the Immigration Act 1971 and granted him Temporary Admission (TA) pending further investigation.

8. By the 17th April 2014 the investigations were complete. The Secretary of State, in a letter of that date, cancelled the Appellant's ILR and formally refused him leave to enter the United Kingdom. The letter states that the Appellant had employed deception, or failed to disclose material facts, on three occasions. Those occasions were i) in his application for ILR, ii) his application for British citizenship and iii) in an interview dated 20th March 2014. The Secretary of State had regard to the evidence recorded by Adjudicator Hands and contrasted this with Appellant's negative response to the following questions, put for instance in his application for ILR:

    > *8.3 In times of either peace or war have you or any dependants who are applying with you ever been involved, or suspected of involvement, in War Crimes, crimes against humanity or genocide?*

8.4 Have you or any dependants who are applying with you ever been involved in, supported or encouraged terrorist activities in any country?

8.5 Have you or any dependants who are applying with you ever been a member of, or given support to, an organisation which has been concerned in terrorism?

8.6 Have you or any dependants who are applying with you ever, by any means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts?

8.7 Have you or any dependants who are applying with you ever engaged in any other activities which might indicate that you may not be considered to be persons of good character?

9. The Secretary of State directed herself to the legal definitions of war crimes and crimes against humanity and having done so was satisfied that the activities that the Appellant described to Adjudicator Hands met these criteria. It was found that in replying "no" to the questions set out above, the Appellant had made a "blatant attempt to deceive the Home Office". The Appellant's explanation that he did not fully understand the questions, and/or that he genuinely did not believe himself to be guilty of the crimes listed, was rejected. The letter goes on to make the same points in respect of the Appellant's application for British citizenship. As to the interview conducted as part of the current investigation it is noted that the Appellant denied having ever told Adjudicator Hands that he had killed or tortured anyone. The Appellant attributed the mistake to there having been an Iranian Farsi interpreter at court rather than one speaking his native Dari. The Secretary of State found the Appellant to have used deception/failed to declare material facts and therefore cancelled his ILR pursuant to Schedule 2 (A)(8) of the Immigration Act 1971. The letter goes to address the Appellant's human rights claim, founded on his parental relationship with his British son, C. Although the Respondent accepts that there is a family life with C, interference with it is found, in all the circumstances, to be proportionate.

10. That was the basis of the decision appealed to the First-tier Tribunal, and the determination begins by setting out that legal framework. The Tribunal then directs itself in the following terms [at 6]: "The burden of proof is on the Appellant. The standard of proof is on the balance of probabilities…". The determination makes reference to the determination of Adjudicator Hands, the Appellant's oral evidence and the Respondent's material. Judge Denson concludes that, notwithstanding the generally positive credibility

assessment made by the previous Tribunal, he cannot accept that the Appellant is now telling the truth. He rejects the Appellant's denials that he was a willing member of the Taliban and finds that he has committed appalling acts including torture which would fall within the definition of war crimes or crimes against humanity. The Appellant's pleas that he was forced to work for the Taliban are expressly rejected in the following terms:

> "31. The Appellant as stated above has attempted to try and disassociate himself from the evidence he gave at the previous hearing which I find goes against his credibility as a witness of truth. He has stated that he was forced to join the Taliban as if he did not do so his family would be killed. I note that the previous Adjudicator in her determination made a different finding in that she stated "His father was old and fragile and therefore the commanders insisted that he send the appellant to fight for them. If he did not do so his family would have been left without food". No mention whatsoever was made at his previous appeal of his family being attacked or possibly killed by the Taliban if the appellant did not comply with what was in effect their forced conscription".

11. The Appellant's claim that his evidence to Adjudicator Hands was mistranslated is expressly rejected, since the determination itself shows there to have been a Dari, nor Farsi, interpreter. This section of the determination concludes: "Given the above findings and conclusions, I find that the appellant has failed to discharge the burden of proof to show that he has not made false representations or material facts have not been disclosed...".

12. In considering Article 8 the First-tier Tribunal appears to accept that the Appellant enjoys an Article 8 family life with his British son, but finds that the Appellant has manipulated this situation by increasing his contact with his son once notified of the Secretary of State's intention to cancel his ILR. In all the circumstances the Appellant's removal is found to be proportionate.

Error of Law

13. Permission was granted on the ground that whatever other errors the determination might contain, the reasoning was arguably fatally flawed for a failure to apply the proper burden of proof.

14. On the 7th December 2015 the matter came before Upper Tribunal Judge Bruce. The Respondent was that day represented by Senior Presenting Officer Ms Savage who agreed that the First-tier Tribunal was wrong in law to have considered, at paragraphs 6 and

37, that the burden of proof in respect of an allegation of deception fell on the Appellant. Her instructions were nevertheless to argue that any such error was not material: the decision would have been the same no matter what burden of proof the Tribunal had applied. Ms Savage pointed to paragraph 31 of the decision (set out above) to submit that the Tribunal had expressly rejected the Appellant's evidence that he had been forced to join the Taliban under duress and as such did not consider himself culpable. That finding would have been the same no matter where the burden lay.

15. Judge Bruce set the decision aside. Whilst it may be that a Tribunal, properly directed as to the appropriate standard and burden of proof, would have reached the same conclusion, that was by no means an inevitability. As Mr Lewis has set out in his detailed grounds, the Appellant had provided an explanation for the answers he gave on the various forms, and it was his case that he had honestly believed those answers to be true. In short, he avers that he did not believe himself to have ever committed a war crime, a crime against humanity or an act of terrorism. It was not for the Appellant to show that this was true, rather it was for the Respondent to show it to be false. In those circumstances, where that fundamental principle has not been recognised, the determination could not stand.

16. It should further be noted that paragraph 31 of the determination contains an unfortunately incomplete summary of the Appellant's evidence before Adjudicator Hands. Judge Denson finds there to have been "no mention whatsoever" of duress in that earlier determination, but this is simply not correct. The determination of Adjudicator Hands makes repeated reference to the Appellant having been coerced into joining the Taliban:

- "local commanders continually threatened him and told him to go and join the war" [8a]
- "Commander Ghulam would gather all the children together and force them to go to war. If you refused to go voluntarily then he forced you to go. [The Appellant] had seen children who had refused to go being killed in front of their parents" [8b]
- "he was only following the orders of his commander at the time" [12]

That the Appellant was not a voluntary participant in the Taliban's activities is central to the *ratio* of Adjudicator Hands' decision, since she finds there to be no risk of harm to former Talibs, "*particularly* those who were coerced to working for the Taliban to *save their lives and livelihood*" (emphasis added) [at 38].

17. Following the error of law decision Mr Lewis requested that the matter be adjourned to be remade at a later date, since the Appellant wished to call witnesses who were not available. Ms Savage had no

objection to this.

The Re-Making

The Hearings

18. When the matter came back before Judge Bruce on the 26th January 2016 the Respondent faced some difficulty. The Senior Presenting Officer who had prepared the case had been taken ill overnight and Mr Kotas, who appeared, had had little time to prepare. The Respondent made a request for an adjournment. Mr Kotas submitted that this was a matter regarded as being of significant importance by the Home Office. He submitted that there were “complex legal issues including an accusation of war crimes” and he had not had time or instructions to prepare submissions. Mr Lewis for the Appellant opposed the adjournment request. This was principally because two additional witnesses had attended the hearing and wanted to give evidence. They were the Appellant’s ex-wife CH and her mother Mrs H. They had both had to make arrangements and travel in order to attend the hearing and may not be able to do so again. Having heard the submissions Judge Bruce decided that the hearing should proceed to be part- heard. The evidence of the witnesses simply went to Article 8. Their testimony could be heard and recorded and Mr Kotas would have no difficulty in preparing cross examination since the matter raised by section 117B(6) of the Nationality Immigration and Asylum Act 2002 was a simple factual one: does the Appellant have a genuine parental relationship with his son and would be it be reasonable for this British citizen child to leave the UK? Mr Kotas agreed that with some time he could deal with the Article 8 evidence. Mr Kotas was given some time to read the papers and prepare his cross examination. This enabled the evidence of the witnesses CH and Mrs H to be heard. The hearing was then adjourned part heard.

19. On the 2nd March the case resumed before the present panel. Mr Clarke was provided with a typed transcript of the oral evidence of CH and Mrs H. We heard oral evidence from the Appellant and detailed and helpful submissions from both parties. We reserved our decision.

The Evidence

CH

20. CH adopted her letter dated 9th November 2014 and gave oral evidence. Her testimony is as follows. CH was in a relationship with the Appellant from 2005 to 2010. They were married in 2007 and divorced in 2011. They have a son together, C, who was born on the

21st August 2007. C had a stroke in 2009 and has had ongoing health issues as a result[4]. CH is now in a new relationship and has another child, A. She does not live with A's father. She maintains a good relationship with the Appellant and relies on him for support with C, particularly since A was born.

21. In her oral evidence she explained that when she found out she was pregnant for the first time the Appellant "went ballistic". He did not want to have a child. He said that he was not in a position to be a father. She booked in to have the pregnancy terminated. When she had a scan she was told that it was twins. She could not go through with the abortion. She told the Appellant and he was not happy about it but it "gradually grew on him". Then at 18 weeks CH miscarried and lost the twins. Both she and the Appellant were devastated. Their relationship continued but CH lied to the Appellant. She told him that she was using contraception but she wasn't. She explained that looking back she realises that she was grieving for her babies. When she found out that she was pregnant again she was dreading telling the Appellant. She knew he would not be happy about it. She avoided the subject until his arrest and detention forced her hand – she was about 5 weeks pregnant when he was detained and after this she had to tell him.

22. The Appellant came back to the UK about three weeks before C was born. He has "not left his side since" – he has been more of a mum than a dad. In response to questions from Mr Kotas CH clarified that she did not mean that comment literally – obviously the Appellant has left his side, but she just meant that he has been there for his son. He is a "wicked dad" (ie an excellent father): "he's not one of those dads who sods off for a year then decide to come back". CH says that during her pregnancy and the early years of C's life she "doted" on the Appellant and their relationship was good.

23. CH takes full responsibility for the breakdown of their marriage. She explains that when C was 2 years old he had a stroke. He was in and out of hospital for months and the strain of this was too much for her. When C finally came home she started falling apart:

> "When he came home I think it all hit me – the grief and everything - all the stress hit me at once. I was going home being horrible and drunk. During that period he was excellent as a dad – my son wouldn't be where he is now without him. He looked after him when I was off the rails".

24. As for the position today CH confirmed that C lives with her full time although he sees his father frequently during the average week. At one time he had him afterschool every Tuesday but now he has

[4] The Appellant's bundle contains a large volume of medical evidence relating to C but since none of this is contested it is not set out herein.

him overnight every Tuesday and at weekends. He regularly pops round. Because of his stroke C needs a lot of extra support. He has physiotherapy every night at home and still has to attend the hospital on a regular basis. His dad does a lot of other physical activities with him designed to increase his strength. For instance he takes him to football and swimming. He takes him to all his hospital appointments. The hospital is 5-6 miles away and CH does not drive. Its quite a walk to the bus stop and C gets really tired. The Appellant has his own taxi so he does all of that. CH described C's relationship with his father as "unbreakable" and added: "he's 9 in August. They have always been tight. If his Dad was not to be here – I don't even want to think about how he would be. He dotes on him. He would be devastated if Dad left"

25. CH says that the Appellant takes a lot of responsibility as far as C's education is concerned. He often takes him to school in the morning especially in the winter when it is cold. Again, sometimes its better that C gets a lift because his legs get tired. A goes to nursery just past the school and CH takes him there in his pushchair but it is hard for C to make that walk every day, so the Appellant picks him up. He has a good relationship with C's teachers. CH contrasted this involvement with her own: she told Mr Kotas that she does not even know the name of all of C's teachers because she gets confused as there are so many of them in the classroom. She knows one of them because she is C's specially allocated 'learning mentor' but the Appellant knows more of them and is familiar with C's needs and achievements at school. She could not comment on why the Appellant was unable to name C's teacher at his interview in 2014 save to say that there are a lot of staff and it can be confusing.

26. Mr Lewis asked CH if she has ever known the Appellant to be dishonest. Her answer was unequivocal:

> "He's always been honest. He has always told me the truth. He's never been disloyal to me. No reason not to trust him ever. He'd do anything for anyone – he's lovely"

27. CH stated that she would not permit C to go and live in Afghanistan with his father: "no way!! I wouldn't even let him on a boat to Kent". In cross examination she added that she would not permit her son to go because it is too dangerous and there would no medical care for him there.

Mrs H

28. The Appellant further relied on the evidence of CH's mother, Mrs H. She adopted her letter dated 25th October 2014 and gave oral evidence.

29. Mrs H was candid in her evidence that when her daughter brought an older Asian man home in the summer of 2005, she was not happy. She is not racist but was worried about what his motives might be. When CH fell pregnant the Appellant was not enthusiastic. He had wanted her to “get rid” of the baby. This made Mrs H really dislike him. They had a big row on the seafront and she slapped him. Asked if this was still her view of the Appellant Mrs H said that now things have changed: things happen over the years and you get a different perspective. She had initially been suspicious of him, that he may have been using CH in order to stay here, but when he was opposed to the idea of having a baby it made her think otherwise. Mrs H explained what then happened when CH discovered that she was pregnant with twins:

> “When it transpired it was two babies she was beside herself she didn’t know how she was going to cope - then he seemed to step up his game. He went from rejection to acceptance”

When problems developed in the pregnancy the Appellant was there to support CH. He was with her when she was told that the babies had died, and when she had to deliver them.

30. When the Appellant was arrested and faced with return to Afghanistan they were all devastated but CH fought hard to get him back to the UK. She travelled to see him in Dubai and then they were married in Pakistan. She supported his visa application for return to the UK. C was born just three weeks after the Appellant arrived back.

31. The Appellant and CH lived together for 2-3 years. They were married and in the beginning they were very happy. Mrs H was unable to remember precise dates but she believes that they split up when C was about 3 or 4 years old. Mrs H squarely blames her daughter for this. In her written evidence she describes how her daughter “went off the rails a bit – she as out all night clubbing and drinking excessively…she was everyone’s worst nightmare”. In her oral evidence she recognised that this had been a very difficult period for her daughter, dealing with the grief of losing her children and the trauma of how they had died and been delivered: “she wasn’t mature enough. Her heart is in right place. She wasn’t grown up enough to deal with it”. It was during this period that Mrs H changed her perspective on the Appellant. He was very supportive of CH and would come to Mrs H to seek advice on how best to deal with her behaviour and how he could try and help her.

32. Mrs H said that she would now trust the Appellant 100%. She has never known him to be dishonest or disloyal.

33. In respect of the Appellant’s current relationship with C her evidence was that the Appellant’s removal would “really set [C] back”. They have a really good bond. He regularly sees him. He does a lot of the school runs and other activities. She said of the Appellant:

> “He’s a brilliant father. It’s a shame they are not together. [C] dotes on his dad. He’s 100% great dad I can’t fault him. He was there - I saw him when the babies were born, when he was removed, when [C] was born - when he had his stroke – I have witnessed his reactions. I have seen how he stuck with it. A lot of men would have walked away.
>
> [The Appellant] stimulates [C]– he’s very weak on one side. [The Appellant] does a lot of stuff [CH] is unable to do because of her youngest. He takes him swimming, fun factory etc. He gives him emotional stability. He wouldn’t be the little boy he is today if its wasn’t for his dad”.

34. Finally Mrs H was asked about the suggestion that the Appellant’s involvement with his son was in some way cynical or recent, being designed to boost his chances on appeal. She was quick to respond: “yeh I read that I think it was a load of rubbish. He shows genuine love to that little boy”.

The Appellant

35. The Appellant adopted his witness statements both dated 19th May 2015 and gave further evidence before us. He did not use an interpreter and at times questions had to be repeated. We were satisfied that with these clarifications the Appellant was able to understand and make himself understood, although his English was far from fluent.

36. The Appellant states that he told the truth to Adjudicator Hands at his asylum appeal. He is from a village in Paktia province which came under the control of the Taliban. He was forced to join them because they threatened those who refused with violence and death. That was the only reason he joined. He did not want to hit people, or to threaten them. He only did so because he was in fear for himself and his family. The Appellant denies having told Adjudicator Hands that he killed or tortured people. The extent of his activities with the Taliban were that he was required to go round the doors and ensure that someone from each house had given a man or boy to join the Commander’s unit. Those who were reluctant were put under pressure. He admitted to Adjudicator Hands, and before us, that during these visits he and other Taliban members would hit, kick, punch and pull men who were refusing to come. The Appellant stressed that this was because he was afraid himself. Just before he

had joined the Commander's unit he had been held in detention for two nights and during that time he had witnessed prisoners bound by their wrists and ankles being beaten on the "palms" (ie soles) of their feet. He could hear their screams. This had made him afraid. He was afraid for his family in particular his father who was in the village and was elderly. He did what he was told.

37. Mr Clarke put it to the Appellant that he had told Adjudicator Hands that he had killed people. She has recorded at paragraph 35 of the determination "his duties included harassing, detaining and killing people under the instruction of his commander". The Appellant denies that this was his evidence. He said that he has no doubt that Commander Ghulam did kill and torture people but that he had never done these things. He believes that his evidence may have been misunderstood or mis-recorded in the determination because he was assisted by a Farsi speaker from Iran, as opposed to a Farsi (ie Dari) speaker from Afghanistan. Mr Clarke referred the Appellant to the note taken by the Presenting Officer on the day of the hearing which contains the following exchange:

Q. That why you don't want to go back?
A. Yes, that's 1 reason and the fact that we did a lot of terrible things eg when we were with Commander Rasoul we did a lot of harm to people, we did harm to the Hazara people.

Q. We – do you mean you?
A. Under order of commander.

Q. You committed acts?
A. Yes, ordered at night to [illegible – possibly "kill" or "torture"]
people

Q. Anything else to tell me?
A. I want to get an education I am fond of the English language and
once I learn I want to start a proper education…

Q. How far along are you learning English?
A……

He put it to the Appellant that he had admitted to killing people at night. The Appellant said that he had not said that he killed people, but those were the kinds of things Commander Ghulam Rasoul did. The Appellant added that his English had been "non existent" at the time and that he had no idea how his evidence was being conveyed to the Tribunal.

38. The Appellant explained that at that time there was no choice but to co-operate with the Taliban. They had started in the south-west, on the Pakistan border, and had swept across the whole country. His village was a small pocket of Dari speaking Shi'ite Muslims in a large population of Sunni Pathans. They were therefore especially vulnerable. He stated that numerous members of his family died in the war. All he saw was violence when he was in Afghanistan – he was a victim too.

39. Asked about the specific questions that he had been asked on various forms and at interview the Appellant was very clear. He had answered "no" to questions like "have you committed war crimes" because as far as he is concerned he had not. He was 17 at the time, he was frightened, and he did what he did in fear for himself and his family. If he was asked the same questions today he would give the same answers. He does not consider himself to be a terrorist, a war criminal, and having committed crimes against humanity, or being of bad character. The Appellant disagreed with Mr Clarke's suggestion that he had ticked "no" because he was trying to hide his past. He pointed out that he had voluntarily divulged all of this information to the Home Office and Tribunal during the course of his asylum case – it made no sense for him to later try and conceal it. He ticked no because he believes that to be the correct answer.

40. Mr Clarke put to the Appellant that in fact, on his own evidence, he had not been under the control of Commander Ghulam Rasoul the whole time. He had told Adjudicator Hands that he was able to see his parents periodically when on 'home leave'. The Appellant agreed that this was so. He was occasionally allowed to visit his parents' home. He denied that this had given him an opportunity to escape however. He pointed out that at that time the Taliban had been in control of the whole country and they had checkpoints everywhere, particularly on the roads leading to Pakistan. It was only when a rival warlord attacked the Taliban positions in Paktia that the Appellant and his family were able to take the chance to flee.

41. The Appellant confirmed that his relationship with his son is a strong one. He sees him on numerous occasions during the week and loves him. He knows that his son loves him and he cannot imagine life if they were apart. He confirmed that he takes his son to hospital for his appointments, and that he plays an important role in his son's physical rehabilitation.

Documentary Evidence

42. The Appellant's bundle contains a great many character references, evidence of his private and family life in the United Kingdom, the determination of Adjudicator Hands and documents

relating to his various applications. We have not considered it necessary to set these materials out in any detail. Where they have been particularly relevant to our deliberations, they are mentioned therein.

Our Findings

The Revocation: Deception

43. The power to revoke on entry a grant of indefinite leave to remain or enter is contained in Schedule 2 of the Immigration Act 1971. An immigration officer may suspend a persons leave to enter for the purpose of establishing whether that leave was obtained as result of false information given by him or his failure to disclose material facts. Under section 2(8) an officer may, upon completion of his investigation, cancel leave to enter or remain. It is accepted on behalf of the Respondent that the burden of proof in establishing deception lies on the Respondent and that the standard of proof lies at the higher end of the spectrum of a balance of probabilities, that is to say that the ordinary civil standard applies but can only be discharged with the production of cogent evidence.

44. The evidence that the Respondent relies upon is set out in the reasons for refusal letter dated 17th April 2014. The case rests on three central submissions.

45. First, the Respondent relies on the findings made by Adjudicator Hands that the Appellant "followed the instructions of his commander and harassed, arrested, detained, tortured and killed people" [paragraph 40]. Those findings were based on the Appellant's credible evidence at the time. Mr Clarke asked us to weigh alongside the determination the written note of the Presenting Officer on the day.

46. Second, the Respondent points to the three occasions in which the Appellant was required to make declarations as to his character and history, and on each he denied having been involved in, or suspected of, involvement in war crimes, crimes against humanity, genocide, terrorism or being otherwise not of good character. For this we are referred to the application forms dated 6th July 2009 (in respect of his application for indefinite leave to remain) and 19th May 2011 (in respect of his application for British nationality) and the interview arising from this investigation conducted on the 20th March 2014.

47. Third the Respondent asks the Tribunal to find that the Appellant cannot reasonably have believed that he was entitled to tick the "no" box in response to the questions about his character and history. The Respondent here points to the Appellant's admissions in the course of

his asylum case that he feared the consequences of his actions in Afghanistan (ie that the local populace would take revenge against his inhumane treatment) and that in 2011 the Appellant was put on notice that the Secretary of State regarded him as having committed these acts: she said so when she refused to grant him British nationality.

48. We begin then, with the determination promulgated in 2004 in respect of the Appellant's asylum appeal. There was no appeal lodged against the decision of Adjudicator Hands, and although we note that the Appellant was at that time unrepresented, we are bound to treat that determination as an authoritative judgment of matters as they stood at that date: Devaseelan v SSHD [2002] UKIAT 00712. We are entitled to depart from the findings in that determination only in certain circumstances, for instance where new evidence has emerged. In his submissions Mr Clarke specifically asked us to consider the findings of Adjudicator Hands alongside the verbatim note taken by the Presenting Officer, now available to us after the Appellant made a 'subject access request' to have them disclosed.

49. We have read that careful handwritten note alongside the evidence as it was recorded in the determination[5]. We have also had regard to the Appellant's evidence before us. Having done so we find that in the course of his asylum appeal in 2004 the Appellant made admissions that he joined the Taliban, and took part in the forcible recruitment of others when he hit, threatened, kicked and punched the victim. Judge Hands found those assertions to be credible, and having heard from the Appellant ourselves we are satisfied that he is telling the truth. These matters are consistently recorded in the determination, the written note and the oral evidence before us. We are further satisfied that the Appellant took part in these actions because he was afraid for himself and his family. The matter of coercion is raised in all three sources, and there is no evidence to the contrary. The Appellant has consistently and credibly stated that he only took part in the activities that he did because he was in fear. On the balance of probabilities we are satisfied that this is the case. We note that before us the Appellant added, in response to questions from the Tribunal, that his village was an anomaly in Paktia: the inhabitants were Shia, albeit ethnically Pathan. As a minority they were therefore particularly vulnerable when militias came to choosing victims. This evidence was consistent with our finding that the Appellant was forced to join the Taliban. He was a very young man (he is uncertain of his age at the time but estimates it to have been seventeen) and when each household was required to give 'tribute' he was the only candidate, his father being relatively elderly.

50. We cannot be satisfied that the Appellant killed or tortured

[5] Unfortunately we have not had access to the Record of Proceedings.

anyone. In contrast to the foregoing matters the three sources before us are entirely inconsistent on this point. The Respondent relies on the findings at paragraph 35 and 40 of the determination. Here Adjudicator Hands records the Appellant's evidence as being that he "followed the instructions of his commander and harassed, arrested, detained, tortured and killed people". Whilst we must take those findings as a Devaseelan starting point, we are bound to say that this record is not borne out by the note of the Presenting Officer. Nowhere in that note is it recorded that the Appellant claimed to have tortured or killed anyone. The closest it comes is in the exchange Mr Clarke highlighted in his cross-examination of the Appellant, where in response to the question "you committed acts?" the answer is recorded "yes, ordered at night [illegible] people". The word that cannot be read may be "to kill", and it may be "torture". We do not exclude the possibility that it might be something else entirely but given the way in which Adjudicator Hands made her findings we assume it to be one or the other. We find there to be a marked distinction between being ordered to do something, and actually doing it. Mr Clarke points to the context in which the answer was given, in response to a question specifically probing the Appellant's actions, and we have given that some weight. It would however appear from what follows that the Presenting Officer on the day did not interpret that answer in the way that Mr Clarke now does. One would think that if a witness made an admission to having committed crimes against humanity, or came close to it, any competent Presenting Officer would clarify any ambiguity, and would seek further confirmation or detail. What happens next in this exchange is a discussion about how far the Appellant has got in learning English. Mr Lewis submitted that it would be "astonishing" if a cross examination turned from war crimes to English lessons. He further submitted it to be telling that nowhere in the determination, or the handwritten note, is there any indication that consideration was given to excluding the Appellant from the Refugee Convention under Article 1F, as one would expect if such admissions had been made. We agree.

51. We have further placed some weight on the evidence of the Appellant himself. We bear in mind that Adjudicator Hands found him to be a credible witness, and having had the opportunity of hearing him give evidence ourselves, we find no reason to disagree. The Appellant was candid in his admissions about what he did do with the Taliban, but he was vehement in denying that he ever killed anyone. As for torture it is a matter of degree whether the press-gang assaults described could reach that threshold. The Appellant himself explained that he had been unsure what the word meant, until the present proceedings necessitated it being explained to him, but he did not, for instance, deliberately inflict pain on someone in detention. Having considered the three sources of evidence we cannot be satisfied that the Appellant did kill or torture anyone, or that in the course of his asylum appeal he made any claims to that effect. We bear in mind

that the Appellant was not represented in 2004 and there was no-one there to re-examine him. We also bear in mind that even taking the Appellant's asylum claim at its highest it was one that was bound to fail since there was no objective risk to him in Afghanistan at the time. That may be some explanation as to why the determination made findings with a broad brush, but it would appear from the Presenting Officer's note that it was not one justified on the actual evidence.

52. We are satisfied that the Appellant did tick "no" to all the questions highlighted in the application forms and that during the course of his interview maintained this position. We note that before us the Appellant confirmed that were he required to answer the same questions about war crimes and terrorism today he would give the same answers.

53. The ultimate question for our evaluation is whether the Appellant sought to deceive when he gave the answers that he did. Mr Clarke accepts that in assessing that question we are guided by the Court of Appeal decision in AA (Nigeria) [2010] EWCA Civ 773. It is for the Respondent to show that the answers given were false, and were given with dishonest intent.

54. In order to establish that the answers given were false the Respondent has referred us to various international instruments which define war crimes and crimes against humanity, and in what circumstances an individual can reasonably claim a defence of duress (see for instance the Rome Statute of the International Criminal Court). The Respondent submits that the Appellant cannot show himself to have had a legitimate legal defence to the actions in question and that as a matter of law he was therefore guilty of those offences. Similarly we were referred to domestic legislation defining "terrorism". As to the alleged deception the Respondent submits that the questions put covered a broad range of activities. Whilst it is readily understandable that the Appellant denied having been involved in genocide, it is less easy to see how he can have denied being involved in war crimes, given the basis of his asylum claim. He wanted asylum because he was afraid of retribution for all the terrible things he had done. It is also the case that from 2011 the Appellant knew these to be matters of concern when he received the negative response to his application for naturalisation.

55. The Appellant's defence is that whilst he knows he did "bad things" that he is not proud of, he did them as a teenager facing threats to himself and his family. He does not regard himself as culpable of any of the matters rehearsed in the questions. It is further submitted that he did not fully understand the nature of the questions asked and that where it might be arguable that the answer given was false, for instance in him having been "involved" in a terrorist

organisation, it was not an attempt to deceive. He submits that he has never tried to hide the fact that he claimed asylum, and that at all times he assumed the Respondent to be aware of the basis of that claim.

56. We have considered the submissions made in the round with the evidence. We note the following chronology. In 2004 the Appellant claimed asylum, and as we have set out, made certain admissions as to his activities with the Taliban. Neither the Respondent nor Tribunal raised any suggestion that he should be excluded from the Refugee Convention as a result. The Appellant was removed. He made an application for entry clearance on the basis of his marriage to CH, and in that application made full disclosure of the fact that he had claimed asylum in the UK, had been refused and removed. He subsequently applied for indefinite leave to remain and again, the facts of the asylum claim were known to the Secretary of State. ILR was granted with no issue raised as to the Appellant's character. It was only in 2011 when his application for naturalisation was refused, that the matter of the Appellant's character was raised. He was told that because of his claims about his involvement with the Taliban he was not of sufficiently "good character" to merit British nationality. The Respondent took no action however to revoke the Appellant's ILR. In 2012 the Appellant visited Afghanistan and re-entered the United Kingdom without difficulty. It was only in September 2013, upon return from a second trip, that the Appellant was subject to investigation for matters that had at that point been known to the Respondent for some 9 years. During those nine years there were, by our calculation, five opportunities for the Respondent take some action against the Appellant and to raise the matters that she now does. That is not to say that there arises any waiver or estoppel, but we regard this chronology as being helpful in giving some context to the Appellant's evidence about his state of mind when he answered the questions in the way that he did. We make a further observation about context. That is that the Appellant was, at all material points, without any legal representation. His English before us was intelligible, but far from fluent. There were points at which questions had to be rephrased and when we had to ask him to clarify his answers. This, alongside the lack of legal advice, highlighted for us the possibility that the Appellant was not fully cognisant of the importance of the questions that he was answering, or the nuances therein.

57. The first question to receive the Appellant's negative response was as follows:

> *In times of either peace or war have you or any dependants who are applying with you ever been involved, or suspected of involvement, in War Crimes, crimes against humanity or genocide?*

As we note above the Respondent produced before us various international instruments containing the legal definitions of these terms. We found these submissions to be of diminished relevance in light of our acceptance that the Appellant did not kill or torture anyone and that the actions that he did undertake were performed under duress. We accept that he joined the Taliban because he was afraid of death or torture (of himself and family members) and that at their highest his activities included hitting, punching, kicking and intimidating other villagers. If those activities could fall within the definition of ‘war crime’ or ‘crime against humanity’ we are satisfied that the Appellant did have a legal defence in that the harm he feared was greater than the harm inflicted. We are further satisfied that the Appellant genuinely believed, and believes, himself non-guilty of these crimes for the reasons he explains in his evidence.

58. The second, third and fourth questions relate to terrorism:

> *Have you or any dependants who are applying with you ever been involved in, supported or encouraged terrorist activities in any country?*
>
> *Have you or any dependants who are applying with you ever been a member of, or given support to, an organisation which has been concerned in terrorism?*
>
> *Have you or any dependants who are applying with you ever, by any means or medium, expressed views that justify or glorify terrorist violence or that may encourage others to terrorist acts or other serious criminal acts?*

In respect of these matters we were referred to domestic legislation defining terrorism, and to the schedule of organisations defined as such by, for instance, the UK and US governments. Again, we found these authorities to be of limited assistance. Whether or not the Taliban were on a list of proscribed organisations at the relevant time is not pertinent to the Appellant’s state of mind when he gave the answers that he did. The question is whether he believed himself to have been involved in, encouraged, supported, glorified or justified terrorist acts. For the reasons we have given above we accept that he did not. We accept his evidence that he did not ideologically support the Taliban.

59. The final question reads:

> *Have you or any dependants who are applying with you ever engaged in any other activities which might indicate that you may not be considered to be persons of good character?*

That question appeared on two application forms, completed in 2009 and 2011. It is the Appellant's case that he considers himself to be a person of good character and that when he completed those forms it did not occur to him that the Respondent thought otherwise. We accept that to be the case. We note that the Appellant is supported in his assertion of good character by his ex-wife, her mother and the written statements of 16 other witnesses who refer to him as "honest", "loyal", "compassionate", "hardworking", "trustworthy" and "a good guy with a big heart". It was not until his application for naturalisation was refused in December 2011 that he could possibly have known that the Respondent took a different view. We have read the 2014 interview with care and we cannot see that this adds anything to the Respondent's case. The bulk of the interview is taken up by the interviewing officer putting the findings of Judge Hands to the Appellant, and the Appellant denying that he ever killed or tortured anyone. The Appellant further explains therein that he had not fully understood the questions when he completed the form and that he had not thought himself to be of bad character. That was precisely the evidence he gave before us, and having regard to the evidence overall, we are satisfied that he was telling the truth.

60. Having considered all of the evidence in the round we are not satisfied that the Respondent has demonstrated that the Appellant used deception at any point in his application forms of 2009 or 2011 or in the course of the investigation into this matter. We find that the burden of proof has not been discharged.

Conducive revocation?

61. At paragraph 43 of the reasons for refusal letter the Secretary of State says the following:

> "Regard has been given to the suitability requirements. As already stated in this letter, based on the evidence you provided, the adjudicator in your asylum appeal determination dated 15 November 2004 concluded and accepted that you had harassed, arrested, detained, tortured and killed people as a member of the Taliban. For these reasons, the Secretary of State considers that your presence in the UK is undesirable and not conducive to the public good and you therefore fail to fulfil S-LTR 1.6 of Appendix FM"

62. Before us Mr Clarke acknowledged that this matter had not featured in the hearing of the appeal thus far since it was plain on the face of the letter that the writer had applied the wrong legal provision. There was no ambit to refuse the Appellant with reference to the suitability requirements in Appendix FM since he had not made

an application under that heading. Mr Lewis confirmed that the Appellant nowhere contended that he should have leave maintained or granted pursuant to the Immigration Rules relating to Article 8.

63. We are not prepared to treat paragraph 43 of the refusal as an alterative basis upon which to consider revoking the Appellant's indefinite leave. That was not the way it was put in the refusal letter, nor the way in which the Secretary of State's case has been put hitherto. Insofar as the 'suitability" requirements under Appendix FM might be engaged that is not a matter for us, but we note that the broad scope of the allegations made at paragraph 43 are not borne out by our findings.

Article 8

64. Given our conclusions on the matter of revocation it is not necessary for us to make findings on the Appellant's alternative human rights claim but we do so for the sake of completeness. If the Appellant retained, as a matter of law, his settled status, our Article 8 analysis would be brief indeed: it would be confined to observing that the Respondent could not possibly show his removal to be reasonable or proportionate. We therefore approach Article 8 on the basis of the alternative: if we are wrong in allowing his appeal against the decision to revoke, and the Appellant is without any lawful status. This will inevitably have ramifications for our analysis of proportionality: for instance, in assessing the public interest in the maintenance of immigration control we will proceed on the basis that the Appellant has never had any valid leave.

65. The Appellant accepts that he cannot meet the requirements of any of the immigration rules relating to Article 8. He does not have a 'partner' in the UK and since C lives with his mother the Appellant has no claim as his 'parent': there is therefore no prospect of success under Appendix FM. In respect of private life the Appellant cannot show that he meets the requirements of paragraph 276ADE because there are no significant obstacles to his integration in Afghanistan: he presently has a wife and daughter living in Kabul, he speaks the language, has a cultural familiarity with the country and he has no protection needs.

66. Mr Clarke submitted that there were not good reasons to go on to look at Article 8 beyond those Rules, which reflect the Secretary of State's view as to where the balance should be struck between the rights of the individual and the public interest. We are satisfied that there manifestly are good reasons to consider Article 8 outside of the Rules: the Appellant is the parent to a British child with whom he does not live. This is not a situation covered by either Appendix FM or 276ADE and is a paradigm illustration of how this part of the Rules do

not form a 'complete code'[6].

67. There is a family life shared by the Appellant and his son C. Although the Respondent had initially taken the view that the relationship with C might be opportunistic, Mr Clarke realistically declined to make submissions to that effect. The evidence given by the Appellant's ex-wife CH, her mother Mrs H and the Appellant himself was compelling and wholly credible. The fact that these witnesses were prepared to come to court on more than one occasion to speak to the level of the Appellant's parental commitment was striking. Mrs H was a particularly impressive witness. She was candid in saying that she had initially viewed the Appellant with hostility, and detailed in her evidence as to how that view changed. As his former mother-in-law she had little to gain from coming and giving the evidence that she did. We are satisfied that she did so because she firmly believes that her grandson needs his father. We are equally satisfied that this child is not going to leave the United Kingdom, because he lives here with his mother and little brother. There would therefore be an interference with the Appellant's family life if he were required to leave the United Kingdom and Article 8 is engaged.

68. We are satisfied that the Secretary of State has the power in law to make the decision that she has, and that it is taken in pursuit of the legitimate aim of protecting the economy.

69. In addressing proportionality we must have regard to the public interest factors set out in section 117B of the Nationality, Immigration and Asylum Act 2002. These do not form an exhaustive list of the material considerations but are a statement of those matters which Parliament considered to be of particular importance in determining Article 8 'outside of the rules'.

70. Mr Lewis relies on the final part of s117B which provides:

> *(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.*

71. The meaning of this section has recently been analysed in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC). The panel (President McCloskey J, Upper Tribunal Judge Francis) found that in the context of the section as a whole, and on the plain

[6] Unlike the rules on deportation of foreign criminals considered in MF (Nigeria) [2013] EWCA Civ 1192

meaning of the text, section 117B(6) provides a complete answer to the question of proportionality. The focus for enquiry is whether it is *reasonable* to expect a qualifying child to leave the UK with the parent with whom they share a substantive relationship. If it would not be reasonable for that child to leave, the public interest does not require the parent to go, no matter what conclusions may have been reached on the matters set out at s117B(1)-(5).

72. We have already found there to be a family life between the Appellant and his son: there is therefore a genuine parental relationship. C is British, lives with his British mother and brother, attends school in the UK and is entitled to the regular medical attention that he so clearly requires. We find as fact that it would not, in these circumstances, be reasonable for C to leave the UK. Applying Treebhawon, the Appellant would succeed in his Article 8 claim.

73. Mr Clarke asked us not to apply Treebhowan. He made two alternative submissions as to why. First, he asked us to find that section 117B(6)(b) had no application here since there is no expectation that C will leave the UK. He submitted that on a true construction of the words the question of reasonableness does not arise for such a child. With respect, we found this argument rather difficult to follow. The effect of it would be that s117(6)(b) would offer protection to parents whose children faced removal with them, but not to parents whose settled children were staying here. Given that the focus of the provision is the protection of the parental relationship this makes little sense. We are not satisfied that anything turns on the words “to expect”. The meaning of the entire phrase is clear. Would it be reasonable for this child to leave the UK? For the reasons we have given, accepted by the Respondent, we find that it would not.

74. Second, Mr Clarke asked us to consider proportionality as a whole, treating s117B(6) as just one factor relevant to the balancing exercise. Whilst Treebhawon is a decision of the President, and as a reported decision is guidance which carries much force, we are conscious that the construction therein is subject to challenge by the Secretary of State. We therefore agree to consider Mr Clarke’s submissions as an alternative.

75. We have regard to the fact that the maintenance of immigration control is in the public interest. The Appellant entered the UK in 2004 and having failed in his bid to secure international protection, overstayed. He subsequently secured entry clearance as a spouse, and indefinite leave to remain: (considering this matter in the alternative scenario that our conclusions about these applications are wrong) these were grants of leave that he was not entitled to because they were obtained by deception. This is a matter which weighs

heavily in favour of the public interest in refusing leave.

76. It is in the public interest that persons who seek leave to enter or remain can speak English, and that they are financially self sufficient. Parliament believes that both of these factors aid integration, and the Appellant provides a good illustration why. His ability to speak English has enabled him to meet and found a relationship with a British woman, and as the evidence before us clearly shows, he is well integrated into her family even though the marriage itself is over. That relationship no doubt provided the spur for the Appellant to be financially self sufficient: he is a self employed taxi driver and we are told that he has never claimed public funds. His employment further aids his integration.

77. It matters not whether the Appellant's status could be characterised as 'unlawful' or 'precarious' for the purpose of 117B(4) and (5): either way we must attach little weight to the private life he has established in the UK. Those sub-sections do not, we note, impact upon the weight to be attached to the Appellant's family life with his son. This rightly formed the centrepiece of the submissions made on his behalf.

78. Mr Lewis pointed first to the quality of the relationship, and the particular vulnerabilities of C. Like many boys of his age, C loves his father, and enjoys a strong bond with him. Unlike many other boys of his age C suffers from ongoing physical challenges arising from his stroke, which mean that he is more dependent on his parents than he might otherwise be. The consequences of his stroke are that he requires physical and psychological support over and above that which another child may not need. For instance, in order to improve his mobility C must undertake regular physiotherapy: it was the consistent evidence before us that it has been the Appellant who has undertaken much of the responsibility for this work. CH told us how he will drive C to and from his regular appointments, and how he will, on a frequent and regular basis, ensure that C has physical activity that supports his recovery, such as swimming. These are activities that CH is not herself able to do (at any rate with much frequency) since she now has another child to look after. It was the evidence of Mrs H that C "wouldn't be the little boy he is today if its wasn't for his dad". That is evidence we have given substantial weight to. We accept that the Appellant and his son share a strong bond and that the Appellant provides well for his son's particular needs. He plays a significant role in C's life and gives substantial support to his ex-wife in this respect.

79. We remind ourselves that in our evaluation of the Appellant's family life we must also take into account the rights of other family members[7] and in our assessment of the evidence we have given substantial weight to the dependence that C has on his father. We

[7] Beoku-Betts (FC) v SSHD [2008] UKHL 39

find that it would be wholly contrary to C's best interests for his father to be required to leave the United Kingdom.

80. We have taken all of these matters into account. The two most significant of the competing factors in this balancing exercise are the Appellant's failure to declare his past involvement with the Taliban and his family life with his son. Having given due weight to the public interest in removing persons who are not entitled to leave to remain under the Immigration Rules we are quite satisfied that on the particular facts of this case the Respondent cannot show the decision to be proportionate. C was born in 2007, after the Appellant had been given entry clearance. We have been told of no good reason why the matters now raised by the Respondent as to the Appellant's Taliban past were not raised then. Had they been so, and the Appellant refused entry on that basis, his family life C would not have developed in the way that it now has. Similarly had he not been granted ILR in 2009, or had his status been revoked after the refusal of naturalisation in 2011, his relationship with his son would not be as strong as it is today, some seven years later. C would have been an infant when the interference took place, and his mother would not have had another baby to look after at the time. The position today is very different. C is now nine years old and extremely close to his father. His mother has more demands on her time and has naturally become increasingly dependent upon the Appellant. having taken all of the relevant factors, including those matters set out in Part V of the NIAA 2002, we are satisfied that it would not be proportionate to remove the Appellant from the United Kingdom today, or to refuse him leave to remain on human rights grounds.

Decisions

81. The determination of the First-tier Tribunal contains an error of law and it is set aside.

82. We re-make the decision in the appeal by allowing it on all grounds.

83. In view of C's young age we make a direction for anonymity having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders:

> "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 his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".

Upper Tribunal Judge Bruce
7th March 2016