Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA135752016**

THE IMMIGRATION ACTS

Heard at Columbus House, Newport
On 19 June 2017

Decision and Reasons Promulgated
On 10 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Alban, Sultan Lloyd Solicitors
For the Respondent: Mr Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan. His claims for asylum and humanitarian protection were refused by the Respondent on 21 November 2016. He was granted discretionary leave to remain until he reached the age of 17.5. The Appellant appealed against the decision to refuse him asylum and humanitarian protection under section

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82 (1) of the Nationality, Immigration and Asylum Act 2002 (NIAA). His appeal was dismissed on all grounds by First-tier Tribunal Judge Solly in a decision promulgated on 1 March 2017. The Appellant sought permission to appeal against that decision and permission was granted by First-tier Tribunal Judge Froom.

2. The Appellant argues in the grounds of appeal that the First-tier Tribunal erred in its assessment of risk of persecution; erred in its assessment of sufficiency of protection; erred in its assessment of internal relocation; erred in its assessment of Article 8 ECHR and failed to take into account the best interests of the child. It is also argued that the First-tier Tribunal erred in its assessment of the country guidance case law.

3. The grant of permission is not limited but states that permission is granted because it is arguable that the First-tier Tribunal Judge gave insufficient reasons for concluding that the Appellant could be reasonably expected to relocate to Kabul. In granting permission, First-tier Tribunal Judge Froom comments that the First-tier Tribunal Judge relied on **AK** but that decision emphasised that the appellant's individual characteristics needed to be considered. On the basis of the First-tier Tribunal's findings, the Appellant had no relatives to turn to in Kabul and would be an unaccompanied minor. Whilst the First-tier Tribunal was plainly aware of the Appellant's age on return, she did not explain how she considered the Appellant would be able to survive on his own.

The Hearing

4. Ms Alban relied on her grounds of appeal. She added that regarding internal relocation, the UNHCR guidelines were not considered. The Judge failed to apply the case law of **AA (unattended children) Afghanistan CG** [2012] UKUT 00016 (IAC)and **LQ (Age: immutable characteristic) Afghanistan [2008] UKIAT 0005** and failed to consider that the case should be distinguished from **AK (Article 15 (c) Afghanistan CG** [2012] UKUT 00163. She argued that the persecution of the Appellant would extend to the whole of Afghanistan and the Judge had erred in failing so to conclude. The Judge erred in the assessment of Article 8. The Appellant could speak English and as an orphan had a close relationship with his foster family. The First-tier Tribunal accepted that he was an orphan and the government killed his family, that he was at risk in home area and that he was an IDP. There was an error in relation to the Judge's conclusions regarding internal relocation and risk of persecution. As an orphan minor he would be at risk.

5. Mr Kotas submitted that the risk of persecution was dealt with by the First-tier Tribunal and there was objective evidence summarised at paragraph 62 of the decision that Hezbi Islami had formed a truce with the government. The Appellant had never done anything himself but just fled. It was open to the Judge on the evidence to find that the government was not going to be looking for a 17.5 year old. He was returning to Kabul so sufficiency of protection did not arise. It was a local problem that he feared. The Appellant had been in the UK for a year and at paragraphs 94 and 95 his best interests had been taken into account. This appeal turned on internal relocation and

was effectively a perversity challenge. All self-directions were correct. The Judge noted all the relevant factors and noted the Appellant's lack of familiarity with Kabul. The Judge dealt with language and found that the Appellant was mentally and physically well. At paragraph 81 the Judge differentiated **AK** and noted the expert's report and dealt with it on the basis that it was generic and not prepared for the Appellant. At paragraph 86 undue hardship was considered. It was not arguable that the relevant factors had not been taken into account. It was not perverse because all the factors had been considered. The findings on internal relocation should stand.

6. Ms Alban replied that although a truce was in place, Hezbi Islami would still be viewed with suspicion. The Judge did not explain how the Appellant would be able to survive. Findings of fact did not need to be made to re-make the decision. The Appellant was still a minor as of today's date.

7. Both parties agreed that I could re-make the decision on the basis of evidence before the First-tier tribunal.

Discussion

8. The grounds assert that the First-tier Tribunal Judge erred in her assessment of the risk of persecution, limiting it to the Appellant's home area. The First-tier Tribunal Judge found that the Appellant's account was true. She accepted that he was a credible witness. She found at paragraph 60 that one of his uncles was involved with Hezbi Islami and the attack on the Appellant's family home which led to the death of all of those with whom the Appellant had lived since shortly after his birth was due to involvement with this group coupled with problems over non-payment at the family shop. She accepted that the Appellant fled in fear of his life as this attack happened.

9. In considering the risk of persecution, she accepted that the police force targeted the Appellant in his home village in Afghanistan. She found that because the problems existed with a local commander it was not possible for the Appellant to seek recourse from the authorities in his local area. She did not accept that there would be problems with the police outside his local area. On his evidence he was not wanted by the police and had never lived outside the village.

10. The Judge further found, at paragraph 53 and 61 that the government had reached an agreement with Hezbi Islami. The basis of her finding that the Appellant would not be at risk outside his home area was that the Appellant had said that he was not wanted by the authorities and that the problem with the police was a localised one. I have not been directed to any evidence that shows and the grounds do not aver to any evidence that the Judge failed to take into account to show that problems with local police or a local commander would cause a risk of persecution outside the Appellant's home area. In the circumstances I find that the First-tier Tribunal Judge's conclusions in this regard were adequately reasoned.

11. The Appellant also contends that the First-tier Tribunal erred in its assessment of internal relocation. The Appellant was 17.5 years old at the date of the hearing. In **AA (unattended children) Afghanistan CG** [2012] UKUT 00016 (IAC) the Upper Tribunal held that when considering the question of whether children are disproportionately affected by the consequences of the armed conflict in Afghanistan, a distinction has to be drawn between children who were living with a family and those who are not. The background evidence demonstrates that unattached children returned to Afghanistan, depending upon their individual circumstances and the location to which they are returned, may be exposed to risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection. In **AA** the Upper Tribunal found that the appellant would be at real risk of persecution as an unattached child from his particular home are who had lost all contact with his family, so that family protection would not be available to him.

12. The First-tier Tribunal considered the internal flight option at paragraphs 67 to 87 of the decision. She accepted that he had not been to Kabul and that he had no contact with his mother's family and that he was not in contact with any family in Afghanistan. She accepted that he would be returning as an internally displaced person. She found that he was mentally and physically well. She did not consider that there was any risk other than the general risk attracting to a male of his age. She considered the case of **HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG** [2010] UKUT 378 and concluded that Kabul was not an area of high militant activity or militant control. She identified the UNHCR Guidelines from 2016 and addressed the evidence in relation to the security situation and employment. She found at paragraphs 86 and 87 that the risk factor in relation to the Appellant was that he was a young male of fighting age. She accepted that relocation would not be easy for him and would involve a degree of hardship but having weighed all the factors including his ability to travel to the UK with an agent concluded that internal relocation to Kabul was a viable alternative and would not be unreasonably harsh.

13. Although the First-tier Tribunal Judge notes that she is urged to take account of the risks in **AA** and consider the case of **LQ (Age: immutable characteristic) Afghanistan [2008]** UKIAT 0005 at paragraph 32 of the decision, the ratio of those cases is not referred to or recognized in the body of the decision. The UNHCR Guidelines set out at page 351 of the Appellant's bundle state that:

    "In the case of unaccompanied and separated children from Afghanistan, UNHCR considers that in addition to the requirement of meaningful support of the child's own (extended) family or larger ethnic community in the area of prospective relocation, it must be established that relocation is in the best interest of the child."

14. Further, the UNHCR considers that internal flight is only reasonable where the individual has access to (i) shelter, (ii) essential services such as sanitation, health care

and education; and (iii) livelihood opportunities. Moreover, the UNHCHR considers that internal flight is only reasonable where the individual has access to a larger traditional support network of members of his or her (extended) family or members of his or her larger ethnic community in the area of prospective relocation, who have been assessed to be willing and able to provide genuine support to the applicant in practice. The UNHCR considers that the only exception to the requirement of external support are single able-bodied men and married couples of working age without identified specific vulnerabilities.

15. The Upper Tribunal noted in **AA** at paragraph 26 that:

> "The proper approach to an application for asylum or for humanitarian protection by a child was addressed by the Supreme Court in **ZH (Tanzania) v SSHD** [2011] UKSC 4, [2011] 2 WLR 148. It held that international law placed a binding obligation upon public bodies, including the immigration authorities and the Secretary of State, to discharge their functions having regard to the need to safeguard and promote the welfare of children; that the obligation applied not only to how children were looked after in the United Kingdom but also to decisions made about asylum, deportation and removal from the United Kingdom; that any such decision which was taken without having regard to the need to safeguard and promote the welfare of any child involved would not be "in accordance with law" for the purposes of Article 8.2 of the Convention; that, further, in all decisions directly or indirectly affecting a child's upbringing national authorities were required to treat the best interest of the child as a primary consideration, by first identifying what the best interest of the child required and then assessing whether the strength of any other considerations, or the accumulative effect of other considerations, outweighed the child's best interests."

16. Although the First-tier Tribunal Judge referred the UNHCR guidelines the decision, she did not, in my judgement, give adequate reasons for the finding that internal relocation would not be unduly harsh by reference to the country guidance case law specifically dealing with minors, orphans and unattached children, nor were adequate reasons given as to how the Appellant would survive in Kabul in the absence of external support. Nor is there an assessment of the best interests of the Appellant either in the context of asylum or humanitarian protection. Although the First-tier Tribunal referred to **HK** in the context of forced recruitment, **HK** did not concern unaccompanied children and the Upper Tribunal noted at paragraph 48 of the decision that the material before it "… presents a bleak picture for children who are returned to Afghanistan and who do not have a family that will care for them." Further, although the First-tier Tribunal referred to the case of **AK** she did not have regard to the conclusion, at paragraph 247, that there was no reason or evidential basis to depart from the child-specific guidance in **AA.**

17. In the circumstances, the First-tier Tribunal materially erred in failing to give adequate reasons for finding that the Appellant could reasonably relocate to Kabul.

The Re-making of the decision

18. Both parties agreed that I could re-make the decision in this appeal on the evidence before the First-tier Tribunal. In the light of the limited fact-finding required, I concluded that the matter should be retained in the Upper Tribunal. The findings of fact summarised above are preserved as they have not been infected by any error of law (**DK (Serbia) v Secretary of State for the Home Department** [2008] 1 WLR 1246).

19. The First-tier Tribunal found that the Appellant would be at risk of persecution in his home area. She made no finding in relation to whether that persecution would be for a Convention reason. The Appellant argued that he was at risk due to imputed political opinion and on the basis of his age. In **LQ** the Upper Tribunal found that a person's age is an immutable characteristic. Although it changes constantly, one can oneself do nothing to change what it is at any particular time. I accept that as an orphan and minor the Appellant is a member of a social group.

20. In **SSHD v AH (Sudan) and Others** 2007 UKHL the House of Lords held that the decision maker should decide whether, taking account of all relevant circumstances pertaining to the claimant and his or her country it would be reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him or her to do so. In applying the test enquiry had to be directed to the situation of the particular claimant; very little was excluded from consideration other than the standard of rights protection which a claimant would enjoy in the country where refuge was sought. All the circumstances of the case have to be assessed holistically, with specific reference to personal circumstances including past persecution or fear thereof, psychological or health conditions, family and social situations, and survival capacities, in the context of the conditions in the place of relocation, including basic human rights, security and socio economic conditions, and access to health care facilities: all with a view to determining the impact on the claimant of settling in the proposed place of relocation and whether the claimant could live a relatively normal life without undue hardship.

21. In **AK (Article 15 (c) Afghanistan CG** [2012] UKUT 00163 the Upper Tribunal considered internal flight in the context of Article 15 (c) and that conditions in Kabul did not make relocation there in general unreasonable, however, there needed to be an inquiry into the applicant individual's circumstances which would often depend on the nature of specific findings about the credibility of an appellant and in respect of such matters as whether they had family ties in Kabul.

22. According to the Home Office, Country Information and Guidance on Afghanistan, July 2016 there was an 18 per cent increase in civilian casualties in 2015 compared to 2014. According to the same report intensified fighting and growing fear caused by insecurity and intimidation have displaced thousands of people throughout Afghanistan. The UNHCR noted that the city of Kabul has seen the biggest population increase of Afghan cities, receiving close to 40 per cent of all new conflict-induced IDPs in Afghanistan since 2002.

23. The Appellant remains a minor. He has no family in Kabul and has never been there. He has no health problems. However, he has no experience of living alone, having lived with his family in a village in Kapisa province in Afghanistan and then having been in foster care in the United Kingdom. The fact that he was able to travel to the UK with an agent, in my judgement, is not evidence of his ability to live independently. The Appellant has no access to an external support network in Afghanistan and in the absence of any support in Kabul, on the evidence before me, as an orphan, he would not have access to shelter, essential services such as sanitation, health care and education; and livelihood opportunities. It is acknowledged in the case law that the situation for unattached children remains bleak, and the evidence does not suggest an improvement in the situation since the country guidance was promulgated. In the circumstances I find that it would not be in the Appellant's best interests to be returned to Kabul and internal relocation to that city would be unduly harsh.

24. Given that I have found that he is entitled to be recognised as a refugee, I do not address the claim for humanitarian protection save to say that had he not succeeded in his claim to be a refugee he would have been entitled to humanitarian protection.

Conclusions:

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

I set aside the decision.

I re-make the decision in the appeal by allowing it on asylum and Article 3 ECHR grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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.

Signed Date 5 **JULY 2017**

Deputy Upper Tribunal Judge L J Murray