Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/00815/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Determination**
On 17 January 2018	**Promulgated**
	On 13 March 2018

Before

Deputy Upper Tribunal Judge MANUELL

Between

Mr M N S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Foster, Counsel (instructed by Hoole & Co, Solicitors)
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This is the rehearing of the Appellant's asylum, humanitarian protection and human rights appeal, following the error of law finding and decision made by the tribunal and promulgated on 2 November 2017.

2. A direction was made on 2 November 2017, which has been complied with, belatedly, by the Home Office's letter dated 22 December 2017. It had been contended that the Appellant was entitled to benefit from the Home Office's discretionary leave policy as he had accrued 6 years leave as an unaccompanied asylum seeking child. The Home Office's position was that he had not qualified for leave on the same basis as the original grant, as his circumstances had changed in that he had turned 18. He faced no very significant obstacles to reintegration on return to Afghanistan. The tribunal has resolved that point in the Appellant's favour, as is explained below. Nevertheless, it has been necessary to deal with all contested issues and that is the only basis, in the tribunal's judgment, on which the Appellant succeeds.

Background

3. The Appellant is a national of Afghanistan, born as was accepted by the Respondent for protection purposes on 1 January 1996. He is currently 22 years of age and an adult. The Appellant claimed asylum on 29 April 2008, having arrived in the United Kingdom illegally the same day. He was accepted to be 12 years of age. His asylum, humanitarian protection and human rights claims were refused under Paragraphs 336 and 339F of HC 395 (as amended) by the Respondent's letter dated 28 October 2008. He was granted discretionary leave to remain until 27 October 2011, in accordance with Home Office policy. He applied, in time, for further leave to remain on 25 October 2011, again raising protection grounds. His claim was refused on 5 January 2015, leading to the present appeal.

4. Through his solicitors, the Appellant served Notice of Appeal under Section 82(1) of the Nationality, Immigration Asylum Act 2002, to which the One Stop Procedure applied. Directions were thereafter made by the tribunal, and were complied with by both parties.

The Law

5. The 1951 UN Geneva Convention (as amended by the New York Protocol in 1967: "the Refugee Convention") provides that the term "refugee" should apply to any person who, inter alia, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

6. The Refugee Convention has been incorporated into the EU Qualification Directive, which in turn has been implemented by appropriate changes to the Immigration Rules, HC 395 (as amended), which came into force on 9 October 2006. This makes provision for Humanitarian Protection in qualifying cases: The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No. 2525.

7. Since 2 October 2000, the commencement date of the Human Rights Act 1998, public authorities (including the tribunal) may not act in a way which is incompatible with the European Convention on Human Rights and the tribunal must by Section 2 take into account the body of material commonly known by the convenient term of "Strasbourg jurisprudence".

8. The burden of proof is upon the Appellant. In determining this appeal the tribunal has applied the lower standard of proof (a reasonable degree of likelihood) to all issues, save to the "in country" Article 8 ECHR claim to which the standard is the balance of probabilities unless there are health matters. The relevant date is the date of the hearing.

The evidence

9. The Appellant gave his evidence in English, in which he is fluent. The Appellant confirmed as true and adopted as his evidence in chief his witness statement dated 27 April 2015, to which the tribunal refers.

10. In summary, the Appellant said in his written evidence that he was from Qemchi, Wata Pur. His father was a prominent member of the Taliban and had been a commander in Hezb-i-Islami before that. His father spent most of the time away fighting. He visited the family home no more than once or twice per month, armed and accompanied. The Appellant's father never talked to the Appellant about the fighting. He spoke about resisting the foreigners. The Appellant's mother disapproved of his father's activities. The Appellant's two older brothers had died fighting with their father. The Appellant's father wanted the Appellant to take their place. The Appellant's mother told him to leave home.

11. The Appellant went to the home of a friend in the same area but some distance from the family home. The Appellant's maternal grandfather arranged the Appellant's journey with an agent, via Pakistan by air to London. He claimed asylum at the airport after his arrival, and was placed in the care of social services.

12. After the Appellant arrived he contacted a relative in Pakistan, using a telephone number the Appellant's grandfather had given him, to pass a message that he was safe and well. The Appellant had no means of contacting his family. There was no telephone and no post. He had relatives in Kabul but he had never met them and they would not help him because of his father's Taliban connections. He knew that his grandfather had died in 2011. The authorities would not be able to protect the Appellant in Afghanistan. The witness statement prepared by his first representatives was inadequate.

13. The Appellant said that he was suffering from post traumatic stress disorder and depression. He had received counselling. He wanted to settle in the United Kingdom and had been advised he was entitled to leave to remain on the basis that he had been in the United Kingdom for 6 years with discretionary leave to remain. He had been involved in community activities in the United Kingdom, which were of public benefit. He wanted to work. He saw himself as integrated with ties and friendships in the United Kingdom.

14. The Appellant produced documents said to be from Afghanistan, as well as certificates of his educational

attainments and activities in the United Kingdom and country background material. He also produced a report prepared by Dr Robin E Lawrence dated 14 August 2016. Further reference will be made to those documents as necessary later in this determination.

15. The Appellant was cross-examined. In summary he said that the Hezb-i-Islami documents had been sent by his aunt in Pakistan. His mother remained uncontactable. His aunt's husband was a doctor and his patients had sent letters. He had tried to find his mother through Red Cross. His cousin had received the documents. He was not at court because he was ill. The Appellant still lived with his cousin. The Appellant did not know why his cousin had not mentioned the documents in his 2016 letter.

16. The Appellant said that his father was in a high position in the Taliban. People feared him. The Appellant had no recollection of what his father had done. He was young at the time. He knew nothing of his father now. He was absorbed in his life in the United Kingdom. Pressed why the Appellant had made no enquiries given that he claimed to fear his father, the Appellant conceded that he had asked his aunt when he spoke to her. He had asked about his mother and two younger brothers. They were in fear of him. He did not know whether his father was still alive.

17. The Appellant said that when he fled he had gone to a friend's house which was about 10 minutes' walk away. He had stayed 14 to 16 days, or three weeks according to his asylum interview record. He did not know how his father did not find him. His father had known that he had left. His parents had had a big fight about the Appellant joining the Taliban, as his two older brothers had died. The Appellant had not seen his father before the Appellant left. His mother had informed his cousin and his grandfather. His grandfather lived in another province and had helped the Appellant to escape. He had no means of contacting his grandfather after he left. When the Appellant had said that his mother was still alive (in his screening interview), that had been a guess. He has been very stressed, depressed and young when he was interviewed. Living in Pakistan would not have helped him. He had not known that he was coming to the United Kingdom. He had not gone to Pakistan because his cousin's father had been kidnapped by the Taliban and it was thought that his father

was behind it. That was what he had been told. He had not tried to find out.

18. The Appellant did not know why his cousin's letter said nothing about it. He did not know why his relations in Pakistan had not sent something about it. They had sent the Hezb-i-Islami letter, which had been hard to get.

19. The Appellant said that he was not receiving any treatment in the United Kingdom. Everything had stopped when he was 18. He was not seeing a counsellor because he did not think it would help him. He was not taking any medicine because he could not afford it.

20. The Appellant agreed that he had relatives in Kabul, his grandfather's brother, but he had never met them. They were a large family. There were no other relatives in his home area.

21. The Appellant had studied and worked in the United Kingdom, including voluntary work, but was doing nothing at present pending the outcome of his appeal. He thought none of his relatives would want to help him in Afghanistan.

22. The tribunal asked the Appellant why he thought that none of his relatives in Afghanistan would want to help him. He replied because of what his father had done.

23. The Respondent produced the standard Home Office bundle as well as recent country information and guidance.

Submissions

24. Mr Clarke relied upon the Respondent's reasons for refusal letters dated 2008 and 18 August 2015, which challenged the Appellant's account of events as lacking credibility. The Appellant had been unable to give a consistent, plausible or credible account of events. The Appellant had no entitlement under the Home Office's discretionary leave policy for unaccompanied asylum seeking children. He had turned 18 and ceased to be a child before he had accrued 6 years of discretionary leave to remain. The policy had thus ceased to apply and the argument that it did was erroneous. AG (Kosovo) [2007] UKAIT 00082 showed that

any such policy had to be applicable in clear terms. There was in any event no risk on return. The documents produced deserved no weight. Nothing more had been produced from Pakistan despite the familial connection. Moreover Hezb-i-Islami were not the Taliban. It was inconceivable that the Appellant's father could not have found him on the Appellant's version of events. The Appellant's claim that he was not in contact with his family was not credible. The Appellant had family in Kabul and there were no very significant obstacles to his return. The Appellant spoke Pashtu. His post traumatic stress disorder diagnosis was explicable by other obvious causes such as family separation. There was a low risk of suicide and help was available in Afghanistan. The Appellant had not spent half his life in the United Kingdom and could not benefit under the Immigration Rules. Article 15(c) of the Qualification Directive was not applicable as there were no strong grounds to depart from existing country guidance. The appeal should be dismissed.

25. Ms Foster for the Appellant relied on her skeleton argument. The Appellant had been granted discretionary leave to remain on 9 July 2012, for three years. He had then applied for further leave to remain, in time, which gave him leave to remain pursuant to the provisions of section 3C of the Immigration Act 1971. His further leave was extended on the same basis. Settlement and further leave to remain were separately considered. Age was not a "change of circumstances" for the purposes of the Home Office policy. The meaning of the policy was a matter of law and was not a question of the rationality of individual decisions. There were very significant obstacles to the Appellant's return, as he had resided in the United Kingdom for 10 years. He spoke Pashto but was not fully literate. He had no contact with his family and had never met his relatives in Kabul. He would stand out as Westernised. The report of Dr Lawrence was not a fundamental element of the Appellant's case. There were, however, exceptional circumstances because of the Appellant's long presence in the United Kingdom. The credibility points taken against the Appellant were ill founded as he had given a substantially consistent account. There was no reason why the Appellant would want to know more about his father. The Appellant had to rely on information drip fed from Pakistan. The Hezb-i-Islami documents had been sent via his mother 10 years

ago. The Appellant was at risk on return and his appeal should be allowed.

Findings and Decision

26. The preliminary point in this appeal is whether the Appellant has any entitlement under the Asylum Policy Instruction Discretionary Leave, Version 7.0 published 18 August 2015. This is the version of the policy made available to the tribunal in the present appeal. That policy states at 1.2 Background:

"DL was introduced alongside HP in April 2003 to replace exceptional leave to remain (ELR) and was initially used to grant leave for Article 8 reasons... However, following the implementation of the family and private life rules on 9 July 2012, DL should no longer be granted where the requirements of those rules in Appendix FM or paragraphs 276ADE(1) to 276CE are met or where LOTR should be granted for Article 8 reasons. Transitional arrangements apply to those granted DL for Article 8 reasons before 9 July 2012. From 6 April 2013, the policy of granting DL to unaccompanied asylum seeking children ended. Leave for this group must now be considered in accordance with paragraph 352ZC to 352ZF of the Immigration Rules and not under the DL policy.

At Section 10 the Transitional Arrangements appear (selected extracts):

"Those granted leave under the DL policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing 6 years' continuous DL (or where appropriate a combination of DL and LOTR, see section 8 above) unless at the date of decision they fall within the restricted leave policy.

"If the circumstances remain the same... a further period of 3 years' DL should normally be granted.

"If there have been significant changes that means that the applicant no longer qualifies for leave under the DL policy… the further leave application should be refused."

27. The Respondent's position was first set out in a letter to the Appellant's solicitors dated 8 September 2015:

"Your client does not qualify for further leave and his circumstances have changed… Applying the policy as it was before 9 July 2012, your client is no longer a child and cannot continue to qualify for leave under this policy."

28. This was reiterated in the Respondent's letter dated 22 December 2017, in response to the tribunal's direction seeking to clarify the issue:

"In the Appellant's case he was granted DL on 27 October 2011, when he was 12 years old as an unaccompanied asylum seeking child. Therefore when he had accrued 6 years leave his circumstances were no longer the same as he had already turned 18 and therefore no longer an unaccompanied asylum seeking child. As such he does not meet the terms of the policy."

29. On its face, the Respondent's interpretation is correct. The Appellant ceased to be a child on 1 January 2014. The Appellant had no need of protection under the policy. The Appellant's counter argument is that the Appellant's original DL continues by virtue of section 3C of the Immigration Act 1971 until his application is finally determined, i.e., until the appeal process is complete. That stage has not been reached.

30. Section 3C, Continuation of leave pending variation decision, so far as it applies in the present appeal, is as follows:

(1) This section applies if—

(a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,

(b) the application for variation is made before the leave expires, and

(c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when—

(a) the application for variation is neither decided nor withdrawn,

(b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought [F2, while the appellant is in the United Kingdom] against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), ...

(c) an appeal under that section against that decision [F4, brought while the appellant is in the United Kingdom,] is pending (within the meaning of section 104 of that Act) ...

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

[(3A) Leave extended by virtue of this section may be cancelled if the applicant—

(a) has failed to comply with a condition attached to the leave, or

(b) has used or uses deception in seeking leave to remain (whether successfully or not).]

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

(5) But subsection (4) does not prevent the variation of the application mentioned in subsection (1)(a).

[(6) The Secretary of State may make regulations determining when an application is decided for the purposes of this section; and the regulations—

(a) may make provision by reference to receipt of a notice,

(b) may provide for a notice to be treated as having been received in specified circumstances,

(c) may make different provision for different purposes or circumstances,

(d) shall be made by statutory instrument, and

(e) shall be subject to annulment in pursuance of a resolution of either House of Parliament.]

31. Section 8: Settlement applications of the relevant Home Office policy states:

"Any leave accrued whist waiting for a valid application for further leave to be considered, may count towards the required period of leave for settlement providing the application was made in time and leave was automatically extended in accordance with section 3C(2) of the Immigration Act 1971…"

Thus the express terms of the Home Office's own policy accept that section 3C extended the Appellant's DL. His DL thus continues in force today, because he applied in time to extend his existing leave to remain and his application has not been finally determined. He has, as counsel on his behalf submitted, now accrued over 6 years DL from 27 October 2011. He is entitled to benefit from the policy and to receive settled status.

32. That conclusion in some ways makes little sense, because (as noted above) the Appellant has no need at all of the protection conferred by the policy. But it may also be said that section 3C was introduced by way of amendment to the Immigration Act 1971 to guard against delays in the Home Office's decision making process. The Appellant thus receives the benefit of Home Office delay in decision making, and the delay caused by the litigation process, for neither of which he is responsible. As the Home Office policy indicates where proportionality lies for Article 8 ECHR purposes, his appeal succeeds under Article 8 ECHR.

33. Now if the tribunal were mistaken for any reason to reach that conclusion, it is necessary to go on to consider the substance of the Appellant's protection claim. The tribunal considers that no part of that claim is reasonably likely to

be true. The Appellant's story is inconsistent and implausible at every significant stage.

34. In reaching that conclusion the tribunal takes into account the Appellant's young age when he was interviewed, the likely impact of separation from his family, cultural dislocation, the lapse of time caused by the delays in his case when being asked to recall past events, and the report of Dr Lawrence. Dr Lawrence found that the Appellant was suffering from post traumatic stress disorder and depression, and described the symptoms which led to that diagnosis. Dr Lawrence observed that the Appellant was not disoriented and "was generally clear concerning the dates of what happened in his answers." The Appellant had limited insight and had little appreciation of the impact of the trauma of his childhood and the dislocation he experienced when he came to the United Kingdom. Dr Lawrence considered that the Appellant's post traumatic stress disorder was likely to have been caused by the way he was treated before he came to the United Kingdom. The recommendations made by Dr Lawrence have not been put into effect. There was happily no evidence that the Appellant was currently having any further thoughts of suicide and there was no evidence of any attempt. The method he imagined was not likely to be available in the United Kingdom.

35. Some weight is due to Dr Lawrence's report because of the symptoms observed by him, but the tribunal notes that the narrative carefully recorded by him as given by the Appellant in 2016 differs significantly from other earlier versions. One notable example is that the Appellant is recorded as informing Dr Lawrence in some detail that his mother and two younger brothers had died: see page 10, "Family History". Before the tribunal the Appellant simply said that he did not where they were. In the tribunal's view that is just one serious inconsistency. Dr Lawrence made no suggestion that the Appellant's depression and post traumatic stress disorder affected his ability to recall past events, or that the Appellant was of subnormal intelligence. The tribunal considers that Dr Lawrence's report provides insufficient explanation for the deficiencies in the Appellant's evidence.

36. The Appellant's date of birth as accepted by the Respondent is obviously merely nominal. Were the

tribunal not bound by the Respondent's acceptance of the Appellant's age and nationality, the tribunal would have found otherwise. Plainly the decision to send the Appellant to the United Kingdom was made by his family, who were of the substantial wealth necessary to pay for his journey to the United Kingdom, as was also seen by his claimed education in Afghanistan. The Appellant's claim that he did not know where he was going makes no sense at all, since he needed to be prepared for a long journey to a foreign land. As the Appellant said in his main witness statement (see [18]) that he had studied "some English" at school, there was all the more reason to have told him his destination. That claim was supported in at least one of the school reports he produced, if any of his documents are reliable.

37. The whole of the story of the Appellant's departure from Afghanistan is implausible. The Appellant was only 12 years of age. According to him his father was a dominant and fearsome figure, with armed supporters. If the Appellant's mother had sent the Appellant away to avoid his forced recruitment into the Taliban, sending the Appellant only a short distance to the home of a friend was almost certain to have led to discovery, by the information being beaten out of her, by a villager wishing to curry favour or gain a financial reward or by means of a search for which on the Appellant's account there was adequate time and resources. There was also time to trace the Appellant to his grandfather. The Appellant's father would surely have left no stone unturned, and would have not hesitated to punish anyone involved. Nothing of the kind was said to have occurred. Yet the Appellant maintained that even now his relatives in Kabul would not help from fear of his father.

38. Even before that point is reached, the question must be asked as to why the Appellant's father would have wanted to force his 12 year old son to join the Taliban. On the Appellant's account a huge family sacrifice had already been made, ample to demonstrate commitment to the Taliban cause. The Appellant is of compact build and it reasonable to infer that at the age of 12 he would have still been a little boy. He could have been of no conceivable military use and indeed would have almost certainly been a hindrance, burden and liability. There was no suggestion that the Appellant was to be sacrificed as a suicide

bomber. Forced recruitment is not a favoured Taliban method as ideological commitment is so obviously preferable in terms of military discipline and loyalty.

39. To enable the Appellant to travel to the United Kingdom, it is obvious that a false identity must have been created for him and travel documents prepared and airline tickets purchased. Such processes are time consuming and costly. That was a further opportunity for his father to prevent the Appellant's departure.

40. The Appellant's claim that he was not in contact with his family made no sense. A large sum of money had been invested in his future and it was hardly likely that his family would not want to know that he was safe, well and happy. The Appellant conceded that he had a means of contacting his grandfather, but his explanation of the lack of success in making contact through other relatives in Pakistan were less than reasonably likely. These, after all, were the supposed conduit by which he obtained documents.

41. Those documents raised more questions than they answered. In the first place, the Appellant's father was supposedly a well known and influential Taliban commander, yet the documents were from a different organisation, Hezb-i-Islami. They proved no Taliban connection. Even if the Appellant's father had once been in Hezb-i-Islami, he might have laid down his arms. There was no obvious reason for such documents (dating from 1989 and 1991) to exist or to have been retained. The tribunal concludes that they were created for the purpose of bolstering the Appellant's claim. They can be given no weight.

42. The Appellant's claim that he had taken no interest in his father because of his new life in the United Kingdom made little sense if any. The Appellant would have to be a most incurious person indeed not have delved into the information available on the world wide web. Yet having claimed he had no information, he told Dr Lawrence that he thought that his father was responsible for the death of his mother and two younger brothers. He further claimed under cross-examination that he had heard that his father had been responsible for the death of a relative in Pakistan. At best this was speculation on his part and was characteristic of the improvised nature of his evidence.

43. There was evidence that the Appellant's cousin in the United Kingdom with whom he is currently living is unwell but there was nothing to have prevented the cousin from providing a proper witness statement in support of the Appellant's claims. His letter provided little support for the Appellant's case. The Appellant's assertion that his relatives in Kabul would not assist him made no sense. Family bonds are at least as important in Afghanistan as elsewhere. The Afghan tradition is one of hospitality. It is in the tribunal's view highly unlikely that the Appellant's relatives in Kabul would not provide whatever help to him that they could. They could hardly blame the Appellant for the actions of his father, even there had been such actions which the tribunal cannot accept.

44. The tribunal thus regrets to say that on the totality of evidence it considers that the Appellant failed to provide an account of events which reached the required standard of reasonable likelihood. The tribunal considers that the Appellant's claims viewed as a whole and in the round are improbable and implausible. It follows that the Appellant has failed to prove any part of his tale beyond his age and nationality, which were conceded. He has failed to show that he cannot return to Afghanistan without real risk. The tribunal dismisses the asylum appeal.

45. For very much the same reasons as have already been given, and because the tribunal saw no evidence sufficient to justify a departure from existing country guidance, the tribunal finds that the Appellant faces no serious risk of individual threat of harm in Afghanistan and so has no need of nor entitlement to humanitarian protection.

46. As to the Appellant's human rights, on the tribunal's findings of fact, the Appellant has failed to show that there are substantial grounds for believing that the consequences of the Respondent's decision to remove him would lead to a real risk of the breach of any of his protected human rights under the European Convention on Human Rights. While the Appellant has been absent from Afghanistan for a lengthy period, he has not been absent from Afghani culture. He lives with a cousin from Afghanistan. The Appellant speaks Pashtu and belongs to the dominant Pashtun ethnic group. It is obvious that many Afghans who live in other parts of the world return to

their homeland frequently. The Appellant is an intelligent young man who has a greater experience of life than most young men of his age. He is able to work and has marketable skills. There is no reason to believe that he cannot adapt to life in Afghanistan. Importantly, he will have the opportunity to re-establish contact with his family. There are no very serious obstacles to his reintegration.

47. The Appellant has lived in the United Kingdom for a substantial period. It has to be said that his entry to the United Kingdom was based on a false claim and he has received substantial benefits in consequence. While his Article 8 ECHR claim must succeed because of the terms of the Home Office policy, for the reasons given above, if proportionality were otherwise an open question, the tribunal would dismiss his appeal because the public interest in maintaining immigration control is a legitimate objective. For the reasons given earlier, however, the Article 8 ECHR appeal must succeed because the Home Office has indicated by its own policy where the proportionality balance lies. It follows that he is now entitled to settled status.

DECISION

The tribunal dismisses the asylum appeal

The tribunal dismisses the humanitarian protection appeal

The tribunal allows the human rights appeal (Article 8 ECHR)

Signed **Dated 9 March 2018**

Designated Judge Manuell
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

There can be no fee award

Designated Judge Manuell **Dated 9 March 2018**

Deputy Upper Tribunal Judge