Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **PA/00359/2017**

THE IMMIGRATION ACTS

Heard At Field House	**Decision and Reasons Promulgated**
On 02.07.2018	**On 03.07.2018**

Before:
Upper Tribunal Judge
John FREEMAN

Between:
IHSAN [A]
(ANONYMITY DIRECTION NOT MADE)

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Antonia Benfield* (counsel instructed by direct access)
For the respondent: Mr Stefan Kotas

DETERMINATION & REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Clifford Mailer), sitting at Hatton Cross on 6 March, to allow a deportation appeal by a citizen of Afghanistan.

2. The judge allowed the appeal on both asylum and article 8 grounds, and both parts of his decision are challenged. So far as the asylum appeal is concerned, the very experienced judge followed what he thought was the effect of *Ocampo* [2006] EWCA Civ 1276, as set out in *AA (Somalia)* [2007] EWCA Civ 1040, modifying the principles set out in *Devaseelan* (Second Appeals - ECHR - Extra-Territorial Effect) [2002] UKIAT 702*.

3. The judge had before him decisions by other judges in appeals by the appellant's son and nephew. In the son's case, Judge Maxwell had set out concessions by the respondent, to the effect that

(i) [the appellant] was in the Afghan National Army and subsequently kidnapped by the Taleban;

(ii) the Taleban had burnt the family house down; and

(iii) they had killed [the appellant's] brother.

The judge noted that the respondent had conceded the 'basic facts' of the son's case, but went straight on to consider whether they left him at any real risk on return. He decided that they would not: an appeal to the Upper Tribunal was allowed on this point, and a fresh hearing before the First-tier Tribunal directed. That never happened, because the appellant eventually withdrew his appeal.

4. In the nephew's case, Judge Oakley did much the same: at paragraph 11, he noted that the nephew, then only 11, was not being called to give evidence, and that the respondent had accept what had happened to him. Again he went straight on to consider the resulting risk; but in this case the nephew's appeal was allowed, and he was later granted asylum.

5. Those concessions were not made in the present case: the refusal letter made it clear that the appellant's evidence was disputed, and he was cross-examined at some length before the judge. The judge set out his evidence in corresponding detail, and set out the effect of *AA* and *Ocampo* clearly and correctly, so far as they related to facts established by judicial decisions.

6. Where in my view the judge went wrong was to take as his starting-point what were no more than concessions on the facts, now withdrawn by the respondent. While he was perfectly entitled to note that such concessions had been made, they were not the result of judicial findings, and should not have been treated as if they were. There is nothing in *AA* or *Ocampo* to support extending the *Devaseelan* principles to cover concessions made by a party, and nothing in Judge Maxwell or Judge Oakley's decisions (see **3 – 4**) to suggest that they made any independent decision on the veracity of the family history.

7. It follows that, despite the great care with which the judge dealt with this part of the case, his decision on it has to be regarded as wrong in law. As it involves the appellant's status, a re-hearing would in any event be needed; but I have also considered the article 8 appeal, in case the judge's decision can be upheld on that point.

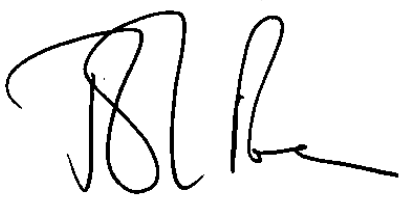
8. Understandably, since to him it was no more than an additional reason for allowing the appeal, the judge dealt with the article 8 claim very much more briefly. Again he relied on authority, in this case *AT and another* (Article 8 ECHR - Child Refugee - Family Reunification : Eritrea) [2016] UKUT 227 (IAC): as he said, McCloskey P had held that, where family reunion for a refugee child (in this case the nephew) was concerned, nothing in the Rules made provision for it, but no other material consideration could be treated as inherently more significant than the best interests of the child.

9. While this was a correct summary of the general principles set out in *AT*, the judge did not do what McCloskey P did there at paragraph 40, which was to consider the effect of s. 117B of the Nationality, Immigration and Asylum Act 2002. This was of particular importance in the present case, as this appellant had not only been unlawfully here ever since before he was caught by the police in on 25 February 2010, but, after being given temporary admission on 3 March, had absconded till 22 June 2016, when he claimed asylum.

10. The appellant explained this by referring to scare stories he had heard from other Afghans, warning him that those who made such a claim would be deported. The validity or otherwise of that as an explanation needed to be decided, before the appellant's unlawful residence in this country was weighed in the balance against his nephew's right to family reunion. That was something the judge had to do, and all that *AT* decided was that this consideration could not be treated as *inherently* more significant than the nephew's best interests. Whether it was actually more significant on the facts of the individual case was something for the judge to decide. Since he did not do so, the article 8 appeal will need a fresh hearing too.

11. Given the lengthy consideration of the facts required on the asylum appeal, both it and the article 8 appeal can more quickly and conveniently be dealt with in the First-tier Tribunal.

Appeal allowed: first-tier decision set aside
Fresh hearing at Hatton Cross, not before Judge Mailer



dated 02 July 2018
(a judge of the Upper Tribunal)