Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06412/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2018	**On 15 February 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

S A
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O Sobewale, Counsel instructed by Rodman Pearce solicitors
For the Respondent: Mr S Staunton, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Chapman promulgated on 16 October 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 26 February 2016 refusing his asylum, humanitarian protection and human rights claim. The Decision was made following remittal by this Tribunal by a decision of Deputy Upper Tribunal Judge Eshun promulgated on 21 April 2017 finding an error of law in the previous decision of First-tier Tribunal Judge James dismissing the appeal. That decision was therefore set aside.

2. The Appellant is a national of Afghanistan. His date of birth is accepted as being 1 February 1999. He claims to have left Afghanistan in June 2015. He arrived in the UK on 8 July 2014 and claimed asylum immediately.

3. The Appellant says that he lived in Sheohabuddin village, Pule Khumri District in Baghlan Province with his parents. He had two brothers, one older and one younger and an older sister. He claims that his older brother worked for the Afghan army and was killed in his home area by the Taliban. The Appellant claims that the Taliban then came to his home to recruit him to the Taliban. His father refused and they left. However, he claims that a letter was delivered by the Taliban to the local Mosque warning that all children should be taken out of school. The Appellant says that his father then took him out of school and, fearing for the Appellant's life, arranged for the Appellant to be brought to the UK by an agent.

4. The Judge accepted that the Taliban might have sought to recruit the Appellant as he said. Although he noted that there was background evidence to the effect that forced recruitment of children is now rarely used by the Taliban, he accepted that this was outweighed by more recent evidence. However, he also noted from the background evidence that the Taliban were being driven from Baghlan Province and he did not accept that there was evidence that they were still in force in that region. The Judge found other aspects of the Appellant's evidence not to be credible. He concluded that the Appellant could return to his home area.

5. The Appellant's first ground focusses on the Appellant's position as a minor when he came to the UK and only just over eighteen at the time of the First-tier Tribunal hearing. The second ground criticises the finding that the Taliban are no longer in Baghlan Province on the basis of other background evidence which it is said the Judge failed to take into account.

6. Permission was granted by First-tier Tribunal Judge Foudy as follows:-

> "[2] The grounds argue that the Judge erred in his assessment of the risks faced by the Appellant in Afghanistan.

> [3] It is arguable that the Judge did not adequately assess the risks this young Appellant might face on removal, especially given his finding that there was a risk of forced recruitment to the Taliban.
> [4] The grounds disclose an arguable error of law."

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Decision and Reasons

8. The first ground asserts that the Judge has misdirected himself in relation to consideration of the Appellant's case. At [66] of the Decision, the Judge says this:-

> "I have looked at the evidence in the round and have considered all the documentary and oral evidence whether I specifically refer to it or not. I have borne in mind at all times that, although the Appellant is no longer a minor, he was a minor at the time of the events claimed, and have taken this into account when assessing his evidence. Indeed, the Appellant is only now just an adult but a few months, and because there can be no bright line between childhood and adulthood, I have considered all aspects of this appeal on the basis that he is a minor."

9. Mr Sobowale submitted that this passage meant that the Judge was bound to consider the risk to the Appellant as at the date of the hearing as if he were still a minor. I disagree. The Judge is obviously bound to consider the risk on the basis of the circumstances as they pertain at the date of the hearing before him (see R v Secretary of State for the Home Department ex parte Ravichandran [1995] EWCA Civ 16). In the course of his submissions why that should not apply in this case, Mr Sobowale came perilously close to putting forward the argument which was roundly rejected by the Supreme Court in TN, MA and AA (Afghanistan) v Secretary of State for the Home Department [2015]UKSC 40 where Lord Toulson, delivering the judgment of the majority said this:-

> "53. On this approach, it is not for the tribunal or the court, in considering a claim for asylum, to try to compensate the claimant for some past breach of duty which does not affect the question whether he is presently exposed to a risk entitling him to the protection of the Refugee Convention (or to humanitarian protection). The consequences of a breach of duty by the respondent may be a relevant factor in the assessment of present risk, because of the possible effect on the nature and quality of the available evidence. But that is different from exercising some form of remedial jurisdiction entitling the tribunal or court to order that the claimant should have indefinite leave to remain, on account of the respondent's breach of duty, in a case where the evidence does not establish the present existence of a right to refugee status or humanitarian protection."

10. Mr Sobowale was not able to point me to any authority in support of his submission other than to what the Judge himself said. He submitted that "all aspects" meant that the Judge should consider the risk on the basis of the Appellant being a minor because there is no

"bright line" between minority and adulthood. I accept that, insofar as the Appellant's claim relied on his position as a minor, the Judge was bound to have regard to the plausibility of his account on that basis (as he did at [68] of the Decision). I also accept that the Judge was bound to consider the Appellant's evidence on the basis that the claim was made when he was still a minor. It is likely that this is what the Judge meant by "all aspects of the appeal" as he was there dealing with how he intended to approach the evidence.

11. All that does not though mean that he could disregard whether the change in the Appellant's circumstances would mean he is no longer at risk. The Appellant complains in particular about what is said at [75] of the Decision as being in conflict with the approach set out at [66]. That paragraph reads as follows:-

> "[75] The only significant evidence in this appeal about the Appellant's home area is the news article to which I have already referred. This suggests that steps have been taken to eradicate the Taliban from the Appellant's home area. Looking at the evidence in the round, I am not satisfied that the Taliban have an adverse interest in the Appellant either generally, because he is no longer a child who they would wish to recruit, or as an individual, because I have not found his account to be credible. The Appellant has not discharged the burden of showing that he is at risk of persecution in his home area."

12. Even if there is an error by the Judge in failing to consider whether the Taliban might still perceive the Appellant as still a child, that error could not possibly be material in light of the finding about the Taliban's lack of presence in Baghlan Province to which I have referred and which I consider below.

13. The Appellant has failed to show that there is any inconsistency between what is said at [66] of the Decision and the Judge's consideration of the claim and the evidence. When making the statement that he would consider "all aspects of the appeal" on the basis that the Appellant is a minor, the Judge was not directing himself to depart from the established legal principle that risk is to be determined on the basis of the circumstances as at date of hearing. Indeed, were he to have meant that, he would not have directed himself as he did at [64] that he must consider the circumstances as at that date.

14. The second ground concerns the Judge's finding that there is no longer a risk in the Appellant's home area because the Taliban no longer have a significant presence there.

15. At [69] of the Decision, the Judge said this:-

> "[69] I note too, the news article at page 11 of the Appellant's bundle, which refers to his home area in Baghlan province. Although this article relates to a time after the Appellant left Afghanistan, it suggests that before the date of the article in 2016, the Taliban did have a presence there, and one sufficiently strong to cause the Afghan authorities to conduct an operation there to oust them. This supports the Appellant's

evidence in his home area at the time of the events he relates. I find, however, that the article does not provide significant evidence that the Taliban are still there, because it indicates a determination on the part of the authorities to succeed in their objective. I find this article to be of little assistance in assessing the current situation, and risk on return now."

16. The news article to which the Judge there refers is dealt with by him at [36] of the Decision in the following terms:-

"[36] One news article, dated 14 April 2016, refers in particular to the situation in Baghlan province, where the Appellant lived in Afghanistan. It records that Dand-e-Ghori has been the scene of fighting between the Afghan security forces and the Taliban, after a concerted military operation was launched in Dand-e-Shahabuddin, and states that the operation will continue until the full elimination of Taliban hideouts in Baghlan province. The article concludes by reporting that Dand-e-Ghori was cleared of insurgents after forty days fighting."

17. I have already drawn attention to [75] of the Decision which begins with the Judge's finding that steps have been taken to eradicate the presence of the Taliban in the Appellant's home area. At [5] of the Appellant's grounds, my attention is drawn to what was said in the skeleton argument for the Appellant as follows:-

"It merits note that his home area is suffering a significant amount of violence and whilst the number of civilian casualties has fallen in 2017 it remains high with violent clashes continuing along with targeted killings. There continues to be high levels of civilian casualties caused by ground engagements with suicide and complex attacks continuing along with the targeting and deliberate killing of civilians."

18. I have read and had regard to the news article to which the Judge makes reference and the background material to which the Appellant's grounds refer. I begin by observing that the Judge's summary of the news article at [36] and [69] is a fair one. Whilst that article speaks of the Taliban seeking to gain control of certain parts of Baghlan province, it also cites official sources as being determined to drive them out of the area and reference to them having recently done so in one part of the province.

19. The difficulty with the other evidence to which the Appellant refers is that the reports are for the most part about the general levels of violence within Afghanistan rather than an account of the situation in Baghlan province specifically. Although the statistics which do refer specifically to Baghlan province do still show some civilian casualties, they also show a 36% decrease on the previous year. In any event, those do not point to the Taliban having a significant presence there; the numbers of civilian casualties are low when compared with many of the other provinces. There is a reference to a former Afghan National Police officer having been abducted by the Taliban in Baghlan province in 2017 but such a person is likely to be of particular interest to the Taliban and that says nothing about the general presence of the Taliban in that area.

20. The Judge dealt with the general levels of violence when considering the claim for humanitarian protection at [77] of the Decision.

21. The Appellant has failed to show that there was evidence before the Judge which did not permit the finding he has made about the Taliban no longer having any or any significant presence in Baghlan province. The finding he made that the Appellant could therefore return to his home area was one which was open to him on the evidence.

22. For the above reasons, I am satisfied that the Decision does not contain a material error of law. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Chapman promulgated on 16 October 2017 with the consequence that the Appellant's appeal stands dismissed

Signed Dated: 14 February 2018
Upper Tribunal Judge Smith