Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: RP/00104/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2018	**On 20 March 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

MANZOOR SHINWARI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Ali, instructed by Aman Solicitors Advocates (London) Ltd.
For the Respondent: Mr T. Wilding, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. Mr Shinwari is a national of Afghanistan. He was recognised as a refugee following a judicial determination made by Judge Herbert in 2010. The basis of Judge Herbert's decision was that, although much of what the appellant said before him was not worthy of credit, Judge Herbert took the view that he was, at that date, under the age of eighteen, and following the then authoritative country guidance of the AIT in LQ [2008] UKAIT 0005 he was entitled to be recognised as a refugee as a young man under eighteen who would otherwise be returned to Afghanistan.

2. The Secretary of State acted on that determination, granting refugee status for a time which was certainly going to last beyond the appellant's eighteenth birthday. At the expiry of that period, the Secretary of State sought to discontinue the refugee status on the grounds set out in article 1C(5) of the Refugee Convention, that:

> "The circumstances in which he was recognised as a refugee have ceased to exist."

3. There was an appeal against that decision and the appeal was allowed. The Secretary of State appealed to this Tribunal and in a determination which is conveniently referred to as MM v SSHD and other cases (not reported) this was one of the determinations set aside.

4. In the case of this determination, the Tribunal's specific decision on the occasion of setting it aside was that the appeal was adjourned before the Upper Tribunal for further consideration. The reason for that was set out in the determination as follows:

> "The question of the interpretation of Article 1C(5) of the Refugee Convention is appropriate for determination in this Tribunal; we shall adjourn this appeal for that purpose before deciding what action to take under s 12.2(b) of the 2007 Act."

5. The interpretation of article 1C(5) of the Refugee Convention is not entirely straightforward. There are no specific authorities on the question of whether a change in personal circumstances is sufficient of itself to cause article 1C(5) to be correctly invoked.

6. The United Nations High Commission for Refugees in various publications and statements has clearly taken the view that, first of all, to merit the application of article 1C(5) a change must be fundamental and durable; and secondly, that it must be a change in the circumstances of the country of which the applicant is a citizen, rather than a change in the circumstances of the applicant.

7. Mr Ali, in arguing Mr Shinwari's case before us today, has asked us to accept that interpretation of article 1C(5): but we find ourselves wholly unable to do so for a number of reasons. The first reason is that there is no hint in article 1C(5) itself, that any circumstances, such as personal circumstances, should be excluded from consideration. The second reason is that there would appear to be no reasons given by the UNHCR for its view. The third reason is that it appears, frankly, contrary to common sense, particularly if one is looking for durable changes. In the present case there is nothing that could be imagined that is more durable than the increase in the applicant's age from an age which is under eighteen to an age which is certainly over eighteen – the one thing that cannot be done is to put the clock back. And yet, it seems to be accepted that a change in country circumstances, albeit characterised as durable, might nevertheless be changeable: for example, a revolution could not be ruled out.

8. We have been referred to a number of authorities. The most helpful is probably the decision of the House of Lords in Hoxha [2005] UKHL 19, and in particular, the judgment of Lord Brown. That is a case in which in the end it was found that article 1C(5) had no application because it applies only to those who have been recognised as refugees which the claimants in that case had not. But there are a number of observations which make it perfectly clear that all members of the House were treating article 1C(5) as identifying circumstances in which a person was no longer to be treated as falling within the definition in article 1A(2). In fact, the second paragraph of article 1C(5) itself suggests the same by its particular provisions in relation to individuals who fall within article 1A(1) and the omission therefore of those within article 1A(2). It seems to us that article 1C(5) is properly interpreted as indicating circumstances which would prevent the individual from being recognised as a refugee if he applied at the present time.

9. However, procedurally, something more is required. Clearly it cannot be right that a person who has been granted refugee status should be at risk from day to day of a view being taken that the circumstances, as they are at any specific moment, do not merit a continuation of his status, even though, perhaps matters will have changed again next week. Hence the requirements for the change to be durable or fundamental. But that, as we see it, is a procedural requirement which arises from the necessity for the Secretary of State, as the person invoking the provision, to demonstrate its applicability.

10. In short, it appears to us that the Secretary of State will need, when invoking article 1C(5), to demonstrate that the claimant would not be recognised as a refugee at the present time: and that the reason why he would not be recognised as a refugee at the present time is that the circumstances on which status might have been based have now changed to the extent that the risk is removed. We use the phrase “might have been based” because of the fact that grants of refugee status made by the Secretary of State, never indicate the specific reasons for the finding meriting the grant; and even grants following judgments of the Tribunal or the Courts may not give a comprehensive indication of what the reasons for the grant were. In the present case for example, Judge Herbert made his decision on the basis of nationality and age without making any very clear findings on whether there had been any persecution in the past, or whether there was any risk of persecution for political reasons in the future.

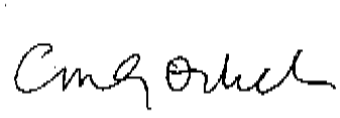
11. The starting point in all of these cases is that the individual has been granted refugee status. He has been granted refugee status as a person who, by reference to his country of nationality, falls within article 1A(2). That will have been based on some assessment which led to a finding that there was a risk of persecution. There may have been other risks which were not evaluated at the time because they did not need to be evaluated; the status was established by, as it were, the story so far.

12. The Secretary of State proposes to remove the refugee status. In order for the removal to be justified, it must be shown firstly, that the circumstances have changed to the extent that the applicant is no longer entitled to the benefits of the refugee status because he no longer falls within article 1A(2) and secondly, that the change has been of such a nature that it is right to make what can be envisaged as a permanent decision in the matter, that is to say that the individual is no longer a refugee and is no longer to be treated as one.

13. For these reasons we reject the interpretation advanced by Mr Ali on the basis of the UNHCR materials. We accept Mr Ali's second alternative proposition, which is that all circumstances are to be looked at, and it is for the Secretary of State to establish that it is right in present circumstances not to recognise the individual as a refugee any more.

14. There have been submissions before us in relation to the standard of proof. Mr Ali's starting point was that it was for the Secretary of State to establish the matters upon which she relied on the balance of probabilities. We do not think that that is a very helpful way of putting it: indeed it may be that any reference to the standard of proof is likely to be misleading. The burden is on the Secretary of State to establish the matters that we have set out. That will necessarily mean demonstrating that the applicant is not at real risk, and demonstrating that the applicant is durably not at real risk. Further than that, we do not think it is very helpful to go. It is clear that the applicant's full circumstances will have to be decided on the facts as they now are, both in relation to his own circumstances and history, and the situation in Afghanistan and perhaps particularly in areas of large population to which he might reasonably be expected to relocate.

15. For those reasons, we remit the applicant's appeal against the article 1C(5) decision to the First-tier Tribunal for determination in accordance with the guidance on the application of article 1C(5) set out in this judgment.



C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 16 March 2018.