



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: PA/00029/2016**

**THE IMMIGRATION ACTS**

**Heard at Birmingham Employment  
Tribunal  
On 28 February 2019**

**Decision & Reasons  
Promulgated  
On 04 March 2019**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**AAR  
(Anonymity direction made)**

Appellant

**And**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Bedford, instructed by Sultan Lloyd Solicitors  
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer.

**ERROR OF LAW FINDING AND REASONS**

1. On 26 September 2016 First-Tier Tribunal Judge Parkes allowed the appellant's appeal to the extent it was said he was entitled to discretionary leave to remain as an unaccompanied minor for whom there were no adequate reception facilities in Afghanistan.

2. Permission to appeal was sought by the appellant on the basis the Judge dismissed the appeal on protection grounds albeit allowing the appeal to the extent set out above.
3. Permission to appeal was refused by a Designated Judge of the First-Tier Tribunal on 21 October 2016 on the basis no arguable legal error had been made out. The appellant renewed his application to the Upper Tribunal who noted the appellant's challenges is in the nature of an upgrade appeal and that since the Judge directed that discretionary leave should be granted there was presently no risk to the appellant as he will not be returned to Afghanistan until such leave expires. It was found the Judge's decision is in line with the findings in *AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC)* and that the appellant's grounds do not identify any arguable error of law in the First-tier Tribunal's determination.
4. The appellant applied for permission to judicially review the decision of the Upper Tribunal to the High Court as a 'Cart' challenge where permission was refused. That decision was challenged by application to the Court of Appeal which succeeded resulting in an order by His Honour Judge Cooke, sitting as a Deputy High Court Judge, granting permission to appeal.
5. The matter comes before the Upper Tribunal today in light of an order of Mr C.M.G Ockelton, Vice President of the Upper Tribunal of 27 November 2018 who granted permission to appeal for the following reasons *"permission is granted for the reasons given by Leggett LJ in the Order of the Court of Appeal in this case. The parties are reminded that the Upper Tribunal's task is that set out in s.12 of the 2007 Act."*

## **Background**

6. The appellant was born on 2 January 2003 and is now aged 16. He is a national of Afghanistan. The Judge noted he arrived in the UK on 18 May 2015 claiming asylum on 17 June 2015.
7. The Judge did not hear oral evidence from the appellant, which was understandable in light of his age, and the advocates made submissions.
8. The Judge summarises the appellant's case from his witness statements in the following terms:

"11. In summary the Appellant's case from his witness statement is that his father was a police officer in the local force who worked with the Afghan government and Americans. Their problems started when he arrested a young couple trying to run away and resisted efforts to hand them over to the local community rather than the authorities. His father shot 2 villagers, escaped and was then arrested for not carrying out

his duty. The Taliban came and killed 2 of his sisters when the Appellant was not at home.

12. The Appellant gave a different account in his interview, the boy had come to kidnapped girls and was arrested by the Appellants father, in the village his father was unable to resist the locals and the boy and a girl was shot, for this his father was arrested.”

### **Error of law**

9. Mr Bates had not seen the order of the Court of Appeal prior to the hearing but was able to study the same after having been provided a copy by Mr Bedford. Permission to bring judicial review, the effect of the challenge to the Court of Appeal, was granted on the basis that the First-tier Tribunal even if it was satisfied the appellant was entitled to a grant of discretionary leave should have still considered the merits of the protection claim to ascertain whether the appellant was entitled to the grant of refugee protection sought. It was found the failure of the First-Tier Tribunal to do more than it did and the failure to properly determine all issues warranted the claim before the Court of Appeal succeeding.
10. Mr Bates was asked during the hearing whether he accepted that in light of the order of the Court of Appeal the First-Tier Tribunal had erred in law in a manner material to the decision under challenge. After further consideration Mr Bates accepted that the Judge should have done more than he did, as identified by the Court of Appeal, and that his failure to do so did amount to legal error.
11. That properly reflects the position in law for the Judge had before him an appeal against the respondent’s refusal to recognise the appellant as a refugee which should have been determined irrespective of whether the appellant was entitled to a grant of discretionary leave.
12. Mr Bedford submitted that such error is material for even on the findings made by the Judge the appellant was entitled to be recognised as a refugee.
13. There was some discussion, as a result of a lack of adequate headings in the decision, as to exactly where the findings of the First-tier Tribunal Judge began in the determination under challenge. It was eventually agreed that it is more likely than not to be at from [22]. Mr Bedford’s submission is based on the findings at [22 - 25] and [31 - 32] which are in the following terms:
  - “22. Dealing with that last point first it is surprising that the Appellant was able to maintain contact with his mother in Afghanistan by phone until shortly before he was interviewed. That would suggest that his family might have been contactable but it is clear that his immediate family have not been traced by the Home Office.

23. The claim that the Appellant can return to Afghanistan as there are adequate reception facilities simply cannot be maintained. The evidence of the contact with the Appellant's uncle, Nazir Khan, is contained in a fax of 8 August 2016. Phone conversation took place on the 1 December 2015.
24. The fax shows that his uncle stated that they were about to leave the area due to the situation (it is not stated which area this was or where it was in relation to the Appellant's home area). They were going from the fighting to a safe haven in the mountains, his eldest son was disabled and his father was in poor health sometimes using a wheelchair, he could not provide any contact details. The Appellant's uncle finally confirmed that he had cousins in the UK but did not know where they lived or contact numbers. The Appellant's name does not appear anywhere in the record of the conversation.
25. As the record shows that the Appellant's uncle was about to move within Afghanistan, and it was not known where to, with there being no mention of the Appellant there is no basis for suggesting that his uncle will be in a position to receive the Appellant if he were to be returned. The consequences of the failure to grant the Appellant discretionary leave are considered below.

...

31. The Appellant's family have not been located and the contact with his cousin's father is clearly inadequate to justify finding that the Appellant would have adequate reception facilities. I cannot find that the Appellant has done all he reasonably could to assist in family tracing given the evidence and the findings made above.
  32. In the circumstances and with there being no adequate reception facilities the Appellant is entitled to be granted leave in line with the policy that applies to unaccompanied minors. On that basis there is no question that he will be returned to Afghanistan and so no question arises about the prospects on return. On that basis risk on return does not arise and, with the appellant being entitled to discretionary Article 8 does not arise."
14. In *LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005* the judge accepted that the Appellant was an orphan, that there would be inadequate reception arrangements for him on return and that, in the light of expert evidence, he would be at risk. There was a general acceptance that an orphan could be at risk as a minor on return.
  15. In *DS(Afghanistan) v SSHD [2011] EWCA Civ 305* it was accepted on the basis of the Tribunal's findings, that the Appellant was a member of the social group identified by the Tribunal in *LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005* and was at risk in the absence of adequate reception facilities on a return to Afghanistan and even if he was not a member of the social group, so that he was not eligible for asylum, the need for humanitarian protection for an

unaccompanied minor on return to Afghanistan would need to be considered.

16. In *ZK (Afghanistan) v Secretary of State for the Home Department [2010] EWCA Civ 749* the Court of Appeal upheld *LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005* and said that, on the basis of the country information evidence presented the Immigration Judge had been entitled to find that, by virtue of being a minor aged 16 and having lost contact with all family members in Afghanistan, the Claimant would be at risk of severe harm if returned to Afghanistan.
17. In *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)* the Tribunal held that (i) The evidence before the Tribunal does not alter the position as described in *HK and Others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG [2010] UKUT 378 (IAC)*, namely 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. That distinction has been reinforced by the additional material before this Tribunal. Whilst it is recognised that there are some risks to which children who will have the protection of the family are nevertheless subject, in particular the risk of landmines and the risks of being trafficked, they are not of such a level as to lead to the conclusion that all children would qualify for international protection. In arriving at this conclusion, account has been taken of the necessity to have regard to the best interests of children. However, 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.
18. The appellant clearly falls within a Particular Social Group as a minor. The findings of the Judge that the appellant has no family available to him will mean that if he is returned to Afghanistan he will be returned as an unaccompanied child with no adequate reception facilities exposing him to a real risk of exploitation and harm sufficient to amount to persecution by virtue of his immutable characteristic from which the State will provide no adequate protection.
19. In relation to internal relocation as return is likely to be to Kabul, in *AS (safety of Kabul) Afghanistan CG [2018] UKUT 00118* it was held that having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan); it will

not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul. However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within that general position. A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return. The guidance in *AK(Article 15(c)) Afghanistan CG [2012] UKUT 00163(IAC)* in relation to internal relocation for certain categories of women remains unaffected by the decision as does the guidance in *AA (unattended children) Afghanistan CG [2012] UKUT 00016*.

20. The appellant is not an adult and, as noted above, the guidance in *AA (unattended children)* is not affected by the decision in *AS*.
21. It was accepted by Mr Bates that there is merit in Mr Bedford's submissions in light of the findings made by the Judge in relation to real risk to the appellant on return and lack of adequate reception facilities. It was also accepted the appellant is entitled to be recognised as a refugee on the basis of such findings.
22. I substitute a decision allowing the appeal under the Refugee Convention.

### **Decision**

23. **The First-tier Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

24. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Upper Tribunal Judge Hanson

Dated the 28 February 2019