Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11293/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 May 2019	**On 05 June 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

J K
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Jones, Counsel
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is an asylum seeker from Afghanistan who arrived in the UK in 2009 aged 16. The anonymity direction made by the First-tier Tribunal has been continued.

2. In a decision promulgated on 21 March 2019 Deputy Upper Tribunal Judge Froom set aside the decision of the First-tier Tribunal to the extent it had

dismissed the appellant's appeal on the ground that removing him to Afghanistan would breach Article 15(c) of the Qualification Directive ("QD").

3. However, the challenge to the First-tier Tribunal's decision to dismiss the appeal on Refugee Convention grounds was dismissed.

4. The First-tier Tribunal's decision to allow the appeal on Article 3 ECHR (health) grounds and Article 8 ECHR (private life) grounds was not the subject of legal challenge and stands.

5. A copy of the decision on error of law is attached to this decision as an annex for ease of reference.

6. For the avoidance of doubt, we record that Mr Jones agreed that the First-tier Tribunal's decision to allow the appeal on Article 3 ECHR grounds does not provide an answer to the issue of humanitarian protection because Article 15(b) is not fully coterminous with Article 3. The ECtHR held in M'Bodj v État Belge (Case C-542/13) that the fact Article 3 precluded in very exceptional cases a third-country national suffering from a serious illness from being removed to a country in which appropriate treatment was not available did not mean that that person should be granted subsidiary protection. The scope for arguing for subsidiary protection was enlarged in MP v SSHD (Case C-353/16) but only in respect of victims of torture or inhuman and degrading treatment who would be intentionally deprived of medical treatment on return.

7. The sole issue before us is whether the appellant's appeal should be allowed on Article 15(c) grounds, applying paragraphs 339C and 339CA of the Immigration Rules, HC395.

8. The appellant's solicitors' letter of representations in support of a fresh claim, dated 23 January 2017, set out a case for consideration under Article 15(c) on the basis that the appellant was at an enhanced risk from indiscriminate violence as a result of his personal profile and vulnerability, although the letter also argued that the existing country guidance contained in AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC) ("AK"), which held that the indiscriminate violence in the country as a whole was not at such a high level as to qualify any civilian present there to humanitarian protection, should no longer be followed.

9. The respondent's refusal letter, dated 18 October 2017, relied on AK. The respondent's position was that the documents submitted with the application had not shown that the security situation in Afghanistan had deteriorated to such an extent that the level of indiscriminate violence was high enough to reach the threshold of Article 15(c). The letter said the respondent had considered the appellant's individual circumstances but not specifically in terms that he might be at an enhanced risk of indiscriminate violence. The letter focused instead on whether the appellant would be able to obtain treatment for his heart condition.

10. The appellant's solicitors filed a bundle in accordance with directions. Mr Jones handed us a skeleton argument and updates from the appellant's GP, Dr Marco Bocchino, and Ms Maya Pritchard, from the South London Refugee Association. In discussion at the beginning of the hearing, it became clear that Mr Walker did not wish to challenge any of the evidence which the appellant was putting forward. We were therefore able to proceed on the basis that the following facts were agreed:

    (1) The appellant is now 25 years of age;

    (2) He is from Baghlan province in the north of Afghanistan;

    (3) He left Afghanistan at the age of 15;

    (4) He has not managed to make contact with his remaining family members in Afghanistan;

    (5) He is not at a real risk of being targeted or forcibly recruited by the Taliban in his home area;

    (6) He suffers from chronic rheumatic heart disease and he has undergone surgery to replace his heart valves with metal valves as a consequence of which he must take Warfarin for the rest of his life to prevent clots forming in heart, lungs or brain, which could be fatal;

    (7) His condition requires frequent and regular blood tests to adjust the dose of his medication, without which the appellant would be at risk of a heart attack, pulmonary embolism or stroke;

    (8) An excessive dose of Warfarin would place the appellant at risk of severe bleeding, which could prove fatal;

    (9) His condition causes tiredness and breathlessness such that he cannot walk any significant distance and he cannot run;

    (10) Having these conditions has an adverse impact on his mood, making management of his health very complex;

    (11) He would be very unlikely to be able to access adequate treatment for his conditions in Afghanistan;

    (12) At the time of the hearing in the First-tier Tribunal, the appellant was receiving counselling and there was psychiatric evidence showing that he fitted a diagnosis of adjustment disorder and also mixed anxiety and depressive reaction;

    (13) There is social stigma in Afghanistan regarding people suffering from mental health difficulties;

    (14) He is very unlikely to be able to find employment in Afghanistan in order to support himself;

    (15) Without employment he would not be able to find accommodation;

    (16) He has no support structures available to him in Afghanistan and would be isolated; and

(17) There would be very significant obstacles to the appellant's reintegration in Afghanistan.

11. In the light of the above, we agree with Mr Jones that the appellant is a vulnerable individual. We now turn to consider the background evidence of prevailing conditions in Baghlan.

12. The most recent country guidance decision on Afghanistan is AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) ("AS"), which focused on the risks from the Taliban in Kabul and internal relocation to Kabul. The earlier decisions in AK and AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) were confirmed. The general position, as set out in particular in AK, is that Afghanistan is undergoing an internal armed conflict but the levels of indiscriminate violence are not such that that, within the meaning of Article 15(c), a civilian, solely by being present in the country, faces a real risk which threatens his life or person.

13. The status of AS as country guidance is doubtful at present following the judgment of the Court of Appeal given after a preliminary hearing (AS (Afghanistan) v SSHD [2019] EWCA Civ 208. In the section in AS on the security situation, the figure for casualties in Kabul in 2017 were miscalculated when expressed as a percentage of the population. However, for the purposes of this appeal we are content to proceed on the basis that the position remains that the level of indiscriminate violence in the country as a whole is not at such a high level that a civilian faces a real risk merely as a result of his or her presence.

14. We recognise that is not the case being put forward by the appellant but the general position is our starting position for considering the individual risk.

15. The First-tier Tribunal found that the evidence showed Baghlan was "volatile". It relied on a report by Dr Antonio Giustozzi, a country expert, which showed that the Taliban stepped up its operations in Baghlan in 2016 and intense fighting took place. It also relied on a report by EASO, dated January 2016, which confirmed that several armed groups were found in Baghlan, particularly the Taliban.

16. Mr Jones relied on the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, dated 30 August 2018. These state that the Afghan security forces have ceded significant ground to the Taliban in rural areas. As at January 2018 the Taliban was reported to control or contest 43.7% of all districts of Afghanistan. The Taliban had intensified its attacks on Kabul and other major urban areas. It had caused high numbers of casualties among Afghan security forces. Throughout 2017 the Taliban launched multiple large-scale operations aimed at capturing district administration centres. At the same time the Taliban consolidated its control

over rural areas, enabling them to undertake more attacks, particularly in the north.

17. Additionally, Islamic State continued to clash with government forces and the Taliban. Islamic State reportedly conducted attacks against military and foreign military targets and the civilian population, including religious sites.

18. The security situation remains volatile with civilians continuing to bear the brunt of the conflict. The continued deterioration in the security situation and the intensification of the armed conflict has been observed since the withdrawal of international military forces since 2014. The conflict continues to affect all parts of the country. In 2017 UNAMA documented the highest number of civilian casualties from combined IED tactics since 2009. The use of IED, such as suicide bombs and pressure-plate devices in civilian populated area, accounted for 4,151 civilian casualties, 40% of all civilian casualties in 2017. This trend continued in the first six months of 2018. The second leading cause of civilian casualties in the first six months of 2018 was ground engagements, followed by targeted killings, aerial operations and explosive remnants of war.

19. As said, we were not asked to depart from the country guidance on Article 15(c) as to the position in Afghanistan in general and we were not directed to any materials on the situation in Baghlan. We accept, however, that the background materials paint a picture of a deteriorating security situation with increasing levels of indiscriminate violence and civilian casualties throughout the country.

20. We were asked to find that the appellant's vulnerabilities entitled him to humanitarian protection notwithstanding the agreed position that the general position remains as set out in country guidance.

21. We now turn to the law.

22. Article 2 QD defines a "person eligible for subsidiary protection" as

"a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;"

23. Article 15 QD defines "serious harm" as,

"…

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"

24. These provisions were transposed into domestic law by the Immigration Rules, which read as follows:

"**339C.** A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and

(iv) they are not excluded from a grant of humanitarian protection.

339CA. For the purposes of paragraph 339C, serious harm consists of:

…

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

25. Article 15(c) QD was analysed in the ECJ Grand Chamber's judgment in Elgafaji v Staatssecretaris van Justitie (Case – C465/07) [2009] All ER (EC) 651, [2009] INLR 235, 1 WLR 2100. The following passage is helpful:

"33. … the harm defined in Article 15(c) of the Directive as consisting of a 'serious and individual threat to [the applicant's] life or person' covers a more general risk of harm.

34. Reference is made, more generally, to a 'threat ... to a civilian's life or person' rather than to specific acts of violence. Furthermore, that threat is inherent in a general situation of 'international or internal armed conflict'. Lastly, the violence in question which gives rise to that threat is described as 'indiscriminate', a term which implies that it may extend to people irrespective of their personal circumstances.

35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.

36. That interpretation, which is likely to ensure that Article 15(c) of the Directive has its own field of application, is not invalidated by the wording of recital 26 in the preamble to the Directive, according to which '[r]isks to

> which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm'.
>
> 37. While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows by the use of the word 'normally' for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.
>
> 38. The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.
>
> 39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.
>
> 40. Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:
>
> > the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and
> >
> > the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower."

26. The reference in paragraph 39 of the judgment to the possibility of an individual being specifically affected by factors such that the level of indiscriminate violence which must be shown to qualify for subsidiary protection is lower has become known as the 'sliding scale'. This appellant argues that he should be entitled to subsidiary protection because he is at greater risk from the indiscriminate violence, (which we accept prevails at the present time throughout Afghanistan), because of his personal circumstances.

27. The personal circumstances on which he relies are primarily his health conditions which mean that:

    - His mental health condition will deteriorate without treatment such that he will become depressed to the point that his ability to make rational decisions about keeping himself safe would be compromised;
    - His heart condition affects his mobility to the extent that he cannot walk far due to breathlessness and he cannot run any distance; and
    - His dependence on Warfarin, a blood-thinning agent, makes him vulnerable to serious and possibly fatal bleeding in the event of an injury.

28. We accept Mr Jones's argument that the combination of these conditions places the appellant in a particularly vulnerable situation in the event of an outbreak of indiscriminate violence of the kinds mentioned in the UNHCR Guidelines. The appellant's parlous circumstances without employment, secure housing or family support are likely to mean he spends his time outdoors with no physical protection against attacks. His low mood would make him less able to recognise risks and the fact that a dangerous situation was developing. It would also compromise his ability to react to warnings and advice. The appellant's limited mobility would mean he would be unable to remove himself quickly from dangerous situations, even if he had heeded a warning. His vulnerability to serious bleeding means that any cut of minor injury could be far more serious than it might otherwise be.

29. For these reasons, we conclude the level of risk of serious harm by reason of indiscriminate violence which qualifies this appellant to protection has been reached. Mr Walker confirmed that he was in agreement that the appeal should be allowed on the basis of the arguments advanced in the appellant's skeleton argument.

30. We therefore allow the appellant's appeal on Article 15(c) grounds. The appellant is entitled to a grant of humanitarian protection under paragraph 339C of the Immigration Rules. No issue of exclusion arises.

31. We wish to make clear that this decision should not be read as establishing any matter of principle or as providing any guidance on current levels of indiscriminate violence or country conditions in Afghanistan in general or Baghlan province in particular. It is a decision taken on the unique facts of the case and on the basis of the evidence put before us

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision dismissing the appeal on Article 15(c) Qualification Directive grounds is set aside. The following decision is substituted:

The appellant's appeal is allowed on humanitarian protection grounds.

Anonymity

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

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 both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 23 May 2019

Deputy Upper Tribunal Judge Froom

ANNEX: Error of law decision

1. The appellant appeals with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal Beach, promulgated on 28 September 2018, allowing his appeal on article 3 (health) grounds and article 8 (private life) grounds but dismissing his appeal on protection grounds.

2. The respondent has not cross-appealed against the parts of the decision allowing the appeal. However, the appellant wishes to pursue his claim to recognition under the Refugee Convention or to a grant of humanitarian protection.

3. The appellant is an Afghan national who arrived in the UK on 26 November 2009, which was his sixteenth birthday. He was taken into the care of the local authority as an unaccompanied minor. He claimed asylum but his application was refused and his appeal was dismissed by Judge of the First-tier Tribunal Baldwin. After his further representations were also rejected, the appellant travelled to Ireland to claim asylum but he was returned to the UK under the Dublin Regulation. He made further representations which were refused but which were treated as a fresh claim so as to give the appellant a right of appeal.

4. The decision under appeal is dated 18 October 2017. The reasons for refusal letter relied on the findings of Judge Baldwin. He had found there were material discrepancies as between the account the appellant gave to social workers at an age assessment made on the day he was apprehended in the UK and the account he gave subsequently. The judge concluded that the appellant had come to the UK for no other reason than to obtain treatment for his heart condition. He found the appellant was at no risk from the Afghan authorities and he was not at a real risk of forced recruitment by the Taliban. If there were a risk from the Taliban he could relocate to Kabul.

5. The refusal letter considered the three reports the appellant had obtained from Dr Giustozzi. The letter accepted that he is a highly qualified expert on Afghanistan. However, it was not accepted he was qualified to authenticate documents from Afghanistan. Therefore, little weight was given to the reports to the extent they were presented as evidence authenticating the documents submitted by the appellant. However, the letter also noted that Dr Giustozzi had stated in his report that there was no evidence that the Taliban actually practised forced recruitment. In terms of the ability of the Taliban to track people down in Kabul, Dr Giustozzi said their ability was limited and the appellant would be a low priority target.

6. The letter considered Article 15(c) of the Qualification Directive and found no reason to depart from the country guidance provided in *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163 (IAC). In any event, Judge Baldwin had found the appellant was able to relocate internally to Kabul.

7. At his appeal before Judge Beach the appellant maintained his account of fearing persecution in Afghanistan. He said his brother, who worked for the Taliban, had been arrested by the Afghan authorities and released following the payment of a bribe and weapons. The appellant said the Taliban had raided his family home, which is in Baghlan province, killed his brother and abducted his other two brothers. He left

Afghanistan because he was afraid of being forcibly recruited or suffering reprisals from the Taliban as a result of his family's history. He said he had lost all contact with his family. Relocating to Kabul would be unduly harsh because of his personal circumstances, including his medical condition.

8. The appellant gave oral evidence and, in the light of the psychiatric evidence, Judge Beach treated him as a vulnerable witness. She also heard evidence from a friend of the appellant. Reliance was placed on the expertise of Dr Giustozzi. The respondent relied on the recent country guidance decision in *AS (Safety of Kabul) Afghanistan CG* [2018] UKUT 00118 (IAC).

9. Judge Beach treated the decision of Judge Baldwin as her starting point. She directed herself in terms of *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka Starred* [2002] UKIAT 00702. She recognised there was other evidence which could potentially address the discrepancies relied on by Judge Baldwin as between the age assessment and the later asylum interview. The age assessment recorded that the appellant stated that he came to the UK because he was unwell and had a heart condition. The age assessment was conducted on the date of arrival. However, the judge rejected the appellant's claim that he had not said that he had come to the UK because he was unwell, although this did not mean that the rest of the account was not credible. There was a further discrepancy as to how many of the appellant's brothers were living at home at the time the appellant left Afghanistan.

10. A medical report stated that the appellant had been suffering from low mood and was contemplating suicide. Subsequent medical evidence suggested the appellant's symptoms best fitted a diagnosis of adjustment disorder, mixed anxiety and depressive reaction. Judge Beach rejected the argument that the medical evidence threw light on the inconsistency given in the appellant's account because the 2014 report stated there was no evidence to suggest the appellant would struggle to recall events.

11. Judge Beach next considered the documents which the appellant stated he had obtained from Afghanistan. In particular, she discussed the letter said to have been issued by the police headquarters of Baghlan province certifying the attack by the Taliban had taken place on the appellant's house. She noted that Dr Giustozzi had not purported to authenticate the document himself but had recorded the results of research undertaken in the field in Afghanistan, in this case by a Mr Kakar. The judge noted that the original letter did not state the date on which the attack was said to have taken place. With respect to the research by Mr Kakar, there was no reference to the date the appellant's father made his complaint. It appeared that the police letter was the response to a complaint but, if that were the case, it had taken four or five years to make. She found little weight could be attached to the documents.

12. Turning to Dr Giustozzi's evidence on the general country conditions, this showed that the Taliban presence in Baghlan increased in 2008. However, he said that there was no evidence that the Taliban actually practised forced recruitment. In communities deemed hostile to the Taliban, the Taliban would force young men to serve as porters or support staff. The Taliban offered financial incentives to recruits and employed psychological pressure. Where tribal leadership groups had negotiated deals with the Taliban in exchange for support against their rivals, a family refusing to contribute to the militia could be fined or expelled from the community. There had been press

reports of the Taliban going from home to home asking each family to contribute a son to the jihad.

13. In Dr Giustozzi's opinion, the appellant's account could be plausible. He conjectured that the raid on the appellant's family home may have gone wrong or the Taliban may have been seeking to punish the appellant's brother as a defector. However, the judge was concerned over the development of the appellant's account since the original evidence at his age assessment interview notwithstanding the fact it was recorded he appeared unwell and tired from his journey. She did not find his account of what happened in Afghanistan credible.

14. In terms of Article 15(c), Judge Beach noted that the appellant's home area remained volatile. She considered whether the appellant was at risk as a result of indiscriminate violence in the context of internal armed conflict. She found the evidence was not sufficient to show such a risk because much of the violence was the result of targeted vendettas or against women.

15. Permission to appeal against the decision of Judge Beach was refused by the First-tier Tribunal. In fact, the application was not admitted because it was out of time and it was considered there was no basis for extending time. However, permission to appeal was subsequently granted by the Upper Tribunal on all three grounds as put forward. Time was extended due to the vulnerability of the appellant. I shall now summarise the grounds.

16. Firstly, Judge Beach had materially erred in her assessment of the expert evidence in relation to the verification of the documents. The grounds suggested the judge's approach was irrational. The researcher employed by Dr Giustozzi had made contact with General Gulbari, the chief of police in Baghlan province, who confirmed that the police report was consistent with police records and accepted that the attack had taken place. On any proper view, this evidence is sufficient to show the appellant's family had been targeted by the Taliban. There was an arguable case that, as past victims of persecution, there was a future risk of repetition.

17. Secondly, Judge Beach had erred in attributing substantial weight to the discrepancy in the age assessment report. That report was not designed to articulate the protection claim. The appellant was a seriously ill and traumatised child on the day of his arrival to the UK.

18. Thirdly, in finding the appellant did not qualify under Article 15(c), the judge should have considered whether the appellant was in an enhanced risk category. As a result of his mental and physical health needs and his general vulnerability, there was an elevated risk of exposure to incidental violence.

19. There has been no rule 24 response from the respondent.

20. I heard submissions from the representatives as to whether the decision of Judge Beach should be set aside because it contains one or more material errors of law.

21. Mr Magennis very much adopted the grounds prepared by his colleague, Mr Jones. In relation to the first ground, he argued that the approach of the judge to the expert evidence was irrational. At paragraph 53 of her decision, in which she considered the reports of Dr Giustozzi, Judge Beach was silent about the issue of verification and

failed to give reasons as to why the expert's opinion should not be followed. Instead, in paragraph 55, she took issue with the contents of the document and concluded, in paragraph 57, that little weight could be placed on them. As the grounds point out, contact had been made with the chief of police who confirmed the attack had taken place. On any proper view, this was evidence was sufficient to find there was a real likelihood of the incident taking place.

22. On the second ground, Mr Magennis argued that paragraph 59 of the judge's decision, in which she concluded she should rely on the discrepancy between the age assessment and the later evidence, had failed to address all the points raised in the skeleton argument provided at the hearing by Mr Jones. Crucially, she failed to consider the absence of any transcript of an interview at the age assessment. He confirmed that the challenge contained in ground two was essentially that the judge had failed to provide adequate reasons.

23. The third ground was distinct because it did not relate to the adverse credibility finding made by Judge Beach. In her consideration of humanitarian protection, she considered the risk of indiscriminate violence as a result of internal armed conflict but, in doing so, failed to consider the arguments made at the hearing about the appellant's vulnerability. The latter was not in doubt because it led to the judge allowing the appeal on article 3 grounds.

24. In reply, Mr Tarlow argued that there was no material error of law in the approach of Judge Beach to the asylum claim. Her findings were open to her. However, he did not argue against Mr Magennis's submissions on the Article 15(c) point.

25. In my judgement, there is no error in Judge Beach's approach to the asylum claim with respect to the matters clearly set out by Mr Jones in grounds 1 and 2 of the written grounds seeking permission to appeal and eloquently elaborated on at the hearing by Mr Magennis.

26. It is important to keep in mind that the issue for Judge Beach was whether she should depart from the unsuccessfully challenged findings made by Judge Baldwin. He heard the appeal in September 2013 and, at that time, the appellant put forward the claim that he had had to leave Afghanistan after two of his brothers were taken by the Taliban and another one was shot (at). He said he feared recruitment by the Taliban. Judge Baldwin found none of the claim was credible. At the hearing before Judge Beach the appellant was essentially seeking to reargue the same claim with the benefit of fresh evidence. The judge was right to direct herself in terms of paragraph 39 of the starred decision of *Devaseelan*.

27. With that in mind, I turn to consider the substance of the complaints about Judge Beach's assessment. Ground 1 boils down to an absence of reasons for rejecting the expert report or, at least, not regarding it as evidence of such weight as to justify a positive finding that the Taliban raid on the appellant's home had taken place in 2009, as claimed.

28. There are a number of documents but attention was focused on what purports to be a certificate provided by Brigadier General Assadullah Sherzad, commander of police headquarters of Baghlan province, the translation of which appears at page B206 of the appellant's bundle. It is dated simply 1392 (2013/2014). It refers to the petition of the

appellant's father and states that it "*certifies the issue of the attack of the Taliban ban on the house of [the appellant] which resulted in martyrdom of a brother of [the appellant] and the capture of his other two brothers by the Taliban and the escape of [the appellant]*".

29. At page A94 of the appellant's bundle is the section of Dr Giustozzi's report of 19 December 2016 dealing with the authenticity of the police documents. He explains that the appellant's solicitors provided him with scanned black and white copies of the police documents which he sent to his researcher, Mr Silab Mangal, based in Kabul. I note that Mr Mangal's CV has also been provided. Dr Giustozzi sets out something of Mr Mangal's extensive experience as a journalist and explains that Mr Mangal in turn relies on his colleague, Mr Javed Kakar, a journalist based in the appellant's home area. It was Mr Kakar who sought to confirm the authenticity or otherwise of the police documents by visiting the chief of Baghlan police, who is now General Noor Habib Gulbari. The latter confirmed that the appellant's father did petition the police headquarters and the stamp and signature on the response letter belong to the previous head of police, Brigadier General Sherzad. That is the extent, as far as I can see, of the authentication provided.

30. It is clear that Dr Giustozzi's role was simply to instruct his researcher in Kabul who, in turn, instructed a colleague in the appellant's home area. I accept that the fact that Dr Giustozzi is an acknowledged expert on Afghanistan whose evidence has been accepted in many cases means that his employment of a researcher can be assumed to have been made in good faith. However, it is quite another thing to suggest that the outcome of the enquiries made should be considered as expert evidence. It is evidence which has the potential to corroborate the appellant's account but the fact it was delivered through the vehicle of a report in the name of Dr Giustozzi does not, in my judgement, place it in the category of expert evidence. To the extent the grounds appear to argue that Judge Beach failed to give reasons for not accepting expert evidence, they are misconceived.

31. In any event, I regard Judge Beach as being perfectly entitled not to give significant weight to the confirmation provided in the police certificate for the reasons she gave. As mentioned, she noted the absence of a precise date on the police certificate and the absence of any reference to the date of the complaint by the appellant's father. As she pointed out, if the complaint had been made in 2009, the police had apparently taken some 4 to 5 years to reply, which had evidently not been explained.

32. As for the second ground, regarding the judge's treatment of the age assessment, the case that was put to Judge Beach appears to me to have been a repeat of the arguments rejected already by Judge Baldwin. I accept that Judge Beach did not express a view on each and every argument arrayed in Mr Jones's skeleton argument but I do not accept there was any obligation on her to do so. She referred to the skeleton argument so it can safely be assumed that she read it. She was evidently fully conscious of the fact that the appellant was young and was reported to have been unwell at the time of the age assessment interview. She also considered carefully the medical evidence as far as it threw light on the appellant's condition at the relevant time. The evidence before her did not support the view that the appellant's mental health state was any impediment to recalling past events. There was later medical evidence, part of which the judge set out at paragraph 47 of her decision, but this only showed that the appellant's mental health had deteriorated. That assessment has not been challenged. I see no error in the judge's approach.

33. I dismiss the appellant's appeal insofar as it challenges the judge's decision to dismiss the asylum claim. However, I do consider the judge erred with respect to her consideration of the separate Article 15(c) ground. My reasons are as follows.

34. Article 15(c) was not expressly considered by Judge Baldwin and would, in any event, be open to fresh consideration in the light of the changing situation on the ground in Afghanistan since 2013. There is, as Judge Beach acknowledged, current country guidance on the level of risk of indiscriminate violence in Afghanistan set out in *AS*. This states that there has been no change to the position as set out in the earlier country guidance decision in *AK (Article 15(c)) Afghanistan CG* [2012] UKUT 00163(IAC). In that case it was held that,

> "Despite a rise in the number of civilian deaths and casualties and (particularly in the 2010-2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person."

35. Judge Beach recognised that the appellant's home area was "volatile". Mr Magennis pointed out that there was extensive background evidence in the appellant's supplementary bundle about the conflict. The judge set out Dr Giustozzi's evidence of the Taliban insurgency in Baghlan and she set out some short extracts from the background evidence in her decision. She concluded as follows in paragraph 70:

> "I have found that the appellant will not be targeted as an individual so he does not qualify for Humanitarian Protection on that basis. I have also considered whether he is at risk as a result of indiscriminate violence as a result of internal armed conflict. The evidence does show that the area has been a volatile area but I find that it is not sufficient to show that there is a risk of indiscriminate violence as a result of internal armed conflict. In fact, the evidence shows that much of the violence is as a result of targeted vendettas or against women. I find that the appellant does not qualify for Humanitarian Protection."

36. It is clear from the above that there is no consideration of the argument put forward by Mr Jones, as set out in his skeleton argument, that this appellant should nonetheless be considered eligible for a grant of humanitarian protection because of his particular vulnerabilities. This argument was based on the 'sliding scale' concept developed by the CJEU in paragraph 39 of its judgment in *(C-285/12) Elgafaji v Staatssecretaris van Justitie* [2009] 1 WLR 2100. The Court held that the existence of a serious and individual threat to the life or person would only be shown where the degree of indiscriminate violence characterising the armed conflict reached a sufficiently high level of intensity. However, the more an individual is able to show that he is affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. The personal circumstances invoked by the appellant in this case included his mental health problems which would mean that he was less likely to react in a way to ensure his protection, his problems with mobility and in particular his inability to run, and, his dependence on Warfarin, which would mean that in the event he was injured he would bleed severely.

37. I consider that this was an aspect of the case which the judge was obliged to consider and her failure to do so leads me to find that her decision to dismiss the appeal on humanitarian protection grounds should be set aside and re-made.

38. Having considered the Senior President's Practice Direction of 15 September 2012 and section 12(2) of the Tribunals, Courts and Enforcement Act 2007, I consider this is an appropriate case for the Upper Tribunal to remake the decision, limited to consideration of Article 15(c). To that end, I make the following directions:

    1. There will be a continuation hearing on a date and at a time to be notified at Field House which will consider afresh the issue of whether the appellant is entitled to humanitarian protection on the ground of Article 15(c) of the Qualification Directive.

    2. The appellant's solicitors should prepare a fresh bundle of evidence which relates to this issue, which should be filed at the tribunal and served on the respondent no later than 14 days before the hearing date. This bundle should contain all the documents relied on in support of the Article 15(c) claim.

    3. It is not anticipated that the appellant will need to give oral evidence but if an interpreter is required, the appellant's solicitors should inform the tribunal.

    4. The tribunal would be assisted by brief skeleton arguments setting out the respective submissions of the parties, cross-referencing the evidence and case law.