Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01156/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Tuesday 27 April 2021	**On 07 June 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

H E
[ANONYMITY DIRECTION MADE]

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Spurling, Counsel instructed by Wimbledon solicitors
For the Respondent: Ms S Cunha, 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 appeal involves a protection claim, I consider 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. By a decision promulgated on 15 December 2020, I found an error of law in the decision of First-tier Tribunal Judge S J Steer itself promulgated on 7 December 2020 allowing the Appellant's appeal against the Respondent's decision dated 15 January 2020 refusing his protection and human rights claims. I therefore set aside Judge Steer's decision but preserved a large part of that decision. I also gave directions for a resumed hearing. My error of law decision is appended hereto for ease of reference.

2. I do not need to set out the Appellant's immigration history. That is set out so far as necessary at [2] to [3] of my error of law decision.

3. The directions I gave in my error of law decision permitted the Appellant to file further evidence. His time for so doing was extended by an Upper Tribunal lawyer on 5 February 2021. In consequence, on 26 March 2021, the Appellant filed a supplementary bundle consisting of an expert report of Dr George Stein dated 11 March 2021 and the Appellant's medical notes. I refer to documents in that bundle hereafter as [ABS/xx]. In addition to those documents, I also have the Appellant's bundle of evidence before the First-tier Tribunal which I refer to hereafter so far as necessary as [AB/xx]. I also have a core bundle also containing the Respondent's bundle. As loose documents, I also have decisions made by previous Judges in an earlier appeal. Those are a decision of First-tier Tribunal Judge A Khawar, promulgated on 13 February 2017 and a decision of Deputy Upper Tribunal Judge D N Harris promulgated on 26 February 2018 finding there to be no error of law in Judge Khawar's decision and therefore upholding it. For completeness, I also have the refusal of permission to appeal to the Court of Appeal of Upper Tribunal Judge Gill dated 5 April 2018.

4. In accordance with my directions, I also have a skeleton argument of Mr Spurling for the Appellant and of Mr Chris Avery for the Respondent.

5. I have read all of the documents which are of relevance to the issues which remain for me to decide but I only refer below to those which are relevant to my findings and reasoning.

6. The hearing was attended by representatives of both parties. It was also attended by the Appellant and his sister [FA]. The Tribunal had also booked an interpreter for the hearing to permit the Appellant and [FA] to give evidence. At the outset of the hearing, Mr Spurling indicated that he considered that the most useful live evidence would be that of [FA] whose circumstances had changed to some extent since the First-tier Tribunal hearing because she has given birth to a fifth child. The Appellant lives with [FA] and her family and therefore they were sharing a video link. Some concern was expressed about [FA]'s ability to give evidence as she was not feeling well. Her fifth child is still a very young baby and was also unwell.

7. I gave Mr Spurling time at the outset to discuss with the Appellant and [FA] whether they considered it necessary to give evidence. Ms Cunha indicated

that she may wish to ask [FA] a few questions if she was able to give evidence but did not consider it likely that she would wish to cross-examine the Appellant (although reserved her position until after [FA]'s evidence). As I pointed out, although [FA] has had a fifth child, that does not add materially to her previous circumstances. She already had four children and the Appellant was living previously with her and her family, including those children. Having taken instructions, when the hearing resumed, Mr Spurling indicated that [FA] did wish to give evidence, but the Appellant agreed that he did not need to give evidence unless Ms Cunha wished to cross-examine him.

8. [FA] gave her evidence with the assistance of an Afghan Dari interpreter. The Appellant tended to her young child in another room whilst she gave her evidence so that she was not distracted. I was satisfied that [FA] and the interpreter understood each other. I refer to her evidence, both written and oral, as necessary below. Following [FA]'s evidence, Ms Cunha confirmed that she did not wish to cross-examine the Appellant. This was explained to the Appellant who agreed therefore that he was content not to give oral evidence. Again, I have regard to his written evidence so far as it is necessary to do so.

9. Having heard evidence and submissions, I indicated that I would reserve my decision and provide it in writing. I therefore turn to do so.

THE ISSUES TO BE DETERMINED

10. By my error of law decision, I expressly preserved paragraphs [1] to [71] of Judge Steer's decision. My reasons for so doing are explained at [21] of the decision. I also refer in passing to [12] of my error of law decision, recording Mr Spurling's concession that the Appellant is not a refugee having been found not to be credible in relation to his claim of individualised risk and that internal relocation is not relevant where, as here, the Appellant has been found not to be at risk in his home area.

11. I gratefully adopt the summary of the earlier findings which are preserved as contained in the Respondent's submissions:

> "The relevant preserved findings are that the account of the appellant's difficulties in Afghanistan, in particular, that his brothers were kidnapped and one was killed, was found not credible. Furthermore, it was found that the appellant did know the whereabouts of his family and was in contact with them. The latter finding was in the context that the sister, with who he resided in the United Kingdom, had returned a number of times to Afghanistan the last occasion being July 2019."

Mr Spurling did not take issue with that analysis. I accept that this is the effect of my earlier determination.

12. Mr Spurling sets out what he considers to be the salient background facts as accepted at [4] of his skeleton argument as follows:

> "(a) [HE] is from Ghazni Province in Afghanistan. He was born on 15 December 1999. He arrived in the UK at the age of 16 on 24 May 2016. He is now 21 years old.
>
> (b) He has relatives in Afghanistan. As to his immediate family, he has a sister and brother-in-law in the UK and the First-tier Tribunal found at §71 that 'he does know the whereabouts of his parents, his older brother and his sister and her family and can contact them'.
>
> (c) [HE] has been living with his sister [FA]'s family since his arrival in the UK or shortly thereafter. At the time of the 2020 hearing before the First-tier Tribunal, [FA] and her husband [BA] had 4 children in school years 8,6,4 and 2 (which would mean that they now range in ages from 7-8 to 13-14) and [FA] was pregnant with their fifth child, due in May 2020. [HE] has lived with them since he was 16 and his niece and nephews ranged in age from 2-3 to 8-9."

Ms Cunha did not take issue with those factual findings which I therefore adopt.

13. Based on the effect of the preserved findings and the facts as set out above, the parties agreed that the issues which remain for me to be determined are as follows:

Issue One: The impact of return to Afghanistan on the Appellant's mental health. As a sub-set of that issue, I have to consider the risk that the Appellant would commit suicide before, during or following return and whether he would self-harm if faced with the prospect of return. The issue falls to be considered as a human rights claim, under Article 3 ECHR.

Issue Two: The impact of return to Afghanistan on the Appellant's private and family life. That issue encompasses not only separation from his family in the UK but also obstacles to integration in Afghanistan. Whatever my findings on Issue One, the impact on the Appellant's mental health of return to Afghanistan falls to be considered as part of his private life (physical and moral integrity).

14. Before I turn to consider those issues in substance, I deal with the relevant evidence and my assessment of that evidence.

THE EVIDENCE

The Appellant's Mental Health

15. I begin with the earlier appeal decisions in light of the Devaseelan guidance. However, I can deal with these very shortly as there was no suggestion that the Appellant was suffering mental health difficulties at that time (and therefore from January 2017 to February 2018). There is also no suggestion that he was unwell when interviewed in connection with his asylum claim in mid-2016. I note however that the earlier appeal was against the refusal to recognise the Appellant as a refugee. The Appellant had at that time been given leave to remain until June 2017 as an unaccompanied asylum- seeking child ("UASC").

He was therefore not under direct threat of removal, certainly in January 2017 when the First-tier Tribunal hearing took place.

16. The Appellant's witness statement dated 6 March 2020 at [AB/1-8] places the start of his mental health problems as being at the point when he was detained for removal. It appears from medical records with which I deal below that this was in June to August 2019. The Appellant says this:

> "8. Whilst I was detained, my mental health deteriorated as my fear that I would be returned to Afghanistan became very real. I was terrified that I would be sent back and that I would be killed under horrible conditions. I would be sent back to a country with no rules, no proper education and constant, indiscriminate violence. I would be separated from the only family I have and I would be alone. These thoughts made me feel despair, hopelessness and helplessness. The journey I had from Afghanistan to safety in the UK was very long and very difficult and the fact that I could so easily be sent back to that place I escaped from terrified me. There is no meaning of life in Afghanistan. I therefore sought medical support in detention and after I was released on bail, I sought further help from my GP who referred me for counselling which I still do today."

17. That account is developed from an earlier statement dated 19 October 2019 ([AB/35-39]) at [5] of that statement. The first part is repeated in the statement I have set out above. It continues as follows:

> "… I used to be treated for my mental health condition with oral medication as well however my GP stopped the treatment as he suggested that it was not helping me and giving me side effects. I now submit a Psychiatric & Scarring Report by Dr J Hajioff, which confirms that I suffer from post-traumatic stress disorder on account of what I have been through. I am certain that if I am returned to Afghanistan, my mental health would deteriorate and I would become suicidal."

18. There are some contemporaneous documents which deal with the Appellant's mental health difficulties at that time and subsequently. I will come on to the medical reports prepared in connection with these proceedings in due course. Independently of those reports, the following documents are of relevance:

    (1) Letter from Robin White, The Children's Society, dated 23 July 2019 at [AB/171-172]. Mr White is a practitioner who had some limited contact with the Appellant in connection with an enquiry about social services support as a former UASC. Mr White has been working with UASCs as a volunteer since November 2013 and has worked for the Children's Society since September 2017. He was approached by the Appellant in June 2018 for advice about access to social services support as he wanted support which his sister could not offer and was also looking to move out of her house. Mr White was unable to assist as the Appellant was by then over 18. He met the Appellant again by chance at the Home Office in August 2018. Mr White says this about the encounter:

"... [HE] was in an argument with one of the security staff there and was evidently highly distressed. I supported security staff to de-escalate the situation and phoned [HE] later that day to see how he was doing. He informed me that the police had been called because he had threatened to kill himself. I raised this as a safeguarding concern with my managers and provided further support to connect [HE] with mental health support, leading to regular contact (by phone and in person at our office in Stratford) that lasted until late November 2018. I have had no further contact with [HE] since this time.

Mental health and support needs

[HE]'s mental health issues have been apparent from early on in my work with him. He explained that he couldn't stay with his sister because doing so exacerbated his depression, though there was no threat to his safety at her house. His decision making around housing has not always been reasonable, seeming to be motivated by a desire to be by himself rather than in a safe and supported environment. I have spent long phone calls with him trying to ascertain what was preventing him from staying with his sister, and in November 2018 he told me that he just wanted to be alone. During the same conversation he spoke to me about his fear of the lack of security in Afghanistan, and his feeling that he is a burden to all those around him.

… it is not my view that [HE] is actually in a position to support himself … as he does not have the necessary independent living skills to do so …

His need for additional mental health support was most clearly apparent when we reopened his case in late August 2018. In my view his confrontation with staff at Becket House reporting centre was a moment of unhealthy risk-taking and the staff there evidently felt concerned enough about his safety to call the police. When I checked up on him later he was extremely despondent, and when I asked him if he thought about suicide regularly he told me that he thought about it 24 hours a day. I strongly advocated for him to see his GP about this, which he agreed to do though he was extremely pessimistic about the benefits this might confer. He continued to display unhealthy risk taking behaviour, specifically by sleeping rough in November 2018 despite warnings of the dangers of this, though his visit led to him being referred to therapy.

Conclusions

It is my view that [HE]'s mental health difficulties and lack of independent living skills make him a very vulnerable young person who would struggle to relocate away from his current support network. Based on my encounters with him, he seems prone to making irrational and self-destructive decisions as he has little concept of his future and places little value in his own life. The prospect of being returned to Afghanistan clearly fills him with a fear for his own safety, the basis for which is in his knowledge of the security situation in that country and the risks to fighting-age young men.

… From my understanding of conditions in Afghanistan, it seems unlikely that he will encounter similar support where he to be removed to that country. I consider his hope of being housed independently from his sister

> to arise from an over-estimation of his own independent living skills and a desire to exert control rather than the competence that would be required to make this workable. I believe that stable and long-term support from professionals familiar with the context of refugees to the UK and who are experienced in delivering trauma-focussed therapy is the only thing likely to bring about recovery for this young man …"

Mr White does not profess to have any mental health qualifications or training nor any direct knowledge or expertise in relation to conditions in Afghanistan. He could not of course be aware in July 2019 of the adverse credibility findings which would be made about the Appellant's claim of individualised risk. He also seems to be unaware of the other relatives that the Appellant has in Afghanistan, leaving aside the Appellant's parents who it has been found he can contact. Nonetheless, Mr White does provide an account of the Appellant's mood and reaction to events in mid-2018 which are supportive of the Appellant's account.

(2) By contrast, the letter from the Appellant's GP dated 5 March 2020 at [AB/16] says only this:

> "… [HE] was seen by the Talking Therapies team for depression (letter received dated 1/8/19). The patient was offered cognitive behavioural therapy based techniques and put on the waiting list to be allocated a therapist…"

I have been unable to find the letter there referred to. The text messages and medical letters produced in the initial bundle show only that some appointments were made. Those provide little information about whether the appointments were attended or the outcome. There is a letter from Talking Therapies (undated) at [AB/42] following an assessment indicating that the Appellant would be offered assistance and another letter at [AB/50] shows that the Appellant failed to attend an appointment made for him in this regard on 18 June 2019. That letter indicates that, if the Appellant failed to respond within seven days, he would be discharged from the service. I note that the Appellant mentioned having missed an appointment with Talking Therapies when he was placed in immigration detention which was around this time although appears to have been after 18 June. He was however apparently booked for another appointment on 27 June 2019 ([AB/56]) which he would have missed due to his detention. Another letter at [AB/54] dated 6 September 2019 suggests that the Appellant had regained contact but again reiterated that he would be discharged if he did not contact the service by 11 September 2019. There is however no evidence from Talking Therapies regarding their assessment.

(3) I now have the Appellant's updated medical records at [ABS/16-42]. Those show the following:

(a) The Appellant was introduced to F2F in June 2019 ([ABS/34-35]). He said he had contacted his GP two to three weeks previously and was not on any medication. He said he had no previous mental health

problems or experience of psychological therapies. He said he had no problems with anger or violent outbursts but thought of "punching the wall" when he felt too low. He had no active plans or intent. He said that "is not so intense to want to act, I hit my wall and it goes". He denied any previous attempts to harm himself or take his own life. The Appellant recounted his claim that his brother had been killed and said that he had experienced difficulties with sleep and depression for two years. He said he experienced low mood, was tired and "extremely lethargic". There is an observation that there is "not enough evidence to indicate PTSD". He described feeling "down, depressed, angry", said that he had "little interest, appetite decreased, irritable, forgetful". He denied having any friends or family support. He was offered further sessions and further assessment for PTSD.

(b) The Appellant was seen for initial assessment on 19 September 2019 ([ABS/36-37]). He said that he had counselling once six weeks earlier but had not found it helpful. When asked about suicide, he said that he had "thoughts of ending [his] life sometimes when [he is] down but [he] distract[s] [himself] and then they go away". He said he had thoughts sometimes but had not self-harmed. He said that he tried to strangle himself "about 2-3 years ago" but had been stopped. He denied any plans, preparation or intent. His friends and family are said to be protective factors. He also mentioned that he got frustrated "quite a bit" and got angry "if someone says something bad". He did not want to hit others but he "often" hit walls and hit his head on walls. It is said that he has "visible injuries on knuckles". Having again recounted the substance of his asylum claim, he said that he was "feeling low about everything" and wanted to be able to work and study which he could not do due to his status. He again described loss of appetite and sleeplessness. The diagnosis on this occasion was said to be "low mood and possible PTSD". Elaboration was provided as follows:

> "Did not complete detailed assessment as I feel patient suffers from PTSD, completed the trauma scale, will speak to supervisor about stepping this patient up as he gets nightmares and flashbacks about his time and experiences in Afghanistan and with trauma".

(c) A one-to-one assessment session was conducted on 28 January 2020 ([ABS/38-39]. Again, the Appellant reported low mood. The assessor commented that the Appellant "disclosed some symptoms of PTSD" but the Appellant is said not to want to talk about past traumas. Having reported similar symptoms to those previously described and again recounted the substance of his asylum claim, the following is said about risk:

> "... reported ideation sometimes, but denies any plans or intent at present. Scored 0/10 on intent scale this time, however, feels this

> sometimes goes up to 5-7/10 on a bad day. Reported he can keep himself safe now, and would let me know if things changed. History of attempted suicide once in Afghanistan when he reported to have taken an overdose, ended up in hospital and one more time in London when he considered jumping in front of a train, but someone helped him out of the situation."

The Appellant was offered six sessions and cognitive behavioural therapy (CBT) was explained to him.

(d) The documents at [ABS/40-42] then set out details of the sessions with the same therapist. The following extracts are relevant:

> 4 February 2020 (Session 2): said to have "frequent ideation, thoughts feel very strong and intense" with a score of 6/10 but denied plans or preparations and said could keep himself safe. He again reported punching walls but said he had not hurt himself recently. There was no change in mood. He scored "severe" when completing an "IES-R".
>
> 13 February 2020 (Session 3): scored 1/3 for thoughts/ideation of risk but continued to deny plans or intent. He recounted the same symptoms of mood and again recounted his asylum claim and other past family history. He was given "homework" to monitor his activities and mood.
>
> 1 March 2020 (Session 4): his ideation is said to be "occasional," but he denied plans or intent. Mood and sleeplessness was said to be the same. He did not complete the homework. The importance of this was explained to him.

The Appellant did not attend an intervening session on 18 February 2020.

(e) The records also show that the Appellant missed a number of appointments or could not be contacted to arrange appointments in the period June 2019 to February 2020.

(f) The medical records also show a series of contacts with mental health services from October 2020 to January 2021. He was triaged on 15 October 2020. He was assessed on 2 December 2020 ([ABS/29-32]. Having completed a questionnaire, the assessor considered that the Appellant was experiencing moderate depression and severe anxiety. When asked about previous therapy, the Appellant confirmed that he had undertaken therapy "4-6 weeks (3 years ago) from a college, not sure details, was asked details about my past – wasn't helpful". He said he had not had previous contact with other services including counselling. He said that he was not on medication as his GP told him "a year or two ago that the medication was not helping". When asked about suicide risk and self- harm the Appellant replied that "sometimes it comes to my mind that it is not worth living, 1-2 times a week, only lasts a few minutes". He again

denied plans or preparation. He said that he had twice in the previous week hit a wall with his fist (which he said was average and was linked to anger). He said that one year ago he went to a train station intending to throw himself off a bridge, but his friend had stopped him. He said he had tried to kill himself "once or twice before that" but he did not remember details beyond that it was in the UK. He said that his sister would prevent him killing himself. The Appellant also said that he got into a fight with a staff member when he was detained. The triage supervisor commented that the Appellant might benefit from an assessment in relation to PTSD but that "no immediate risk" had been reported. It appears that the Appellant was therefore assigned for assessment in relation to PTSD but there is no confirmation that any such assessment was carried out.

(4) The GP records at [ABS/17-25] are largely irrelevant. They show a document received in March 2020 from Psychological therapies, Goodmayes hospital (which may relate to the letter at [ABS/26-27]). A telephone consultation on 21 August 2020 reports depression but that the Appellant did not consider medication to assist. Although there was a history of self-harm, he had no suicidal thoughts. The Appellant wanted to see a psychiatrist and a referral was apparently sought. It may be that this is what led to the assessment in December 2020 (see above). It appears that the referral was taken forward in October 2020. The Appellant was given the "talking therapy" number. On 13 January 2021, the Appellant had a telephone consultation in which he described feeling low and sleeping poorly. He asked for medication for depression. The document at [ABS/16] confirms that he was prescribed 28 day's supply of Mirtazapine (30mg) on that day.

(5) At [AB/58-71] are medical records from the period when the Appellant was detained. On arrival, the Appellant stated that he suffered from depression, was low in mood, had thoughts of self-harm and was taking medication but could not remember the name of it. It was however clarified during screening that the Appellant had not received medication for mental health problems, nor had he received treatment from a psychiatrist. There is reference to self-harm and suicidal thoughts and that he appeared low in mood. An entry on 20 July 2019 ([AB/60]) indicates that the Appellant was placed on constant supervision as he said that, if he could, he would end his life. He also said that during an interview with the Home Office he had punched the wall. He made reference to having punched the wall a week ago. He also said that he had been on antidepressant medication but that "did not work". He referred to having attended talking therapy in the community. Those assertions are repeated in an entry on 21 July 2019 when the Appellant said that he had been taking antidepressants for "a few months" but when this was not effective, he had been referred to talking therapy. The Appellant did

not attend the next session with the mental health nurse. On 23 July 2019, he was seen again. It is recorded that he had no suicidal thoughts and no thoughts of deliberate self-harm. It appears however that later on the same day, the Appellant hit his head and hand on the wall as he became angry having received a letter from the Home Office ([AB/63]). A record later the same day records that he had no bruises on his forehead and he had hit his head "due to frustration". There then follow a number of entries concerning the Appellant's low mood. He was assessed by a mental health nurse on 25 July 2019 ([AB/64]). On this occasion he is said to have reported suicidal thoughts. The nurse referred him to the mental health team and indicated that she would ask the GP to consider a prescription for Mirtazepine. The Appellant told the nurse that "he wants to die from this life, as he feels he is crazy and what does he have for this life". The Appellant said that he felt like this also when not detained and had no protective factors. It appears that he was taken off observations following the cancellation of removal. The Appellant at this stage said that he did not wish to hurt himself. On 29 July 2019, the Appellant denied suicidal thoughts.

19. Beyond the description of the onset of his mental health problems to which I have referred at [16] above and the brief summary of symptoms and treatment referred to at [17] above, I have no further direct evidence from the Appellant about his symptoms and continuing problems. He has not produced a further witness statement for the hearing before me. I have his account as provided to the medical experts. I deal with their reports below.

20. I have additional witness evidence from the Appellant's sister and brother-in-law. However, neither mention any problems with the Appellant's mental health in their statements. The only reference to mental health problems is to those experienced by the Appellant's sister [FA]. Similarly, in her oral evidence, [FA] was asked only about her own health.

21. I turn then to the reports of the medical experts beginning with the report of Dr J Hajioff which appears at [AB/102-129]. His report is dated 18 September 2019 and follows an assessment on 16 September 2019. Dr Hajioff is a registered medical practitioner and a consultant psychiatrist who has worked as such for fifteen years. He has a great deal of experience working with asylum seekers. He also has experience assessing injuries and scarring.

22. Mr Spurling pointed out that the Respondent had not challenged the findings made by Judge Steer regarding Dr Hajioff's report. He invited me to accept what was said about Dr Hajioff's diagnosis and prognosis. He accepted that this appears in the part of the decision which I have set aside. In fact, all that is said by Judge Steer in that part of the decision in relation to the report (at [77]) is that "[t]he Appellant has been diagnosed with PTSD and at risk of suicide if removed to Afghanistan. The Appellant is currently being treated by weekly counselling sessions and is not taking medication". Those findings are made by way of asserted fact, presumably on the basis that Judge Steer accepted what Dr

Hajioff reported. However, in the section of the decision setting out the content of the report (at [53] to [60]) Judge Steer makes no finding about the content of the report, what weight he gave it or why, having rejected the Appellant's credibility in circumstances where the report was based on the Appellant's account, he accepted the findings of the report. It is also the case that Judge Steer did not apparently have the advantage of the medical records which I now have. Those show, for example, that, whilst the Appellant may have been receiving weekly counselling sessions for short periods between June 2019 and March 2020, he had not received such counselling on a regular basis throughout the period. Given the centrality of the mental health issue on this occasion, I do not consider it appropriate to simply adopt as accepted fact what is said at [77] of Judge Steer's decision. I therefore turn to consider the report for myself.

23. I begin by noting that Dr Hajioff has proceeded on the basis of what he was told by the Appellant about his history. Although Dr Hajioff had before him the decision of Judge Khawar, there is no indication that he had read or taken into account the adverse credibility findings in relation to the Appellant's asylum claim. I accept as Mr Spurling submitted, that the views of a medical expert are not necessarily undermined simply because they are based on the account of an appellant which is later found not to be credible. However, in most cases, there will not have been a prior determination of the credibility of an appellant's account. In this case, the Appellant had been found not to be credible by a Judge at the time that Dr Hajioff interviewed him and that finding was upheld on further appeal. There is no indication that Dr Hajioff had taken the earlier findings into account when assessing the Appellant's presentation.

24. I accept however that part of the purpose of Dr Hajioff's report was to deal with the consistency of the scarring that the Appellant said was the result of his ill-treatment by the Taliban with his account. Dr Hajioff says that the scarring attributed to that ill-treatment is typical of the injuries which would be suffered by the treatment which the Appellant describes. I do not however need to consider this part of the report as the findings about the relevance of the report to the Appellant's asylum claim are part of Judge Steer's decision which I have preserved. As Judge Steer points out at [55] to [60] of his decision, the account of physical beatings by the Taliban formed no part of the Appellant's claim prior to his assessment by Dr Hajioff. In spite of what is there said by Judge Steer about the content of the report, therefore, it made no difference to the Judge's adverse credibility findings.

25. The Appellant's account to Dr Hajioff about his symptoms as described at [25] to [33] of the report is largely consistent with the other medical records to which I have already referred. In short summary, the Appellant has problems with sleep, is inactive, has a loss of appetite and is sometimes forgetful. He was not receiving medication. There is no reference at this time to counselling. Asked about suicide, the Appellant admitted to feeling low "at times" and to punching walls. He also said that he had made cuts on his left forearm "about a year ago". Dr Hajioff judged the cuts he observed as "highly consistent" with self-

inflicted injuries whilst observing that "none indicate deep cuts". Dr Hajioff also observed that the Appellant bites his nails which he considered could indicate "anxiety and tension" where, as the Appellant says is the case here, he did not do this as a child.

26. Having evaluated the symptoms described against diagnostic criteria, Dr Hajioff concluded that the Appellant "does not fulfil sufficient criteria for a diagnosis of depression". The reasons why Dr Hajioff concludes that the Appellant "fulfils the criteria for the diagnosis of PTSD" are based largely on an acceptance of the Appellant's account of events in Afghanistan. There is no consideration whether the PTSD (assuming the Appellant would otherwise meet the criteria) might be caused by other factors, such as the Appellant's period of detention, his uncertain immigration status or a fear of return to Afghanistan based only on the general situation in that country.

27. Turning to the risk of suicide, Dr Hajioff again relies on the Appellant's account of his "frightening experiences" in Afghanistan and fear of return. Again, there is no recognition that, by the time of the assessment, the Appellant had been found not to be credible in his account. Dr Hajioff opines that given the Appellant's level of anxiety and self-harm, there was "a risk of suicide if he sees no way of avoiding being returned".

28. Dr Hajioff therefore diagnosed "chronic PTSD" and "injury consistent with his account". Judge Steer having concluded that, notwithstanding Dr Hajioff's assessment of the Appellant's scarring, his account still could not be believed and Dr Hajioff's failure to consider the impact of the earlier adverse credibility findings on the acceptance of the Appellant's account leads me to give less weight to Dr Hajioff's views.

29. I do however have regard to what Dr Hajioff says about the risk of suicide given his observations about the scarring to the Appellant's forearm, the Appellant's level of anxiety and history of self-harm. The Appellant's self-harming is something which appears consistently in the medical and other evidence.

30. Dr Hajioff advocates anti-depressant medication and counselling. There is no evidence that the Appellant was prescribed medication until quite recently, having rejected attempts to put him on medication at earlier stages. I have referred already to what the medical evidence shows about the intermittent counselling treatment which the Appellant has received.

31. As I have already indicated, the Appellant has submitted updating evidence in the form of a report, not from Dr Hajioff or any of those who have assessed him over time, but of Dr George Stein. Dr Stein, FRC Psych, is a recently retired Consultant General Psychiatrist. He is a Member of the Royal College of Psychiatrists. He has worked as a Consultant Psychiatrist for 25 years. He has specialised in general psychiatry, post-natal depression, bonding difficulties and post-traumatic stress disorder.

32. Dr Stein's report is dated 11 March 2021 and follows an online interview via WhatsApp on 26 February 2021, using an interpreter. The interview lasted just under two hours.

33. Again, I observe that Dr Stein had before him "recent court determinations". I assume these would have included at the very least that of Judge Khawar and Judge Steer, together with my decision upholding Judge Steer's findings in relation to the Appellant's asylum claim. Notwithstanding that, there is no recognition by Dr Stein that the Appellant's claim had been found not to be credible nor any consideration what impact that would have on his assessment. Indeed, having set out at length the now familiar account of what the Appellant said occurred in Afghanistan, Dr Stein goes so far as to say at page [6] of his report that, having "looked through the papers … [he] could not work out why [the Appellant] was turned down". I recognise that it does not appear from Dr Stein's report that he has any or any significant experience of working with asylum seekers or refugees but his failure to take into account when assessing the Appellant's mental state, judicial findings in relation to the credibility of the Appellant's account causes me to treat Dr Stein's report with caution.

34. Whilst I again accept Mr Spurling's submission that, just because a medical expert has accepted the credibility of an account may not, in general, undermine the medical assessment, there is a significant difference between the acceptance of that account when it has not been the subject of independent scrutiny and the position here where the Appellant's account had, when Dr Stein assessed the Appellant, been found not to be credible on two previous occasions by two different Judges. Dr Hajioff's report had been written with a view to supporting the Appellant's case notwithstanding the earlier adverse credibility findings. However, Dr Stein was asked to (or should have been asked to) report only on the impact on the Appellant's mental health of return to Afghanistan on the basis of the preserved finding that his asylum claim was not to be believed. That was the context in which the Appellant's case was to be considered by me.

35. Dr Stein records at [§22] of the report that the Appellant had been prescribed "perphenazine" for his depression. That does not appear in the other documents, but I am prepared to accept that the prescription may have been changed from that in January 2021. The Appellant told Dr Stein that the medication was "better than nothing" which is inconsistent with what he has previously told those who have assessed him (that it did not help). He also told Dr Stein that the counselling with Talking Therapies "helps for a few hours but that's all, and then the effect wears off". The Appellant also told Dr Stein that he had sometimes had suicidal thoughts "because [he had] been in limbo for so long and [he] think[s] it's better to kill [himself]". He said that he had once "walked to a railway bridge" but "one of his friends prevented him from jumping". He said that this was in 2019.

36. I do not need to go through Dr Stein's consideration of the Appellant's medical records. As Dr Stein observes, there is no record from those who have

counselled the Appellant dealing with the substance of their conversations with the Appellant. Nor do I need to deal with what Dr Stein says about Dr Hajioff's report since Dr Stein says only that his "findings are basically the same". He offers no reasoning in support of that opinion. There is no indication that he has assessed the Appellant's account of his symptoms against any diagnostic criteria. As such, what he says about the Appellant suffering from PTSD or being at risk of suicide does not add anything to the findings of Dr Hajioff. For that reason, when it comes to Dr Stein's diagnosis at [§37] of the report that the Appellant is suffering from "depression of moderate severity" and "post-traumatic stress disorder also of moderate severity", I can give that assessment little if any weight because it is simply not explained (and interestingly, the first part of that diagnosis at least appears at odds with what was said by Dr Hajioff). I can find no reasoning to support what is there said.

37. Turning then to the reasons which Dr Stein says are the cause of the Appellant's mental health problems, I give no weight to those. The facts which Dr Stein accepts as true based on the Appellant's account are all ones which have not been accepted by the Tribunal. Dr Stein goes so far as to say that the Appellant's account "seems to be consistent" and that the Appellant "gives the same story at every interview" whilst also opining that "the Taliban or warlords are unlikely to confirm that they murdered his brother or demanded ransoms". He concludes that "[a]nyway, [he] did not feel [the Appellant] was lying to [him]". As I have already noted, there is nothing in Dr Stein's report which suggests that he has experience of assessing asylum seekers or refugees let alone any knowledge of the situation in Afghanistan. An expression of that nature regarding the credibility of an asylum seeker's account is not a matter for a medical expert; it is a matter for a Judge, particularly where, as here, the Appellant's account has been found by previous Judges to be anything but consistent.

38. I can give only limited weight for the same reason to what Dr Stein says will occur if the Appellant is removed. He has assumed that the Appellant's mental health problems are to be attributed to events in Afghanistan which are not accepted as having occurred. Based on the medical notes themselves, I accept that the Appellant has punched walls and also hit his head when threatened with removal. As I observed in the course of Mr Spurling's submissions, Dr Stein's description of that threat having seemingly "sent [the Appellant] ballistic and he started punching the walls and stuff like that" is not a particularly professional way of expressing what occurred. It is also potentially an exaggeration as it does not appear from the detention medical records that the medical staff witnessed what had occurred. Moreover, even the Appellant says that he punches walls when he becomes frustrated. Dr Stein does not consider that as a possible cause of the Appellant's actions.

39. Turning to matters about which Dr Stein can perhaps usefully opine, he says that the Appellant is able to carry out "day-to-day duties". He also says that "he would be able to care for himself and access support and services, and

support himself through employment". He considers that, if he were allowed to remain in the UK, the Appellant would be likely to find himself working in "some unskilled job". He does not consider that the Appellant "is vulnerable to trafficking or abuse". I do not place much weight on Dr Stein's opinion in that latter regard given his apparent lack of experience dealing with victims of trafficking. The fact that the Appellant is "sturdy" and, in Dr Stein's view, unlikely to be "deceived in this way" appears to simplify the characteristics of potential trafficking victims.

40. Dealing finally with potential return to Afghanistan, as I have already said, I accept the contemporaneous medical evidence about the Appellant's reaction when he was last threatened with removal (although I think that Dr Stein's report at [§15] of the report once again overstates the position when compared with the records). I give no weight to what Dr Stein says about the position after return as it relies on an acceptance of the Appellant's account about past events. It is not for a medical expert to opine on what would be the risk from non-State actors. That is a matter for a Judge. In this case, Judge Steer had already found that the Appellant would not be at risk.

41. Dr Stein says that he does not consider that the Appellant "would play up on the plane" as "[the Appellant] seemed to be quite a calm chap". That is somewhat at odds with the description of the Appellant "going ballistic" (see above). It is also somewhat at odds with what Dr Stein says later in the report about the Appellant becoming angry if told to board a plane. In any event, the issue is not whether he would become disruptive but whether he might act on any suicidal thoughts.

42. I note what Dr Stein says about the risk of suicide increasing on return to Afghanistan but, given that this assessment once again relies on Dr Stein's acceptance of the situation which would face the Appellant on return, I can give that opinion little if any weight. In any event, Dr Stein provides no reasoning and admits that it is difficult accurately to predict the risk. Dr Stein's observations about the situation which the Appellant would face on return also include the lack of support in Afghanistan. That is something with which I deal below. Dr Stein was apparently unaware that the Appellant has other family members in Afghanistan (as I will come to).

43. For those reasons, I give Dr Stein's report very limited weight in my assessment.

44. Finally, although I was not taken to it, the Appellant's bundle contains at [AB/130-155] an expert report of Jawad Hassan Zadeh dated 1 October 2019. Mr Zadeh is a national of Afghanistan now naturalised as a British citizen. He has 25 years' work experience in Afghani affairs. He holds an LLM in International Law and International Relations obtained from the University of Kent. He has studied Afghanistan academically since 2011. He has provided expert reports in a number of cases.

45. Mr Zadeh has offered some information about the mental health services in Afghanistan generally and in Kabul at [46] to [53] of his report. The information is based on two fact finding reports which Mr Zadeh has personally commissioned via a lawyer based in Kabul who interviewed three individual doctors and via a legal translator who interviewed one psychologist. They were asked to provide information about mental health services in Kabul and Afghanistan more generally. It is not clear to me whether these reports were prepared for the purposes of the Appellant's appeal or more generally. In either event, it does not appear that the doctors or psychologist were given any information about the Appellant's medical condition or treatment needs. It appears from what is there said that facilities are limited, that there are no specialists dealing with PTSD and that there is a high cost to treatment. The psychologist said that medication was available for PTSD but not counselling.

The Situation in Afghanistan

46. I begin with the security situation in Afghanistan. The most recent country guidance is AS (Safety of Kabul) Afghanistan CG [2020] UKUT 00130 (IAC) ("AS (Afghanistan)") dealing with the situation in Kabul. The Tribunal concluded in AS (Afghanistan) that the security situation in Kabul has not reached the level where there is a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". In other words, removal to Kabul does not breach Article 15(c) of the Qualification Directive.

47. Mr Spurling accepted that no issue of internal relocation arises in this case as the Appellant has not been accepted to be at risk in his home area. Although Mr Spurling accepted that the issue of internal relocation is not directly relevant in this case, he submitted that I should still be guided by what is said in AS (Afghanistan) about the reasonableness of removal to Kabul to where the Appellant would be returned. The part of the guidance relevant to the Appellant's case is as follows:

> "**Risk of serious harm in Kabul**
>
> (ii) There is widespread and persistent conflict-related violence in Kabul. However, the proportion of the population affected by indiscriminate violence is small and not at a level where a returnee, even one with no family or other network and who has no experience living in Kabul, would face a serious and individual threat to their life or person by reason of indiscriminate violence.
>
> **Reasonableness of internal relocation to Kabul**
>
> (iii) 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 and even if he does not have a Tazkera.
>
> (iv) 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 the general position set out above. Given the limited options for employment, capability to undertake manual work may be relevant.
>
> (v) 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. A person without a network may be able to develop one following return. A person's familiarity with the cultural and societal norms of Afghanistan (which may be affected by the age at which he left the country and his length of absence) will be relevant to whether, and if so how quickly and successfully, he will be able to build a network."

48. Although I was not taken to Mr Zadeh's report, it contains some information of relevance to this part of the Appellant's case. I do not need to set out much of what is said in Mr Zadeh's report since it concerns the history of Afghanistan and the substance of the Appellant's asylum claim which has not been accepted as credible. The substance of Mr Zadeh's evidence is set out at [29] of Judge Steer's decision. Mr Zadeh does however go on to deal with relocation to Kabul and the impact of that for the Appellant.

49. I do not need to deal with what Mr Zadeh says about the security situation in Kabul as that is covered by the guidance in AS (Afghanistan) (see above). Mr Zadeh opines that "finding a safe place to reside in Kabul will be the biggest challenge". He says that, as a single man, the Appellant would find himself residing in a "mosaferkhana" which is equivalent to an inn. He would be unable to live in a house with a woman with whom he has no blood or kinship ties. Mr Zadeh says that, due to the stigma of living in a mosaferkhana, it is difficult to get employment. He says that inhabitants of such places may also receive unwarranted attention from the police. I do not understand the relevance of the footnote in Mr Zadeh's report in this regard since it refers to men being found in brothels rather than dealing with those living in a mosaferkhana. Mr Zadeh says that if the Appellant were to become destitute, he would become a target for the Taliban. Mr Zadeh also points to the high level of unemployment in Afghanistan generally.

50. Mr Zadeh was not one of the experts who gave evidence to the Tribunal in AS (Afghanistan). The Tribunal in AS (Afghanistan) based its findings about the situation in Kabul on the evidence of Dr Lisa Schuster. She has lived in Kabul for a lengthy period. Her evidence about the need for family and other networks is recorded at [127] to [130] of the decision. What she says about accommodation is at [131] to [134] and about employment at [135] to [138].

That evidence (which is largely consistent with what Mr Zadeh says) is taken into account in the findings and guidance of the Tribunal which I have set out above.

51. In this case, based on the findings of Judge Steer, the Appellant maintains contact with his parents and sister [S] who also lives with her family in Turkey ([70] of Judge Steer's decision). The finding there made is that the Appellant's family "were extremely wealthy". I accept that it is not clear whether the Appellant's parents are said to be in Afghanistan or Turkey. Since the Appellant claims that he is not in contact with them, he will not say where they are.

52. The Appellant's sister, [FA] in her oral evidence before me, accepted that she has returned to Afghanistan on several occasions. Although it was her evidence that she spoke to her mother last in 2016, she said that she has seen her sister [S] in Turkey. She also confirmed that her parents have met her three eldest children. They are aged 14, 13 and 10 years. [FA] said that she had been to Afghanistan twice since 2016. She attended a funeral there and went once more in 2019. She was unable to go in 2020 and had not yet been in 2021. She said that her father had also met her third child in 2016 when she travelled to the Appellant's home area with that child. The other two children were left in Kabul with their father. She had travelled to Ghazni with her brother-in-law.

53. [FA] confirmed that her husband's family lives in Kabul. It is also recorded at [49] of Judge Khawar's decision that the Appellant has "uncles and cousins who continue to reside in and around Kabul". The only reason given why they would not be able to assist is that "they have their own lives and their own children".

54. There is little if any evidence about the Appellant's educational background. He was a minor when he first arrived in the UK and presumably therefore benefitted from some education here. There is however no information about any qualifications which he obtained. Since attaining his majority, I accept that the Appellant has been unable to work due to his status. I accept that he is unlikely to have had any experience of working in Afghanistan due to his age. There is no evidence that he has previously lived in Kabul.

The Situation in the UK

55. The Appellant lives with his sister and her family in the UK. I accept based on the evidence that they are close. He has lived with them since 2016 – some five years. I also accept the written evidence of the Appellant and [FA] that the Appellant helps out with the children. Although there is no medical evidence to support [FA]'s evidence about her depression, I am prepared to accept that she finds it difficult to cope with five children. I accept the unchallenged evidence that her husband is sometimes absent from home as he needs to travel for his business. [FA]'s husband says that this happens "often" but does not say how often nor for how long he is absent. The Appellant says that [FA]'s

husband travels two to three times per month "and can stay outside of the UK even 7 days at a time."

56. As Ms Cunha was able to elicit via cross-examination of [FA], if the Appellant were permitted to stay in the UK, he is likely to wish to study or work here. As [FA] said however if that were the case she was "sure [they] will be able to arrange things". She said that her husband had managed to study and help out. It appears therefore that, except when her husband is away on business, he could continue to help out. Moreover, when Ms Cunha asked how [FA] would manage if the Appellant decided to leave and set up his own home, [FA] said only that "God will help us". I have regard to the fact that [FA]'s children are aged between one and fourteen years. She had four children prior to the Appellant's arrival in the UK (other than the baby, the next youngest is aged eight). [FA] confirmed that they had not ever been supported by the authorities other than by way of child benefit. Moreover, four of the children are now in school and the eldest is now aged fourteen and could presumably offer some assistance with the younger children if needs be.

57. I accept however that the Appellant has formed a close bond not only with his sister and husband but also the children. In particular, the Appellant describes in his statement how he plays with the children. [FA] says that he helps with their homework as well as taking them to Saturday tuition and after-school classes. She says that when she is not well or busy, the Appellant takes the children to school. The Appellant describes the children's individual personalities. The Appellant says that he "believe[s] that their mental well-being would be affected" if he were removed as would be "their daily schedule". With the exception of that evidence as confirmed by [FA] however I have no independent evidence about the impact which the Appellant's removal would have on the children.

FINDINGS AND DISCUSSION

Issue One: Article 3 ECHR

The Appellant's Mental Health

58. I begin with the Appellant's case based on Article 3 ECHR founded on his mental health condition. In light of the Supreme Court's judgment in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 ("AM (Zimbabwe)") the legal test which applies can now be stated with some certainty. At [31] of the judgment and at [32] of the judgment the Supreme Court explains the burden and standard of proof which applies. Those paragraphs read as follows:

> "31. It remains, however, to consider what the Grand Chamber *did* mean by its reference to a 'significant' reduction in life expectancy in para 183 of its judgment in the *Paposhvili* case. Like the skin of a chameleon, the adjective takes a different colour so as to suit a different context. Here the general context is inhuman treatment; and the particular context is that the

alternative to 'a significant reduction in life expectancy' is 'a serious, rapid and irreversible decline in … health resulting in intense suffering'. From these contexts the adjective takes its colour. The word 'significant' often means something less than the word 'substantial'. In context, however, it must in my view mean substantial. Indeed, were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which article 3 requires. Surely the Court of Appeal was correct to suggest, albeit in words too extreme, that a reduction in life expectancy to death in the near future is more likely to be significant than any other reduction. But even a reduction to death in the near future might be significant for one person but not for another. Take a person aged 74, with an expectancy of life normal for that age. Were that person's expectancy be reduced to, say, two years, the reduction might well - in this context - not be significant. But compare that person with one aged 24 with an expectancy of life normal for that age. Were his or her expectancy to be reduced to two years, the reduction might well be significant.

32. The Grand Chamber's pronouncements in the *Paposhvili* case about the procedural requirements of article 3, summarised in para 23 above, can on no view be regarded as mere clarification of what the court had previously said; and we may expect that, when it gives judgment in the *Savran* case, the Grand Chamber will shed light on the extent of the requirements. Yet observations on them may even now be made with reasonable confidence. The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But 'Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …': *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold, set out in para 23(a) above, is for the applicant to adduce evidence 'capable of demonstrating that there are substantial grounds for believing' that article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish 'substantial grounds' to have to proceed to consider whether nevertheless it is 'capable of demonstrating' them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate 'substantial' grounds for believing that it is a 'very exceptional' case because of a 'real' risk of subjection to 'inhuman' treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a 'prima facie case' of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in *AXB v Secretary of State for the Home Department* [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by

> the Secretary of State and, in the event of an appeal, again by the First-tier Tribunal."

59. I have already explained why I do not give weight to Dr Stein's report. I give some weight to Dr Hajioff's report. Dr Hajioff does not diagnose depression. He does diagnose PTSD although, as I have pointed out, since this is based on an acceptance of the Appellant's account, I can give it less weight at least as to the cause. Ms Cunha did not however suggest that I should not accept that the Appellant suffers from depression and PTSD. The diagnosis of depression is supported by some of the other medical evidence to which I have referred (although the severity of it is not clear). Ms Cunha said however that I should find that the Appellant's PTSD was due to other factors, plausibly the uncertainty of the Appellant's immigration status, his immigration detention or a general fear of return to Afghanistan.

60. It is difficult to be precise about the cause of the Appellant's PTSD not simply because both Dr Hajioff and Dr Stein (adopting Dr Hajioff's findings) have assumed it to be caused by events in Afghanistan which have been found not to be credible. It is however worthy of note that the Appellant's medical records suggest that the onset of his mental health problems coincided with his immigration detention and threat of removal. As I have pointed out at [15] above, there was no indication that the Appellant was suffering any problems with his mental health following arrival and during his asylum interview or previous appeal. The Appellant himself attributes his mental health problems to his fear of return (see [8] of his statement as cited at [16] above). I accept that Mr White says that the Appellant's mental health had been "apparent from early on in [his] work with [the Appellant]". However, that appears to be based on the Appellant's threat of suicide which I come to below and self-harm with which I also deal separately. Mr White is not a medical expert and nor does he purport to have any relevant qualifications. I find it more likely therefore that the PTSD was caused by the threat of removal, possibly exacerbated by the detention leading to that potential removal.

61. The difficulty for the Appellant in relation to his Article 3 case, is the absence of evidence about the situation which would face him in Afghanistan in relation to his mental health and specifically the impact of that removal on a worsening of his condition to such an extent that he would suffer treatment reaching the threshold of Article 3 ECHR. He would need to show to "a significant reduction in life expectancy" or "a serious, rapid and irreversible decline in … health resulting in intense suffering".

62. I leave aside for these purposes a consideration of the suicide risk. In relation to his mental health, there is limited evidence that the Appellant's depression or PTSD is impacted by the treatment he is receiving in the UK. There is no record of medical intervention until 2019. The Appellant has declined medication on a number of occasions on the basis that it does not help him. He has received counselling treatment intermittently. He told Dr Stein that this helped him only for a very short time after the session and did not really assist. There is no

evidence about the impact of withdrawal of such treatment as the Appellant has received. In short, therefore, there is little evidence that the Appellant's mental health problems are managed via medication and counselling.

63. I accept of course that the care available for mental health in Afghanistan is not on a par with that in the UK. In addition to the evidence in the report of Mr Zadeh, the Tribunal at [145] of the decision in AS (Afghanistan) accepted the evidence that there is an "extremely low availability of psychosocial support services" and that "recovery opportunities are likely to be minimal". However, there is no evidence showing that the effect of not being given counselling or not receiving medication after removal would have the sorts of impacts envisaged by the threshold set out in AM (Zimbabwe). There is insufficient evidence to show that his condition would deteriorate to such an extent that it would meet the Article 3 threshold.

64. I accept as was said by the Court of Appeal in GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40 that the impact of removal on health can be taken into account in an Article 8 assessment. However, as Laws LJ observed at [85] of the judgment "Article 8 cannot prosper without some separate or additional factual element which brings the case within the Article 8 paradigm – the capacity to form and enjoy relationships – or a state of affairs having some affinity with the paradigm." The Appellant's mental health can be considered as part of his private life. I consider that within the Article 8 assessment below.

Risk of Suicide

65. I turn then to the risk of suicide. This too is relevant to the Article 3 assessment. I begin with the legal test as set out in J v Secretary of State for the Home Department [2005] EWCA Civ 629 ("J"). The familiar legal test in relation to an Article 3 claim in this regard is set out at [26] to [31] of the judgment. There is no dispute about the test and observations there set out, and I therefore summarise it as follows:

    (1) The severity of the treatment which the applicant would suffer if removed must attain the minimum level of severity.

    (2) A causal link must be shown between the threat of removal and the Article 3 treatment relied upon.

    (3) The Article 3 threshold is "particularly high" in a foreign case.

    (4) An Article 3 claim can "in principle" succeed where there is a risk of suicide.

    (5) A "question of importance" is whether the applicant's fear of ill-treatment is well-founded. If not, "that will tend to weigh against there being a real risk that the removal will be in breach of article 3".

    (6) "[A] further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of

suicide". If there are such mechanisms that will weigh against an applicant.

66. I turn next to the Court of Appeal's judgment in Y and X v Secretary of State for the Home Department [2009] EWCA Civ 362 ("Y and X"). In those cases, the Court was considering the fifth part of the legal test in I as set out above. Of particular relevance to the instant case was the question whether, if an appellant did not have a well-founded fear of persecution, nonetheless the fact of the general situation in a country and a "real and overwhelming fear" of the position on return could for that reason lead to an Article 3 real risk. In that case, the appellants faced return to Sri Lanka. As here, the appellants had failed in their individual asylum claims. At [16] of the judgment, the Court added to the fifth part of the test in I "that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without any objective foundation, is such as to create a risk of suicide if there is an enforced return."

67. For the sake of completeness on that latter issue, I refer to the guidance given in the Tribunal's decision in AXB (Article 3 health: obligations; suicide) Jamaica [2019] UKUT 397 (IAC) (as expanded upon at [96] to [104] of the decision):

> "(4) Where an individual asserts that he would be at real risk of committing suicide, following return to the Receiving State, the threshold for establishing Article 3 harm is the high threshold described in N v United Kingdom [2008] ECHR 453, unless the risk involves hostile actions of the Receiving State towards the individual: RA (Sri Lanka) v Secretary of State for the Home Department [2008] EWCA Civ 1210; Y and Z v Secretary of State for the Home Department [2009] EWCA Civ 362."

That guidance now has to be read in light of AM (Zimbabwe) and the test for what has to be demonstrated by the evidence. Nonetheless, the point remains that the same high threshold applies (necessarily as it involves a breach of Article 3 ECHR).

68. I turn then to the evidence. I begin by drawing a distinction between the evidence about self-harm and risk of suicide. Whilst accepting that the first may be indicative of the second, I do not understand the medical evidence to suggest that this is necessarily so or that the link is to be assumed in this case. As shown by the medical evidence recorded at [18] above, the Appellant has told those who have assessed him that he punches walls when he gets angry or frustrated. The Appellant also said that he was involved with a fight with a member of staff when detained. The episode in detention when he apparently hit his head on a wall is said, according to the records, to have been triggered by the Appellant receiving a letter from the Home Office, presumably rejecting his further submissions.

69. I accept however that the self-harm which is undoubtedly a feature of the Appellant's case has on occasions been linked with threats to commit suicide. Mr White records that he met with the Appellant by chance at the Home Office

in August 2018 when the Appellant was in an argument with the security staff. That was clearly an incident when the Appellant had become angry or frustrated but Mr White records that the police had been called because the Appellant had threatened to kill himself. Shortly after the episode in detention, the Appellant said that he had suicidal thoughts.

70. I accept that previous attempts at suicide are not a necessary feature of a risk of suicide in the future. Nonetheless, they may be indicative of the extent to which an individual might put thoughts into action.

71. In this case, the Appellant's evidence as to past incidents is inconsistent. The high point of the Appellant's case in this regard is his account to Dr Hajioff that he self-harmed by cutting his left forearm in the previous year. That would mean that he had done so sometime in 2018. Dr Hajioff says that the scarring he observed on the Appellant's forearm is "highly consistent" with that causation. There is however no record of any such injury at the time of the Appellant's detention nor has the Appellant mentioned it to any of those who have assessed him in the period from mid-2019 onwards. It is notable that when the Appellant was introduced to F2F in June 2019, he did not mention this. He expressly denied any previous attempts to harm himself or take his own life. Notwithstanding Dr Hajioff's view that the scarring was highly consistent with the cause described by the Appellant, therefore, I am unable to give weight to his opinion as the Appellant's account is inconsistent with other evidence.

72. Similarly, the Appellant has also been inconsistent in his reporting of other events. When assessed on 19 September 2019, he said that he had tried to strangle himself "about 2-3 years ago" (ie in 2017) but had been stopped. Again, that is prior to the F2F assessment in June 2019 when the Appellant denied any previous attempts to harm or kill himself. He made no mention of any such incident to either Dr Hajioff or Dr Stein. There was no mention of any such attempt nor indeed of any mental health problems at the time of the appeal in 2017. That appeal was not concluded until 2018.

73. There is no mention of this attempt in other assessments. He has on more than one occasion said that he had once intended to throw himself off a railway bridge. He told Dr Stein that this was in 2019. That is broadly consistent with what he told assessors in December 2020. It is also broadly consistent with an account given to assessors in January 2020 (although he says in that assessment that "someone" prevented him carrying out his intention whereas in December 2020 and to Dr Stein he said that it was a friend who had stopped him). He did not however mention this to Dr Hajioff. Even if it may have post-dated Dr Hajioff's assessment in September 2019, there is no mention of this incident to those who assessed the Appellant between January and December 2020.

74. Finally, in January 2020, the Appellant told assessors that he had taken an overdose whilst still in Afghanistan. That is the only mention of this incident which the Appellant did not report to either Dr Hajioff or Dr Stein.

75. I am bound to note also that none of these incidents are mentioned by either the Appellant or [FA] in their statements. Even if [FA] was not in Afghanistan when the Appellant says he took an overdose I find it highly unlikely that the Appellant or another family member would not have mentioned it to her. She remains in contact with her sister in Turkey even if she says that she has no contact with her parents. I also do not believe that, if the Appellant had attempted suicide in the UK in various ways as he has told the doctors and assessors, that his sister would be unaware of it, given that the Appellant has lived with her throughout or that she would fail to mention it in her evidence. There is no explanation for the failure of the Appellant to deal with this issue in his own evidence.

76. There have been varying assessments of the risk of suicide made by the doctors and assessors in this case. Again, I begin with Dr Hajioff's report. I accept that Dr Hajioff was of the view that there was a risk of suicide if the Appellant were returned to Afghanistan or threatened with removal. However, as I have already found, I cannot accept Dr Hajioff's opinion about the previous suicide attempt for the reasons I have given. His acceptance of the cause of the Appellant's injury underpins his opinion about the risk of suicide. Further, Dr Hajioff's assessment is also based on the Appellant's account of past events which have been found not to be credible. The situation which would face the Appellant on return has been found not to be that which Dr Hajioff envisages based on the Appellant's reporting. Similarly, although I can, for reasons I have explained, give little if any weight to Dr Stein's report, his assessment of the increased risk of suicide is also undermined by his acceptance of what would be the position on return.

77. There have been various assessments of the Appellant's intent to commit suicide ranging from "0/10" in January 2020, through "6/10" in February 2020 and "1/3" later in February 2020. Those are of course based on what the Appellant himself says about his mood and intention at specific times. I accept that he has expressed an intention to kill himself on occasion but has generally denied any plans or preparation. I have not accepted that he has gone so far as to attempt suicide in the past.

78. Even when confronted with the threat of removal in July 2019, the Appellant did not continually assert that he had suicidal thoughts. He told a nurse on 25 July 2019 that he wanted to die, but, by 29 July 2019, he was again denying suicidal thoughts.

79. The Appellant's fear of return is one which has not been accepted as being well-founded. Nonetheless, the Appellant did say in his witness statements and to me at the end of the hearing that he was afraid of returning to Afghanistan because Kabul was not safe. As the Tribunal has found in AS (Afghanistan), the security situation in Kabul has not reached the level where there is a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". In other

words, removal to Afghanistan does not breach Article 15(c) of the Qualification Directive.

80. I accept that, after five years in the UK, the Appellant will fear the general insecurity in Afghanistan. However, although he was still a child when he left Afghanistan and, prior to leaving, had the support of his family, he has experience of having to deal with the general level of violence in Afghanistan. I do not underestimate the difficulties which that general level of violence causes for the Appellant and others like him. As I will come to, however, he also has family members around Kabul. His sister's in-laws also live in that city. I do not accept that he will be without support.

81. I have regard to what is said in Y and X in relation to the need to show a "real and overwhelming fear" rather than one which is necessarily objectively well-founded. However, on the evidence in this case, I am unable to find that the Appellant has such a fear or that he has shown that he has such a genuine fear that there is a real risk of suicide before, during or after return to Afghanistan. I also observe that Y and X is a very different case. In those cases, it was accepted that the appellants had suffered severe ill-treatment in the past at the hands of the Sri Lankan authorities which had a potential impact on their fear of return ([8] of the judgment). That is not this case.

82. For those reasons, I am not satisfied that removal of the Appellant to Afghanistan would breach Article 3 ECHR.

Issue Two: Article 8 ECHR

The Situation in Afghanistan: security and obstacles to integration

83. As I have already noted above, the most recent country guidance in relation to Afghanistan is that there is no generalised level of violence (at least in Kabul), which reaches the threshold of permitting the Appellant to succeed on that account alone.

84. There is a preserved finding that the Appellant remains in contact with his parents. It is not clear to me whether they are in Afghanistan or Turkey with his sister. Since the Appellant and [FA] deny that contact, they obviously will not say where their parents are. If they are still in Afghanistan and in his home area, the Appellant would doubtless prefer to return there.

85. I have however assumed it to be more likely that the Appellant's parents are no longer in Afghanistan and that he would relocate to Kabul. It is to that city that he would be returned. The family of [FA]'s husband lives in Kabul. Whilst I note what Mr Zadeh says about a single man being unable to live in a household with a woman to whom he is not related by blood or kinship ties, there is no evidence that the Appellant could not be assisted by that family. Nor is there evidence that he would not otherwise be assisted by those family members in other ways, financially or by assisting him to find employment. The Appellant also has uncles and cousins living in or around Kabul. There is

no evidence that they would be unable to help the Appellant either by providing accommodation or other financial support or help with finding a job.

86. I appreciate that the Appellant does not have work experience from either Afghanistan or the UK. He arrived in the UK aged sixteen and will therefore presumably have received some education here. I have no evidence about his qualifications. I also heard briefly from the Appellant at the end of the hearing when he expressed concern that if he were returned to Afghanistan, he would be unable to continue his studies which he was keen to do if permitted to remain. I accept that it is unlikely that he will have access to education if he returns to Afghanistan. He will need to work to maintain himself. Due to his lack of experience, he may find it difficult to obtain employment. It is likely that he would have to resort to unskilled labour.

87. I have already dealt with the impact on the Appellant's mental health as part of the assessment under Article 3 ECHR. I accept based on what is said in AS (Afghanistan) and Mr Zadeh's report that the Appellant would not have access to the counselling and medication which he has here. However, as I have pointed out, the treatment he has received in the UK in that regard has been intermittent. I do accept however, on account of his mental health problems, that the Appellant cannot be said to be "in good health".

88. I have taken into account what is said in AS (Afghanistan) about the "particular circumstances of an individual" which need to be taken into account. Although there is no evidence that the Appellant suffers physical ill-health to such an extent that he would not be able to undertake manual labour, I accept that his mental health condition might have some impact on his ability to work. The evidence is that he is inactive and lethargic due to his mental health. That is not helped, however, by his inability to work in the UK due to his immigration status. I note in this regard Dr Stein's opinion that if the Appellant were granted leave to remain in the UK, he would likely to be able to work in some unskilled employment. It is not said that the Appellant's mental health would prevent him from working if employment could be found.

89. Taking all the evidence and the above findings in the round, although I accept that the Appellant suffers mental health problems which, at present, have an impact on his motivation to work, I do not accept that those would prevent him finding work in unskilled employment were such work to be available. In any event, as I have found, the Appellant has family members in and around Kabul who could support and assist him in the short term while he finds his feet.

90. I do not accept that the situation which faces the Appellant on return to Afghanistan amounts to very significant obstacles to integration for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules ("Paragraph 276ADE(1)(vi)"). The test in that regard was explained by the Court of Appeal in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 as follows:

> "14. In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

91. The Appellant was born and grew up in Afghanistan. He did not leave until he was in his teens. He continues to speak the language. He continues to have family ties there. I have found that he will be able to find support from those family members. Although the Appellant has not worked in that country and may find it difficult to obtain employment, he is not physically incapacitated. Given the high threshold which applies, I do not find that Paragraph 276ADE(1)(vi) is met.

92. My findings in this regard are also however relevant to the Article 8 assessment outside the Immigration Rules ("the Rules") which I conduct below, having regard to the impact of removal also on the Appellant's family and private life in the UK.

Article 8 assessment

93. For the foregoing reasons, the Appellant cannot meet the Rules based on his private life. I have rejected his case that there are "very significant obstacles" to his integration in Afghanistan. He cannot therefore meet Paragraph 276ADE(1)(vi). Nor can he meet the remainder of Paragraph 276ADE based on his length of residence in the UK. It is also accepted that the Appellant cannot meet the Rules based on his family life. He has no partner or child in the UK.

94. Since the Appellant cannot meet the Rules based on his family and private life, I turn to conduct an assessment outside the Rules. In so doing, I am required to balance the interference with the Appellant's family and private life caused by removal against the public interest justification for his removal (see Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60). The issue is whether the Appellant's removal is necessary and proportionate. It is for the Appellant to make out his case in relation to the strength of his private and family life with which removal will interfere and for the Respondent to justify the proportionality of the interference caused by removal.

95. Given the close emotional bond which the Appellant has with [FA] and her family, I accept that the Appellant has formed a family life with them. That

finding is not undermined by what is reported by Mr White regarding the Appellant's wish to move out from his sister's home (in 2018). I accept that the Appellant is of an age where he is likely to want to move away from his family and form an independent life. I accept that he may do so whether he is removed or permitted to remain in the UK. I have to assess the position however as at the date of hearing. I am satisfied on the evidence I received that there is presently a close interdependency between the Appellant and his sister's family which engages Article 8(1) as part of the Appellant's family life.

96. I have no independent evidence about the impact which the Appellant's removal would have on his nieces and nephews. Several of them are at an age where they are likely to be aware of his absence and the effect of that absence on their everyday life. However, they have their mother and father in the UK. They will remain living with them and socialising with their friends if the Appellant is removed. It may also be the case as I have pointed out that the Appellant would move away if permitted to remain. Whilst the children may well be distressed by the Appellant's departure, the children's best interests are unlikely to be seriously adversely affected in the longer term by his absence. Those best interests, whilst a primary consideration, do not weigh heavily in the balance.

97. I also take into account the impact of removal of the Appellant on [FA]. She places some reliance on the Appellant to help around the house and with the children. However, as Ms Cunha pointed out (and as I have accepted above), even if the Appellant were to remain in the UK, it is likely that he will wish to form his own independent life here. As I have already pointed out, it was reported by Mr White that the Appellant was seeking to leave his sister's home in order to live independently in 2018. Whether the Appellant is removed or remains and decides to move out, [FA] will no doubt miss the support of her brother. However, she has her husband to support her and her own family to care for. I do not place much weight on this aspect of the Appellant's case.

98. There will, I find, be a greater impact on the Appellant himself. He has lived with his sister since arriving in the UK aged sixteen. He has spent the period of transition from childhood to adulthood in a strange country supported by his sister. Although I have pointed to the lack of evidence from either the Appellant or his sister about the detail of the Appellant's mental health problems, I have accepted that he has problems. He is therefore likely to be more dependent on his sister for that reason. On the other hand, as I have pointed out, the Appellant told Mr White that he wanted to move out of his sister's home. He also told me that he wanted a future in the UK. He wants to get an education and to improve himself. That suggests that he is still looking for a life independently of his sister. I give some weight to the impact on the Appellant's family life of removal but that is not a significant factor for the reasons I have given.

99. There is limited evidence about the Appellant's private life in the UK. I take into account that he came to the UK whilst still a child. Although there is

limited evidence as to his integration here, I accept that the period from teenager into adulthood is an important one. The Appellant is finding his feet and gaining some independence (although limited in this case by his circumstances). He is likely to have become accustomed to life here. I accept his evidence that he will find it very difficult to leave the UK, if nothing else based on the relative security of this country compared to Afghanistan. I place some weight on this factor.

100. I have already made findings about the impact of removal on the Appellant's private life based on the situation which he will face in Afghanistan. Although I have not accepted that the obstacles he will face can properly be described as very significant, it is undoubtedly the case that the Appellant will find it very difficult to adjust back to life in Afghanistan even with family support. That is not simply because of the period he has lived outside the UK but also because of his age and mental health condition. He left Afghanistan when he was a child. At that time, he had the support of his parents. I have found that he will have some support from extended family members in Kabul and from his brother-in-law's family. However, he will still essentially be alone as a young man having no familiarity with Kabul, with how to find work and accommodation there and faced with a difficult security situation. It may be that the Appellant's mental health will improve in the longer term if it is indeed the uncertainty of his immigration status which is causing or exacerbating his symptoms. However, that is unpredictable. On the evidence, the Appellant's mental health problems are likely to impact on his ability to form new relationships on return. I accept also that he will not have counselling or medication to the extent that he may want or need it. His expressed fear of returning to Afghanistan given the general security situation there appeared to me to be genuine. The interference with the Appellant's private life caused by removal is for those reasons a factor on which I place significant weight.

101. Against those factors, I have to weigh the public interest. I have regard to Section 117B Nationality, Immigration and Asylum Act 2002. I accept that the maintenance of effective immigration control is in the public interest. I accept that an effective immigration control system generally requires the removal of those who are unable to meet the Rules in order to achieve fairness for those who seek to enter and remain lawfully and in order to deter those who would otherwise enter or remain in breach of those Rules. I accept that the Appellant falls into the category of those who should generally be removed in the interests of preserving effective immigration control. I do not suggest that he has remained unlawfully. He had discretionary leave when he came to the UK as a child and has been seeking to regularise his stay since via his asylum claim(s). However, his individual asylum claim has been found not to be credible and he has no other claim which can succeed within the Rules.

102. The Appellant spoke to me in English briefly at the end of the hearing and he therefore speaks some English. He is not in receipt of public funds. As I understand it, he is supported by his sister and her husband. He is not

financially independent. In any event, those are neutral factors in the public interest balance. They do not weigh in the Appellant's favour.

103. The Appellant had discretionary leave for a year when he arrived in the UK. His immigration position has however always been precarious. For that reason, I am directed to give his private life little weight.

104. I recognise that the Appellant could not expect that he would be permitted to stay if his asylum claim failed. I take into account the precariousness of his situation. However, the weight which I give to the Appellant's private life depends on the factors in his case and the strength of the private life and interference with that private life as demonstrated by the evidence in his case.

105. Although I accept that I have limited evidence of the strength of the Appellant's private life in the UK, I have explained why I give substantial weight to the interference with that private life caused by removal to Afghanistan based on the cumulative effect of all the factors to which I have made reference. Although I have not given a great deal of weight to the interference with the Appellant's family life, that is a factor which weighs additionally in the balance.

106. Having balanced the interference with the Appellant's private and family life against the public interest, I have reached the conclusion that removal would be disproportionate. I therefore allow the appeal on human rights (Article 8 ECHR) grounds.

CONCLUSION

107. The Respondent's decision to remove the Appellant to Afghanistan amounts to a disproportionate interference with his private and family life. It is therefore a breach of the Appellant's rights under section 6 Human Rights Act 1998.

DECISION

The Appellant's appeal is allowed on Article 8 ECHR grounds.

Signed: *L K Smith*
Upper Tribunal Judge Smith

Dated: 25 May 2021

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01156/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Monday 7 December 2020	15 December 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

H E

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr R Spurling, Counsel instructed by Wimbledon solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves a protection claim, I consider 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. This is an appeal by the Secretary of State. I refer to the parties hereafter as they were before the First-tier Tribunal for ease of reference. The Respondent appeals against the decision of First-tier Tribunal Judge S J Steer promulgated on 2 April 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 15 January 2020 refusing his protection and human rights claims.

2. The Appellant is a national of Afghanistan born in December 1999. He arrived in the UK on 24 May 2016 whilst still a minor. Although his asylum claim was refused at that time, he was granted discretionary leave until 15 June 2017 on account of his age. The Appellant's appeal against the refusal of his asylum claim was dismissed in February 2017 and onward appeals were also rejected. He became appeal rights exhausted on 8 May 2018. He made further submissions on 23 July 2019 leading to the decision under appeal.

3. The Appellant claimed asylum on the basis that his family was targeted by the Taliban following a lottery win by a family member who lives in the UK. The Appellant claimed that his older brother and then his younger brother were kidnapped. He said that his older brother was released on payment of a ransom, but no ransom was paid for his younger brother who was killed. The Appellant's claim to be at risk based on those facts was rejected as not credible.

4. In spite of further documentary evidence being produced with the submissions made after the appeal, the Respondent concluded that the claim of an individualised risk still lacked credibility. The Judge similarly found the claim not to be credible ([71] of the Decision). She also there found as fact that the Appellant "does know the whereabouts of his parents, his older brother and his sister and her family and can contact them". There has been no challenge by way of a cross-appeal or Rule 24 Reply to those findings. Mr Spurling accepted that those findings should stand.

5. However, the Judge went on to consider background evidence concerning the situation in Kabul in the context of return of the Appellant who has been diagnosed as suffering from PTSD and to be a suicide risk. She reached the conclusion at [77] of the Decision that "the Appellant is a refugee".

6. By reference to [77] of the Decision, the Respondent challenges the adequacy of the Judge's reasons, particularly given the earlier finding that the individual asylum claim was not credible.

7. Permission to appeal was granted by First-tier Tribunal Judge L Murray on 12 May 2020 in the following terms so far as relevant:

> "... 3. It is arguable that the Judge has not given adequate reasons in relation to the finding that the Appellant could not internally relocate in light of the adverse credibility findings and the findings in relation to the presence of his family in Afghanistan".

8. By a Note and Directions dated 10 August 2020, Upper Tribunal Judge Norton-Taylor reached the provisional view that the error of law hearing should be conducted remotely via Skype for Business. Neither party objected to that course. There were no technical problems encountered during the hearing.

9. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

10. Ms Everett indicated at the outset that the parties were agreed that there was an error of law in the Judge's conclusion that the Appellant is a refugee. There remained however a dispute as to the materiality of that error. Mr Spurling argued that it was simply a technical error which I could correct without more. Ms Everett submitted that at least that part of the Decision on which the conclusion was based could not stand and that the basis on which the appeal was allowed needed to be reconsidered.

11. I begin by setting out the content of [77] of the Decision as that is the reasoning lying behind the conclusion on which the allowing of the appeal is based:

> "Ms Bell stated that the Appellant would be removed to Kabul. Given the UNHCR 30 August 2018 Guidelines, I find that internal relocation to Kabul is generally likely to be unreasonable or unduly harsh. The Appellant has been diagnosed with PTSD and at risk of suicide if removed to Afghanistan. The Appellant is currently being treated by weekly counselling sessions and is not taking medication. The Respondent referenced the MedCOI response, dated 10 December 2018 which noted that outpatient and inpatient treatment for mental health conditions was available, but accepted that such treatment may be difficult to access. Jawad Zadeh, country expert, detailed two fact-finding reports from July 2019 (AB 152-153) in which mental health care specialists advised that PTSD could not be treated in Afghanistan. It was not a recognized condition, there was medication available, but there were no counselling services, making treatment incomplete. For this reason, only, I find that the Appellant is a refugee."

12. Mr Spurling accepted that, whatever the Judge's intentions, the conclusion that the Appellant is a refugee cannot stand. He accepted that internal relocation is not relevant where the Appellant has not been found to be at risk in his home area.

13. Mr Spurling submitted however that the basis of the Judge's conclusion at [77] of the Decision was in reality the Appellant's human rights claim based on his medical condition. He argued therefore that all I needed to do was to find an error in relation to the conclusion and by reference to the finding on internal relocation/refugee law and substitute a conclusion that the Appellant should succeed on human rights grounds based on the findings as to his mental health. The fallacy of that argument however is shown by the fact that Mr Spurling

could not identify whether the Judge intended to allow the appeal under Article 3 ECHR or Article 8 ECHR and nor could he show me where in the Decision the Judge has directed herself on the legal principles relevant to a conclusion on that basis.

14. The only references to the applicable legal principles in a "health case" appear at [15] and [16] of the Decision where the Judge recites the Respondent's consideration of this issue and at [45] of the Decision where the Judge sets out the Appellant's submissions. In fact, the law has moved on since the Respondent's consideration of the issue but I accept that, if I could identify the basis of the Judge's conclusion as being the Appellant's human rights based on his health, that would not of itself amount to an error as the threshold is now somewhat lower. The Judge does refer at [45] of the Decision to the submission that the Appellant would be "at real risk of treatment contrary to Article 3, ECHR due to the risk of suicide and the lack of, or access to, treatment, including counselling, for his PTSD in Afghanistan". However, the only reference to the legal threshold or principles in human rights cases in the section headed "Applicable Law" at [47] to [50] of the Decision is extremely general and does not focus on the health aspect.

15. I accept of course that there is some potential read across from an outcome that internal relocation is "unduly harsh" in refugee law terms to the real risk of ill-treatment contrary to Article 3 ECHR. However, taken in the context of what precedes [77] of the Decision, I am quite unable to read that paragraph as any intention by the Judge to allow the appeal purely on the basis of the Appellant's mental health condition.

16. As I have already noted, the Decision, in the "Findings and Reasons" section up to and including [71] is concerned with the individual asylum claim which is found not to be credible. Thereafter, the Judge turned to consider the position on internal relocation to Kabul. As I have noted above, Mr Spurling accepted that, since the Judge had found there not be a risk in the Appellant's home area (or perhaps more accurately not to have reached any finding in that regard), internal relocation was not an issue.

17. Having directed herself to this Tribunal's country guidance on the issue of internal relocation to Kabul in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) ("AS"), the Judge referred to the UNHCR Eligibility Guidelines August 2018 which post-dated that guidance. At the time of the hearing before Judge Steer and the Decision, the guidance in AS had been the subject of an appeal to the Court of Appeal. As the Judge noted at [74] of the Decision, the Court of Appeal had allowed the appeal but remitted on the basis that the Tribunal need consider only its conclusions on the security incidents in Kabul. However, as the Judge noted that was "subject to the qualification that it was for the Upper Tribunal to consider whether, following the new 2018 UNHCR Guidelines on returns to Afghanistan, a reconsideration of its country guidance on a more extensive basis was required". Having made reference to the Home Office's own policy guidance seeking to maintain the existing

country guidance in AS pending the reconsideration, the Judge went on to say this at [76] of the Decision:

> "Whilst it is correct that **AK (Article 15(c)) Afghanistan CG** was not displaced by **AS (Safety of Kabul) Afghanistan CG**, the findings in **AK (Article 15(c)) Afghanistan CG**, however, were maintained in **AS (Safety of Kabul) Afghanistan CG** but were dealing with the specific concept of the risk of harm from indiscriminate violence and not the wider concept of the reasonableness of internal relocation, of which the security situation is only one factor in the exercise that is conducted to determine the reasonableness of internal relocation."

18. That is then the basis on which the Judge proceeded at [77] to conclude that internal relocation would be unduly harsh and therefore that the Appellant is entitled to refugee status. Moreover, she did so on the basis of the UNHCR 2018 Guidelines. As she indicated at [73] of the Decision, the tenor of those guidelines is that "internal relocation was not generally available in Kabul".

19. Whilst I accept that the Judge's conclusion is largely based on the Appellant's mental health, therefore, I cannot accept that her reasoning is the same as it would be if that were the only issue. Since Mr Spurling accepted that internal relocation was not relevant based on the Judge's previous finding, the error is not simply a technical one based on the way in which the Judge has expressed herself but is an error in the approach taken which cannot therefore simply be read across to a finding that the Appellant would be at real risk of ill-treatment contrary to Article 3 on return to Afghanistan generally.

20. Put another way, as the Respondent contends in her grounds, there is an inadequacy of reasons for reaching a conclusion that removal of the Appellant would breach his Article 3 (or Article 8) rights based solely on his mental health. Nor indeed is there any discernible finding or conclusion to that effect. Whilst the Appellant may succeed based on the evidence as to his mental health, therefore, I am not confident that I can say that this would necessarily be the outcome. For that reason, the errors which I have identified are material.

21. I move on then to next steps. Neither party suggested that this appeal needs to be remitted. There is no error identified in the Judge's fact finding up to and including [71] of the Decision. There is therefore no need to revisit those findings. I therefore preserve the Decision for the most part and I set aside only paragraphs [72] to [77] of the Decision. Whether or not internal relocation is said to be relevant based on the earlier findings, the Tribunal has now reconsidered the guidance in AS and that later guidance would have to be brought into account if it is relevant.

22. Mr Spurling asked for the opportunity to file more evidence if that were thought to be appropriate. As this appeal now centres mainly if not entirely on the Appellant's mental health and nine months have passed since the hearing and the medical evidence then relied upon, I agree that it would be of assistance to the Tribunal to have updated medical evidence, either by way of a further

report or at the very least production of updated medical records. Ms Everett did not object to that course.

23. If there is to be more evidence, and also in light of the changing case-law, particularly in relation to health cases, it is also appropriate for there to be a resumed hearing so that oral submissions can be made and further oral evidence taken if that is thought to be necessary.

24. I have therefore given directions below to the above effect.

DECISION AND DIRECTIONS

The Decision of First-tier Tribunal Judge S J Steer promulgated on 2 April 2020 involves the making of an error on a point of law but only in relation to paragraphs [72] to [77] of the Decision and the outcome allowing the appeal. I therefore set aside those paragraphs and the allowing of the appeal. I preserve paragraphs [1] to [71] of the Decision.

I make the following directions for the resumed hearing:

1. **Within six weeks from the date when this decision is sent, the parties shall file with the Tribunal and serve on the other party any additional evidence on which they seek to rely at the resumed hearing.**

2. **Within eight weeks from the date when this decision is sent, the parties shall file with the Tribunal and serve on the other party a skeleton argument identifying the legal issues which require to be determined and setting out (briefly) the applicable case law and statutory provisions relied upon.**

3. **The resumed hearing will be relisted on the first available date after eight weeks from the date when this decision is sent for a hearing of ½ day.**

4. **Unless either party files an objection in writing within 28 days from the date when this decision is sent, the resumed hearing will take place via Skype for Business. The parties are required to provide joining details for that hearing within 28 days from the date when this decision is sent for those who are to attend the hearing which may include the Appellant, his witnesses and legal representatives for both parties.**

5. **If an interpreter is required for the hearing, the Appellant shall notify the Tribunal accordingly within 28 days from the date when this decision is sent.**

6. **Documents or submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents which should continue to be sent by post.**

7. **Service on the Secretary of State may be to [email] and on the Appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.**

8. **The parties have liberty to apply to the Tribunal for further directions or variation of the above directions, giving reasons if they face significant difficulties in complying.**

Signed: *L K Smith*
Upper Tribunal Judge Smith

Dated: 10 December 2020