**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/10040/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision Promulgated** |
|---|---|
| **on 23 August 2021** | **On 13 October 2021** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**
**DEPUTY UPPER TRIBUNAL JUDGE BOWLER**

**Between**

**H S**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Anonymity was granted at an earlier stage of the proceedings because the case involved protection issues. We find that it is appropriate to continue the 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 both to the appellant and to the respondent.

**Representation:**
For the appellant: Mr J. Dhanji, instructed by Biljana & Co.
For the respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

## Background

1. The appellant is a citizen of Afghanistan who entered the United Kingdom illegally on 27 January 2012. He claimed to be 15 years old on arrival but was assessed by social services and allocated a date of birth of 01 August 1995. The appellant made a protection claim on 03 February 2012, which was refused on 28 March 2012. He was granted Discretionary Leave to Remain (DLR) until 01 February 2013 under the respondent's policy relating to unaccompanied asylum seeking children (UASC). Under the relevant statutory framework in place at the time, he did not have a right of appeal against the decision to refuse the protection claim because he was granted leave to remain for a period of less than 12 months.

2. The appellant made an in-time application for further leave to remain, which was refused on 10 June 2013 with a right of appeal. The subsequent appeal was dismissed by First-tier Tribunal Judge Doran in a decision promulgated on 30 July 2013. The judge rejected the credibility of the appellant's claim that his father was a Taliban commander in Tagab district in Kapisa province who wanted to forcibly recruit him. The judge concluded that he would not be at risk on return. Permission to appeal to the Upper Tribunal was refused and the appellant's appeal rights became exhausted on 15 October 2013. There is no evidence to suggest that the respondent took any steps to remove the appellant between 2013 to 2019.

3. Further submissions were made to the respondent on 18 July 2019. The respondent decided to treat the further submissions as a fresh claim but concluded that the evidence produced by the appellant failed to show that he had a well-founded fear of persecution on return. The claim was refused in a decision dated 25 September 2019 with a right of appeal.

4. First-tier Tribunal Judge Russell dismissed the protection claim but allowed the human rights claim under Article 8 in a decision promulgated on 28 November 2019. Having heard evidence from the appellant and his cousin, he found that the further evidence was not sufficient to depart from the earlier credibility findings made by the First-tier Tribunal. He concluded that it would not be unduly harsh for the appellant to relocate to Kabul, but on the same evidence, concluded that the appellant's removal would amount to a disproportionate breach of his right to private life under Article 8 of the European Convention.

5. The appellant did not appeal the protection decision. The respondent appealed the human rights decision and was granted permission to appeal. In a decision dated 27 February 2020, the Upper Tribunal concluded that the First-tier Tribunal decision involved the making of an error on a point of law (annexed).

6. It is not necessary to set out the further procedural history in any detail save to note that the case was reviewed and a series of directions were made following the start of the Covid-19 pandemic. Delays occurred due to the public health situation and the case was also put back to await the outcome of the country guidance decision in *AS (Safety of Kabul)* [2020] UKUT 130.

7. By the time the case was listed for a resumed hearing to remake the decision, there had been a significant change in the situation in Afghanistan. The Taliban, who had been gaining control over significant parts of Afghanistan in the run up to the withdrawal of US and British coalition troops, took control of Kabul on 15 August 2021. The situation was chaotic and uncertain with few reliable reports of what was happening on the ground. However, the Taliban had been in control of significant areas of Afghanistan before that. There are reports of their activities while in control of those areas. The nature of their activities, and the way in which the civilian population is treated in areas under their control, is not usually a disputed issue.

8. The appellant's up to date bundle of evidence produced shortly before the hearing includes a brief position paper by UNHCR on returns to Afghanistan dated August 2021. UNHCR states that more than 550,000 Afghans have been internally displaced as a result of conflict and insecurity since the beginning of the year. The security and human rights situation was rapidly deteriorating and there was an unfolding humanitarian emergency. The situation was fluid and uncertain. UNHCR calls on countries to allow civilians fleeing Afghanistan access to their territories and to ensure respect for the principle of *non-refoulement*. UNHCR states that it may be necessary to review the protection needs of Afghans and to suspend removals until the situation has stabilised, and pending assessment of whether it is possible to effect returns 'in safety and dignity'.

9. Mr Tufan informed us that the Home Office Country Information and Policy Notes on Afghanistan had been withdrawn. He was instructed to apply for an adjournment for the respondent to review her position. Although we acknowledged that it might be helpful to understand the respondent's position following a review, Mr Tufan could not say when the review might be completed. No time frame was suggested. Although Mr Dhanji did not oppose the application, we refused it. There has been a prolonged delay since the error of law decision was made in early 2020. Beyond saying that the situation was fluid and uncertain, Mr Tufan was unable to say what might be different after a further period of delay. It seems unlikely that the situation on the ground in Afghanistan would change in any significant way if we relist the case in 6-8 weeks. The case would still need to be determined on the up to date evidence relating to the situation in Afghanistan. We have evidence relating to the current situation. We considered that it was not a good use of court time to adjourn for an uncertain purpose and an uncertain period of time.

10. The appellant attended the hearing to give evidence and adopted his up to date witness statement. We were told that he was no longer relying on a long term relationship with a British citizen because the relationship had broken down. The appellant's immigration history and length of residence in the UK was not disputed. Mr Tufan indicated that he did not need to ask the appellant any questions. He did not dispute that the appellant had established a private life in the UK. In his brief submissions he pointed out that there was a lacuna in the evidence at the current time as to the conditions the appellant might face if returned to Afghanistan. We indicated that we did not need to hear from Mr Dhanji and that the appeal would be allowed.

**Decision and reasons**

*Article 8(1) – private life*

11. The decision is being remade solely on human rights grounds. The appellant entered the UK as a child in 2012 and has lived here for nine years. It is not disputed that he has established a private life here in that time. According to the date of birth allocated to him the appellant is now 26 years old. As Judge Russell noted, the appellant has spent an important developmental period of his life in the UK where he transitioned from childhood into adulthood. The appellant produced letters of support from friends and acquaintances in the UK. He continues to have a relationship with the foster family who cared for him when he first arrived. We are satisfied that this evidence shows that the appellant's removal would interfere with his right to private life in a sufficiently grave way to engage the operation of Article 8(1) of the European Convention on Human Rights.

*Article 8(2) – proportionality*

12. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

13. Part 5A of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the Human Rights Act 1998. In considering the 'public interest question' a court or tribunal must have regard to the issues outlined in section 117B in non-deportation cases. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention.

14. It is in the public interest to maintain an effective system of immigration control. The requirements of the immigration rules and the statutory provisions are said to reflect the respondent's position as to where a fair balance is struck for the purpose of Article 8 of the European Convention.

15. The appellant does not assert that he comes within any of the immigration rules relating to family life in the UK. He falls far short of meeting the 20 year long residence private life requirement under paragraph 276ADE(1)(iii) of the immigration rules.

16. The appellant needs to show that he would face 'very significant obstacles' to integration in Afghanistan to meet the private life requirement of paragraph 276ADE(1)(vi) of the immigration rules. In *Kamara v SSHD* [2016] 4 WLR 152 the

Court of Appeal outlined the key elements of the test, which is also found in section 117C(4) NIAA 2002.

> "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."

17. Paragraph 276ADE(1)(vi) is intended to apply to those who have spent so much of their life, or maybe even their whole life, in the UK to the extent that they have very few remaining links with their country of origin and would struggle to integrate there. The political and security situation in a country is rarely likely to be relevant. However, in this case we consider that the situation is relevant to the assessment in the particular circumstances relating to Afghanistan.

18. We have outlined the significant recent developments in Afghanistan above. Although the current country guidance in *AS (Safety of Kabul) Afghanistan* CG [2020] UKUT 00130 (IAC) will need to be reviewed, it is worth noting the conditions that were already said to exist in Kabul before the Taliban took control of the city. Kabul is the destination of any proposed return.

19. The appellant claims that he is no longer in contact with any family members in Afghanistan. Given the current turmoil it is reasonable to infer that even if there were family members in Afghanistan their position is likely to be uncertain and their current whereabouts might be unknown. The appellant would return as a young man who left Afghanistan as a child. He has spent a large part of his life in the UK, has no experience of how to navigate adult life in Afghanistan, and no obvious support network that might help him to do so.

20. In *AS (2020)* the Upper Tribunal considered figures that indicated what sections of the population were most likely to be at risk. At [96] it considered a UN OCHA report issued in December 2019, which stated that 41% of casualties in the first three quarters of that year were women and children. The Upper Tribunal observed that this indicated that those who are economically active and most likely to be travelling around Kabul were at greater risk than those (mostly women) who do not. This risk was present even before the Taliban took control of the city.

21. The UNHCR Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan dated 30 August 2018 made clear that young men of

fighting age are more likely to be subject to forced recruitment by armed groups. The guidelines make several references to evidence of forced recruitment by the Taliban of young people from schools and madrassas (pg.28), and there is reference to a Danish Refugee Council report that stated that young returnee boys and men are at particular risk of recruitment by armed groups and criminal networks because of their 'high visibility' on return to a rural area (pg.47 f.n.298). We note that Judge Russell did not appear to consider whether there might be a general risk of forced recruitment in his home area of Kapisa province, which was controlled by the Taliban at the time, regardless of the credibility findings. In the section on forced recruitment UNHCR states that in areas which are under the effective control of armed groups, they are reported to use a range of coercive recruitment mechanisms. Those who resist recruitment, and their family members, are reportedly at risk of being killed or punished (pg.52-53).

22. Although the country guidance pre-dates recent events, the decision is still of use in assessing the difficult conditions that were already present in Kabul, which are only likely to be exacerbated by the current turmoil and the increased threat arising from Taliban control. Although the general security situation was not deemed to be sufficiently serious to find that there was an Article 15(c) risk or, taken alone, to render internal relocation unduly harsh, the Tribunal in *AS (2020)* found that the evidence showed that there was still 'widespread and persistent conflict related violence in Kabul' [253(ii)]. Safety and security issues were still thought to be 'highly relevant to the reasonableness of return but are not by themselves determinative' [216]. The Tribunal in *AS (2020)* also considered evidence relating to poverty and the humanitarian conditions in Kabul noting that the challenges that were said to face displaced persons included limited job opportunities, few or no social protection nets, poor shelter/housing conditions, impeded access to education and healthcare, and continuous fear of eviction [123]. The position remained the same as in 2018, whereby the evidence showed that 'most of Kabul's population is poor, lives in inadequate housing with inadequate sanitation, lack access to potable water, and struggles to earn sufficient income to sustain itself in a society without any safety net' [225].

23. The Tribunal found that there was little evidence to suggest that returnees faced hostility because they have returned from the west, but face challenges 'primarily because of poverty, lack of accommodation and the absence of employment opportunities, as well as the security situation'[246]. Given the Taliban's well-documented hostility to western culture the situation might change, but it is too early to tell at the date of this hearing. The panel in *AS (2020)* agreed that a person's age was still relevant to reasonableness. Returnees of any age without a network will face significant challenges establishing themselves in Kabul, but a person who left Afghanistan at a young age may, depending on individual circumstances, be less able than someone who spent their formative years in Afghanistan to navigate the challenges of the city by, for example, finding work and accommodation'[251]. The guidance made clear that there must be an individualised and holistic assessment in each case.

24. The appellant is a 26 year old man who speaks Pashtu. The evidence from his friends in the UK indicates that he still knows many Afghans and is likely to have continued cultural connections. However, he grew up in a rural area of Afghanistan and has no direct experience of life in Kabul or how to navigate adult life there in order to earn a living. If he were to be returned to Kabul at the date of the hearing the evidence shows that he would struggle to establish himself there as a young single man who may not have a support network capable of assisting him to integrate. Whilst the situation in Kabul at the date of the country guidance showed that, in general, it would be reasonable to expect a young single man to relocate to Kabul, those who left as a child were identified as a group that might face additional challenges.

25. We highlight the country guidance because it is an indicator of the difficult situation that returnees already faced in Kabul. Whilst we accept Mr Tufan's submission that the situation is now fluid and uncertain, there is a body of evidence over many years which can inform the assessment of how the Taliban is likely to act in areas under its control. The situation in Kabul at the current time is chaotic and frightening for those who, for a long time, have not lived under direct Taliban control.

26. Although the appellant retains some cultural and linguistic links to his country of origin he left as a child, and even before the Taliban took over Kabul, the country guidance indicated that a person in his position is likely to face significant challenges to establishing a meaningful private life within a reasonable period of time. Exceptionally, we consider that the compelling circumstances relating to the current political and security situation are relevant to the assessment and are only likely to exacerbate what was already going to be a very difficult situation on return. For these reasons we are satisfied that the appellant would face very significant obstacles to integration on return and that he meets the requirements of paragraph 276ADE(1)(vi) of the immigration rules.

27. Even if we are wrong in our assessment under the immigration rules, we conclude that removal would be disproportionate. In assessing what weight to place on the public interest considerations outlined in section 117B NIAA 2002. We give weight to the public interest in maintaining an effective system of immigration control. We take into account the fact that the appellant speaks English and that there is no evidence to suggest that he would be incapable of finding work to support himself financially. However, those factors are only neutral in the balancing exercise. Little weight should normally be given to a private life established in the UK at a time when a person's status is unlawful or precarious. However, like Judge Russell, we place some weight on the fact that the appellant's private life was established at a time when he was a child and that he has spent an important developmental period of his life in the UK where he has forged his adult identity. We also take into account the fact that, despite having exhausted his appeal rights in 2013, the respondent did not appear to consider that there was a pressing social need to remove him given that there is no evidence to suggest that any enforcement action was taken in the six years after his appeal was dismissed.

28. We find that the compelling factor is the country situation in Afghanistan. Even before recent events the situation would have been extremely difficult for the appellant if returned to Kabul. The unfolding events can only increase the risk in light of the background evidence relating to the risks to civilians, and in particular to young men, in areas that have already been under Taliban control. Whilst we accept that only time will tell whether the Taliban will modify their behaviour, the evidence relating to past events is the only way to inform what is likely to happen at the present time. We are satisfied that the already difficult situation in Kabul is only likely to be made worse by the presence of the Taliban unless or until there is evidence to the contrary.

29. Having evaluated what weight should be placed on the factors weighing in favour of the appellant, and what weight should be given to public interest considerations, we find that it would not strike a fair balance to return the appellant to Afghanistan. We conclude that removal would amount to a disproportionate interference with his right to private life for the purpose of Article 8(2) of the European Convention.

30. The appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed M. Canavan Date 28 September 2021
Upper Tribunal Judge Canavan

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is "sent' is that appearing on the covering letter or covering email.**

**ANNEX**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/10040/2019

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision Promulgated** |
|---|---|
| **On 25 February 2020** | **On 13 August 2021** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

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

Appellant

**and**

**H S**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the respondent (HS) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

**Representation:**
For the appellant: Mr C. Avery, Senior Home Office Presenting Officer
For the respondent: Mr J. Dhanji, instructed by Biljana & Co.

## DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant before the Upper Tribunal.

2. The appellant (HS) appealed the respondent's (SSHD) decision dated 25 September 2019 to refuse a fresh protection and human rights claim.

3. First-tier Tribunal Judge Russell ("the judge") dismissed the appeal in relation to the Refugee Convention ground. The appellant did not apply for permission to appeal the decision relating to the protection claim. The judge allowed the appeal on human rights grounds. The respondent applied for permission to appeal the human rights decision.

4. The Secretary of State's grounds are diffuse and unparticularised but appear to make the following points.

   (i) The judge failed to consider the public interest factors under section 117B of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") adequately given that he had noted that there was little evidence relating to the substance of the appellant's private life in the UK [75] and his private life was established at a time when his immigration status was precarious.

   (ii) The judge erred in failing to conduct a proper balancing exercise and/or failing to give adequate reasons to explain how or why removal would lead to unjustifiably harsh consequences for the appellant.

5. First-tier Tribunal Judge Fisher granted permission to appeal to the Upper Tribunal, adding his own observations as follows:

> "2. The grounds seeking permission assert that the Judge erred in allowing the article 8 claim outside the Immigration Rules, especially after highlighting the paucity of evidence concerning the Appellant's private life, and that he failed to consider the precarious or, indeed, lack of status when that private life was established.
>
> 3. In his lengthy decision, the Judge found at paragraph 77 that the Appellant would face very significant obstacles to his integration in Afghanistan, and yet he does not appear to have allowed the appeal under Paragraph 276ADE, because he goes on to consider the circumstances outside the Rules. It is clear that he attached considerable weight to the issue of delay. Whilst there are passing references to Section 117B of the 2002 Act, it is arguable that the judge has failed to give adequate consideration to the public interest criteria; in particular, to Sections 117B(4) and (5)."

### Decision and reasons

6. Having considered the grounds of appeal, the grant of permission and the submissions made by both parties, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law.

7. The judge made detailed findings of fact relating to the new evidence produced by the appellant in support of the protection claim and explained why he gave little weight to it [34-42]. Those findings were open to the judge on the evidence and are not subject to challenge. The decision provided a long description of the situation in Afghanistan without clear reference to the source of the information [25-33]. Although the appellant's account relating to his father's alleged activities for the Taliban was rejected, no consideration seems to have been given as to whether the appellant might nevertheless have been at risk as a result of the general security situation in his home area of Kapisa province.

8. It matters not, because even if the appellant was at risk in his home area, the judge went on to consider whether it would be reasonable to expect him to relocate to Kabul. He quoted the correct test outlined in *Januzi v SSHD* [2006] UKHL 5 and reminded himself that "relocation may not be reasonable, unless the person would be otherwise able to sustain a relatively normal life at more than just a minimum subsistence level." The judge concluded that the appellant had familial support available in Kabul and would be able to lead a relatively normal life there [44-45]. He took into account the fact that the appellant was a single man in good health who had shown resilience in making the journey to the UK [46]. The judge went on to consider the background evidence and relevant country guidance before concluding that the security situation was not sufficiently serious for the appellant to qualify for humanitarian protection [48-67].

9. The Secretary of State only seeks to challenge the judge's findings relating to the human rights claim. The judge began this part of the decision with general statements of law. He noted that Appendix FM and paragraph 276ADE of the immigration rules reflect the respondent's position as to where a fair balance should be struck for the purpose of Article 8 of the European Convention [68]. He cited several authorities, which outlined trite statements of principle [69-72]. At [73] the judge reminded himself that section 117B NIAA 2002 lists several public interest considerations that needed to be taken into account. However, when the judge came to make his findings on the facts of the case the decision begins to lose structure and the findings become rather muddled.

10. The judge noted that the appellant entered the UK when he was 16 years old and that he was 24 years old at the date of the hearing [74]. There was not much evidence of the strength or depth of his personal relationships. The judge said that he was "surprised by the lack of evidence…. about his private life or indeed any particularized evidence about the appellant's circumstances..." [75]. He went on to make the following findings:

> "76. Nonetheless, I have to consider whether there are very significant obstacles to the appellant's integration in Afghanistan. He is a young man with no apparent health problems and, as noted, no strong personal attachments to the UK. I have found above that he has an extended family network in Afghanistan and he is a national of that country and speaks the language and retains the culture of his homeland. Nothing in the evidence can lead

me to find otherwise. I have found, above, that the situation in Afghanistan does not give rise to a need for humanitarian protection.

77. That being said, I note that the appellant has been in the UK since 2012 – almost eight years – and his personal circumstances were such that he was granted leave to remain. While the situation in Afghanistan does not give rise to a need for humanitarian protection, by any metrics the situation is one of acute humanitarian need facing the major part of the population, characterized by conflict, displacement, environmental crisis, huge unemployment, economic collapse and extremely limited government capacity. While people in Afghanistan rely on strong networks to survive the evidence is that these networks are under extreme stress because of the pressures upon them: it is for that reason that so many young men are sent out of the country as a coping mechanism. In that sense, I would draw a distinction between my finding above about a network that could assist the appellant in an internal flight alternative and a network that would be able to help him integrate into Afghanistan in the sense of livelihood and housing and service provision. The evidence is that this is a remote possibility and in that regard I take into account the evidence of the appellant's own migration from Afghanistan, which indicates distress. All of the reports are consistent in this description. I find that the background evidence, allied with the evidence of distress in the appellant's own family in sending him out of Afghanistan, establishes that the appellant faces very significant obstacles – notwithstanding his own characteristics and capabilities – to integration in Afghanistan.

78. In that light, I find that the refusal to extend the appellant's leave to remain represents an interference with his private life serious enough to engage the operation of article 8 ECHR. There is no doubt that this interference has a legal basis and s.117B tells me that it has a legitimate aim.

79. The public interests (sic) consideration in the appellant's case are undermined by the absence of any action to remove the appellant after he exhausted his appeal rights on 15 October 2013, a delay by now of six years. In *EB (Kosovo) (FC) v SSHD* [2008] UKHL 41 the House of Lords said that delay could be relevant in three ways. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. The to the extent that it is true the appellant's case will be strengthened. Secondly, the delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as relevant to the quality of the relationship. With delay the sense of impermanence in such a relationship with fade. Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results.

> 80. In the appellant's case, the delay means that he has now been in the UK for almost eight years during important, transformative years. He has developed some form of a private life here and his position has not been as precarious as might at first seem, given the absence of any action to remove him since October 2013.
>
> 81. For those reasons, I find that the interference with the appellant's private life is disproportionate to the achievement of the legitimate aims set out by the statute."

11. It was open to the judge to consider the appellant's length of residence and the fact that he spent time in the UK during an important transformative period of his life when he made the transition from childhood to adulthood. Even though he had noted that there was little evidence relating to the substance of the appellant's private life in the UK, in those circumstances, it was reasonable for the judge to infer that it was likely that the appellant had established sufficient ties to at least engage the operation of Article 8(1) [78].

12. The judge was aware that the immigration rules and the public interest considerations contained in section 117B NIAA 2002 needed to be considered. However, the way in which he approached them became somewhat confused. Having reminded himself of the five-stage approach in *Razgar v SSHD* [2004] UKHL 11 some findings did not follow the same logical order. Some of the issues were not considered at the right juncture with reference to the relevant legal test; other relevant issues were not considered at all.

13. GEN.1.1 of Appendix FM makes clear that the private and family life provisions now contained in the immigration rules reflect the Secretary of State's position as to where a fair balance should be struck for the purpose of Article 8. In other words, the provisions relate to the balancing exercise conducted under Article 8(2). If the requirements of the immigration rules are satisfied, it is likely to be dispositive of the Article 8 issue since it is likely to be disproportionate to remove someone if they meet the requirements of the immigration rules: see *TZ (Pakistan) v SSHD [2018* EWCA Civ 1109.

14. Section 117A NIAA 2002 also makes clear that the 'public interest question' relates to the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

15. Although the grounds were poorly pleaded, I find that there is some force in the Secretary of State's submission that the public interest considerations contained in section 117B were not considered adequately. The judge referred to the provision in general terms but did not conduct a structured approach to the list of factors contained in section 117B. Not all of those factors were relevant. For example, there was no evidence to suggest that the appellant was in a relationship with a 'qualifying partner'. No consideration was given to whether the appellant spoke English or was capable of being financially independent although I recognise that those matters were likely to be neutral at best. The more important consideration from the Secretary of State's perspective, was the exhortation in sections 117B(4)-(5), that little

weight should be given to a private life established by a person at a time when their immigration status is unlawful or precarious.

16. Although section 117B leaves sufficient flexibility for a judge to depart from the statutory rule, any departure would need to be justified with adequate reasons. I find that there is some force in the respondent's complaint that the judge did not give sufficient weight to the issue of the appellant's precarious immigration status or failed to give adequate reasons to explain why the appellant's private life was sufficiently strong that it lessened the weight to be given to the public interest considerations.

17. The appellant entered the UK as a child in 27 January 2012 and was granted Discretionary Leave to Remain until 01 February 2012 i.e. a period of less than 12 months. He applied to extend his leave to remain. The application was refused. The appellant's appeal was dismissed by First-tier Tribunal Judge Doran in a decision promulgated on 29 July 2013 and his appeal rights became exhausted on 15 October 2013. There is no record of the respondent making any attempt to remove the appellant thereafter. He remained in the UK in the knowledge that he had no leave to remain. The appellant did not make further submissions to the respondent until 18 July 2019. The refusal of that application is the subject of this appeal.

18. In this context the judge's reference to the "refusal to extend the appellant's leave to remain" is inaccurate [78]. This is not a case where the appellant was awaiting the outcome of a delayed decision. In fact, the appellant's immigration status has, from the start, been nothing but precarious and for a number of years he remained in the UK unlawfully.

19. While it was open to the judge to consider the principles in *EB (Kosovo)*, and his summary of the principles at [79] is correct, I find that he failed to give adequate reasons to explain why weight was given to the appellant's private life to the extent that it outweighed the public interest in maintaining an effective system of immigration control. The judge failed to identify which of the principles in *EB (Kosovo)* he considered applicable to this case. The appellant was not in a relationship and it is difficult to see how he could have rationally concluded that the appellant's private life was strengthened in any period of delay when he had already noted that there was a lack of evidence relating to the substance of the appellant's private life. The only reason given for concluding that weight should be given to the appellant's private life was the inference that he was likely to have established ties to the UK because he had lived here during "transformative years". It was open to the judge to give some weight to that fact, but that inference was the high point, because the judge had already found that there was little evidence relating to the extent of the appellant's ties to the UK. The findings at [80] provide no indication that the judge had in mind the principles outlined by the Supreme Court in *Ruppiah v SSHD* [2018] UKSC 58. One is left with unclear picture as to how and why the judge sought to depart from the statutory guidance contained in section 117B(4)-(5) to give little weight to a private life established when a person's status is unlawful or precarious. I conclude that this failure amounts to an error of law.

20. However, an error in the assessment of the appellant's precarious immigration status would be immaterial if the judge made clear findings in relation to any other aspects of the immigration rules that are said to reflect the respondent's position as to where a fair balance should be struck. Mr Dhanji was correct to point out that the grounds did not plead the point. Given that the proportionality assessment under Article 8(2) is holistic, it is necessary to consider the judge's findings as a whole.

21. The First-tier Tribunal Judge who granted permission touched on the lack of clarity as to whether the judge allowed the appeal with reference to paragraph 276ADE(1)(vi) of the immigration rules. I also find that there are some concerns relating to the judge's findings that are sufficiently obvious that they cannot be ignored.

22. First, the judge's findings at [76-77] use the term 'very significant obstacles' but do not make clear whether he is considering paragraph 276ADE(1)(vi) of immigration rules, nor is there any clear finding that the requirements of the rules were satisfied. Second, the judge's findings at [76-77] precede his finding that there would be an interference with the appellant's private life that would engage the operation of Article 8(1) [78]. It is not clear that any assessment under paragraph 276ADE, if that was what it was, took place as part of the overall balancing exercise under Article 8(2). Third, it is not clear whether the judge had in mind the correct test for integration outlined in *SSHD v Kamara* [2016] 4 WLR 152 i.e. "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.". The judge had already found that the appellant spoke the language, retained the culture of his homeland, was likely to have a familial support network in Kabul, and could "lead a relatively normal life there" [45]. Fourth, given the high threshold requiring not just obstacles, but 'very significant' obstacles to integration, it was irrational for the judge to find that it would be reasonable for him to relocate to Kabul, but on the same facts, that there would be 'very significant obstacles' to integration. Mr Dhanji rightly pointed out that the judge sought to distinguish his finding at [77] from his earlier finding under the Refugee Convention. However, the humanitarian considerations outlined in that paragraph should have formed part of the overall assessment of whether it was unreasonable or unduly harsh to relocate in any event. Given that the factual matrix was the same in relation to both assessments, nothing in what the judge said at [77] adequately explains how or why he came to the opposite conclusion in relation to the test under paragraph 276ADE(1)(vi), which imposes a fairly stringent threshold.

23. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of errors of law in the assessment of the human rights claim. The findings relating to Article 8 of the European Convention are set aside. The factual findings relating to the Refugee Convention claim shall stand. The Upper Tribunal will remake the decision. In the knowledge that a new country guidance decision relating to Afghanistan is awaited, it makes sense to delay remaking until the decision is published.

DIRECTIONS

24. Further to the discussion at the hearing, it was agreed that it might be possible to remake the human rights decision on the papers with the assistance of further written submissions once the pending country guidance decision in *AS (Afghanistan)* is published.

25. The appellant's immigration history and length of residence is not in dispute. The appellant will need to note the comments made by the First-tier Tribunal regarding the lack of evidence relating to the substance of his private life and the extent of his ties to the UK. To that end the parties are granted permission to serve any further evidence that they rely on as soon as possible, or at the latest, within **14 days** of the date the country guidance decision in *AS (Afghanistan)* is published.

26. The parties are then directed to file written submissions within **21 days** of the date the country guidance decision in *AS (Afghanistan)* is published.

27. The parties are at liberty to apply to amend these directions and/or to request an oral hearing for remaking if it is considered necessary.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision relating to the human rights appeal is set aside

The decision will be remade following further submissions

Signed M.Canavan Date 27 February 2020
Upper Tribunal Judge Canavan