



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/00690/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On the 16 September 2022

On the 14 November 2022

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

MR MA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Burrett, counsel instructed by JD Spicer Zeb solicitors

For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or

indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. In a decision and reasons dated 10 March 2022, the Upper Tribunal found material errors of law in the decision and reasons of the First tier Tribunal in relation to the Appellant's protection claim, set aside that decision and adjourned the appeal for a resumed hearing before the Upper Tribunal, with directions. That decision is appended.
2. The appeal came before the Upper Tribunal for hearing on 16 September 2022, when we clarified the scope of the appeal with the parties, in terms of preserved findings relating to article 8 of ECHR and gave Mr Whitwell the opportunity to read the Appellant's skeleton argument and the supplementary bundle.

Oral evidence

3. The Appellant was called to give evidence and he adopted his statements dated 24 September 2013, 23 May 2016, 28 March 2019 and his updated statement of 4 August 2022. He was then cross-examined by Mr Whitwell, who asked him about contact with his family members in Afghanistan. The Appellant stated that he had had no contact with any family members since he was last in Afghanistan, 9-10 years ago. Mr Whitwell asked the Appellant if he had tried to obtain evidence that his brother was working as a police officer in Afghanistan by eg contacting the authorities there. The Appellant stated that the Red Cross had tried on his behalf and they had given him a number which he called and spoke to someone from Kandahar, but this is a different province very far away from Logar; the man was not his brother and he had a different name. He said this was 2 years ago and the Red Cross had now closed his file. Mr Whitwell then asked the Appellant why he did not report his abduction to the police in Afghanistan and the Appellant responded that because his brother was the police officer in the local area all the people and the police were aware of his abduction.
4. It then became apparent that Mr Whitwell had been reading an earlier refusal decision dated 23 February 2015, rather than the extant decision dated 13 January 2016. Mr Whitwell stated that he was unable to proceed properly as he had not had enough time to consider the papers and this was impeding his ability to cross-examine. We decided to put the appeal back until 2pm to enable Mr Whitwell to have sufficient time. In the event, we were informed at midday that Mr Whitwell was ready to proceed and the proceedings re-commenced at that time.
5. Mr Whitwell resumed cross-examination, putting to the Appellant that in an earlier witness statement he stated he was not aware of

whether or not the police had been informed and so how was he aware of it now? The Appellant responded that his brother was in the police and his father was aware of all the incidents and that when he was released by the Taliban he was released into the district and he was asked questions there as well. Mr Whitwell confirmed with the Appellant that his case is that he was aware that the Taliban were pursuing him because of his brother. He then asked the Appellant why he would get into a stranger's car when offered a lift, to which the Appellant responded that he had not been very concerned the Taliban would apprehend him again because they had detained him 5 days before that but had released him

6. Mr Whitwell asked whether the Appellant's brother had resigned from the police in the meantime to which the Appellant responded in the negative. He was asked what his brother did in the police, to which the Appellant responded that all he knew is that his brother worked for them; he did not know what he did and he did not attend his brother's workplace. The Appellant said that his brother did not inform him of his job title but that once when he was a child he saw him in the vicinity of the police in uniform and once he came to the house. The Appellant said he was about 14 or 15 at that time.
7. Mr Whitwell asked whether his father had been targeted by the Taliban to which the Appellant responded that they had come to the family house at night and broken his father's foot. When asked why the Appellant had been abducted rather than his brother or father, given that he was not a threat, the Appellant said he did not understand why he was being targeted but he was. Mr Whitwell put to the Appellant that at Q. 47 of his asylum interview the Appellant stated that his brother was a hiring officer and what he had meant by that. The Appellant responded that he was a figure of authority and had his uniform and car.
8. The Appellant was asked whether he knew if his brother was still in the police, to which he said that he had not spoken to him since he left. The Appellant confirmed that he was being prescribed anti-depressant medication which he took daily. He was then asked about his uncle in the UK and whether he had contacted family in Afghanistan. The Appellant stated that while he had been living in his uncle's house in the UK, his uncle went to Afghanistan and when he returned both the Appellant and his social worker had asked him whether he had had contact with his family. His uncle said he did not go himself in person to Logar to look for family members because the Taliban were there, but he sent someone who came back and reported that there was no-one there. His uncle did not name or identify the person who went to check and he does not know how long his uncle spent in Afghanistan.
9. The Appellant said, in response to questions from the panel, that he did not know why his brother joined the police force but he had

worked at Mohammad Agha Police Station; that he had a wife and he was much older than the Appellant. There was no re-examination.

Submissions

10. Mr Whitwell then made submissions on behalf of the SSHD. He sought to rely on both refusal decisions: the decision of 23.2.15 substantively deals with the decision maker's view of inconsistencies in the account and the 13.1.16 supplementary refusal letter followed the Appellant's request for an extension of leave. Whilst he appreciated that the Appellant was a minor it seemed to him, subject to one variation, that the case comes down to credibility and that if it was accepted the Appellant is telling the truth about his brother's role in the police and the abduction then in light of the current Home Office CPIN he succeeds.
11. However, Mr Whitwell submitted that credibility is still a live issue as set out in the refusal letters. With regard to the 23.2.15 refusal at [33] the Appellant's brother being a hiring officer is at odds with the Appellant's evidence today that he did not know what he did and this is inconsistent. At [24](f) it notes that the Appellant did not know if his abduction was reported to the police, which is inconsistent with his evidence today. Upon being challenged on this submission by the panel Mr Whitwell agreed that the Appellant said that he thought he said the police were aware of this. At [35] the Appellant said his brother had to walk around with a machine gun, yet the Appellant accepted lifts from strangers during this period of time.
12. Mr Whitwell submitted that, whilst there is no requirement of corroboration there is no evidence that the Appellant's brother is a Police Officer and that the Upper Tribunal was entitled to take into account the fact that the Appellant has had no contact with Afghan authorities seeking to verify this. He submitted that there were two issues to determine: whether the Appellant's brother was a police officer and whether the Appellant was abducted.
13. With regard to the background evidence, Mr Whitwell acknowledged that if the Appellant's claim were accepted the Refugee Convention reason was imputed political opinion on the basis of his membership of his family. He submitted that the CPIN makes a distinction between those in the police and those who are not. He drew attention to Appellant's Bundle B1 dated April 2022 at [2.4.9] which provides that police officers are at risk, albeit the Appellant is not himself a former member of the police. The panel also drew his attention to [2.4.6] of the same CPIN report *Fear of the Taliban* as to a different risk category: "*persons who have credibly resisted or opposed, or are perceived to resist or oppose, Taliban requests or control.*"

14. In closing, Mr Whitwell expressly accepted the Appellant's age. He noted that section 8 of the 2002 Act had been raised and had nothing to add to the refusal decisions with regard to article 15C.
15. In his submissions, Mr Burrett sought to rely upon his skeleton argument. With regard to issues arising as to the Appellant's credibility he reminded the panel that the Appellant was 15 years of age on arrival and was alone and vulnerable. Mr Burrett referred the panel to the findings of Professor Katona, who found that the Appellant had complex PTSD, not just as a result of events in Afghanistan but also his journey and events in the UK. Mr Burrett submitted that the Appellant was particularly vulnerable when he was being interviewed and this should have led to the Respondent taking a more liberal view and giving him the benefit of the doubt: *cf. KS [2014] UKUT 00552 (IAC)*.
16. Mr Burrett submitted that we should consider the evidence in the round and that, ultimately, there was nothing unbelievable in his evidence and nothing was raised in cross examination or disclosed in the refusal. As to the fact that no contact had been made by the Appellant with the Afghan police, he submitted that there is no such evidence that this was an achievable goal rather than just speculative. There is no dispute he fled Afghanistan and left his family behind at a very young age. As to the purported inconsistency about his brother's role in the police, Mr Burrett submitted that it is apparent looking at the whole question and answer in his interview that the Appellant does not know what his brother's role was and given that he was 14/15 years of age this is not surprising and is consistent with his evidence today.
17. As to the Appellant's abduction and whether or not he complained to the police, his evidence was that the police were aware and this is not inconsistent. The Appellant's core account is that his brother was in the police and because of that threats were made to his family by the Taliban. Mr Burrett submitted that the likelihood was that the Taliban would have threatened his family and him which led to him fleeing his home area. As to why the Appellant was threatened, Mr Burrett submitted that he was coming up to adulthood and it would deter him from working for the police or Afghan authorities. Given the lower standard, it is a plausible and believable account.
18. In response to a question as to the existence of statistics of the number of police officers in Afghanistan, neither representative was able to assist but had no objection to the panel seeking to ascertain this number. Mr Burrett confirmed that the Appellant's brother was working at Mohammad Agha district office in Logar province but only came to the family home on Fridays. He submitted that if his brother is in the Afghan police force that is the end of it.

19. Mr Burrett drew attention to additional factors when considering risk on return: the Appellant has been absent from his home area for 9 years; the Taliban are now in power; the Appellant would be subject to suspicion as he would be coming from the UK and he is to some degree Westernised and his time in the UK would have had an impact on him culturally and in terms of his mental health vulnerabilities and how he acts and behaves. The evidence is that he has no family members whose whereabouts are known in Afghanistan and so he would stand out.
20. In response to a question from the panel, Mr Burrett submitted that the Appellant would be returned to Kabul and would then travel from Kabul to his home area. Mr Burrett drew attention to the previous preserved findings of First tier Tribunal Judge Beg that there would be very significant obstacles to his integration. In terms of the current circumstances, recent reports showed a deterioration in human rights in Afghanistan and that the Taliban have moved away from their proclamation of amnesty; extra judicial executions are widespread and not just targeted at one small group of people. He submitted that there is an element of imputed political opinion (anti-Taliban) and the Appellant was likely to be perceived as such a person and there would be an element of demonstrating loyalty as he would be expected to lie.
21. Mr Burrett submitted that there is a resistance group, the NRF, within Afghanistan, whose home area is not a million miles away from Logar. Reports suggest since August 2021 150 Talib have been killed by the NRF so there is some resistance from within Afghanistan which will concern the Taliban and also ISIL are active. Mr Burrett submitted that the background evidence demonstrates that the Taliban do what they want; that torture levels are more prevalent today and that this all points to an unacceptable risk of persecution, particularly for someone who is not able to stand on their own two feet on return, either by way of association with someone in the authorities or as suspected anti-Taliban. Therefore, there is no protection available for the Appellant and the appeal should be allowed.
22. Mr Burrett sought, in the alternative, to rely upon article 15(c) because of the resistance and ongoing fighting between the Taliban and NRF, which is very new. He submitted that article 15(c) must be considered against that backdrop of fighting and skirmishes in many areas, including in the Appellant's home area and that he would be at risk of getting caught up because he is unable to integrate and there is no internal flight alternative.

Discussion

23. We find that the Appellant is overall to be considered as a consistent and credible witness, bearing in mind his young age upon arrival in

the United Kingdom and at the time of the relevant events that led to his flight from Afghanistan. The Respondent has accepted that the Appellant is from Logar province and this finding was accepted by Judge Beg. Logar province is strategically important as it is directly south of Kabul province and we find it is reasonably likely that the Taliban were operative there at the relevant time and thereafter, as the SSHD accepted in the refusal decisions, it was an area of internal armed conflict to which the Appellant could not be expected to return and remained as such until the Taliban took power in August 2021.

24. We find that the Appellant cannot necessarily be expected to recall details as to his brother's employment as a police officer particularly when these were not provided to him at the time and given his young age and the appellant was candid that he had not been to work with his brother which is understandable. We note Mr Whitwell's question as to why the Appellant would accept a lift from strangers, however, we are mindful of the context ie that in the absence of public transport this was normal practice, there were other people in the car and it was raining. It was the appellant's subjective belief that as he had been released he was of no interest. We note that the SSHD is relying upon section 8 of the 2004 Act as to the failure by the Appellant to claim asylum en route to the United Kingdom in France, where he was fingerprinted [40] of the 2015 refusal refers and thus his credibility is damaged. We take that into account as part of our consideration but note he was at the material time a minor aged 15 and that he had an uncle in the UK, which was the reason underlying the decision for him to make his asylum claim in this country. We find that the Appellant's verbal responses in his oral evidence were unhesitating and were generally consistent with his screening interview and asylum interview record. In particular, at the outset in his screening interview on 3 May 2013 the Appellant referred to his fear due to his brother being "in government".
25. We note from [37] of the refusal decision of 13 January 2016 that there were 157,000 police employed in Afghanistan in July 2021. Whilst there may well be some variation in this number over the past decade we consider that this is a substantial number of people and there is a reasonable degree of likelihood that the Appellant's brother was employed by the police as claimed. Not least because it would be an accessible source of employment which would assist in supporting a family. The appellant has consistently claimed that his brother was in the police force and clarified in his response in his asylum interview when referring to his brother as a 'hiring officer' that he was not clear of his duties. Therefore, we accept that the Appellant's brother was employed in the Afghan police force.
26. The question is whether this would cause the Appellant to be at risk of persecution if returned to Afghanistan at the current time. We

have carefully considered the background evidence, both that submitted by the Appellant's representatives and the Home Office CPIN: *Fear of the Taliban*, Afghanistan, April 2022. We note, as is set out at [13] above, that the Home Office CPIN expressly accept that a number of cohorts of people would be at risk on return to Afghanistan at the current time. [2.4.9] of the *Fear of the Taliban* provides:

"The current evidence suggests that persons likely to be at risk of persecution, because they may be considered a threat or do not conform to the Taliban's strict interpretation of Sharia law, include but are not limited to:

- *Former government employees and members of the Afghan National Armed Forces (ANSF), including the police*
- *Former employees/those linked to international forces and organisations, including interpreters*
- *Women, particularly those in the public sphere*
- *Ethnic/religious minorities, in particular Hazara*
- *Persons who have credibly resisted or opposed, or are perceived to resist or oppose, Taliban requests or control*
- *Persons who do not conform to, or are perceived to not conform to, strict cultural and religious expectations/mores, in particular women, and which may also include persons perceived as 'Westernised' after having spent time in the West, though no clear definition of what 'Westernised' means or entails is available.*
- *Journalists critical of the Taliban*
- *Human rights defenders, lawyers and judges*
- *LGBTI persons*

27. Whilst the Appellant himself is not a former member of the police, the same report provides at [6.1.7] that:

"Human Rights Watch (HRW) reported on 30 November 2021 that, despite a general amnesty, more than 100 members of the former security services have been killed or disappeared in 4 provinces between 15 August and 31 October 2021. The report also indicated family members of former security forces had also been targeted."

[6.2.8] provides:

"On 26 October 2021, the Jurist's Staff Correspondent in Kabul gave their observations on the Taliban's targeting of perceived or

potential opponents in Afghanistan who publicly object to their policies, who were associated with the previous government, or who worked with foreign forces prior to the Taliban takeover.’ They said: ‘... former government officials in Panjshir, Mazar, and Samangan provinces have been targeted, leading to the death of one in Samangan province. A few weeks ago the Taliban even went farther and stated some specific individuals – especially those who worked with the foreign forces – should give themselves up to be prosecuted or they will prosecute their family members if they find them. Anyone on the Taliban’s blacklist is in great danger. The Taliban are using different techniques in targeting people. They have issued warning letters to some former government officials stating that if they do not give themselves to them then their families would be arrested.”

28. The Amnesty International report at A148 of the Appellant’s bundle makes reference to the extrajudicial execution of people associated with the former administration, including the sons of a former Kandahar provincial council member, a former member of the police force in Ghor province who was beaten and shot dead in front of her children. AB 159, a report entitled “*Taliban takes revenge on former Afghan security forces*” by RFE/RL Radio Azadi dated 12 October 2021 refers to Patricia Gossman, the associate director of Human Rights Watch stating that they have heard reports of people being arrested purely for having any association with the former security forces and family members being interrogated or beaten by Taliban looking for former officials. The Taliban’s acting Defence Minister, Mullah Mohammad Yaqub admitted on 23 September that militants had committed revenge killings since seizing power.
29. We note that Judge Beg’s finding that there would be very significant obstacles to the Appellant’s integration in Kabul is preserved. We find, for the same reasons, including the Appellant’s mental health vulnerabilities, that it would be unduly harsh to expect him to internally relocate to Kabul. Consequently, his fear of persecution requires consideration in the context of return to his home province of Logar.
30. The Taliban remain in power in Afghanistan to date. Whilst there is no definitive evidence showing that the Appellant would be at risk of persecution if returned to Afghanistan, due to his elder brother’s role as a police officer in Logar province, we find that there is a real risk that he would face persecution or treatment contrary to Article 3 of ECHR for this reason. The Appellant’s membership of his family is an immutable characteristic and he would be returning to his home area. We find that even though the Appellant has been absent from Afghanistan for more than 9 years, this is unlikely to act as a protective factor, given that he has become Westernised during that time, which would also serve to highlight his absence from the

country and his difference from those who remained in Afghanistan, culturally and linguistically.

31. In light of our finding above there is no need for us to determine the article 15(c) claim.

Notice of Decision

32. For the reasons set out above, the appeal is allowed on protection grounds.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

2 November 2022



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: PA/000690/2016

THE IMMIGRATION ACTS

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

MR MA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Burrett, counsel instructed by JD Spicer Zeb solicitors

For the Respondent: Ms J. Isherwood, Senior Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Appellant is a national of Afghanistan, born on 1 March 1998. He arrived in the United Kingdom on 3 May 2013 and claimed asylum the same day. This application was refused but the Appellant was granted discretionary leave to remain as an unaccompanied minor until 1 September 2015.

2. The Appellant renewed his asylum application on 18 August 2015 but this application was refused in a decision dated 13 January 2016. The basis of his claim, in brief, is that his elder brother, with whom he lived as part of an extended family unit, was working as a police officer. In early 2013 he received a letter from the Taliban telling him to resign from the police force or his family would be killed. His brother reported it to his police station. Ten days later a further letter was received with a final warning. Forty days later the Taliban came to the family home, beat, punched and kicked his father, hit him with the butt of a gun and broke his leg and abducted the Appellant for three days. His brother spoke to the Taliban, agreed to resign and the Appellant was released. However, his brother did not resign his job. Five days later the Appellant went to a shop at his father's request and was abducted by the Taliban and held for twenty days until the cave where he was being held was attacked by either the Afghan army or the American forces and he was able to escape. His family then made arrangements for him to leave the country.

3. The Appellant's appeal came before First tier Tribunal Judge Beg for hearing on 14 November 2019. In a decision and reasons dated 20 November 2019, the Judge dismissed the appeal on asylum and humanitarian protection grounds but allowed the appeal on the basis of Article 8 of ECHR. Permission to appeal was sought by the Appellant on the following bases:

- (i) the First tier Tribunal materially erred in law relating to credibility/plausibility;
- (ii) the First tier Tribunal materially erred in law/reached an irrational conclusion regarding the issue of Hukmat Khan;
- (iii) the First tier Tribunal erred in relation to the issue of family support and contact by failing to properly consider the evidence;
- (iv) the First tier Tribunal erred by failing to consider all relevant circumstances in relation to internal relocation, as required by the country guidance case of AS (Afghanistan);
- (v) the First tier Tribunal erred regarding the relevance to be attributed to the medical reports.

4. Permission to appeal was granted by First tier Tribunal Judge Adio in a decision dated 22 July 2021 on the basis that:

"2. Having read the determination and in particular the findings of fact of the judge and the grounds, I find that the

conclusions of the judge on internal relocation area unsustainable in the context of the findings made regarding very significant obstacles to reintegration under paragraph 276ADE (1)(vi). It is arguable that the same factors that caused the judge to conclude that there were very significant obstacles to reintegration should have led the judge to conclude that it would be unduly harsh to expect the Applicant to internally relocate particularly in view of the medical evidence.

3. Grounds 2, 3 and 5 are arguable for the reasons stated in the grounds and have a bearing on the judge's credibility finding in some part with regards to Ground 1. The negative credibility finding with regard to the absence of Mr Khan has a bearing on whether the credibility findings of the judge can be sustained with regards to evidence which the judge was expecting Mr Khan to provide in support of the Applicant's claim. There is an arguable error of law with regards to the issue of the findings on asylum and humanitarian protection."

5. An application for permission to appeal by the Respondent was made with regard to the Judge's decision to allow the appeal on human rights grounds but permission to appeal was refused by First tier Tribunal Judge Bristow. The Upper Tribunal has no record of a renewed application for permission to appeal.

Hearing

6. At the hearing before the Upper Tribunal Ms Isherwood who confirmed that no renewed application for permission to appeal had been made on the part of the Respondent, who had granted the Appellant discretionary leave until December 2022.
7. Mr Burrett made submissions on behalf of the Appellant in line with the grounds of appeal. He submitted that it was inconsistent for the Judge on the one hand to find that there would be very significant obstacles to the Appellant's integration in Afghanistan but on the other hand to find it would be reasonable and not unduly harsh for the Appellant to internally relocate. With regard to humanitarian protection, Mr Burrett submitted that it was accepted that there was a conflict in the Appellant's home area at [73] and thus the appeal should have been allowed on this basis.
8. With respect to the Judge's findings on credibility, Mr Burrett submitted that the starting point is that the Judge failed to give any leeway to the Appellant being a minor when he claimed asylum, nor his vulnerabilities and his past experience of abuse was not taken into account. Considering his background and vulnerabilities and his diagnosis of PTSD the Judge had put a higher burden on the

Appellant than was required and had she taken into account his vulnerabilities it is likely the threshold would be lower.

9. With regard to the second ground of appeal whilst the Judge took into account the letter from Barnardo's regarding Mr Khan the Judge then proceeded to engage in speculation as to why he was not called to give evidence. The Judge found that the Appellant's account was not plausible but one would expect an explanation as to why she found this, which was absent.
10. In terms of Ground 3 at [58] Mr Burrett submitted that the Judge ignored the evidence from the Red Cross and appeared to be picking and choosing findings to suit the decision: see pages 180-181, 198, 239-242. There was no reasonable basis for the Judge to find, given the passage of time, his vulnerabilities and isolation and the breakdown of his relationship with Mr Khan that he would be in contact with his family in Afghanistan given the conflict in his home area. At the very least the Judge needed to set out why she found that. He was in contact with them despite his evidence. Mr Burrett submitted that there was a general sense that the Appellant is not believed about anything he says throughout.
11. With respect to Ground 4 and the issue of internal relocation Mr Burrett relied upon his earlier submission that the Judge's finding on this was unsafe, given that she found insurmountable obstacles to integration. Emphasis on severe and complex PTSD.
12. In terms of Ground 5 Mr Burrett submitted that the Judge discounted the medical reports and a lack of weight was given to Professor Katona's report.
13. In her submissions, Ms Isherwood on behalf of the SSHD submitted that there was no material error of law in the Judge's findings and reasons. Her findings commenced at [29] and at [31] she found that the Appellant should be treated as a vulnerable witness in light of Professor Katona's report. This does not mean his evidence should simply be accepted. At [33] the Judge acknowledged the caselaw before any findings on credibility were considered and the Judge referred to what the medical evidence was saying at [34]-[45]. At [46] the Judge noted the lack of documentary evidence and considered what the Appellant said in his asylum interview, which was a finding open to her to be made.
14. In terms of [48] it was open to the Judge to make a credibility finding that the Taliban would simply accept the Appellant's word his brother had resigned from the police force and release him. Ms Isherwood submitted that the findings at [49] and [50] were telling points in that it was a silly decision for the Appellant to get into a car with strangers, particularly given the family would have been more careful since getting the letters. Bringing all that together that

was why the Judge found that the Appellant had fabricated his claim.

15. Ms Isherwood proceeded to take the Upper Tribunal through the remainder of the Judge's findings at [52]-[77]. She submitted that it was clear from determination that the Judge was aware of the Appellant's vulnerabilities, age at the time he claimed asylum and his age at the time of the hearing and his evidence saying someone went to his home area. She submitted that the Judge referred multiple times to the asylum interview record and that her findings were not based on speculation but were sustained findings.
16. In reply, Mr Burrett submitted that the fact is once the Judge had found there was a conflict in the Appellant's home area, the arguments were not simply about his brother being a police officer but about the Appellant being targeted for this reason in the home area and the Judge needed to consider alternatives e.g. risk from the Taliban. Mr Burrett submitted that the Judge did not reject the Appellant's credibility out of hand but accepts it in part eg how he was abused, which was an important finding and having accepted that she needed to have acknowledged why she believes the Appellant about other matters. Mr Burrett submitted that the Judge's reasoning just does not fit together properly.
17. We reserved our decision which we now give with our reasons.
18. Following the hearing the Upper Tribunal apprehended that, due to the grant of discretionary leave to remain to the Appellant, in light of section 104(4A) of the NIAA 2002, representations were required pursuant to section 104(4B) of the NIAA 2002 as to whether the Appellant sought to continue his appeal on asylum and humanitarian grounds and directions were issued requesting the parties' respective positions *cf.* MSU (S.104(4b) notices) Bangladesh [2019] UKUT 00412 (IAC). On 18 February 2022, the Appellant's representatives served a section 104(4B) notice and an application to extend time. The Respondent offered no objection in light of the confused circumstances around applications from both parties seeking permission, one being initially undetected. Directions were then issued extending time for the Appellant to serve the section 104(4B) notice and permitting the Appellant to pursue his appeal.

Findings and reasons

19. We find that the First tier Tribunal Judge made material errors of law in her decision. Our reasons are as follows:
 - 19.1. We find there is merit in the first ground of appeal, in particular, that the Judge engaged in speculation as to the plausibility of the Appellant's account, absent any evidential basis: at [46]-[49] and [53] of the decision and reasons. These concerned matters central

to the Appellant's asylum claim viz whether or not the Appellant's brother would drive a police jeep to the family home; whether he would carry a machine gun; whether or not the Taliban would accept the word of the Appellant's brother as to his resignation from the police; why the Appellant would get into a stranger's car and whether or not he would have been provided with a mobile telephone at the outset of his journey, absent any evidence on the point. We bear in mind the judgment of Lord Justice Neuberger (as he then was) in HK [2006] EWCA Civ 1037 and respectfully adopt his findings at [28]-[30]. In particular at [29]:

"29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which the overwhelming majority of residents of this country will be wholly unfamiliar."

- 19.2. As to the second ground of appeal, this concerns the Judge's finding at [57] that the Appellant had not provided a credible explanation as to why he had not asked Mr Khan to come to the Tribunal to give evidence as a witness. The Judge went on to find that there was no credible evidence that Mr Khan was charged with a criminal offence involving the appellant. However, we find that this was not the issue. As the Appellant's representative submitted at the hearing, given that the Appellant had difficulties whilst living with Mr Khan which resulted in him being taken into care, as attested to by the letter from Barnardo's at [AB 320-321] of the Appellant's bundle, it was not surprising that Mr Khan had not been asked to give evidence. We find that in these circumstances it was not properly open to the Judge to expect Mr Khan's attendance as a witness at the Appellant's appeal and it was unsustainable for her to find the Appellant's explanation not to be credible.
- 19.3. The third ground of appeal asserted that the Judge erred in failing to take account of the evidence in relation to the issue of family support and contact. There was evidence from the Red Cross [AB 180-181, 185 and 239-242] that the Appellant had sought to trace his family but they had been unable to locate them in their home area of Loghar province. In particular, at [AB 322-323] the Red Cross confirm that they were unable to obtain any information regarding the Appellant's older brother and that the number provided was not for his brother. It was asserted that the Judge failed to consider the evidence of the Appellant's distress at being out of contact with his family and evidence of his suicide attempt in 2017 [AB 193-196] yet somehow finds that he is in contact with his own family [64] and

that his relatives in Kabul would provide him with a network of support [71]. We find that this ground is made out in that there was no evidential basis to support the Judge's finding that the Appellant was in contact with his birth or extended family members in Afghanistan.

- 19.4. In terms of the fourth ground of appeal, we agree with Mr Burrett's submissions that the Judge's finding that it would not be unduly harsh or unreasonable to expect the Appellant to relocate away from his home area, which she found at [73] was an area to which article 15C applied, to Kabul whilst at [77] finding that there would be very significant obstacles to his integration in Kabul is inconsistent. Whilst we accept that the test for internal relocation and for establishing very significant obstacles is not identical, if anything the test for the latter is higher, yet the Judge found that it was met. Therefore, we accept that these two findings do not sit well with each other. In the absence of a renewed challenge by the Respondent to the Judge's article 8 finding, that is preserved, and we find that the Judge's finding that the Appellant could internally relocate to Kabul is unsustainable.
- 19.5. The fifth ground of appeal asserted that the Judge at [40]-[44] appeared to discount the evidence of Professor Katona and erred in relying upon the decision in HE (DRC) [2004] UKIAT 00321 rather than the subsequent relevant caselaw of JL (China) [2013] UKUT 00145 (IAC). We are not persuaded that this ground of appeal is made out, given that at [77] one of the key reasons the Judge provided for finding that it would be difficult for the Appellant to integrate was his mental health, which would indicate that she accepted Professor Katona's opinion that the Appellant has complex PTSD which would worsen significantly if faced with removal to Afghanistan. We do, however, accept that the Judge does not appear to have factored in the impact of the Appellant's mental health upon his ability to give evidence and therefore on his credibility generally.

Decision

20. We find that the decision and reasons of the First tier Tribunal Judge contains material errors of law and requires setting aside in terms of her findings pertaining to asylum and humanitarian protection, other than the findings with regard to Article 8 of ECHR, which are preserved.
21. Given that this is the second time that the appeal has reached the Upper Tribunal we have decided that it should remain in the Upper Tribunal. The appeal is adjourned for a resumed hearing before the Upper Tribunal.
22. We are conscious that the situation in Afghanistan has changed substantially since the time of the hearing before the First tier

Tribunal on 14 November 2019 and anticipate that the parties may wish to rely upon updated country evidence, which should be served in an indexed and paginated bundle 7 days before the date of the resumed hearing. A Pashto interpreter will also be required if it is intended that the Appellant give evidence before the Upper Tribunal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

10 March 2022