**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/03873/2020
(UI-2021-000878)

**THE IMMIGRATION ACTS**

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| **Heard at : Field House** | **Decision & Reasons Promulgated** |
| **On : 14 April 2022** | **On : 8 June 2022** |

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**KHALID KHAN STANIKZAI**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms P Heidar of AA Immigration Lawyers
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision refusing his asylum and human rights claim.

2. The appellant is a citizen of Afghanistan born on 3 July 1997. He arrived in the UK on 4 September 2011, aged 14 years, and claimed asylum on 7 September 2011. His claim was made on the basis that he was at risk of being forcibly recruited by the Taliban on return to Afghanistan owing to his father's membership of the Hizb-i-Islami. He claimed that his father had died in 1999 and he had been sent to the UK by his mother to avoid being recruited by the Taliban. She sent him to his father's brother, his paternal uncle Mohammed Gul, who had been living in the UK as a refugee since 2000. It was claimed that he had since lost contact with his mother and that he was unable to return to Kabul.

3. The appellant's asylum claim was refused on 2 November 2011, but he was granted a period of discretionary leave as an unaccompanied asylum-seeking child (UASC) until 1 November 2014. He appealed against that decision, but his appeal was dismissed in a decision promulgated on 29 December 2011. In that decision, First-tier Tribunal Judge Balmain did not accept the appellant's account and found that he could, in any event, relocate to Kabul where he had family support and would not be at risk.

4. On 24 October 2014 the appellant applied for further leave to remain. His application was refused on 3 November 2015, and he appealed against that decision. His appeal was allowed by First-tier Tribunal Judge Lloyd on 4 November 2016 on the limited basis that the respondent was to re-consider the decision in relation to three matters, namely family tracing, section 55 of the Borders, Citizenship and Immigration Act 2009 and the Home Office Asylum Policy Instruction: Discretionary Leave issued on 18 August 2015, none of which had been considered.

5. The respondent re-considered the decision and refused the appellant's claim again, in a decision dated 27 February 2020. In so doing, the respondent, relying upon the findings of First-tier Tribunal Judge Balmain in dismissing the appellant's appeal, did not accept that his father was a member of the Hizb-i-Islami and did not accept that he would be forcibly recruited by the Taliban on return to Afghanistan. The respondent considered that the appellant could safely and reasonably relocate to Kabul where he had family support and found that his removal to Afghanistan would not breach his human rights. The respondent had regard to the best interests of the child and to the question of family tracing but noted that the appellant was now an adult. The respondent considered that the appellant did not qualify under the Asylum Policy Instruction: Discretionary Leave and found there to be no exceptional circumstances justifying a grant of leave on that basis.

6. The appellant's appeal against the respondent's decision was heard by First-tier Tribunal Judge Hussain on 27 May 2021. The appeal was heard remotely by video-link. The judge heard oral evidence from the appellant and his paternal uncle, Mohammed Gul, with whom he was living. The appellant had produced his father's ID card for the appeal which he stated had been obtained by his uncle. His uncle's evidence was that he had obtained the ID card when he visited Afghanistan on a trip to Pakistan five years previously and had made

contact with the appellant's maternal uncle who had given him the card. The judge did not accept his account of managing to get in touch with the appellant's maternal uncle by leaving his number and a message at a few shops and considered that the appellant had in fact maintained contact with his mother and maternal uncle and could therefore obtain support from them on return to Afghanistan. The judge did not accept that the ID card was a reliable document. He declined to depart from the findings previously made, but in any event considered that the appellant would be able to relocate to Kabul where he would have some family support. The judge found that the appellant would be at no risk on return to Afghanistan. He considered that the appellant's removal would not breach Article 8 as he could re-establish his private life in that country. He accordingly dismissed the appeal on all grounds.

7. The appellant sought permission to appeal the decision to the Upper Tribunal on three grounds: that the judge had failed to consider relevant matters such as support in Kabul, when concluding that the appellant could relocate to Kabul in accordance with AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130; that the judge had failed to consider the Home Office policy on Discretionary Leave and the question of settlement after six years of discretionary leave; and that there had been an insufficient assessment of Article 8.

8. Permission was granted in the Upper Tribunal and the matter came before me.

**Hearing and Submissions**

9. Ms Heidar submitted firstly that the judge had erred in law by failing to take into account the Home Office discretionary leave policy, despite the fact that she had made submissions on the matter before him. She submitted that that was material because the appellant qualified for settlement under the policy, having had six years of discretionary leave. Her second submission was that the judge had made inadequately reasoned findings on AS and had failed to consider what the guidance in that case required, in particular consideration of the appellant's age when he left Afghanistan. The judge had made no findings on the support that the appellant's maternal uncle could provide and had failed to consider how the appellant could live in Kabul. As for the third ground, Ms Heidar submitted that the judge had made mistakes of fact in his Article 8 assessment which amounted to material errors of law. He had proceeded on the incorrect basis that the appellant had been living unlawfully in the UK, which was relevant to the question of his ability to meet the requirements of the immigration rules and his ability to qualify under the discretionary leave policy and was relevant to the weight to be given to his private life in the UK and the public interest assessment.

10. Mr Melvin relied upon the detailed rule 24 response provided by his colleague Mr Tan. With regard to the first ground, he submitted that the judge's failure to consider the discretionary leave policy was immaterial because the appellant could not qualify for discretionary leave in any event. The second

ground relating to AS was just a re-arguing of the facts. It was found that the appellant had contact with his family and would have family support in Kabul and the judge's decision was consistent with the guidance in AS. As for the judge's Article 8 assessment, there was very little in the way of evidence from the appellant and he could not demonstrate compelling circumstances outside the immigration rules.

11. Ms Heidar reiterated the points previously made in response.

**Discussion**

12. I find there to be no merit in the grounds of challenge.

13. The first ground is simply misconceived. It is clear that the appellant could not qualify under the discretionary leave policy and, as such, any omission by the judge in referring to the policy was immaterial. Ms Heidar submitted that the appellant's discretionary leave was extended under section 3C of the Immigration Act 1971, so that he had completed more than six years of discretionary leave and therefore qualified for settlement under the terms of the policy. However, that was not what the policy said. She relied upon section 10.1 of the policy at page 144 of the appeal bundle, which set out the transitional arrangements for those granted discretionary leave before 9 July 2012. The reference to six years' continuous discretionary leave applied to those who qualified for further leave on the same basis as their original discretionary leave was granted and referred to the circumstances at the time the decision was made. As Mr Tan pointed out in the rule 24 response, the appellant was an adult at the time of the respondent's decision and therefore no longer qualified for further leave on the same basis as that upon which the discretionary leave was granted. There was no reason for Judge Hussain to consider Judge Lloyd's decision to remit the matter to the respondent since the respondent had re-considered the decision on the three relevant bases, namely family tracing, s55 and the discretionary leave policy, and none of those matters were material by the time the decision was made on the appellant's application as he was no longer a child.

14. The second ground raised by Ms Heidar (which was the first of the written grounds) was in relation to the guidance in AS. However, again, I find no merit in that ground. There was no challenge to Judge Hussain's adverse credibility findings and therefore the unchallenged findings of fact, as previously found by Judge Balmain, were that the appellant retained contact with his family in Afghanistan and that he would have family support in Kabul. Indeed, Judge Balmain referred, at [30] of her decision, to Mr Gul's evidence that the appellant had previously lived in Kabul and she considered that his life experience was therefore not as narrow as a child who had not ventured outside his home village. Judge Hussain found Mr Gul's claim to have managed to make contact with the appellant's maternal uncle within a short visit to Kabul to be unbelievable and found that the reality was that they had maintained contact with the family members in Afghanistan and that those family members would be able to support the appellant in Kabul. As the

respondent properly found for the reasons given in the rule 24 response at [7] to [9], the judge's consideration of the risks the appellant could face on return to Kabul was entirely consistent with the guidance in AS and it is clear that the judge had full regard to the appellant's particular circumstances as set out at (iii) of the headnote. The judge was clearly aware that the appellant had left Afghanistan as a child of 14 years of age and I reject the assertion that his failure to make specific mention to his age was an indication of a failure to conduct a full assessment of his circumstances.

15. As for the third ground, again I find no merit in the challenge to the judge's assessment and conclusions. Ms Heidar submitted that the judge had made errors of fact which undermined his assessment of the appellant's ability to meet the requirements of the immigration rules and to qualify under the discretionary leave policy and which materially impacted upon his assessment of his private life and the public interest in his removal. Such errors arose, she submitted, from the judge's misunderstanding of the appellant's immigration status during his residence in the UK. She referred in particular to the judge's reference at [27] to much of the appellant's stay in the UK being unlawful and at [29(i)] to the appellant having entered the UK unlawfully. However, when pressed, she accepted that the appellant had indeed entered the UK unlawfully. I cannot see any basis upon which Ms Heidar could properly assert that the appellant was able to demonstrate ten years' lawful residence in the UK. It may be that the judge wrongly described the majority of the appellant's stay in the UK to be unlawful, but as the rule 24 response properly stated, his status was certainly precarious, and his private life thus attracted little weight in the proportionality assessment. As Mr Melvin submitted, there was very little in the way of evidence presented to support an Article 8 claim and nothing that demonstrated any compelling circumstances outside the immigration rules. The judge undertook a lengthy assessment from [27] to [30], having full regard to the appellant's circumstances in the context of the relevant statutory provisions and was perfectly entitled to conclude that the public interest in his removal prevailed.

16. In all of the circumstances, the judge was perfectly entitled to conclude, at the time of the hearing and on the basis of the evidence before him, that the appellant was at no risk on return to Afghanistan and that his removal would not disproportionately interfere with his private life. Whilst the situation in Afghanistan has clearly changed significantly since the hearing, the judge made no errors of law in dismissing the appeal on the basis of the circumstances at that time. It is of course open to the appellant to make a fresh claim on the basis of the changed circumstances, but the grounds of appeal do not identify any errors of law in the judge's decision as it was made at that time.

## DECISION

17. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: S Kebede Dated: 14 April 2022
Upper Tribunal Judge Kebede