Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/12904/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 May 2013	**On 14 August 2013**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SAYADAMIR YAGHOBI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Wilford C ins Afro-Asian Advisory Service
For the Respondent: Ms L Kenny, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by a citizen of Afghanistan who was born on 10 December 1993. On 4 November 2011, when the appellant was aged 17 years, the Secretary of State refused to vary his leave to remain in the United Kingdom but did not actually make an "immigration decision" within the meaning of section 82(2) of the Nationality, Immigration and Asylum Act 2002 until November 2012, by which time the appellant was aged 18.

2. The appeal was heard by First-tier Tribunal Judge Aujla, and he dismissed the appellant's appeal, but he made very positive findings of fact. Paragraphs 44 and 45 are particularly helpful to the appellant, and this is what the judge said:

> "44. No credibility issues arose regarding the appellant's account about what happened to him before he came to the United Kingdom. I therefore have no doubts about his credibility and accept and find that the appellant was at risk of being forcibly recruited by the Taliban before he left the country. There is nothing to suggest that the security situation in Wardac province had improved. The Taliban are still active in the area. In the circumstances I accept and find that the

> appellant would be at risk of persecution and ill-treatment in his locality on return to Afghanistan. The remaining issue in this case, as accepted by both representations, is whether or not the option of internal relocation to Kabul was open to the appellant, and whether or not it would be reasonable to expect him to relocate there.
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> 45. Insofar as the appellant's family were concerned, the appellant stated in his witness statement as well as interview that he was not in contact with his family. He made the same claim at the previous hearing. He repeated it in evidence before me. He was not in contact with his family and he was not even aware whether or not they were still alive. In answer to a question from Mr Zukunft, the appellant clearly stated that there was no arrangement in place for him to contact his family to inform them that he had arrived safely in the United Kingdom. The agent told him that he would inform the family of his safe arrival. Having found that I had no concerns about the appellant's credibility, I find and accept that the appellant was not in contact with his family and never had been. He was not aware of their whereabouts in Afghanistan. I therefore find that the appellant would not have familial support on return to Afghanistan."

3. In short, the First-tier Tribunal Judge found that the appellant was at risk of persecution if he returned to his home area, but the First-tier Tribunal Judge also went on to find that the appellant is not at risk now. He has achieved his majority and, broadly speaking, a young man from Afghanistan who is at risk in his home area can reasonably be expected to return to Kabul and live there safely. Nothing before me suggests that this is not such a case. Again, broadly speaking minors, even minors who are approaching their majorities, cannot be returned safely to Kabul.

4. Mr Wilford for the appellant says that the effect of Judge Aujla's findings is that the appellant was a refugee when the appellant says that he was not. Unless that is, he could not have been returned. Here Mr Wilford relies on the so-called **Rashid** principle which was explained particularly in the Court of Appeal in the case of **KA and Others v SSHD [2012] EWCA Civ 1014**. The appellant would not have been a refugee if he could have had family support away from Kabul. The Secretary of State did nothing to investigate that possibility, although the appellant had been quite straightforward and presumably in the light of other findings entirely frank about contact addresses for his family in Afghanistan.

5. Mr Wilford says, and I think he is right, that this is a case where the appellant has been deprived of a chance of showing that he could not be returned by the Secretary of State not testing the claim that he had no contact and that the contact addresses he had did not work.

6. Broadly speaking the appellant should be put in the position he would have been in if he had been recognised as a refugee when he should have been. The decision in **KA** has been considered by the Court of Appeal in **EU [2013] EWCA Civ 32** which was clearly wary of the **Rashid** principle and expressed concern about the undesirability of treating a person as if he were a refugee when plainly he was not. That undesirable quality of course has to be balanced against the undesirability of not recognising a person as a refugee when that person should have been recognised as a refugee. It may be that the difficulty, if that is what it is, is that had the appellant have been recognised as a refugee when he should

have been he would have been given five years' leave to remain, even though in fact it was reasonably likely that he would not have needed that period if recognising him as a refugee throughout his majority only would have been sufficient.

7. I am persuaded that this is a case where the First-tier Tribunal failed to follow the approach taken in **KA** and that I have to allow the appeal on the grounds that it is not in accordance with the law.

8. I make it plain it is not immediately clear to me what I must do next, but I think the answer is, having made that finding, to give a direction based on the direction given in the case of **AA** and explained at paragraph 11 of **KA** where it was noted that the court granted relief in the form of a direction under Section 87 of the Nationality, Immigration and Asylum Act 2002 requiring the Secretary of State to consider whether, in the light of the judgments of the courts and of any further representations made by the appellant within 21 days, a period of leave should be granted and if so, for how long.

9. I do not think that this is a case where the appellant's clam under Article 8 of the European Convention on Human Rights makes any difference to what I have considered already. It is not a case where the appellant has established any right to be in the United Kingdom independent of his right to be recognised as a refugee. It is not a case of strong family ties for example, as I understand it, and I see no additional error created by the Immigration Judge's decision to dismiss the appeal on Article 8 grounds.

10. It follows therefore that I set aside the decision of the First-tier Tribunal. I substitute a decision that the decision was not in accordance with the law, and I give the following directions:

Directions

The Respondent must consider whether, in the light of this judgement and any further representations made by the appellant within 21 days, a period of leave should be granted and if so, for how long.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 23 May 2013