Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10984/2019

THE IMMIGRATION ACTS

Heard on: 7th January 2021
At: Field House

Decision & Reasons Promulgated
On: 26th February 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

FH
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Fitzsimons, Counsel instructed by Duncan Lewis & Co Solicitors**
For the Respondent: **Mr Lindsay, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born in 1997. He appeals to this Tribunal, on protection and human rights grounds, against the Secretary of State's decision to refuse to grant him leave to remain.

2. The Appellant has lived in this country since he was 12 years old. He arrived in October 2009 having made the journey from Afghanistan by land and sea and sought protection. Although asylum was refused he was between 2010 and 2013 granted a period of Discretionary Leave, subsequently extended by virtue of s3C of the Immigration Act 1971. The Appellant has however been without any leave to remain in this country since he became 'appeal rights exhausted' on the 20th April 2016, his appeal against the refusal of asylum having been dismissed by the First-tier Tribunal (Judge Bennett).

3. The history of the present proceedings is as follows. On the 25th October 2016 the Appellant made further representations to the Secretary of State. By her letter of the 18th October 2019 the Secretary of State agreed to treat those representations as a 'fresh claim' on both protection and human rights grounds; she was not however prepared to grant leave. The Appellant appealed to the First-tier Tribunal. On the 12th December 2019 the matter came before Judge Minhas, who by his decision of the 9th January 2020 dismissed the appeal on all grounds. On the 6th February 2020 First-tier Tribunal Gumsley granted the Appellant permission to appeal to this Tribunal. The matter was unfortunately then adjourned because of the Covid-19 pandemic. It was not heard until the 15th September 2020, when the 'error of law' hearing was conducted via remote means. On the 28th October 2020 I handed down a decision setting the decision of Judge Minhas aside on all grounds. That decision is appended. I directed that the matter would be brought back before me for a further hearing in order that I could 're-make' the decision in the Appellant's appeal. In order to best facilitate the giving of live evidence this was to be a 'face to face' hearing. On the 3rd January 2021 the Prime Minister announced that from Monday the 4th January the country would once again go into 'lockdown'. I contacted the parties to see if they wished to go ahead with a hearing at this time, particularly since it required travel into central London. The Appellant's solicitor informed me that both Counsel and the Appellant wished the appeal to go ahead, and Mr Lindsey for the Secretary of State similarly had no objection.

Preliminary Issues

4. At the outset of the hearing Mr Lindsey raised two preliminary issues.

5. The first was that he did not consider it appropriate for the matter to proceed without the parties, or Tribunal, having had sight of the 2016 decision of First-tier Tribunal Judge Bennett. This decision is referred to in the Secretary of State's refusal letter, and in the decision of Judge Minhas, but was not on the court file. I entirely agree. This issue was resolved by Ms Fitzsimons who was able to provide me with an electronic copy, and a hard copy to Mr Lindsey, who was then given time to read the decision.

6. The second concerned a report in the Appellant's bundle dated 31st December 2020 by Consultant Psychiatrist Dr Nuwan Galathappie. At paragraph 10 there is a list of documents that Dr Galathappie had before him when he made his assessment. The list does not include the Secretary of State's reasons for refusal letter. Mr Lindsey submitted that this was contrary to part 10.1 of the Practice Direction[1]:

> 10.1. A party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, **the reasons why the appellant's claim or application has been refused by the respondent** and copies of any relevant previous reports prepared in respect of the appellant.

Given the apparent failure of the Appellant's solicitors to provide Dr Galathappie with a copy of the refusal letter, he submitted that his expert report should be excluded from the evidence.

7. I have had regard to The Tribunal Procedure (Upper Tribunal) Rules 2008 Rule 15(2):

> (2) **The Upper Tribunal may—**
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> (a) admit evidence whether or not—
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> (i) the evidence would be admissible in a civil trial in the United Kingdom; or
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> (ii) the evidence was available to a previous decision maker; or
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> (b) **exclude evidence that would otherwise be admissible where—**
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> (i) the evidence was not provided within the time allowed by a direction or a practice direction;
>
> (ii) **the evidence was otherwise provided in a manner that did not comply with a direction or a practice direction**; or
>
> (iii) it would otherwise be unfair to admit the evidence.

8. I accept that if there was indeed a failure to give the refusal letter to Dr Galathappie this could potentially be contrary to the Practice Direction. I am however mindful that Dr Galathappie was well aware of the why the Appellant has been refused asylum. That is because he was supplied with both of the decisions of the First-tier Tribunal, wherein extensive negative credibility

[1] Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal

findings are made, largely echoing the Respondent's position on the historical narrative advanced by the Appellant. The Practice Direction requires that the expert is made aware of the "reasons why the appellant's claim or application has been refused by the respondent": given the clear terms in which Judge Bennett in particular expressed himself, I am satisfied that Dr Galathappie was so aware. For that reason, I do not consider it to be in the interests of justice to exclude the report of the Consultant Psychiatrist. I add for the sake of completeness that Ms Fitzsimons' instructions are that contrary to the face of the report, the 'reasons for refusal 'letter was included in the papers sent to the doctor: it is omitted from his list in error.

9. Ms Fitzsimons raised a preliminary issue of her own. She made an application for the Appellant to be treated as a vulnerable witness for the purpose of the Joint Presidential Practice Note No 2 of 2010. I accept, in light of the medical evidence, that the Appellant should be so treated.

Matters in Issue

10. The Appellant maintains that he should be given further leave to remain on protection and human rights grounds. Notwithstanding that there is already a significant finding in the Appellant's favour on a key protection issue [see §15 below] Ms Fitzsimons pursued the Appellant's case on all available grounds[2]. That was of course a matter for her, but that litigation strategy has resulted in this decision being the length that it is, and in taking the time that it has to make: both parties have my apologies for any ensuing delay. Here I summarise the matters in issue, which I will discuss and resolve under the thematic headings below.

The Refugee Claim

11. Notwithstanding the conclusions reached to the contrary by First-tier Tribunal Judge Bennett in 2016, the Appellant asserts that he is entitled to protection as a refugee. He has a well-founded fear of persecution for reasons of his membership of a particular social group, namely a member of his own family. The Appellant asserts that his parents were killed in 2008 and that he would be at risk from the same people who killed them. This is a matter in issue. The Respondent rejects the historical narrative about what happened in Afghanistan before the Appellant left as not credible. In the alternative the Respondent submits that any risk that might have existed in 2008 is now negligible.

[2] I note that in her 96 paragraph 'skeleton' argument Ms Fitzsimons has, in addition to the matters addressed in this decision, submitted that the Appellant has a discrete Article 3 claim based on a risk of suicide. Although that skeleton is dated the 11th December 2019, and has therefore been taken over by events, I was asked to take its contents into account. Given that neither party made any submissions on such an Article 3 claim I have assumed that it is no longer pursued and have not addressed it in this decision.

12. Alternatively, the Appellant submits that if he returned to Nangahar today he would face a real risk of persecution for his perceived political opinion, because he would be seen as 'westernized'. This too is a matter in issue. The Respondent relies on the extant country guidance to submit that no such objective risk arises.

13. Finally, it is submitted that as an orphaned young man the Appellant would be particularly vulnerable to forced recruitment by armed groups operating in Nangahar, including the Taliban and Islamic State in Khurasan (ISIK or Daesh).

14. Each of these limbs require the Appellant to demonstrate that it would be 'unduly harsh' to expect him to internally relocate. This is in issue between the parties. The submissions on this point were confined to the situation in Kabul: it is not suggested that he go anywhere else.

The Humanitarian Protection Claim

15. Having had regard to the Respondent's policy published in the Afghanistan CPIN *Security and Humanitarian Situation* (July 2019) the First-tier Tribunal accepted that the Appellant could not be returned to Nangahar because there exists there an internal armed conflict such that he would face a real risk of indiscriminate violence. At the 'error of law' hearing on the 15th September 2020 Senior Presenting Officer Mr McVeety indicated that this was the Respondent's position, and before me Mr Lindsay accepted that this concession set the parameters of my enquiry.

16. The issue between the parties is whether it would be unduly harsh to expect the Appellant to relocate within Afghanistan in order to avoid serious harm/indiscriminate violence. As above, my enquiry is confined to the situation in Kabul.

Paragraph 276ADE(1)(vi) of the Rules

17. The Appellant asserts that he should be given leave to remain because there are "very significant obstacles" to his integration in Afghanistan generally, but in particular Kabul.

18. The Secretary of State does not accept that such obstacles exist.

The Article 8 Claim

19. Beyond paragraph 276ADE(1)(vi) the Appellant asserts that his removal from the United Kingdom today would amount to a disproportionate interference with the family/private life that he has established here in the past twelve years and so a breach of Article 8 ECHR.

20. The Respondent accepts that the Appellant has established a private life in the time that he has spent in the United Kingdom, but not that the refusal to grant any further leave amounts to a disproportionate interference, given the public interest considerations expressed in Part 5A of the Nationality, Immigration and Asylum Act 2002.

The Evidence

21. The evidence falls into three parts.

22. First there is the Appellant's own evidence, supported to some degree by the written evidence of his cousin, about what happened in Afghanistan and why he left.

23. The second is subjective evidence about the Appellant's long residence, life and relationships in the United Kingdom. This includes not only the Appellant's own evidence, but the compelling and helpful oral testimony of his (former) foster mother, Mrs Din. There are also a number of medico-legal reports that I have taken into account.

24. Finally, there is the evidence relating to the Appellant's likely circumstances should he be returned to Kabul. I must consider the 'objective' country background material, the expert opinions provided, and the more subjective evidence pertinent to how the Appellant might fare.

25. I have read, and have taken into account, all of the evidence before me, carefully and helpfully presented by the Appellant's representatives into a composite bundle. I have also had regard to the 2016 decision of First-tier Tribunal Judge Bennett, which I must treat as my starting point.

The Refugee Claim

26. The Appellant arrived in the United Kingdom in October 2009. There does not appear to have been any dispute about his age at the time, since he was placed in suitable care and subsequently granted Discretionary Leave to Remain: he was then 12 years old.

27. He was interviewed on the 1st February 2010 with the assistance of a Pushto interpreter. He told officers he was from a village in the Shershai district of Nangahar: he was able to name surrounding localities and so that was accepted to be true. He said that he had left Afghanistan because he was afraid of the people who had killed his parents. Who they were, he did not know.

28. The Appellant was then questioned about the detail of his parents' deaths for approximately two and a half hours, with a five-minute break. He was asked to describe the details of their injuries, how the people who gathered in the aftermath came to be there, where he had been at the time, where he was going, how long it took him to get back to the house and who he thinks might have done it. The officer revisited areas of questioning and pressed the Appellant on certain matters, such as whether there had been signs of "forced entry "into his house, and exactly how many bullet wounds he could see on the bodies of his dead parents. I interpolate that this kind of lengthy and intense questioning of a 12 year-old would, or should, not occur today. I have not however been asked to exclude that interview record, and what emerges from it is this.

29. The Appellant explained that on the day in question he was on his way to the mosque in order to attend midday prayers when he met with a friend, who was also on his way to mosque. This friend told the Appellant that gunshots had been heard near to his house. The friend carried on his way, but the Appellant was curious to know what the shots might have been, so cautiously made his way back to his home. When he arrived, he saw that a crowd of people had gathered there, including his maternal uncle. The Appellant went inside and saw the body of his father lying on the floor of the 'guestroom' (I understand this to be a reference to the *baytak*, a room traditionally found in Pukhtun homes where the men of the house can receive outside visitors without them entering the main house itself). His mother's body was in the kitchen. He was unable to say whether there had been "forced entry". Asked who he thought might have done this, he was unable to say. In response to the officer's questions the Appellant said that his father used to receive regular visits from men with "long beards" but he never heard the conversation as he was playing in the courtyard. In the aftermath of the killings his uncle took the decision, and made the appropriate arrangements, to send the Appellant and his brother away. They stayed with this uncle for some weeks before being sent on their way to Europe.

30. As Tim Foxley[3] notes in his report of the 19th February 2016, all of this was entirely unremarkable. Nangahar was at the material time a Taliban stronghold, and the group has been responsible for the deaths of thousands of civilians. The account was therefore plausible in the context of the background material. Mr Foxley further comments that it was plausible in light of his knowledge of Afghani society: it would in his view be unlikely that the Appellant would be able to give any more information than he did about the men with long beards, or what they might have been discussing with his father. Similarly he would have been expected to follow his uncle's instructions without question.

[3] Mr Tim Foxley MBE has prepared two reports for the purposes of this appeal. He is a political and military expert who has specialised on Afghanistan for twenty years. He served in the British Army in Afghanistan and has latterly been employed by the Ministry of Defence. His expertise is accepted by this Tribunal, and uncontested by the Secretary of State.

31. The Appellant's claim was not however free of difficulties.

32. Prior to the interview he had completed an 'Statement of Evidence Form' (SEF) with his then representative. This had said that he was actually *in* the mosque when he received the news. At the interview this discrepancy had been put to him and he had said that the statement was wrong – this was a mistake. The Respondent, and then Judge Bennett, found this discrepancy to weigh against him. In his decision of the 5th April 2016 Judge Bennett found "a boy of twelve might ordinarily be expected to have no difficulty in remembering where he was when an event occurred that saw the start of a very significant series of events in his life…".

33. A second matter found by Judge Bennett to weigh against the Appellant arose from the claimed actions of his uncle after the killing. The Appellant had said that his uncle had taken the Appellant and his brother back to his house, and told them to stay indoors, but had himself gone somewhere because he was afraid. Judge Bennett found this to make little sense: if the uncle believed his home to be a target, why would he leave his nephews there?

34. The decision makers who have gone before have further had regard to other material not available to me. I note from the decision of Judge Bennett that the original refusal letter had identified a discrepancy between the Appellant's account, and that given by his brother who also claimed asylum in the UK. It appears that one of them (it is not clear to me which) described their destination that day as the madrassa, the other said it was the mosque. One thought that it took half an hour to walk from there to their home, the other thought it was one and half hours. The brother's appeal had been dismissed by a Judge Broe, who had found that the claim lacked credibility, as I understand it because the brother had produced a 'death card' indicating that his mother had died of her injuries in hospital: when it was pointed out to the brother that this was inconsistent with his account he had changed his story, a development which as Judge Bennett put it, "sowed the seeds of his own destruction", at least insofar as his asylum appeal was concerned. There was confusion over how the boys' uncle came to arrive at the house that day. A further discrepancy arose between the two claims in that the Appellant did not think that they had ever known the telephone number of that maternal uncle; his brother claimed to have had the number, tried it twice, but then it had gone dead. All of this led Judge Bennett to conclude that the account was not capable of discharging the burden of proof and the appeal was dismissed.

35. In evaluating the narrative today my starting point must be the findings of Judge Bennett which stand as an authoritative determination of the claim as it was presented on the 5th April 2016: Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702. I should only depart from those findings if there is some reason to do so.

36. Ms Fitzsimons asked me to do so on the basis of the new evidence which had led the Secretary of State to accept the further submissions made on behalf of the Appellant as a 'fresh claim' under paragraph 353 of the Immigration Rules.

37. The first item was an updated report by Mr Foxley dated 6th July 2017. I have not derived any real assistance from this report. Although I do not in any way doubt Mr Foxley's expertise, its contents - insofar as they relate to the plausibility of the Appellant's account - add nothing to the report already prepared by Mr Foxley and placed before Judge Bennett in 2016. That the account was plausible in the context of the background material does not appear to have ever been in doubt.

38. The second item was a statement dated 4th December 2019 by the Appellant's cousin Ajmal Ali, who provided a copy of his British passport as evidence of identity. There are two matters that limit the weight that I can attach to this evidence. The first is that although Mr Ali did attend the hearing before Judge Minhas in the First-tier Tribunal, he did not attend the hearing before me, and so I have not seen his evidence tested. The second is that Mr Ali is unable to confirm any specific detail of the Appellant's account, since he was in the UK at all material times. I note however that he is able to confirm was that it is his belief that both of the Appellant's parents were killed in Afghanistan in 2009. He states that he does not know who killed his uncle and his wife, but the family believe it to have been the Taliban.

39. The third tranche of evidence relates to the Appellant's mental health. I am provided with a report from Consultant Psychiatrist Dr Galathappie dated the 31st December 2020, and a report by Consultant Clinical Psychologist Dr Rachel Thomas dated the 4th December 2019. The headline conclusion of both of these well qualified professionals is that the Appellant is suffering from severe depression, anxiety and post-traumatic stress disorder (PTSD). Much was said about both advocates before me about the weight that I could attach to these diagnoses when I consider whether to depart from the findings of Judge Bennett.

40. Ms Fitzsimons pointed to Dr Galathappie's view that the Appellant's account of events in Afghanistan is consistent with his reported symptoms which include flashbacks, nightmares, low mood, anxiety, tearfulness, poor concentration, intrusive distressing memories and fearfulness. In his opinion the trauma of losing his parents, and seeing their dead bodies, "would have directly caused his PTSD" [at §87]. Dr Thomas reaches similar conclusions. Ms Fitzsimons accordingly asks me to place considerable weight on these reports in my *Devaseelan* analysis of whether the account advanced by the Appellant can now be accepted to be true.

41. In his submissions Mr Lindsay reiterated his complaint about a failure to comply with the Practice Direction, which I have already dealt with [see above

at my §6-8]. He further suggested that neither doctor had addressed what might be called the countervailing factors – namely the discrepancies identified by Judge Bennett. That failure, submitted Mr Lindsay, mean that Dr Galathappie's views should "not carry any real weight at all". Insofar as both doctors had, in compliance with the Istanbul Protocol and the caselaw of this Tribunal, directed themselves to consider whether the Appellant could be feigning symptoms, Mr Lindsay asked me to reject their professional evaluations on this matter as "wholly unsustainable", because neither had referred to academic sources. Dr Thomas had not, for instance, offered any objective support for her view that many of the symptoms reported by the Appellant, such as appetite disturbance, are not immediately obvious to the layperson as being symptoms of psychiatric disorder.

42. I am satisfied that both doctors are suitably qualified and that they have generally presented fair reports in compliance with their *Ikarian Reefer* duties to this Tribunal. They both make a point of saying that they have assessed that the Appellant is not exaggerating or feigning symptoms, and as experienced professionals, that is a matter for them. I found nothing inappropriate in the comments made by Dr Thomas, who noted that the Appellant presented a "considered and balanced view of his psychiatric symptoms", and that this would be "most unusual for someone attempting to fabricate psychiatric disorder" who would be expected to exaggerate. She also recorded her own observations of the Appellant's low mood and "markedly flattened emotional affect". I entirely reject Mr Lindsay's submission that these comments should attract no weight because they were not supported by academic reference: Dr Thomas *is* the expert. She is a Consultant Psychologist with 18 years PQE and long experience in assessing survivors of trauma. She need not footnote every comment or observation in her report.

43. That said, I must accept the criticism made by Mr Lindsay that neither Dr Thomas or Dr Galathappie appears to have weighed into their evaluation the evidence that the Appellant reported being happy and settled with Mrs Din and her late husband in the years immediately following his arrival. In her evidence Mrs Din reported that at the time the Appellant had told a social worker that he was "in heaven" living in her home, and Mr Lindsay is entitled to wonder whether Dr Galathappie would have drawn such a direct line between the claimed murder of the Appellant's parents and his PTSD, had he been aware of that evidence, relating as it does to a period more proximate in time to the claimed events than today. I further accept that Dr Galathappie has not expressly considered whether the Appellant's symptoms might have other causes. He refers, for instance, to the Appellant's detention in an Immigration Removal Centre, and is plainly aware that he traversed Asia and Europe as a young child, but does not squarely address the very real possibility that either or both of this matters – what Dr Thomas summarises as "cumulatively traumatic life events" - could have given rise to the mental health issues faced by the Appellant today.

44. I do not however think for one moment that any of the diagnoses presented in these reports, and produced by clinical assessment, is wrong. The Appellant arrived in this country on his own, aged 12. The Respondent has never challenged the evidence that in order to get here the Appellant spent many months in the company of violent people traffickers. Implicit in that is an acceptance that whatever the truth might be about why he left Afghanistan, the Appellant was dislocated from his immediate family at a young age and has never seen them again. Although he found happiness and some measure of security in the home of his foster family the Dins, it is hard to imagine that these life events would *not* take their toll on the Appellant's mental health. Add to this the incessant insecurity that he has experienced since his last grant of leave expired in 2013, including a period in immigration detention, and it is clear to see, even for the layperson, why he might be suffering from depression, anxiety and post-traumatic stress disorder. It is for that reason that the general diagnoses made add little to my *Devaseelan* enquiry. Had they been known to Judge Bennett in 2016 they would have been of the same probative value as they are today: limited. Whilst they are wholly consistent with his claimed history, there are many other possible causes. The Appellant's PTSD cannot in these circumstances logically establish that his parents were killed in the manner he describes.

45. There is however one specific point arising from the medical reports which does merit considerably more weight in my evaluation. That is the evidence of Dr Thomas that such narrative discrepancies as are identified by the Respondent (and Judge Bennett) could be explained by reference to the Appellant's conditions. She writes [from her §66] that the Appellant:

> "….is showing considerable cognitive impairment and slowing consequent on a severe depressive disorder and I consider, therefore, that psychiatric factors are of real importance in relation to inconsistency of narrative and if these have not previously been considered in determining credibility then this needs to be undertaken.
>
> There are also factors relating to age and developmental trauma and its impact on memory that may well have impacted on the information [the Appellant] is able to recall from his time in Afghanistan. He instructs that he was 12 years old when his parents were killed, that he saw their dead bodies and that he was made to leave Afghanistan rapidly thereafter with an agent and endure a long and arduous journey as an unaccompanied minor to the UK. It can readily be seen how the cumulatively traumatic nature of these experiences at a very young age will have contributed to [the Appellant] being liable to forget details of this time.

> Indeed, [he] stated at interview, as described above, that he has blocked out memories of his time in Afghanistan in a form of post-traumatic avoidance because these have been so traumatic to him"

46. That expert opinion was not available to Judge Bennett in 2016. Nor, I note, was the decision of the Court of Appeal in AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123, which was handed down the following year. Given the terms in which he expressed himself, I cannot be satisfied that Judge Bennett's decision would have been as it was, had the medical evidence, and the decision in AM, been before him. Had the procedural fairness issues canvassed in AM been raised here, the Appellant would undoubtedly have been treated as a vulnerable witness, and his evidence assessed accordingly. Judge Bennett's formulation "a boy of twelve might *ordinarily* be expected to have no difficulty in remembering…" is now, in light of Dr Thomas' evidence, obviously problematic. As her report makes clear, it is not in fact in the case that a boy of twelve *would* ordinarily be able to accurately recall all the details of a deeply traumatic event: to the contrary the human brain will deliberately block memories or certain details as a self-protection mechanism. This phenomena, of "post-traumatic avoidance", could be one explanation for the matters that troubled Judge Bennett. Another could be the Appellant's personal characteristics: he is found, on clinical assessment, to have "considerable cognitive impairment".

47. I have given consideration to the countervailing factors identified by the Respondent and by Judge Bennett. As I wrote in my 'error of law' decision I attach no weight at all to the Appellant's fluctuating evidence on how long it might have taken him to walk from A to B on the day in question. It may be reasonable to expect an adult witness to accurately state the time span of a journey taken with regularity, since the time that such a journey will take will inevitably have significance in the ordering of that adult's daily life. I am not however prepared to accept that a 12 year old wandering through the Afghan countryside with his brother could accurately be expected to recount journey times, particularly on a day where, if the account is true, he suffered the greatest trauma of his life. As to his inconsistent evidence on the point, I bear in mind that children are apt to say whatever comes into their head rather than simply saying that they do not know. For the same reason I attach minimal weight to the Appellant's flustered attempts to say how and when his maternal uncle arrived on the scene. Mr Foxley rightly notes that it would be culturally inappropriate for an Afghan child to question his uncle about decisions pertaining directly to him: it seems very unlikely that the Appellant would then have cross-examined his uncle about how he came to have arrived at the murder scene so quickly.

48. As to where the Appellant was when he was told about the gunshots, I recognise the difference in the accounts given, but read that them in light of the

expert opinion of Dr Thomas about the unreliability of memory in such circumstances.

49. Weighing in the Appellant's favour are the following matters. That the account has been, at its core, consistent over many retellings over an eleven-year period. It is an account wholly consonant with the country background material: as Mr Foxley explains, Nangahar, and in particular the rural areas, were in 2009 firmly in the grip of a Taliban insurgency which claimed many thousands of civilian lives. The very young age of the Appellant when he embarked on his journey would tend to indicate that there was some pressing reason for him to leave. Although there is a limit to the weight that I can place on Mr Ali's evidence, I have taken into account the fact that he attended the hearing before the First-tier Tribunal to confirm his belief that his uncle and aunt were indeed shot dead. Some small weight is also attracted by the Appellant's mental health sequalae of trauma. Applying the lower standard of proof and bearing in mind the Appellant's youth at the time that the account was originally given, I am satisfied that it is reasonably likely that the account given is at its core true. I accept that the Appellant's parents were killed by unknown assailants and that an uncle made arrangements for him to leave the country.

50. That does not mean, however, that he has made out a real risk arising from these facts today. These events took place 11 years ago. The Appellant has no real idea of who might have killed his parents, or why. Nor, according to Mr Ali, does anyone else in the family, who can only speculate that it was the Taliban. Whilst that supposition accords with the background material, which demonstrates that the Taliban take brutal reprisals against those they perceive to oppose them, there is no indication in the evidence that this was in fact the case. The fact that men with beards visited the family home to sit and talk with the Appellant's father takes the analysis nowhere. I was taken to no evidence supporting the notion that the Taliban in Nangahar would seek to kill the son of a family who got in their way 11 years ago, particularly since that son was a young boy at the time. Even applying the lower standard of proof, and the *Demirkaya* presumption in paragraph 339K of the Immigration Rules, I am unable to accept that the Appellant faces a real risk of harm from his parents' murderers today.

51. It is no doubt because of that difficulty that Ms Fitzsimons' submissions on the Refugee Convention were in the alternative put on two other bases.

52. The first was that the Appellant would attract the enmity of the Taliban, or possibly the new threat in the area, Islamic State, because he is "westernized". A considerable amount of energy is expended in the Appellant's statement on this topic, but I am unable to do any more than point to the fact that the Upper Tribunal has recently, and categorically, rejected the assertion that "westernised" individuals face a real risk of harm in Afghanistan for that

reason. This was the finding of the Tribunal in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) at [§187]:

> We do not find a person on return to Kabul, or more widely to Afghanistan, to be at risk on the basis of 'Westernisation'. There is simply a lack of any cogent or consistent evidence of incidents of such harm on which it could be concluded that there was a real risk to a person who has spent time in the west being targeted for that reason, either because of appearance, perceived or actual attitudes of such a person. At most, there is some evidence of a possible adverse social impact or suspicion affecting social and family interactions, and evidence from a very small number of fear based on 'Westernisation', but we find that the evidence before us falls far short of establishing and objective fear of persecution on this basis for the purposes of the Refugee Convention.

53. This finding was not challenged to the Court of Appeal and so is expressly upheld in AS (Safety of Kabul) Afghanistan CG [2020] UKUT 130 (IAC) at §7. I should say that it is not entirely clear to me on what basis the Tribunal extended the scope of its enquiry to "more widely in Afghanistan": as far as I can tell the evidence and submissions in the appeal before it related solely to Kabul. Ms Fitzsimons did not however ask me to depart from that country guidance, and so by law am bound to apply it.

54. The final basis upon which refugee protection is sought is that as an unattached young man – that is to say exposed by his lack of family – the Appellant would today face a real risk of forced recruitment or exploitation by armed groups operating in his home area of Nangahar.

55. I am unable to draw any assistance from AS on this point. It would appear that the last time this risk was considered, albeit in the context of children, was in HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC) where the guidance given was this:

> *While forcible recruitment by the Taliban cannot be discounted as a risk, particularly in areas of high militant activity or militant control, evidence is required to show that it is a real risk for the particular child concerned and not a mere possibility.*

56. Nothing in the evidence produced before me suggests that this situation has changed.

57. In his report of the 19th February 2016 Mr Foxley writes that "coercion is not the Taliban's preferred method of recruitment. The Taliban generally prefer to appeal – with some success, given that they are maintaining a strong insurgency force in its 11th year – to potential recruits' sense of pride,

xenophobia, nationalism or Islam" [at Foxley §51]. In his second report, of the 6th July 2017, Mr Foxley acknowledges that it is possible that the Appellant could fall into that group of "vulnerable, suggestible and immature Pushtun youth" [at §56], but I find it to be clear from the evidence that this is not so: the Appellant makes clear that he regards himself as "westernized" with no political or religious leaning towards extremism. It is in my view extremely unlikely that he would fall under the sway of the Taliban in the manner outlined by Mr Foxley, and if he did, as a man of 23 years old, that is a matter for which he would be responsible.

58. I am therefore not satisfied that the Appellant has made out a claim under the Refugee Convention for any of the three reasons advanced by his representatives.

Humanitarian Protection

59. Notwithstanding the United Kingdom's withdrawal from the European Union, the 'minimum standards' of protection set out in the Qualification Directive continue to find expression in the Immigration Rules:

> 339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:
>
> (i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;
>
> (ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
>
> (iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and
>
> (iv) they are not excluded from a grant of humanitarian protection.
>
> 339CA. For the purposes of paragraph 339C, serious harm consists of:
>
> (i) the death penalty or execution;
>
> (ii) unlawful killing;
>
> (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return; or

(iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

60. The First-tier Tribunal found, in unchallenged findings, that in Nangahar the Appellant would face a serious and individual threat to his life or person by reason of indiscriminate violence in a situation of internal armed conflict. The question remains whether it would be reasonable to expect the Appellant to avoid such harms by internally relocating to Kabul.

61. In my assessment of whether it would be 'unduly harsh' to expect the Appellant to live in Kabul Ms Fitzsimons asks me to have regard to the following factors:

i) The Appellant has never lived in Kabul and has no known connection to the city

ii) He has never lived in Afghanistan as an adult and so has little to no understanding of how things 'work' in terms of the job market, obtaining housing etc

iii) Although falling short of Article 15(c) conditions, security and crime remain significant problems in Kabul

iv) The Appellant is already suffering from mental health difficulties and returning him to the country where his trauma occurred would likely exacerbate those problems

v) The objective evidence indicates that he would be unlikely to be able to access meaningful mental health treatment or support

vi) His mental illness will make him stand out, and render him vulnerable

vii) He would face societal hostility (albeit falling short of persecution) because he will be perceived as 'westernized'

viii) As an internally displaced person (IDP) he would be particularly vulnerable to Covid-19

ix) The pandemic should further be considered in that it has placed a considerable burden on the already strained resources available to IDPs in Kabul

62. For his part Mr Lindsay asked me to take into account the following submissions:

i) The Appellant is a physically healthy adult male

ii) The extent of his mental health issues is exaggerated

iii) The Appellant said in oral evidence that he would be prepared to work as a builder if he could find a job, and he has had some vocational training in construction work

iv) He speaks Pushto, and to the extent that he may have lost familiarity with it through a lack of daily use, it would not take him long to recover it

v) Mrs Din could provide him with some financial support whilst he 'got on his feet'

vi) Although he may not be a devout Muslim he has demonstrated his ability to 'fit in' by the evidence of how he manages to meet the expectations of Mrs Din in this regard

63. My starting point is the recent country guidance in AS [2020]:

> *Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan) it will not, in general, be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul and even if he does not have a Tazkera.*
>
> *However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills when determining whether a person falls within the general position set out above. Given the limited options for employment, capability to undertake manual work may be relevant.*
>
> *A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return. A person without a network may be able to develop one following return. A person's familiarity with the cultural and societal norms of Afghanistan (which may be affected by the age at which he left the country and his length of absence) will be relevant to whether, and if so how quickly and successfully, he will be able to build a network.*

64. Having regard to that guidance I note that it is not in general, unreasonable to expect a returnee to settle in Kabul. I must however examine, cumulatively, each of the specific factors raised by the representatives as being relevant to the Appellant. I begin with the external, that is to say the social, economic and security situation in which the Appellant will find himself.

65. The security situation in Kabul is poor. Although the Tribunal in AS rejected the submission that conditions in the city have deteriorated to the extent that Article 15(c) is engaged, its clear findings are that it can still be a dangerous place:

> 201. Kabul (both the city and province) is significantly affected by widespread and longstanding conflict-related violence and has been – at a relatively consistent level - since at least 2016. Some of the violence is targeted (e.g. at police, embassies or ethnic groups) but much of it is indiscriminate. Even the targeted violence affects civilians in an indiscriminate way, because people can be killed or injured as bystanders. There is also a significant problem of violent crime.

66. In respect of political violence, the Tribunal found that the risk to the civilian depended on behaviour: someone who stays at home all the time is at far lower risk than someone who is economically active and must be out on the streets looking for work in crowded places. Further "someone who has an understanding of the culture and society will be more adept at avoiding violence than someone who is ignorant of societal norms" [§202]. In respect of crime, the Tribunal cite the 2019 findings of the Asia Foundation Survey which reported that 15% of the population were affected by crime during the year.

67. The city itself is one of the fastest growing in the world. Approximately 8% of the population are IDPs. The Tribunal acknowledges the concern expressed by the UNCHR and human rights organisations that the "influx of IDPs and refugees has put a huge strain on Kabul's infrastructure, and that the city is, or is close to being, at the limits of its capacity to absorb any further people" [§220]. It is against that background, the panel finds, that the socio-economic situation conditions are extremely challenging:

> 224. The Panel in the 2018 UT decision found that much of Kabul's population lives in inadequate informal housing with limited access to basic services such as sanitation and potable water. They noted that healthcare provision, although poor, is better in Kabul than elsewhere.

> 225. The evidence before us indicates that the position is unchanged. As was the case when the Panel made its findings in the 2018 UT decision, most of Kabul's population is poor, lives in inadequate housing with inadequate sanitation, lacks access to potable water, and struggles to earn sufficient income to sustain itself in a society without any safety net.

68. Ms Fitzsimons asked me to note that these findings were based on the evidence as it stood in 2019. She points to the evidence of Dr Ayesha Ahmad to submit that during the course of the past year the impact of the Covid-19 pandemic has made a bad situation for IDPs considerably worse. Before I consider Dr Ahmad's evidence on this point, it is appropriate that I comment generally on the evidence she has given in her two reports, dated 4th December 2019 and the 4th January 2021.

69. Dr Ahmad lectures at St Georges, and at the Institute for Global Health, both part of the University of London. Her expertise is in global health and she was, at the date of writing, involved in two projects examining the mental health sequalae of trauma, with a particular focus on Afghanistan. She has published numerous articles, edited books and is a contributor to The Lancet. She describes her areas of expertise as psychological trauma and mental health during post-conflict, disability, gender-based violence, gender in conflict and extreme settings, mental health, and the impact of culture on mental illness. Insofar as Dr Ahmad's reports address sociological issues relating to mental health, and health generally, in Afghanistan, I wholly accept her expertise. This is her area of study, and her reports are well referenced; she has drawn on a wide variety of sources and brought her own expertise to bear on the raw data to provide helpful analysis.

70. What is less clear is why Dr Ahmad has been asked to comment on matters such as the current security situation in Nangahar, and whether there is a 'sufficiency of protection' provided by the state. I do not doubt that Dr Ahmad has a general familiarity with the security background to her work, but she is not an expert on these matters, as her report illustrates: in response to these instructions she can offer no meaningful contribution other than to cite other reports, all of which are available to the Tribunal, and in many cases already dealt with in the country guidance. This is a case where the Appellant's solicitors had, at the point that they instructed Dr Ahmad, already obtained two country reports by Mr Foxley. Mr Foxley is, as the Secretary of State has repeatedly accepted before this Tribunal, an eminent expert on security matters in Afghanistan. There was no point at all in asking Dr Ahmad to re-cover this ground. She is not, and does not claim to be, an expert on matters such as "the current risk to civilians in Nangahar", and her instructions should not have included such questions – particularly since, in the case of the most recent report, that was a matter already settled by the findings of the First-tier Tribunal. I make no criticism of Dr Ahmad for attempting to set her work in

context by answering the questions put to her, but those instructing Dr Ahmad may wish to reflect on the utility of obtaining, and paying for, such extraneous evidence.

71. I return to Dr Ahmad's work on healthcare below, but in the context of the humanitarian situation generally I note her January 2021 evidence that the significant challenges and obstacles already faced by the population have been magnified by the pandemic. She reports that the Assessment Capabilities Project Taskforce estimate that over the winter of 2020-21 there will be a significant increase in the number of people facing 'crisis' or 'high' levels of food insecurity in Afghanistan, up from 11.1 million to 13.1 million. The risk of humanitarian crisis is very high with Afghanistan scoring 8/10 on the INFORM risk scale[4]. I accept that the effects of the pandemic, bad everywhere, are likely to be severe in a country such as Afghanistan, and that this will necessarily exacerbate the socio-economic challenges already found to exist at the time of AS.

72. As to the ability of individual returnees to survive economically in such challenging circumstances, the Tribunal in AS found that family or other social networks are an important advantage, but are not essential. A lone male may be able, in time, to build his own network. At [§229] the Tribunal further noted: "even a person who is unable to form any such connections, and who must survive without the benefit of a network, will ordinarily be able to find inexpensive accommodation in a 'chai khana' and (depending on physical abilities, health and other individual characteristics) be able work as a day labourer in the informal labour market in Kabul". The reality of a 'chai khana' is described as involving "sharing a (dirty and unlocked) room and washing facilities– and would lack privacy"; having regard to the conditions generally in Kabul the Tribunal found that for a single man such readily available and cheap accommodation would be adequate. Returnees are on arrival provided with sufficient funds – approximately £125 - to pay for a few weeks of such accommodation.

73. In respect of the attitude of the population generally towards returnees the Tribunal in AS was referred to a German study which concluded that they can face violence and hostility. At [§246] the Tribunal accepted that "some people in Kabul are suspicious of and hostile towards returnees. However, the evidence before us, considered together and as a whole, points to returnees facing challenging circumstances not because they have returned from the west (risk from westernisation was categorically rejected in the 2018 UT decision (at para. 187) and this finding was not appealed), but primarily because of poverty, lack

[4] INFORM is a multi-stakeholder forum for developing shared, quantitative analysis relevant to humanitarian crises and disasters. INFORM includes organisations from across the multilateral system, including the humanitarian and development sector, donors, and technical partners. The Joint Research Centre of European Commission is the scientific lead for INFORM.

of accommodation and the absence of employment opportunities, as well as the security situation.

74. I now turn to the evidence on mental health. In its 2018 decision in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 118 (IAC) the Tribunal made the following undisturbed finding:

> 142. In terms of mental health care, the same EASO Report recorded very high levels of mental health problems in Afghanistan (particularly depression, anxiety and PTSD) creating significant needs but that there was a lack of trained professionals (psychiatrists, social workers, psychologists) and an inadequate infrastructure. Although the Public Health Minister reported that psychological services were available at some 1,500 health centres around the country with 300 dedicated mental health clinics; there was only one dedicated mental health hospital in Kabul and Samual Hall's study in 2016 referred to there being only three trained psychiatrists and ten psychologists in the whole of Afghanistan.

75. To that bleak picture Dr Ahmad adds that mental health provision has suffered disproportionately because of the poor security situation. Targeted attacks against healthcare facilities "are a further reason why mental health fails to be prioritized because accessing any healthcare treatment has to be balanced against the risk of travelling and attending to treatment clinics". In June 2019 the World Health Organisation published statistics to the effect that 1 in 5 people in post-conflict settings are suffering from "depression, anxiety, post traumatic stress disorder, bipolar disorder or schizophrenia": this needs to be contrasted with the figure of 1 in 14 for the global population at large. This is the context in which the lack of mental health provision in Afghanistan needs to be seen: 40 years of conflict has left behind a "mental health epidemic".

76. That prevalence notwithstanding, the literature review conducted by Dr Ahmad demonstrates that mental health issues continue to be stigmatized and misunderstood. In the absence of formal or effective treatment Afghanis tend to characterise mental distress either in non-clinical terms – just being 'sad' – or, as the possession of the body by malevolent spirits. A 2016 study (Ahmad and Dein) found the stigmatisation of poor mental health in Afghanistan arises from the individual being perceived as having a weak faith, or having committed a morally wrongful act, such a spiritual deficiency allowing the *jinn* to take over. Once an individual is perceived to be so possessed – to be in a state of *peryan* – the obvious solution is simply to turn to prayer. Dr Ahmad reports on the harrowing practice of the seriously mentally ill being chained in shrines for 40 days, the length of time considered to be required for a person to heal from *jinn* possession. During such confinement they are provided with a particular diet of bread, water and black pepper, which must be eaten near to the grave of a saint or *pir*. Efforts by the Afghan government to implement 'western' style mental

health treatments such as talking therapies, have been stymied by such beliefs: talking openly about personal matters in counselling is not considered culturally appropriate. That these attitudes are widely held, Dr Ahmad writes, is one reason why services continue to be so lacking and under-prioritized: WHO reported in 2019 that care providers in both the formal and informal sectors found themselves subject to stigma and human rights violations because they undertake that work. Dr Ahmad cites a 2017 academic study (Wildt et al) to summarise the situation on the ground:

> "primary care physicians and primary health care workers often have little or no training in mental health, may not recognise mental disorders, have limited access to psychiatric medicine, and have few outside mental health agencies to whom they can refer".

77. Against that background I consider the personal characteristics of the Appellant.

78. The Appellant grew up speaking Pushto and has by his own evidence continued to speak that language with friends, and family members living in the United Kingdom. Although he says that he has lost some proficiency in it, I agree with Mr Lindsay that this is something that he could remedy within a short time after arriving back in the country.

79. He is physically healthy and told me frankly that he would be able and willing to undertake construction work were it available.

80. I accept that on the evidence before me there is no indication at all that the Appellant has any connection to Kabul. He has never been there and has no family there. Nor, on my own findings, does he have any immediate family to whom he could turn in his home province. Even if he has more distant relatives living somewhere in the country, it appears doubtful, given the level of extreme poverty in Afghanistan, that they would be willing or able to offer financial support to someone who has just come back from the West, after the family spent a considerable amount of money getting him out. That would simply be good money after bad. I note in this regard that Dr Ahmad cites academic research indicating that there is significant stigma attached to 'failed migration'. He would however receive £125 on arrival which would provide a short-term cushion, and Mrs Din acknowledged in her evidence that she would help in some way if she could.

81. Applying the country guidance I have rejected 'westernisation' as a risk factor, but I accept that its flip side - a lack of familiarity with Afghan culture and norms – is relevant to the 'reasonableness' of internal relocation. It is perhaps self-evident that the practical challenges set out above – work, food, accommodation, creating social networks – would all be far easier to navigate for an individual familiar with those norms. Mr Lindsay placed great emphasis

on the fact that the Appellant lived in Afghanistan until he was 12, and that he has not been entirely divorced from Afghan culture since his arrival in the United Kingdom, having had contact, if sporadic, with family members here. The Appellant confesses that he no longer regards himself as a practising Muslim. He describes his own lifestyle, behaviour and values as being 'Western'. He no longer fasts or prays regularly – when he does it is out of respect for Mrs Din, who is very traditional and devout.

82. I have taken those matters into account. I find that the Appellant would not be a fish completely out of the water in Kabul. He knows how to pray, and how to behave as if he is observant. As he has demonstrated in his behaviour under Mrs Din's roof, he is prepared to do that in order to comply with social expectations. He speaks Pushto, and will, I accept, have retained some understanding of how people carry themselves, and behave, in Afghan society. That said, I consider it likely that it would be evident to any close observer that he was not a native Kabuli. Experience of life as a boy in a village does not necessarily equate to life as a man in the city. This will mark him out as different. Dr Ahmad also emphasises that the relevance of the Appellant's decade long absence from Afghanistan is not just in how others perceive him, but in how he is likely to feel himself. She cites research documenting how those returned to Afghanistan after migrating as children experience common difficulties in "reconnecting".

83. In his statement the Appellant states that he is very afraid of returning to Afghanistan. Having accepted that his parents were killed in the manner he describes, I have no reason to doubt that that is the case. Dr Ahmad writes that current academic literature has shifted from previous narrow definitions of conflict related stressors (such as, as I understand her, trauma arising from a particular event) to understanding the impact on mental health as a "continued process", in which stressful social and material conditions will continue to contribute to mental distress. As Dr Ahmad puts it, the Appellant will bear the "dual burden of reintegration plus war exposure". He further lives with the psychological consequences of "migratory stressors": in his case such stressors have included not just the long, arduous and dangerous journey he made as a child, but the period of insecurity and instability he has experienced in the years he has spent trying to regularise his position in the United Kingdom.

84. It is against this evidential background that I assess Mr Lindsay's submission that the Appellant was exaggerating his mental health issues. I have already rejected the suggestion that he is feigning them entirely. For the reasons I set out above [§44] common sense would dictate that a young child dislocated from his family and tasked with making a 6000km journey by land and sea would likely to suffer some psychological consequences. What Dr Ahmad refers to as "migratory stressors" must also be taken into account. Mr Lindsay's submission is that the conclusions of Dr Galathappie and Dr Thomas are to be contrasted with the evidence of Mrs Din that as a teenager the Appellant reported that he

was "in heaven" living in her home, and that he did not apparently seek help from his GP for any mental health concerns until approximately 2018.

85. I have given careful consideration to those submissions, and I have re-read the medico-legal reports before me in the context of the GP records, and the evidence of Mrs Din.

86. The evidence of Mrs Din was – I return to this below in greater detail – wholly credible and compelling. The Appellant came to live with Mrs Din and her husband in 2012. As registered foster carers he was not the first Afghan boy they had looked after: although Mrs Din is herself from East Africa, her late husband was from Peshawar and spoke Pushto. They had therefore considerable experience in looking after troubled boys, and in making them feel secure. The Appellant immediately bonded with Mr and Mrs Din. He was extremely happy in their home and no doubt, relieved to have found some measure of security. Mrs Din describes him as being "kind and content", and in her oral evidence proudly recalled him telling a visiting social worker that he felt he had come to live "in heaven" in their house. Unfortunately, Mr Din died very suddenly in 2013. Mrs Din described this as a "terrible blow" to her and the Appellant. Presumably because she did not have Pushto, social services subsequently tried to remove the Appellant from her care – a move that she and the Appellant fiercely resisted. The Appellant desperately wanted to remain with her and they fought the proposed transfer until they won out. During this period the Appellant had an outstanding application with the Home Office for further leave to remain. It was when that was refused in 2015 that Mrs Din really started to notice the Appellant exhibiting signs of depression. He eventually went to the GP in 2018 upon her insistence.

87. So, in the period closest to his childhood trauma the Appellant appears contented and happy, and it is only later, when faced with the prospect of removal from the United Kingdom, that the Appellant begins to show symptoms of depression. It is possible, as Mr Lindsay suggests, that the visit to the GP in 2018 was part of a strategy on the part of the Appellant to create the evidence necessary to prevent his removal, a strategy that has culminated in him giving fabricated evidence to Drs Galathappie and Thomas. It is possible. But I do not regard it as likely. It seems to me that there is nothing remarkable about a traumatised child appearing happy because he has found a secure and loving home, nor in that child facing the sequalae of his trauma later in life, when challenge piles upon challenge. Nor is there anything out of the ordinary in there being a delay between the onset of symptoms, as described by Mrs Din, and the Appellant seeking help. I conclude that Mr Lindsay is correct to describe this evidence as contradictory: in other words, it's just like real life.

88. For reasons I have already set out above, I am satisfied that the conclusions reached by Dr Galathappie and Dr Thomas are entirely consistent with the sad and troubled life history of the Appellant. He has lost his parents in a brutal

murder, been trafficked across Asia and Europe, become dislocated from the few family members he has in this country, suffered the sudden loss of Mr Din, had to fight removal from Mrs Din's home, and has ever since had the threat of removal from the United Kingdom hanging over his head. Both doctors have considered, and discounted, the possibility that the Appellant is feigning his reported symptoms which include recurrent and distressing memories, flashbacks, fearfulness, auditory hallucination, feeling that the room around him is spinning, tension, feeling 'jumpy', being unable to eat or sleep properly. He shakes and sweats when he feels anxious and has experienced heart palpitations. All of that is consistent with what is recorded by the GP, and the Brent mental care team to whom the Appellant was referred. Mrs Din, the person best placed to have observed the Appellant over a long period of time, has credibly told me about how withdrawn and listless he is, and how worried she is about him. He is demonstrably, and visibly, suffering from mental ill health.

89. The formal conclusion of Consultant Psychiatrist Dr Galathappie, which I accept, is that the Appellant is suffering from severe depression, severe generalised anxiety disorder and PTSD. He requires continuing medication (he is already on Mirtazapine), psychological therapy, and crucially, stability in order to recover. In Dr Galathappie's opinion the ongoing uncertainty over the Appellant's status here is having an adverse impact on his mental health, and the efficacy of treatments that he is being offered. If he is permitted to remain in the United Kingdom, and continues to access treatment, Dr Galathappie considers that the Appellant could make a meaningful recovery (although he notes that the extent of the Appellant's difficulties mean that this will likely take several years). Should he be removed from the United Kingdom, and from his support networks including Mrs Din, Dr Galathappie writes that this will:

> "…significantly worsen his mental health. In my opinion his mental health is likely to deteriorate if returned to Afghanistan and he is likely to find being returned to Afghanistan traumatising. His depression would impair his problem-solving skills and lower his self-confidence. His anxiety and PTSD would make him anxious and fearful such that he would lack the confidence and ability to trust others and would therefore not be able to build supportive networks within Afghanistan with family, community members or professionals".

90. Drawing all of this together I conclude as follows. The Tribunal held in AS that it is not in general unreasonable to expect a single adult male in good health to settle in Kabul. The Appellant is not such an individual. His life experiences thus far have left him in very poor mental health. He is currently living with a kind and supportive lady whom he loves and trusts, but he is still very unwell. He has a roof over his head and medical treatment for his conditions, but he is still very unwell. It is perhaps self-evident – and this is the view of both Dr

Thomas and Dr Galathappie - that should that security be removed, the Appellant's condition will significantly deteriorate.

91. What that means on the ground in Kabul is easy to see. The Appellant will on arrival have to go to a 'chai khana' where he will be required to share a dirty and unlocked room and washing facilities. His lack of familiarity about life in Kabul, his nightmares and anxiety will mark him out to fellow residents. The stigma attached to mental health, to 'failed migration' and the societal hostility towards returnees will make it very hard to make friends, to build a network. This coupled with his terror of return, the sudden dislocation from Mrs Din, and from the country that he has grown up in, is likely to drive the Appellant into a downward spiral. He may, on a good day, be able to find some labouring work. Mrs Din might be able to send him a bit of cash where she can. But the reality is that the Appellant's life will be far from normal. It will in the short term be lonely, isolated, deeply distressing and wretched. In the longer term it is unlikely that the Appellant will be able to access any effective treatment for his mental illnesses, and I find it unlikely that he will be able to build for himself a meaningful private or family life. On a more practical level the Appellant knows nothing about Kabul, about places, areas or people to avoid. His behaviour and isolation will make him easy prey to criminals. Although I accept that the bar for what is 'normal' in Kabul is set fairly low – insecurity, poor sanitation and unremittingly dire poverty have all been held to be quite 'reasonable' - the Appellant's particular characteristics are such that his suffering is likely to be far worse than that endured by most other residents of the city. Taking into account all of the factors I have set out above, I find that it would be unduly harsh to expect the Appellant to avoid the violence in Nangahar by relocating to Kabul.

92. The appeal is therefore allowed on protection (humanitarian protection) grounds.

Article 8

93. Given my findings above I can here be brief.

94. My starting point is the Immigration Rules. Paragraph 276ADE (1) provides that leave to remain will be granted on private life grounds where the claimant can demonstrate that one or more of four alternative criteria are met:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
>
> (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

95. The Appellant cannot qualify under sub-paragraph (iii) because he has not lived here for 20 years. He has never been able to meet the requirements at (iv) because he is today over the age of 18 and reached that point shortly before he had accrued seven years continuous residence. There is similar 'near miss' in respect of (v) because although the Appellant has, on a rough calculus, spent half his life here, under the exacting terms of the rule he will not in fact reach that point until a few weeks after his 25th birthday. That leaves (vi). The test of "very significant obstacles" is a high one. It requires the claimant to demonstrate not just that he faces practical difficulties in re-establishing himself in his country of origin but that there are there obstacles to him in time rebuilding the private life that he has lost in the United Kingdom. For the reasons I have set out above, in my consideration of internal flight, I find that on the particular facts here that high test is met. The appeal is therefore allowed on Article 8 (private life) grounds.
96. I wish to add this. Mrs Din told me that she came to this country in the 1970s as part of the exodus of persons of South Asian descent from East Africa. She met and married her Pakistani husband and they had a very happy marriage but never had children of their own. Although they both worked full time – Mrs Din continues to do so as a science technician in a school – they decided to open their home to children who needed it, and to take on the very challenging task of providing those troubled young people with support and stability. Over the years they fostered a great number of children, including other unaccompanied minors seeking protection. In her evidence she movingly described how devastated she and the Appellant were at the loss of her husband, and how she and the Appellant came to lean on each other for support:

> "[The Appellant] is very helpful to me around the house. He helps with the shopping, cleaning, cooking etc. He has been my only family since my husband passed away in 2013. He has been the only

> consistent person in my life since I lost my husband…I have family but they are busy with their own lives. I consider [the Appellant] to be my immediate family member. Sometimes people ask me how I cope without my husband as I do not have children of my own, but I always say that I have my foster children. I have [the Appellant]. Without [the Appellant] my life would be very different and lonely. I have meaning in my life when he is around. He is there when I come home from work. He is someone to talk to, to share stories with, to have dinner with. Fostering means a lot to me. My husband died of cancer, but I have heard that loneliness kills people more than cancer. Without [the Appellant], my life would be very lonely".

97. From the Appellant's perspective the relationship is described in similarly warm terms. Having explained in detail how he avoids hurting her feelings by shielding her from behaviour that she might regard as 'un-Islamic' the Appellant says this:

> "She is like a mother to me. I call her 'auntie' and I have continued to live with her since 2012 even though I have become an adult. She is always there for me and supports and encourages me. She knows when I am feeling down and depressed and will always help keep my spirits up – just like a mother would do…. My auntie has provided a loving and happy home to me all these years, and I will always be grateful to her. She lost her husband, and this was a difficult time for her, but we supported each other like a family. She treats me as her son…"

98. Judge Bennett did not apparently give any consideration to the possibility that what the Appellant shared with Mrs Din might be called 'family life'. On the evidence before me I am quite satisfied that this is what it is. The Appellant might now be an adult but he continues to live in a house with this woman who has cared for him since he was a child, and I am wholly satisfied that they were both telling the truth about their relationship. They have both suffered terrible loss but found support and solace in each other. I am satisfied that the refusal to grant the Appellant any further leave, a decision with the consequence that he is required to leave the United Kingdom, will be an interference with that family life.

99. Whilst I am satisfied that the decision is in law one that the Secretary of State is empowered to take, I must consider whether it is in all the circumstances proportionate.

100. I have taken account of the public interest as it is expressed at s117B of Nationality, Immigration and Asylum Act 2002.

101. The maintenance of immigration control is in the public interest. I note in this regard that the Appellant has not have leave to remain in this country for a number of years, and that his status has always been precarious: these are matters that weigh against him I also note, however, that the account which I have today accepted would likely, if accepted back in 2009, have resulted in the Appellant then being placed on a path to settlement by a grant of refugee status.

102. It is in the public interest that those who wish to settle in the United Kingdom speak English. The Appellant does speak English.

103. It is in the public interest that those who wish to settle in the United Kingdom are financially independent. Although there was no evidence before me to indicate that the Appellant is in receipt of public funds, I find that he is not financially independent. This is therefore a matter that weighs against him.

104. In the context of this exercise I exclude my own findings under 276ADE (1) and acknowledge that the Appellant's private life has been established when his status has been precarious.

105. In the Appellant's favour weighs the following factors. He came to this country as a young child seeking protection. I am satisfied in retrospect that had his account been accepted at the time, that he would have been granted refugee status, but even if I am wrong about that, the point is that his journey here was for a lawful purpose under international law. He is a former child migrant who is suffering from serious mental health issues, who has grown up here and regards the United Kingdom as his home. The consequences for him of dislocation from this country, and for Mrs Din, would be tragic and severe.

106. The family life that he shares with Mrs Din means a lot to both of them. I accept her evidence that her life without the Appellant would be "very different and lonely" and find that she would be devastated if he were to leave the United Kingdom. Having come here herself as a young woman (in a situation of forced migration) Mrs Din has worked hard to 'give back' to this country. She has been employed over many years in a state school and told me how much she enjoys that work. She has moreover done what many, if not all, members of society would regard as something incredible. She has opened her home to children in the care system, children who are by definition those who others have let down, and who are left with the physical and mental trauma of those failures. Although with her pleasant nature Mrs Din betrayed none of this, it cannot always have been easy. She and her husband must have encountered some tough and challenging situations. Now that her fostering days are over, the legacy of that work is her warm and loving relationship with the Appellant, who she looks forward to coming home to at the end of the working day. After all these years it does not seem to me that it can today be rationally said that the public interest requires an interference with this family

life. It rather seems to me that society in general would wish to recognise the debt of gratitude that we owe to Mrs Din, (and others like her). For those reasons I would, in the alternative, allow this appeal on Article 8 (family life) grounds.

Anonymity Order

107. The Appellant is entitled to protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "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. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

108. The appeal is dismissed on protection (Refugee Convention) grounds.

109. The appeal is allowed on protection (humanitarian protection) grounds.

110. The appeal is allowed on human rights (Article 8) grounds.

111. There is an order for anonymity.

Upper Tribunal Judge Bruce
13th February 2021

APPENDIX A: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10984/2019

THE IMMIGRATION ACTS

Heard on: 15th September 2020 **Decision Promulgated**
At: Civil Justice Centre (remote hearing)

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Before

UPPER TRIBUNAL JUDGE BRUCE

Between

FH
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Ms Fitzsimons, Counsel instructed by Duncan Lewis & Co Solicitors**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

'ERROR OF LAW' DECISION
DECISION TO ADJOURN

1. The Appellant is a national of Afghanistan born in 1997. He appeals with permission against the decision of the First-tier Tribunal (Judge N. Minhas) to dismiss his appeal on protection and human rights grounds.

2. The short history of this appeal is as follows. The Appellant arrived in the United Kingdom in 2009 when he was 12 years old. He sought international protection and although this was refused he was between 2010 and 2016 granted Discretionary Leave. As he reached adulthood the Respondent decided that his circumstances had changed and that he no longer required leave to remain in the United Kingdom. The Appellant made a 'fresh claim' for asylum and leave on human rights grounds, and following a successfully judicial review the matter came back before the First-tier Tribunal in the shape of a protection/human rights appeal.

3. Before the First-tier Tribunal there were three limbs to the Appellant's case:

    i) Notwithstanding the conclusions reached to the contrary by the First-tier Tribunal in 2016 (First-tier Tribunal Judge Bennett), he was entitled to protection as a refugee. He has a well-founded fear of persecution for reasons of his membership of a particular social group, namely a member of his own family. The Appellant asserts that his parents were killed in 2008 and that he would be at risk from the same people who killed them. *In the alternative:*

    ii) He could not be expected to return to his home area of Nangahar, because the security situation was such that simply by virtue of his presence there he would be at risk of indiscriminate violence. Accordingly he submitted that Article 15(c) of the Qualification Directive[5] was engaged. Further he submitted that protection could not be withheld with reference to Article 8 of the QD, since it would, having regard to his personal characteristics and the many years that he has been absent from Afghanistan, be unreasonable to expect him to live elsewhere in that country. *Further and in the alternative:*

    iii) His removal from the United Kingdom today would amount to a disproportionate interference with the private life that he has established here in the past twelve years and so a breach of Article 8 ECHR. That this is so could be illustrated *inter alia* with reference to paragraph 276ADE(1) of the Immigration Rules which stipulates that he should be granted leave if there are "very significant obstacles to his integration" in Afghanistan.

[5]COUNCIL DIRECTIVE 2004/83/Entry Clearance Officer of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

4. The Tribunal found against him on all three limbs and the appeal was dismissed. Permission to appeal was sought and granted by First-tier Tribunal Judge Gumsley on the 6th February 2020.

Error of Law: Discussion and Findings

5. Mark Twain famously said that it takes a long time to write a short letter but the same principle does not apply to grounds of appeal. As became apparent at the hearing before me the 8 grounds committed to writing by Ms Fitzsimons (in pleadings as long as the decision itself) were completely unnecessary and in fact boiled down to just 3 points. It is almost invariably the case that errors of the magnitude that warrant interference by this Tribunal can be stated succinctly. By contrast very lengthy argument in the grounds gives the unfortunate impression that there is not really any error at all, and that the writer is simply disagreeing with the outcome of the appeal.

6. As it happens that is not the case here. The decision of the First-tier Tribunal is flawed for error of law in respect of all three of the limbs of the Appellant's claim.

The Asylum Claim: Credibility

7. In respect of the Appellant's asylum claim the Judge, and apparently the Judge who preceded him in 2016[6], draws the rather astonishing conclusion that this protection claim can be safely dismissed on the ground that the Appellant cannot clearly remember how long it took him to walk home on a day 12 years ago, when he was 12 years old and on his account his parents had both just been shot dead. On one telling the Appellant thought it had taken him 15 minutes; in another he thought it was 30 minutes. I am satisfied that it is wholly perverse to draw adverse inference from such a discrepancy. A great many 12 year-olds would find it difficult to give an exact time for the length of a walk they did last week, never mind a decade ago in extremely traumatic circumstances. There is little wonder that the Appellant is unclear about events that day.

8. I am also satisfied that Judge Minhas erred in his approach to the evidence of a supporting witness, the Appellant's cousin. At paragraph 17 of the decision the Judge says:

> "I place little weight on the evidence of the Appellant's cousin, he was already in the United Kingdom at the time of the Appellant's parents' alleged killing and cannot provide reliable evidence as to how the Appellant's parents died or who killed them".

[6] Although that decision was not available to me at the date of writing – I am drawing here on paragraph 16 of Judge Minhas' decision.

I am satisfied that this reasoning is flawed for two reasons: a failure of logic and a failure to take material evidence into account. It is no doubt correct to say that this man could not say *who* had killed his uncle and aunt, but that was not why he was being called: he was obviously able to speak to his belief that his uncle and aunt *had in fact* been killed in Nangahar in 2008 and absent any reason to doubt that it was his genuinely held belief that they had, that was evidence which lent support to the Appellant's claim.

9. It follows that I need not dwell on the complaint articulated over another 14 paragraphs of the grounds, namely that in its assessment the Tribunal failed to have regard to the expert evidence of two additional witnesses. The first was a doctor who opined that the Appellant's memory of these events would be hazy. The second was a country background specialist who points out that an uneducated Afghan child is unlikely to have a firm grasp of dates, and that in view of the fact that Nangahar was at all material times in the grip of a Taliban insurgency which cost the lives of many civilians, there was nothing implausible in the account given. I intend no criticism of the Appellant's representatives, who have obviously prepared this appeal with great diligence and have sought to ensure that the Tribunal had before it the best evidence possible, and I certainly intend no respect to the experts concerned, but this evidence simply served to confirm what should have been obvious to any reasonable decision maker. It is with that in mind that I accept that it was an error of law for the First-tier Tribunal to fail to weigh these expert reports in the balance when assessing the credibility of the claim, and in particular, applying the *Devaseelan* principles[7], whether there was reason to depart from the findings of Judge Bennett.

10. Mr McVeety submitted that notwithstanding any error in the approach to credibility a real risk could not, after so long, be made out: even if the historical narrative is accepted the Appellant is unable to articulate who he is afraid of and why. In the final analysis Mr McVeety's submission may be proved correct. It is however not satisfactory for a risk assessment to be built on shaky foundations, and even if a current risk is not proven, the question of what happened to this Appellant's family remains relevant to the question of internal relocation, to which I now turn.

Humanitarian Protection: Internal Flight

11. The First-tier Tribunal accepted that the Appellant could not be returned to Nangahar because there exists there an internal armed conflict such that he would face a real risk of indiscriminate violence. Although the Presenting Officer did not concede that to be so, the First-tier Tribunal properly had regard to the Respondent's published policy which made that very concession:

[7] Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702

Afghanistan CPIN *Security and Humanitarian Situation* July 2019. Before me Mr McVeety agreed that this was the Respondent's position.

12. The only matter left to be determined, therefore, was whether the Appellant could reasonably be expected to relocate within Afghanistan.

13. Mr McVeety accepted that the Tribunal did not expressly direct itself to consider either of the acceptable formulations - 'reasonable' or 'unduly harsh' - to be applied in this context: Ms Fitzsimons' first complaint. He further accepted her second, namely that the Tribunal's conclusion that the Appellant would not be at risk of serious harm in Kabul could not be determinative of the issue of internal flight. It is also right to say, as articulated under the heading of ground 1, that the Tribunal appeared to view the Appellant's mental health issues exclusively through the prism of Article 3 when that was beside the point. All of these arguments are made out. In the context of internal flight claimants are under no obligation to show that they would suffer serious harm in the area of relocation. The question is whether in all the circumstances, it is *reasonable* to expect them to live there. The Tribunal failed to ask itself that question, and perhaps for that reason failed to take all relevant evidence into account. That evidence included the extensive medical opinion offered on the Appellant's precarious mental health. In this country he feels stable, safe and supported. He has mental health professionals to whom he can turn; family members and indeed his former foster carer rally around him. He has a private life in the true sense of the term under the Convention: he enjoys meaningful relationships with other human beings. In Kabul, it is submitted, he will have none of that. He may, as the First-tier Tribunal finds, be able to eat, and (even though he has absolutely no life experience of value in that country) could conceivably hustle his way into receiving some form of mental health support, but those matters are not the only relevant considerations. It was incumbent on the Tribunal to consider whether there was a real risk that this very vulnerable young man would not be able to lead a "relatively normal life" if returned to Kabul. That it did not do, and so its reasoning on internal flight must be set aside for, amongst other things, misdirection.

Private Life: Very Significant Obstacles

14. As I have already alluded to at my §12 above, in this case there was considerable overlap between the Article 8 considerations under paragraph 276ADE(1)(vi) of the Rules and the internal flight analysis. As above, I am satisfied that in its assessment of this matter the Tribunal erred. I further find that in its assessment of private life 'outside of the rules' the Tribunal manifestly failed to have regard, at all, to the 11 years that the Appellant has spent in this country. Its consideration of this aspect of the claim is confined to an iteration of the public interest as expressed at s117B Nationality, Immigration and Asylum Act 2002. That was an important part of its

assessment, but to only weigh one side of the scale in the proportionality balancing exercise was a serious error.

Anonymity Order

15. The Appellant seeks international protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

16. The decision of the First-tier Tribunal is flawed for material error of law and it is set aside.

17. The decision in the appeal will be remade following a further hearing in the Upper Tribunal.

18. There is an order for anonymity.

Upper Tribunal Judge Bruce
15th September 2020