Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18375/2011

THE IMMIGRATION ACTS

Heard at Bradford
On 14th August 2013

Determination Promulgated
On 8th October 2013

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MOHAMED NABI ZAHIRJALI MENGAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T. Hussain, Counsel instructed by French and Company
For the Respondent: Ms R. Petterson, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Afghanistan born on 1st March 1983. He appeals with permission against the decision of the First-tier Tribunal panel (Judge Colyer and Mrs Greenwood) who dismissed his appeal against the decision of the Respondent

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dated 9th June 2011 to make a deportation order by virtue of Section 5(1) of the Immigration Act 1971. In this case the Respondent states that Section 3(5)(a) of the Immigration Act 1971 applies, upon the grounds that the Respondent deemed it to be conducive to the public good to make a deportation order against him.

The procedural history:

2. The Appellant arrived in the United Kingdom on 30th April 2002 and claimed asylum. That application was refused on 11th September 2003 after it transpired the Appellant had already claimed asylum in Australia. Arrangements were made for his removal to that country but he absconded prior to that and made an appearance in Birmingham Magistrates' Court for an offence of affray for which he was ordered to pay a £200 fine and £250 in costs.

3. On 10th July 2009 the Appellant made an application to return to Afghanistan voluntarily via the Assisted Voluntary Return Scheme. The application was approved on 13th July 2009. However, on 18th August 2009 the Appellant was convicted of two counts of battery for which he received a twelve month community order with an 80 hour unpaid work requirement. On 20th October 2009 his application for voluntary removal was cancelled by the Home Office as he had not been in touch with the relevant international organisation.

4. On 14th December 2009 the Appellant appeared at Birmingham Magistrates' Court where he was convicted of failing to comply with the requirements of his community order. The order was varied so as to include a further ten hours' unpaid work.

5. On 2nd February 2010 the Appellant appeared at Birmingham Magistrates' Court where he was convicted of harassment. He was sentenced to six weeks' imprisonment and made the subject of a restraining order for two years until 1st February 2012.

6. On 23rd February 2010 the Appellant made a further appearance in court, this time before Birmingham Crown Court where he was convicted of breach of a restraining order and harassment. He was sentenced on 23rd March 2010 to a total of 30 weeks' imprisonment for both offences. His Honour Judge Mayo sitting at the Crown Court at Birmingham sentenced the Appellant for two offences both of which were breaches of a restraining order imposed on him by the magistrates in February of 2010 when he had been sentenced to a period of six weeks' imprisonment for pursuing a course of harassment. The sentencing remarks state as follows:-

> "You were released from that sentence within three days of being sentenced and within three days of your release from custody, you were pestering your former wife or your wife in Smethwick and then embarked on a series of harassing telephone calls on 18th February, 19th February and 20th February of this year. You were arrested on 22nd February and that obviously brought the contact to an end. I have read your pre-sentence report and I think, now, you probably have more insight into the importance of this order than you did before and I take into account, in fixing the length of the sentence, your pleas of guilty and the fact that no actual violence was used against

your former wife. However, there are aggravating features here; the most important one is that you breached this order very shortly after it was imposed on you. It was a court order and court orders are not there to be disobeyed. You have a history of violence towards Rafia Begum going back some years and, in my judgment, what you did was persistent and calculated to cause psychological harm and indeed did cause Ms Begum some psychological harm. These offences are so serious that only a custodial sentence can be justified on the first offence, namely the Section 5 breach; there will be a sentence of twelve weeks' imprisonment. On the second offence, namely Section 4 offence, there will be a sentence of 30 weeks' imprisonment. Those sentences will run concurrently and I direct that no time shall be taken off any sentence you serve because I anticipate that you will return to custody as breach of your licence."

7. The judge also took the decision that the days that he had served would not count towards his sentence. The reason being that he had breached his order very quickly after it had passed and that he was the subject of a restraining order. The judge also issued a fresh restraining order and that from release from prison until 1st August 2012 it would remain in force.

8. On 15th April 2010 whilst serving his custodial sentence the Appellant informed an Immigration Officer that he wished to proceed with his asylum claim. He therefore completed a screening interview and on 24th June 2010 that interview was concluded.

9. On 11th October 2010 the Appellant was granted indefinite leave to remain, exceptionally, outside the Immigration Rules due to his length of residence in the UK. However, on 14th April 2011 he was convicted by Birmingham Magistrates' Court of a breach of his restraining order and sentenced to eighteen weeks' imprisonment.

10. The Respondent served him with a notice informing him of his liability to deportation. On 31st May 2011 the Appellant responded to that notice. He made a further claim for asylum on 1st June 2011. On 9th June 2011 he was served with a notice of the decision to make a deportation order.

11. The decision to make a deportation order reads as follows:-

> "On 14th April 2011 at Birmingham Magistrates Court, you were convicted of a breach of a restraining order. In view of this conviction the Secretary of State deems it to be conducive to the public good to make a deportation order against you. The Secretary of State has therefore decided to make an order by virtue of section 3(5)(a) of the Immigration Act 1971 (as amended by the Immigration Act 1999).
>
> This order requires you to leave the United Kingdom and prohibits you from re-entering while the order is in force.
>
> She proposes to give directions for your removal to Afghanistan the country of which you are a national or which most recently provided you with a travel document.

Right of Appeal

You are entitled to appeal this decision under Section 82(1) of the Nationality, Immigration and Asylum Act 2002."

12. An Explanatory Statement for this decision was given in a letter setting out the reasons for the deportation dated 14th June 2011. That letter sets out the following matters:-

"Liability to deportation

1. On 23rd May 2011, the UK Border Agency wrote seeking reasons why you should not be deported from the United Kingdom following your conviction for breach of a restraining order. The representations received have been considered but for the reasons set out below it has been concluded that your deportation will be conducive to the public good.

Background

2. The background history and reasons are outlined as follows:

You arrived in the United Kingdom on 30th April 2002 and subsequently claimed asylum. On 11th September 2003 your asylum application was refused and certified on third country grounds as it transpired that you had already claimed asylum in Austria. Arrangements were initially made for your removal to Austria. However, the removal did not go ahead as scheduled because you absconded.

On 10th July 2009 you made an application for return to Afghanistan via the Assistant Voluntary Return (AVR) Scheme. On 13th July 2009 your application for AVR was approved.

On 20th October 2009 your application for AVR was cancelled as you had not been in contact with the International Organisation for Migration (IOM) regarding your return to Afghanistan.

You next came to the attention of the UK Border Agency after you were convicted for harassing your partner and breaching a restraining order for which you were sentenced on 23rd March 2010 at Birmingham Crown Court to 30 months' imprisonment.

On 15th April 2010 whilst being held at HMP Liverpool you informed an Immigration Officer that you wished to proceed with your asylum claim. On the same day you completed a screening interview and on 24th June 2010 an asylum interview was completed.

On 11th October 2010 you were granted indefinite leave to remain exceptionally, outside the Immigration Rules due to your length of residence in the United Kingdom.

On 14th April 2011 at Birmingham Magistrates' Court you were convicted of breach of a restraining order. You were sentenced to eighteen weeks' imprisonment.

In light of the fact that you received three custodial sentences amounting to 54 weeks' imprisonment within the last five years, on 25th May you were served with a notice informing you of your liability to deportation.

<u>Circumstances of the offence</u>

The Secretary of State regards breaches of the United Kingdom's laws by a person subject to immigration control as extremely serious as it shows that, the person has no regard for the laws of the United Kingdom. Criminal behaviour which results in a custodial sentence of twelve

> months or more, or a total aggregate sentence of twelve months or more over a period of five years, or cases where the court recommends deportation, is serious enough to initiate deportation action. In making this decision, the type and frequency of the offending is an important consideration, together with the need to protect the public. In addition to these factors, the circumstances of the offence, the sentencing court's view of the offending (as reflected in the sentence imposed) together with the effect and extent of the criminal activity on the wider community are considered. In addition to these factors, your personal circumstances together with the circumstances of your offences have been carefully looked at.
>
> As stated above you have been convicted of four separate offences since February 2010 for which you have received 54 weeks' imprisonment. In regards to your most recent offence the memorandum of an entry in the register of the Birmingham Magistrates' Court states,
>
> > 'On 6th December 2010 at Birmingham in the country of West Midlands without reasonable excuse, you breached your restraining order by contacting a Rafia Begum which you were prohibited from doing by restraining order imposed by Birmingham Magistrates' Court on 2nd February 2010.'
>
> You pleaded not guilty to this offence on 15th March 2011, however you were found guilty by a jury on 23rd March 2011. All four offences relate to the harassment of your wife and subsequent breaches of a restraining order taken out against you in order to protect your wife from you. By repeatedly breaching the restraining order you have demonstrated that you have a blatant disregard for the United Kingdom's laws."

The refusal letter also set out details of consideration under Article 8. It was noted in relation to Article 8, that he was 28 years of age, married and believed to be in good health. He had been resident in the United Kingdom for nine years and two months including some time spent in prison. The letter set out and paid regard to his previous convictions and noted that the sentences added together with the current sentence aggregate to a custodial sentence of more than twelve months' imprisonment over a period of five years which fit the criteria to be considered for deportation. In respect of his family life, the Respondent made reference to his claim to be married to Rafia Begum, a British citizen. However it was noted that he had not provided any evidence to support the claim and that it had been noted that a restraining order was currently in force against him which he had breached on a number of occasions which prevented him from both indirect and direct contact with Rafia Begum and visiting her place of residence. In respect of the representations that he had made that his life was with his wife in the United Kingdom, in the light of the restraining order it was not accepted that the marriage was subsisting. Thus it was not considered that he had a family life.

As regards his private life, it was accepted that he may have established a private life given that he entered the United Kingdom on 30th April 2002. It was accepted that he may have made some friends and formed relationships that constituted a private life however if deported from the United Kingdom it was noted that there were "no known issues preventing him continuing any relationships using modern forms of communication such as email and telephone." As to interference with his private life, it was not accepted that the decision to deport gave any rise to any interference with his private life as it was not considered unreasonable to expect private life to be continued elsewhere. It was noted that he was prohibited from contacting his wife by way of a restraining order imposed on him on 2nd February 2010 which he had

persistently failed to comply with which resulted in convictions on 23rd February 2010 and most recently on 14th April 2011. The court commented that he had a "flagrant disregard for court orders and you do not think you have done anything wrong". In the event that there was an interference, it would be in accordance with the relevant legislation and the policies in pursuit of the permissible aims of prevention of disorder and crime and the protection of the rights and freedoms of others. In respect of proportionality, it was stated that it was a proportionate decision on the circumstances of his case. The Appellant had spent his youth and formative years in Afghanistan and it would not be considered unreasonable to expect him to readjust to life in Afghanistan.

13. In relation to paragraph 364, it was noted that full and careful consideration had been given to all the known factors in respect of paragraph 364. It had been concluded that it would not be contrary to the UK's obligations under the ECHR to deport him and in this case all the relevant factors have been considered and that there would be no exceptional circumstances to outweigh the public interest presumption and therefore it was concluded that in his case it was appropriate to deport him to Afghanistan.

14. The Appellant appealed this decision under Section 82 of the Nationality, Immigration and Asylum Act 2002. The grounds state that the decision was not in accordance with Article 8 of the ECHR on the grounds of the Appellant's private and family life established whilst in the United Kingdom, on the basis of his marriage to a British citizen.

The hearing before the First-tier Tribunal:

15. His appeal against the decision to make a deportation order and against the refusal of the Respondent to accept the Appellant's asylum application came before the First-tier Tribunal panel (Immigration Judge D E Colyer and Mrs Greenwood, a non-legal member) on 22nd November 2011 sitting at Nottingham Magistrates' Court. It is clear from the determination prepared on 22nd November 2011 that the Appellant had appeared before the Tribunal unrepresented although his previous representatives Hassan Solicitors had produced a bundle of documentation. In that determination the panel dismissed the appeal on both grounds having regard to the Appellant's immigration and criminal offending history.

16. The findings of the panel at paragraphs 31 to 42 dealt with the Appellant's background and the chronology of his immigration history. His life in the United Kingdom was set out at paragraphs 43 to 44 noting that he claimed to have been married in 2008 to Rafia Begum, a British citizen who was born on 5th February 1982. They had married in a religious ceremony at a friend's house in Birmingham. At that stage he contended that the marriage was still subsisting and that his wife lived with her mother in Birmingham. He stated before the panel that he last saw his wife in mid-February 2010. The panel found that there was no marriage certificate and from the description of the circumstances of the alleged ceremony, it would appear that the marriage was not officially registered in the United Kingdom. The panel found

that whatever the circumstances it was apparent that the relationship with his "wife" quickly deteriorated and that the relationship with that woman formed the background to the Appellant's criminal behaviour. The panel were satisfied that the relationship was no longer in existence. At paragraphs 45 to 48 the panel dealt with the Appellant's criminal activities setting out the details of all of those convictions and noting that it was conceded on behalf of the Appellant the victim of all of his crimes was his wife. At paragraph 46 they set out the evidence that the Appellant had given concerning those offences. At paragraph 47 the panel gave due regard to the sentencing comments of His Honour Judge Mayo on 23rd March 2010. At paragraphs 49 to 52 the panel summarised the Appellant's claim to asylum and considered the general security situation in Afghanistan. They did not accept that the Appellant had a well-founded fear of persecution on the basis of his fear of the Taliban and that even if it were right that he would be at risk in his home area that he could relocate to Kabul. The panel found that having regard to the circumstances of this particular Appellant it was not considered that the indiscriminate violence in the Appellant's home area would be at such a high level that there existed "substantial grounds for believing that he would face a real risk which threatens his life or person". The panel considered the issue of internal relocation and at paragraph 63 found that the Appellant, even if his claims were credible, has an alleged fear of persecution which was "relatively local". They found

> "The perpetrators living in their own province. I find that there is no evidence that those persons have any power, influence or intelligence outside of that province. We therefore find there are other parts of Afghanistan that the Appellant could travel to without any fear of persecution."

The panel found that he could live in any other part of the country most particularly Kabul without any fear and that it was not unreasonable or unduly harsh for him to relocate. They considered relocation to Kabul extensively at paragraph 66 onwards and reached the conclusion at paragraph 74

> "We find that the Appellant has failed to establish that his family history, his ethnicity, his implied political opinion or other characteristics will cause him to be the subject of harm in Kabul. Kabul is clearly a difficult place for the vast majority of its citizens to live in – ravaged as it has been by years of harsh Taliban authoritarian government and the recent war. We have no doubt that quality of life is far from good for many of its citizens and such services are available are basic. However the available evidence regarding the current situation there does not persuade us that there is a real risk of this Appellant being subject to torture or to inhuman or degrading treatment or punishment on his return there."

At paragraph 75 the panel said this:-

> "75. The Appellant has shown that he has been able to relocate to a completely different country and culture. We find that this shows resilience on his part. We find that it is probable that when he reaches Afghanistan he will be able to use his resilience and his skills acquired during his stay in this country to facilitate his return to anywhere within Afghanistan. It is however to Kabul that he will

first be returned and we find that there are state resources available for him to use should he so wish on his return."

17. The panel dealt with the credibility of the Appellant between paragraphs 78 and 80 noting that they did not find the Appellant to be a "credible witness and we have significant doubts about the truthfulness of many of the details of the Appellant's accounts". Thus they concluded that he had not established to the lower standard that he has in the past or would in the future suffer persecution in Afghanistan if returned. Consequently they concluded that the Appellant's removal would not cause the United Kingdom to be in breach of its obligations under the 1951 Convention. As to Articles 2 and 3 they found that there was no evidence that the Appellant was in bad health or is unable to work to support himself. They found that it was not unduly harsh to return him to Afghanistan and that the Appellant's experience of relocating, having left his home district a considerable time ago and having spent time in the UK that whilst it would not be easy to establish life in Afghanistan it would no doubt involve a degree of hardship and discomfort but it had not been shown that it was unduly harsh. Consequently they did not find that there was a real risk that on removal that he would suffer a breach of Articles 2 and 3.

18. They then turned to Article 8. They found that the deportation of the Appellant would be an interference by a public authority with his exercise of his right to his private life. They found that he had a limited private life and that his family life with his "wife" had ended. They took into account that the Appellant entered the United Kingdom illegally and not under the provisions of the Immigration Rules and that it was the Respondent's intention that he should leave under the current UK and European laws concerning the control of immigration. They found that the action in deporting him was in accordance with the law and had the legitimate aim of the maintenance of immigration control in respect of those who had entered the UK illegally and to ensure the prevention of disorder or crime in respect of those who commit criminal offences. The panel set out the law at length at paragraphs 94 onwards including consideration of the decision of the European Court in **<u>Boultif v Switzerland</u>** and the **<u>Uner</u>** criteria (paragraph 98). At paragraph 101 the panel said this:-

> "From the Appellant's history of offending we find that he has shown that he has a propensity to commit criminal offences and to engage in a criminal lifestyle. His pattern of offending shows the seriousness of the crimes he is prepared to undertake. He now states that prison has taught him a lesson but we are not persuaded that he will change his ways. He has been given opportunities in the past and these have not succeeded. We find that as a risk of harm to the community the Appellant will pose a realistic prospect and that he is a danger to society through his criminal activities. We find that the Appellant will remain a risk of further serious criminal behaviour if he remains in the United Kingdom. Having taken all those matters into account we reach the conclusion the decision to deport the Appellant back to Afghanistan is proportionate."

19. The panel at paragraph 102 noted that they did not underestimate the practical difficulties entailed for the Appellant to relocate to Afghanistan but that no

significant evidence had been adduced which would indicate that it would be impossible, exceptionally difficult or unreasonable for him to do so. They found that the Appellant's private life could be resumed in Afghanistan and that he was

> "mature enough to be able to adapt to life in his home country and that his needs are not exceptional. The facts of this appeal reveal no particularly exceptional health or welfare issues, either here or in his home country. The situation in Afghanistan may be materially less good for the Appellant than in the UK and there may be a relative disadvantage. However we find that any such difference is not in itself a sufficient basis for allowing his human rights appeal."

20. The panel then went on to consider the appeal against the Respondent's decision to make a deportation order noting the criminal convictions that the Appellant had and the Secretary of State's view who deemed it to be conducive to the public good to make a deportation order by virtue of Section 3(5)(a) of the Immigration Act 1971. The panel at paragraph 107 set out that they agreed with the Respondent's submissions regarding the circumstances of his offending as set out in the supplementary refusal letter of 22nd July 2011. They found that the Appellant had been convicted of four separate criminal offences since February 2010 for which he had received a total of 54 weeks' imprisonment. The panel then reached the conclusion at paragraph 112 that after considering his immigration and criminal offending history the Respondent had appropriately applied for the procedure for deportation of the Appellant given the number of serious criminal offences committed during his time in the United Kingdom. They found that he had been given an opportunity to amend his ways but he had continued with criminal offending and his relationship problems were an explanation but not a defence. They found the Secretary of State had considered all the relevant factors in considering whether there is an exception to the automatic deportation in this particular case. They found it had not been established that there were exceptional circumstances in this Appellant's case and that the public interest in his deportation is not outweighed by the claim by the Appellant that the Human Rights Convention and the Refugee Convention would be breached by the decision to deport. Thus they dismissed his appeal on all grounds.

The appeal before the Upper Tribunal:

21. The Appellant then instructing his solicitors to appeal the decision the Appellant appeared to have drafted his own Grounds of Appeal. The first ground was based on his lack of representation at the hearing and that he did not have any legal guidance and struggled to represent himself. The second ground advanced related to his claim under the Refugee Convention and that he would be killed upon return to Afghanistan as a result of problems with Shia and the Taliban. In respect of Article 8, he made reference to the length of stay in the United Kingdom.

22. Permission to appeal the decision of the panel was granted by Designated Judge Garratt on 4th January 2012. The judge noted that the panel acknowledged the Appellant was unrepresented and took steps to assist him in presenting his case. The judge noted however:-

"It is arguable, from a study of the copious self directions which the determination contains, that the Tribunal adopted the wrong approach to the deportation issue. The refusal letters make it clear that the Respondent proposed deportation on conducive grounds applying the provisions of paragraph 364 of the Immigration Rules yet the panel of the Tribunal directed itself on the provisions covering automatic deportation under Section 32 of the UK Borders Act 2007. The arguable error is obvious from the two pages of quotes from that Act set out at paragraph 30 of the determination and also from the final paragraph where automatic deportation is again mentioned as the basis for the Respondent's decision. Automatic deportation provisions are not appropriate as the Appellant had not been sentenced to imprisonment of over twelve months. Permission is therefore granted."

23. Upper Tribunal Judge Macleman, in a note and directions following permission being granted set out the following:-

> "The next hearing will be submissions on whether the determination of the First-tier Tribunal should set aside for legal error; if so, to what extent; and the further procedure required, if any. If error is found, the UT may proceed without any further hearing to substitute a fresh decision, if satisfied that it can be done on the basis of the evidence already given."

24. Thus the matter came before Deputy Upper Tribunal Judge Hanbury on 15th May 2012. In a written decision dated 12th June 2012, Deputy Upper Tribunal Judge Hanbury reached the conclusion that the determination of the panel disclosed a material error of law. The reasons given were as follows:-

> "14. Unfortunately, the Immigration Judge demonstrated a degree of confusion between the two distinct types of deportation; automatic deportation under Sections 32 – 39 of the UK Borders Act 2007 and deportation pursuant to Section 3(5)(a) of the Immigration Act 1971. The latter type of deportation requires the Secretary of State to apply those factors in paragraph 364 of HC 395.
>
> 15. Paragraph 30 of the determination may be explained by an unfortunate use of standard paragraphs. However, unfortunately, the Immigration Judge returned to the theme of the automatic deportation in paragraph 110 of his determination and refers to case law decided under Section 33. There is also a reference to 'the automatic deportation' in paragraph 112 of his decision. Unfortunately, I was left confused as to what the Immigration Judge intended to say at the end of reading the determination and plainly that is a material error of law. The overall conclusion cannot be regarded as necessarily sound if the analysis is so flawed.
>
> 16. For these reasons I have concluded that it is appropriate to set aside the Immigration Judge's decision in relation to the deportation order but leave the Immigration Judge's decision in place in relation to all other matters, including his findings in relation to the application of the European Convention on Human Rights and the facts of this case. It is necessary to remake the decision and in order to justly do so a hearing will be required which the Appellant can attend if he wishes. At that hearing the Appellant should be at liberty to provide an updated witness statement with any developments since the hearing of 22nd

November 2011 but otherwise the Immigration Judge's fact-finding will stand. As I have said, I see no reason to interfere with the Immigration Judge's findings in all other respects."

25. The judge then issued directions before himself at a venue convenient to the parties and to the Tribunal listing. Thus the hearing was reserved to Deputy Judge Hanbury who had heard the parties concerning the error of law. It appears from the Tribunal file that thereafter there appeared problems in listing the case before the Deputy Judge and on 25th July 2013 a transfer order was made and a panel to hear the appeal was authorised to include Deputy Upper Tribunal Judge Hanbury if available to hear the case.

26. It was on that basis that the case was listed before the Upper Tribunal on 14th August 2013.

The Re-making of the decision:

27. At the hearing before the Tribunal, the Appellant was represented by Mr T. Hussain (Counsel) and the Respondent by Ms R. Petterson (Home Office Presenting Officer). Despite the directions given by the Deputy Upper Tribunal Judge that had been served on the parties, no further evidence had been filed on behalf of the Appellant nor had there been any witness statement taken from him. Mr Hussain informed the Tribunal that it was not his intention to call the Appellant to give any evidence and that the case would proceed on submissions only. Thus the Tribunal had before it the original material that had been placed before the First-tier Tribunal and set out in the determination of the First-tier Tribunal panel.

28. Ms Petterson on behalf of the Respondent made the following submissions. She relied upon the material in the Respondent's bundle which comprised of three refusals, 14th June 2011, 20th July 2011 and 22nd July 2011 including the reasons for deportation as set out in the accompanying documentation. She invited the Tribunal when assessing his criminal convictions to note that he had been convicted of a number of offences which gave a total of 54 weeks of imprisonment over the last five years which culminated in the most recent conviction on 14th April 2011 when he was sentenced to eighteen weeks' imprisonment. The Secretary of State took the view that this was of importance when considering whether it was conducive to deport the Appellant.

29. Ms Petterson made reference to the skeleton argument produced by Mr Hussain and in particular the matters set out at paragraph 3 that referred to the historical grant of indefinite leave to remain. She noted that the skeleton argument appeared to refer to an inconsistency between the Secretary of State granting indefinite leave to remain in 2010 but deciding to deport him in 2011. She submitted there was no such consistency and that he was notified of his liability to deportation because he had hit a "trigger point" of an amount of time since he had been granted indefinite leave to remain. The Appellant's background had been clear. He committed another offence after he had been granted indefinite leave to remain which was why the Secretary of State took the view that the trigger point had been breached. The seriousness of the

last offence is highly relevant. The Appellant had breached the restraining order yet again and had been given eighteen weeks' imprisonment. Whilst the skeleton argument at paragraph 4.2 made reference to the fact that the offence was committed against the same individual namely his former partner rather than the public at large, that was only one matter for the Secretary of State to take into account. In this particular case the Appellant had continued his offending behaviour and it was sufficient to say that that was enough that he had continued to commit offences whilst not a risk to the general public and that was a matter to take into account.

30. As regards the asylum, the First-tier Tribunal panel dealt with that and in the light of the directions given concerning the error of law those facts were to be preserved. That has not been challenged by any further evidence.

31. As to Article 8, those findings of fact were also preserved and no further evidence has been placed before the Tribunal to make any further assessment. The Appellant has had the opportunity to put further evidence or reasons before the Tribunal as to why he should not be deported. From the evidence before the First-tier Tribunal and now the Appellant has not demonstrated that he has any significant private life. Whilst it was acknowledged that he developed a private life there is no recent evidence nor was there any evidence before the First-tier Tribunal panel to suggest that it had been widely developed. He may have friends and been resident in the United Kingdom for a period of time but there was nothing on the basis of the Appellant's situation which would outweigh the need for deportation given the number of offences that he had committed.

32. She submitted that the scope of the hearing was a narrow one and that by applying the applicable law to the history and the facts as found by the First-tier Tribunal would demonstrate that the Secretary of State had demonstrated that they were justified in making a deportation order. She made reference to the Appellant's criminal activities at paragraph 45, the sentencing remarks set out at paragraph 47 and the reasons for his offending at paragraph 46. At paragraph 101 the panel reached the conclusion that he had a propensity to commit criminal offences and they did not accept the Appellant had changed his ways and that he remained a risk to the community as a result of his activities. This had not been challenged. Looking at his age, length of residence he was now 31 years of age and had been in the United Kingdom just over ten years. Whilst the Secretary of State had been criticised for granting him indefinite leave to remain it is clear why deportation was then thought appropriate was a result of the Appellant's offending which had taken place post the decision to grant indefinite leave to remain. She submitted that there was no evidence of any close ties and the panel did not accept his remorse. Overall there was nothing in his history that was sufficient to outweigh deportation. She therefore invited the Tribunal to remake the decision by dismissing his appeal.

33. Mr Hussain on behalf of the Appellant relied upon his skeleton argument. He submitted that in this case the Appellant had been granted indefinite leave to remain on 11th October 2010 based on the length of residence in the United Kingdom. In reaching a decision, the Respondent had given consideration to all of his previous

convictions save for the last one on 14th April 2011 which had led to a sentence of eighteen weeks' imprisonment for breach of a restraining order. It was clear that prior to the grant of the indefinite leave to remain the factors set out in Section 395C must have formed part of the assessment. In those circumstances it was disproportionate and unfair to consider it conducive to deport the Appellant on the strength of a most recent conviction.

34. He submitted that the seriousness of the last offence was highly relevant to the assessment and that it did not justify deportation. The judge's sentencing remarks which had been recorded at paragraph 47 of the determination of the First-tier Tribunal acknowledged that the Appellant had developed a far greater insight into the importance of abiding by a restraining order. The pre-sentence report was not in the bundle before the First-tier Tribunal.

35. He submitted that the Tribunal erred in making an assessment as to his propensity to offend and failed to take into account the pre-sentence report and the sentencing remarks. This was an offence against one individual and not against specific individuals. There was no suggestion of any further offending behaviour and that was relevant to an assessment as to his propensity. The previous convictions, it was submitted were relatively minor and in this case it was not necessary to deport the Appellant because there was no members of the public to protect.

36. In respect of the public interest, Mr Hussain relied upon the decision of **<u>Peart</u> [2012] EWCA Civ 568** and particular relevance at paragraphs 20 to 22. He submitted that the Tribunal was required to consider the individual circumstances of the offences and not to apply **<u>N</u> (Kenya)** which was a wholly different case dealing with serious convictions and criminal activity. In this case the Appellant had no propensity to reoffend and thus absent this factor the Appellant's Article 8 rights were worthy of respect. Mr Hussain invited the Tribunal to consider his offending history and the passage of time and that there was no suggestion that he had committed any further offences and that he was now law-abiding and that there had been no risk to the public. In those circumstances it would be disproportionate use of the Secretary of State's powers to deport him now. He invited the Tribunal to remake the decision allowing the appeal.

37. Ms Petterson on behalf of the panel confirmed that there was no pre-sentencing report available to the panel nor is there one available to the Upper Tribunal.

38. At the conclusion of the submissions I reserved my determination.

The findings of fact:

39. The starting point are the findings of fact made by the First-tier Tribunal panel which were preserved by order of Deputy Upper Tribunal Judge Hanbury who found an error of law in the legal approach by the panel but not in respect of the facts that they found.

40. The Appellant has been given the opportunity to respond to those findings of fact made by the First-tier Tribunal and preserved by Judge Hanbury, however no further evidence of any kind has been produced on the Appellant's behalf. Nor has he given evidence before this Tribunal. They are therefore unchallenged findings of fact and there are no reasons to depart from them. The only element is that time has moved on. There has been no attempt on behalf of the Appellant to produce any evidence to demonstrate what has happened during that intervening period. Those findings of fact are set out in this determination at paragraphs 16-20.

41. Neither advocate has made any submissions as to the law that should be applied and the legal questions that require to be answered in this appeal. I shall therefore summarise those provisions below.

The Law

42. Section 3(5) of the 1971 Act provides:-

> "3(5). A person who is not a British citizen is liable to deportation from the United Kingdom if
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or …"

43. In making a deportation order the Respondent is required to have regard to paragraph 364 of HC 395. That Rule was amended on 19th July 2006 and now reads:-

> "364. Subject to paragraph 380, while each case would be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority."

44. It can be seen from paragraph 364 that the decision has to take into account paragraph 380 of HC 395 which provides:-

> "380. A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United

Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or the Human Rights Convention."

45. The Tribunal in **EO (Turkey)** provided guidance in dealing with deportation decisions. In determining an appeal against the deportation decision made on "conducive" grounds on or after July 20, 2006 the Tribunal should:

(a) "confirm that the Appellant is liable to deportation (either because the sentencing judge recommended deportation or because the Secretary of State has deemed deportation to be conducive to the public good);

(b) if so, consider whether deportation would breach the Appellant's rights under the Refugee Convention or the ECHR;

(c) if not, consider paragraph 364 HC 395."

46. In **Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC)** The Tribunal held:

"In a deportation appeal not falling within section 32 of the UK Borders Act 2007, the sequence of decision making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 still applies but the first step is expanded as follows:

i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:-

a. Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied;

b. Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport;

c. In considering b) the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy;

ii) If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private or family life, this will require an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors.

iii) If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human

rights should normally be deported absent exceptional circumstances to be assessed in the light of all relevant information placed before the Tribunal"

47. Paragraph 364 is only in issue if the Appellant fails to establish a claim under either Convention and if an appeal is to be allowed under paragraph 364 the Tribunal must identify the reasons, state why they amount to "exceptional circumstances", and why they are so strong that the Appellant is able to establish that his own circumstances displace the public interest".

48. Neither advocate made any submissions concerning the test set out in **EO (Turkey)** or the decision in **Bah** (as cited). Further it has not been argued on behalf of the Appellant that the Appellant is not liable to deportation in the light of the nature of his offences and his offending history. Thus I find that on the particular factual matrix of this Appellant that he is liable to deportation because the Secretary of State has properly deemed deportation conducive to the public good in the light of his offending history and the nature of the offences he has committed whilst in the United Kingdom. Those offences are set out earlier in the précis of the evidence and comprise of offences of battery and harassment and history of non-compliance with orders made by the courts, including the imposition of a community order and breaches of a restraining order. As noted by the Secretary of State the sentences of imprisonment added together aggregate to a custodial sentence of more than twelve months' imprisonment over a period of five years.

49. As regards any protections claims, the findings of fact relating to this are set out at paragraphs 33-38, paragraphs 49-58, paragraphs 59 -75 and 78-80. The panel found in summary that the Appellant's immigration history demonstrated that he arrived in the United Kingdom in 2002 claiming asylum, however on 11th September 2003 that application was refused and certified on third country grounds as it transpired he had already claimed asylum in Austria. Before he could be removed to Austria, the removal did not go ahead as the Appellant had absconded. A further application was made for asylum. The panel dealt with that in their determination making general credibility findings within the determination at paragraphs 78 to 80. They found the Appellant's account to be at risk of harm on return to Afghanistan to be an account which they did not find to be a credible one and they found that they had "significant doubts about the truthfulness of many of the details of the Appellant's accounts." Thus, having regard to the factual circumstances of his appeal did not accept that the Appellant would be at risk of harm in his home area on account of his father's alleged involvement with the Hezbi-Islami nor that he would be at risk of any harm from his or his family's alleged involvement with the Taliban by the authorities or the Taliban themselves.

50. The panel considered the general security situation in Afghanistan but found at paragraph 58 that the indiscriminate violence in the Appellant's home area was not of such a high level that there existed substantial grounds for believing that he would face a real risk. The panel found at paragraph 63 that even if his claim was credible and had a fear of persecution it would be local and that there was no evidence that

those people had any power, influence or intelligence outside the province and therefore the Appellant could relocate to Kabul (see paragraph 63-64).

51. As to resettlement in Kabul, the panel took into account the background evidence at paragraph 67 onwards and reached the conclusion at paragraph 74 that the Appellant had failed to establish that his family history, his ethnicity, his implied political opinion or other characteristics would cause him to be the subject of harm in Kabul. Whilst they found Kabul was a difficult place for the majority of its citizens to live in, ravaged as it has been by years of harsh Taliban authoritarian government and the recent war, the evidence before them did not demonstrate that there was a real risk of the Appellant being subject to torture, inhuman or degrading treatment or punishment. They found that he had shown by his conduct that he had been able to relocate to a completely different country and culture and this demonstrated resilience on his part and that when he reached Afghanistan he could use his resilience and skills acquired during his stay in the United Kingdom to facilitate his return. Further they found there would be state resources available for him. Whilst in the skeleton argument produced by Mr Hussain at paragraph 3.2 it is stated that it is "arguable that the First-tier Tribunal erred in its assessment of sufficiency of protection and that there is none", this was not pursued by Mr Hussain at the hearing, he did not refer to any background material or make any submissions on this point. Thus the findings of fact of the First-tier Tribunal, preserved by Judge Hanbury, remain as set out above.

52. It cannot be said that the Appellant has any claim to remain on the basis of asylum or protection grounds under Article 2 or 3 on the above facts.

53. Thus the advocates agree that the central issue in this matter will revolve around the Appellant's rights secured by Article 8 of the ECHR and the issue of the public interest:-

"Article 8 of the ECHR provides that:-

8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.

8.2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

54. I remind myself of the questions addressed by Lord Bingham in **<u>R (Razgar) v SSHD</u> [2002] UKHL 27** at paragraph 17. His questions are as follows:

"(i) Would the proposed removal be an interference by a public authority where the exercise of the Appellant's right to respect for his private or (as the case may be) family life?

(ii) If so, will such an interference have consequences of such gravity as potentially as to engage the operation of Article 8?

(iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate end sought to be achieved?"

55. As noted in the refusal letter, originally the Secretary of State considered that there had been no family life established in this case. The panel dealt with the issue of his family life at paragraphs 43-44 and at paragraph 92 noting that he last saw his "wife" in mid-February 2010 and found that from the description given by the Appellant, the marriage was not officially registered in the UK and that "whatever the circumstances, it is quite apparent that his relationship with his "wife" quickly deteriorated. It would appear that his relationship forms the background to the Appellant's criminal behaviour. We are satisfied that this relationship no longer exists." There is no evidence before this Tribunal to change that finding.

56. There is no issue between the parties and considering the well-established five stage test under **Razgar** and the questions to be addressed and that in respect of the first question, that the decision in this case to deport the Appellant from the United Kingdom is an interference with his Article 8 rights to respect for his private life., the Appellant having resided in the UK since 2002. Considering the second issue of **Razgar** "will the interference have consequences of such gravity as potentially to engage the operation of Article 8", it has not been in dispute before us that the refusal decision amounts to an interference with that life and that it crosses the minimum level of severity to engage Article 8(1).

57. Article 8(2) which deals with proportionality, states that there should be no interference by a public authority with the exercise of family rights under Article 8(1) except such as in accordance with the law and:

> "… is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

58. As noted, once Article 8 is engaged, the focus moves to the process of justification under Article 8(2). It is common ground between the parties that the decision here was in accordance with the law and it has not been suggested that the Respondent's decision does not further a legitimate aim, namely the prevention of crime and disorder. In this case past criminal conduct is the basis of the decision and thus the legitimate aim is the prevention of disorder or crime. Where a person poses a particular risk to the safety of others, the protection of the health or rights of others may be of importance. The issue therefore concerns the proportionality of that decision.

59. The Strasbourg court has repeatedly recognised that states have the right to control the entry and residence of non nationals. Further any serious interference with Article 8 rights must be a proportionate response to the objective sought, in this case the prevention of serious crime and the safety of the population generally.

60. The core principles for evaluating Article 8 claims in deportation cases are to be found in the judgment of the Grand Chamber in **Boultif v Switzerland (no.54273/00)[2001] ECHR 479**. The Court set out a list of factors to be considered. Boultif criteria have been adopted and augmented in subsequent judgments in this field including the decisions of the Grand Chamber in **Uner v Netherlands (no. 46410/99) [2006] ECHR 873** and **Maslov v Austria (no. 1638/03) [2008] ECHR 546**.

61. The relevant considerations were very clearly, and possibly exhaustively, set out at paragraphs 57 and 58 of the decision of the Grand Chamber of the European Court of Human rights in ***Uner v The Netherlands*** **(2007) 45 EHRR 14**, which I quote in full –

> "[57] Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland,* cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:
>
> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;

- the nationalities of the various persons concerned;

- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

- whether the spouse knew about the offence at the time when he or she entered into a family relationship;

- whether there are children of the marriage, and if so, their age; and

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

[58] The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

- the solidity of social, cultural and family ties with the host country and with the country of destination."

Conclusions:

62. I have therefore considered those criteria by reference to the findings of fact that the First-tier Tribunal have made and their analysis of the evidence.

63. I shall deal with the nature and seriousness of the offence committed by the Appellant. The circumstances of the offences committed by him are as follows:

On 14th December 2009 the Appellant appeared at Birmingham Magistrates' Court where he was convicted of failing to comply with the requirements of his community order. The order was varied so as to include a further ten hours' unpaid work.

On 2nd February 2010 the Appellant appeared at Birmingham Magistrates' Court where he was convicted of harassment. He was sentenced to six weeks' imprisonment and made the subject of a restraining order for two years until 1st February 2012.

On 23rd February 2010 the Appellant made a further appearance in court, this time before Birmingham Crown Court where he was convicted of breach of a restraining order and harassment. He was sentenced on 23rd March 2010 to a total of 30 weeks' imprisonment for both offences. His Honour Judge Mayo sitting at the Crown Court at Birmingham sentenced the Appellant for two offences both of which were breaches of a restraining order imposed on him by the magistrates in February of

2010 when he had been sentenced to a period of six weeks' imprisonment for pursuing a course of harassment. The sentencing remarks state as follows:-

> "You were released from that sentence within three days of being sentenced and within three days of your release from custody, you were pestering your former wife or your wife in Smethwick and then embarked on a series of harassing telephone calls on 18th February, 19th February and 20th February of this year. You were arrested on 22nd February and that obviously brought the contact to an end. I have read your pre-sentence report and I think, now, you probably have more insight into the importance of this order than you did before and I take into account, in fixing the length of the sentence, your pleas of guilty and the fact that no actual violence was used against your former wife. However, there are aggravating features here; the most important one is that you breached this order very shortly after it was imposed on you. It was a court order and court orders are not there to be disobeyed. You have a history of violence towards Rafia Begum going back some years and, in my judgment, what you did was persistent and calculated to cause psychological harm and indeed did cause Ms Begum some psychological harm. These offences are so serious that only a custodial sentence can be justified on the first offence, namely the Section 5 breach; there will be a sentence of twelve weeks' imprisonment. On the second offence, namely Section 4 offence, there will be a sentence of 30 weeks' imprisonment. Those sentences will run concurrently and I direct that no time shall be taken off any sentence you serve because I anticipate that you will return to custody as breach of your licence."

The judge also took the decision that the days that he had served would not count towards his sentence. The reason being that he had breached his order very quickly after it had passed and that he was the subject of a restraining order. The judge also issued a fresh restraining order and that from release from prison until 1st August 2012 it would remain in force.

64. The factual circumstances of these offences relate to his former partner as the victim of the crimes. There are no details of the circumstances of the offence of affray for which he was convicted in August 2006 nor for the two offences of battery for which he received a sentence of a twelve month community order with an 80 hours unpaid work requirement (it was subsequently varied following his failure to comply with the requirements of the community order six months later). There is some suggestion by the Appellant that it related to his partner but there is no document in respect of that.

65. In respect of the offences committed on 2nd February 2010, the circumstances are referred to in the judge's sentencing remarks when passing sentence for the breach of the restraining order. It is plain that the magistrate imposed a sentence of six weeks' imprisonment having pursued a course of harassment against his former partner. A restraining order for two years was also made. Within eleven days of his release from custody he began to pester and harass his former partner embarking on a number of harassing telephone calls. The judge made reference to the "history of violence towards Rafia Begum going back some years" and that the course of conduct he embarked upon was "persistent and calculated to cause psychological

harm" and as the judge observed, did cause her some psychological harm. Whilst no actual physical violence was used, it is plain that this persistent course of conduct led to his victim suffering some psychological harm.

66. The history demonstrates that on 14th April 2011 he was convicted by Birmingham Magistrate's Court of a breach of his restraining order and sentenced to eighteen weeks' imprisonment. The circumstances of this offence are not set out in the papers. Thus the Appellant had been convicted of four separate criminal offences and received a total of 54 weeks' imprisonment.

67. Mr Hussain on behalf of the Appellant has submitted that on 11th October 2010 the Secretary of State granted the Appellant indefinite leave to remain and did so after consideration of paragraph 395C factors which included matters such as length of residence, strength of connections, character and conduct and criminal convictions. It is further submitted that the Respondent must have given consideration to all of his previous convictions (save for 14th April 2011) when making a decision to grant him indefinite leave to remain and therefore it would be unfair and disproportionate for the Secretary of State to now consider it conducive to deport the Appellant on the strength of his most recent conviction. It is further submitted that the offence was committed against the same individual rather than the public, it was at the lower end of the scale and he has not committed any further offences.

68. It is common ground that the Secretary of State did grant the Appellant indefinite leave to remain on 11th October 2010 after he had committed criminal offences. Whilst Mr Hussain submits that he was granted indefinite leave to remain after the Secretary of State considered paragraph 395C factors, which included criminal convictions and character and conduct, I find such a submission to be speculative. It is not known what factors the Secretary of State took into account when reaching that decision and there has been no evidence placed before this Tribunal concerning that decision. At its highest, the panel made a reference to this in their determination of the Appellant being granted such leave on the basis of his length of residence outside the Immigration Rules (see paragraph 40 of their determination). Nonetheless the reasons given by the Secretary of State have not been put in evidence before this Tribunal.

69. Nonetheless the only logical explanation for the grant of indefinite leave to remain was that notwithstanding his offending history, the Secretary of State was prepared to accept that his offending had come to an end. However, as the history demonstrates that was not in fact the case. The Appellant continued to breach the restraining order against the same victim, who had previously been found to have suffered psychological harm from his course of conduct and that such conduct resulted in yet another period of imprisonment. In my judgment the Secretary of State was entitled to respond to the conduct of this Appellant by deportation measures.

70. As to the seriousness of the offences, the Secretary of State was entitled to take into account the Appellant's conduct and his refusal and lack of compliance of court orders; not only his breaches of the restraining order but also his failure to comply with community orders. This demonstrates in my judgment a persistent refusal to respect the authority of the court and the state. Whilst Mr Hussain submits that the facts of the offences were not serious, that would be ignoring the course of conduct embarked upon by this Appellant and that its seriousness does not necessarily come from the actual conduct itself but by his persistent failure to comply with court orders and breaches of those orders showing a lack of respect for the United Kingdom authorities.

71. Even if the Secretary of State took a generous view in respect of the Appellant's desire for leave to remain, the Appellant responded by committing further offences and failed to observe his obligations to abide by court orders. Whilst there has been no offending since 2011, in my view, the persistence of his previous record and his propensity to breach orders, the Tribunal is entitled to take that into account concerning offending in the future. There has been no OASy's Report produced nor has there been a pre-sentence report indicating whether or not he has undergone any courses whilst in custody relating to offences towards females or in the context of relationships with partners. There is no information before the Tribunal forthcoming from this Appellant whatsoever despite being given the opportunity to provide evidence concerning his position. Whilst the skeleton argument makes reference to the fact that the Appellant has "developed a far greater insight into the importance of abiding by restraining orders" by reference to the sentencing remarks, that fails to take into account that after those sentencing remarks, the Appellant went on yet again to breach the restraining order which led to a further period of imprisonment. Furthermore, to that end, there is no evidence before this Tribunal to suggest that he would behave any differently in the future should he find himself in a relationship with a female partner.

72. When considering the length of stay the Appellant has been in the United Kingdom since 2002 having entered illegally and claiming asylum. His claim was refused by 2003 and then he absconded. He was granted indefinite leave to remain in 2010 thus much of his time in the United Kingdom has not been by way of lawful leave. Any lawful leave has been a relatively short period.

73. I have dealt with earlier the time elapsed since the offence was committed and his conduct during that period. There is nothing known of his conduct save from the bare assertion that he has not committed any offences. No assessment of risk has been placed before the Tribunal bearing in mind the type of offending for which he has been dealt with in the past.

74. As to the nationality of the Appellant, he is an Afghan national and the matters set out earlier in this determination relating to the panel's findings of fact which demonstrated that he would not be at risk of harm upon return to Afghanistan is of relevance. Their findings as to his resilience to re-establishing his life in Afghanistan

is set out in their findings of fact and whilst they did not doubt the quality of life would be far from good for many of its citizens and the services available are basic, the Appellant had shown that he had been able to relocate to a completely different country and culture, therefore showing a resilience. He was found to be a man who was in good health and there was no evidence that he would be unable to work to support himself (see paragraph 88) and whilst it may not be easy to establish life in his country of origin it would not be shown that it would be unduly harsh for him to do so. By way of comparison, the panel found that he had limited social and cultural ties to the United Kingdom.

75. In drawing together all of those factors in the light of the assessment I have made, I remind myself that the assessment of proportionality for me to consider having regard to the strength and the nature of the private life on the one hand and the legitimate aim identified in this case and to the strength for deportation as a fair balance and as being necessary in support of that aim.

76. The legitimate aim of the prevention of crime is not confined to those who are likely to reoffend and I am satisfied that the case law indicates that in serious cases affecting public confidence in the criminal justice and immigration systems, deportation of offenders has a legitimate role of play in the deterrence of others who might be minded to offend (I refer to **<u>N</u> Kenya [2004] EWCA Civ 1094** and **<u>OH</u> Serbia [2008] EWCA Civ 694**). I remind myself that I have to balance the private interests of this Appellant against the public interests of the state, which Judge LJ (as he then was) summarised in **<u>N</u> (Kenya)** as being "broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom". Cases decided by the Court of Appeal including **<u>Samaroo v SSHD</u> [2001] EWCA Civ 1139**, **<u>N</u> (Kenya)** and **<u>OH</u> (Serbia)** identified particular public policy or public interest considerations that had to be taken into account at two stages. First they were factors that the SSHD was entitled to take into account when deciding whether or not to make a deportation order. Secondly, they were factors going to the public interest, to which appropriate weight had to be given by the Tribunal when considering the balance between public interests and the private interests of a potential deportee if he demonstrated that his removal pursuant to a deportation order would infringe his Article 8 rights, so that the "proportionality" balance had to be struck in accordance with Article 8(2) of the ECHR .

77. I take into account the remarks of Wilson LJ in **<u>OH</u> (Serbia)** who summarised three important "facets" of the public interest that had to be considered in deportation cases involving non-British citizens who had been convicted of offences in the UK and where the SSHD had concluded that the deportation of the person concerned was conducive to the public good. Those "facets" he identified were, the risk of reoffending by the person concerned which I have dealt with in the preceding paragraph, the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation; and the rule of deportation as a expression of

society's revulsion at serious crimes and in building public confidence and the treatment of foreign citizens who have committed serious crimes.

78. In this appeal the sentence passed was a short custodial sentence. Thus as identified by Mr Hussain the question remains as to whether deportation is proportionate, giving due and proper weight to the public interest which I have identified earlier and to the right to respect for this Appellant's private life.

79. In the light of the facts set out, whilst it has been demonstrated that the Appellant has been in the United Kingdom since 2002 the period of lawful leave has been a relatively short one since granted indefinite leave to remain in 2010 after which time, despite that generous grant of leave the Appellant responded by committing a further criminal offence of the same type that he had done before. The nature of the private life found by the panel was weak; he did not identify any significant relationships with others, any work carried out in the community, any course of study that he has undertaken either prior to being granted leave or since granted leave. He has then been given the opportunity to provide further evidence before this Tribunal to demonstrate that his private life is of such significance. The only factor is the length of residence which has been since 2002. Consequently the Appellant's claim to have established a private life is a weak one factually.

80. On the other side of the balance, whilst the Secretary of State was entitled to take the view that the Appellant has shown a persistent course of conduct, which has resulted in short custodial sentences, in my judgment it demonstrates a more fundamental seriousness by this Appellant and his failure to comply with the orders of the court and the persistent refusal to respect the authority of the court and the state. Whilst he has not committed an offence since April 2011, the legitimate aim of the prevention of crime is not confined to those who are likely to reoffend and I must have regard to the broad social issues relating to deterrents as set out earlier (see **OH Serbia**) (as cited). Therefore having weighed the relevant factors in the balance, having found and paid regard to the length of residence he has had in the UK since 2002, but that he has put forward only a weak private life that has been unsubstantiated by any significant relationships, work within the community, courses of study, this balanced against the public interest demonstrates in my judgment for the reasons given, it has not been demonstrated that it would be disproportionate for the Appellant to be deported.

81. I now move to the next issue. As demonstrated by the decision of the Tribunal in **Bah** (as cited), if the two previous steps are decided against the Appellant then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. Paragraph 364 is only in issue if the Appellant fails to establish a claim under either Convention and if an appeal is allowed under paragraph 364 the Tribunal must identify the reasons, state why they amount to "exceptional circumstances and why they are so strong that the Appellant is able to establish that his own circumstances displace the public interest." As noted in **Bah** the present wording of the Rules assumes that a person

who is liable to deportation (as in this case) and whose deportation was not contrary to the law and in breach of human rights (as found in relation to this Appellant for the reasons set out above) should normally be deported absent exceptional circumstances to being assessed in the light of all relevant information placed before the Tribunal.

82. In the light of the matters set out above, Mr Hussain has not identified any exceptional factors relevant to this Appellant's case. Those that he has relied upon have been taken into account earlier for the reasons I have given but none of them have been demonstrated to show that they amount to "exceptional circumstances" nor has it been demonstrated that they are so strong that the Appellant is able to establish that they displace the public interest that I have identified in this case. For those reasons, I find the decision to deport the Appellant to be a proportionate one and is otherwise in accordance with the law.

Decision

83. The original Tribunal made an error of law. The decision is set aside. The decision is re-made as follows. The appeal is dismissed.

Signed Date **8th** October 2013

Upper Tribunal Judge Reeds