Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/10756/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 27 March 2014	**On 6 May 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

N M
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Sills, Counsel, instructed by JD Spicer Zeb, Solicitors
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 1 January 1994 and is a citizen of Afghanistan. He appeals with permission against the determination of First-tier Tribunal Judge S Taylor promulgated on 20 January 2014, dismissing his appeal against the decision made by the respondent on 25 November 2013 to refuse to grant him further leave to remain and to remove him from the

United Kingdom by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant arrived in the United Kingdom in August 2008 and claimed asylum. The respondent did not accept his claimed date of birth and refused his claim on 23 July 2010. An appeal against that decision was successful although to a limited extent. First-tier Tribunal Judge Cockrill found that the appellant was the age claimed; that the decision was therefore unlawful; and, directed that the respondent should reconsider the matter. The decision to refuse the claim for asylum was maintained but the appellant was granted discretionary leave to remain until 1 June 2011 in the light of the finding on his age. On 26 May 2011 he applied for further leave to remain in the United Kingdom. No decision was reached on that case until 25 November 2013 and it is against that decision that the appeal to the First-tier Tribunal lay.

3. The appellant's case is, in summary, that his father had worked as a civil servant in the local district office but had been killed in 2005 by the Taliban. His older brother had disappeared about a year earlier. Later, the Taliban came looking to recruit him but he was not at home when they called. It was for that reason that his family took steps to have him taken out of Afghanistan and to the United Kingdom where he claimed asylum.

4. The respondent did not accept the appellant's account of events but did accept his date of birth. Although accepting that in 2008, the time he had left Afghanistan, he had been of an age where forced recruitment to the Taliban was likely, she did not accept that that had occurred. The respondent also considered, given that the appellant was over 18, that although she had not carried out family tracing, he would not be disadvantaged by that. She concluded also that the appellant had failed to establish a private or family life within the meaning of the Immigration Rules and that there was no reason on which he could not be removed from the United Kingdom.

5. On appeal, Judge S Taylor accepted the appellants account of the events which took place in Afghanistan leading to his departure, in particular that his brother had disappeared; that his father had been killed by 2005 [18]; and, that the Taliban had come to look for him to recruit him in 2008. He then went on to dismiss the appeal, finding that:

   (i) the situation in Afghanistan had moved on since the appellant left and that there was no evidence of continued interest in him by the Taliban [18];

   (ii) following Country Guidance, the appellant would not be at risk on return to Kabul Airport or Kabul [19]; that there was no longer such a high level of indiscriminate violence in Afghanistan such that the appellant would be at risk and thus entitled to humanitarian protection [19]; and, that the appellant was not in an enhanced risk

category by reason of his age [20], there being no evidence that he would be seen as a child due to lack of education and maturity;

(iii) the appellant had failed to remain in contact with a tracing agency and that in any event he had not been disadvantaged by the lack of tracing as he is now an adult and his account of the events which had occurred in Afghanistan had been accepted [20];

(iv) there had not been an unreasonable delay in dealing with the appellant's application or that he had been disadvantaged by any delay; that he was not at risk due to his enhanced risk due to his personal history [20]; that there was no evidence of a link between the death of the appellant's father and the Taliban's wish to recruit him three years later [20] or that he was targeted for recruitment on account of his father's occupation; that there was no evidence that the attempted recruitment of the appellant was anything other than a general recruitment of youth in the area and no evidence of continued interest by the Taliban and the appellant, it being accepted that there was no evidence that the appellant was on a Taliban wanted list [20]; that no evidence had been submitted to ongoing risk in his home area after five and a half years and thus it would not be necessary for the appellant to consider internal relocation but were he to do so that he could relocate to Kabul [20];

(v) the appellant had not established a family life in the United Kingdom although he did have a girlfriend [24] and that any interference with his right to respect for his private life would not be of sufficient gravity to engage Article 8 [24] in light of **MG (Serbia and Montenegro) [2005] UKAIT 113** given that he is not working or studying in the UK, there was no work record and no history of progression of his studies, evidence of community involvement and his private life had been established whilst he had only limited leave and that it would be proportionate to the needs of immigration control for him to be removed [24];

(vi) the respondent had fully considered paragraph 353B of the Immigration Rules and that there were no additional factors connecting the appellant to the United Kingdom or other exceptional factors under paragraph 353B [25].

6. The appellant sought permission to appeal on the grounds that:-

(i) given that past persecution had been accepted [6] the judge had erred in concluding that the appellant was no longer at risk by not taking into account of Article 4.4 of the Qualification Directive, that is, that prior persecution is a serious indication of a well-founded fear of persecution in the future unless there are good grounds to consider that it would not be repeated, the judge's reasoning on the latter issue not being sufficient;

(ii) the judge had failed to consider objective evidence submitted to the effect that the appellant would be at an ongoing risk of persecution, by failing to make reference to the UNHCR 2013 eligibility guidelines [9] which was "evidence" that the appellant would still be targeted by the Taliban because of his past, his father's association with the Afghan government and in his own right, [10], it being incorrect to state that there was no evidence and that accordingly the finding that the appellant was not in an enhanced risk category or at risk in his home area were flawed [11] and that further, the judge's conclusions with respect to internal relocation were unsatisfactory and unsafe [12] given the failure to consider the UNHCR eligibility guidelines;

(iii) the judge erred in concluding that the appellant had not met the thresholds for Article 8 to be engaged [13] given that he had lived here now for five and a half years [14]; that his residence had not been precarious from the outset [15] and that had the appellant's case been properly considered on the basis of the findings made, the appellant would have been granted refugee status had his case been considered whilst he was a minor [16];

(iv) the judge had failed to consider the impact of delay in the appellant's case, it being incorrect to say that he had not been disadvantaged [20] given that on the findings made by the judge, the appellant, his case would have succeeded had these findings been made whilst he was a minor [20], the delay also being relevant on asylum grounds on the basis that the appellant would have benefitted from them from the **Rashid/S** principle in addition due to the failure to apply the tracing obligation; that the judge had also erred in his consideration of paragraph 353B in failing to take into account the length of the time spent by the appellant in the United Kingdom and without having had regard to chapter 53 of the enforcement instructions and guidance.

7. On 13 February 2014 First-tier Tribunal Judge McDade granted permission on all grounds.

8. On 4 March 2014 the respondent replied pursuant to Rule 24 in stating that Judge S Taylor had directed himself appropriately; had properly considered the issue of risk on return and had dealt adequately with the issue of Article 8 as well as the issue of delay.

Submissions

9. Mr Sills submitted that the judge had failed to take into account the UNHCR guidance although he accepted that there was no further evidence specific to the appellant since he had left Afghanistan. He submitted that the UNHCR guidance shows that the appellant's home area, Nangarhar, had a high level of security incidents and that the appellant was at risk because his father had been employed as a civil servant (the risk category part 3). He submitted that in the alternative the judge had erred in failing

to take into account relevant evidence regarding Kabul and had dealt solely with the issues of general risk, the judge having been invited to consider the UNHCR guidance that the Taliban can operate throughout the country, seeking to rely also on **AA (Afghanistan),** the appellant in that case being from a family associated with the government and it would not be easy for him to go away from Pashtun areas, principles which would apply equally in this case.

10. Mr Sills submitted that the judge had applied too high a threshold in considering Article 8 and had erred to say that any risk was disproportionate, given that he had directed himself to case law relevant to those situations where people had not had leave to remain.

11. In respect of delay Mr Sills submitted that there had been two substantial periods of two years' delay which were relevant and ought to have been taken into account. He submitted that as a result the respondent had acted unlawfully with respect to the asylum claim and on that basis following **KA (Afghanistan)** at paragraph [25] he was entitled to leave to remain either on **Rashid** principles or as a result of the failure to trace. He submitted further that the substantial delay here took the facts of this case outside **Gulshan** and that the judge had erred in his approach to paragraph 353B.

12. Ms Holmes relied on **EU (Afghanistan) [2013] EWCA Civ 32**, submitting that the judge had had regard to the evidence and had given good reasons for concluding that past persecution would not give rise to a well-founded fear on return [20]. She submitted further that the UNHCR guidelines did not constitute substantive evidence relating to an ongoing risk in the home area and that, as the judge had been entitled to find the appellant was not at risk in his home area, any finding with regard to risk in Kabul was unnecessary and in any event the decision in **AA (Afghanistan)** was not relevant.

13. Ms Holmes submitted also that the appellant had not been disadvantaged by a failure to trace or by the delay in consideration of his case. She submitted that this case was not at all like that in **Rashid** and that the judge had made findings with respect to Article 8 which were open to him.

14. In reply, Mr Sills submitted that the appellant's case could be distinguished factually from **EU**, the key issue being the unfairness arising from the delay of the failure to trace. In all the cases before the Court of Appeal in **EU** the appellants had been found not to be credible; that was not the case here.

Discussion

15. Judge S Taylor concluded that the appellant had been subjected to an attempted forced recruitment in the past. There is no challenge to that finding, but equally he found [20] that there was no evidence the appellant was specifically targeted for recruitment on account of his

father's occupation and that there was no evidence that the attempted recruitment of the appellant was anything other than the general recruitment of youth in the area [20]. He also found that there was no evidence of continued interest in the appellant on the part of the Taliban, interest last shown in him some five and a half years earlier. These were conclusions open to him, and for which he gave adequate reasons. There is no effective challenge to these findings.

16. Mr Sills was unable to point me to evidence relating to the particular circumstances of the appellant or relating to the situation on the ground in the appellant's home area. Whilst he did direct me towards the UNHCR guidelines which are quoted in considerable detail in the grounds of appeal [9] none of this is specific to the appellant or to his area and Mr Sills was unable to point me to any other evidence on these issues which was before Judge S Taylor.

17. It is evident from the determination at [19] and [20] that the judge had considered the relevant country guidance material and risk factors, taking these into account when concluding that the appellant would not face the same problems on return, as must his finding that the appellant, who is now no longer a minor, had been sought as part of a general recruitment of youth. Mr Sills was unable to point me to any evidence which is supportive of the contrary proposition over and above the UNHCR's guidelines which are by definition not specific to this appellant.

18. The judge was thus entitled to conclude that there had been a change over time – the appellant's age and reaching maturity – such that he would no longer be at risk of persecution or serious harm and in the circumstances, sufficient reasons were given for concluding that the persecution in the past would not be repeated. The judge gave adequate reasons, for his conclusion that the appellant would not be at risk on return. Whilst taken in isolation the observation that "things have moved on" is somewhat succinct, it is clear that this conclusion was reached after a careful consideration of the relevant country guidance material [19] and other risk factors [20].

19. The judge found that the appellant had not established a family life in the United Kingdom. That was a conclusion open to him and is unchallenged. It was also open to him to conclude that the appellant's life had been established here when he was in a precarious situation and it was open to him to conclude [24] that there was little content to the appellant's private life.

20. It is accepted that there was no tracing undertaken but equally, on the facts of this case, as the appellant was only on appeal believed in the substance of his claim, it is not properly arguable that he has been disadvantaged by this. Whilst I accept that, the appellants in **EU (Afghanistan)** were not believed, this case can be distinguished on its facts from **KA** and **Rashid** as here, the Secretary of state had concluded that the appellant had not told the truth. It is not properly arguable that

tracing would have resulted in a different outcome. This is not analogous to the situation in **Rashid** where the Secretary of State had failed to apply properly a policy whereby, on the facts accepted by her, the applicant should have been granted status. It was only as a result of further, fresh fact-finding exercise carried out by Judge S Taylor that the appellant was in a position whereby he would have won an appeal.

21. Although there has been delay in this case, that is not in itself a basis on which the appellant was entitled to leave to remain in the United Kingdom, given the very limited and restricted content of his private life as found by the judge, findings which were open to him. In reality, this is a challenge to weight which was a matter for the judge, and for which he gave sustainable reasons.

22. The arguments with regard to the delay and paragraph 353B are not well-founded. The judge explained adequately why he did not consider that the delay on the facts of this case was of particular significance, a conclusion open to him, and accordingly the submissions with regard to his findings are nothing more than disagreements with weight to be attached to that factor.

23. Accordingly, for these reasons, I consider that the determination of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

SUMMARY OF CONCLUSIONS

1 The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

2 I maintain the anonymity order made by the First-tier Tribunal

Signed Date: 25 April 2014

Upper Tribunal Judge Rintoul