**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/07400/2014

**THE IMMIGRATION ACTS**

**Heard at: Field House**
**On: 17th April 2015**

**Determination Promulgated**
**On 13th July 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**MZ**
**(anonymity direction made)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

Representation:
For the Appellant: Mr Smyth, Kesar & Co
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The Appellant is a national of Afghanistan date of birth 1st September 1996. He appeals with permission[1] the decision of the First-tier Tribunal (Judge S Taylor) to dismiss his asylum appeal[2].

[1] Permission was granted on the 9th January 2015 by First-tier Tribunal Judge Levin
[2] Appeal brought under s83(1) of the Nationality, Immigration and Asylum Act 2002.

2. It is accepted that the Appellant was 16 years old when he arrived in the UK as an unaccompanied asylum seeking child on the 4th July 2013. He claimed asylum and in accordance with her policy the Respondent granted him discretionary leave until he was 17½ years old. The Respondent rejected the Appellant's claim to international protection, having found his account of forced recruitment to the Taliban not to be credible.

3. The Appellant brought an appeal to the First-tier Tribunal. In a decision dated 18th November 2014 Judge Taylor accepted the Appellant's account of events before he left Afghanistan to be true. That factual background is as follows:

   i) he is from a village in Chardara district, Kunduz, an area of "high Taliban activity";

   ii) his father had formerly worked for the Taliban but had left the organisation;

   iii) this had resulted in his abduction, along with the Appellant's brother, in (approximately) late 2012;

   iv) his father and brother's whereabouts remain unknown;

   v) his mother died shortly after the abduction;

   vi) his paternal uncle who remains in his home area is a senior Taliban commander;

   vii) a tenant farmer helped him leave the country in exchange for the Appellant giving him his father's land;

   viii) the Appellant was 16 when he arrived in the UK, and had just turned 18 at the date of the appeal hearing

   ix) he has no family in, nor any known connection with, Kabul.

4. Having made those findings the determination implicitly accepts that the Appellant would be at risk in his home area. I say this because the next paragraph dismisses the appeal on the grounds that there was a reasonable internal flight alternative. The First-tier Tribunal finds that the Appellant would be returned to Afghanistan as an 18 year old and could therefore safely relocate to Kabul [at 17]:

> "His expert report referred to the large numbers of people who had returned to Kabul and the difficulty of finding work. The expert report refers to the poor earnings and restricted employment opportunities in Kabul, such that the appellant would probably be unemployed. The expert report refers to various charity organisations which help people in Kabul which the appellant may have recourse to. The expert report acknowledges that the UK government provides assistance to returnees from the UK but some returnees had a lack of confidence in the system. The expert report refers to difficulties in Kabul but does not suggest that the appellant would be in danger of being hunted down or targeted by the Taliban in Kabul. Neither is there any expert or external evidence to

> suggest that the appellant would be at risk from the government on return, as the son of an ex-Taliban member. By the time that the appellant would return to Kabul he would be at least 18 and a half, he has no medical issues, and he has had the advantage of some education in the UK. While there may be difficulties on return to Kabul, which may be considered harsh, the test in the case of Januzi [2006] UKHL 5 was relocation being unduly harsh, which is a higher test than being harsh. I find no aspects of undue harshness on return. Many of the returnees to Kabul would have no family support but there are several support agencies such as charities and government assistance schemes".

**Submissions on Error of Law**

5. This appeal is brought on the grounds that in making his findings on internal flight the First-tier Tribunal Judge failed to consider, or give appropriate weight to, the particular characteristics of this appellant, those being his young age, and the background facts set out above: he would be returned to Kabul as a very young man whose entire family have died/been kidnapped by the Taliban. The grounds submit:

   a) That the First-tier Tribunal failed to have regard to the findings in AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC):

      > "92. But the background evidence demonstrates that unattached children returned to Afghanistan may, depending upon their individual circumstances and the location to which they are returned, be exposed to a risk of serious harm, inter alia from indiscriminate violence, forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection. Such risks will have to be taken into account when addressing the question of whether a return is in the child's best interests, a primary consideration when determining a claim to humanitarian protection".

      Had the First-tier Tribunal expressly directed itself to these findings it may not have concluded that internal flight would not be unduly harsh.

   b) That the Tribunal further failed to have regard to the point made by Maurice Kay LJ in KA (Afghanistan) & Ors v SSHD [2012] EWCA Civ 1014:

      > "18. At this point, it is appropriate to refer to what I may call "the eighteenth birthday point". Although the duty to endeavour to trace does not endure beyond the date when an applicant reaches that age, it cannot be the case that the assessment of risk on return is subject to such a bright line rule. The relevance of this relates to the definition of a "particular social group" for asylum purposes. In *DS*, Lloyd LJ considered *LQ (Age: immutable characteristic) Afghanistan* [2008] UKAIT 00005 in which the AIT held that "for these purposes age is immutable", in the sense that, although one's age is constantly changing, one is powerless to change it oneself. Lloyd LJ said (at paragraph 54):
      >
      > > "… that leaves a degree of uncertainty as to the definition of a particular social group. Does membership cease on the day of the

> person's eighteenth birthday? It is not easy to see that risks of the relevant kind to who as a child would continue until the eve of that birthday, and cease at once the next day."
>
> Given that the kinds of risk in issue include the forced recruitment or the sexual exploitation of vulnerable young males, persecution is not respectful of birthdays – apparent or assumed age is more important than chronological age. Indeed, as submissions developed there seemed to be a degree of common ground derived from the observation of Lloyd LJ."

It is submitted that this determination fails to assess the risk/circumstances in Kabul for young man leaving care, who has only just reached majority. Further reliance is placed on JS (former unaccompanied child – durable solution) (Afghanistan) [2013] UKUT 568 (IAC).

c) That the established facts place the Appellant at the top end of Maurice Kay LJ's hypothetical spectrum in KA: he is a young person who has provided a credible account of having no family to whom he can turn. Had the Secretary of State discharged her duty to trace his family members when he claimed asylum his account would have been corroborated and he would have been granted asylum then. This raises the principle of 'corrective relief'.

6. For the Respondent Mr Avery agreed that there is no "bright line" between minority and majority, but the fact was that the Appellant was now an adult for whom no particular vulnerabilities had been identified. He pointed out that the skeleton argument before the First-tier Tribunal had not argued that the Appellant was a membership of a particular social group by reason of his age. As for the tracing point Mr Avery protested that the burden of proof does not lie on the Respondent; it is for the Appellant to prove his case and the obligation to trace does not extend to proving the Appellant's case for him.

**My Findings**

7. The legal framework to be applied when considering internal flight is set out at Article 8 of the Qualification Directive:

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

8. In AH (Sudan) [2007] UKHL 49 the House of Lords make clear that the question of whether internal flight is "reasonable" is not to be equated with the test under Article 3 ECHR. Lord Bingham refers [at 5] to his own guidance in Januzi [2006] UKHL 5:

> "In paragraph 21 of my opinion in Januzi I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:
>
> > 'The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so….There is, as Simon Brown LJ aptly observed in Svazas v Secretary of State for the Home Department, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls… All must depend on a fair assessment of the relevant facts'.
>
> Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evidence that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant…"

9. At 20 Baroness Hale cites with approval the UNHCR view that the test is whether the individual will be able to live a "relatively normal life without undue hardship", itself a formulation approved by their Lordships in Januzi[3]:

> "As the UNHCR put it in their very helpful intervention in this case:
>
> > '…the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship'.
>
> I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very

[3] See for instance Lord Hope of Craighead at 47.

> little, apart from the conditions in the country to which the claimant has fled, is ruled out."

10. The cases that the Appellant cites in his grounds of appeal apply this guidance with specific reference to the position of the young. I am satisfied that in his consideration of internal flight the First-tier Tribunal Judge did not have any regard to the particular dangers identified for unaccompanied young males in AA and other cases, for instance "indiscriminate violence, forced recruitment, sexual violence, trafficking". Whilst it is no doubt correct to say that being unemployed does not itself render internal flight "unduly" harsh there must be some consideration of what the consequences of that would be for this 18 year old with no connections in the city, a troubled past and a objectively well-founded fear of the Taliban that would prevent him from returning to his home area. The findings in paragraph 17 of the determination do not address any of these issues. There was before the First-tier Tribunal a detailed expert report by Claudio Franco which does:

> "The option of MZ making his own way in Kabul must be considered. MZ is a young man whose life experience consists firstly of life in a remote rural village, and secondly, of some time in the UK which has been directed and structured by social services, school etc. Neither has prepared him for life in a chaotic, teeming, predatory large city full of desperate people, such as Kabul. Lacking a home, employment and any friends or family members – indeed any contacts at all – his situation would be extremely precarious. It must be remembered that in Afghan culture and society the importance of family and kinship networks and the support they provide are absolutely central, and constitute defining trait of a person to an extent which is difficult to understand when accustomed to the highly individualistic perspective of British culture…."

Mr Franco then sets out the statistical data on the rampant unemployment rate and concludes:

> "Were he forced to relocate to Kabul on his own, the probability of his ending up on the street without home or employment therefore is very high, in a city already awash with desperate people, having an infrastructure stretched to breaking point, and lacking any form of social services. He might have recourse to various options such as ASCHIANA who provide free meals, or the Revolutionary Association of the Women of Afghanistan (RAWA) who run an orphanage in Kabul. Even at best, these options would provide a subsistence or survival level existence. Added to this must then be the considerable risks of becoming a victim of crime on the streets, or of sexual predation of street children, which is a significant problem".

11. I find that the determination of the First-tier Tribunal fails to consider internal flight in the context of the particular circumstances of this Appellant. He is not simply an "adult male". He is a young man who has only just attained majority, who has lost his mother, father, brother, whose only living relatives are members of the Taliban and to whom he cannot therefore turn,

who has no connection at all to Kabul. The risks to someone in his situation are plainly spelled out by Mr Franco, a recognised expert on Afghanistan who has produced a pertinent and balanced report. The Appellant's case was not simply the high likelihood of him facing unemployment in Kabul. It was the risk which stemmed from that: homelessness, destitution, vulnerability to crime, sexual predation and trafficking. These are not matters which can be considered part of "normal life". Whilst much of the population in Kabul are living in very challenging circumstances, they do so with connections and family support. The Appellant has neither of these things. I set the decision of the First-tier Tribunal aside. The errors identified are a failure to apply the legal tests on internal flight to the individual circumstances of the Appellant, and further a failure to consider the material evidence of Mr Franco (it should be noted that the evidence of risk in Kabul was not confined to his report, but is most conveniently summarised therein).

12. The parties agreed that if the grounds in respect of internal flight were made out this was a case where the final outcome was 'rolled up' with the finding on error of law. Having found the determination contains the errors set out above it follows that I would re-make the decision in the appeal by allowing it on the grounds that there is a risk to the Appellant in his home area and that there is no reasonable internal flight alternative.

13. I need not therefore address the 'tracing/corrective relief' grounds.

**Decisions**

14. The determination of the First-tier Tribunal contains an error of law and it is set aside.

15. I re-make the decision in the appeal by allowing it on asylum grounds.

16. The First-tier Tribunal made a direction for anonymity and I do the same in the following terms:

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

Deputy Upper Tribunal Judge Bruce
17th June 2015