Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/18670/2014**

THE IMMIGRATION ACTS

Heard at Field House, London **Decision & Reasons Promulgated**
On the 19th August 2015 **On the 4th September 2015**

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR Z Y
(Anonymity Direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Solanki (Counsel)
For the Respondent: Miss Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Respondent's (The Secretary of State for the Home Department's) appeal against the decision of First-tier Tribunal Judge Norton-Taylor dated the 12th December 2014. Although it is the Respondent's appeal, for the sake of clarity, throughout this decision the parties will be referred to as they were referred to in the First-Tier Tribunal hearing, such that Mr Z Y is referred to as the Appellant and

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the Secretary of State for the Home Department is referred to as the Respondent.

Background

2. The Appellant had initially entered the UK illegally in July 2009 and claimed asylum on the 6th August that year. He claimed asylum on the basis that he is a national of Afghanistan and that his father was an important figure in the local community and had interacted with the US forces when they visited his home village, such that his father had received threats from the Taliban who were active in the region. His case is that the Taliban had attacked his home, killing the Appellant's father and brother and the Appellant had made arrangements to leave Afghanistan, and had come on a long journey to the United Kingdom via Iran, probably Turkey, Greece, Italy and France and that during that journey it is said that the Appellant was told that his mother had died.

3. The Appellant's claim for asylum was original rejected by the Respondent on the 14th January 2010, but he was granted discretionary Leave as a minor that ran until the 1st July 2010, the Appellant having been born on the 1st January 1993. On the 17th June 2010 he made a further application for Leave to Remain which was refused. He appealed and that appeal was dismissed by First-tier Tribunal Judge Aujla. The Appellant appealed to the Upper Tribunal and Deputy Upper Tribunal Judge Davidge on the 9th September 2011 found an error of law existed in that Judge Aujla failed to consider the Appellant's best interests as a minor at the time and therefore set aside the Judge Aujla's determination. He remade the decision by relying upon the adverse credibility findings found by Judge Aujla and went on to dismiss the Appellant's appeal on all grounds.

4. Thereafter on the 2nd April 2013 the Appellant's representatives submitted further submissions in support of a fresh claim for international protection and in respect of Article 8. The Appellant now relied upon a report from Dr German, a Chartered Educational Psychologist dated the 28th February 2013, in which it was said that the Appellant had severe learning difficulties and also PTSD, and that he was suffering from distress, depression and also was a suicide risk. The

Respondent considered those submissions as a new claim but still refused the Appellant's claim in a refusal letter dated the 10th March 2014. That decision was the subject of the appeal that was heard before First-Tier Tribunal Judge Norton-Taylor on the 14th November 2014.

5. First-Tier Tribunal Judge Norton-Taylor noted that the Respondent had conceded that the Appellant had PTSD and severe learning difficulties and she equally found that he had both PTSD and severe learning difficulties, irrespective of the concessions that had been made. The First-Tier Tribunal Judge did not accept that the Appellant was a severe suicide risk in that the Respondent's removal decision in March 2014 did not result in any adverse action by the Appellant and he was not under the care of mental health services. However, she accepted that the combination of the Appellant's age at the time, together with his cognitive and mental health problems did undermine the reliability of the previous adverse credibility findings reached by Judge Aujla.

6. Judge Norton-Taylor accepted that the Appellant's father was considered by the Taliban to have assisted the US forces and that the Taliban had attacked the Appellant's home sometime in 2008 and his father and brother had been killed and that the Appellant had then left Afghanistan in 2008 and made his way to the UK and that during that journey he been told that his mother had died. However the First-Tier Tribunal Judge did not accept the Appellant was at a real risk upon return as he was the surviving relative of a perceived collaborator who had already been killed. Further, the Appellant given his limited capability was found not to be an individual who was able to mount any sort of threat against the Taliban, nor did she consider that there was there any real risk of the Taliban forcibly recruiting him. The Appellant's appeal on asylum grounds was therefore rejected, as was his claim under Article 3.

7. However, First-Tier Tribunal Judge Norton-Taylor allowed the Appellant's appeal under paragraph 276 ADE (vi) of the Immigration Rules, for the reasons set out within [71] to [80] of her determination. She concluded that the Appellant was a very vulnerable young man who would face "very significant obstacles" indeed to reintegration back into Afghan society at this time. She appreciated the test was a high one, but found that it was satisfied in this case.

8. The Respondent has appeal that decision to the Upper Tribunal. In the Grounds of Appeal it is argued that First-Tier Tribunal Judge Norton-Taylor materially misdirected herself in law regarding her assessment as to whether or not there were very significant obstacles for the Appellant’s integration into Afghan society and that the Appellant’s ability to access medical treatment and the fact that he would not receive a level of comparable support to that which he receives in the UK did not amount to significant obstacles and that the First-Tier Tribunal Judge’s approach was thereby fundamentally flawed. It is further argued that the Home Office Presenting Officer at the First-tier hearing relied upon the case of Akhalu (Health Claim: ECHR Article 8) [2013] UKUT 00400 in support of the Respondent’s position regarding the Appellant’s medical needs and that the public interest in removal is a weighty factor and that whilst in the difference in care and availability of care was relevant to the proportionality assessment, such factors will be defeasible by the public interest in removal, particularly in light of the need to ensure “that the limited resources of this country’s health services are used to the best effect for the benefit of those for whom they are intended”.

9. It is argued that the First-Tier Judge did not engage with Akhalu nor establish why this appeal is one of those very rare cases envisaged by the Tribunal in the Akhalu case. Although the Appellant has learning difficulties compounded by PTSD, it is argued that it was not clear why the circumstances amounted to a “very rare case”.

10. The second ground of appeal argues that the First-Tier Tribunal Judge was wrong in law to find that although “little weight” should normally be given to an Appellant’s private life that was formed when his status was precarious under section 117B(5) of the Nationality, Immigration and Asylum Act 2002, in this case the reduction in the weight should be reduced as the Appellant was present in the UK having had leave as a minor. It is argued that there is no authority for concluding that a distinction should be drawn in the weight afforded under section 117B (5) based upon whether or not the Appellant was here as a minor and that the Appellant’s private life should have been afforded little weight as he was present in a temporary capacity and could hold no legitimate expectation of remaining in the United Kingdom.

11. Permission to appeal was granted by Deputy Upper Tribunal Judge Davey on the 19th May 2014 and it was stated that it was arguable that the First-Tier Tribunal Judge concentrated on the Appellant's problems rather than balancing the considerations, including the public interest and that the Judge did not address Akhalu but if he had the decision may have been no different. However, it was stated that the Respondent should not be unduly optimistic about the outcome of the error of law issues and the materiality of the error. It was further stated that the second ground was also arguable, although whether any different outcome might arise would require a fuller argument.

Submissions

12. In her submissions Miss Everett relied upon the Grounds of Appeal. She said that there was not much else that she could add. I asked whether or not in fact section 117B was relevant at all to the Judge's determination, given that the Judge was considering the appeal under the Immigration Rules rather than outside of the Immigration Rules under Article 8. She was unable to advance any reasons as to why the considerations of section 117B should apply when a Judge was considering an appeal under paragraph 276ADE, as opposed to outside of the Immigration Rules under Article 8, but still relied upon the Grounds of Appeal. Further, she did not feel able to assist further as to how it was being argued that any failure on the part of the Judge considering the case of Akhalu would have been relevant to his consideration of the appeal under paragraph 276ADE. She simply again relied upon the Grounds of Appeal and asked me to dismiss the appeal.

13. Miss Solanki on behalf of the Appellant relied upon the skeleton argument. She further submitted that the original appeal she had argued before the First-Tier Tribunal Judge that section 117B was not relevant for the purpose of paragraph 276ADE, but that as a belt and braces approach, the Judge had considered section 117B, in addition to the requirements of paragraph 276ADE and she argued that he could not be criticised in respect of having done so, and that this did not amount to an error of law. She relied upon paragraphs [28) and [29] of her skeleton argument regarding the weight to be attached to section

117B (5). She further argued that it was in fact the Appellant Mr Z Y who was seeking to rely at the First-Tier Tribunal upon the case of Akhalu rather than the Respondent and that in that case the Upper Tribunal had upheld the decision of the First-Tier Tribunal allowing the Appellant's appeal on Article 8 grounds, based upon the Appellant's health.

14. However she argued that Mr Z Y's case was not concerned with whether or not he was able to access medical treatment and that in his case given that he had severe learning difficulties, such that he functioned at the level of a 6-year-old, had Post Traumatic Stress Disorder and the Judge found that he would have lacked the support that he had in the UK and also found that he had no family now to return to in Afghanistan, his father, brother and mother having been killed and the Judge made findings regarding his employment prospects and ability to find housing. She argued that it was perfectly open to the First-Tier Tribunal Judge to find that there would have been very significant obstacles to the Appellant integrating back into life in Afghanistan for the purpose of paragraph 276ADE and that they were consolation of factors in that regard, not simply a comparison of the availability of medical services or treatment in the UK and Afghanistan. She asked me to find that there was no material error of law and to uphold the original decision of First-Tier Tribunal Judge Norton-Taylor.

My Findings on Error of Law

15. I find that there was an error of law in the decision of First-Tier Tribunal Judge Norton-Taylor, when he applied the factors in section 117B of the Nationality, Immigration and Asylum Act 2002 to the consideration that he gave to the Appellant's appeal under the Immigration Rules under paragraph 276ADE (vi). Section 117A of the Nationality, Immigration and Asylum Act 2002 specifically states at section 117A (1) that "this part applies where Court or Tribunal is required to determine whether a decision made under the Immigration Acts-

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998."

16. Part 5A which includes the provisions of section 117B therefore only applies where the Tribunal is determine whether or not the decision breaches a person's right to respect for private and family life under Article 8 and as a result would be unlawful under section 6 of the Human Rights Act 1998. However, the decision being made by First-Tier Tribunal Judge Norton-Taylor was not as to whether or not the decision was unlawful under section 6 of the Human Rights Act 1998, but simply whether or not the Appellant should succeed under the provisions of paragraph 276ADE (vi) of the Immigration Rules. Although the Immigration Rules have been amended in July 2012 to take account of Article 8, the assessment being made by the First-Tier Tribunal Judge was simply under the Immigration Rules, rather than an assessment of lawfulness under section 6.

17. Further, under section 117A (2) it is when considering the public interest question that the Court or Tribunal must (in particular) have regard in all cases to considerations listed in section 117B. The public interest question is defined at section 117A (3) as meaning "the question of whether an interference with a person's right to respect for private and family life is justified under Article 8 (2)." However, an assessment as to whether or not there are very significant obstacles to integration for the purpose of paragraph 276ADE (vi) does not involve the Judge determining whether or not an interference with the person's right to respect for private and family life is justified under Article 8 (2). Although the Rules have been amended by the Respondent in an attempt to reflect Article 8 considerations, the Judge is not in fact carrying out an Article 8 balancing consideration, when considering the application purely under the Immigration Rules.

18. Had the Judge gone on to consider the application outside of the Immigration Rules and in respect of Article 8, then clearly the considerations under section 117B would have been relevant and the Judge would have been duty-bound to consider the same. However, the Judge is not in fact carrying out a balancing exercise when considering the appeal under paragraph 276ADE (vi) and is not making any findings in respect of unlawfulness under section 6 of the Human Rights Act 1998. The Judge was purely looking at whether or not there are very significant obstacles to the Appellant's integration back into

life, in this case Afghanistan, being the country to which he would be returned. However, for the reasons set out below, I do not consider that the error made by the Judge in this regard was material.

19. Although it is argued within the Grounds of Appeal that the Judge erred in law in his assessment as to the Appellant's ability to access medical treatment and the comparable support that he would receive in the UK compared to that which he would receive in Afghanistan and that he was required to undertake a holistic assessment of that, with particular regard to the public interest in such cases and that these factors did not amount to very significant obstacles. However, the Judge was not carrying out a balancing exercise in order to determine whether or not the decision taken was proportionate to the legitimate aim sought to be achieved for the purpose of article 8 (2) when simply considering the application under the Immigration Rules under paragraph 276ADE (vi).

20. Further, the First-Tier Tribunal Judge was not in his decision simply comparing the Appellant's ability to access medical treatment or health care facilities in the United Kingdom compared to that available in Afghanistan, but was between paragraphs [71] and [80] considering whether or not the Appellant would face significant obstacles in terms of integration back into Afghan society. The Judge considered that as a result of the Appellant's severe learning difficulties with an overall function age of just 6 compounded by his PTSD and without familial assistance, given the First-Tier Tribunal Judge accepted that the Appellant's father and brother had been killed and his mother had died that the appellant's ability to access healthcare of any sort, the labour market, housing, social integration would be extremely limited.

21. The Judge further found that the support the Appellant received in the UK would simply not be available to him in Afghanistan, but although these were factors that the Judge did take into account, they were not the only factors, but were part of a plethora of factors found by the Judge as to why the Appellant would face very significant obstacles in terms of integration back into Afghan society and given the Appellant's severe learning difficulties, his functioning age and his parents and his

lack of familiar assistance and his PTSD, it was perfectly open to the Judge in such circumstances to find that the Appellant was a very vulnerable young man who would face very significant obstacles integrating back into Afghan society. The Judge had simply not just carried out in assessment as to the ability of healthcare or support, but has specifically looked at also the Appellant's availability and access to the labour market, housing, and his ability to integrate back into society.

22. As regards the argument that First-Tier Tribunal Judge failed to deal with the case of Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400, I accept that in fact it was Miss Solanki on behalf of the Appellant who relied upon that case before the First-Tier Tribunal, rather than the Respondent, and that in any event, that case was dealing with Article 8 considerations outside of the Immigration Rules rather than under paragraph 276ADE, and that the Judge was not carrying out a proportionality assessment for the purpose of Article 8 when considering paragraph 276ADE, and that therefore the case of Akhalu I find was in fact irrelevant to that consideration. The Judge therefore did not err in law in failing to refer to that case.

23. That case would have been relevant if he was considering the case outside of the Immigration Rules for the purpose of Article 8 on the basis of a consideration as to the difference in care and availability of care in Afghanistan and the United Kingdom, but the Judge was not considering the case outside of the Immigration Rules, he was considering it within the Immigration Rules. The circumstances did not therefore need to be a "very rare case". The circumstances simply had to amount to very significant obstacles to integration for the purpose of paragraph 276ADE.

24. Further, given that the Judge was conducting his consideration under paragraph 276ADE (vi) I find that the Judge did in fact err in making an assessment under section 117B (5) at all, given that 117B did not apply to his consideration under paragraph 276ADE (vi).

25. However, given that the First-Tier Tribunal Judge considered that the factors under section 117B in terms of the Appellant knowing his status was precarious, his limited ability to learn English and that he in fact was financially dependent were potentially factors counting against the

Appellant, rather than in his favour, and given the plethora of reasons for the Judge's findings that the Appellant was a very vulnerable young man who would face very significant obstacles in terms of integration back into Afghan society given his severe learning difficulties, his overall functioning age of 6 years old, his lack of family support given the murder of his father and brother and the death of his mother and his problems being compounded by his PTSD and his extremely limited ability to access the labour market, housing and social integration as well as any healthcare, and his lack of support available to him in Afghanistan, it was perfectly open to the Judge to find various significant obstacles to the Appellant's integration back into Afghanistan, irrespective of his findings in respect of section 117B.

26. The First-Tier Tribunal Judge's findings on section 117B do not undermine any of his findings in terms of the Appellant facing very significant obstacles to integration back into Afghanistan, were he to be returned. The error of law by the Judge was therefore not material.

27. In the very particular circumstances of this case it was perfectly open to the Judge to find that there were very significant obstacles to the Appellant's integration back into Afghan society now and that he should succeed under paragraph 276ADE (vi) of the Immigration Rules. The Judge's reasons were perfectly adequate and sufficient and it is clear from reading the Judge's decision as to why he reached the decision made. The decision does not disclose any material error of law, the appeal is dismissed and the decision of First-Tier Tribunal Judge Norton-Taylor is maintained.

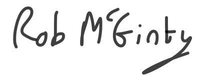
Notice of Decision

The decision of First-Tier Tribunal Judge Norton-Taylor does not contain any material errors of law and is maintained.

The First-Tier Tribunal did make an order pursuant to Rule 13 of the Tribunal procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 in respect of anonymity, given the Appellant's severe learning difficulties and functioning details of his functioning age, as appropriate for his anonymity to be maintained. Unless and until the Tribunal directs otherwise the Appellant is granted anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. 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 the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed Dated
19th August 2015



Deputy Upper Tribunal Judge McGinty