Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07167/2014**

THE IMMIGRATION ACTS

Heard at Birmingham
On 26 May 2016

Sent to parties on:
On 14 July 2016

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

MR FARIDULLAH SAIDI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Reza (Solicitor)
For the Respondent: Mr Mills (Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the appellant's appeal to the Upper Tribunal against a decision of the First-tier Tribunal (Judge Robertson hereinafter "the judge") promulgated on 31 October 2014, dismissing his appeal against the respondent's decision of 10 September 2014 refusing to grant him further leave to remain and deciding to remove him from the UK.

2. In a determination promulgated on 13 November 2015, I set aside the judge's determination and indicated, (a course of action not opposed by the parties), that I would remake the decision in the Upper Tribunal. My determination promulgated on 13 November 2015 explains, in detail, my reasons for setting aside the judge's decision but, essentially, I did so because I concluded that in refusing the appellant's application for an adjournment in circumstances where he had found himself unrepresented but with some prospect of his being able to secure future representation, she had, albeit understandably, not followed the approach set out in **Nwaigwe (adjournment fairness) 2014 UKUT 00418 IAC**. It does not appear that she was aware of the decision in **Nwaigwe** when refusing the adjournment request but I decided that in all the circumstances an error of law had been made such that the determination ought to be set aside in its entirety so that matters could be considered, by way of remaking, entirely afresh. That is what has happened and the rest of this determination of the Upper Tribunal is concerned with the remaking of the decision.

The appellant, his immigration and his adjudication history

3. The appellant is a national of Afghanistan and was born on 1 January 1995. It was not in dispute before me that he hails from the Kapisa Province in Afghanistan which is one of 44 provinces in that country and is located in the north east. It is recorded that he entered the UK on 15 June 2009, at a time when he was therefore aged 14 years, and then claimed asylum. In pursuing his claim he provided the respondent with a relatively brief witness statement of 6 July 2009 (prepared with the assistance of his then representatives) and was then interviewed by the respondent, with the assistance of a Pushto speaking interpreter on 10 August 2009 when he provided further details about his claim. The interview was conducted in the presence of a social worker. Thereafter, for reasons explained in a "reasons for refusal letter" of 1 September 2009, the respondent decided to refuse to grant asylum. However, in recognition of the appellant's young age and in accordance with Home Office policy, he was granted limited discretionary leave as an unaccompanied minor until such time as he attained the age of 17½ years.

4. The appellant, as was his entitlement despite the grant of limited leave, sought to challenge the refusal of asylum. He appealed and his appeal was heard by Immigration Judge Parkes (as he then was) on 27 October 2009. There are various copies of Judge Parkes determination before me but all of them appear to be incomplete. However, it is clear that Immigration Judge Parkes did not accept that the appellant had given a truthful account of events and that that is why the appeal failed. Of course, though, the appellant was left with his existing limited leave. Prior to that leave expiring, in fact in June 2012, he applied for further leave. In so doing he supplied a further statement of 26 June 2012 along with some documentary evidence relating to his life in the UK. He maintained that he had told the truth in his asylum claim and appeal and so maintained his claim to be entitled to international protection but he also sought to rely upon Article 8 of the European Convention on Human Rights (ECHR). The respondent, however, for reasons contained in a reasons for refusal letter of 26 August 2014, concluded that he was not entitled to asylum or any other form of international protection and that removal would not bring about a breach of Article 8. Accordingly, the decision of 10 September 2014, which is the subject of this appeal, was made. It is the appellant's

appeal against that decision which forms the matter (by way of remaking) now to be determined.

The law in summary

5. In order to establish entitlement to international protection the appellant must show that there is a real risk or, put another way, a reasonable likelihood that upon return to Afghanistan he will:

(a) be persecuted for one of the five reasons set out in the 1951 Refugee Convention;

(b) be subjected to serious harm such as to give rise to a grant of humanitarian protection;

(c) be treated in such a way as to constitute a breach of Article 2 or Article 3 of the ECHR.

6. The relevant date for assessment with respect to all of the above is the date of the hearing before me.

7. The appellant has also relied upon Article 8 of the ECHR in the context of private life. He has not, however, relied upon the content of what might be described as the Article 8 related Immigration Rules. His Article 8 arguments are made outside the rules. I shall set out, below, should it be necessary, the various stages which must be considered when undergoing an Article 8 assessment outside the rules.

The appellant's account

8. When he applied for asylum the appellant gave an account of events, as recorded in his initial statement and in the record of interview, which may be summarised as follows.

9. The appellant said that at the time he was living in Afghanistan Kapisa was effectively controlled by the Taliban. He had a brother called Khalid, who had become a member of the Afghan Army. The Taliban had told his father that Khalid had to cease working for the Army otherwise the family would face harsh consequences. His father did persuade Khalid to comply and to return to the family home. However, shortly afterwards, the Taliban raided the family home, murdered Khalid and abducted his father whom the appellant says he has not seen nor heard from since. After that his mother made arrangements for him to leave Afghanistan because she thought it dangerous for him to remain. She gave him some money. In his statement of 6 July 2009 he recounts how he then travelled to Pakistan where he met an agent who took him to Tehran. He also said, in that same statement, that he then journeyed to Turkey, then to Greece, then to Italy and then to France prior to coming to the UK, entering in a clandestine manner, and claiming asylum. In pursuing his claim he asserted that he no longer had any contact with his family and that if he were to return to Afghanistan he would be killed by the Taliban because of his brother's involvement with the Afghan Army. He also made the point that he would have no-one to look after him upon return and would, therefore, be at risk of abuse.

10. The appellant, in pursuing his current appeal, has maintained the above. It has also been contended on his behalf that, in addition to his being at risk of targeting by the Taliban as a result of his connection to his brother, he would, in any event, be at risk of being recruited by them in order to fight for them. The point is made, in this context, that he is a young man of fighting age. It is further contended on his behalf that he would be similarly at risk (that is to say at risk of forced recruitment) by the organisation known as the Islamic State of Iraq and the Lavant and also known as ISIS and Daesh. I shall, for convenience, refer to that organisation, hereafter, as ISIS. It was also contended on behalf of the appellant that he had established a private life in the UK, his having been here since 2009, and that removal would represent a breach of his Article 8 rights. It was also contended, with respect to Article 8, that the alleged failure of the Secretary of State to pursue her tracing obligations should feed into the Article 8 assessment. Finally, it was contended on behalf of the appellant that conditions in Afghanistan were now such as to put him at risk upon return, and hence to give rise to entitlement to humanitarian protection, on the basis of the high level of indiscriminate violence.

The respondent's case

11. This was set out in the reasons for refusal letter of 26 August 2014. In that letter the respondent maintained the disbelief of the appellant's account and pointed out that immigration Judge Parkes had, similarly, disbelieved him. So, it was not accepted that he would be of adverse interest to the Taliban if returned. Given what was felt to be his lack of credibility it was not accepted that he did not have family to return to in Afghanistan either. Further, and in any event, it was said that he could safely relocate to Kabul. It was not accepted that he would be at risk as a result of indiscriminate violence in Afghanistan because it was not accepted that any such indiscriminate violence reached the necessary threshold. He did not meet the requirements of any of the Article 8 related Immigration Rules and whatever private life he had built up in the UK he had done in the knowledge of his precarious immigration status. Removing him would not violate Article 8.

The documentary evidence

12. I had before me a bundle of documents, in the usual form, supplied by the respondent. That was, in fact, the bundle which had been before the First-tier Tribunal. The respondent had not added to that documentation for the purposes of the remaking of the decision. The appellant's representatives had, in accordance with directions I had issued, submitted a consolidated bundle of documents. That included, amongst other things, copies of the statements of the appellant referred to above, a large volume of background country material and new reports relating to Afghanistan, some United Nations High Commissioner for Refugees (UNHCR) eligibility guidelines for assessing the international protection needs of asylum seekers from Afghanistan produced in August 2013, two expert reports prepared by one Dr. L Schuster of 4 March 2015 and December 2015 (there not being a precise date) and some case law. A supplementary bundle containing an updated skeleton argument and more recent UNHCR guidelines was also provided.

13. I confirm that in remaking this decision I have given consideration to the various documents which have been placed before me.

The proceedings

14. The hearing concerned with the remaking of the decision took place, at Birmingham, on 26 May 2016. Representation was as stated above. I heard oral evidence from the appellant who had the assistance of a Pushto speaking interpreter. There did not appear to be any difficulties with respect to interpretation. After hearing oral evidence I heard submissions from each representative. What was said at the hearing has been noted in a written record of proceedings which I have retained on the tribunal file. I have taken all of what was said into account. Where necessary, or otherwise appropriate or helpful, I have referred to the oral evidence and the oral submissions in explaining the decision I have reached.

The credibility of the appellant's account

15. Since there is a dispute about this, I have found it necessary to consider whether or not I am able to accept the appellant's account of the events underpinning his claim for asylum as given previously and in oral evidence (albeit relatively briefly) before me. In this context, though, it has been necessary to apply the principles set out in the well known case of **Devaseelan v Secretary of State for the Home Department [2002] UKIAT 00702** given that there are unchallenged or not successfully challenged findings contained in the determination of immigration Judge Parkes. It was said in Devaseelan, in a nutshell, that in the context of asylum and human rights appeals, where there has been a previous determination and where a further claim or appeal involves overlapping material, the first determination should always be the starting point though not necessarily the end point. New evidence may displace earlier findings but if the facts before the second judge are not materially different from those put to the first judge, and the claim was supported by essentially the same evidence, the second judge should regard the issues as settled by the first judge's determination.

16. Immigration Judge Parkes, having considered the account offered by the appellant, said this:

> "In short I do not believe the appellant's account of events in Afghanistan with regard to his brother and his father. I do not believe that his brother has been killed or his father kidnapped. I do not believe that the appellant would have been sent away with such urgency when events had shown he was not at risk or that he would have left behind other family members who would also be in danger."

17. It does not seem to me that the appellant has shown any viable reason as to why, in light of what it said in **Devaseelan**, I should depart from those findings. He has not offered anything which can be characterised as new evidence relevant to the claimed events. Whilst he did seek to address those adverse findings in his witness statement of 26 October 2015, all he really did was assert that what he had originally claimed was true. That does not seem to me to take matters any further. Mr Reza, at the hearing before me, invited me to take account of the appellant's young age at the time he had first presented his account. Of course, his age at the time was something which Immigration

Judge Parkes would have been aware of (he specifically mentioned it at paragraph 5 of his determination) and would have taken into account. It seems to me that I really cannot, and I do not, depart from those adverse credibility findings. I too, therefore, find that the appellant's brother was not killed as claimed and his father has not been taken away.

18. The appellant's claim, as now put, though, does not rest simply upon his initial account and his fear that the Taliban will harm him because of his links to his brother. So, it is necessary to make and set out some further factual findings.

19. In this context, as I have already noted, there is no dispute about the appellant's nationality, his claimed date of birth and age and his being from Kapisa Province. I make findings in his favour with respect to all of that. I would also accept that since coming to the UK he has not been back to Afghanistan and, of course, had he done so he would have effectively given up his asylum claim. So, he has now been in the UK and away from his home country for a period of around seven years. At the hearing he told me that he did not know the current whereabouts of any of his family members. He was not specifically challenged about that in cross-examination though his credibility, in general, was subject to challenge and, of course, I have found that his initial account was untrue. That might afford reason to disbelieve him but, on the other hand, there is certainly much to suggest that life can be difficult in Afghanistan and that such might create difficulties in keeping in tough with one's family. There is nothing to positively suggest he has maintained contact with his family and it is not implausible that he would not have been able to do so despite his brother not having been killed and his father not having been abducted. Given the low standard of proof applicable I have found that the appellant is not currently in touch with his family members. The appellant also told me, in oral evidence, that he does not have any family in Kabul and that he has never himself been to Kabul. Mr Mills did not seek to persuade me otherwise in his closing submissions and I can find nothing in the material before me to suggest that the appellant does have family in Kabul or has been there. Of course, I have accepted he is not from there. So, again to the lower standard of proof, I find he does not have any links to Kabul or experience of life there.

20. It is in light of the above findings that I have gone on to consider how I should remake the decision.

My consideration of the arguments

21. I shall, first of all, consider whether the appellant has made out his claim to be a refugee. I have found that he has provided an untruthful account regarding the claimed fate of his brother and his father. Accordingly, I conclude, without difficulty, that he will not be at real risk of persecution upon return to Afghanistan at the hands of the Taliban on the basis that they have an adverse interest in him as a result of his brother's claimed previous membership of the Afghan Army.

22. Mr Reza, though, argues, and the appellant himself says, that there is a real risk he will be forced to fight for the Taliban, or possibly even for ISIS, if he is to be returned to his home area of Kapisa. It is perhaps appropriate, therefore, to consider at this stage what sort of area Kapisa is. The respondent has not provided any background material regarding Kapisa. The appellant has provided some. There is, at page 17 of the

supplementary bundle, what appears to be some form of news report regarding the killing of Taliban members by the security forces. There is a suggestion contained therein that the Taliban do control territory in that region. There is then an article headed "Kapisa Province: the Taliban's gateway to Kabul", though I note it is somewhat dated having been prepared in 2008, which suggests what appears to be quite extensive Taliban activity in Kapisa, its being stated that the province "has served as an insurgent bastion for several years". I cannot find anything specific to Kapisa in the reports of Dr. Schuster and, since there is no schedule of essential reading (and really there ought to have been), I am not directed to anything specific to it in any of the other background country material. But, on the limited material before me, and I can only do my best with what I have been provided with, I would conclude that the Taliban are influential in Kapisa as the appellant has claimed.

23. The mere fact that the Taliban have influence in Kapisa, of course, does not mean that there is a real risk they, or indeed any other organisation, will forcibly recruit the appellant to fight for them. In seeking to convince me that there is such a real risk, however, Mr Reza refers me, in particular, to the 2016 new UNHCR eligibility guidelines referred to above. It is suggested therein that in areas where anti-government elements exercise control over territory and the population "they are reported to use a variety of mechanisms to recruit fighters, including recruitment mechanisms based on coercive strategies". It is also noted that "persons who resist recruitment, and their family members, are reportedly at risk of being killed or punished". In **HK and Others (Minors – indiscriminate violence – force recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 IAC** it was said, in the context of child recruitment by the Taliban, that such a risk cannot be discounted, particularly in areas of high militant activity or militant control, though evidence was required to show that such was more than a mere possibility.

24. Mr Mills, if I understand him correctly, relied primarily upon the appellant's ability to live safely in Kabul rather than in Kapisa. However, he did also submit that the appellant had not shown anything above a mere possibility that he might be forcibly recruited. He had not shown, for example, that he would be particularly vulnerable to such treatment though Mr Mills did observe, very fairly, that it might be the case that Kapisa would be an area where anti-government elements were in control or were engaged in an armed struggle. Mr Reza, in his submissions, perhaps surprisingly, did not focus very much if at all upon the risk in Kapisa, though he did draw my attention to his reference to it in his skeleton argument.

25. The material does appear to show that Kapisa is an area where the Taliban do have influence and I have already made a finding to that effect. I have found that the appellant is no longer in touch with his family and, against that background, although I have not accepted his claim that his family were harmed in 2009, I would conclude that there is a real risk that they will no longer be there to receive him. I note the risk of forcible recruitment in certain areas as referred to in the UNHCR guidelines of 2016 which are, of course, very recent. Strictly on the facts of this case, therefore, and bearing in mind the lower standard of proof, I am satisfied, albeit that it is marginal, that the appellant has demonstrated he will face a real risk of forcible recruitment at the hands of the Taliban (I

do not think that the evidence suggests any specific risk in Kapisa at the hands of any other organisation) of forcible recruitment. However, there is the matter of an internal fight alternative which was the argument pursued most forcibly by Mr Mills before me. In this context there has never been any suggestion that the appellant could safely relocate to anywhere other than Kabul and so it is Kabul, in this context, which I must now consider.

26. The general approach to be taken to internal fight has been explained by the House of Lords in **Januzi v The Secretary of State for the Home Department and Others [2006] UKHL 5.** Essentially, it was said that in considering internal fight a decision maker should assess whether it would be unreasonable or unduly harsh to expect a claimant to relocate to another part of the home country. Decision makers should not conduct the assessment by way of a comparison between conditions in the area of proposed internal relocation and international human rights law standards or the conditions in the country of refuge.

27. In considering internal fight I have looked at the material which has been placed before me regarding the situation in Kabul. It seems to me that much of that material has been put forward with a view to persuading me that the appellant should be entitled to a grant of humanitarian protection on the basis of the levels of indiscriminate violence in Afghanistan including in Kabul. I have, however, focused here upon the situation concerning internal fight and whether or not it would be unreasonable or unduly harsh to expect the appellant to take advantage of such an alternative.

28. A good starting point might be what the appellant himself has had to say. However, at paragraph 14 of his statement of 26 October 2015, he simply asserts that he could not relocate because he will not be safe from the Taliban anywhere in Afghanistan and because the expert who has prepared the two reports referred to above has said the whole country is unsafe. In his oral evidence, when cross-examined on the point, he referred to the cost of living in Kabul being high and to reports of killings in Kabul. When pushed further he said that there would be no-one to look after him and suggested, as I understand it, that he would be unfamiliar with the way of life there. Mr Mills, in submissions, was quite dismissive of that, suggesting that what the appellant had claimed did not amount to any real difficulty in relocating at all. Mr Reza, as I understand it, argued that the Secretary of State cannot expect all returnees to go to Kabul (I assume that behind that was a suggestion that the city is overcrowded) and that many of the areas outside of Kabul city itself are controlled by the Taliban. He also submitted, perhaps more pertinently, that there were difficulties in obtaining housing and employment in Kabul.

29. I bear in mind what is said about internal relocation to Kabul in **AK (Article 15(c) Afghanistan CG [2012] UKUT 00163 (IAC)** in particular at paragraph 243. My focus here is upon the "unduly harsh" aspect. It is necessary, in that context, to conduct a fact specific consideration and to bear in mind findings which have been made regarding a claimant's individual circumstances. Here, I have found that the appellant does not have any family or other connections in Kabul, has never been to Kabul before, that he came to the UK as a child, that he has never lived in Afghanistan as an adult, that he has been in the UK for seven years (during which time he has transitioned from a child to an adult) and that he is no longer in touch with his family in Afghanistan. Those are matters which might be thought to support his contention that internal fight would, for him, be unduly

harsh. On the other hand, he is a young man who has shown himself to be resourceful in building a life for himself in the UK as Mr Mills points out. Further, there is the availability of a relocation package to consider although that, as I understand it, would only assist with the initial process of resettling. I would accept background country material suggesting that for persons without connections the obtaining of shelter and employment is likely to be very difficult. I did not understand Mr Mills to be suggesting that that was not the case. In **AK** the appellant did have a family contact in Kabul and that was, on my reading of the decision, thought to be a matter of some significance and it is a factor which is lacking here. Whilst, again, matters are quite marginal, I have decided that in the particular circumstances of this case requiring this appellant to relocate would be unduly harsh. I conclude, therefore, that he has demonstrated that he is a refugee, on the basis of his being a member of a particular social group, his being at risk in his home area of Afghanistan and his not having available to him (because it would be unduly harsh to expect him to do so) an alternative involving internal relocation.

30. My having resolved the appeal in this way does, I am afraid, mean that it is not necessary for me to express any view of what I did feel to be rather wide ranging and in some respects ambitious arguments concerning the unfitness of Kabul for the relocation of any person and the current risk to citizens on the basis of an internal armed conflict and indiscriminate violence. Those arguments will have to be assessed on another day. Nor, my having decided that the appellant is a refugee, is it appropriate for me to consider humanitarian protection at all. I do, though, on the same basis as I have found the appellant to be a refugee, conclude that he succeeds under Article 3 of the ECHR. There is nothing to be gained, in the circumstances, by my going on to consider Article 8.

Decision

The decision of the First-tier Tribunal has already been set aside.

In remaking the decision I allow the appeal on asylum grounds and on human rights grounds (Article 3)

No anonymity direction is made.

Signed **Date: 14 July 2016**

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and there can, therefore, be no fee award.

Signed **Date 14 July 2016**

Upper Tribunal Judge Hemingway