IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20724/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 20th October 2015, 15th December 2015 and 29th February 2016	**On 8 April 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between
ATTAULLAH SHINWARI
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Brookes instructed by Malik Law Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer (20th October 2015)
Mr D Mills, Senior Home Office Presenting Officer (15th December 2015 and 29th February 2016)

DECISION AND REASONS

1. The background to this appeal is set out in my decision on error of law made following the hearing on 20th October 2015 and promulgated on 28th October 2015, which is annexed, and which is to be read as incorporated into this decision. One point requires clarification; in the initial version of the decision on error of law the Appellant was, in error, referred to as coming from Pakistan. It is now accepted by all parties that he comes from Afghanistan.

2. As was clear from the decision on error of law it was anticipated that the remaking of the decision would take place at or following the hearing on 15th December 2015. However, on that occasion the proceedings took an unexpected turn. Mr Mills, who was now appearing on behalf of the Secretary of State, asked me to revise my decision on error of law. He said that there was express authority on the point as to whether the relevant form of paragraph 276ADE(vi) of the Immigration Rules to be addressed by the First-tier Tribunal was that incorporated following the changes in the Statement of Changes in Immigration Rules HC 532 which came into effect on 28th July 2014. The case in point he said was a judgment of the Court of Appeal namely **YM (Uganda) v SSHD [2014] EWCA Civ 1292**. He regretted that this had not been brought to my attention at the error of law hearing. He said that the judgment in **YM (Uganda)** concerned a deportation appeal but the wording of the relevant section of HC 532 was the same as regards the implementation of the changes to paragraph 276ADE. The same statement of changes applied to both types of decision. In any case he said any remaking of the decision should incorporate paragraph 276ADE in its later form.

3. Unsurprisingly Mr Brookes was not prepared for this argument and said that he needed time to consider the matter. I also raised the point as to whether, having set aside the decision of the First-tier Tribunal, I had at this stage jurisdiction to review my earlier decision. I considered putting the matter back for further argument but I also bore in mind that although one had been requested there was no Pushtu interpreter available and the hearing to remake the decision could not have gone ahead in any event. I accordingly adjourned the hearing, making further directions. These were in particular that the Respondent's representative should serve a skeleton argument setting out the basis on which it was claimed that the Tribunal might revise an error of law finding and set that finding aside once made and as to why it was contended that the error of law finding might require revision. There was provision for a skeleton argument in response also to be served. The hearing was adjourned until 29th February 2016.

4. At the resumed hearing I had the opportunity to consider the skeleton arguments submitted. In his skeleton argument, having reviewed the authorities, Mr Mills accepted that the decision already made to set aside the decision of the First-tier Tribunal could not be challenged. However he went on to say that the second issue, namely whether the Tribunal was bound to consider the version of paragraph 276ADE(vi) that existed at the date of the Secretary of State's decision was still highly relevant. If the

Tribunal was persuaded that **YM (Uganda)** was express authority for the contrary position and that the version of the Rules as at the date of hearing was applicable then, he submitted, the Tribunal was bound to dismiss the appeal in the light of the findings made by Judge Thomas. In that context he relied in particular upon the comments of Lord Justice Aikens at paragraph 39 of **YM (Uganda)**. He contended that whilst the Court of Appeal was dealing with changes to a different paragraph the interpretation given by the Court of Appeal was equally applicable to the change to paragraph 276ADE(vi) given that the wording was, he said, identical. The Tribunal he therefore contended should dismiss the appeal on the basis of the unchallenged finding made by the First-tier Tribunal. He also submitted that there was no compelling case to go beyond the Immigration Rules in considering Article 8 issues.

5. Mr Brookes for his part also accepted in his skeleton that the Tribunal had no power to review the decision on error of law already made. As to the remaking of the decision he contended that the version of paragraph 276ADE applicable prior to 28th July 2014 was the relevant form to be considered. He pointed out that **YM (Uganda)** concerned foreign criminals. The Appellant was not a foreign criminal and the Statement of Changes in Immigration Rules HC 532 differentiated between the implementation of the amendment to paragraph 276ADE(vi) as compared with the implementation of the amendments for Article 8 claims by foreign criminals. Different wording had been used. The Secretary of State had specifically referred to "applications" being decided after HC 532 came into force with regard to matters under paragraph 276ADE but to "claims" with regard to foreign criminals. As the Appellant's application had been decided by the Secretary of State before the implementation date of HC 532 he submitted that the earlier version was that applicable. He then went to address the merits of the Appellant's case and the earlier version of paragraph 276ADE(vi), noting in particular that the Secretary of State had earlier asserted that the Appellant was not from Afghanistan at all. By contrast the Secretary of State now accepted that the Respondent was from Afghanistan. It was necessary, he said, to reconsider matters already decided insofar as they had an impact on the current claim.

6. Having retired to consider those skeleton arguments I confirmed that I agreed that there was no power for me to review the earlier decision to set aside the decision of the First-tier Tribunal. With regard to the applicable form of paragraph 276ADE(vi) I remained of the view that this was the wording in place prior to the implementation of HC 532. The two forms of the sub-paragraph are set out in my earlier decision promulgated on 28th October 2015, which is annexed, and I therefore do repeat them at this point but I refer to them.

7. I found that there was force in the argument put forward by Mr Brookes that in the judgment of the Court of Appeal in **YM (Uganda)** the court was dealing with the amendment to the revisions relating to deportation of foreign prisoners. It is correct that the wording of the implementation

provisions for the two amendments is different. That relating to paragraph 276ADE reads as follows:

> "The changes set out in paragraphs 4 to 12 and 49 to 64 of this statement take effect on 28th July 2014 and apply to all applications to which paragraphs 276ADE to 276DH and Appendix FM apply (or can be applied by virtue of the Immigration Rules) and to any other ECHR Article 8 claims (save those from foreign criminals) and which are decided on or after that date."

The implementation provision relating to deportation cases reads as follows:

> "The changes set out in paragraphs 14 to 30 of this statement take effect on 28th July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date."

There is to my mind a difference between the situation where a person in this country seeks leave from the Secretary of State in order to remain, and is therefore the prime mover in that circumstance, and the situation where the Secretary of State makes a decision to remove a foreign criminal and the party it is proposed to deport prays in aid Article 8 in order to resist that deportation decision. At paragraph 39 of **YM (Uganda)** Lord Justice Aikens referred specifically to the judgment of the Court of Appeal in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**. However that judgment also refers to deportation provisions of the Immigration Rules. The traditional view has been that the form of the Rules which should be considered by a Tribunal at the appeal stage is that applicable as at the date of the decision made by the Secretary of State (or other deciding authority). Whilst I accept that this has been displaced in the case of deportation of foreign criminals, as is made clear in the judgment in **YM (Uganda)**, I am not persuaded that this also applies to the situation of persons who are not foreign criminals facing deportation and who are simply seeking leave to remain under the Rules. There is some support for this view in Macdonald's Immigration Law & Practice (Ninth Edition) at paragraph 20.15 where the following is stated:

> "The Rules to be considered by the Tribunal are (absent transitional provisions or a properly established legitimate expectation to the contrary) those applicable at the time of the decision appealed against, not those applicable at the time the application was made or those applicable at the time of the hearing. However at least in respect of the Immigration Rules intended to codify Article 8 ECHR as applied to deportation decisions, the Rules to be applied are those in force at the time that the Tribunal considers the matter even if they were not in force at the time of the decision. …."

The authority for that view, referred to in a footnote, was **YM (Uganda)**. Thus after consideration the view I take is that the form of paragraph

276ADE(vi) with which I am concerned in the remaking of the decision in this appeal is the form extant prior to 28th July 2014.

8. I then heard evidence from the Appellant, who spoke through a Pushtu interpreter. He first adopted his two statements dated respectively 18th June 2014 (which had been prepared for the hearing before the First-tier Tribunal), and 28th November 2015. In the first of those statements he referred to his father having been employed in the intelligence service of the communist regime under President Mohammad Najibullah which had resulted in a split in the family, his paternal uncle Mumtaz being involved with the Hezbat Islami group. When the government changed in 1992 his father had been put into prison and his paternal uncle had taken the family's land. On his release his father was killed. Following the fall of the Taliban regime, under which there had been some relief, he claimed the family again faced difficulties. He was a target because he was the son of his father who had been connected with the communist government. He had left Afghanistan in 2002 for his own safety. In March 2004 he became aware that his wife and two children had been killed in a bomb blast. His paternal uncle Darjan told him that someone had thrown a bomb into the Appellant's house at night. The Appellant subsequently suffered from depression.

9. The Appellant stated that he later met, in this country, Kauser Parveen whom he married in 2009 in an Islamic ceremony and then in a civil ceremony in 2010. He had been granted discretionary leave to remain on this basis but in 2012 he and Kauser Parveen broke up and they were divorced. In March 2014 he applied for an extension of his visa but it was refused. He stated he could not return to Afghanistan because his life was still in danger. His paternal uncle had influence. His wife and children have been killed and he felt that he would be killed also. He was suffering from depression. He had established a life in this country, had friends here and was making a positive contribution.

10. In his second statement, dated 28th November 2015, the Appellant said that he had lived in the UK since his arrival in February 2003 and he now had no connections with any family members in Afghanistan, his wife and children having been killed in a bomb blast in March 2004. After that he had not spoken to any relative in Afghanistan as there was no need to do so and no-one had tried to contact him from Afghanistan. He had no family members in this country but he did have good friends here. When he was granted the right to work he did so as a chef. He was friendly with other workers. He had received support when depressed. He did some voluntary work for local charities and mosques to provide food for visitors. He was currently attending South & City College, Birmingham studying for an English language and social media qualification and he had many friends at the college. He had been attending a local mosque for over ten years but he also helped prepare food for a local church. He had been suffering from a variety of medical issues linked to the stress caused by the death of his wife and children and uncertainty with regard to his

immigration status. The thought of going back to Afghanistan caused him extreme stress.

11. He continued in his oral evidence that he had no relatives alive in Afghanistan and his last contact had been in 2004 when he had received a death certificate for his wife and children from his maternal uncle Darjan. He had received no news since of his maternal uncle or his family as that uncle had told him not to make contact any more as he did not want to put his own family at risk. That uncle had six sons as well as his wife. He had previously only been in touch with him every six or eight months whilst in Afghanistan. It was the maternal uncle who had sent the death certificates. It was his father's brother Mumtaz who had taken the family's land. Prior to leaving the Appellant he had been living in his own house in Jalalabad district but that had been sold in order for him to go to somewhere safe. His father had received money from his work in the intelligence agency but after his father's death the Appellant had worked selling vegetables and milk which he obtained from his agricultural land where he had some goats. That land had been sold to a powerful person after he had experienced problems and had to flee. He continued that he had not told the Home Office earlier of the termination of his marriage but had referred to it when he applied for further leave. He thought that was in order. Asked why he had not shown photographs which had been produced at the hearing in 2014 he said that if he had produced them earlier he was afraid that he might be sent back. The Home Office had not accepted he was from Afghanistan. He had received the photographs with the death certificates in 2004. The cause of the family's death was a bomb thrown at the house which he understood from his maternal uncle was because the family were associated with the communist regime through his father. His maternal uncle had found a place for his wife and children to live and another place for the Appellant when he came under threat.

12. Cross-examined the Appellant said he had been in this country for thirteen years. He was attending English classes. He had been suffering from depression and a heart condition but he was working hard at learning English and he thought that he could be something like 70% fluent. Where he lived there were many Pushtu speakers but he also spoke to other persons. He was still working in a restaurant.

13. Following the oral evidence I heard submissions from both representatives. Mr Mills submitted that the Appellant could not meet the test demonstrating that he had no ties with Afghanistan. He referred to the guidance in **YM (Uganda)**. The test was an exacting one and a rounded assessment was required. He referred also to the reported decisions of the Upper Tribunal in **Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC)** and **Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC)**. The possibility of remaking contacts was a relevant issue. The claim that there was no current contact was not necessarily the answer to the test even if it was believed.

14. However, he continued, the Appellant had not been believed. The first judge (Adjudicator Gurung-Thapa) did not find him to be credible and did not accept that the Appellant's father had been killed or that the Appellant would be targeted. Mr Brookes at this stage interposed that it was also the case that at that stage the Appellant was not believed to be from Afghanistan. Mr Mills continued that Miss Gurung-Thapa had also considered the Appellant's claim on its face and had found it not credible. Even if he were from Afghanistan, what he claimed had not been accepted to have occurred. Judge Thomas' findings were preserved and there had been no application to challenge them. The challenge to her decision was expressed with regard to paragraph 276ADE(1)(vi). At paragraph 16 of her decision Judge Thomas concluded that the Appellant's account was fabricated. She found the death certificates said to be for the wife and children not to be reliable. Her primary finding was that the wife and children were not in fact deceased. The starting point was therefore that that the Appellant's family were in Afghanistan and therefore the family land would be there also. The Appellant had work experience. On his own account he had worked as a farmer in Afghanistan. He had the ability to support himself. Mr Mills also pointed out that although the Appellant had been in this country for thirteen years he still needed to use an interpreter and he was culturally and socially acclimatised to life in the Afghan community. With regard to any claim under Article 8 outside the Rules the Appellant had been in this country unlawfully for the long part of the period of his stay although he had subsequently had a period of discretionary leave. Nonetheless his leave had been precarious and thus his private life carried little weight. Following the judgment in **SSHD v SS (Congo) [2015] EWCA Civ 387** there was a lack of anything compelling requiring consideration outside the Rules and there was no basis, he said, to go beyond paragraph 276ADE.

15. In response Mr Brookes said that the Presenting Officer was seeking to state that the Appellant was living in Afghan society in the UK but the UK was a multicultural society and the Appellant was integrated. He was part of UK society. He had ties with individuals and had a private life. Medical care was part of private life and he had friends.

16. With regard to preserved findings in paragraph 19 of her decision Judge Thomas had said the Appellant was not at risk of persecution but in making that finding she was looking back through glasses informed by a finding that he was not from Afghanistan at all. In the circumstances he submitted that I could find that the Appellant's evidence could reverse that earlier finding. The preserved findings did not say that his father was still alive and only that the wife and children could be alive. That was merely hypothetical. Whether the Appellant could seek support in Afghanistan was predicated on whether the family were alive. As was clear from **Ogundimu** more than abstract links were required. The Appellant's case was that he had no subsisting connections, no family, no property, only negative ties in the form of his paternal uncle who was seeking to do him harm.

17. With regard to Article 8 outside the Rules he said, paragraph 276ADE looked to the Appellant's ties in Afghanistan but failed to consider the position as to the Appellant's life in this country. In Afghanistan he had no support mechanism. Removal would be disproportionate.

18. In considering the merits of this appeal I bear in mind that the burden of proof is upon the Appellant to establish that he meets the requirements of paragraph 276ADE(1)(vi), that the standard of proof is the balance of probabilities and that I may take account of evidence up to and including the date of the hearing before me. As Mr Brookes acknowledged the Appellant is faced with the hurdle of various previous findings. I specifically preserved in my decision on error of law made following the hearing on 20th October 2015 the findings of Judge Thomas at paragraphs 15 to 19 inclusive of her determination promulgated on 22nd October 2014. Paragraph 15 of that decision recites something of the history of the Appellant's application. Judge Thomas went on to state as follows:

> "16. The Appellant claims that the decision put him at risk of persecution under the Refugee Convention. As stated his asylum appeal was dismissed in 2003. In line with case of **Devaseelan** the determination of Judge Gurung-Thapa is my starting point on this issue. She had considered the Appellant's account of events that he claimed happened in Afghanistan prior to his departure. She did not find the Appellant to be credible and found that he had invented the 'whole story of his father working for a previous communist regime and the problems he encountered from his paternal uncle called Mumtaz.' She considered the photographs that the Appellant claimed were of his father with Dr Najibullah and did not find them to be reliable.
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> 17. The Appellant has now produced further photographs which he claims show him as a child with his father. However given the previous findings of the previous judge there is no further evidence to establish that the Appellant is related to the man he says is his father. Further there is no evidence to show that the Appellant is the child in the later photograph. There is no evidence to explain why they were not available to the Tribunal in 2003 or to explain how the Appellant has since got possession of them. Given these matters and given the findings of the previous judge there is no reasonable explanation for the Appellant's failure to produce these photos sooner. Given the previous credibility findings against him and applying the case of **Tanveer Ahmed** I find that these photos are not reliable evidence and that I am able to take account of them now.
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> 18. The Appellant seeks to argue that his circumstances worsened since his arrival into the United Kingdom in that his wife and children were killed in a bomb blast in Afghanistan in 2004. He seeks to rely on a death certificate dated 25th March 2004. His explanation for not producing the certificate sooner, because he

was afraid of being deported, is not reasonable or credible. Given previous credibility findings against the Appellant and my findings in paragraph 17 above I do not find this document to be reliable. However in the event that I am wrong and the Appellant's wife and children were killed in a bomb blast there is no evidence to suggest that they were specifically targeted because of the Appellant.

19. Given all of my findings in paragraphs 16 to 18 above there is no evidence to cause me to come to a different conclusion on the matters that were before the Tribunal in 2003 in the Appellant's asylum appeal, and there is no evidence to prove that the Appellant would be at risk of persecution in Afghanistan now. It follows that I do find that the Appellant's removal now would breach the United Kingdom's obligations under the 1951 Refugee Convention."

19. Mr Brookes sought to persuade me that notwithstanding their express preservation those findings were unsafe as in the earlier decision in 2003 Miss Gurung-Thapa had not been satisfied that the Appellant was in fact from Afghanistan. However it is the case that from paragraph 33 onwards of her determination Miss Gurung-Thapa considered the Appellant's account on the basis that he was from Afghanistan and maintained her view that his account was not credible. I found nothing in the Appellant's evidence which would persuade me to depart from the findings made by Judge Thomas which I had expressly preserved and which was based in part upon the findings of Miss Gurung-Thapa. The position is therefore that the Appellant has not established on the balance of probabilities that his wife and children have been killed or that he is without land or connections in Afghanistan, even if those connections were not recently being pursued. The likelihood is that the Appellant's maternal uncle and his family are also still resident in Afghanistan and would be available to assist the Appellant in reintegration.

20. The Appellant has lived in this country for thirteen years his English is not fluent and he made use of a Pushtu interpreter at the hearing. Although he has given some assistance in food distribution at a Christian Church he remains an active Muslim attending mosque and regularly praying. In my view he is still culturally attuned to Afghanistan. In Afghanistan he made a living selling milk and vegetables. He has shown that he is able to work in this country, where he had has employment as a chef. In considering whether the Appellant meets the requirements of paragraph 276ADE(vi) in the form mentioned I have borne in mind all of the authorities to which I have been referred and also the recent judgment of the Court of Appeal in **The Queen on the Application of Akpan v SSHD [2015] EWCA Civ 1266**. Making the "rounded assessment" required I find that this Appellant does have cultural, family and social ties with Afghanistan. He remains essentially rooted in Afghan society. He has not shown that he can meet the requirements of the paragraph. His appeal therefore falls to be dismissed under the Immigration Rules.

21. He states that he is suffering from depression but there was no recent medical evidence before me to that effect and he stated that one of the reasons that he felt depressed was because of the uncertainty of his immigration status, which will of course be resolved if he is returned. In considering whether Article 8 outside the Rules can assist the Appellant I have borne in mind the guidance in **SSHD v SS (Congo) [2015] EWCA Civ 387**. I do not consider that the Appellant has a reasonably arguable case under Article 8 not sufficiently dealt with already under the substantive provisions of the Rules but I would add for the avoidance of doubt that the only basis upon which the Appellant could succeed would be his private life. That private life he has built up at times when he either had limited leave or was in this country unlawfully. In considering the matter I am bound by the requirements of Section 117B of the Nationality, Immigration and Asylum Act 2002. By sub-paragraphs (4) and (5) I am required to ascribe little weight to private life developed in such circumstances. Given such mandatory guidance it would be inevitable that having regard to the need to maintain effective immigration controls the Appellant's removal would be proportionate. His appeal therefore fails.

Notice of Decision

The decision of the First-tier Tribunal has been set aside. I have remade the decision and the appeal of the Appellant stands dismissed.

There was no application for an anonymity order and none is made.

As the appeal has been dismissed no fee award is appropriate.

Signed Date 15 March 2016

Deputy Upper Tribunal Judge French

IAC-AH-SAR-V1

Upper Tribunal
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Representation:

For the Appellant: Mr M Brooks instructed by Malik Law Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION ON ERROR OF LAW

1. The Appellant comes from Afghanistan. He arrived in the United Kingdom in February 2003 and claimed asylum. That claim was refused and an appeal dismissed following a hearing in June 2003. He subsequently re-

mained and was in 2011 granted discretionary leave for a period of three years on the basis of marriage to a British citizen, but that marriage has since broken down. Through solicitors he applied for further discretionary leave which was refused on 22nd April 2014 and a decision made to remove him to Afghanistan. It was noted in the refusal letter that the Appellant's relationship with his spouse was no longer subsisting. The application was considered under paragraph 276ADE(1) of the Immigration Rules and it was considered that the Appellant did not satisfy any of the criteria set out in that paragraph. With regard to sub-paragraph (vi), which was recited and which I set out below, it was said:

> "Having spent 21 years in your home country and in the absence of any evidence to the contrary, it is not accepted that in the period of time that you have been in the UK you have lost ties to your home country and therefore the Secretary of State is not satisfied that you can meet the requirements of Rule 276ADE(1)(vi)".

It was also considered that there were no exceptional circumstances arising as a result of his medical condition or otherwise which might require consideration under Article 8 ECHR outside the Rules.

2. The Appellant's appeal against that decision was heard before Judge of the First-tier Tribunal Thomas at the Birmingham Hearing Centre on 24th September 2014, following which the appeal was dismissed. The judge relied upon the findings made by the Adjudicator who decided the asylum claim in 2003. She did not accept that there was any basis for a claim founded on asylum or Article 3 ECHR now to be reopened and did not find that the Appellant's medical condition was of sufficient severity to militate against removal. The judge then went on to state as follows:

> "21. In determining the Appellant's appeal under Article 8 I have taken full account of the Respondent's obligations under Article 8 ECHR as set out in paragraph 276ADE of HC 395 and Section 19 Part 5 of the Immigration Act 2014 and the cases of **Amjad Mahmood [2000] EWCA Civ 385**, **EB Kosovo [2008] UKHL**, **Beoku-Betts v SSHD [2008] UKHL 39** and **Chikwamba v SSHD [2008] UKHL 40**.
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> 22. The Immigration Rules contain provision for appropriate applications to be made on the basis of family and private life. The Appellant's relationship with his wife has broken down and he has no family in the United Kingdom. He has not been in the United Kingdom for twenty years and there are no significant obstacles to him establishing private life elsewhere. He does not meet the requirements of Appendix FM or paragraph 276ADE of HC 395.
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> 23. In determining whether or not I should consider private and family life outside the Immigration Rules I follow principles in the case of **MM [2013] EWHC 1900 (Admin)**, **Nagre [2013]**

> **EWHC 720 (Admin)**, **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC)** and **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)**. After consideration of all the evidence I find that there are no compelling circumstances or specific reasons to justify consideration of the proportionality of the Respondent's decision outside the Immigration Rules".

3. In the application for permission to appeal it was contended that the judge had applied the wrong version of paragraph 276ADE(vi) and had she applied the correct version would have had regard to the reported decision of **Ogundimu (Article 8 – new Rules) Nigeria [2013] UKUT 00060 (IAC)**, which gave guidance as to the meaning of the word "ties". The judge had misdirected herself in applying a "significant obstacles" test. The grounds went on to suggest that she had given inadequate reasons for certain findings including with regard to Article 3 ECHR.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Kelly on 3rd December 2014 only with regard to the issue arising under paragraph 276ADE of the Immigration Rules. In a response under Upper Tribunal Procedure Rule 24 the Secretary of State contended that any error on the part of the judge was not material.

5. At the commencement of the hearing before me Mr Brooks on behalf of the Appellant accepted that the grant of permission to appeal was restricted to the issues which arose under paragraph 276ADE(vi). Mr Smart for his part said that the test of "no ties" had been used in the refusal letter. He produced a copy of the Statement of Changes in Immigration Rules HC 532 and referred to the implementation section which specified that the relevant changes (which I will refer to below) took effect on 28th July 2014 and applied to applications decided on or after that date. He said that having regard also to the explanatory memorandum annexed to the Statement of Changes (at Section 2.1), which referred to the changes aligning the Immigration Rules with Sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002 which also came into force on 28th July 2014, the judge might have been entitled to consider the new form of paragraph 276ADE of the Rules. Mr Brooks said that he considered it was clear that the amended form of the Rules applied only to decisions made on or after 28th July 2014.

6. In the interests of clarity I set out here the two forms of the relevant paragraph of the Rules. Prior to 28th July 2014 sub-paragraph (vi) read as follows:

> "Subject to sub-paragraph (2) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK".

With effect from 28th July 2014 sub-Section (vi) reads as follows:

> "Subject to sub-paragraph (2) is aged 18 years or above, has lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

Having heard the submissions as to the correct form of the relevant paragraph which should have been applied by the judge I came to the view, having regard to the guidance given by the House of Lords in **Odelola v SSHD [2008] EWCA Civ 308**, that the judge should have considered the form of the paragraph as it existed prior to 28th July 2014. The Statement of Changes referred to "decisions" made after that date but in the absence of express authority that it should apply to the Tribunal I took that to mean decisions by the Secretary of State. The explanatory memorandum does not form a part of the Statement of Changes and indeed at paragraph 4.5 of that explanatory memorandum simply repeats that the changes in 276ADE apply to applications decided on or after 28th July 2014.

7. Mr Brooks then addressed me further saying that the error made by the judge was material as she had applied the wrong test. There had been some mention as to whether the Appellant was from Afghanistan at all but the Appellant said he was from Afghanistan, the Home Office accepted he was from Afghanistan and the proposed removal was to Afghanistan. It was agreed that there was no subsisting issue on that point. I also noted that at the commencement of her determination Judge Thomas had accepted that the Appellant was from Afghanistan.

8. Mr Smart said that in the Appellant's submissions at the original hearing there had been no reference to the Appellant having no ties and he appeared to have been able to contact an uncle. The thrust of Mr Smart's argument was that it had not been necessary to go on to make a formal finding of whether the Appellant had ties.

9. In response Mr Brooks said that the relevant paragraph quite clearly referred to whether there were no ties and **Ogundimu** had set out an exacting test. There must be meaningful ties. The Appellant's case was that he had had no contact with his uncle since 2004. The existence of some ties would not be sufficient. The characteristics of any ties needed to be explored. The Grounds of Appeal had expressly referred to the correct version of the Immigration Rules. He continued that the no ties test looked at the country of removal whereas Article 8 proper was concerned with interference with private or family life in this country also. It was arguable, he said, that Article 8 should have been looked at beyond the Rules.

10. Having heard all of those submissions I came to the view that the judge had made an error of law. The fact that she had considered the wrong form of the relevant paragraph of the Immigration Rules and had made no

express findings on whether the Appellant did or did not have continuing ties with Afghanistan rendered her error material to the possible outcome. There was no continuing challenge to her findings in respect of other issues. Mr Brooks requested remittal to the First-tier Tribunal but I did not think that appropriate in the light of the preserved findings. I was not in a position to proceed immediately, partly through lack of time but also as Mr Brooks said that the Appellant would wish to give evidence as to the current situation and there was no Pushtu interpreter available.

Notice of Decision

There was a material error of law in the decision of the First-tier Tribunal and that decision is set aside.
No anonymity order was requested and none is made.

In accordance with Upper Tribunal Practice Statement 7.2 and pursuant to Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, there will be a further hearing in the Upper Tribunal to decide the outcome of the appeal in accordance with the following directions:

(1) The decision of the First-tier Tribunal is set aside but the findings made by Judge Thomas at paragraphs 15 to 19 inclusive of her determination promulgated on 22nd October 2014 are preserved.

(2) The issues to be decided at the renewed hearing will be under paragraph 276ADE(vi) of the Immigration Rules in the form existing prior to 28th July 2014 and, if appropriate following argument, under Article 8 ECHR outside the Immigration Rules.

(3) Each party shall serve upon the Tribunal and upon the other party any statement or other document upon which reliance is intended to be placed (subject to the requirements of Upper Tribunal Procedure Rule 15(2A)) at least seven days before the resumed hearing.

(4) The resumed hearing will take place before me at Birmingham on 15th December 2015 or upon such other date as shall be notified.

(5) The estimated time required for the hearing is two hours and a Pushtu interpreter will be required.

Signed Date 27 October 2015

Deputy Upper Tribunal Judge French