



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/13884/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 October 2017**

**Decision & Reasons Promulgated  
On 21 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SHAERF**

**Between**

**[M S]**

**(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Gilbert of Counsel instructed by J D Spicer Zeb Solicitors

For the Respondent: Ms J Isherwood of the Specialist Appeals Team

**DECISION AND REASONS**

**The Appellant**

1. The Appellant is a citizen of Afghanistan, born on [ ] 1973. He is a Pashtu speaker from Paghman, near Kabul. In 2001 he married and there is a child of the marriage born in 2002.
2. On 16 October 2002 the Appellant claimed asylum on arrival. He feared persecution on return because his father had been a major in the Afghan Army and worked in the Ministry of Defence during the time of the

Najibullah regime. And his eldest brother had worked in the Ministry for National Security. He himself had worked as a police officer in the security services. On collapse of the Najibullah regime his family was perceived as responsible for the imprisonment of the brother of a local Mujahideen commander, Sher Alam and the execution of a nephew of Sher Alam. Another local commander subordinate to Sher Alam, Hamidullah had been responsible for the confiscation of his family's land and had killed an uncle of the Appellant.

3. On 28 May 2003 the Respondent refused the Appellant's application and his appeal was dismissed by a determination promulgated on 16 December 2003. He did not exercise any rights of appeal. He attributes this to the difficulties he experienced in finding solicitors to instruct. Subsequently he consented to participation in the Assisted Voluntary Removal Scheme but later he withdrew his consent and eventually on 23 October 2007 he was removed to Afghanistan.
4. The Appellant states that on return to Afghanistan his sister's husband's family arranged for him to travel to Pakistan. He was arrested at the border and taken to Kandahar where he was in prison and tortured for some six and a half months. He states the reason for his imprisonment was because of his association with his father and brother and the Najibullah regime which had been responsible for the imprisonment of Sher Alam's brother and the execution of his nephew. He had been able to escape when the prison was stormed by the Taliban. He returned to the United Kingdom arriving on 23 April 2009 when he again claimed asylum. The Tribunal file contains no documents to establish what precisely happened thereafter to the Appellant's new claim, although the procedural history is briefly summarised in the Respondent's reasons for refusal. The NAB of it is that at some point after a 2<sup>nd</sup> application for judicial review the Respondent made a fresh decision on 30 November 2016 refusing the Appellant's claim and granting a right of appeal.
5. The Appellant's wife and son arrived in the United Kingdom on 9 September 2015 having made an unsuccessful protection claim in the Netherlands. Ms Isherwood stated they had made claims for asylum but because the claims had not been made at the same time as the Appellant's claim the Respondent could not treat them as dependants of the Appellant although in effect she understood that dependency on the Appellant was the basis for their claims.
6. On 15 December 2016 the Appellant lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds are formulaic or generic and include a claim based on respect for the Appellant's private and family life protected by Article 8 of the European Convention.

### **The Respondent's Decision**

7. The Respondent summarised what the Appellant claimed he had endured in Afghanistan and identified some apparent and unexplained discrepancies. The documents which the Appellant had submitted in support of his claim were given little weight on the basis of the jurisprudence in *Tanveer Ahmed\** [2002] UKIAT 00439. These included an arrest letter or warrant of 8 January 2006. The Respondent referred to background information and the country guidance given in *AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)*. She concluded that having regard to the discrepancies in the Appellant's account he was not credible and would not be at risk on return to Paghman or Kabul or even Pakistan. She also referred to the adverse credibility findings made in the Tribunal's determination promulgated on 16 December 2003.
8. She considered the claim under Article 8 of the European Convention. She noted that the Appellant's wife and child had unsuccessfully claimed asylum in the Netherlands and their claims made in the United Kingdom had on 2 March 2016 been refused on third country grounds. The Appellant did not meet all the relevant requirements of Appendix FM of the Immigration Rules and Section EX was not engaged. The Appellant did not meet any of the time critical requirements of paragraph 276ADE(1) of the Immigration Rules.
9. The Respondent also considered the circumstances of his wife and his child including the child's best interests and concluded there were no very significant obstacles to their re-integration on return to Afghanistan.
10. The Appellant had claimed that his medical issues were one of the reasons he could not return to Afghanistan. The Respondent noted that there was no recent medical evidence to support his claim and that suitable medication would be available in Afghanistan. There were no exceptional or compassionate circumstances to warrant the grant of leave on the basis of his private and family life and the application on Article 8 grounds was also refused.

### **The Standard and Burden of Proof**

11. The standard and burden of proof in relation to claims under the Refugee Convention, for humanitarian protection under the Qualification Directive and under the European Convention are for all material purposes one and the same; that is the Appellant must show there are substantial grounds for believing that if returned to his country of origin he will be persecuted for a Refugee Convention reason or if removed from the United Kingdom will be subjected to treatment which for the purposes of humanitarian protection as defined by paragraph 339C of the Immigration Rules will amount to serious harm or will be subjected to treatment which will violate his rights under the European Convention. This is known as the lower standard of proof. The effective date for assessment of the evidence in support of each claim is the date of the hearing. In the case of a free-standing claim that Article 8 of the European Convention is engaged based on circumstances arising in the United Kingdom, the standard of proof is

the civil standard; that is on the balance of probabilities. The burden of proof remains on the Appellant.

### **Documentary Evidence**

12. The Appellant's solicitors supplied for the error of law hearing leading to my decision of 3 August 2017 a full bundle with an index (AB). At my request they have subsequently supplied a chronology. In addition to the documents already referred to or mentioned, the Tribunal file includes copies of:-
- (a) The screening interview of the Appellant on 16 October 2002, and 24 April 2009.
  - (b) Substantive interviews of the Appellant on 8 April 2003 and 15 May 2015.
  - (c) Statements of the Appellant dated 7 April 2003, 24 September 2003, 27 May 2009 and 9 January 2017.
  - (d) A statement by the Appellant's wife dated 9 January 2017.
  - (e) An expert report by Mr T Foxley of 7 April 2017.
  - (f) An expert medical report of 21 October 2003 prepared by Dr J Taghipour.
  - (g) An expert psychiatric report of 24 November 2003 prepared by Dr N Campbell.
  - (h) A letter of 30 April 2002 requiring production of the Appellant at Military Command Headquarters with translation.
  - (i) A letter of 12 December 2005 from Sher Alam to the Paghman District Chairman that the Appellant has committed numerous crimes against the Islamic movement with translation.
  - (j) A letter of 26 January 2006 from the Village Chief of Khaldari village in Paghman with translation.
  - (k) Home Office Country Policy and Information Note of August 2017 on the security and humanitarian situation in Afghanistan.
  - (l) A skeleton argument prepared by Mr Gilbert for the October hearing.

### **Proceedings in the First-tier Tribunal and the Error of Law Finding**

13. By a decision promulgated on 4 May 2017 Judge of the First-tier Tribunal Oliver dismissed the Appellant's appeal on all grounds. On 31 May 2017 Judge of the First-tier Tribunal Ransley granted permission to appeal. By a decision promulgated on 3 August 2017 I found that there was a material error of law in the First-tier Tribunal's decision and set it aside. Having regard to the turgid history of the appeal which includes two First-tier Tribunal decisions of 26 September 2014 and 16 March 2015 both remitting the matter to the Respondent and the overriding objective, I directed that the appeal be heard afresh in the Upper Tribunal and with the agreement of the parties reserved it to myself.

## **The Hearing on 18 October**

14. The Appellant together with his wife and son attended. Although the parties were ready to proceed shortly after 10am, the hearing could not commence until 2pm when an interpreter had arrived.
15. The Appellant gave oral testimony. He confirmed his current address and that the contents of his four statements were true and accurate.
16. The land dispute with Hamidullah had lasted as long as he could remember. The land was family land and the owners included an uncle.
17. The arrest warrant at AB pages 355-356 had been sent to him by his brother-in-law that at the time he was in the United Kingdom: see hearing replies 15-17.
18. Mr Gilbert referred to the arrest warrant which had been supplied to the Respondent and to the Respondent's reasons for refusal but which warrant the Respondent had not been able to produce. The Appellant said that this was similar but in shorter form to the warrant at AB pages 355-356 and that the shorter style of the arrest warrant was introduced in 2007. He had received the warrant in 2008 and it had been issued in Paghman by the government: see hearing replies 18-22.
19. The Appellant was referred to his return to Afghanistan in 2007 and was asked about the authorities' visit to his home in search of him. He said that he had left early in the morning on the next day. He was asked when the visit had taken place. He stated it had been on 26 November 2007 which was the day he had left Afghanistan. He then explained that when he had been in prison he had found out that the authorities had visited the following day: see hearing replies 24-26.
20. In cross-examination the Appellant sought to explain the apparent inconsistency on the basis that there was an issue with the interpretation: see hearing reply 32. He sought to explain the discrepancy about his claim to have been in prison in 2006 when he was in the United Kingdom: see hearing reply 33 when he confirmed he had been imprisoned in 2007 and that he had difficulty remembering things as a consequence of the torture he had experienced.
21. The Appellant confirmed that the family land had been appropriated to the time when he was still in school in Kabul.
22. The Appellant had been present when his father had been killed at their home and had been taken away by Sher Alam who was present at the time: see hearing replies 42-46. He was held by Sher Alam for some five to six months and when he was being transferred to another base used by Sher Alam he tried to escape from the open top 4 x 4 vehicle in which he was being transported under guard. He was the only prisoner. He had jumped out of the vehicle and had been injured in the hand and leg when the guards threw a grenade: see hearing replies 48-53. During his

imprisonment he had been interrogated about his elder brother, Najibullah, and tortured. Subsequent to his escape attempt and injuries, he was taken to hospital: see hearing replies 54, 56-58, 59 and 80-85.

23. The Appellant was questioned about seeing Sher Alam. He said that he had seen him once in 2002 and I noted this confirmed his 2005 interview reply 17. However, at reply 19 he had corrected himself, saying that he had seen him once in 1992. This was pointed out to him and he confirmed that he had only seen him in 1992 and not in 2002. It was then put to him that he had said he had seen Sher Alam when his father had been killed and during his imprisonment. His explanation for the apparent inconsistencies was that were a few cells where he had been in prison and he had last seen Sher Alam in 1992 at the place where he had been in prison. He did not address the apparent inconsistency in his claim that he had seen Sher Alam at the family home when his father was killed and he was taken away and at the place where he had been in prison: see hearing replies 62-65.
24. The Appellant was asked about his family and in particular his siblings. He explained he had one sister and an older brother, Najibullah killed in 2002. He mentioned that his father had three wives and that there were half-siblings and step-siblings. He had a half-sister who was deceased and two half-brothers, one of whom was called Yasim and was also known as Asif. He said he had not previously mentioned the wives of his father who were not his mother and their children, his half or step-siblings. He was referred to his 2002 screening when he had identified four brothers and one sister. He was able to identify them but said he did not include his deceased sister, Naama. There was no explanation given for the inconsistencies which were pointed out to him between his stated siblings at his 2002 2009 screenings: see AB page 10.
25. He was asked where his siblings lived and replied simply that he had had no contact since 1992 in Afghanistan because they were his half-siblings. He said that he had been informed that some of them had left Afghanistan and were in foreign countries. It was put to him that in his 2002 screening interview he had said that he had two brothers in the United Kingdom. He replied it was a rumour which he had heard but he had not found them. There was no evidence of efforts to trace them or explanation for the absence of any such evidence. He gave a similar reply in respect of another brother who in 2002 he had said was in Pakistan: see hearing replies 97-103. The inconsistencies between the two screenings were put to him again and he gave a similar answer that he had only spoken about his full siblings and not his half or step-siblings. He sought to explain any inconsistency by saying that in 2002 he may have been asked a different question from that asked at the 2009 screening. He was asked about how many siblings he had in total although he had previously mentioned that it was not his cultural custom to identify half or step-siblings when asked about siblings: see hearing replies 104-106.

### **The Hearing on 6 December**

26. There was insufficient time to complete the hearing on 18 October and the matter was adjourned until 6 December. The Appellant's solicitors had sought an adjournment of the 6 December hearing on the basis that Mr Gilbert of Counsel would not be available. Consequent upon an administrative oversight, the adjournment application was refused. Mr Burrett of Counsel renewed adjournment application which in all the circumstances I considered it appropriate to grant. Both parties agreed that they would not at any future date seek to argue that the delay in completing the oral evidence and eventual promulgation of the Tribunal's decision as a reason to challenge it.

### **The Hearing on 15 January**

27. The hearing did not start until 1:15pm because the Solicitor's interpreter had not arrived. I explained to him the procedure he should adopt if he had any query with the interpretation offered by the Tribunal's interpreter. In the event no such issue was raised.
28. Ms Isherwood for the Respondent continued her cross-examination about the Appellant's siblings. It was at this point the Appellant disclosed his father had had three wives and that they had each lived in separate establishments. One of the three, not his mother, had children by a previous marriage whom he had only seen once. He stated that his full siblings comprised one brother now deceased and two sisters of whom one is deceased. Ms Isherwood noted that at various times the Appellant had given the whereabouts of various siblings. He now said that he was not in contact with any of them and so did not know their whereabouts and could have been mistaken in his previous evidence: see hearing replies 107-116.
29. It was put to the Appellant that he had been imprisoned by Sher Alam for a considerable period of time and on more than one occasion but he had survived, notwithstanding the Appellant's claims that Sher Alam wanted him dead by way of revenge for the execution of his nephew and imprisonment of his brother for which he held the Appellant's father responsible. The Appellant said that he did not know why he had survived and attributed his survival to a divinely ordained destiny or to Sher Alam not having an opportunity: see hearing replies 119 and 126. This was notwithstanding the prominence of Sher Alam mentioned at hearing reply 130.
30. Ms Isherwood referred to his flight to Pakistan in 2009. The Appellant explained that his brother-in-law had assisted him for a short distance that thereafter he had been on his own. He had been arrested at the border when he had failed to produce any identity document. The Appellant stated that on being asked details where he lived, the District Office was

contacted and Sher Alam informed of his presence: see para 10 of his statement of 16 September 2011 at AB p.171.

31. Ms Isherwood then turned to the Appellant's account of the raid on his in-laws' home following his return on 24 October 2007 2 Afghanistan. The Appellant said that he had been away from the property with another brother in law when the authorities raided and they had left an arrest warrant: see hearing replies 131-134 and paras 7-10 of his statement of 27 May 2009. Para 9 is peculiarly worded even on the basis that it is an interpretation of what the Appellant said because he states that "Sher Alam still believed that I was wanted for the death of his nephew and detention of his brother." It has been throughout the Appellant's case that Sher Alam was obliged to seek revenge as a family member of a victim, his nephew. It was accepted that the Appellant had handed this warrant to the Respondent on arrival in April 2009.
32. The Appellant's wife gave oral testimony. She adopted her statement. She suffered from difficulty in sleeping, restlessness and pains in her back, neck and joints. She produced a letter from a nurse as medical evidence. She was on three types of medication but could not remember the names of any of them. She had been to a specialist but could not explain why there was no expert medical evidence or details of the specialist given to her husband's solicitors. She accepted that much of what was in her statement was a repetition of what she had been told by her husband: see hearing replies 141-165.
33. Mr Gilbert did not seek to re-examine the Appellant's wife. At that point Ms Isherwood for the Respondent stated that she had learned that the wife had brought an application for judicial review on the third country return issue. She had claimed asylum in the Netherlands and had then come to the United Kingdom. There was a brief discussion about this information. The wife had a separate appeal and although it might have been helpful to have had some information about the wife's claim I took the view that having reached the close of the Appellant's case, there being no more oral testimony, and having regard to the overriding objective the hearing of the Appellant's appeal should proceed to its conclusion.

### **Submissions for the Respondent**

34. Ms Isherwood urged that the appeal be dismissed. She relied on the various letters given reasons to refuse the Appellant's claim which the Respondent had issued since he first arrived in 2002. Both the appellant and his wife had claimed to experience difficulties remembering things although there was no medical evidence to support such claims. The wife's evidence is essentially and so far as relevant to this appeal a mere repetition of what she had been told by her husband. Both the Appellant and his wife had given evidence in a manner which was vague and evasive. The Appellant's evidence became increasingly vague and incoherent as he strayed outside the limits of the core of his claim.



35. Ms Isherwood referred to the Appellant's claim to have been a self-employed grocery shopkeeper when screened in 2002 at AB pp.6 and 10 and to have been a member of the police. She highlighted the numerous inconsistencies in the Appellant's evidence about his siblings and their whereabouts at various screening interviews and at the hearings on 18 October and 15 January. At one point he had referred to 2 brothers being in the United Kingdom. At para 11 of his statement of 16 September 2014 he had claimed that Sher Alam had targeted all the male members of his family. Set against the claim that he had brothers in the United Kingdom he had ample opportunity to obtain their testimony to support his claim.
36. The Appellant's description of the position of himself and his family in Afghanistan was not as he claimed. She turned to the documents which the Appellant had produced and which were before the Tribunal. The letter from Sher Alam of 12 December 2005 referred to not only the Appellant but also his family as guilty of numerous crimes against the Islamic movement but there was neither claim nor evidence that anything had happened to any of them since the date of the letter. The Islamic Council of Kabul's letter of 8 January 2006 was vague and contained nothing specific. The Village Chief's letter of 26 January 2006 stated that it was given according to information from the Appellant's father-in-law. Little weight should be given to these letters and also the news item in accordance with *Tanveer Ahmed*\* [2002] UKIAT 00439. The Appellant had been evasive throughout in his evidence. He had previously been found not credible by Adjudicator Aujla in December 2003 against whose decision no application for permission to appeal made. Consequently, his adverse credibility finding stood in accordance with *Devaseelan* \*[2002] UKIAT 702.
37. Ms Isherwood turned to Mr Foxley's report. He had noted that the prison break from Kandahar in 2008 had been widely publicised. It would have been easy for the Appellant to have learned the details and woven them into his account. He had been detained on a number of occasions on his own admission at the direction of Sher Alam, including at places owned or occupied by him. Yet, despite the Appellant's protestations that Sher Alam wanted to wreak revenge on him for the death of his nephew and imprisonment of his brother, the Appellant had survived. This was simply not plausible. I find the Appellant's explanation at para 10 of his statement of 9 January 2017 at AB p.307 to be weak.
38. She next turned to Dr Taghipour's medical report. This set out at some length the Appellant's account but added little if anything to that account. The Appellant's explanation of escaping from a moving truck and injuries from a hand grenade thrown after him lacked plausibility and detail.
39. It was implausible that the Appellant happened never to be present when the authorities had raided way he had been living or staying but was out shopping or in an orchard or similar. Given what the Appellant said about the strength of the culture of revenge in Afghanistan and how he and his

family had been targeted, it was simply not plausible but he had been able to survive for so long.

40. Ms Isherwood proceeded to a more detailed examination of Mr Foxley's report. She made the following comments with reference to the mention paragraph numbers:
- o Para 13 the expert had accepted that it was difficult to give a confident assessment. Verification of many of the events described by the Appellant was problematical. I note he added that the core aspects of the Appellant's account were plausible in generic terms.
  - o Para 13(e) the expert had not referred to any supporting evidence for the Appellant's claim that he was in fact out of favour with Sher Alam.
  - o Para 14 it was to be noted the expert did not take issue with the Respondent's Country of Origin Information Report (the COIR).
  - o Para 14(b) the Appellant and his wife had family in Afghanistan. There was no evidence of the medical treatment each of them required.
  - o Para 16(c) this needed to be considered in the light of the guidance given in *AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)* and the COIR, especially section 2.3.4.ff.
  - o Para 18 the risks identified needed to be consists seen in the context of what she described as a lack of explanation and that little weight should be given to the evidence of the Appellant's wife.
  - o Para 21 the most the expert had found here was that the Appellant "*might* be at least briefly questioned upon arrival and that there might be paperwork pertaining to his name and place of origin, but I do not have a good sense of the level of detail, scope, scale or intent of this process."
  - o Para 26 the expert had relied on long dated evidence on the power and influence of warlords who now had less influence. The information at at para 28 on Sher Alam dated from 2003.
  - o Para 30 the expert had noted that the Kandahar prison break had been well documented and widely reported.
  - o Para 30 the sources relied on were long dated
  - o Para 37 the expert had only "sensed" the Appellant will not be able to access state protection.
  - o Para 38 the evidence about the availability of mental health facilities was long dated.
  - o Para 45 the Appellant has family in Afghanistan.

41. The error of law finding had mentioned a failure to refer to *SO KhaD [200 ] UKIAT.....* In this determination the Upper Tribunal had made the point at para 20 that each case depended on its particular facts. In the case of the Appellant he would not be at risk on return.
42. Ms Isherwood then referred to skeleton argument for the Appellant. The part of the Appellant's claim based on the theft of family land 1992 by Hamidullah. The issue of the claimed theft of family land had little bearing on the appeal given the passage of time and the decisions previously made in the appeal. The medical evidence for both the Appellant and his wife was limited. She had already commented at length on the expert report of Mr Foxley. The situation in Afghanistan had moved on considerably in the more than 10 years since the determination in *SO (KhaD)*.
43. Addressing the claim based on the Appellant's private and family life. He could return with his wife and son as a family unit. No reliance had been placed on the short period during which his son had been in the United Kingdom. Their removal as a family unit would not interfere with their private and family life. Reduced weight should be attached to the various letters of support at AB pp. 163-168. They referred to knowing the Appellant over a period of time which included the time he had spent in Afghanistan after his initial removal there. The failure to mention the not insubstantial break in the period of acquaintanceship was notable.

### **Submissions for the Appellant**

44. Mr Gilbert referred first to the wife's evidence. This needed to be considered in the light of what the nurse had said in her undated letter of late 2016 to her doctor. Some aspects of the wife's evidence could have been known only to her, for example the raid on her sister's home some 20 days before she with her son fled Afghanistan referred to at para 17. This raid was crucial because her account was evidence that the authorities continued to search for the Appellant following his escape from prison.
45. Few examples of the Appellant's evasiveness in his evidence had been identified. At para 12 of his determination Adjudicator Aujla had noted the Appellant's low rank in the police service which he had left in 1992. Thereafter the Appellant had been shopkeeper.
46. Mr Gilbert acknowledged that the Appellant had displayed considerable confusion about his siblings. He submitted that earlier there may have been a lack of clarity but there was no indication the Appellant had sought to mislead. His evidence at the January hearing had been clear. He was

not close to the children of his father's other wives each of whom had lived separately from the others.

47. The Appellant had throughout been consistent about the issues with Sher Alam. He referred to AB pp 42 and 172. His wife had not personally been subject to any abuse by the authorities or others in Afghanistan. She would not have been involved in matters subsequent to the land theft. Women in Afghanistan were largely disenfranchised and she would have not been perceived by Sher Alam as a threat.
48. Mr Gilbert asked me to take a holistic approach to the medical evidence. The Appellant had given a plausible explanation for his scarring at the October hearing and in his statements at AB pp 43 and 46.
49. With regard to the Appellant's mental health, Mr Gilbert referred me to the expert psychiatric report of Dr Campbell and the Doctor's letter at AB p319.
50. The Appellant had received the newspaper item and other documents at various times between 2003 and 2016. Not unsurprisingly, it was difficult for him to remember when he received each individual document. The letter confirming his involvement with the police force at AB pp 76-77 was consistent with the rest of his evidence. The Respondent had mislaid documents about the Appellant's 2007 arrest and the visit made to him by his brother-in-law while he was in detention. There was clear evidence the Respondent had those documents recorded at the screening interview at AB p 128. The arrest warrant was an original referred to in the 2014 statement at AB p 172 and 173 and the 2017 statement at AB p307.
51. On return in late 2007 to Afghanistan the Appellant had stayed with his father-in-law in Paghman: see AB p 139. Mr Foxley' expert report at AB p 329 made it clear that internal relocation was not likely to be available for the Appellant.
52. The Appellant had given detailed evidence at the October hearing about his escape from a moving truck and being stopped by a grenade explosion. There was no information available about the military training and expertise of the guards on the truck. The Respondent had claimed that Sher Alam had had ample opportunity to dispose of the Appellant but had not done so. However, there was no information to assess the state of his mind at various times during the periods when he had detained the Appellant. Possibly, keeping the Appellant detained had been Sher Alam's chosen form of revenge and must be seen against his belief that the Appellant's family had been responsible for the detention of Sher Alam's brother as well as the death of his nephew. It was useless to speculate as to Sher Alam's motives.
53. The Appellant's detention in Kandahar from late 2007 had been in a different province from his home province and by the Border Police. There was no evidence about the extent or otherwise of Sher Alam's influence in

Kandahar. Mr Foxley had addressed the areas of influence of Sher Alam and of his patron, Abdoul Rassoul Sayyaf in his report at AB pp 332-333. Both had established reputations as human rights abusers. In his 2003 statement the Appellant had detailed the connection with Sher Alam: see AB p 42. At AB p 326 Mr Foxley had noted that the violent pursuit of blood feuds was common and the Appellant's account in this respect was plausible. Further, if the Appellant was for any reason sought by Sher Alam he would likely be at risk of detention and abuse.

54. The Appellant had given a detailed account of his escape from the prison in Kandahar, referring to the two explosions: see AB pp 140a and 334.
55. Mr Gilbert referred to *SO (KhaD)* and *AK (Article 15(c)Afghanistan CG [2012] UKUT 00163 (IAC)*. Sher Alam and Abdoul Rassoul Sayyaf remained in play as warlords. The Appellant would be at risk in Kabul, Maidan or Kandahar. There was enough evidence to justify departing from the conclusions of Adjudicator Aujla. The issues were the risks flowing from the land theft and Sher Alam's desire for revenge. The Appellant in short was a victim of the regime and at risk as a member of his family which for Refugee Convention purposes constituted a Particular Social Group. On return to Afghanistan the Appellant would face very significant obstacles to his re-integration. There were no family members to whom he could turn and integration would be more difficult because of the mental health issues he and his wife experience.
56. He turned to the background evidence. He relied on the UNHCR April 2016 report on Eligibility Guidelines for Asylum Seekers at p170ff of the Appellant's supplementary bundle. The Appellant and his family would be destitute on return to Afghanistan. The Appellant had not worked since 2009, had mental health issues and was at risk from Sher Alam.
57. The evidence is that his son is well integrated into school: see the letter from his school at AB p318. The family is unit is vulnerable and it would be disproportionate to remove the Appellant with or without his family. The appeal should be allowed.

### **Findings and consideration**

58. I have carefully considered the written and oral testimonies of the Appellant and his wife together with the expert country report, the two expert medical reports and the other assorted documents comprising the medical evidence as well as the submission made for each of the parties. I have looked at the documents from Afghanistan and the background evidence in the Appellant's supplementary bundle and the Respondent's Country Policy and Information Note of August 2017. I have noted the skeleton argument submitted for the Appellant and the case law cited to the Tribunal. I have taken account that the Respondent has been unable to produce the documents said to show the authorities' interest in the Appellant which he handed over in 2002.

59. I accept the Appellant's explanation at hearing replies 113-114 for at least some of his confused replies to questions about his siblings, namely that his father had three wives each of whom he maintained in separate establishments and who had little contact with each other. However, this does not explain why he stated when screened in 2002 that two male siblings were in the United Kingdom and at 2003 interview reply 91 that he had a half or step brother in England and at the January hearing initially maintained that some siblings or half siblings were not in Afghanistan: see hearing reply 109. When pressed the Appellant said he simply did not know whether they were in Afghanistan: see hearing reply 116. What the Appellant did not explain is why this last information that he did not know where his siblings took so long to come to light.
60. I take account of his claim to have worked in the intelligence services (KhaD) for a period of time: see 2003 interview reply 41. This may in some small part explain his evasiveness but does not explain the folly of not truthfully answering non--aggressive questions about his family. I note the Appellant said in 2002 he had been a shopkeeper for some 9 years and this would tie in with his claim to have left the Intelligence Service when President Najibullah fell.
61. The Appellant places the start of his problems at the unlawful seizure of family owned land by Hamidullah. He is clear in his April 2003 statement that the land was seized by Hamidullah who shot and killed the Appellant's uncle and who then alleged to Sher Alam that the Appellant's father had been involved in the detention of Sher Alam's brother and death of his nephew. At para 11 of the 2003 statement, having immediately previously referred to Hamidullah the Appellant states "they" raided his home and killed his father and took him away. The account of his father's death in 1992 at his 2003 interview replies 44-51 also refers to "they" and that the Appellant was not at home at the time but in the bazaar. The reference to Sher Alam at hearing reply 46 does not indicate Sher Alam was present when his father was killed. At 2015 interview reply 15 the Appellant stated that both Sher Alam and Sayyaff killed his father. At reply 19 he said he had last seen Sher Alam in 1992 but did not place him at the family home. There was no explanation why Sher Alam should have a greater interest in wreaking revenge than his brother whose son is said to have been executed by the Najibullah regime. There is no material reference to Hamidullah at 2003 interview reply 46 dealing with the incident of his father's death or at his 2005 and 2015 interviews or any of his later statements.
62. There was no explanation for the Appellant's statement para 9 of his 2009 statement at AB p139 that on his return in late 2007 the Appellant considered that Sher Alam "believed he was wanted for the death of his nephew" and detention of his brother. This type of expression to describe what the Appellant thought of Sher Alam's intentions towards him does not sit easily with the claimed "blood feud" with Sher Alam. Dr Taghipour in his report at AB pp50-51 does not record the Appellant stating Sher Alam was present when his father was killed or arrived immediately

afterwards while the Mujahideen were still in the area and able to arrest him. At the October 2017 hearing at replies 43-46 and at para 12 of his 2014 statement at AB p172 the Appellant claimed both he and Sher Alam were present when his father was killed. These apparent inconsistencies remain unreconciled.

63. At his 2003 interview replies 84, 87, 89 and 90 the Appellant claimed his brother had been killed in Maidan at his maternal uncle's home variously in May 2002 and in October 2001 and at the time he had been absent in nearby fields. There was no explanation for the material difference in time and season between these two dates.
64. At para 11 of his 2014 statement at AB p172 the Appellant explained why he considers he is at risk as a revenge victim of Sher Alam. This does not sit easily with the opportunities he states at para 9 of the same statement for Sher Alam to have had his revenge while the Appellant spent 6 months in his private detention centre: see also October 2017 hearing replies 47-50.
65. I turn to events subsequent to the Appellant's return to Afghanistan in 2007. In his statement of May 2009 at para 7 the Appellant states he went to Paghman: see AB p 139. He claims that while there he learned that Sher Alam had been advised of his return and he decided to leave. He states he went to Kabul and from there to Kandahar with a view to travelling to Pakistan. He was stopped at the border, held at the police station while his identity was checked and sent the following day to prison in Kandahar.
66. At the hearing I indicated I would be referring to a map of Afghanistan and not relying on the diagrammatic map in Mr Foxley's expert report at AB p325. I have used a map of Afghanistan scale 1: 1M from ITMB Publishing Vancouver. There is no reason given why arrangements were made for the Appellant to travel from Paghman to Kandahar, a distance of some 500 km which the Appellant stated at AB p 140a and at 2015 interview replies 77-78 he was able to traverse in 4 or 5 hours. This would appear to be a remarkably rapid journey even allowing for the comparative (by Afghani standards) quality of the road. There was no explanation why he did not travel by the shorter route of just over 100 kms from Kabul to the border at Tower Kham. At 2015 interview replies 32 and 35 the Appellant stated he was arrested on the border at Chaman. Chaman is well inside Pakistan. The border town is Vesh. There was no explanation for this apparent inconsistency or how the Afghans would be able to arrest him at a place well within Pakistan and hold him overnight in a police station there.
67. The medical evidence for the Appellant comprises Dr Taghipour's report of 21 October 2003, Dr Campbell's psychiatric report of 24 November 2003 and letters of 18 November 2010 and 1 February 2017 from the Appellant's GP. The 2017 letter states the Appellant suffers from depression and anxiety associated with sleep disturbance. At the time he was "prescribed amitriptyline for his symptoms unfortunately his symptoms have not improved much. This is partly due to present social

circumstances.” The GP writes that treatment is likely to be long-term. The 2010 letter refers to additional complaints and medications so it would appear over the intervening six years there has been some improvement. The 2003 expert reports have not been updated.

68. Dr Taghipour’s expert opinion is that the Appellant’s scarring is “likely to be consistent” with his account. There are appended to his report comments about torture and rape the latter of which seems to be of no relevance the body of the report which is limited to scarring and contains a suggestion the Appellant should be psychologically assessed. Dr Campbell’s report diagnosis is a Major Depressive Episode and Post-Traumatic Stress Disorder. The recorded evidence in the report other than the Appellant’s personal and family history is extremely limited and without any reference to any of the standard textbook criteria. There is a concluding recommendation that the Appellant be assessed by his local Community Mental Health Team and a prognosis that if untreated the Appellant’s condition will deteriorate.
69. There is also an undated (but from internal information it can be placed as prepared at the end of 2016) report from a Nurse Assessor on the Appellant’s wife recommending a change in her medication. The report refers to her as depressed and suffering from symptoms which include nightmares, flashbacks and hyper-vigilance, variable appetite and poor concentration and memory.
70. Mr Foxley at para 13 of his expert report states that:
- “It is difficult to give a confident assessment: verification of many of the events your client describes is problematic given the fact that many of these events are spread over decades and Afghanistan’s infrastructure, after several decades of destructive conflict, has hindered preservation of data. But the core aspects of your client’s account are plausible”
- He then goes on to identify the violent pursuit of “blood feuds”, human rights abuses by warlords including Sher Alam and the imprisonment and execution of many former communists following the fall of the Najibullah regime. At para 27 he identifies Sher Alam as a lower-level local warlord and as having been involved in land appropriations in Paghman.
71. At para 30 he refers to the Appellant’s escape from Kandahar prison and confirms the:
- “... spectacular Taliban-organised prison break ... On 13 June 2008, involving use of 2 suicide bombers (hence the 2 big explosions your client refers to) and the escape of around 1000 prisoners ... The incident was well documented in the media.”
72. At paras 31-37 he notes extensive police corruption in Kabul and the lack of sufficiency of protection as well as the still regular Taliban and attacks



there. Since the date of the report, there have been some serious incidents reported in the UK national press of bombings.

73. At paragraphs 45-47 he addresses the bleak situation the Appellant would face on return to Kabul if unable to rely on a family support network. Para 10. 2 of the Home Office Country Policy and Information Note of August 2017 refers to information from Australia and the United Nations that:

‘Kabul’s rapid growth has put pressure on its infrastructure ... Approximately 64% of dwellings in the city are considered “informal”. The quality of housing and infrastructure in informal areas varies greatly and has unreliable access to infrastructure. Rents in Kabul tend to be expensive compared to most other parts of Afghanistan. As a result, many residents of Kabul live in informal settlements.

... Some estimates suggested Kabul grew by some 1200 people per day owing to the influx of displaced and returnees. At the time of the visit [October 2016], more than 50 informal sites around Kabul housed an estimated 55,000 internally displaced persons ... Large parts of the city remain extremely poor.

... Unemployment was estimated to be widespread ... And underemployment is also common. Influx of IDPs and returnees to the city has put pressure on the local labour market.’

74. The Upper Tribunal in *AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)* at paras 77-80 and 243 addressed the situation in Kabul and of IDPs there. In the intervening period of five years, the situation in Kabul is fluid. There was no evidence before me to suggest it is currently any better than it was in 2012. Recent reports in the media about Taliban bombings and the increased extent of Taliban control or influence throughout many areas of Afghanistan, including Kabul, might indicate the position has deteriorated.
75. The Respondent made no specific challenge to Mr Foxley’s expert report. He was engaged in country research on Afghanistan for the UK Ministry of Defence from 2001 to 2012 for which work he was made MBE. He is experienced in the preparation of reports for the Tribunal and subject to issues of the Appellant’s credibility, I give substantial weight to his report.
76. I accept Dr Taghipour’s report that the Appellant’s scarring is likely to be attributable to wounding as a result of a grenade blast. Dr Campbell’s report on the Appellant’s mental health condition is some 13 years old. It might be an accurate assessment of the Appellant’s condition at the end of 2003 but its conclusions are quite different from the Appellant’s condition as described by his GP in 2010 and early 2017. There was no more recent medical evidence for the Appellant. In these circumstances and noting the Appellant has now been re-united with his wife and son, I give reduced weight to Dr Campbell’s 2003 report.

77. The Appellant's bundle includes five handwritten documents of which translations of only four have been supplied. They are a letter of 21 March 1990 of recommendation of the Appellant by a group leader of the 5<sup>th</sup> Security Headquarters Youth Organisation. The next letter is of 30 April 2002 requiring production of the Appellant at Military Command Headquarters of the Ezhar. No further details are given. There is no indication where and when the Appellant is to be produced or in respect of what matter. The third document is dated 12 December 2005 under the hand of Sher Alam ordering the arrest of the appellant as an active member of the Communist regime and the person who "had committed numerous crimes against the Islamic movement and legitimate Jihad of Afghan people. He personally betrayed not only my family but also the Islamic movement." The letter is dated at a time when Sher Alam was the Governor of Ghazni province: see para 29 of Mr Foxley's report at AB pp332-333. The fourth letter is of 26 January 2006 from the village chief of Khaldari in Paghman district. It re-iterates the Appellant's claim about Sher Alam wanting to kill him to take revenge for the death of his brother and his nephew. The letter acknowledges that the information contained in it comes from the Appellant's father-in-law. Consequently, I am not able to treat it as independent evidence but as evidence from an interested party and so at best can attach little weight to it.
78. The Appellant's wife gave oral testimony. She had arrived in the United Kingdom on 9 September 2015 and stated she made contact with her husband on 17 September 2015. She was asked about her medical condition additions and was able only to give the replies. She did not appear to have any understanding of the complaints from which she suffered or of the medical advice she had been given. She accepted that the parts of her statement of 9 January 2017 relating to the Appellant simply reflected what he had told her to say: see hearing replies 161-164. At the end of the wife's evidence, Ms Isherwood informed me she had an outstanding application for judicial review: she did not have full details but believed it related to issues surrounding the fact that she had claimed asylum in the Netherlands and the impact of the provisions of Dublin III. I took the view that at such a late stage the better course was to proceed with the disposal of her husband's appeal.
79. I have already pointed out a number of difficulties with the Appellant's evidence and that much of it was vague and appeared to be given in an evasive manner. I accept to the lower standard that he and his family were involved in KhaD and that his father and a brother, both of whom served in KhaD, met violent deaths. I also accept that some family owned land was the subject of unlawful or forced expropriation by Hamidullah, a junior commander under Sher Alam. For the reasons already given, I do not accept the Appellant's account that Sher Alam was present when his father was killed.
80. For the reasons already given, I do not find the Appellant's account of his first detention by Sher Alam to be credible and consequently I do not find his claim to have survived a grenade blast when he tried to escape from a

moving truck to be credible. I accept in the light of the medical evidence that he has survived a grenade blast but not that it happened in the way he narrated. I do not find it credible that if Sher Alam wanted to take revenge on the Appellant he or his minions would have arranged treatment of the Appellant by a doctor for his psychological problems while detained and in hospital following injuries sustained during his claimed escape. I find the Appellant has used the connection between Hamidullah and Sher Alam as the basis for fabricating, with serious inconsistencies nevertheless, much of the substance of his claim.

81. There was no explanation or evident reason why the Appellant should have moved from Paghman to Kandahar in order to cross the border into Pakistan, when the distances are so much greater via Kandahar. There was no explanation how the Appellant could have been arrested by Afghanis some distance over the border with Pakistan. As Mr Foxley points out, the jailbreak from Kandahar was extremely widely publicised. For the reasons already mentioned I do not find credible even to the lower standard the Appellant's account of what happened subsequent to his return in 2007 to Afghanistan. Similarly, his wife's evidence adds no weight to the Appellant's case.
82. I have already expressed concerns about the letter of 30 April 2002. This leaves the letter of 12 December 2005 requiring the arrest of the Appellant said to come from Sher Alam. Given my adverse credibility findings in respect of the connection claimed by the Appellant with Sher Alam and applying the jurisprudence of *Tanveer Ahmed (Documents unreliable and forged)* \*[2002] UKIAT 00439, I attach little weight to this letter. It was unfortunate there was no evidence to confirm that the handwriting of the bulk of the letter was different from that of the signature said to be of Sher Alam.
83. The Appellant served in KhaD for a comparatively short period of time and on his own account in a junior position, if only by reason of his youth. I am satisfied that his service in KhaD and the passage of time since the fall of the Najibullah regime and the deaths of his father and brother will not be likely to place him at real risk on return on account of his or their connections with KhaD, particularly in the light of my adverse findings about the strength of the claimed connection with Sher Alam: see para 36 of the determination in *SO and SO (KhaD - members and family) Afghanistan CG [2006] UKAIT 00003*.
84. The Appellant's appeal on Refugee Convention grounds is dismissed. There was no individual claim for humanitarian protection under the Qualification Directive. Neither evidence nor submissions were put to me to support such a claim. The circumstances of the Appellant even if he returns with his wife and son to his home area Paghman or nearby Kabul are not such as to fall within the scope of the findings in *AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC)*. The burden is on the Appellant and has not been discharged. Consequently, any claim for humanitarian protection has not been made out.

85. There remains the Appellant's claim under Article 3 of the European Convention. The Appellant's wife evidently has some psychological difficulties and notably to have limited mental resilience. Their child is a minor and so by definition vulnerable. The Appellant has effectively been out of Afghan society since 2002. His wife states that she and their son arrived in the Netherlands in 2014: see para 18 of her statement at AB p315. She and her son have been away from Afghanistan and in western Europe for almost 4 years, years which will have been very formative for him. On return there is a real risk that they will be perceived as "westernised".
86. The real prospect is that they will find accommodation in what the Upper Tribunal described as tents or unplanned areas or in illegal settlements with poor sanitation and lack of access to safe drinking water in a place which has been abandoned by the government and aid agencies: see para 80 of AK and which the 2015 Australian report referred to at para 10.2 of the Home Office's August 2017 Note describes as "informal settlements". I also bear in mind the comments of Mr Foxley already referred to at para 73. The Appellant's home area is close to Kabul. I find the Appellant and his family on return would be in a situation tantamount to a state of destitution which coupled with their vulnerability will amount to inhuman or degrading treatment such as to engage the State's obligations under Article 3 of the European Convention.
87. Although the appeal of the husband Appellant is before the Tribunal, his wife and son have made claims and are in every respect his dependants. The claims have not been conjoined but it seems to me that the circumstances of the family as a unit should be taken into account in the consideration of the Appellant's appeal. I find the Appellant's circumstances will be considerably more difficult if he is returned with his wife and son or if he is returned alone and his wife and son follow. I see little point in considering the splitting of the family between Afghanistan and either the United Kingdom or the Netherlands. In the circumstances of this appeal, such an approach would not pay any respect to the individuals' family life and would amount to a breach of the obligations imposed on the State by Article 8 of the European Convention sufficiently serious to engage those obligations.
88. The Appellant did not seek to amend the grounds of appeal to include a claim in respect of his family life now that his wife and son have arrived in the United Kingdom. Other than the fact that they are a family unit there was no evidence and no submissions were made to support such a claim.

### **Anonymity**

89. There was no request for a continuance of the anonymity direction and having heard the appeal I consider none is warranted.

**NOTICE OF DECISION**

**The appeal is dismissed on asylum grounds.**

**The appeal is dismissed on humanitarian grounds.**

**The appeal is allowed on human rights grounds (Article 3).**

**Anonymity direction not made.**

Signed/Official Crest  
2018

Date 13. ii.

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal

**TO THE RESPONDENT: FEE AWARD**

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

Signed/Official Crest  
2018

Date 13. ii.

Designated Judge Shaerf  
A Deputy Judge of the Upper Tribunal