Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09966/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 January 2019	**On 02 April 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

A N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lay, Counsel instructed by Syed Shaheen Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me following a hearing on 12 June 2018 before me and Yip J following which we concluded that the decision of the First-tier Tribunal ("FtT") was marred by error of law such as to require its decision to be set aside and

for the decision to be re-made in the Upper Tribunal. The hearing before me was for the re-making of the decision.

2. The decision ('the error of law decision') which gives our reasons for setting aside the FtT's decision is included as an annex, and reference to it should be made for the further background to the appeal.

3. To introduce this, the re-making of the decision, I repeat the details of the opening paragraphs of the error of law decision. Thus, on 12 September 2017 the respondent refused the appellant's protection and human rights claim within her decision to make a deportation order against the appellant. That deportation order followed his convictions for conspiracy to supply Class A and B drugs for which he received a total sentence of 27 months' imprisonment.

4. The appellant had arrived illegally in the UK from Afghanistan in May 2006. He made a claim for asylum which was refused, but in the light of the fact that he was aged 16 years at the time, he was granted discretionary leave until 31 January 2008. That leave was further extended.

5. At the hearing before me the 22 page bundle that was before the FtT was relied on. There was a further bundle containing some duplicated material but with further witness statements of the appellant and his partner, a psychiatric report from a Dr Fazel dated 13 January 2019 and various country background documents, including the UNHCR Guidelines in relation to asylum seekers from Afghanistan. There was also an extract from the appellant's prison records.

6. Mr Lay relied on his earlier skeleton argument dated 12 June 2018 insofar as the arguments advanced in it have not been superseded by the conclusions set out in the error of law decision.

7. It was accepted that the appellant could not rely on paragraph 399(b) as regards his relationship with his partner because of the requirement in para 399(b)(i) that their relationship was not formed at a time when his immigration status was precarious, and bearing in mind the decision of the Supreme Court in *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58. However, it was submitted that the appellant could rely on the 'very compelling circumstances' provision of para 398(c) taking into account the aspects of para 399(b) that do apply in his favour.

8. The appellant and his partner gave evidence. I set out a summary of their evidence in the following paragraphs.

The oral evidence

9. The appellant adopted his witness statements in examination-in-chief. He said that he had heard from a man in their village of Shakardara that his parents had been killed in Afghanistan. He said that they were going to a wedding and they were killed by an airstrike. He was told that that was about six months before 2014. Since

he left Afghanistan he has had no contact with his sister there and no news of her. He has no brothers.

10. He is still in a relationship with his partner Asma. They performed the nikah Islamic ceremony on 1 January 2019. Her parents were present but they are still not happy about the relationship.

11. In cross-examination he said that he has not kept in contact with the person who told him about his parents. He had seen him twice. As to how he knows that what he was told is true, that person is from his area and knew his parents. He went to his house near Stratford but he had not seen him since then. He is the only person from Afghanistan who he has been in contact with.

12. He only speaks Pashtu, but does not read it. He does not speak or read Dari. He agreed that Pashtu is one of the main languages in Afghanistan.

13. He had never been to Kabul. There are no jobs and nothing in Afghanistan. Whilst he was there he was just helping his father in the fields but otherwise he could not get a job. He was aged 13 or 14 when he left. He would not be able to get a job even though now an adult. He has not spoken to his younger sister since he left and he does not know where she is. The friend does not know either.

14. He does not live with Asma, but still lives at his friend's house. She lives with her parents.

15. Referred to para 3.7 of Dr Fazel's psychiatric report, he agreed that he had been advised to attend a mental health centre but did not do so. He was also advised to go to see a doctor and was prescribed anti-depressants but he did not take them. He did take them whilst he was in prison but not since his release.

16. In re-examination he said that in the first place he had no identity documents to go and see a GP and felt so low that he could not go there. He lost a lot of weight. He was also scared to go to the GP. The tablets he had been taking whilst in prison made him feel worse. The medication was Olanzapine, although Mirtazapine used to help. He then said that Mirtazapine makes him feel worse, although when he takes it without Olanzapine he feels okay. He had told the psychiatrist that he had been unable to register with a GP.

17. In answer to my questions he said that the name of his friend (who told him about his parents) is Karim. That is the only name he knows him by. He does not know his immigration status. He works as a construction worker.

18. 'Asma' adopted her witness statements in examination-in-chief. She said that on 1 January 2019 they had a family get together with an imam and they performed the nikah. It was so that his family could get to know the appellant. Her family is still a bit worried about the relationship but that is changing a bit.

19. She still works as a primary schoolteacher earning roughly £2,100 per month. At the end of the month she is left with about £200 or £300.

20. If the appellant had to return to Afghanistan she would only realistically be able to send him about £50 per month. She would still be concerned about him even if she was sending him money because he has no family there and no job. She would be worried about his emotional wellbeing. He is prone to self-harm and suicidal thoughts. He has no family, friends or relatives. That would worry her a lot. All those things add up.

21. She had read the psychiatric report. She found out about his self-harming when he was in prison. She also found out about his low mood and his crying uncontrollably. That has now increased. Sometimes he will suddenly cry for no reason and would constantly shake his head. She feels that his appetite has gone down. Even now if he has just a coffee he would not finish it. He does not seem to finish anything (to eat or drink). His mood changes all the time. He is worse now since he has been in prison, although she also had concerns before he went to prison.

22. She had suggested that he goes to a doctor but he is very reluctant to do so. He does not like doctors because he is scared that they would lock him away. She had tried to suggest it to him many times. However, because he now has psychiatric evidence, that may help to persuade him to go to the doctor because it comes from someone professional. It is someone else saying it.

23. In cross-examination she said that the issue in relation to his appetite is not just because of uncertainty over his immigration status. It was at a low level before. He did tell her what had happened in prison.

24. She has been with him for nine years. He has never had a full-time or proper job. After he came out of prison she supported him. She would not say that she is 'happy' to provide him with about £50 per month routinely, because she has other responsibilities.

25. She referred to "certain protocols" in relation to whether she was able to bring a man home. She is from Pakistan and was not born in the UK although she is a British citizen. She does not speak Pashtu.

26. Her family know about his time in prison and they do have difficulty accepting him. Their backgrounds are different. Her parents are both from Pakistan.

27. She spoke to him when he was in prison whenever he called her. She visited him every week. Their relationship could not continue over the phone if he went to Afghanistan. They are planning to live together regardless of her family not accepting him.

28. In answer to my questions she said that they would be allowed to live together after having performed the nikah. As to why they do not, she said that first they need to get a place. He is still not able to stay at her place because her parents do not want

him to as a result of their cultural differences. There are also many other reasons so she would want to get their own place.

29. To her knowledge he does not have family in Afghanistan. She does not think he has his parents because he told her that they had died and she believes him.

30. In further cross-examination she said that she had to ask her parents to be allowed to go through the nikah but they were not happy. However, at the end of the day it was her choice.

31. As to why then she is not living with him, she said that it takes time to get a place. She works full-time and it is hard to find a place. The procedure is long and most estate agents are shut on Saturdays which is the only day she has. It is just a question of getting the time. She clarified that most estate agent's appointments are on Saturdays but often they cancel.

32. She wants the Home Office to understand the situation and look beyond his convictions. If he goes to Afghanistan she would be left behind. She relies on him for emotional support and she would be punished for something that she did not do. People should be allowed a second opportunity. He has made a mistake and has been punished. That does not mean he should be punished for the rest of his life, or that she should. What would she do if he was deported? She would probably never have her own family and so what would be the point of living? Everything she does she does for him. She went into teaching for him and to break that bond would be unfair on both of them.

Submissions

33. Ms Cunha relied on the respondent's decision letter. Although the pre-sentence report refers to the risk of reoffending being low and the appellant has not committed further offences, he has nevertheless been on strict licence conditions including not accessing the area where the offences were committed.

34. The sentencing remarks show that the appellant played a significant role in the offences. He has two previous cautions for possessing controlled drugs and for an offence of battery. He had previously been warned and had disregarded those warnings. Despite what is in the pre-sentence report he could pose a risk to the community if he is unable to find a job and has financial needs. It was submitted that he had not rebutted the presumption of being a danger to the community.

35. As to risk on return, Ms Cunha relied on *AS (Safety of Kabul) Afghanistan* CG [2018] UKUT 00118 (IAC). The events that the appellant describes as having happened to him when he was in Afghanistan occurred when he was aged 13 or 14. He is now 27. He was in any event only assisting the Taliban with food. He was never in a high-profile position. There would be no real risk of persecution on return to Kabul. Both the Country of Origin Information Report and the EASO report indicate that there is rehabilitation available for drug addicts.

36. In relation to article 3 of the ECHR, *Secretary of State for the Home Department v Said* [2016] EWCA Civ 442, in particular at [31], decided that poverty and destitution are not sufficient to reveal a breach of article 3.

37. So far as article 8 is concerned and undue harshness under para 399, it was accepted that it would be unduly harsh for the appellant's partner to go to Afghanistan. However, she could remain in the UK.

38. It is clear from *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, in particular at [23] that 'unduly harsh' means more than just harsh. The fact is that the appellant and his partner do not even live together. Likewise, in relation to s. 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the appellant could return to Afghanistan and obtain employment. He was able to obtain work in the UK through friends who, according to his evidence, were not even nationals of Afghanistan. He also has a contact from Afghanistan who lives in Stratford.

39. The psychiatric report does not say that he is completely unable to cope, and he has managed before. He came to the UK where he did not know the country or the language. He was able to draw on the support of his partner. She says that she would be able to provide him with about £50 per month should he have to return to Afghanistan. That would go further than it would in the UK. He would also have access to about £750 from the Secretary of State. That would assist initially.

40. In relation to his mental health, he had chosen not to seek treatment so the situation would be no different if he were to return to Afghanistan. There are in any event pharmacies there and he would have access to medication. The appellant's partner has not been able to exercise any influence over him in the nine years that they have been together. She could not stop him taking drugs or selling them to innocent people. She was unable to persuade him to seek medical attention.

41. There was a clear public interest in his deportation and there were no very significant obstacles to his integration. He had lived most of his life in Afghanistan and was familiar with the language and culture. There were no compelling circumstances.

42. In his submissions Mr Lay argued that the appellant does not represent a danger to the community and thus the presumptions in s. 72 of the 2002 Act are rebutted. It was accepted that the previous offences were serious but not that he represents a danger to the community. He had been bailed since October 2017 and had not committed further offences.

43. As regards asylum, the appellant had been subjected to recruitment and harm as a child, as set out in his witness statement. He was held in solitary confinement and beaten. That was near Shakardara in Northern Kabul province. Therefore, para 339K of the Rules applies. Rural areas in the north of Kabul province are still contested. Mr Lay made it clear that he was not suggesting that the Taliban actually hold Shakardara but as is clear from the background reports, adjacent districts to the east and west are subject to a Taliban presence and infiltration. There is no direct

evidence of the situation in Shakardara in that context, but it is reasonable to conclude that the Taliban are still in his home district.

44. His evidence is that his parents have died. I was invited to accept that evidence. It was accepted that there was no article 15(c) risk in the north of Kabul province. Further, it was accepted that in the light of current country guidance, it could not be said that there was a risk of persecution in the city of Kabul.

45. Although it was not accepted that *AS (Afghanistan)* was correct, the appellant could not in any event relocate to Kabul city, consistently with *AS (Afghanistan)*. I was referred to [230] of that decision and the factors to be taken into account. The appellant left Afghanistan when he was 14 and is now aged 28. He has no support network there and his mental health is a factor to be taken into account, as set out in the psychiatric report. There was compelling evidence from his partner in terms of his ability to cope.

46. The prison record refers to the acts of self-harm. Even if his mental health conditions are related to the murder that he witnessed in prison, that is not necessarily relevant. It does not weaken the argument in terms of his circumstances on return with reference to his mental health.

47. As to what was said about the returns package, there was no evidence of that put before me, it was submitted. It is not referred to in *AS (Afghanistan)* either. The respondent's decision letter does not mention it. In any event such financial assistance would not provide a long-term solution.

48. *AS (Afghanistan)* looks at the 2016 UNHCR guidelines. However, the 2018 UNHCR guidelines are significant.

49. The decision in *Said* does not affect the assessment of article 3 in this case. Furthermore, the situation in Kabul is connected to the civil conflict. Mr Lay described Kabul as "an island of surviving national government in a sea of insecurity".

50. It was however accepted that if it was reasonable for the appellant to relocate to Kabul, there would be no article 3 risk. If it was not reasonable for him to relocate there, the issue of article 3 does not arise.

51. As to article 8, the decision in *KO (Nigeria)* was not concerned with relationships between partners. It was accepted that in any event even if the appellant was able to establish that his separation from his partner would be unduly harsh with reference to para 399(b) that would not mean necessarily that his appeal would succeed under article 8 and having regard to s. 117C of the 2002 Act. Similarly, even if the decision was only 'harsh' that could still come within article 8. There are preserved findings in terms of the length of their relationship. The issue of cohabitation is not particularly relevant given the cultural issues evident in this case. For them, that is their only relationship. The appellant's partner is committed to him.

52. It was also relevant that the appellant had had a decade of lawful leave, until 2018. He came to the UK as a child. He suffered harm in Afghanistan.

53. Furthermore, if he returned she could not even visit him. It would be less harsh if she could visit but she could not. All that "accumulates" into a situation of despair for her. Furthermore, there are the additional factors which have been referred to. There are very compelling circumstances, including the low risk of reoffending.

54. It was confirmed that there was no argument advanced in relation to the risk of suicide and article 3 in that respect.

Assessment and Conclusions

55. At [67] of the error of law decision a provisional view was expressed as to what findings of fact made by the FtT could be preserved. There we said as follows:

> "Our initial view, subject to the submissions of the parties, is that the findings that the appellant and his partner are in a genuine relationship, that it would be unduly harsh to expect his partner to return to Afghanistan with him, and the finding that the appellant has given a credible account of events in Afghanistan prior to his leaving, are the only findings that can be preserved."

56. The parties did not dissent from the suggestion as to preserved findings. Thus, the preserved findings are that:

- The appellant has given a credible account of events in Afghanistan prior to his leaving.
- The appellant and his partner are in a genuine relationship.
- It would be unduly harsh to expect the appellant's partner to return to Afghanistan with him.

57. The appellant's account of events in Afghanistan, and as accepted by the FtT, is to be found in the witness statement prepared for that hearing. There he states that he was seized by the Taliban to fight as a child soldier, there having been forced conscription of young men in the area where he lived. One of his cousins was killed whilst fighting for the Taliban. The appellant ignored the order of conscription because he was the only able-bodied member of the family, his father being disabled and his mother had cancer. His younger sister was very young at the time.

58. The Taliban came searching for people who ignored the order. They came to his house but he managed to escape. He spent some time hiding in the hills but was eventually captured. He was taken to a place where there were many other prisoners and was questioned. He continued to refuse to fight and was forced to cook and clean for them, stating that "it was like slavery". He was put in solitary confinement in the basement of the house for five months. He was unable to stand up properly because of the low ceiling. He slept on a plastic sheet on the floor. He was let out only to go to the toilet which was a hole in the ground nearby.

59. During that five month period of detention he was beaten on many occasions, sometimes with the use of a rubber belt. He was beaten about two or three times a week. He was tied to a chair and they would beat him on the soles of his feet, demanding that he fight for the Taliban.

60. Eventually local villagers fought with the Taliban because of the young men and boys being detained. During the fighting some of the Taliban and the villagers were killed and some of the prisoners too. He was rescued by the villagers and left the country with the assistance of an agent.

61. Mr Lay, understandably, relies on para 339K of the Rules. That states as follows:

> "The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

62. S. 72 of the 2002 Act, so far as material, provides that:

> "(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is-
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> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least two years.
>
> …
>
> (6) A presumption under subsection (2)…that a person constitutes a danger to the community is rebuttable by that person."

63. The presumptions, that the appellant has been convicted of a particularly serious crime and that he constitutes a danger to the community of the United Kingdom, are thus presumptions that are rebuttable by the appellant. It was not disputed on his behalf that he has been convicted of a particularly serious crime, and plainly that is a realistic position to take on his behalf. However, it is argued that he has rebutted the presumption that he constitutes a danger to the community of the United Kingdom.

64. The probation officer's report dated 6 February 2018 confirms that the appellant had, as at that date, been complying with his licence. It refers to his having been assessed by the Probation Service "as a low risk of serious harm and a low risk of re-offending".

65. The pre-sentence report refers to the circumstances of the appellant's involvement in the offences of conspiracy to supply Class A and B drugs. It is not necessary for me to repeat what is in the pre-sentence report, except to say that the appellant's role was as an introducer on behalf of others who held and supplied the drugs in question. This is also reflected in the sentencing remarks. The pre-sentence report states that "there is a 34% chance of reconviction within a two year period, indicating

a relatively low risk of reconviction. I would concur with this assessment." It goes on to state that he is a low risk of serious harm to the public.

66. It is to be noted that the appellant has two cautions, prior to those offences, for battery in 2008 and possession of cannabis in 2015 (as revealed in the pre-sentence report).

67. I do note from the pre-sentence report that part of the assessment of the appellant's low risk of reoffending is that his partner informed the author of the report that the appellant would be residing with her and her family once released. The report's author stated that that would be extremely positive for the appellant and reduced the probability of offending, referring to his nine-year relationship with her. However, as was apparent from the evidence before me, the appellant did not, and does not, live with his partner. It is not clear therefore, why the author of the pre-sentence report was told that he would be living with her and her family on his release. It is reasonable to conclude that the assessment of the risk of reoffending may have been affected had the author of the report been aware that the appellant would not in fact be living with his partner, although the fact of the relationship would no doubt have still been taken into account.

68. Nevertheless, I bear in mind that it is not suggested on behalf of the respondent that the appellant has committed any further offences. I was told by Mr Lay that the appellant was released in October 2017. Furthermore, I do consider that the professional view of the author of the pre-sentence report needs to be afforded weight in terms of the risk of reoffending, although that view is plainly not determinative.

69. Whilst the appellant is not living with his partner, their relationship continues. His use of illicit drugs which was occurring when he committed these offences, and for some years previously, according to what he told the author of the psychiatric report, Dr Fazel, has ceased. The appellant told him that he had stopped taking illicit drugs whilst in prison and had not relapsed since. The psychiatric report in fact refers to his release on 18 December 2017, about two months adrift from Mr Lay's understanding of his release date. The pre-sentence report also refers to his having had a problem with gambling at the time of the offending.

70. I bear in mind that according to the Trial Record Sheet the period of offending was between 16 March 2016 and 2 September 2016. The period of offending was therefore of some months' duration.

71. Nevertheless, taking into account all the circumstances, I am satisfied that the risk of the appellant reoffending is low, as assessed by the author of the pre-sentence report. Events since his release and the circumstances overall reveal that to have been a realistic assessment.

72. However, a low risk of reoffending does not necessarily mean that a person does not constitute a danger to the community of the United Kingdom. Offences of supplying drugs would plainly come within that category in terms of danger to the community.

Nevertheless, I do not consider that there is a likelihood that this appellant would revert to offences of supplying drugs; the risk of reoffending is low. Accordingly, I am satisfied that the appellant has rebutted the presumption that he constitutes a danger to the community of the United Kingdom. He is not therefore, excluded from Refugee Convention protection.

73. On behalf of the appellant it is submitted that against a background of deteriorating security in the country as a whole, and regular infiltration into Kabul province, there is a reasonable likelihood of ongoing risk to the appellant in the area where he is from, namely Shakardara. It is argued that that district, in Northern Kabul province, was historically a Taliban hotbed and is still a strategic area on the border with Parwan, while the province more generally still has an issue with Taliban infiltration. In the error of law decision reference is made at [53] to a New York Times article that was relied on by the appellant before the FtT, which described the appellant's home area as "historically a Taliban hotbed". The European Asylum Support Office ("EASO") report dated May 2018 is relied on by the appellant. As summarised in the skeleton argument the report states that:

- In Surobi district, in Kabul province, there is a "medium open Taliban presence".
- In Paghman district to the west of Shakardara, the security level is assessed as the same.
- In 2017, in Kabul city itself, suicide and complex attacks caused 1,612 civilian casualties; a 17% increase on 2016;
- Criminality in the form of gang-related violence, abductions, thefts and murder is on the rise in the city of Kabul.
- Kabul province has received the highest number of returnees in 2017; its capacity to absorb and reintegrate refugees returning, as well as IDP's from other provinces, is minimal.

74. I quote the particular passages from the EASO report from which those summaries are drawn (with footnote references taken out):

> "According to a BBC study of January 2018, based on research conducted between 23 August and 21 November 2017, the Taliban have a 'medium active and physical presence' in Surobi, defined as being attacked at least three times a month, and 'low' activity/presence (district attacked at least once in three months) in the districts of Paghman, Farza, Qarabagh, Musayi, Khak-e Jabbar and Surobi [page 25]…
>
> In a map depicting 'conflict severity' in 2017 - a combination of three indicators: security incidents, civilian casualties, and conflict-induced displacement - UNOCHA [United Nations Office for the Coordination of Humanitarian Affairs] places most of the districts of Kabul province in the lowest two categories. Only Paghman in the west and Surobi in the east of the province are in the middle category [page 26]…
>
> In the period from 1 January 2017 to 31 March 2018, 388 incidents related to insurgents in Kabul province were found in open media sources by the Global Incidents Map

> website. Surobi district is depicted by the BBC as a district with 'medium' open Taliban presence, defined as being attacked at least three times a month [page 27]…
>
> In 2017, Kabul province accounted for the highest number of civilian casualties in Afghanistan, which is due mainly to deliberate attacks in Kabul city; 16 % of all civilian casualties in Afghanistan occurred in Kabul. Suicide attacks and complex attacks, as well as other types of incidents which also include the use of IEDs, pushed up the rate of civilian casualties in Kabul. One high-profile attack in May 2017 alone accounted for a third of all civilian casualties. UNAMA [United Nations Assistance Mission in Afghanistan] stated that in 2017, in Kabul city, suicide and complex attacks caused 1 612 civilian casualties (440 deaths and 1 172 injured), a 17 % increase compared to 2016. In January 2018, at least 174 people were killed in attacks in Kabul city alone [page 27] …
>
> Criminality in the form of gang-related violence, abductions, thefts and murder is on the rise in the city of Kabul, with some observers calling the increase in the most recent months 'sharp'. At the end on 2017, the government announced a plan to tackle crime by seizing illegal weapons and cars, and in February 2018 declared that crime had fallen by 40 % in the previous month because of their measures. However, residents interviewed by Tolonews disputed these claims and stated that the government measures had little effect on the armed groups inside the city, and crime continued to rise [page 32] …
>
> In June 2017, UNHCR and the Norwegian refugee Council made the following assessment:
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> 'Kabul province has received the highest number of returnees in 2017, and historically since 2002. Its capacity to absorb and reintegrate refugees returning to Afghanistan, as well as IDPs from other provinces is minimal. IDPs and returnees are mostly settling in the outskirts of the capital (eg. PD 21, Bagrami, PD 8, PD 12, PD 16) where basic services are lacking'. In the period from 1 September 2017 to 26 March 2018, 4 296 individuals were displaced to Kabul district, primarily from Parwan, Nangarhar and Logar [page 33]"

75. It was specifically said on behalf of the appellant that it was not suggested that the Taliban hold Shakardara district, although the situation in adjacent districts was relied on. As far as I am aware, there is in fact no reference at all to Shakardara district in the EASO report, and I was not referred to any passage where it is mentioned. It was accepted that there was no actual direct evidence of the situation in Shakardara although it was submitted that it was reasonable to conclude that his home district was still a place where he would be at risk from the Taliban.

76. However, it seems to me that there are certain difficulties with the contention that the appellant would be at risk on return to his home area. In the first place, there is no direct evidence of Taliban activity in Shakadara district, even accepting the evidence of conflict in neighbouring or adjacent areas.

77. Secondly, as was pointed out on behalf of the respondent in submissions before me, the appellant was born in January 1990. He left Afghanistan when he was 13 or 14 years of age. He arrived in the UK in 2006. He was aged 28 years, almost 29, at the date of the hearing before me. The difficulties he had were when he was a child and thus more easily able to be recruited forcibly, and were events of about 14 years ago.

Those are highly relevant factors in terms of the extent to which there would now be any risk to him on account of his having refused to fight for the Taliban and having escaped from them, even taking into account the state of his mental health.

78. Whilst the appellant in his witness statement expresses a fear of being taken advantage of by the Taliban, and being at risk because he refused to fight, I cannot see in the background evidence put before me that it is reasonably likely that he would be identified on return or, more importantly, that the Taliban have a presence in the district to which he would be returned. Even if it could be said that the area where the appellant lives is subject to regular Taliban infiltration, which in my judgement it could not, the lapse of time since the appellant left Afghanistan and his age now indicate that it is not reasonably likely that he would be at risk from such infiltrators as a person of individual interest. In those circumstances, I am not satisfied that he has established a well-founded fear of persecution in his home area. Thus, the issue of internal relocation does not arise.

79. Accordingly, I am not satisfied that the appellant has established to the required standard that he has a well-founded fear of persecution on return to Afghanistan.

80. No arguments were put before me in relation to any *independent* article 3/article 15(c) risk in his home area.

81. The evidence given by the appellant to the effect that his parents have been killed, as reported to him by a friend or acquaintance, was not challenged on behalf of the respondent. Furthermore, his evidence in this respect was consistent as between his witness statement and oral evidence. Likewise, his partner's evidence supported that aspect of his evidence. I am satisfied that the appellant would not be able to call on any family support on return to his home area.

82. Nevertheless, he speaks Pashtun and is familiar with the customs and culture of Afghanistan, and plainly would be familiar with his own district, albeit that he left some years ago now. The evidence from his partner is that she would be able to send him an amount of money, in the region of about £50 per month. Regardless of any resettlement package provided by the respondent, the evidence indicates that he would be able to survive on return, at least to the extent that he would not be destitute, even accepting his mental health problems.

83. In any event, following *Said v Secretary of State for the Home Department* [2016] EWCA Civ 442, a risk of destitution or homelessness would not establish an article 3 risk.

84. As regards article 8, it is accepted on behalf of the appellant that he is not able to bring himself within para 399(b) of the Rules, for the reasons already explained.

85. It was not argued that he is able to succeed with reference to para 399A of the Rules. Para 399A(a) requires the appellant to have been lawfully resident in the UK for most of his life, which he has not. I also doubt that it could be said that there would be very significant obstacles to his integration into Afghanistan (para 399A(c)) in the light of the observations above at [82].

86. Thus, under the Rules, the appellant would have to establish that there are very compelling circumstances over and above those described in paras 399 and 399A. It is argued on his behalf that there are.

87. The very compelling circumstances contended for include that he would be returning to a country where he suffered significant trauma when he was a child. He has no family support to look to on return there. He would be returning to a country which, on any view, suffers from significant insecurity and instability, including in Kabul province from where he comes. Furthermore, there is medical evidence from Dr Fazel to the effect that he has "symptoms most consistent with a clinical depression (of moderate severity)" (para 6.1). It was concluded at para 6.2, that he does not suffer from PTSD because some of the symptoms of that disorder were not present.

88. There is evidence that the appellant has attempted suicide and self-harmed. Such is referred to in the psychiatric report at, for example, paras 3.6 – 3.7. There was an attempted suicide in 2014 after he heard about his parents' death but a friend stopped him from jumping from London Bridge. He also attempted suicide in prison by hanging, prompted by his witnessing the fatal stabbing of an inmate. The prisoner profile record states that on 16 May 2017 he made cuts to his left forearm with a razor blade, he having said that voices told him to do this. On 12 May 2017 he was found in his cell with superficial cuts to his neck. As far as I can see however, there is no reference in those records to an attempted suicide by hanging. Nevertheless, it was not disputed on behalf of the respondent that he does suffer from a mental disorder. There is undoubtedly evidence of deliberate self-harm.

89. There is of course the significant matter of the appellant's relationship with his partner. I do not consider that that relationship, its intensity or genuineness, is undermined by the fact that they do not live together. This was explained satisfactorily by the appellant's partner, albeit I remind myself of what she said to the author of the pre-sentence report about their living together once he was released. It is a preserved finding that they have a genuine and subsisting relationship. The evidence I heard from both the appellant and his partner reinforced that conclusion.

90. There is merit in what is said on behalf of the respondent to the effect that the appellant's partner has had little influence over him, in the sense that she was not able to prevent him committing offences and she has not been able to prevail upon him to seek medical attention in the form of appointments with a GP or accepting medication.

91. It is accepted that if the appellant returns to Afghanistan, she could not be expected to return with him. She is not from Afghanistan, and is not familiar with its culture and customs, quite apart from the conditions of insecurity that prevail there. There is also the fact that her lifestyle would be very different in the sense that she would have to comply with the cultural norms of Afghanistan. In any event, as I say, it was not suggested that she could return with him.

92. The outcome of his return to Afghanistan therefore, would be that their relationship would end in the sense that they could no longer be together. As the appellant's partner explained, their relationship would have to end because it could not be a relationship conducted by phone.

93. The public interest in removing the appellant is significant in the light of his convictions, with the seriousness of the offending reflected in the sentence imposed. There is the deterrent effect to be taken into account regardless of my conclusion that the risk of reoffending is low. The harm that offences of supplying drugs does is all too obvious, and that is reflected in the sentence that was imposed.

94. However, taking all the circumstances into account, I am satisfied that there are very compelling circumstances over and above paras 399 and 399A making it a disproportionate interference with the appellant's private and family life for him to return to Afghanistan. I would also conclude, although this is not a necessary conclusion in the circumstances, that it would be unduly harsh on the appellant's partner for her to be separated from him in circumstances where, even though she would be able to send him funds, she would be aware that he would be vulnerable in Afghanistan because of the security situation, because of his vulnerable mental state and because of his lack of family support.

95. I have therefore decided that the appellant meets the requirements of the article 8 deportation rules, in that there are very compelling circumstances over and above the requirements of paras 399 and 399A. The article 8 Rules in relation to deportation express the Secretary of State's view as to how the public interest should be assessed for those persons that come within those Rules. In terms of ss. 117A-C of the 2002 Act I would in any event conclude that the appellant's circumstances come within s. 117C(5) in that the effect of his deportation on his partner would be unduly harsh.

Decision

96. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision by allowing the appeal under article 8.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Upper Tribunal Judge Kopieczek 28/03/19

ANNEX

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09966/2017

THE IMMIGRATION ACTS

Heard at Field House
On 12 June 2018

Promulgated

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Before

THE HONOURABLE MRS JUSTICE YIP DBE
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr T Lay, Counsel

DECISION AND DIRECTIONS

1. The appellant in these proceedings is the Secretary of State but it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. On 12 September 2017 the respondent made a decision to refuse a protection and human rights claim within her decision to make a deportation order against the appellant. The deportation order followed his convictions for conspiracy to supply Class A and B drugs for which he received a total sentence of 27 months' imprisonment.

3. The appellant arrived in the UK from Afghanistan illegally in May 2006. He made a claim for asylum which was refused but in the light of the fact that he was aged 16 years at the time, he was granted discretionary leave until 31 January 2008 which was then further extended

4. The appellant's appeal against the refusal of his protection and human rights claim came before First-tier Tribunal Judge Andonian ("the FtJ") on 16 February 2018. He allowed the appeal on asylum grounds, and on human rights grounds with reference to Article 8 of the ECHR. It is not clear from his decision as to whether he also allowed the appeal on Article 3 grounds.

5. In order to put the respondent's challenge to the FtJ's decision and our assessment of it into context, it is necessary to refer in detail to the FtJ's decision.

The FtJ's decision

6. In his decision the FtJ summarised the basis of the appellant's claim, as itself summarised in the respondent's decision. The claim is that he fears mistreatment from the Afghan Government if returned because he is of Pashtun origin and is easily identified as such on return. As a child he was recruited by the Taliban and trained by them to fight. On a date unknown he fled from the Taliban and travelled to the UK aged 16. He also fears mistreatment from the Taliban on the basis that he would be seen as a traitor and that they would force him to re-join them and fight against the Government. He further claims to fear mistreatment from the Taliban because he had previously deserted, and they would kill him as a result.

7. The FtJ summarised the circumstances of the appellant's offending which led to the decision to make a deportation order, including referring in detail to the sentencing judge's remarks. Within the respondent's decision there is consideration of section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to the effect that because of the appellant's sentence of imprisonment for a period of at least two years, it is presumed that he has been convicted of a particularly serious crime and constitutes a danger to the community of the UK. The effect of the application of s. 72 is that if the presumptions in it apply, an appeal under the Refugee Convention must be dismissed. In relation to s. 72 the FtJ said this at [17]:

> "I was not prepared to uphold the certificate taking into account the volatile country where the appellant hails from and the area where he lived before he came to the UK. It was important that I heard full details of his asylum claim."

8. He referred to *AH (Algeria)* [2012] EWCA Civ 39 and at [61], having referred to the decision in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630, he stated that:

> "it seems to me that the appellant can rebut the presumption that he continues to pose a serious risk. Having regard to the evidence before me I do not believe that he continues to pose a serious risk".

9. At [62] he noted evidence indicating that the risk of reoffending was low, that evidence coming from a letter from his probation officer. Lastly, at [73] he said that he did not believe that the appellant remained a danger to the community in the United Kingdom.

10. He assessed the appellant's claimed fear of return and the respondent's detailed reasons for rejecting the credibility of his claim. He set out some background evidence in relation to Pashtuns in Afghanistan, and gave a detailed summary of the appellant's oral evidence, that of his partner AA, and of another witness called on his behalf.

11. He said at [63] that the appellant had maintained his account (of events) since his arrival in the UK to the effect that he was targeted, kidnapped and tortured by the Taliban. He said that the asylum claim had never been subject to a substantive asylum interview nor, given that the appellant was granted discretionary leave, had he been the subject of "fact-finding by first year judge" (sic).

12. He concluded at [65] that the "historic account" is reasonably likely to be true having regard to the objective evidence and he then referred to paragraph 339K of the Immigration Rules in terms of the relevance of past persecution. He found at [66] that the appellant's account given when he was a child was consistent with the activities of the Taliban in districts outside Kabul in the mid-2000's as indicated in the objective evidence.

13. In relation to a criticism of the appellant in terms of his not having given full details of his claim in the screening interview, with reference to authority he said that applying the lower standard of proof it was "quite possible" that what the appellant said did in fact occur "and indeed taking into account the situation in Afghanistan at present".

14. At [69] he referred to the appellant's home area being Shakar dara district, northern Kabul province which he described as "historically a Taliban hotbed" and "now" noted to be a strategic area on the border with Parwan and "the province still has an issue with Taliban infiltration". He referred in the next paragraph to the Home Office Country of Origin Information Report ("COI") (undated) at 2.3.9 to the effect that whilst some evidence suggested that the Taliban may have the ability to pursue

a person, decision-makers must consider whether they would have the motivation to track and pursue a person considered low profile. He then found that against a background of deteriorating security in the country as a whole, and regular infiltration into Kabul province, there was a reasonable likelihood of risk to the appellant.

15. Rather than summarise what the FtJ said at [72] it is best if we quote that paragraph in full. He said as follows:

> "Insofar as humanitarian protection is concerned on the basis of an article 3 EC HR risk in Kabul return, in any event, it is my view having regard to the evidence of the appellant, that he faces a real risk of destitution in Kabul a country of which he knows next to nothing about insofar as experience as an adult is concerned. He was there as a child. He is likely to find himself living in conditions of destitution with no access to family support employment or housing. There is no reason for me to disbelieve the fact that he has no family there that he knows of. However, I do not believe I need to deal with this aspect of the claim in detail because it is my view that the appellant succeeds in any event on the asylum aspect of the claim having regard to all the circumstances and on the lower standard of proof incumbent upon him to discharge."

We have set out what the FtJ said at [72] exactly as he wrote it.

16. The FtJ then went on to consider the contention that para 399(b) applied in terms of his relationship with his partner AA. Her evidence before him, as summarised at [55], was that she and the appellant were in a stable relationship and had been for the past nine years. She worked as a supply teacher and had done so since 2013, but was now in a permanent position. Her evidence was that they intended to get married as soon as possible but they could not at present because of his immigration situation.

17. The appellant's evidence in relation to his relationship with AA, to summarise, was to the effect that he maintained a relationship with AA and for a period of about five years pretended to her that he was working and had accommodation, whereas in fact he was homeless, sleeping at the home of friends or at bus shelters. It appeared from his evidence that throughout this time he had discussed marriage. The evidence was that the appellant had not been to AA's home and her parents did not know anything about him.

18. The FtJ at [75] found the evidence of the appellant and AA credible as to their relationship. Referring to what he described as the "exception" under para 399 (presumably a reference to para 399(b)) he said that the appellant had discharged the burden of proof upon him to show that he fell within that exception. He said that he could well understand why AA could not go and live in Afghanistan, referring to the fact that she has a family and a job in the UK and stating that it would be unsafe for her to go there as a woman, and knowing nothing about Afghanistan. He concluded that the appellant met para 399(b) on the basis that it would be unduly harsh for her to relocate to Afghanistan and it would be unduly harsh for her to remain in the UK without the appellant.

19. The FtJ then returned to consideration of para 399(b) at [78] and summarised the Rules. At [79] he said that it would be "plainly" unduly harsh for AA to attempt to live in Kabul given present country conditions, and that the respondent accepted that it would not be reasonable for her to do so.

20. He then went on to state at [80] that it would also be unduly harsh for her to remain in the UK without the appellant "when all the circumstances are taken into account including the length of and seriousness of the relationship and the permanent rupture to which deportation would lead".

21. The FtJ's decision then moved to a consideration of what appears to be an assessment of Article 8 outside the Rules. He concluded that the appellant's deportation would be a disproportionate interference with his and his partner's Article 8 rights (family life). He said as follows:

> "Even if the appellant were not to meet paragraph 399D of the rules, insofar as paragraph 398C is concerned, the deportation would in the circumstances of this case be a disproportionate interference with the appellant's and his partners article 8 EC HR rights as to family life. I do believe that the family life exists between the appellant and his partner. I have further understood the culture, I have understood how they have been keeping up the relationship. It is one of love and affection. They have been together for some nine years, as detailed in the appellant's evidence and that of his partner and in her latest witness statement and I have also seen a letter submitted to the Home Office in May 2017".

Again, we have quoted what the FtJ said at [81] as he wrote it. At [82], as written, we find this:

> "The existence or nonexistence of family life for the purpose of article article 8 is a question of fact depending upon the real existence in practice of close personal ties, the facts of a particular case crucial. See the case of *Lebbin v the Netherlands 2000 for 40 EEA chart 417 at 36*. I think it shows the love of both parties towards one another in keeping up the relationship in the way they have done to date".

22. He concluded at [84] that the appellant and his partner are "close life partners". He found that he needed to look not only to present ties but to future plans, referring to certain authorities. He stated at [88] that the requirement of very compelling circumstances is replicated in s. 117C of the 2002 Act. He then also referred to s. 117B of that Act stating that the relationship and the appellant's private life had been established whilst he had lawful leave.

23. Referring at [90] to *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617, he said that the evaluation of unduly harsh is a matter of "common sense definition, coloured by context".

24. The FtJ then concluded as follows at [91]:

> "In my view, what pushes the effect of this deportation into unduly harsh category is the extreme unlikelihood of the family life been (sic) relocated to Afghanistan in all the

> circumstances and the impact of permanent separation on the appellant's partner [A] with my view that compelling and emotional evidence was given before me and both parties showed love for one another, and I have also noted the impact of permanent separation on the appellant's British partner after nine years of the relationship".

25. He then referred in the next paragraph to the relevance in the proportionality assessment of the length of time that the appellant had been in the UK lawfully and his likely circumstances if deported to Afghanistan. He referred to *Secretary of State for the Home Department v Kamara* [2016] EWCA Civ 813 on the issue of integration in the context of deportation.

26. Finally, at [93] he concluded by stating that the appellant's lawful period of leave, his history and likely prospects in Kabul, the length of time he has spent in the UK as an adult, the fact of having a British partner, the low risk of reoffending and the lack of support in Kabul "consistent with the mandatory public interest considerations" constituted very compelling circumstances within para 398(c) of the Rules (although erroneously referring to that paragraph as para 398C).

The Grounds and Submissions

27. In relation to the asylum aspect of the FtJ's assessment the respondent's grounds refer to the COI report that the FtJ quoted in terms of the Taliban having the ability to pursue a person but consideration needing to have been given to the motivation to do so in respect of a person with a low profile. The appellant does not claim to have a particularly high profile. Furthermore, although the FtJ had said that the appellant was at risk, against a background of deteriorating security in the country as a whole and "regular infiltration" into Kabul province, the FtJ did not elaborate on what that infiltration was, or by whom, and he did not appear to rely on country information or reports to arrive at that conclusion. Further, the FtJ did not consider internal relocation.

28. The grounds refer (without citation) to *AK (Article 15(c)) Afghanistan* CG [2012] UKUT 163 (IAC) to the effect that there are areas less affected by indiscriminate violence (presumably in support of the contention that the appellant could return to one of those areas and not be at risk in Kabul).

29. In terms of the s. 72 certificate, it is argued that the FtJ was not entitled to take into account where the appellant comes from, and where he lived before coming to the UK in relation to whether the certificate should be upheld. The FtJ had conflated consideration of the certificate with issues in relation to the asylum claim itself. Whether or not the appellant remained a danger to the community was irrespective of his country of origin. It is asserted that that error infected the rest of the FtJ's analysis regarding s. 72 and his treatment of the asylum claim as a whole.

30. Further, the FtJ went on to rely on a passage from *AH (Algeria)*, but that related to exclusion under Article 1F.

31. It is next asserted that the FtJ incorrectly attributed significant weight to the appellant's rehabilitation, relying on this as a factor in allowing the appeal. However, in quoting (again without citation) from a passage in *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596, we interpret the grounds as indicating that the FtJ's conclusions were inconsistent with that decision in that rehabilitation of the kind exhibited by the appellant was not uncommon and could not greatly contribute to the existence of very compelling circumstances which outweigh the public interest in deportation. The quotation also mentions the need to deter others.

32. In relation to the FtJ's conclusions in terms of the undue harshness of the appellant's deportation with reference to Article 8, it is argued that the FtJ had failed to identify anything exceptional about the appellant and his partner's situation which would outweigh the compelling public interest in removal. It is asserted that the FtJ misunderstood the correct test. In terms of the conclusion that it would be unduly harsh for the appellant's partner to remain in the UK without him, the FtJ had simply relied on their relationship being based on "love and affection". That was inconsistent with authority.

33. The general assertion in this respect is that the FtJ's decision failed to give appropriate consideration to the public interest in deportation. Likewise, he had failed properly to consider and give sufficient weight to the appellant's serious criminality and immigration history.

34. In submissions, Mr Avery relied on the grounds. He submitted that the FtJ's decision was "slightly baffling" in terms of the way he approached the issue of internal relocation, and his decision in terms of destitution was completely unreasoned. Whether in relation to Kabul province or Kabul city, the FtJ's findings were flawed. He had failed to take into account what was said in *AK (Afghanistan)*.

35. In terms of his conclusion that the appellant's home area of Shakardara district in northern Kabul province was historically a Taliban hotbed, it was submitted that there was no evidence in relation to that conclusion. The appellant's skeleton argument before the FtJ indicated some evidence of Taliban activity in that area but the FtJ's reasoning was hard to follow.

36. In terms of the s. 72 certificate, the FtJ had not properly engaged with it and had muddled that with the asylum aspect of the appeal.

37. The conclusions in relation to undue harshness were rather hard to follow, it was submitted, and the FtJ had completely failed to engage with the deportation issue in terms of the impact on his partner in the UK. Their relationship was such that they do not live together and there was no real assessment of why it would be unduly harsh for them to be separated over and above what would normally be expected in a relationship. That indicated that the FtJ had not really "got a grip" of that aspect of the appeal.

38. In relation to risk in his home area, it was accepted that that was the weakest of the grounds on behalf of the respondent but the FtJ had not explained why there was a risk to the appellant. It was submitted that "fundamentally" the decision was "all wrong" and needed to be re-made. No aspect of the decision could be "rescued".

39. Mr Lay relied on his skeleton argument. He submitted that at [59] the FtJ had indicated an appreciation of the structure required for his decision and on the issue of whether internal relocation to Kabul was reasonable. It was submitted that he was entitled to find that it was reasonably likely that the appellant would become destitute and would be at risk in his home area. He had applied para 339K (past persecution) and there was background evidence before him.

40. The decision in *AK (Afghanistan)* was not relevant in circumstances where it was not argued that there was an Article 15c risk outside Kabul. The reasonableness of relocation was always going to be the issue.

41. It was submitted that there was background evidence in terms of a New York Times article on the issue of "infiltrators" and there was also a European Asylum Support Office ("EASO") report, both of which were put before the FtJ. That material was provided on the day of the hearing and the respondent was aware of it.

42. In relation to Kabul province and Kabul city there were different arguments. In [72] the FtJ was considering the issue of destitution and internal relocation. His conclusion was that he would be at risk in his home area and could not go to Kabul. One needed to look at the whole context of the decision.

43. In terms of the conclusions on the s. 72 certificate, as set out at [22] of the skeleton argument before us the appellant had completed prison courses and obtained qualifications. The risk of reoffending was said to be low and there was a letter from his current probation officer which confirmed the low risk of serious harm and low risk of reoffending. The "muddle" earlier in his decision at [17] was therefore of no consequence. At [61] and [62] the FtJ had referred to the low risk of reoffending.

44. In relation to the issue of undue harshness under Article 8, the FtJ had given clear reasons as to why the appellant's partner could not go to Kabul. The issue was in relation to her remaining in the UK without him. At [88] the FtJ had referred to s. 117C of the 2002 Act and the decision in *MM (Uganda)*. At [91] he had summarised the nature of their relationship and he was entitled to take into account the impact of separation on her. He was also entitled to reach the view that it was unduly harsh because of the compelling oral evidence that he heard. That was sufficient reasoning.

45. In any event, he went on to conclude that with reference to para 398(c) there were compelling circumstances making his removal disproportionate. He had cited the decision in *Kamara*. All the circumstances were capable of being very compelling, as explained by the FtJ at [93].

46. In reply, Mr Avery repeated earlier submissions and added that there was no reference by the FtJ to the appellant's offending or the nature of that offending. He

had failed to deal with the public interest. There was no reference anywhere to any country guidance on Afghanistan. It was not clear on what basis he found that there was a risk in his home area.

Conclusions

47. We have no hesitation in concluding that the respondent's arguments in terms of the errors in the FtJ's decision have merit, and conversely we are wholly unpersuaded by the appellant's counter-arguments, notwithstanding the eloquence and vigour of Mr Lay's submissions.

48. As a general observation, we must say that it appears to us that various aspects of the FtJ's decision are unclear, lack reasons, or are unfocused, all of which affect the overall coherence of his decision.

49. In relation to the s. 72 certificate, it is true that the evidence before the FtJ was to the effect that there was a low risk of reoffending and a low risk of serious harm, as the FtJ said at [61] and [62]. However, early on in his consideration of the issues, he squarely equated the appellant's country of origin, which no doubt accurately he described as "volatile", with a decision not to uphold the certificate. Whether the appellant has been convicted of a serious crime or represents a danger to the community of the UK has nothing whatever to do with where he comes from and the security situation there. The FtJ's statement that it was important that he heard full details of the appellant's asylum claim suggests that he had already decided that the certificate was not to be upheld, regardless of the evidence on the issue.

50. Whilst there is something to be said for the proposition that in the light of the evidence any error of law in that aspect of the FtJ's decision was not material, because of the evidence of a low risk of reoffending, we are not persuaded that such is the case. The appellant has been convicted of serious offences and the issue of danger to the community needed to be assessed within a correct appreciation of the relevant legal framework. This was not done by the FtJ and for that reason his conclusion that the appellant does not constitute a danger to the community of the United Kingdom cannot stand.

51. In relation to the assessment of risk on return, the FtJ's decision fails to identify the background evidence that he relied on in support of his conclusions at [69] and [70]. It is true that there was before the FtJ a New York Times article, albeit that the FtJ did not identify it as being the foundation for his conclusion that there was "regular infiltration" into Kabul province. The article is headed "Afghans Build Security, and Hope to Avoid Infiltrators". However, it is an article that relates to infiltration into the security forces by the Taliban. Furthermore, it is dated 27 June 2011. To suggest that this is a sufficient basis from which the FtJ could conclude that there was regular infiltration into Kabul province is misconceived.

52. As suggested in the appellant's skeleton argument it is true that there was an EASO report on Afghanistan before the FtJ. It is dated November 2016. However, if the FtJ was relying on that report for his conclusions at [69] in relation to the appellant's

home area or [71] in relation to the deteriorating security situation in the country as a whole, he ought to have made that clear in his decision.

53. Further, in relation to what the FtJ said at [69] in terms of the appellant's home area being "historically a Taliban hotbed", the New York Times article in fact states that the appellant's home area of Shakardara, described as a small farming district north of Kabul, "at one time had been a hotbed of Taliban activity". That is not the same as the FtJ stating that it was "historically" a Taliban hotbed, which suggests that it remains such.

54. The EASO report contains information in relation to Kabul city and the security situation there as well as in relation to Kabul province. If the FtJ was basing his decision as to infiltration into Kabul province on that report, it was incumbent upon him to identify the report and explain which aspects of it supported that contention. There is a reference in the report to Taliban infiltration into Kabul province but that alone is not a sufficient basis from which to conclude that any error of law in the FtJ's decision in this respect is immaterial. The detail and import of those aspects of the EASO report needed to have been explained by the FtJ in terms of what support it provided for his conclusions.

55. Further, we are not satisfied that the FtJ's reasoning in relation to Article 3 and humanitarian protection is sustainable. We have quoted [72] of his decision at [15] above. The first sentence of that paragraph is on its face rather muddled. The conclusion that the appellant would be living in conditions of destitution makes no reference to any background material or any country guidance.

56. Furthermore, although it is true that the appellant came here when he was 16 years of age, that does not mean that he is unfamiliar with Afghanistan as a whole, or Kabul province in particular. That is aside from whatever may be said about his ability to sustain himself in Kabul city. His evidence recorded by the FtJ at [42] is that he has experience of working in the catering and construction industries and was at that time doing construction courses to increase his employability. At [49] it records his evidence as being that he speaks Pashtun, albeit that he cannot read or write it. He obviously also speaks English.

57. Furthermore, regardless of what may be said about risk to the appellant in Kabul province, the FtJ has not explained why he concluded that the appellant would be at risk in the city of Kabul. His conclusions appear to fail to have regard to the COI which he quoted at [70] in terms of consideration needing to be given to whether the Taliban have the motivation to track and pursue a person considered low profile, which this appellant undoubtedly is, on his account.

58. Further, at [72] the FtJ said that he did not believe that he needed to deal with Article 3/humanitarian protection "in detail" because of his view that the appellant succeeded on the asylum aspect of the claim. However, we have already explained our view that the FtJ's assessment of the asylum ground of appeal is flawed. He did

therefore need to deal with issues in relation to humanitarian protection and Article 3 in detail, and again he did not do so.

59. Our view that the FtJ misapplied the law in relation to his consideration of the s. 72 certificate is reinforced by the statement at [73] of his decision to the effect that he did not believe that the appellant remained a danger to the community in the United Kingdom. That followed his conclusions in relation to Article 3 and humanitarian protection at [72] and the repeated conclusion that the appellant succeeded in his asylum claim. The finding at [73] that he does not remain a danger to the community, immediately after a consideration of those issues, further supports our view that the FtJ at [17] conflated considerations in relation to the s. 72 certificate with the asylum aspect of the appeal.

60. The FtJ was entitled to conclude that the appellant and his partner were in a committed relationship. On the facts of this case he had to consider whether it would be unduly harsh for the appellant's partner to return to Afghanistan with him or for her to remain in the UK without him. He said at [79] that the respondent accepted "at the very least" that it would not be reasonable for the appellant's partner to go to Afghanistan with him. This is a matter dealt with at [166] of the respondent's decision. There it is stated that "It is accepted that it may be unduly harsh" for her to live in Afghanistan if she chose to do so, although the same paragraph goes on to state that no evidence had been provided to suggest that she would face significant difficulties or severe hardship there, because he would be in a position to help her to adjust to life in Afghanistan. However, we bear in mind that the respondent's grounds of challenge to the respondent's decision do not suggest that there is any error in the FtJ's conclusion that it would be unduly harsh for her to return with him to Afghanistan.

61. Nevertheless, we do consider that the FtJ's conclusion that it would be unduly harsh for her to remain in the UK without the appellant, in other words for them to be separated, is bereft of sustainable reasons. In reality, the FtJ's reasons amount to nothing more than a conclusion that they are in a committed relationship and they ought not to be separated because of the impact that it would have on them as a couple.

62. However, it is clear from authority, if authority were needed, that separation of families is the natural consequence of deportation. The issue of undue harshness has to be seen in context. That context includes the demands of the public interest in the deportation of foreign criminals who have committed serious offences, as this appellant has. There is virtually nothing in the FtJ's reasoning which reveals any recognition of the public interest considerations in play. Further, we cannot see in the reasons given by the FtJ how the appellant's separation from his partner amounts to undue harshness, or factors which indicate that their separation is likely to have any more impact on them than would ordinarily be the case in deportation.

63. We reject the contention on behalf of the appellant that the test of undue harshness can be met by an appellant who persuades a judge that he/she and their partner

have such a bond between each other that it would be unduly harsh to separate them. Such a proposition amounts to little more than an assertion that an appeal to emotion can carry the day in terms of the test of undue harshness. That in our view is simply an unsupportable proposition.

64. Similarly, we do not find in the FtJ's reasons a rational basis for the conclusion that there are very compelling circumstances going beyond the demands of para 399(b). The FtJ's conclusion as to the likely prospects for the appellant on return appears to be a reference to his earlier findings in terms of either risk or his ability to sustain himself on return, or both. We have already indicated that those findings are legally flawed.

65. Furthermore, although the FtJ at [93] referred to the "mandatory public interest considerations", that reference to the public interest fails to engage meaningfully with the extent of the public interest in this case. For example, there is no reference by the FtJ to the deterrent element of the public interest.

66. The errors of law in the FtJ's decision are such as to require his decision to be set aside. We have considered whether it is appropriate for the appeal to be remitted to the First-tier Tribunal for a fresh hearing. We have concluded that in the light of the findings of fact which are not infected by the error of law and which can therefore be preserved, the appropriate course is for the re-making of the decision to take place in the Upper Tribunal.

67. At the resumed hearing the parties will have the opportunity to make submissions as to what findings of fact can be preserved. Our initial view, subject to the submissions of the parties, is that the findings that the appellant and his partner are in a genuine relationship, that it would be unduly harsh to expect his partner to return to Afghanistan with him, and the finding that the appellant has given a credible account of events in Afghanistan prior to his leaving, are the only findings that can be preserved.

68. The following directions apply in respect of the resumed hearing.

DIRECTIONS

1. Any further evidence relied on by either party is to be filed and served no later than seven days before the next hearing.

2. In respect of any person whom it is proposed to call to give oral evidence, there must be a witness statement drawn in sufficient detail to stand as evidence-in-chief such that there is no need for any further examination-in-chief. Any such witness statement must be filed and served no later than seven days before the next hearing.

3. All further evidence relied on by either party must be contained within a supplementary paginated and indexed bundle and must be filed and served no later than seven days before the next hearing.

4. There must be a skeleton argument on behalf of the appellant filed and served no later than seven days before the next hearing.

5. At the next hearing the parties must be prepared to make submissions as to what findings of fact made by the FtJ can be preserved.

Upper Tribunal Judge Kopieczek

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Because this is a protection claim, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.