



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

Appeal Number: PA/03457/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 21<sup>st</sup> January 2020**

**Decision & Reasons Promulgated  
On 28<sup>th</sup> January 2020**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

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

Appellant

**and**

**MF**

**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr S Khan, of counsel, instructed by M & N Solicitors Ltd

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of Afghanistan born in February 1990. He arrived in the UK in 2003 as a dependent child with his family. They claimed asylum at the port of entry. He was granted discretionary leave to remain and then, in June 2010, indefinite leave to remain.

2. On 13<sup>th</sup> December 2016 the claimant was convicted of supplying controlled drugs class A. He was sentenced to 2 years and six months imprisonment. From the sentencing remarks it is clear that the claimant pleaded guilty to the charges and the sentencing judge noted that he had expressed utter remorse. He was however found to have been involved with street dealing and to have had a significant role in the drugs dealing, and was sentenced accordingly.
3. On 14<sup>th</sup> February 2017 the Secretary of State notified the claimant that he would be deported unless he could show that he fell within the exceptions at s.33 of the UK Borders Act 2007. The Secretary of State refused his human rights claim on 2<sup>nd</sup> March 2018. His appeal against the decision was allowed by First-tier Tribunal Judge SJ Clarke in a determination promulgated on the 28<sup>th</sup> June 2019
4. Permission to appeal was granted and the Panel found that the First-tier Tribunal had erred in law and set aside the decision allowing the appeal.
5. The matter now comes before me to remake the appeal. I preserve from the First-tier Tribunal the following findings:
  - That the claimant had lived in the UK lawfully for most of his life.
  - That the supply of class A drugs is a very serious offence and the more serious the offence the greater the public interest in deportation.
  - That the claimant and his partner are currently in a genuine and subsisting relationship.
  - That the claimant has a genuine parental role with respect to his children.
6. Mr Avery conceded:
  - That it would be unduly harsh for the claimant's partner and children to accompany him to Afghanistan if he were deported.
7. The factual issues which needed to be remade were agreed to be as follows:
  - Whether it would be unduly harsh for the claimant's partner and children to remain in the UK without him whilst he is deported to Afghanistan.
  - Whether the claimant could relocate to Baghlan, his home area of Afghanistan, or Kabul without very significant obstacles to integration.
  - Whether the claimant has social and cultural integrative links in the UK.

*Evidence & Submissions – Remaking*

8. The key evidence of the claimant, as contained in his written statement and oral evidence, is as follows.
9. He was born in 1990 and came to the UK in March 2003 with his parents and seven siblings, when he was 13 years old. He did not obtain any qualifications from his UK schooling as he struggled as he did not speak English on arrival, but did manage to obtain some level 1 certificates in English, maths and IT from college. After leaving college in 2005 until he started his prison sentence in January 2017 he did work in kitchens and in Tesco. The claimant said that during the period 2014 to 2016 he was "lost" as he was addicted to class A drugs and drinking alcohol, during this time he lived with a friend in a shared flat. In 2016 he was sentenced to 30 months imprisonment for supply of class A drugs namely crack cocaine and heroin, with the sentence starting in January 2017. In prison he did English and maths courses and learned skills to make himself more employable, and also a parenting course. After coming out of prison in May 2018 it took a number of months for him to get his work permission sorted out, but once he had this he started work immediately getting a job in McDonalds', then a job with an agency doing food packing and then most recently with Wagamama as a kitchen porter. He has temporarily given up work as his wife needed help with his son M due to his behavioural issues in the context of the birth of his son Z in December 2019.
10. He says that after leaving school he became a fluent English speaker and has adopted the life-style and culture of the UK. He says he is without a network of support in Afghanistan as all of his family are in this country, and could be easily spotted as a foreigner in that country due to his mannerisms. His grandparents have all passed away. He has two paternal uncles: one in the UK and one in France and his paternal aunts have all died. His extended maternal family all lived in other villages in Afghanistan, and he has never had any contact with them, and his mother does not know where they are either. There was no electricity in his home village, and so no phone or social media contact. He had no education in Afghanistan: there was no village school and no education via the mosque. The religious and cultural understanding he has come from his mother. He is not literate in Pashto, but can speak it to a moderate level. The only work he did in Afghanistan was helping with the family goats and sheep, and on their subsistence small holding.
11. The claimant met his partner in 2005 at school, they re-met in 2012 and they became partners in 2014. Their first child, M, was born in December 2014, and so is five years old, and their second child, Z, was born in December 2019. His partner has a degree which she finished in 2014/2015 and wants to do a teaching course but has not been able to complete this. His children are both British citizens. He has played a role in bringing up his oldest child as his partner was unwell with a miscarriage in 2016, spending time in hospital, and at that time and generally he provided some help to care for his son prior to his being sentenced to his term of imprisonment.

12. The claimant's partner is currently on maternity leave following the birth of Z, and normally works in a school doing lunch time supervision/teaching assistant work.
13. Since he came out of prison in May 2018 he has played a more significant role with children M and Z. M started reception class at school in September 2019. The claimant does not officially live with his partner as firstly he was not allowed to because of the terms of his probation which were that he live with his parents, and secondly because the flat is a small one bedroom flat which is now overcrowded. However he goes there every day: typically in the week he will go there at about 1pm and then stay until about 9pm, enabling him to collect his son from school where he is in reception at Brentford school; help with preparing food and at supper time; read to him and put him to bed, and at the weekends he might stay over and help throughout the day and take M to clubs such as swimming and martial arts. Sometimes his wife will call him, and he will go over earlier on a week day to get M ready for school, but it takes an hour and a half to travel to his wife's flat from his parents home.
14. The claimant says that he currently plays a very important role with his son, M, as he has behavioural problems and hyperactivity, and is a very picky eater. He did feel that he had some problems as a toddler but since he came out of prison these are now much more obvious, and since they had their second child, Z, they are much more pronounced and problematic. Initially he thought that these problems were within normal bounds but now he does not believe they are. If M feels his needs are not being instantly met he cries, screams, throws things and sometimes hits his own head. They cannot take him shopping or to a restaurant due to his behaviour and they have instead tried to leave him to the children's club at IKEA and then go out themselves to eat (although on the last occasion this did not work). They have a family support worker, sent by Social Services, who visited a few times whilst he was in prison and is now going to do a formal assessment on M next week. The claimant feels that his partner cannot handle M as M just shouts and screams at her and threatens to hit Z. It takes him giving his whole attention to M to engage him and calm him; and in addition he uses star charts to encourage good behaviour with rewards. He and M now have a strong bond, and M expresses a preference that the claimant help him and take him to things rather than his mother. M's school are also expressing concerns about his behaviour there.
15. The claimant argues that other family members could not take on his role with M, helping his partner to cope with the two children, as they have too much else they have to do. His parents still have a 6 year old child of their own; and his in-laws have a daughter with autism who they have to care for. They are all too busy to provide the support his wife needs with M, and struggle with coping with M's behaviour themselves. They do have regular contact with his mother-in-law who sometimes cooks them food which he collects, speaks to them on the phone or comes to visit. He is not really close to his father-in-law. He also helps out and supports his wider

family of father, mother and seven siblings, all of whom are younger than him ranging from 25 years to 6 years. His parents and siblings who remain at home are reliant on universal credit.

16. If he were to return to Afghanistan the claimant would not be able to meet his children in a third country as neither he nor his partner would have funds to travel. He believes it would also be dangerous for him to return to Afghanistan due to the war particularly in his home area of Baghlan, and says that he would not be able to live there as he has never lived there as an adult and does not have the skills to do so. He also does not believe he could work cooking Afghan cuisine as he is used to cooking English food and does not know Afghan dishes.
17. The key evidence of Ms RR, partner of the appellant, is that she is a British citizen born in 1991 in Isleworth. Her family are of Egyptian origin and her parents have lived in the UK since 1974. She met the claimant at school in 2005, and they became friends again in 2012 and partners in 2014. The appellant did a bit of looking after their child, M, up to his being 2 years old and before the claimant went to prison but mostly she was helped by her mother when her sister was at school. She confirms that she and the claimant are now a strong family unit, the family language is English, and that the claimant cared for M when she was in hospital having a miscarriage in July 2016 where she had to have two blood transfusions, and the claimant has spent a lot of time with her, M and Z in the living arrangements as described above in his evidence since coming out of prison in May 2018.
18. Their son M has severe behavioural issues which have been present over the past year and a half but have become much worse since the birth of Z. Z had a traumatic birth as he stopped breathing during the delivery and had to spend time in intensive care M is hyperactive and cannot follow instructions. He has thrown things at Z, and is behaving in a way which is beyond normal sibling jealousy. It is very difficult to do anything such as shopping with M, or get him ready for school or bed without the assistance of the claimant. If the claimant were not in the country she would struggle with these basics and could not take M to his extracurricular activities at the weekend. She confirmed that the family support worker is coming to do an observation assessment of M next week having met her for an appointment at which she discussed her concerns. There is, as yet, no diagnosis or plan. She could not attend her first parents evening for M as she was in hospital with Z but is aware that the teachers are also concerned about his behaviour.
19. The claimant's partner's view is that their children M and Z would be terribly impacted if the claimant were deported and they remained here because their children would lose their father. She could not meet the claimant in Pakistan as she does not speak Urdu or Punjabi either, and she has no funds for such trips. She could not turn to her parents for help with Z and M as she has a 19 year old sister with autism, ADHD and special needs and they have their own responsibilities. She cannot take Z there as

her sister wants to pick him up and can be a danger to him. She does sometimes provide some care to her sister to help her mother when the claimant can care for their kids, and her mother does cook for them sometimes and they go and collect the food but generally her mother has not been able to help her with her children, M and Z, as much as she would have liked. There have been periods where she has only spoken to her mother on the phone, for instance over the summer holidays, due to the difficulties with her sister's behaviour and there was a period when her mother told her sister that she lived abroad, and her sister is still not aware of her address. She likes her mother-in-law and the claimant's older sister but she cannot communicate with them without the claimant translating as they do not speak English and she cannot speak Pashto. In addition, none of them can really cope with M's behavioural problems

20. Mr Avery relies upon the reasons for refusal letter. The key submissions relevant to the issues that I must decide that arise from this document and which Mr Avery set out in oral submissions are as follows.
21. It would not be unduly harsh for the claimant's wife and children, M and Z, to remain in the UK as they could be assisted by his extended family in the UK and there is no medical evidence that the impact on M and Z would be more than the normal effects of deportation. The behaviour of M is simply normal jealousy following the birth of a sibling, and in any case the claimant is not living with his family full time. There was a degree of exaggeration of their family life as the claimant gave evidence regarding them going out as a family which his wife denied had happened.
22. It is not accepted that the claimant is socially and culturally integrated in the UK due to his criminal convictions for drugs offences, and the lack of evidence of employment and any positive contribution to the community made by him. Further it is not accepted that the claimant would have very significant obstacles to integration in Afghanistan because he speaks Pashto; he is aware of Afghan culture from his mother; he spent the first 13 years of his life in that country and has memories of living in the village in Baghlan; he has transferrable skills as a chef/ kitchen assistant that he could use in Kabul or alternatively he could work for another family on a small holding in the village. There is no strong evidence that he would be at risk as someone who is westernised or evidence that this is the case.
23. It is not accepted that there are any very compelling circumstances over and above the exceptions to deportation as he has criminal convictions for supplying class A drugs and for shop-lifting in another identity. Whilst he has extended family in the UK there is no evidence that the relationships he has with this family show dependency beyond more than normal emotional ties.
24. Mr Avery submitted that the appeal should therefore be dismissed.
25. Mr Khan argued that the witnesses were both credible as they were essentially consistent and plausible in their evidence.

26. Mr Khan argued that the claimant was socially integrated in the UK. He had given his evidence in fluent English which is his language of choice; his entire education had taken place in the UK; his entire family and private life was in the UK; and his work bar a small amount of family assistance as a child of 13 years on their small holding in Afghanistan had been in the UK. Since his release from prison in mid-2018 he had focused all his attention on his family, and particularly his children, and on legitimate work.
27. Mr Khan argued that there would be very significant obstacles to the claimant integrating in Afghanistan. He referred me to the EASO Country Guidance Afghanistan report dated June 2019 and particularly to the section regarding Baghlan regarding the security situation, which stated that there was indiscriminate violence in that area. He said that the claimant could not go to Kabul because he had no knowledge of that place, never having been there, and no network or family support there either. Whilst the claimant speaks Pashto he is not literate in that language, and could not receive remittances from his parents in the UK who are reliant on universal credit or his wife who has a low income and two children to support. As a result, he would not have anything like a full and active private life if returned to Afghanistan.
28. Mr Khan argued that it would be unduly harsh to return the claimant to Afghanistan whilst his family remain in the UK because the issues with his child, M, are beyond the normal ones. It is not only the claimant and his wife who are worried, Social Services and the school are also concerned so clearly this is beyond normal jealousy and misbehaviour. The issues go back to prior to the claimant going to prison. The evidence of the claimant's current extensive caring role with M is consistent. Without the claimant his partner would struggle profoundly to care for the two children, and this would impact on all three of them. There is not an alternative source of support for his partner as her mother has to deal with an autistic daughter with learning difficulties and ADHD, and has had to pretend the claimant's partner/wife lives abroad as this daughter cannot be around the children safely. The claimant's partner cannot turn to her in-laws if he were deported as she cannot communicate with her mother-in-law as they do not have a common language and also because her mother-in-law has her own six year old child. Further whilst the grandparents love M and Z they cannot deal with M's behavioural problems in the way the claimant can.
29. The appeal should therefore be allowed.
30. At the end of the hearing I reserved my decision.

### *Conclusions - Remaking*

31. The claimant might succeed in this Article 8 ECHR deportation appeal in one of three ways.

32. Firstly, the claimant might succeed in this appeal by showing that it would be a breach of right to respect to private life to deport him because he can meet the requirements of the exception to deportation at s.117C(4) of the 2002 Act, by showing that he is socially and culturally integrated in the UK and would have very significant obstacles to integration if returned to Afghanistan, and thus be able to meet the first exception to deportation as it is accepted that he has been lawfully present in the UK for most of his life.
33. In CI (Nigeria) v SSHD [2019] EWCA Civ 2027 the Court of Appeal held: "In assessing whether a "foreign criminal" is "socially and culturally integrated in the UK", it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under Article 8. The test should therefore be interpreted and applied having regard to the interests protected by the concept of "private life." It is further said that: "Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the Article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court." And with respect to the impact of criminality on social and cultural integration it is said: "Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK."
34. In Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 the Court of Appeal considered the following with respect to whether a claimant would have very significant obstacles to integration: "The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on



and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”

35. Secondly, the claimant might succeed in this appeal by showing that it would be a disproportionate interference with his right to respect to family life as it would be unduly harsh for his partner and children to remain in the UK without him whilst he returns to Afghanistan, and thus that he can meet the second exception to deportation at s.117C(5) of the Nationality, Immigration and Asylum Act 2002. It is accepted on behalf of the respondent by Mr Avery that it would be unduly harsh for his partner and children to accompany him to Afghanistan and I have preserved the finding that he has a genuine and subsisting relationship with his partner and a genuine and subsisting parental relationship with his children. Despite the submission of Mr Avery that their relationship is “unusual” I do not find that there is evidence before me that upsets these preserved findings. There was no substantial difference in the evidence of the claimant and his partner with respect to the time they spend together as a family, which I find to be very substantial, or indeed what they do together. The fact that the claimant’s wife did not mention an abortive attempt to have dinner out at Nandos I find to be of no significance at all.
36. Applying KO (Nigeria) & Others v Secretary of State for the Home Department [2018] UKSC 53 what is needed to be shown is that, solely focusing on the impact on the partner and children, that the claimant’s deportation would be unduly harsh and go beyond the normal sad effects of deportation on them such as splitting the family and causing upset by virtue of this fact. The interpretation of unduly harsh set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 is that: “‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable”.
37. Thirdly the claimant might, if neither exception applies, succeed in this appeal because he can show that there are very compelling circumstances over and above these exceptions that make his deportation a disproportionate interference with his right to respect to family and private life, applying s.117C(6) of the 2002 Act as per RA (s.117C: "unduly harsh": offence: seriousness) Iraq [2019] UKUT 00123 (IAC), in this process the seriousness of the claimant’s offence will be of relevance and the outcome will be assessed most profitably with a balance sheet approach.
38. I am satisfied that the claimant and his partner are credible witnesses. Their evidence was detailed and showed a high level of consistency over the most relevant issues such as the normal schedule of time that the claimant spends with his family given that he mostly sleeps at his parents house, and the type of assistance he provides in the care of their oldest child M, and the history of issues with the behaviour of M and current

interventions by the family support worker and concerns of the school. Both witnesses had detailed knowledge of the extended family of their partner. I find that they continue to be in a genuine and subsisting relationship, and that the claimant continues to have a genuine and subsisting parental role with both of his children.

39. I will firstly consider whether the requirements of the exception to deportation relating to private life with reference to the claimant's evidence are met. The claimant is accepted as having lived lawfully in the UK for the majority of his life. I find that he is socially and culturally integrated in the UK for the following reasons. He has lived in the UK since he was a 13 year old child; he is a fluent English speaker in a relationship where the family language is English with his partner being a British citizen who was born in the UK; he has been educated only in English and that is the only language in which he is literate; he has worked in a wide variety of English settings; he is currently leading a normal socially integrated life centred around work and family. There was undoubtedly a period of two years between 2014 and 2016, candidly referred to by the claimant as a time when he was "lost", and a drug addict who was abusing alcohol and committing serious crime, which was followed by a period from January 2017 to May 2018 when he was in prison. During this time he was not socially and culturally integrated but I find that this time is now behind him, and since leaving prison in May 2018, so for the past 20 months, he has become an integrated citizen once again, as he was from 2005 to 2014, as I find that he has resumed his normal social and cultural ties with the UK.
40. I find that the claimant does have a number of attributes which might generally mean that it was not the case that he would have very significant obstacles to integration if returned to his country of nationality and origin, Afghanistan. He does have memories of living in the village in Baghlan; his parents still communicate with him in Pashto and he has sufficient ability in that language to mean that he could start the process of integration and having a social life by way of making friends and obtaining work; he has transferrable work skills in kitchen/ restaurant work and would be able to learn the relevant new cooking techniques or do unskilled labouring or farm work as a fit young man. I now turn however to look at these attributes in the context of the country of origin situation in Afghanistan.
41. I am satisfied that the claimant would have very significant obstacles to the integration in his home area of Baghlan for the following reasons. There is a situation of indiscriminate violence in that area of Afghanistan. I find that I can rely upon the evidence in the EASO report Country Guidance: Afghanistan June 2019 at page 91 to 92 of that report as a reliable source of evidence. Whilst the evidence is not found to be sufficient to cause a real risk of serious harm to satisfy Article 15 (c), I am satisfied that the different test of very significant obstacles to integration is met as the majority of the districts in Baghlan are contested with one under Taliban control; there is a high Taliban presence; there were 261

civilian casualties in this area in 2018; and more importantly 13,491 people were displaced during the period January 2018 to February 2019. I find that the claimant would not have financial assistance from the UK as none of the UK family has funds for this, his wife being low paid and his parents on universal credit, and so this could not ameliorate his situation in Baghlan in any way. I am satisfied that he could not have a semblance of normal private life ties in this area despite his having the attributes I outline at paragraph 40 as he would like many others would be at real risk of displacement due to the violence there.

42. The Upper Tribunal found in AS (Safety of Kabul) Afghanistan CG [2018] UKUT 00118 (IAC) that it will not be generally unduly harsh to expect a young healthy man without accompanying dependants to relocate to Kabul even without remittance support or a connection there. However, there has been a partially successful appeal to the Court of Appeal against this decision, in AS (Afghanistan) v SSHD [2019] EWCA Civ 873, which required this conclusion to be revisited by the Upper Tribunal with reference to the latest (2018) UNHCR report which unequivocally concluded that relocation to Kabul, in an asylum context, was not reasonably available and by reference to the correct statistic for the number of persons killed or injured in armed conflict or security incidents in Kabul. This remitted appeal has not yet been finally determined by the Upper Tribunal.
43. According to the EASO report there were 1866 casualties in Kabul in 2018. I am of course applying a different legal test but given the data examined by UNHCR in their report on Afghanistan dated June 2018, which led to the conclusion that internal flight should not be considered reasonably available to those with a real risk of serious harm in their home area, I find that the claimant would have very significant obstacles to integration in Kabul for the following reasons. It is a place he has never visited and has no family or community connections with. In the 2018 UNHCR report it says: "UNHCR notes that civilians who partake in day-to-day economic and social activities in Kabul are exposed to a risk of falling victim to the generalized violence that affects the city. Such activities including include travelling to and from a place of work, travelling to hospitals and clinics, or travelling to school; livelihood activities that take place in the city's streets, such as street vending; as well as going to markets, mosques and other places where people gather." UNHCR also finds that 70% of people in Kabul live in informal settlements, with: "Population growth in the city is outpacing the city's capacity to provide necessary infrastructure, services and jobs to citizens"; and 55% of those living in those settlements are severely food insecure. The view of UNHCR in this 2018 report is upheld and indeed strengthened in their submissions dated 6<sup>th</sup> December 2019 to the European Court of Human Rights in the case of MJ v Netherlands (application 49259/18) as security incidents are noted to have further increased over the period January to September 2019; they record a deterioration in the socio-economic conditions in Kabul with an even worse situation as regards the lack of accommodation and infrastructure; and note evidence that they clearly regard as credible

that deported Afghans are particularly vulnerable to experiencing violence and difficulty accessing the labour market. I find that if returned to Kabul that the claimant would be likely to be returned to live in an informal settlement; that he would be likely to struggle to find employment and be severely food insecure; and that he would be at risk of being a victim of violence. I find that this satisfies the test that he would have very significant obstacles to integration as in this context, even with the attributes set out at paragraph 40, he would not be able to establish the basics of a private life in Afghanistan.

44. As such my conclusion is that the claimant can meet all of the requirements of s.117C(4) of the 2002 Act, and as such whilst significant weight must be given to the public interest in the deportation of foreign criminal, and I fully acknowledge that the claimant committed a serious crime relating to the supply of class A drugs, I find that his deportation would be a disproportionate interference with his right to respect to private life as protected by Article 8 ECHR.
45. For completeness I go on to consider whether he can also meet the requirements of s.117C (5) of the 2002 Act and show that he meets the exception to deportation based on family life ties. The issue, as set out by reference to the guidance cases above, is whether it would be unduly harsh (as properly defined above) to his children and partner for him to be deported whilst they remain in the UK. It plainly would not be in the best interests of his children for him to be deported: the evidence before me is that since leaving prison he has been and continues to be a good father. He is not simply someone who genuinely has a parental relationship with those children but is also a father who has plays a significant role in their upbringing, and is willing to prioritise their well-being over his employment and make them the most important and major focus of his day to day life. The test of unduly harsh is one which, however, requires evidence that his deportation would go beyond the normal effects of deportation which would predictably leave those children bereft and saddened that this good father is no longer in their lives. The test can only be met if the outlook for them would be severe and bleak and not merely difficult and undesirable in his absence.
46. I accept that this is a case in which I have no expert evidence on the behavioural problems that M is exhibiting, but this is not because the claimant has not asked for this it is because it is not yet available as the family support worker has not yet completed her investigation and M is only in his second term of school. I have however found the evidence of claimant and his partner credible, and it is relevant, I find, that his partner has played a caring role for her sister who has learning difficulties, ADHD and autism as well as having experience working in a school and so her opinion with respect to her son M is informed by a context of being exposed to normal children and those with identifiable difficulties which go beyond the regular issues of sibling rivalry, toddler tantrums and normal misbehaviour. I also find it relevant that the claimant gave up his work at Wagamama despite the family being on a low income as the difficulties his

partner was facing dealing with the children alone and the severity of M's behavioural problems could only be addressed by his being there. It is also supportive of the claimant and his partner's evidence that the family support worker is investigating this matter through observation of M, indicating that the problems could not be addressed simply by advice and parenting techniques such as star charts, which the claimant has already tried as a response; and also that the school has expressed concerns about M's behaviour even though he is in the early days of settling into school in the reception class.

47. I am satisfied on the evidence before me that M's behaviour is currently such that it would be extremely problematic for the claimant's partner to safely care for her baby Z and M at the same time and do basic household management such as shopping and cooking without support. I find if she were to be placed in a position where she had to do this her life and that of her two children would indeed be bleak and not just merely difficult. This is because M's behaviour is physically threatening to Z and preventative of normal and necessary activities such as shopping. I do not find that the claimant's partner can turn to family for this extra help: her parents have her disabled sister to care for and her in-laws have their own young child of 6, live one and a half hours away, are existing on universal credit and her mother-in-law and her do not have a common language. It is also questionable whether the grandparents would be able to deal with M's challenging behaviour. I also find that the claimant's partner is not in a position to pay for such support as she is on a low income as a lunchtime supervisor and teaching assistant in a school on maternity leave; and that the wider family do not have financial resources to assist her in this way either.
48. In light of the above, and in the context of my finding that M currently has severe behavioural problems and that Z, is clearly very vulnerable due to his young age, I find that it would be unduly harsh for the claimant's partner and children M and Z to remain in the UK whilst he is deported to Afghanistan. As it is conceded that it would be unduly harsh for them to accompany him to Afghanistan, I find that the requirements of the family life exception to deportation at s.117C(5) of the 2002 Act are met, and thus whilst acknowledging that significant weight must be given to the public interest in the deportation of foreign criminals, and that the claimant committed a serious crime related to the supply of illegal class A drugs, I find that his deportation would also be a disproportionate interference with his right to respect to family life as protected by Article 8 ECHR.
49. In these circumstances I do not need to go on to consider whether there are compelling compassionate circumstances over and above the exception to deportation as they are found to be met for the reasons set out above.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The Panel set aside the decision of the First-tier Tribunal.
3. I remake the appeal by allowing it on human rights grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant/ now the claimant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of harm arising to the claimant's children.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 22<sup>nd</sup> January 2020

## **Annex A: Error of Law Decision**

### **DECISION AND REASONS**

#### *Introduction*

1. The claimant is a citizen of Afghanistan born in February 1990. He arrived in the UK in 2003 and claimed asylum at the port of entry. He was granted discretionary leave to remain, and then in June 2010 indefinite leave to remain. On 13<sup>th</sup> December 2016 the appellant was convicted of supplying a controlled drug class A. He was sentenced to 2 years and six months imprisonment. On 14<sup>th</sup> February 2017 the Secretary of State notified him that he would be deported unless he could show that he fell within the exceptions at s.33 of the UK Borders Act 2007. The Secretary of State refused his human rights claim on 2<sup>nd</sup> March 2018. His appeal against the decision was allowed by First-tier Tribunal Judge SJ Clarke in a determination promulgated on the 28<sup>th</sup> June 2019
2. Permission to appeal was granted by First-tier Tribunal Judge Bristow on 19<sup>th</sup> July 2019 on the basis that it was arguable that the First-tier Judge had erred in law in considering that it would be unduly harsh for the appellant's partner and child to remain in the UK without him. This was because it is arguable that the decision was based solely on the fact that it would break up the family, and therefore that there was a failure to apply the proper unduly harsh test set out in KO (Nigeria) v SSHD [2018] UKSC 53.
3. The matter came before us to determine whether the First-tier Tribunal had erred in law.

#### *Submissions - Error of Law*

4. In the grounds of appeal, skeleton argument and oral submission the Secretary of State argues as follows.
5. Firstly it is said that it was not open to the First-tier Tribunal Judge to conclude that the claimant had a genuine and subsisting relationship with his partner and child at paragraphs 11 and 12 of the decision, when a social worker had said in a report of December 2017 that the relationship was on and off and he had not done much for his son. The claimant's name is not on his child's birth certificate and the positive findings about family outings were not sufficient to reach this conclusion. There was no evidence of significant and meaningful positive engagement with the son to find that the claimant had a parental relationship with him.
6. Secondly, it is argued that when considering the unduly harsh test the seriousness and nature of the offending is not to be taken into account but it is a high test going beyond what would necessarily be involved for any child faced with the deportation of a parent, see KO (Nigeria). Harsh is defined in MK (Sierra Leone) [2015] UKUT 223 as something severe or

bleak. The First-tier Tribunal found that the circumstances in Afghanistan were such that the family would be broken up, and that alone was the reason the deportation would be unduly harsh. This is insufficient; there was also a failure to consider why the appellant's partner and son could not live with him in Afghanistan; and a failure to consider whether the family could meet from time to time in a third country such as Pakistan if they remained in the UK whilst he was deported. The context for the decision-making was that the appellant no longer claims to have a fear of persecution in Afghanistan so it was open to him to return to his home area of Baghlan as well as Kabul.

7. Thirdly, it is argued that the finding that he would have very significant obstacles to integration in Afghanistan, and so satisfied the private life immigration rules, was also not open to the First-tier Tribunal. It was found that he would have such obstacles due to his arrival in the UK at a young age, see paragraph 16 of the decision. This was an insufficient finding given the test as set out in SSHD v Kamara [2016] EWCA Civ 813 was that he needed to show that he would not be able to integrate on return, which meant that he would have to show that he would not have a reasonable opportunity to be accepted in Afghanistan, operate on a day to day basis and building up a variety of human relationships. Further, he needed to show very significant obstacles to this integration, which means more than mere hardship or inconvenience. As the claimant has worked in the UK, has some relatives in Afghanistan, speaks Pashto and has some cultural links, and has no health problems it was not rational of the First-tier Tribunal to have found that he met this test.
8. Fourthly, it is argued that the claimant is not socially and culturally integrated in the UK applying the test set out in Binbuga [2019] EWCA Civ 551, as this means that he must hold the core values, ideas, customs and social behaviour of the UK. The findings of the First-tier Tribunal were insufficient to meet this test as they were that through his work he had started to integrate, see paragraphs 13 and 15 of the decision.
9. Fifthly, it is argued that the First-tier Tribunal failed to consider the public interest as set out at s.117C(1) and (2), which was relevant given the claimant's drugs conviction.
10. Mr Khan pointed to issues with the claimant's wife being pregnant and having miscarriages as being relevant to whether it would be unduly harsh for her and her child to remain in the UK without the claimant, and said that there was no evidence as to whether they would be able to meet him in a third country or maintain contact via social media. He accepted that the First-tier Tribunal had not looked at the issue of relocation to the home area when considering whether the claimant would have very significant obstacles to integration if he was deported, but argued that the decision that he was socially and culturally integrated was properly made as the First-tier Tribunal had built on the probation evidence set out at paragraph 13 and added the claimant's long residence and current work to find that he was currently integrated.



11. At the end of the hearing we informed the parties that we found that the First-tier Tribunal had erred in law and would set out our reasons in writing. Both representatives were content that we remake the appeal in the Upper Tribunal, and were in agreement that the remaking hearing should be adjourned to another day as the claimant was with his wife in hospital as she had given birth prematurely.

*Conclusions - Error of Law*

12. The Secretary of State accepts that the claimant has lived in the UK lawfully for most of his life, see paragraph 5 of the decision of the First-tier Tribunal.
13. We find that the First-tier Tribunal Judge has given weight to the public interest in the deportation of foreign criminals, and the fact that the more serious the offence the greater the public interest in deportation. At paragraph 8 of the decision, it is clearly stated that the supply of class A drugs is a very serious offence which undermines society and that the Judge has full considered the serious nature of his criminal activity through the decision.
14. With respect to the family life exception to deportation we find that it was open to the First-tier Tribunal to find that the claimant and his partner were currently in a genuine and subsisting relationship, particularly as his partner has had three miscarriages since the birth of their son and was currently pregnant, as recorded at paragraph 11 of the decision. There is careful consideration of the email from the social worker dated 6<sup>th</sup> December 2017 which stated that at that time the relationship was “on and off” and the claimant had not done much for his son in the past, see paragraph 10 of the decision, but it was open to the First-tier Tribunal to find that the relationships had moved on in a positive way and he was now fulfilling a parental role in his son’s life based on the oral evidence at the appeal, particularly as the claimant and his partner were both found to be credible witnesses, see paragraphs 9 to 12 of the decision.
15. However we find that it was undoubtedly an error of law for the First-tier Tribunal to have found, at paragraph 14 of the decision, that it would be unduly harsh for the appellant’s partner and child to remain in the UK whilst he was deported as this would break up the family unit, as this does not properly apply the judgement of the Supreme Court in KO (Nigeria), which found that something more than the normal consequences of deportation was needed to show that the deportation was unduly harsh. As such the conclusion that the appeal should be allowed on the Article 8 ECHR family life grounds is materially flawed.
16. With respect to the findings relating to the claimant’s private life the First-tier Tribunal finds that return to Afghanistan would lead to the claimant having very significant obstacles to integration, notwithstanding the fact that the claimant speaks Pashto and has some cultural ties, because of the UNHCR guidelines from 30<sup>th</sup> August 2018 which states that

there is no reasonable internal relocation alternative to Kabul. There is however no consideration as to whether the applicant could reasonably relocate to his home area of Baghlan without very significant obstacles to integration. The grounds of appeal correctly identify that there is therefore an incompleteness in the reasoning in paragraphs 15 and 16 of the decision as this material consideration has not been addressed.

17. There was also a failure, when considering the appeal on private life grounds, to consider the claimant's social and cultural integrative links in the light of his offending. At paragraph 13 of the decision it is said that he is now starting to integrate in the UK and can speak English which would indicate that the test has not yet been fully met.
18. Thus, we find that the First-tier Tribunal erred in finding that these two elements of the private life exception to deportation were met as there is insufficient reasoning to reach this conclusion, as well as erring in the application of the unduly harsh family life exception.

#### Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. We set aside the decision of the First-tier Tribunal
3. We adjourn the remaking hearing.

#### Directions

1. The remaking of the appeal will take place at 10am on 21<sup>st</sup> January 2020
2. Any new evidence from either party to be filed with the Upper Tribunal and served on the other party by 4pm on Friday 10<sup>th</sup> January 2020.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of harm arising to the claimant's child.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 26<sup>th</sup> November 2019