Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11748/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 23 May 2022	**On 15 June 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MIS
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Karnik instructed by Sabz Solicitors LLP
For the Respondent: Mr Tan, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. This appeal returns to the Upper Tribunal to enable it to give further consideration to the appellant's claim that he is entitled to a grant of leave on human right grounds, following the rejection of his claim by a Judge of the First-tier Tribunal and the Upper Tribunal at the error of law stage of the appellant's submission that he was entitled to a grant of leave on the basis of a legitimate expectation.
2. There is no need to set out the background in full, which was taken from judicial review papers drafted by Mr Karnik and is copied at [2] of

the error of law finding promulgated on 1 December 2021 at this stage, but I shall refer to the same further below.

3. One of the directions made by the Upper Tribunal was for the appellant to confirm whether he intended to make a fresh application relating to his status in light of the country conditions in Afghanistan that had developed since his original claim was made, and not procced with this appeal. In an email received by the Upper Tribunal on 14 December 2021 the appellant confirmed he wished to proceed.
4. The Secretary of State has since the error of law finding issued two further documents being the Country Policy and Information Note (CPIN) Afghanistan: Humanitarian situation, Version 2.0, April 2022 and Country Policy and Information Note: Fear of the Taliban, Afghanistan, April 2022.
5. In light of these documents Mr Karnik has developed his arguments further as set out in a skeleton argument filed prior to the hearing, which had not been seen, but of which he was able to provide an electronic copy on the day; which is in the following terms:

APPELLANT'S SKELETON ARGUMENT

On 1st December 2021 UTJ Hanson concluded that the FTT had erred in its evaluation of the Appellant's appeal in respect of article 8 ECHR, he directed a resumed hearing. This skeleton argument is limited to submissions in respect of article 8.

In summary:

The SSHD says that:

- The Appellant does not meet the IRs, in particular 276ADE;
- There are no unjustifiably harsh consequences that means refusal breaches the SSHD's obligations under the ECHR – by inference the public interest in immigration control takes precedent.

The appellant says that:

- He meets IR276ADE(1)(vi);
- In his unusual circumstances the weight afforded to the public interest is materially and substantially diminished;
- When all the factors are properly and cumulatively weighed the article 8 balance falls in his favour.

BACKGROUND

1. The Appellant is a national of Afghanistan from Kunduz, who arrived in the UK on 12th January 2005 and claimed asylum. He is illiterate. Between 2007 and 2018 the Appellant resided, he says lawfully, in the UK and/or under the misapprehension, as a result of the actions, including erroneous ones, and inactions of the SSHD, that he had been granted ILR. He has been issued with a travel document by the SSHD, he has been issued with a national insurance number and has worked lawfully in the UK, paid taxes and contributed inter alia to the economy of the UK. He has not returned to Afghanistan.
2. Shortly after his claim the SSHD provided the Appellant's then advisors, Refugee Legal Centre, "the RLC", with various documents. On 7th February 2005 RLC wrote to the SSHD informing them that his name was [MIS] dob 01.01.1974, citing reference number J1015791.

3. The SSHD refused his asylum claim, this time using the name [MIS] dob 01.01.1974. The Appellant appealed, again, through RLC, using the HO reference number J1015791, [RB E1], his appeal was dismissed by FTTJ Nicholson on 7th July 2005, his onward applications challenging that decision were unsuccessful.
4. The SSHD took no steps to remove the Appellant and he continued to report to immigration officers, and in 2007, whilst reporting, he was told unequivocally by an immigration officer that he had been granted ILR, and that consequently he no longer needed to report. The SSHD does not dispute these facts.
5. On 30th March 2007 the SSHD sent a letter to the Appellant's home address to [MIS], 1 Jan 1974, Afghanistan, saying: Following confirmation that your application for asylum has been determined and the confirmation that you have been granted leave to remain the United Kingdom, I am writing to advises that you no longer qualify for support under section 95 of the Immigration and Asylum Act 1999. ……Our records show that your claim for asylum was determined on the 28 Oct 2002, therefore the period of support ended on 26 Nov 2002. …..there is no right to appeal against this decision…..If you believe that your support should continue because your claim is still pending….
6. The letter used the same HO reference number that RLC used in their earlier, and subsequent correspondence with the SSHD - J1015791.
7. On 3rd April 2007 the Appellant's NASS housing providers wrote to him stating that he was required to vacate his residence because the SSHD had decided he could stay in the UK.
8. About the same time the SSHD, through NASS, wrote to the Appellant, at his address, using the same reference number and in a letter bearing his photograph, the record showed that his NASS support had ended.
9. The Appellant returned to his then advisors who informed him that, although some of the dates did not seem right, all was in order.
10. The SSHD's records show that on 15th February 2007 she was aware that there was "some kind of duplication, needs looked into". There is no suggestion that the SSHD took any steps to resolve the question of duplication [RB Annex H].
11. On 19th April 2007 the SSHD received a request from the Appellant's solicitors notifying her that he had not received status papers, the SSHD did not respond.
12. However, in 2007 the SSHD wrote to the Appellant at his new address and issued a travel document, using the Appellant's photograph, the documentation also relied upon the reference number J1015791 [RB F1].
13. The Appellant was also issued with a national insurance number. He found work and established a life in the UK.
14. Out of the blue in 2018 his workplace was visited by immigration officers, they took his fingerprints and confirmed that he was present lawfully in the UK, they showed him his picture on their hand-held device. The SSHD does not dispute this fact.
15. The Appellant applied to renew his travel document however on 28th September 2018 the SSHD refused the application on the basis that in fact he had no right to remain in the UK. Thereupon the Appellant sought to regularise his position in the UK.
16. The Appellant continues to remain in the dark over what appears to be a conflation of 2 asylum seekers. The SSHD still has not provided an explanation to him or to the Tribunal over what occurred. The SSHD now says his reference number is S1281898, but she also says that he is known as M I 01.01.74, (RFRL 30th September 2019 pg 1). The reference number J1015791 is also attributed to M I 10.10.74, who was recognised as a refugee on 24.10.02.[RB A1] The SSHD still has not explained how that same reference number was also connected to the Appellant's fingerprints and his photograph, or if it was not how the immigration officer who visited the Appellant's workplace in 2018 was able to determine that the Appellant's biometric details were assigned to a person who had LTR.
17. In 2006 the Home Office began a programme of work to resolve the substantial number of legacy asylum cases, like the Appellant; failed asylum seekers who had not been removed were commonly granted ILR, over 145,000 cases1received ILR. The Legacy

programme covered asylum applicants made before 5 March 2007, it closed in March 2011.

18. On 29th July 2019 the Appellant made a human rights claim, the refusal of that application forms the substance of this appeal. On 20th February 2020 FTTJ Morris dismissed his appeal.

THE LEGAL FRAMEWORK

19. SSHD v Kamara [2016] EWCA Civ 813 confirmed that the concept of integration under 276ADE(1)(vi) is a broad one, it is not confined to the mere ability to find a job or sustain life, it requires "*a broad evaluative judgment of whether the individual will be enough of an insider in terms of understanding how life in that other country is conducted and a capacity to participate in it, have a reasonable opportunity to be accepted, operate on a day-to-day basis and to build up within a reasonable time a variety of human relationships*"
20. The test is case sensitive and requires both factors personal to the Appellant and the country of removal to be taken into account.
21. Hydar (s.120 response, s. 85 "new matter", Birch) [2021] UKUT 176 (IAC) confirmed that in respect of the conclusions regarding s85, Birch (precariousness and mistake; new matters) [2020] UKUT 86 (IAC) was made per incuriam the judgment of the Court of Appeal in Alam & others v SSHD [2012] EWCA Civ 960. Hydar does not negate the logic of Birch in respect of what is said about the relevance of mistake and knowledge as to how the public interest should be treated.
22. In Birch the Tribunal considered how article 8 should be considered in circumstances where a person mistakenly thought they had been granted ILR. Between [17-18] the President said:

> 17. Between 2007 or 2008 and 2015 the appellant thought she had indefinite leave to remain. …. In considering the "public interest question" the Judge ought to have taken into account whether a "less stringent approach might be appropriate". . …
> 18. …The Judge should have treated the period during which the appellant thought she had leave differently from the periods in which she knew she had no leave. Given the extent of the former, and the relationships and the conduct of her private life during it, it is impossible to say that the result in general, and in the application of s 117B, would or should have been the same if this factor had been taken into account. ….

23. In Agyarko v SSHD [2017] UKSC 11 at [53] Lord Reed said:

> "One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate."

24. The ECtHR noted in Jeunesse v Netherlands (2015) 60 EHRR 17 at §108:

> "Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. "

25. In Pormes v. The Netherlands - 25402/14 [2020] ECHR 572 at §60 the ECtHR held:

> "At the same time, the Court cannot accept the Government's submission that, as the applicant had established his private life in the Netherlands whilst he was residing in the country unlawfully, the refusal to admit him would be contrary to

> Article 8 of the Convention in exceptional circumstances only ….. In the present case, the Court observes that when the applicant started to build up his ties with the Netherlands he was completely unaware that neither his presumed father nor his foster parents had taken steps to regularise his stay in the country"

26. In Rhuppiah v SSHD [2018] UKSC 58 at [37] Lord Wilson said:

> "It is obvious that Parliament has imported the word "precarious" in section 117B(5) from the jurisprudence of the ECtHR ….And, because the focus is upon the applicant personally and because, perhaps unlike other family members, he or she should on any view be aware of the effect of his or her own immigration status, the subsection does not repeat the explicit need for awareness of its effect." [Emphasis added]

27. In R. v SSHD Ex p. Ram, [1979] 1 W.L.R. 148 the Divisional Court confirmed that the fact that the immigration officer had mistakenly stamped the passport of the applicant, who did not come within the categories of lawful entrants did not vitiate the officer's authority under section 4 (1) of the IA 1971.
28. In Patel (historic injustice; NIAA Part 5A) India [2020] UKUT 351 (IAC) the Tribunal noted:

> "Cases that may be described as involving "historical injustice" are where the individual has suffered as a result of the wrongful operation (or non-operation) by the Secretary of State of her immigration functions. Examples are where the Secretary of State has failed to give an individual the benefit of a relevant immigration policy (eg AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12); where delay in reaching decisions is the result of a dysfunctional system (eg EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41); or where the Secretary of State forms a view about an individual's activities or behaviour, which leads to an adverse immigration decision; but where her view turns out to be mistaken (eg Ahsan v Secretary of State for the Home Department [2017] EWCA Civ 2009). Each of these failings may have an effect on an individual's Article 8 ECHR case; but the ways in which this may happen differ from the true "historic injustice" category. Page 6 In all cases where, for whatever reason, the public interest in the maintenance of effective immigration controls falls to be given less than its ordinary weight, the usual course should be for the judge so to find in terms, when addressing section 117B(1) of the 2002 Act. The same result may be achieved, at least in some situations, by qualifying the consideration in section 117B(4) that little weight should be given to a private life formed when the person concerned is in the United Kingdom unlawfully."

29. Applying the approach required by GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630 the proportionality test requires a fair balance to be struck on the "circumstances of the individual case" in a real world sense, and the list of relevant factors is not closed.
30. In EB (Kosovo) v SSHD [2008] UKHL 41 between [14-16] Lord Bingham considered the potential effect of delay on evaluating article 8 at [16] he said:

> "Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

31. More recently in Remi Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098 at [39] Sir Ernest Ryder said: "… The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the

deportation of foreign criminals has a moveable rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal."

SUBMISSIONS

32. Firstly, the Appellant respectfully submits that he meets the substantive requirements of IR 278ADE(1)(vi) and applying in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 at [34] that is positively determinative of his appeal.
33. Since the SSHD's decision the factual situation in Afghanistan has materially changed. The SSHD has recognised this, and since UTJ Hanson's decision was promulgated the SSHD has produced updated CPINs. The Humanitarian Situation CPIN2 April 2022 says at 2.4.6:

> "Since 15 August 2021, food security has deteriorated in all regions and 98% of the population has insufficient food consumption …. The 2021 drought, the second in four years, has had a severe impact on agriculture and livestock. Acute (crisis or emergency) levels of food insecurity affects approximately 18.8 million people and this is predicted this to rise to 22.8 million people (55% of the population) in 2022, with 8.7 million at risk of famine-like conditions."

34. At 2.4.7 it says:

> "Severe drought and poor water management contributes to water insecurity. Based on 2020 figures, basic drinking water services are available to 48% of the population although an estimated 80% of people drink bacteriologically contaminated water."

35. At 3.3.1it continues:

> "Overall, the economic crisis that followed the political transition has negatively impacted the labour market in both urban and rural areas. The World Food Programme's (WFP) market and price monitoring showed a drastic decline in the number of days work available for casual labour in urban areas"

36. The Fear of the Taliban CPIN April 20223 says at 2.4.9:

> "The current evidence suggests that persons likely to be at risk of persecution, because they may be considered a threat or do not conform to the Taliban's strict interpretation of Sharia law, include but are not limited to:….
>
> > Persons who do not conform to, or are perceived to not conform to, strict cultural and religious expectations/mores, in particular women, and which may also include persons perceived as 'Westernised' after having spent time in the West.."

37. Secondly, the Appellant says his unusual case amounts to exceptional circumstances and the public interest falls to be granted less weight. The approach and the omissions of the SSHD further acts to undermine the weight that should normally be accorded to the public interest in immigration control.
38. A proper analysis of his case applying the law to his facts shows that:

    i. He was granted leave to remain in 2007, and resided in the UK lawfully until the SSHD recognised her mistake, and then only after the Appellant made an

application; applying R. v SSHD Ex p. Ram, [1979] 1 W.L.R. 148, the Appellant had LTR at least between 2007-2018.

ii. The SSHD has not revoked that leave or shown that she has done so lawfully;

iii. Alternatively, if the SSHD is right that the Appellant has resided in the UK unlawfully, ECtHR jurisprudence requires the tribunal to treat the Appellant as if he had leave to remain, and/or was not unlawfully in the UK, see Pormes v. The Netherlands; iv. Additionally, because of the mistaken actions and inactions of the SSHD the Appellant lost the opportunity to seek to regularise his position through the Legacy programme Patel (historic injustice;

39. The SSHD has not disclosed her full CSID notes for both reference numbers, nor provided an explanation as to how conflation occurred. The SSHD was aware of an issue in 2007, and yet she failed to act. That bears the hallmark of a dysfunctional system.
40. Having identified an issue over 10 years later the SSHD is unable to clarify the seat of the error, she has chosen not to explain to the Appellant, who has borne the SSHD's error, how it occurred, and instead has decided, applying a formulaic approach, to deny the Appellant leave. He respectfully submits that that amounts to an arbitrary exercise of power.
41. In addition to a substantial passage of time, the facts disclose dysfunctionality of the operation of the system in his case and an arbitrary exercise of power, they additively are factors that have to be taken into account EB (Kosovo) v SSHD [2008] UKHL 41. The weight accorded to immigration control had to be recognised as moveable, Remi Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098.
42. Thirdly, the cumulative effect of all the factors mean that the fair balance falls decisively in the Appellant's favour.
43. The SSHD has allowed a substantial passage of time to occur during which the Appellant has developed substantial ties to the UK and concurrently his ties to Afghanistan have withered, moreover Afghanistan has undergone substantial change.
44. The Appellant has worked in the UK contributed to the UK, the other factors in s117B do not count against him.
45. The Appellant's circumstances and the conditions prevalent in Afghanistan continue to be important relevant factors in the overall article 8 balance.
46. In any event the SSHD is not enforcing removals to Afghanistan, and he says cannot do so in the foreseeable future; in those circumstances it is neither fair nor proportionate to maintain a state of limbo. R (AM) v SSHD (legal "limbo") [2021] UKUT 62 (IAC) and RA (Iraq) v SSHD [2019] EWCA Civ 850.

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Garden Court North Manchester
19 May 2022.

6. Mr Karnik also produced a copy of a judgment not relied upon earlier of R v The Secretary of State for the Home Department Ex p. Ram, [1979] 1 WLR 148. That case involving an applicant who came to the United Kingdom from India in September 1970 where he remained until January 1974 when he went to Canada. The appellant returned to the UK in November 1974 telling the immigration officer he had come to attend a wedding. His passport was stamped with leave to enter the United Kingdom and remain for an indefinite period. The appellant subsequently left again for Canada but a fortnight later returned to the United Kingdom and did so on three further occasions, in July 1976, November 1976 and November 1977. On the last occasion he tended his passport without making any misrepresentation and was given

leave to remain in the United Kingdom for an indefinite period. That applicant considered himself lawfully in the country because of the stamp of his passport and set up a business in the UK which he attended until June 1978 when he was interviewed by immigration officers and detained in prison pursuant to paragraph 16(2) of Schedule 2 to the Immigration Act 1971. The matter before the Court was an application by way of a writ of habeas corpus on the grounds he was a legal entrant and could not be detained under the said provision.

7. Mr Karnik has marked in that decision the finding of the Court in which it was held:

> Held, allowing the application (Lord Widgery CJ. Dubitante), that, since the immigration officer had not been misled by the applicant into stamping the passport with leave to enter indefinitely, the onus was on the Secretary of State to show that the applicant was an illegal entrant, that the fact that the immigration officer had mistakenly stamped the passport of the applicant, who did not come within the categories of lawful entrant defined in the Statement of Immigration Rules for Control of Entry: Commonwealth Citizens, did not vitiate the officers authority under section 4(1) of the Immigration 1971 to grant leave to enter the United Kingdom, and the applicant was lawfully in the United Kingdom pursuant to that grant of leave to remain indefinitely stamped on his passport.

8. That case was not before the Tribunal previously, it relates to a writ of habeas corpus following the applicant's arrest and detention pursuant to the relevant statutory provision which permitted a person who may be required to submit to examination under paragraph 2 above to be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter. As identified by the Court, there was no requirement for the appellants detention pending a decision to give or refuse leave to enter, as the applicant had already been granted lawful leave to enter for the reasons stated. The case was decide in 1979, is fact specific, and contains within the judgement of Lord Widgery CJ a reference to two decisions of the Court of Appeal to which reference was made contemplating the possibility that there is a new and further principle that arises in that case, namely that if an immigration officer has no authority to grant particular permission which was granted this renders the grant of leave void.

9. The error of law finding in the current appeal also focused upon more recent authorities including that of the Supreme Court in R (Finucane) [2019] UKSC 7 and sets out detailed reason for why the legitimate expectation argument was, on the specific facts of this case, rejected.

10. In relation to the appellants status in the United Kingdom as identified in the error of law finding, no legitimate expectation arises; for even though statements were made by the Secretary of State that he had leave to remain, it was shown they related to another person, particularly on the basis that the chronology related to a period relevant to the proper applicant who was in the UK at that time whilst

the applicant was still outside the UK, and that it was clear at a very early stage that these documents could not relate to the appellant even though attempts by the applicant to clarify the situation proved unsuccessful, as noted above.

11. It has been long established that when considering a human rights claim a structured approach is best, with a clear indication of how the competing interests have been balanced. Useful guidance on that structure still remains the decision of the House of Lords in Razgar [2004] 2 AC 368, often referred to as the 'Razgar test' set out at [17] of that judgement in the following terms:

> 17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

12. It is not disputed before me that the appellant has formed a private life in the United Kingdom or that the interference with that private life caused by his removal is sufficient to engage article 8.
13. In relation to the third question Mr Karnik indicated that the appellant would argue that such interference would not be in accordance with the law but in terms of any attempt to return to the legitimate expectation argument I find no merit in such a claim for the reasons set out in the Upper Tribunal's error of law finding.

Paragraph 276ADE

14. Mr Karnik also referred to the immigration rules and specifically paragraph 276ADE (1)(iv), an argument based initially upon the earlier

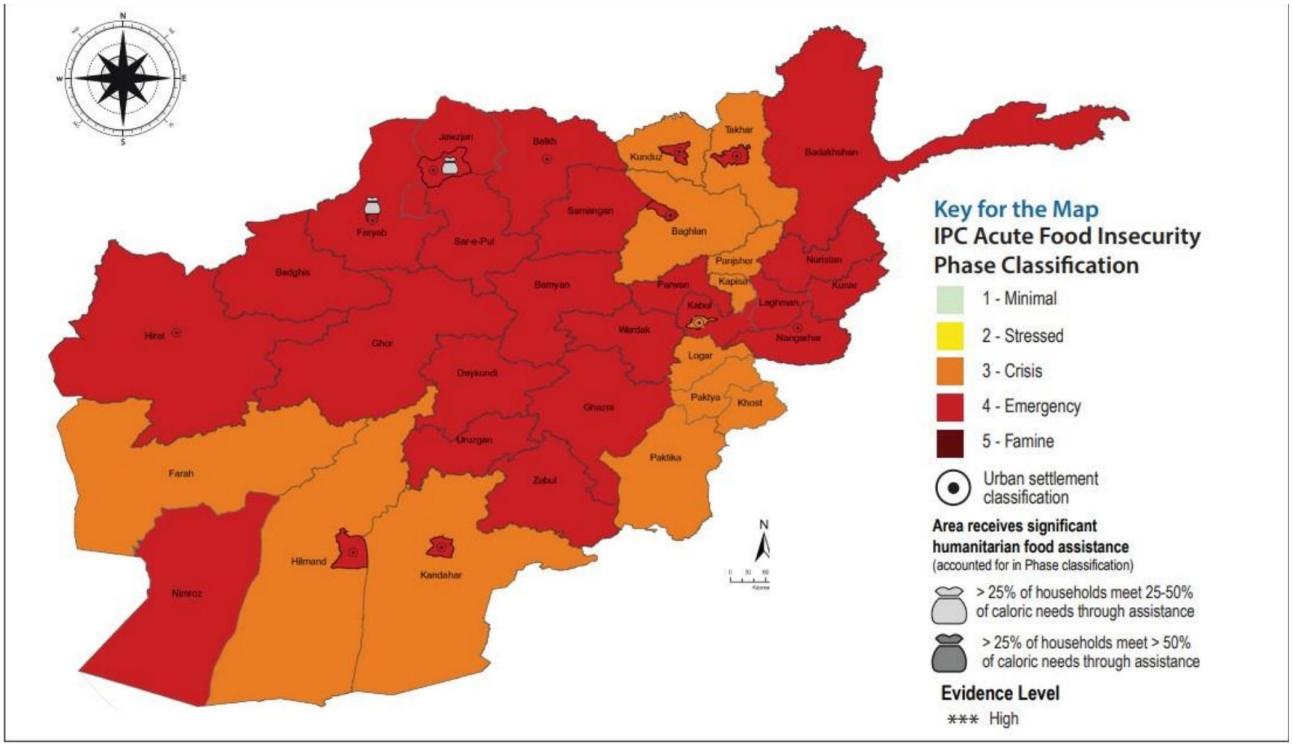
history but at this stage upon the contents of the CIPU relating to the humanitarian situation in Afghanistan.

15. That aspect of the claim was rejected by the Secretary of State in the reasons for refusal letter for the following reasons:

> 51 It is noted that you claim you entered the UK on 02/01/2005. Therefore it is not considered you have demonstrated that you have lived continuously in the UK for at least 20 years (discounting any period of imprisonment) and you failed to meet the criteria outlined in paragraph 276 ADE (1) (iii).
>
> 52. You are not under the age of 18 years and it is not unreasonable to expect them to leave the UK, you have failed to achieve the requirements for paragraph 276 ADE(1)(v).
>
> 53. You are not between the ages of 18 to 25 years nor have you spent at least half your life living continuously in the UK (discounting any period of imprisonment) thus it is not accepted you have attained the criteria set out in paragraph 276 ADE(1)(v).
>
> 54. You are a 45-year-old man, and it is not accepted that there would be very significant obstacles preventing you from continuing with and re-establishing and developing your private life upon return to your country of origin, the country of your birth, a country in which you speak the language and have resided in for the vast majority of your life. You can maintain contact with Emily UK based family, friends and other associates through modern channels of communication. It is considered you can utilise the skills, knowledge, skills and experiences you have gained during your residence in Afghanistan and the United Kingdom to reintegrate into society there. You stated your mother and siblings reside in Afghanistan, you have not provided evidence which demonstrates otherwise, and you have not provided evidence which demonstrates they would be unable or unwilling to provide you with reintegration support and assistance on return, as such it is considered you will have a support network on return to Afghanistan. On your own account you are keen to work, you have not submitted medical evidence demonstrating that you are unable to work. With the assistance of your family members and your ability and want, to work, it is considered you will be in a position to gain employment, accommodation and access healthcare should you need to. It is considered you can also obtain reintegration assistance and support through AVR's, which can be used to set up a business, for education; vocational training; job placement; housing (temporary accommodation or for repair work); childcare fees; or medical and psychological support, should you decide to return to Afghanistan voluntarily. You enjoyed an established private and family life before coming to the UK and there is no reason why you should not do so again upon return to Afghanistan, therefore you failed to meet the requirements of the paragraph 276 ADE (vi).

16. The specific submission today is that there are very significant obstacles to the appellant's integration into Afghanistan.
17. In Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 it was found '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'
18. 'Consideration as to obstacles to integration requires consideration of all relevant factors, including generic ones such as intelligence, employability and general robustness of character' AS v. Secretary of State for the Home Department [2017] EWCA Civ 1284 (23 August 2017) [2018] Imm AR 169
19. The Upper Tribunal found a number of findings of the First-tier Tribunal are preserved specifically relating to the dismissal of the protection claim, humanitarian protection claim (as it was that stage), the findings in relation to articles 2 and 3 ECHR although it is important to note the First-tier Tribunal's comments in relation to the appellant's family situation in Afghanistan.
20. At [20 (i)] the First-tier Tribunal Judge noted the appellant was born on 1 January 1974 in Archi District , Kunduz Province, Afghanistan, where he lived with his parents, brother and two sisters.
21. The claim to face a real risk in his home area was rejected as was the appellant's assertion at that stage that he would face very significant obstacles to reintegration.
22. At this stage the evidence does not suggest that other than the information contained in the more up-to-date CPIN those core findings should be disturbed. It was not made out, for example, that the appellant would not have family support in Afghanistan, that he did not now possess skills that may enable him to seek employment as a mechanic, or that he would not be able to reintegrate into society in Afghanistan.
23. In relation to the humanitarian situation, there are various passages quoted by Mr Karnik set out above in his skeleton argument. It is accepted that those passages reflect a summary of the overall situation in Afghanistan, section 2 dealing with the issue of risk, and in section 3 the socio-economic position of that country.
24. There is a section 4.3.4 is a map showing a detailed breakdown of the provinces in Afghanistan giving a clearer view of localised impact of the difficulties being faced at this time. Kunduz province is in the north of Afghanistan bordering Tajikistan and an area predominantly coloured orange on the map.

> 4.3.4 An IPC map showed areas of projected food insecurity (Phase 3 shown in orange and Phase 4 in red) between November 2021 and March 202264:



4.3.5 The IPC defined the Phases:

• ‘Households experiencing Phase 3 conditions typically have food consumption gaps that are reflected by high or above-usual acute malnutrition, or are marginally able to meet minimum food needs but only by depleting essential livelihood assets or through crisis-coping strategies.
• ‘Households experiencing Phase 4 conditions typically have large food consumption gaps, which are reflected in very high acute malnutrition and excess mortality, or are able to mitigate large food consumption gaps but only by employing emergency livelihood strategies and asset liquidation.’

25. Reference to the overall situation of Afghanistan, focusing specifically on the areas of the country coloured red on the above map, does not establish a claim for this appellant in his specific area. It is not made out, for example, that if returned the appellant he would not be able to obtain the required levels of nutrition, there being no specific evidence before the Upper Tribunal at the date of the hearing to show that however difficult it may be for his remaining family in Afghanistan they are experiencing such difficulties.
26. In relation to the appellant’s claim in the skeleton argument of risk on return through being ‘westernised’, whilst it is accepted there is specific reference to this in the CIPU more was required to establish such an argument which is intently fact specific.
27. Whilst it may be difficult I do not find the appellant has established, when taking the necessary global assessment in to account, that he is entitled to leave to remain in the United Kingdom under the Immigration Rules pursuant to paragraph 276 ADE.
28. ‘"Very real culture shock" is not the same as "very significant obstacles"’ Secretary of State for the Home Department v Olarewaju [2018] EWCA Civ 557 at [26] .

29. ‘The task of the Tribunal is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as ‘very significant’’ Parveen v Secretary of State for the Home Department [2018] EWCA Civ 932 (25 April 2018) - I have done so but do not find, on the facts of this appeal, that such very significant obstacles have been made out.
30. It was not suggested before with the appellant was able to satisfy any other provision of paragraph 276 ADE.

Article 8 ECHR

31. It is not accepted, for the reasons set out in the error of law decision and above, that when considering the five questions set out in Razgar that the decision to reject the applicant’s claim giving rise to the interference of the protected right is unlawful.
32. It was accepted by Mr Tan that the issue in relation to this final aspect of the appeal is the proportionality of the Secretary of State’s decision. When a decision-maker arrives at this point the burden is upon the Secretary of State to establish that any interference in an identified protected right is proportionate to the legitimate interest relied upon.
33. Section 117 of the Nationality, Immigration Asylum Act 2002 mandates that where a decision-maker is considering article 8 they must factor into that process the statutory provisions.
34. Section 117A reads:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

35. This is not a deportation case and it is not suggested the appellant is a foreign criminal, so there is no need to consider section 117 C.

36. Section 117B reads:

117BArticle 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are this better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

37. Whilst the statutory provisions set out Secretary of State's view of how the assessment of article 8 should be approached, Strasbourg jurisprudence and domestic case law remains relevant.

38. The appellant entered the United Kingdom on 12 January 2005 has lived a normal life in the UK including finding a home, work as a mechanic, forming friendships and relationships with women, as he believed he was being permitted to do so.

39. It was not made out the appellant does not have a sufficient command of English to enable him to integrate, the evidence clearly is that he has, or that he will be a burden upon the public purse, the appellant demonstrating a skill which in this era when there is a shortage of trained mechanics will enable him to secure employment and make a positive contribution both towards his economic situation and by paying such taxes as may be due and payable on that income. I accept this does not gain the appellant in a positive advantage as it is a neutral offence and adverse finding against him on these points.
40. This is not a case where the appellant claims to have a genuine subsisting relationship with a qualifying child meaning section 117 B(6) is not applicable.
41. In relation to section 117B(4) the appellant refers in his witness evidence to having a girlfriend, but it is not made out he has a relationship with a qualifying partner on the basis the material considered at the date of the hearing. The appellant does, however, rely upon his private life.
42. The chronology shows the appellant entered the United Kingdom in 2005 without leave, claimed asylum and was entitled to remain in the UK whilst his asylum application was being processed. That took him until sometime in 2005 when appeals against the rejection of his asylum claim by the First-tier Tribunal Judge failed and he became appeal rights exhausted. In 2007 whilst reporting the appellant was told he had been granted indefinite leave to remain (ILR). Whilst the argument regarding the legality of that decision and whether it created a legitimate expectation has been discussed at length in the error of law finding and the decision of the First-tier Tribunal, the appellant believed he had lawful leave even though the reality of the situation is that he did not.
43. The issue is, therefore, the weight to be given to the appellant's side of the balancing exercise during the time is leave in the United Kingdom has been precarious. That must relate to all his time in the United Kingdom as it has not been found he has been lawfully granted ILR.
44. The definition of precarious status, for the purposes of section 117B(5), has been clarified in case law as being a reference to anyone who, not being a citizen of the United Kingdom, is present in this country and who has leave to reside here other than to do so indefinitely' - Rhuppiah v. Secretary of State for the Home Department [2018] UKSC 58 .
45. It is accepted, however, that the little weight provision is not a fixed element and that more than a "little weight" can be given to a private life of a person with "precarious" immigration status where there are "particularly strong features". The particular aspects of this case which require very careful consideration of this aspect and the weight to be given to the appellants private life are set out in detail in the error of law determination.
46. It is also important to bear in mind that the private life established is not confined to the initiation, or creation of the private life in question

but extends to its continuation or development' - see Deelah (section 117B – ambit) [2015] UKUT 00515 (IAC) (30 July 2015) . I accept the appellant's arguments regarding his desire to be able to continue to reside in the United Kingdom to develop his private and eventually to form a family life here.

47. As noted by Mr Karnik, there is still no explanation from the Secretary of State as to what caused the issues outlined in his skeleton argument and the error of law determination but the fact is that whatever those reasons were, which the facts indicate was confusing this appellant with another similarly named individual, it is the factual matrix that exists at the date of the appeal hearing that is important.

48. In the Error Law hearing it was written:

49. In relation to Article 8 Mr Karnik pleads:

> Article 8
>
> 47. The FTT erred by misapplying the law in respect of article 8. Contrary to the FTT's approach the issue was not simply a passage of time, the dysfunctionality of the operation of the system in his case had to be taken into account EB (Kosovo) v SSHD [2008] UKHL 41. The weight accorded to immigration control had to be recognised as moveable, Remi Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098. 48. A month before the FTT hearing the Tribunal recognised as much in circumstances echoing the Claimant's own in Birch (Precariousness and mistake; new matters : Jamaica) [2020] UKUT 86, where the Tribunal considered how article 8 should be considered in circumstances where a person mistakenly thought they had been granted ILR. Between [17-18] the President said:
>
> 17. Between 2007 or 2008 and 2015 the appellant thought she had indefinite leave to remain. .... In considering the "public interest question" the Judge ought to have taken into account whether a "less stringent approach might be appropriate". Judge Carroll took no notice of the Agyarko approach despite its having been cited on the appellant's behalf: paragraph 23 of the Judge's decision notes the period of time, the mistake, and the respondent's acceptance of it, but in the end states simply that "It remains the case that the appellant had no valid leave to remain from 2001".
>
> 18. That was an error of law. The Judge should have treated the period during which the appellant thought she had leave differently from the periods in which she knew she had no leave. Given the extent of the former, and the relationships and the conduct of her private life during it, it is impossible to say that the result in general, and in the application of s 117B, would or should have been the same if this factor had been taken into account. The Judge's decision must be set aside.
>
> 49. The failure to follow the approach required by Remi Akinyemi v SSHD (No 2) and Birch was a misapplication of the law relating to article 8, and was an error.
>
> 50. The fact that the Claimant had been led to believe that he had LTR was a material factor in the article 8 evaluation.

50. The finding is Birch makes reference to [53] of the decision of the Supreme Court in Agyarko [2017] UKSC 11 in which it was held:

> 53. Finally, in relation to this matter, the reference in the instruction to "full knowledge that their stay here is unlawful or precarious" is also consistent with the case law of the European court, which refers to the persons concerned being aware that the persistence of family life in the host state would be precarious from the outset (as in Jeunesse, para 108). One can, for example, envisage circumstances in which people might be under a reasonable misapprehension as to their ability to maintain a family life in the UK, and in which a less stringent approach might therefore be appropriate.

51. It is quite clear on the facts of this appeal that the appellant, at least between the period it appeared he was granted ILR and the time it was made clear that the Secretary of State's view was that this grant had been made incorrectly, that the appellant's claim that he did not have full knowledge that his stay in the UK was unlawful or precarious has merit. It is clearly a reasonable misapprehension as to the appellant's ability to develop and enjoy his private life in the United Kingdom during the time that he believed he had been granted permission to remain.
52. 'It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay…' TZ (Pakistan) and PG (India) v. Secretary of State for the Home Department [2018] EWCA Civ 1109 (17 May 2018) [2018] Imm. A.R. 1301
53. In EB (Kosovo) (FC) v SSHD [2008] UKHL 41 the House of Lords said that delay could be relevant in three ways:
54. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. To the extent that it is true the applicant's case will be strengthened.
55. Secondly, delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as relevant to the quality of the relationship. With delay the sense of impermanence in such a relationship will fade (or as the Court of Appeal later put it in BS (Congo) [2017] EWCA Civ 53 –"delay tempers precariousness").
56. Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results.
57. The Supreme Court in Agyarko [2017] UKSC 11 considered at para 52, referring to EB (Kosovo), that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish or looking at the matter from the opposite perspective, the

weight to be given to precarious family life was liable to increase if there was a protracted delay in the enforcement of immigration control.

58. In relation to the first matter; it is clear that during the period the appellant has been in the United Kingdom, particularly during the period he mistakenly believed he had leave to remain, he has been able to develop a strong private life of the type he would not have been able to develop had he believed that he had no right to remain in the United Kingdom.

59. In relation to the second issue the delay in resolving the appellant situation, particularly from 15 February 2007 when the Secretary of State acknowledged that there was some element of duplication which needed looking at in relation to the alleged grant of leave to the appellant as discussed elsewhere, the eventual refusal of the appellant's application to renew his travel documents in which it was specifically claimed he had no right to remain in the United Kingdom, and the general history of this matter; supports a finding that the weight to be given to the public intertest in the challenge to the appellant's private life in the United Kingdom should be substantially reduced on the facts of this case.

60. In relation to the third element, it is submitted by Mr Karnik in his skeleton argument this case clearly demonstrates a dysfunctional system in which despite repeated attempts to try and obtain clarity as to why what happened did happen, no explanation is as yet forthcoming. It is appreciated the Secretary of State has at various times in the field of immigration and asylum law faced great pressures upon the system for determining claims in the United Kingdom but it is not made out that, despite the background concerns and pressures that exist within the Home Office which often provides a defence of Secretary of State for mistakes that are made, that the error in this case arose simply as a result of the same, but as a result of an individual transposing the details of a different person and those of this appellant. Human error. It is clear that the appellant sought clarification both directly and through his previous representatives yet the Secretary of State appeared unable to resolve the issue. What is clear is that the actions of the Secretary of State's representative who dealt with this matter, as a result of the unexplained issues, created a situation that was unfair to the appellant.

61. What is clear is that the private life of the appellant was created and strengthened at the time he genuinely believed he had a right to remain in the United Kingdom. He was entitled, as provided by the law, to challenge any decision of the Secretary of State suggesting he was not entitled to ILR to the Courts and Tribunal's. Although he did not succeed in so far as the legitimate expectation concept is understood in law, I find that the weight to be given to the public interest is considerably reduced in this matter when assessing the competing interests and the Secretary of State's desire to remove the appellant from United Kingdom in breach of the appellant's reliance on

protected rights pursuant to article 8 ECHR, as a result of the respondent's failings.

62. Having undertaken the necessary balancing exercise I find, for the reasons set out the error of law decision, Mr Karnik's written and oral submissions, and the reasons stated above, that notwithstanding the inability of the appellant to satisfy the Immigration the impact of the reduction of the weight given to the public interest as a result of the matters referred to above, is that the Secretary of State has been unable to establish that the interference in the appellant's private life is proportionate. It is clear that a combination of factors in favour of the appellant outweighs the public interest in the balancing exercise when the reduced weight it is appropriate to give to the public interest is taken onto account.

63. I therefore allow the appeal on Article 8 ECHR grounds outside the Immigration Rules.

Decision

64. **I allow the appeal.**

Anonymity.

65. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed…….
Upper Tribunal Judge Hanson
Dated 25 May 2022