IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000494
(UI-2022-001764, UI-2022-001772)
First-tier Tribunal No: PA/04797/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of December 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Shah Faisal Hotak
(ANONYMITY DIRECTION REVOKED)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr T. Hodson, Counsel, Elder Rahimi Solicitors

Heard at Field House on 27 September 2024

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born in 2000. He appeals against a decision of the Secretary of State dated 27 November 2020, supplemented by a decision dated 15 September 2023, to refuse his humanitarian protection claims, and an associated human rights claim, taken in relation to the his prospective deportation for a number of criminal offences.

Principal controversial issues

2. The appellant's case is based on his likely reception in Afghanistan under Taliban rule. His case is that he would face a real risk of serious harm (for the purposes of Article 3 ECHR) or being persecuted (for the purposes of the Refugee Convention) in Afghanistan on account of his lacklustre engagement with the Islamic faith, his inability to comply with Afghan social mores, and his westernised presentation and lifestyle.

3. The Secretary of State disagrees. She contends that the appellant would not be at a real risk of serious harm upon his return. General conditions in Kabul are not such that a young Afghan male would face such a risk. He may have to modify his behaviour to fit in, but he will be able to do so in a manner that does not offend the Refugee Convention.

4. The principle controversial issues, as refined at the hearing, are therefore:

   a. Does the appellant face a real risk of serious harm in Afghanistan, arising from (i) general conditions or (ii) his personal characteristics?

   b. If the appellant's personal characteristics do, in principle, expose him to a real risk of serious harm, could he avoid that risk by modifying his behaviour or otherwise complying with the Taliban's religious expectations, or Afghan social mores and expectations?

   c. If the appellant has to modify his behaviour to avoid a real risk of serious harm, would that amount to "being persecuted" for the purposes of Article 1A(2) of the Refugee Convention?

5. It is common ground that the appellant's criminal convictions do not trigger the presumption contained in section 72 of the 2002 Act. That is because he has not received a single sentence of imprisonment of at least two years. His offences were committed before 28 June 2022, meaning that he is not caught by the reduction of the threshold to twelve months by section 38 of the Nationality and Borders Act 2022.

6. The appellant does not pursue a standalone Article 8 ECHR claim. It is agreed that any Article 8 claim stands or falls with the appellant's primary protection-based case.

Procedural and factual background

7. This appeal is brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The matter is being heard in the Upper Tribunal under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, in light of my earlier decision, sitting with Deputy Upper Tribunal Judge Hanbury, dated 25 June 2024, setting aside a decision of the First-tier Tribunal dated 4 January 2024 which allowed the appeal. The full procedural and factual background is set out in my earlier decision annexed to this decision.

Anonymity

8. An order for anonymity was made by the First-tier Tribunal. In light of this appeal being allowed, the order is no longer required. The interests of open justice are such that the appellant should be identified. I lift the order. Either party may apply to the Upper Tribunal within 7 days of being sent this decision to re-instate the order for anonymity. Such an application must be supported by evidence.

Legal framework

9. Article 3 of the European Convention on Human Rights is titled "prohibition of torture". Is provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

10. Article 1A(2) of the Refugee Convention defines "refugee" to mean a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

11. The headnote to *YMKA and Ors ('westernisation') Iraq* [2022] UKUT 16 (IAC) summarises the principles applicable to this appeal:

> "The Refugee Convention does not offer protection from social conservatism per se. There is no protected right to enjoy a socially liberal lifestyle.
>
> The Convention may however be engaged where
>
> (a) a 'westernised' lifestyle reflects a protected characteristic such as political opinion or religious belief; or
>
> (b) where there is a real risk that the individual concerned would be unable to mask his westernisation, and where actors of persecution would therefore impute such protected characteristics to him."

12. It is for the appellant to establish his case to the lower standard, namely that there is a real risk, or reasonable likelihood, of serious harm or persecution.

Hearing

13. The resumed hearing took place before me sitting alone on 27 September 2024. I heard evidence from the appellant, his sister R, and his partner F. They adopted their statements and were cross examined. The appellant adopted three witness statements, dated 14 July 2021, 31 July 2023 and 3 September 2024. I do not propose to set out the entirety of the witnesses' evidence, or the parties' submissions, in this decision, but will summarise their salient features to the extent it is necessary to reach and give reasons for my findings.

14. Mr Hodson relied on a helpful skeleton argument dated 12 September 2024. In addition, I had the benefit of the original "error of law" bundle prepared by the Secretary of State, a bundle prepared by the appellant's solicitors entitled the "missing documents bundle", and a further bundle prepared for the resumed hearing on 27 September 2024. All page references are to that latter bundle.

15. I heard submissions from both advocates and reserved my decision.

Findings

16. I have reached my findings having considered the entirety of the evidence, in the round, to the lower standard. The evidence includes extensive country materials. I have read everything to which I have been referred.

Country materials: general conditions

17. I start with the generalised situation, and any generalised risk, in Afghanistan, specifically Kabul. Prior to the resumption of Taliban rule in Afghanistan on 15 August 2021, there were a number of country guidance cases addressing this issue (the most recent being *AS (Safety of Kabul) Afghanistan CG* [2020] UKUT 130 (IAC)). Those decisions were based on an entirely different evidential landscape to the present situation. I am satisfied that there is cogent evidence supported by strong grounds to depart from those earlier findings. The change in country conditions is one reason why the Secretary of State was directed by the First-tier Tribunal to serve a supplementary decision letter, namely the decision of 15 September 2023 ("the 15 September decision"). There is no more recent country guidance decision issued by this tribunal. I will therefore look to the materials relied upon by the parties in these proceedings.

18. The 15 September decision outlines on a number of country guidance authorities pre-dating 15 August 2021. The decision accepts that the political and security situation, and socio-economic conditions, have changed significantly since the country guidance authorities preceding that date. Some of the statistics quoted in the 15 September decision summarise the vast increases of people in Afghanistan who are now expected to need some form of humanitarian assistance; in 2019, this was estimated to be in the region of 6.3 million people, by 2021 that had increased to 18.4 million, and the projected increase in 2022 was 24.4 million. The letter describes how asset freezes and reduced foreign funding had led to a severely fragile economy and reduced employment. As many as 500,000 security forces personnel were out of work. Male unemployment was on the rise. There were few opportunities for casual employment. Those in government roles had not been paid for many months. Costs of basic provisions had risen substantially. Food security had deteriorated since 15 August 2021. Acute food insecurity was estimated to affect 22.8 million people by 2022 (55% of the population), with 8.7 million at risk of famine-like conditions. The urban population was suffering from food insecurity at a similar rate to rural communities. The healthcare system was on the brink of collapse. Hospitals lack basic medicines, equipment and food. There were 5.5 million internally displaced persons. The Taliban-led government was unable to provide for the needs of its citizens.

19. Against that background, the 15 September decision stated that the "humanitarian situation is not so severe that in general, a single adult male in good health like yourself, is likely to face a real risk of serious harm. This is because the conditions do not amount to torture or inhuman or degrading treatment…"

20. The most recent Country Policy and Information Note published by the Secretary of State on this issue to which I was taken, *Afghanistan: Fear of the Taliban (August 2024)* ("the CPIN") concludes that there is no generalised risk of being persecuted by the Taliban for all persons (see page 33). A vague or in specific fear of the Taliban does not, in the Secretary of State's view, provide a basis for recognition as a refugee. The document concludes that only certain

profiles of returnee will be at real risk of being persecuted. None of the categories listed are relevant to this appellant. The document states (page 39) that those who claim to be "westernised" are unlikely to be at risk from the Taliban. Similarly, failed asylum seekers are not, without more at a real risk of being persecuted.

21. In his skeleton argument, Mr Hodson relied on a range of materials to support the contrary proposition. This included the May 2024 *European Union Agency for Asylum Country Guidance on Afghanistan*. In the chapter addressing actors of persecution, the section concerning the Taliban authorities and associated groups states, at para. 2.1:

> "It has been reported that the human rights situation has gradually deteriorated and sources noted the tendency of the de facto administration in developing into a theocratic police state, ruling through an atmosphere of fear and abuse."

22. While *Sharia* law is now implemented by the Taliban, its interpretations vary, and its requirements, as articulated for day to day life, are rarely or only vaguely set out. Force is sometimes used to target the population. The human rights situation has deteriorated. The guidance states:

> "Human rights violations by the *de facto* authorities or by Taliban members included intimidation, ill- treatment, excessive use of force, arbitrary arrests, incommunicado detention, use of torture in detention, killings, abductions, enforced disappearances and corporal and capital punishments, including following a *de facto* court judgment." (UT Bundle, page 274)

23. Mr Hodson also relied on other sources, such as the EUAA COI Country Focus Report on Afghanistan, 5 December 2023, concerning the in-country resistance to Taliban rule, and the steps taken to quell it. The United Nations Assistance Mission in Afghanistan (UNAMA) report, *De Facto Authorities' Moral Oversight in Afghanistan: Impacts on Human Rights*, 9 July 2024, states, in relation to the activities of the Ministry for the Propagation of Virtue and the Prevention of Vice ("MPVPV"), in the Executive Summary (page 351):

> "Since its establishment, the activities of the *de facto* MPVPV have already had negative impacts on the enjoyment of human rights and fundamental freedoms in various aspects of life for people living in Afghanistan, with a discriminatory and disproportionate impact on women. The *de facto* MPVPV has issued instructions on obligations and prohibitions based on the de facto authorities' interpretation of Islamic law. The instructions are issued in a variety of formats and often only verbally, and in certain cases lack clarity, consistency and legal certainty. Failure to adhere to any of these instructions could at times lead to severe punishments. The ambiguities and inconsistencies surrounding the instructions issued, the unpredictability, severity and disproportionality of punishments associated with non-compliance, and restrictive measures to regulate activities of individuals in the private sphere all contribute to a climate of fear and intimidation among segments of people living in Afghanistan."

24. The Executive Summary goes on to state that the MPVPV has had negative impacts on the enjoyment of human rights and fundamental freedoms for those

living in Afghanistan. The focus of the discriminatory and disproportionate impacts on women. The ministry issues instructions on obligations and prohibitions which are vague and uncertain. Failure to adhere to the instructions could lead to severe punishments. It continues:

> "The ambiguities and inconsistencies surrounding the instructions issued, the unpredictability, severity and disproportionality of punishments associated with non-compliance, and restrictive measures to regulate activities of individuals in the private sphere all contribute to a climate of fear and intimidation among segments of people living in Afghanistan."

25. A report by the US Commission on International Religious Freedom, *Religious Freedom under Taliban-Controlled Afghanistan*, 7 August 2024 (page 247) also addresses the activities of the MPVPV. At page 248:

> "According to the United Nations Mission in Afghanistan (UNAMA), for example, the MPVPV instructed all Afghan men to observe congregational prayers, stating that doing so is necessary for uniting Muslims. Failure to adhere to these edicts and regulations has led to harsh penalties, including fines, detention, and corporal punishment."

26. Under the heading *Use of Corporal and Capital Punishment*, the report continues (page 248), with emphasis added:

> "Under *de facto* Taliban rule, the use of corporal and capital punishment has resumed in Afghanistan to penalize perceived violations of *Shari'a*. **Punishments include public executions, lashings and floggings, stoning, beatings, and acts of public humiliation, such as forced head shaving.** According to UNAMA, corporal punishment in Afghanistan has fallen into three categories: judicial corporal punishment, corporal punishment facilitated by nonjudicial de facto authorities, and ad hoc corporal punishment administered by a nonjudicial de facto authority. Of these, the most frequently reported punishments have been delivered by nonjudicial *de facto* authorities, including MPVPV officials."

27. In the *Conclusion* section (page 252), the report states:

> "Religious freedom conditions in Afghanistan remain dire. Under *de facto* Taliban rule, authorities have c**ontinued to repress and significantly stifle any action or behavior that does not conform with their strict interpretation of Islam.** In doing so, the Taliban has retaliated and silenced religious clerics, prevented religious minorities from observing religious ceremonies, and continued to restrict the movement and educational access of Afghan women and girls. Authorities have implemented severe forms of punishment, including detention, beatings, and execution."

28. The report of the Office of the United Nations High Commissioner for Human Rights (OHCHR), *The human rights situation in Afghanistan: Report of the Office of the United Nations High Commissioner for Human Rights (September 2024) (Advance unedited version)*, 3 September 2024, states (page 112):

> "The de facto Ministry for the Propagation of Virtue and Prevention of Vice has continued to enforce instructions regulating the daily private and cultural life of individuals… Men must adhere to a prescribed physical appearance, according to which beards shorter than the length of a fist and 'Western style' haircuts are prohibited. They are also required to attend congregational prayers."

Conclusion on general risk on return in Afghanistan

29. Drawing this analysis together, while the overall humanitarian situation is very poor, on the evidence before me it does not, without more, automatically engage Article 3 ECHR for all returnees. Indeed, Mr Hodson did not contend that it would. Life is incredibly difficult for many people in Afghanistan at the moment, but there is nothing in the materials to which I have been referred which merits the conclusion that a young adult male in good health, who is familiar with Afghan culture and the language, returning with the assistance of a relocation grant from the Secretary of State and to in-country family, will automatically and without more be at a real risk of Article 3 mistreatment.

30. I do accept, however, that if such a returnee failed to conform to the societal expectation imposed upon him by Taliban rule, and the various (and varying) de facto manifestations concerning everyday life, there could be a real risk of serious harm. The materials that I have been taken to all demonstrate that there must be some form of link between the conduct of the person concerned, on the one hand, and the retributive reactivity of the Taliban or related individuals, on the other. While some will be at a particular risk, such as women and former officials who worked with coalition forces, none of those categories are relevant to this appellant. Moreover, while there are certain individuals who are subject to a heightened risk profile, the reality appears to be that there are millions of men who are still able to go about their daily lives without encountering significant difficulties, provided there is a degree of outward conformity with the expected social mores and customs. For the vast, vast majority of men in Afghanistan, that is the reality of daily life.

Issue (1): Whether the appellant faces a real risk of serious harm in Afghanistan?

31. Turning to the first principle controversial issue identified above, I conclude that the appellant does not face a real risk of serious harm arising from the general conditions in Afghanistan. Indeed, Mr Hodson did not seek to advance a stand-alone Article 3 case based on the general in-country conditions.

32. Next, I must assess whether the appellant's personal characteristics would, in the particular circumstances of his return and in light of his current and prospective lifestyle and beliefs, place him at a real risk of serious harm. To address this, I turn to the evidence in the case.

33. The appellant has a serious criminal record for committing offences relating primarily to drugs, weapons and violence. He has a conviction for assault against F, committed in the context of their relationship. He also has a conviction for breaching a criminal behaviour order. His most recent conviction was in 2023.

34. There are relatively few disputed facts in these proceedings relating to the appellant's evidence. He presented as a young man who, by Mr Hodson's acceptance, had a "wayward" approach to life. He is nominally Muslim but his

faith means very little to him. He wears a short beard and has a short haircut. He does not wear Afghan dress. The relationship with Ms F is outside of marriage and, while culturally acceptable in the United Kingdom, would not be so in Afghanistan. In his statement dated 3 September 2024, the appellant said that he does not try to live "according to some strict Islamic code or anything like that." He does attend the mosque, but only very occasionally. He has no in-principle objection to attending the mosque or saying prayers, but said (para. 9) "I am not sure whether I am truly a believer by the standards that now apply in Afghanistan."

35. I pause here to note that Mr Hodson places no reliance on the relationship with F as part of the broader Article 8 assessment; intending no discourtesy to F, the significance of the appellant's relationship with her is that, on his case, it demonstrates the appellant's willingness to engage in a relationship that would not conform to the religious or social expectations of life in Afghanistan. Moreover, F, while she is originally from an Islamic country and is now a naturalised British citizen, does not appear adhere to strict Islamic cultural expectations when living in the United Kingdom. The picture that emerges of the appellant's relationship with F is of one living in a westernised manner, at odds with the approach the Taliban would take in Afghanistan. There is no suggestion that she would return with him (and I recall that Mr Hodson as not sought to present her as a "qualifying partner" for the purposes of section 117C of the 2002 Act) with the consequence that the appellant's relationship with her would not present barriers to societal and cultural acceptance in Afghanistan.

36. At para. 11 of his 3 September 2024 statement, the appellant said that his most significant fear was that he did not know how to keep up the pretence of being a strict Muslim, and being able to conform to the rules imposed by the Taliban concerning social expectations.

37. I have considered the evidence of R, and F. Their evidence was helpful. It supports the overall image conveyed by the appellant concerning his presentation, attitude to his criminal offending, and overall approach to life. In short, the appellant's presentation is presently significantly different from that which the background materials contend is expected of young men in Afghanistan.

38. If the appellant were to live in Afghanistan in the same way he has lived in the United Kingdom, wearing the same clothes, drinking, taking drugs and selling drugs, he would undoubtedly attract the adverse attention of the Taliban, or de facto Taliban enforcers in Afghanistan. More significantly, if he does not attend the mosque and manifest outward adherence to the Islamic faith in a manner that satisfies the MPVPV, he may face harsh punishments.

Issue (2): Appellant will need to adapt his behaviour

39. In order to stay safe in Afghanistan, the appellant will need to adapt to Afghan cultural mores and expectations. Millions of men do this on a daily basis. The evidence does not show that there is a generalised risk to which young men in comparable situations face. Life is hard in Afghanistan but many, men in particular, cope. They do so by adapting to the cultural, societal and religious requirements set by the Taliban.

40. In my judgment, the appellant has demonstrated that he has a degree of resolve to his personality. He has previously had the resolve to defy the wishes of

those around him, and, according to F, thinks that he has brought shame on his family through his offending (see para. 16 of F's witness statement dated 21 August 2024) and through his lacklustre approach to the cultural and religious values under which he was brought up. He is his own man, when he wants to be.

41. While the appellant is understandably concerned at his ability to "fit in" in Afghanistan, I find that he retains sufficient cultural links with the country, and a sufficient understanding of what life there will involve, that he will know what to do in order to adapt to daily life there. The appellant's time in the United Kingdom has demonstrated that he is a streetwise young man. He familiarised himself with the subculture of gangs and drugs on the streets of London. He knew how to act in that context in a way to keep himself safe and was able to adapt to life in that very unique subculture. That was against a background of having moved to the United Kingdom aged 13 with no knowledge of English and experience only of culture and life in Afghanistan, and to a limited extent, Pakistan.

42. While the appellant has subjective fears concerning his ability to familiarise himself with the expectations to which he will be subject in Afghanistan there is no evidence before me that those subjective fears are at a real risk of translating into an objective reality. He does not fall into a risk profile of the sort which is more likely to engender attention upon his return, such as a former government official, security worker, a member of the judiciary, or being a woman. There will be a period of adjustment, undoubtedly, but he will be able to use his sense of being streetwise, and his ability to adapt to life in a violent subculture in the United Kingdom, to stay safe in Afghanistan. He has not offended since May 2023 and has demonstrated his ability to stay out of trouble. He would be able to do this in Afghanistan.

43. Moreover, the appellant would not be returning as a lone male with no recent experience of the country and no support. He visited in 2017 and 2018, wearing traditional dress at times (para. 12, statement dated 3 September 2024), staying with family in the family compound. Both of his parents still have family in Afghanistan.

44. While the appellant's evidence was that he fears that his Afghanistan-based extended family are angry with him for breaking of an arranged engagement (see para. 17 of his statement dated 3 September 2024), I do not accept that evidence. The appellant referred to the broken engagement in his statement dated 31 July 2023, he simply stated that his father – who enjoys asylum status in the UK – was not happy about that decision. He made no reference to a fear of extended family members in Afghanistan on that account.

45. Under cross-examination, Ms Cunha explored the societal attitudes of his wider family, in particular in relation to his sister who lives in Afghanistan and who is presently in Iran for medical treatment. The appellant's evidence was that his sister was permitted by the broader family, including her husband's family who live in Iran, to travel unaccompanied between Afghanistan and Iran. I accept Ms Cunha's submission that the appellant's broader extended family do not embody the same restrictive societal attitudes which are characterised by the broader Taliban rule. I also note that the appellant's sister and father gave witness statements in his support, and his sister attended the hearing to give evidence, notwithstanding his criminal convictions and the fact he broke off the arranged marriage. Drawing this together, I find that the appellant has not demonstrated that he is in any way alienated from his broader family, either in Afghanistan, all those members of the family who were in the United Kingdom.

46. The main hesitation I have in reaching a conclusion that the appellant's adaptation would place him out of harm's way is that the approach of the Taliban is often unpredictable, and potentially extreme. I have reflected at length on this issue. Ultimately, however, I conclude that the appellant would be returning as a young, healthy male, with cultural experience, and with prospective in-country family support. He adapted to life in the United Kingdom having moved here when he was 13 years old without speaking English. While, as I have set out above, he was to fall into a life of crime while surrounded by bad influences, he was nevertheless able to adapt to his environment, albeit through making choices which many would consider to be reprehensible. He identifies as a Muslim and is familiar with the requirements of adherence to that faith. His wider family, he said in evidence, "are religious" and will be able to provide him with guidance and instruction to assist with his outward manifestation of the faith. He will be returning to a place where the norm is to practice Islam openly and in a vivid manner. He will be able to adapt in order to fit in.

47. The evaluative, risk-based, prospective assessment that I must make looks to what the appellant's likely reception and any consequences would be upon his return to Afghanistan.

48. The appellant would only be at risk if he chose deliberately and openly to conduct himself in a way that would attract the adverse attention of the Taliban by failing positively to confirm to the expected religious expectations upon him. I find that he will be capable of adapting his religious demeanour and presentation to fit in.

49. I therefore conclude that the appellant has not demonstrated that his personal characteristics will place him at a real risk of being subject to serious harm because he will be able to adapt his behaviour in such a way to avoid attracting the adverse attention of the Taliban.

Issue (3): modification of behaviour contravenes the Refugee Convention

50. Mr Hodson relied on *HJ (Iran)* [2010] UKSC 31 and *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 as authority for the proposition that the appellant should not be required to modify his behaviour, including by feigning adherence to a set of values he does not believe in, in a manner that is contrary to his beliefs and identity, in order to avoid being persecuted.

51. For example, Mr Hodson put it in this way at para. 69 of his skeleton argument:

> "When it comes to religion, the Appellant is entitled to indifference or at best to being a tepid Muslim who is unmoved to act in accordance with strict Sharia law."

52. See also para. 70:

> "It is submitted that a person should not be compelled to act in the matter of religious observance purely, or even partly, out of fear of punishment which would be not merely disproportionate and unjust but would meet the threshold of cruel and inhuman or degrading treatment under Article 3 ECHR."

53. Those propositions are correct and I agree with them. Although there has previously been discussion in these proceedings of whether being "westernised"

can engage the Refugee Convention, properly understood the central question is whether the requirements to which the appellant would be subject, namely to manifest (falsely) an adherence to extremist Islam, would offend the Refugee Convention. Put another way, it relates to the Convention impact of being required to adopt and manifest a version of religious faith that is at odds with the appellant's own religious beliefs. To the extent it concerns the appellant's "westernisation", it is as a facet of that issue.

54. In these proceedings, the appellant identifies, in broad terms, as a follower of the Islamic faith. He goes so far as to clarify that his objections to engaging in an outward show of strict *Sharia* compliance do not stem from a non-Islamic standpoint. See para. 8 of his witness statement dated 3 September 2024:

> "…while I do consider myself a Muslim, I certainly don't have any firm beliefs and do not try to live my life according to some strict Islamic code or anything like that."

55. See also para. 9:

> "I can't pretend to object on principle to attending mosque saying prayers, but I am not sure whether I am truly a believer by the standards that now apply in Afghanistan."

56. It is clear from the background materials to which I have been referred that the form of Islam practised in Afghanistan is the ultra-conservative. To many, it would be classified as an extremist mindset, with good reason. So much is clear from the many and vivid ways in which the Taliban expect followers of the Islamic faith to conduct themselves in Afghanistan, based on the background materials before me, as summarised briefly above. Afghanistan was already, before 15 August 2021, a majority Islamic country. When the Taliban re-took Afghanistan on that date, the expectations on adherents of the faith became significantly more onerous, the mindset became more extreme, and the punishments for non-compliance were increased such as to encompass Article 3 mistreatment. The standards that now apply in Afghanistan concerning religious behaviour would require the appellant to take positive action that he would otherwise not seek to take to pretend to be a follower of the strict *Sharia* version of Islam that is now imposed by the State in Afghanistan. It would be necessary for him to confirm outwardly in order to avoid Article 3 mistreatment.

57. On any view, the appellant's version of his faith is many steps removed from what would be expected of him upon his return to Afghanistan. Lord Dyson addressed this scenario through the lens of the Refugee Convention at para. 46 of *RT (Zimbabwe)*:

> "45. There is no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer, any more than there is support for a distinction between the zealous believer and the marginally committed believer. All are equally entitled to human rights protection and to protection against persecution under the Convention. None of them forfeits these rights because he will feel compelled to lie in order to avoid persecution."

58. The approach in *RT (Zimbabwe)* to political expression applies by analogy to religious expression. See also *WA (Pakistan) v Secretary of State for the Home*

Department [2019] EWCA Civ 302 in relation to the suppression by Ahmadis of their faith.

59. On the evidence before me, this appellant would be compelled, on pain of Article 3 mistreatment, to embody an ultra-conservative and extreme interpretation of Islam, contrary to his own indifferent and, as Mr Hodson put it, tepid beliefs. Every aspect of his public-facing life would have to be defined by a false manifestation of an extreme form of Islam in which the appellant has no personal interest. While I have found that he would, in practice, be able to manage doing that, the fact that he is so anxious about his ability to do so reveals just how much of a falsehood he would be expected to live out in order to survive. For the appellant to be compelled to adopt such expressions of false faith would be just as much persecution in this context as it was in *RT (Zimbabwe)* for those required to manifest false support for Zanu PF on pain of mistreatment and harm.

60. On the present authorities, this situation would amount to one of persecution. The appellant is not a returnable refugee under Article 33 of the Convention, in light of the terms of the version of section 72 that is applicable to him (Parliament did not make the change achieved by the Nationality and Borders Act 2022 retrospective). This appeal is therefore allowed on Refugee Convention grounds. The Convention subsumes the ECHR in this context, meaning the appeal is also allowed on human rights grounds.

Notice of Decision

This appeal is allowed on Refugee Convention and on human rights grounds.

I make a fee award for any fee that has been paid or is payable.

The order for anonymity is lifted.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 November 2024

Annex – Error of Law decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000494

First-tier Tribunal No: PA/04797/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

Secretary of State for the Home Department

Appellant

and

[Shah Faisal Hotak]

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr T. Hodson, Counsel, Elder Rahimi Solicitors

Heard at Field House on 24 May 2024

[Anonymity order revoked]

DECISION AND REASONS

1. A central issue in this appeal is whether it would be a breach of the Refugee Convention to return a "westernised" follower of the Islamic faith to Afghanistan in circumstances when, in contravention of the prevailing social and religious norms and expectations, he may forget to attend the Mosque for prayers, thereby

exposing himself to the risk of persecution? The answer given by First-tier Tribunal Judge O'Garro ("the judge") to that question in relation to the appellant in these proceedings was "yes", and she allowed his appeal against a decision of the Secretary of State dated 27 November 2020, maintained by a supplementary decision dated 15 September 2023, to refuse his human rights and protection claim.

2. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

3. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge I. D. Boyes.

4. For ease of reference, we refer to the parties as they were before the First-tier Tribunal.

Factual background

5. The appeal had been brought by SH, a citizen of Afghanistan born in 2000, who was admitted to the United Kingdom in 2014 under family reunion arrangements to live with his father, a citizen of Afghanistan and recognised refugee. The Secretary of State refused SH's human rights and protection claims in the context of taking a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007 ("the 2007 Act"), following his conviction and subsequent sentences of a total of 28 months' of detention, for offences relating to the possession of a Class A drug with intent to supply (20 months' detention, in the form of the activation of an earlier suspended sentence of imprisonment), possession of an offensive weapon (a machete; eight months' detention, to run consecutively), and breach of a criminal behaviour order (two months' detention, to run concurrently). The appellant has other convictions pre-dating those offences, but those convictions did not trigger the automatic deportation provisions in the 2007 Act.

6. On 10 December 2019, the Secretary of State served the appellant with a notice of a decision to deport him. He claimed asylum the next day.

7. The appellant's father had (following an allowed appeal before this tribunal) been recognised as a refugee, having claimed to have fled Afghanistan twice; in 2001, in fear of the Taliban, and, having returned to Afghanistan, in 2005, in fear of the Northern Alliance, as a member of Hezb-e-Islami. He sponsored the appellant's family reunion visa to the UK. The appellant's claim for asylum was based on the risk he faced in Afghanistan through association with his father. The claim was refused.

8. These proceedings have a relatively lengthy history. The hearing before the judge was the second time the appeal was heard by the First-tier Tribunal. It was originally heard, and dismissed, by a decision promulgated on 18 August 2021. By a decision dated 4 April 2023, the Upper Tribunal set that decision aside and remitted the matter to be heard afresh by a different judge. By the time Judge O'Garro heard the second appeal, the appellant's asylum claim had evolved to include the risk arising from his perceived westernization. The Secretary of State's supplementary decision of 15 September 2023 addressed that development, plus the fall of Kabul to the Taliban. The Secretary of State maintained the decision to refuse the appellant's human rights and protection claims.

Decision of the First-tier Tribunal

9. In her decision, the judge found that the appellant would not face any risk on account of a perceived association with his father, nor on account of being perceived to be a criminal. There has been no cross-appeal against those findings, and we need say no more about them.

10. The judge's reasons for allowing the appeal may be found at paras 58 to 64. She quoted from the European Union Agency for Asylum *Country guidance: Afghanistan (January 2023)* which, at chapter 3, summarises the risk said to be faced by returnees to Afghanistan who are perceived to have transgressed religious, moral and/or societal norms. That risk includes non-attendance at Friday prayers at the Mosque. At para. 59, the judge summarised the appellant's oral evidence, in which he said in cross-examination that he does not attend the mosque for prayers "every Friday", and in which he said he does not attend the call to prayer "everyday". The judge said that the Taliban would not know about the appellant's lifestyle in the United Kingdom, but found, at para. 61, that the appellant had adopted the characteristics of a person who lives in the West in the way he dresses, and for his behaviour. In particular, found the judge, that included his "lax attitude" to the daily call to prayer, and also "not attending the mosque for prays" [sic].

11. The judge's operative findings for allowing the appeal were contained at paras 62 to 64:

> "62. Although one might expect the appellant to change his dress so as to fit into the society, he lives, I find remembering to attend the Mosque for prayers is a behaviour the appellant would have to adopt, having not been a regular attendee at a Mosque in the United Kingdom and for that reason it cannot be ruled out that the appellant might forget to attend Mosque for prayers as it is not something he is used to doing , thus exposing himself to harm as noted from the objective evidence.
>
> 63. Further, I find that the appellant's lax attitude in attending the Mosque , which he will have to change but this may take time , could result in him being seen as an "unbeliever" and that could expose him to persecution. As Judge Bruce found in *YMKA and Ors ('westernisation') Iraq* [2022] UKUT 00016 (IAC) "in a particularly hostile environment… the necessary nexus is created by the perspective of the persecutor."
>
> 64. For these reasons, I find there is a reasonable degree of likelihood for the appellant to face persecution due to his westernised behaviour. I find the appellant has established that he meets one of the exceptions to deportation and therefore he succeeds in his appeal."

12. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

13. On a fair reading of the grounds of appeal, there are three main issues:

    a. Ground 1: the judge failed to take into account the fact that the appellant had previously been found to have lied about his sexuality by a different judge of the First-tier Tribunal, in a decision dated 24 February 2022, when assessing his credibility.

b. Ground 2: the judge failed to address section 72 of the 2002 Act (serious criminals and Article 33(2) of the Refugee Convention);

c. Ground 3: the judge failed to give sufficient reasons for finding that the appellant would be unable to adhere to cultural expectations in Afghanistan. There was no evidence that the appellant would forget to attend the mosque for Friday prayers, nor evidence that he sought to argue the point.

14. We are grateful to the parties for the skeleton arguments; the Secretary of State's, dated 11 March 2024 and the appellant's, dated 17 May 2024.

15. The issues had narrowed considerably by the time the matter reached us.

16. First, in relation to ground 1, Mr Tufan accepted that there was no previous decision of the tribunal which had made findings concerning the appellant's lack of credibility. He therefore abandoned this ground of appeal. He was right to do so. The only previous decision in relation to this appellant is that dated 18 August 2021, which was set aside by the Upper Tribunal in its entirety on 22 March 2023 with no findings of fact preserved. The appellant does appear to have raised the issue of his sexuality as part of his claim for asylum: see part 4.1 of the *Initial Contact and Asylum Registration Form*. He accepted at para. 27 of his witness statement dated 14 July 2021 that he did so falsely. The judge, sitting as an expert judge and a specialist tribunal would have been well aware that aspect of the appellant's narrative, and nothing turns on account of her decision not expressly to address it as part of her findings of fact, on the facts of this matter.

17. Secondly, in relation to ground 2, Mr Tufan accepted that section 72 was not engaged in this case. That was an appropriate concession. The version of section 72 applicable to these proceedings is only engaged by single sentences of imprisonment or detention of over 24 months, and does not include the aggregate total length of separate consecutive sentences. While the Nationality and Borders Act 2022 reduced that threshold to 12 months, those amendments only apply to convictions on or after the date of section 38's commencement, namely 28 June 2022 (see sections 38(13) and 87(5)(d)), thereby not capturing the appellant's 2019 convictions.

18. The focus of Mr Tufan's submissions lay in ground 3, challenging the sufficiency of the judge's reasoning. He submitted that the judge failed to address why the appellant would not go to the mosque, namely whether an account of his religious disinclination or mere forgetfulness. The judge also failed to address whether, with societal encouragement not amounting to persecution, the appellant could be "reminded" of the need to attend the mosque.

19. Mr Hodson submitted that the judge reached her finding concerning the appellant's prospective forgetful approach to adhering to the requirements of Islam was based on his approach to the religion in this country. Her finding in that respect was hardly surprising. Moreover, there was extensive other evidence demonstrating that the appellant would not conform to the social mores of the Taliban, including his serious criminal record in the United Kingdom, and his evidence that he was a Muslim in name only. The remaining evidence before the judge included additional background materials which detailed the extensive requirements with which adherents of the Islamic faith must comply in order to meet the expectations of the Taliban. The judge was entitled to rely on that evidence, submitted Mr Hodson.

20. As we have observed above, Mr Hodson did not challenge the other findings of the judge.

The law

21. Article 1A(2) of the Refugee Convention defines "refugee" to mean a person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

22. The headnote to *YMKA and Ors ('westernisation') Iraq* [2022] UKUT 16 (IAC) summarises the principles applicable to this appeal:

> "The Refugee Convention does not offer protection from social conservatism per se. There is no protected right to enjoy a socially liberal lifestyle.
>
> The Convention may however be engaged where
>
> (a) a 'westernised' lifestyle reflects a protected characteristic such as political opinion or religious belief; or
>
> (b) where there is a real risk that the individual concerned would be unable to mask his westernisation, and where actors of persecution would therefore impute such protected characteristics to him."

Discussion: analysis of prospective persecution insufficiently reasoned

23. In our respectful view, the judge's analysis at paras 62 to 64 omitted to address certain key considerations and thereby involved the making of an error of law.

24. We accept that, in principle, a legal requirement on a returnee to feign outward adherence to and manifestation of religious belief in circumstances in which the returnee's own religious convictions (or lack of convictions) would not do so voluntarily may amount to persecution.

25. However, the judge's findings of fact were incapable of meriting that conclusion, in the circumstances of this case, for the reasons she gave. The judge did not find that the prospect of the appellant having to attend the mosque would amount to a requirement that would be inconsistent with his religious beliefs, or lack of religious belief. By contrast, she simply found that he would forget to do so.

26. We assume that it was implicit in the judge's finding that the appellant would "forget" to attend the mosque meant that there was, in principle, no Convention-based objection to him being required to do so. We doubt that the judge would have used the word "forget" if the real reason for the appellant's prospective non-attendance at the Mosque was founded in his deeper-rooted resistance as a matter of his religious identity. Mere forgetfulness seems to imply no underlying or in-principle resistance to the underlying activity. We also note that the appellant's evidence before the judge appears to be consistent with genuine Islamic faith. At para. 89 of his witness statement dated 24 June 2020, the

appellant's father said that the appellant had reconnected with his Islamic faith. The judge's summary of the appellant's oral evidence was that he does not attend the Mosque "every Friday" nor attend the call to prayer "every day". That could mean that he *never* attends, or that he attends frequently, but not on each occasion he should, or some other formulation.

27. Assuming, therefore, that the judge's findings were that there was no in-principle, Convention-based reason that the appellant could not be expected to conform to societal and religious mores by attending the mosque, we respectfully conclude that the judge erred by failing to give sufficient reasons to explain how such forgetfulness (i) would manifest itself in practice, and (ii) amounted to a Convention reason for the purposes of Article 1A(2).

28. As to point (i), we agree with Mr Tufan that the judge failed adequately to explain how or why the prevailing societal expectation of regular attendance at the mosque, and other methods of outward manifestation of the Islamic faith, which would characterise most aspects of daily life in Afghanistan would be insufficient to prompt the appellant into remembering that he needed to "live out" his Islamic faith. We also accept that, in the absence of any findings that the appellant's religious identity would be inconsistent with such regular attendance at the Mosque or other forms of outward Islamic adherence, the judge failed to address whether there would be any precursor steps prior to full punishment for non-attendance at the mosque which the appellant could reasonably be expected to comply with in order to avoid being persecuted. We note, for example, that there was no medical evidence before the judge going to the appellant's memory, or any difficulties in his cognitive functions.

29. As to point (ii), we also respectfully consider that the judge did not address the basis upon which the appellant's forgetfulness was capable of amounting to a Convention reason. On the basis of the reasoning given by the judge, it is difficult to see how forgetting to attend the mosque falls within one of the five categories of persecution contained in Article 1A(2) of the Convention, assuming that the judge's findings were that a requirement to attend the mosque in and of itself would not be contrary to the Convention, in light of the appellant's adherence to the Islamic faith, albeit that such adherence had been lacklustre recently. The judge did not expressly find that this was a situation in which the appellant would be unable to mask any underlying westernisation, for the purposes of para. (b) of the headnote to *YMKA*.

30. For these reasons, we accept Mr Tufan's submissions that the judge's operative findings were insufficiently reasoned. We set the decision of the judge aside, retaining all findings of fact with the exception of those set out below, and direct that the matter must be reheard in the Upper Tribunal. This approach is consistent with para. 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* since the degree of fact finding required is not such that, having regard to the overriding objective to decide cases fairly and justly, it is not appropriate to remit the case to the First-tier Tribunal. We also bear in mind that this matter has now been heard twice by the First-tier Tribunal, which is a factor militating in favour of retaining it in this jurisdiction in any event, in light of the overriding objective.

31. We do not preserve the judge's finding that the appellant would forget to attend the mosque and the findings consequential to that. Those findings were insufficiently reasoned.

32. We therefore direct that the appeal will be reheard in the Upper Tribunal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

33. The focus of the resumed hearing will be:

    a. Whether, upon his return to Afghanistan, if the appellant would be subject to a requirement to attend the mosque and conform to other outward expressions of the Islamic faith, that would be inconsistent with the appellant's "religion" for the purposes of Article 1A(2) of the Refugee Convention? We consider that we need to decide this issue for ourselves as it is only implicit in the judge's findings, rather than express.

    b. Whether the appellant would forget, or otherwise fail to conform with any societal or cultural expectations to which Muslims in Afghanistan are subject, in light of any cultural reminders or prompts in Afghan culture?

    c. Whether, in light of the answers to the above two questions and any other relevant factors (including any failure by the appellant to mask his westernisation), the appellant is a "refugee" for the purposes of the Refugee Convention?

Notice of Decision

The appeal is allowed.

The decision of the First-tier Tribunal involved the making of an error of law and is set aside, subject to the findings of fact summarised above being preserved.

[Directions omitted from this version]