Trinity Term
[2015] UKSC 40
On appeal from: [2013] EWCA Civ 1609 and 1625

JUDGMENT

TN and MA (Afghanistan) (Appellants) *v* Secretary of State for the Home Department (Respondent)

AA (Afghanistan) (Appellant) v Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

24 June 2015

Heard on 2 and 3 March 2015

Appellants (TN & MA)
Becket Bedford
Zane Malik
(Instructed by Sultan Lloyd Solicitors)

Appellant (AA)
Stephen Knafler QC
Anthony Vaughan
(Instructed by Luqmani Thompson & Partners)

Respondent
Jonathan Hall QC
David Blundell
(Instructed by Government Legal Department)

Intervener (The Office of the Children's Commissioner – Written Submissions Only)
Nadine Finch

(Instructed by Freshfields Bruckhaus Deringer LLP)

LORD TOULSON: (with whom Lord Neuberger, Lady Hale, Lord Wilson and Lord Hughes agree)

1. The appellants have four things in common. They have Afghan nationality. They came to the UK as unaccompanied minors. They claimed asylum. Their claims were rejected. The present appeals involve two discrete sets of issues. They relate a) to the sufficiency of the appellate process and b) to the respondent's obligations with regard to family tracing.

Background

2. In 1999 the EU Council of Ministers resolved to work towards a Common European Asylum System. There followed a group of Council Directives which together form a code. They are Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ("the Reception Directive"), Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive") and Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status ("the Procedures Directive").

3. Article 39 of the Procedures Directive requires Member States to "ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against … a decision taken on their application for asylum".

4. The main provisions of domestic law regarding challenges to asylum decisions are in the Nationality, Immigration and Asylum Act 2002 ("NIAA"). The provisions applicable in these cases are those contained in that Act as it was prior to the Immigration Act 2014. In the form with which we are concerned, section 82 gives a general right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) from an "immigration decision" as defined in section 82(2). This includes a refusal of leave to enter the UK; a refusal to vary a person's leave to enter or remain if the result is that the person has no leave to enter or remain; or a decision to remove them. Additionally, section 83 (as amended by section 26(3) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004) provides:

> "(1) This section applies where a person has made an asylum claim and –

a) his claim has been rejected by the Secretary of State, but

b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).

(2) The person may appeal to the Tribunal against the rejection of his asylum claim."

(Section 82 was substantially amended and section 83 was repealed by section 15 of the Immigration Act 2014, which came into force, subject to various savings, on 20 October 2014.)

5. Lindblom J explained in his judgment in TN's case, [2011] EWHC 3296 (Admin) at para 22, the reason given by the government, when introducing section 83, for confining it to cases where an unsuccessful applicant for asylum is given leave to remain for more than a year. The reason was that in circumstances where a person arrives from a country in turmoil, and their claim for asylum is rejected, but it is not immediately safe or practicable to return them, they will be given leave to remain for a short period with a view to reconsidering at the end of that period whether the situation has become sufficiently stable for it to be possible to return them. Kosovo was given as an example. If at the end of the period of leave there is a refusal to extend it, the person concerned will have an immediate right of appeal under section 82 against the refusal and against any removal decision. The likely effect of providing an earlier right of appeal under section 83 would be to clog up the appeal system before it became necessary for their appeals to be heard.

6. It has long been the policy of the government not to return an unaccompanied asylum seeking child ("UASC") unless the respondent is satisfied that there are proper reception arrangements in the country to which they are to be removed. Under section 55 of the Borders, Citizenship and Immigration Act 2009 the respondent has a duty, in summary, to ensure that any of her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. Statutory guidance issued under that section, "*Every Child Matters*" (November 2009), para 2.7, requires the Border Agency to act in accordance with principles which include the following:

"In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although

not necessarily the only consideration) when making decisions affecting children. …

Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree."

7. The respondent's published guidance on *Processing an Asylum Application from a Child* states at para 17.7:

"Discretionary Leave under UASC Policy

The UK Border Agency has a policy commitment that **no unaccompanied child will be removed from the United Kingdom unless the Secretary of State is satisfied that safe and adequate reception arrangements are in place in the country to which the child is to be removed**.

Where:-

the child does not qualify for asylum or HP [humanitarian protection] or otherwise under the general DL policy, and;

we are not satisfied that the child will be able to access adequate reception arrangements in the country to which they will be removed;

the child should normally be granted DL **for three years or, with effect from 1 April 2007, until they are 17.5 years of age,** whichever is the shorter period. This applies in all cases except where stated otherwise in country specific operational guidance notes (OGN)."

Paragraph 17.8 states:

"Best interests and duty under section 55 of the Borders, Citizenship and Immigration Act 2009.

> The availability of safe and adequate reception arrangements is only one factor to consider in deciding on whether the person should be granted Discretionary Leave under the UASC policy. Full account also needs to be given to the following:
>
> > the best interests of the child must be taken into account as a primary consideration in the decision; and
> >
> > the duty to have regard to the need to safeguard and promote the welfare of the child in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 and the statutory guidance that accompanies it ("Every Child Matters" …).
>
> …
>
> The best interests of a child, whilst a primary consideration, is not the sole consideration when considering whether a child should be granted leave to remain or return to the country of origin. Other factors, including the need to control immigration, are also relevant.
>
> In some cases, it may be reasonably clear that the child's best interests may be served by returning to the country of origin – for example where the family has been traced and it is clear that the return arrangements can be made direct to parents.
>
> In other cases, the decision on whether to return will be a matter of making a careful assessment of the child's best interests and balancing those interests against the wider public interest of controlling immigration."

8. In the case of UASCs from Afghanistan whose applications for asylum are rejected, it has been the respondent's settled practice at all relevant times to grant them discretionary leave to remain until they reach the age of 17 years six months. Whether the period of leave exceeds one year will therefore depend on the age of the individual child.

9. Family tracing is one aspect of concern for an unaccompanied child's welfare. The Reception Directive lays down minimum standards for the reception of asylum seekers in Member States: article 1. Chapter IV (articles 17 to 20) contains

provisions for protecting the welfare of persons with special needs. Article 19 is concerned with unaccompanied minors. Article 19.1 requires the host Member State to ensure that the minor is represented by "legal guardianship", or by an organisation which is responsible for the care and well-being of minors, or by another appropriate organisation. Article 19.2 requires the placement of UASCs, from the moment that they are admitted to the territory until they are obliged to leave, with adult relatives, or with a foster-family, or in accommodation centres with special provisions for minors, or in other accommodation suitable for minors. Article 19.3 provides:

> "Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety."

The importance of the second sentence cannot be overstressed. Recognising the potential delicacy and sensitivity of the problem, article 19.4 provides:

> "Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work."

10. The only reference to family tracing in the Qualification Directive is in Chapter VII, which deals with the content of international protection, ie the rights of those who have refugee status or are entitled to humanitarian protection, rather than the process of determining whether they qualify for such protection. Article 30.1 requires Member States, as soon as possible after the granting of refugee status or subsidiary protection status, to take the necessary measures to ensure the representation of unaccompanied minors by legal guardianship, or by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order. The rest of article 30 in effect echoes article 19 of the Reception Directive.

11. The Procedures Directive lays down minimum standards on procedures in Member States for granting and withdrawing refugee status: article 1. Article 17 contains certain provisions about unaccompanied minors (essentially to ensure that they are properly represented, properly informed and that their best interests are taken into account in the process as a primary consideration), but the Procedures

Directive makes no mention of family tracing as part of the process for determining the application.

12. Article 19.3 of the Reception Directive was implemented in domestic law by regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7). Regulation 6(1) provides:

> "So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum."

Regulation 6(2) provides:

> "In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety."

Facts

13. TN travelled to the UK in August 2010 in the back of a lorry. On 8 September he was arrested while working illegally and was put into accommodation provided by Birmingham City Council social services. Two days later he applied for asylum. The basis of his claim was that in July 2009 two paternal uncles, who were members of the Taliban, visited the home where TN lived with his parents, two sisters and two younger brothers, and asked his father's permission for him to join the Taliban. His father refused. After the visit it was decided that TN should leave Afghanistan. His father arranged for him to escape with an agent in October 2009. He said that since his arrival in the UK he had not had any contact with his family, but he feared that if he returned to Afghanistan he would be killed by his paternal uncles because of his refusal to join the Taliban.

14. On 12 November 2010 the respondent rejected TN's application but, in accordance with her published Asylum Policy Instruction on Discretionary Leave, she granted him leave to enter and remain in the UK until the age of 17 years six months. His agreed date of birth is 1 January 1994, and the period of leave was therefore eight months.

15. On 14 February 2011 TN began judicial review proceedings claiming a declaration that sections 82 and 83 of NIAA are incompatible with his right under article 39 of the Procedures Directive to an effective remedy before a court or tribunal against the decision made in his asylum application, and compensation. His claim was dismissed by Lindblom J in a comprehensively detailed judgment, which was upheld by the Court of Appeal (Maurice Kay, V-P, and Beatson and Briggs LJJ) [2013] EWCA Civ 1609, [2014] 1 WLR 2095. TN's case now comes before this court on appeal from that decision.

16. Separately, on 29 June 2011 TN applied to extend his discretionary leave by an application for humanitarian protection. He repeated his claim to be at risk if returned to Afghanistan. Humanitarian protection is leave granted under the Immigration Rules ((HC 395), paras 339C-Q) to a person who is in the UK, does not qualify for refugee status and in respect of whom substantial grounds have been shown for believing that he or she would face a real risk of suffering serious harm in the country of return. It fulfils the UK's obligation to provide such persons with subsidiary protection under the Qualification Directive, as well as protection under articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

17. On 29 September 2011 the respondent sent a family tracing pro forma for TN's completion in order to assist in tracing his family members. It was completed by him on 25 October 2011. In it he stated that he had been in contact with the British Red Cross, who had taken details of his family and village, but they had not been able to locate any members of his family. He said that before leaving Afghanistan his parents were living in Mohammad Agha district, but that since leaving Afghanistan he had not had any contact with them and that he did not know where they were.

18. On 8 November 2011 the respondent refused to extend TN's discretionary leave. He appealed to the First-tier Tribunal and his appeal was dismissed by FTTJ Camp, but that decision was set aside in the Upper Tribunal by deputy UTJ Juss in a determination dated 30 August 2012. UTJ Juss held that the First-tier Tribunal's decision was flawed by reason of a number of matters including the failure of the respondent to comply with her tracing duty. The effect of the Upper Tribunal's order was that the respondent must now re-take her decision on TN's application. She is waiting for the outcome of this appeal before doing so.

19. MA arrived in the UK on 27 July 2009. He was provided with accommodation by Birmingham City Council social services on 30 July and claimed asylum on 6 August. He claimed to be 13 years old but was assessed to be aged 16 and was given a notional birth date of 1 January 1993. He said that his father was a member of the Taliban and used to be away for lengthy periods. MA was uneducated

and worked as a shepherd. His claimed that his elder brother was killed in an explosion cause by American forces and that a few months later his father was taken away by the government. His mother and maternal uncle told him that it would not be safe for him to remain in Afghanistan as the government would come after him even though he was only 13 years of age. He was subsequently told that his father had been killed. Arrangements were made with an agent for him to leave Afghanistan. He and his mother had lived in a village in Babrak District, Khost, but he had no contact with her after leaving the village and he did not know her whereabouts. His uncle was a shepherd in Khost and had no permanent address.

20. On 23 November 2009 the respondent rejected MA's application but granted him discretionary leave until 1 July 2010, when he would be aged 17 years six months. On 26 June 2010 MA applied to extend his period of leave on grounds of humanitarian protection. The application was refused and MA appealed to the First-tier Tribunal.

21. MA gave oral evidence in support of his claim. His account was disbelieved by IJ Sangha and his appeal was dismissed. On appeal to the Upper Tribunal, deputy UTJ Hall described it as a claim to be entitled to refugee status or humanitarian protection or protection under the European Convention. He found that IJ Sangha's decision contained an error of law because of an absence of adequate findings but he re-made the same decision. He too heard oral evidence from MA and disbelieved his account.

22. MA was given permission to appeal to the Court of Appeal on the issues whether he had been deprived of a significant chance of establishing refugee status by the respondent's failure to endeavour to trace his family members, and whether section 83 of NIAA denied him the opportunity of establishing refugee status as an unaccompanied minor. His appeal was heard by the Court of Appeal jointly with TN's appeal and was dismissed.

23. AA travelled to the UK in the back of a lorry on an unknown date in mid 2011. Following arrest by the police, he claimed asylum on 13 October 2011. According to his account, his father had been a known Taliban commander in Nangarhar Province in eastern Afghanistan and was killed in April or May 2011. He then came under pressure both from the local Taliban, who wanted him to become a suicide bomber to avenge his father's death, and from the police because it was common for sons to follow their father's path. With his mother and younger brother he left their family home in the village of Baghak, which was sold, to join his grandfather in the village of Jokan. But he said that this was still not safe, because they had further visits from the Taliban and the police, and so his grandfather arranged for him to leave the country.

24. On 19 February 2012 the respondent wrote to AA's solicitors asking whether they required assistance in tracing AA's family and enclosing a family tracing pro forma. On the following day the Secretary of State rejected AA's asylum claim but granted him discretionary leave until the age of 17 years six months. His accepted date of birth was 29 December 1995 and so the period of leave was for more than a year.

25. AA appealed to the First-tier Tribunal and gave oral evidence but the judge, IJ Hodgkinson, disbelieved his core account and dismissed his appeal. That decision was upheld in the Upper Tribunal by deputy UTJ Drabu CBE.

26. AA was given permission to appeal to the Court of Appeal on the question of the respondent's failure to take steps to trace his family members. The appeal was dismissed for reasons given in a judgment by Underhill LJ, with which McFarlane and Beatson LJJ agreed: [2013] EWCA Civ 1625.

Compatibility of section 83 of NIAA with article 39 of the Procedures Directive

27. TN and MA were both aged over 16 years six months at the time when their applications for asylum were rejected and they were given discretionary leave to remain until they reached 17 years six months. In the interim period they had no statutory right to appeal to the First-tier Tribunal and the only form of legal challenge open to them was to bring judicial review proceedings (a course taken by TN but not MA). It is their case that they were thereby deprived of an "effective remedy" in breach of article 39.

28. This argument was rejected by the Court of Appeal unanimously but in part for different reasons. Maurice Kay V-P accepted the respondent's submission that judicial review was an effective remedy within the meaning of the Procedures Directive. He was not persuaded by the respondent's alternative submission that the availability of an appeal to the First-tier Tribunal under section 82 at the end of the period of discretionary leave was itself an effective remedy. He did not consider that a delayed remedy would necessarily be as effective as an immediate remedy.

29. Beatson LJ agreed that judicial review was, in the circumstances, an effective remedy which satisfied the requirements of article 39. He also accepted the respondent's alternative submission, as to which he said:

> "31. I do not consider that the short delay before claimants such as these would be able to appeal against an adverse decision by the Secretary of State made after their eighteenth birthday means that the

> totality of the remedy they have is not 'an effective remedy' within article 39. As was stated in *Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-69/10) [2012] CMLR 204], the Procedures Directive lays down minimum standards. Article 39 requires Member States to ensure that applicants have the right to 'an effective remedy', not that they should have the most effective remedy. The suggestion that a delayed remedy by way of appeal would not, in principle, suffice because … it would not necessarily be as effective as an immediate one would have been appears to require a higher threshold than 'an effective remedy'.
>
> 32. I also consider that to regard the right of appeal after the short delay envisaged in cases such as these as inadequate and not an 'effective remedy' could undermine the legislative decision to restrict the right of appeal under section 83 of the Nationality, Immigration and Asylum Act 2002 to those who have been given leave to enter for more than 12 months. That policy was not criticised by this court in *FA (Iraq) v Secretary of State for the Home Department* [2010] 1 WLR 2545. It serves the useful purpose of helping to avoid duplication between decision-making at first instance and on appeal in cases in which the Secretary of State will be reconsidering a person's position in the near future.
>
> 33. It may be the case that delaying an appeal until after a person's eighteenth birthday would mean that it would not be necessary for the best interests of that person as a child to be a primary consideration in the decision-making process pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. But such applicants will, in the light of *KA (Afghanistan) v Secretary of State for the Home Department* [2013] 1 WLR 615, be treated as young people and their whole history will be considered. I am concerned that to regard the fact that an immediate appeal would be an appeal by a child whereas an appeal within what would otherwise be a reasonable period would be an appeal by a young adult as a reason for finding the remedy to be inadequate and not an effective remedy under article 39 would be undesirable from a policy point of view."

30. Briggs LJ agreed that judicial review was an effective remedy, and, if necessary, he said that he would have been inclined like Beatson LJ to accept the respondent's alternative submission, but he preferred not to express a final view.

31. The Strasbourg court has consistently accepted that judicial review is capable of satisfying the requirement of providing an effective remedy within the meaning

of article 13 of the European Convention in the context of asylum cases: *Vilvarajah v United Kingdom* (1991) 14 EHRR 248, para 126, *D v United Kingdom* (1997) 24 EHRR 423, para 71, and *Bensaid v United Kingdom* (2001) 33 EHRR 205, para 56. Those cases undoubtedly establish an important general principle, but I regard it as a mistake to concentrate on the remedy of judicial review in the particular circumstances that Parliament has established a statutory procedure under NIAA for granting and withdrawing refugee status. In general, a right of appeal to an immigration judge, involving a full factual review, arises at the point when an applicant would otherwise be liable to removal. Additionally, section 83 enables an applicant to appeal at a time when he is not at risk of removal, despite the rejection of his claim, if he has been given discretionary leave to remain for over a year. Such an applicant is in the position that his case will not be reviewed for some time, but his longer term outlook is uncertain. Does the scheme satisfy the requirement of providing "an effective remedy" for an applicant who is refused asylum but given leave to remain for a matter of months?

32. I agree with Beatson LJ that the answer is yes for essentially the reasons which he gave. The right of appeal of the person to the tribunal is not immediate but is still effective. The deferment is not for long and there are understandable reasons for it. In a situation where crisis conditions in a particular country lead to a surge of asylum applications resulting in a large number of applicants being granted short term leave to remain, it is not in the public interest or the interest of applicants for tribunals to become clogged with cases which are due to be reviewed by the respondent before long in any event.

33. The point is made that TN and MA were deprived of the chance of establishing that they were entitled to refugee status as members of a particular vulnerable social group, namely minors who were effectively orphans. But as Maurice Kay LJ observed in *KA (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1014, [2013] 1 WLR 615, para 18, when it comes to the kinds of risk such as the forcible recruitment or the sexual exploitation of young males, "persecution is not respectful of birthdays". And if, however unrealistically, the relevant social group and attendant risk are identified in a way which is strictly age specific, any corresponding entitlement to refugee status would be time limited in the same way.

34. If the statutory scheme failed to provide an effective remedy, it would be necessary to consider whether the availability of judicial review made good the deficit, but that situation does not arise.

35. TN and MA also relied on article 47 of the Charter of Fundamental Rights of the European Union, which provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

A denial of refugee status to an applicant does not, as such, concern a right or freedom guaranteed under the European Convention (*A v Netherlands* (2010) 59 EHRR 1098), and in relation the law of the Union the argument under article 47 adds nothing to the argument under the Procedures Directive.

Family tracing: the issues

36. The appellants all contend that the respondent's decision to reject their asylum claims was vitiated by her failure to carry out her tracing duty and, in particular, that they were prejudiced by the failure because proper inquiries may have produced evidence to support their accounts which the respondent disbelieved.

37. Mr Stephen Knafler QC on behalf of AA argued that the only lawful conclusion open to the tribunal, applying corrective justice, was to find that AA was entitled to asylum (or make findings which required the respondent to grant "corrective leave") and that this court should so hold. Alternatively, he submitted that the case should be remitted to the Upper Tribunal, which should (a) decide the case on the facts as they were at the time of the respondent's decision and (b) apply a presumption that AA was credible, since he had cooperated in providing all the information relevant to tracing which he had been asked to provide and the respondent had failed to carry out inquiries which could well have corroborated his account. The Upper Tribunal should only reject his appeal if it was satisfied that his claim, notwithstanding its presumptive credibility, was clearly not capable of belief. Mr Becket Bedford on behalf of TN and MA also submitted that the proper remedy for the respondent's breach of duty with regard to family tracing was for the tribunal to have held that they were entitled to asylum.

38. Before considering the reasoning of the Court of Appeal in the present cases it is necessary to refer to some of its earlier decisions. In *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97 the Court of Appeal held that asylum appeals should be determined by reference to the position at the time of the appellate decision rather than by reference to the factual situation at the time of the original decision against which the appeal was brought. This makes good sense and the general policy has not been doubted. The subject matter is whether the applicant requires refugee protection. Hearings before the First-tier Tribunal involve immigration judges receiving evidence and making up their own minds about the facts. As Simon Brown LJ observed in *Ravichandran*, at p 112, this may fairly be regarded as an extension of the decision-making process. Moreover, as he also

pointed out, immigration judges build up a body of knowledge, and it would not serve the public interest if they were required to ignore matters which they know to have happened after the date of the Secretary of State's decision. The situation might have changed for the better or for the worse. Similar considerations apply, at least to some extent, to the Upper Tribunal. If it finds that there has been a material error by the First-tier Tribunal it will ordinarily re-make the decision and for that purpose may well hear fresh oral evidence (as in the case of MA). And the point about the judges' constantly developing bank of knowledge is equally applicable to the Upper Tribunal. It would not make sense for the First-tier Tribunal to take into account its knowledge about the situation at the time of its decision, but for the Upper Tribunal to have to ignore its more recent knowledge.

39. In *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA 744, [2005] Imm AR 608, the Court of Appeal created in effect an exception to the *Ravichandran* principle. The facts were unusual. The claimant was an Iraqi Kurd. He came to the UK during the regime of Saddam Hussein and claimed asylum. In December 2001 his claim was rejected on the ground that internal relocation was available to him within the Kurdish Autonomous Zone ("KAZ"). The decision was upheld by an immigration adjudicator and in July 2002 he was refused permission to appeal to the Immigration Appeal Tribunal. In February 2003 he was given permission to apply for judicial review to argue whether the KAZ was an entity capable of providing the necessary protection for the purposes of the Refugee Convention. The same point was due to be considered by the Court of Appeal in the following month in appeals brought by M and A, and Rashid's judicial review claim was ordered to be listed after the hearing of those appeals. On 6 March 2003 the Treasury Solicitor wrote to M and A's solicitors, saying that the Secretary of State was not as a matter of policy at that time relying on the availability of relocation to the KAZ, and they were granted refugee status. The policy in question had existed from October 2000, but not all Home Office case workers were aware of it and it had not been consistently applied. Rashid's solicitors learned about the policy as a result of the Treasury Solicitor's letter to M and A's solicitors, and on 12 March 2003 they wrote asking for Rashid's case to be reconsidered. The Treasury Solicitor replied that he was aware of cases stacked behind those of M and A, and that Rashid's case had been sent back to a case worker for reconsideration. In the same month military action in Iraq began, and on 21 March it was announced that all decision making on claims by Iraqi nationals had been suspended. At the end of the war the Secretary of State adopted a new policy, and Rashid's claim was rejected on the ground that after the collapse of Saddam Hussein's regime he was not at risk.

40. On Rashid's application for judicial review, the Court of Appeal held that he was entitled to unconditional leave to remain in the UK. The Secretary of State relied on the *Ravichandran* principle. The leading judgment was given by Pill LJ, with whom May LJ agreed. He based his decision on the principle that an abuse of power called for the court to "intervene to give such relief as it properly and appropriately

can" (para 37). He found that there was an abuse of power because there was conspicuous unfairness in Rashid's treatment. After "startling and prolonged" failures of the Home Office (para 13), the correct policy emerged in the cases of M and A. Rashid's case had been stacked behind them, the issues were identical and fairness required that the same treatment be given to him as to them. Pill LJ recognised that the court could not declare that Rashid was entitled to be granted refugee status, as M and A had been, because that is a status conferred on the basis of criteria prescribed in an international treaty and should not be conferred if the criteria are not satisfied at the time of the decision. But he held that the court could and should declare that Rashid was entitled to indefinite leave to remain. This, he said, provided a remedy for the unfairness and was the appropriate response in the circumstances.

41. In a concurring judgment Dyson LJ said that the case presented the stark question which of two considerations should prevail: justice and fairness, which suggested that the claimant should not be returned to Iraq, or the *Ravichandran* principle. He accepted that to hold the Secretary of State to an earlier policy which had been withdrawn by the final stage of the decision making process would infringe the principle established by *Ravichandran*, but this consideration was outweighed by the conspicuous unfairness which there had been.

42. The reasoning in *Rashid* has been criticised. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, [2007] Imm AR 781, para 39, Carnwath LJ described the reasoning as "not altogether convincing", and that it appeared to turn "abuse of power" into a factor able to achieve remedial results not open to the courts in other instances of illegality. He also had doubts about the weight placed by the court on the Department's conduct. The court's proper sphere is illegality, not maladministration. If the earlier decision to refuse the asylum application was unlawful, it was the unlawfulness rather than the cause of it (whether bad faith or muddle) which justified the court's intervention and provided the basis for the remedy. Having made those criticisms, Carnwath LJ said that the court's task was to try to extract a principled basis for the decision, which must be found in the majority judgment of Pill LJ. Although Pill LJ appeared to have expressed the result as an exercise of the court's remedial discretion, the court had no power to grant indefinite leave to remain; the power and discretion rested with the Secretary of State, and it was not open to the court to assume that function. The principled basis for the decision must be that it was open to the court to determine that a legally relevant factor in the exercise of the discretion was the correction of injustice, and that in an extreme case the court could find that the unfairness and the remedy were so plain that there was only one way in which the Secretary of State could exercise his discretion.

43. In *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305, [2011] INLR 389, the Court of Appeal remitted an asylum claim

by an unaccompanied minor to the Upper Tribunal because no consideration had been given to the respondent's duty to consider the appellant's best interests as required by section 55 of the 2009 Act. The respondent had also made no attempt to trace his family. As to that aspect, Lloyd LJ said in his judgment with which Rimer LJ agreed:

> "68. The obligation to endeavour to trace under regulation 6 applies when a child has made an asylum application, but the application is to be determined on its merits, whether or not any steps have been taken pursuant to the obligation. To that extent I would accept the submission … for the respondent that the obligation to endeavour to trace is distinct from the issues that arise on an application for asylum. If steps have been taken pursuant to the obligation under regulation 6, the results, if any, may be relevant to the determination of the asylum application, depending on what the issues are on that application. In fact, no attempt to trace was made by UK Border Agency in the present case. All that was done was to draw to the attention of the applicant or his foster carer the facilities of the Red Cross, with a view to his attempting to trace his relatives through that agency. … It seems to me that that failure is not, by itself, relevant to the determination of the appellant's asylum application. However, the Secretary of State is still subject to the obligation, and steps ought now to be taken to comply with that obligation."

44. In *KA (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1014, [2013] 1 WLR 615, the eight appellants came, unaccompanied, from Afghanistan to the UK aged 15 or 16 and claimed asylum. Their applications were refused and they were all granted discretionary leave until the age of 17½ in accordance with the standard policy. Shortly before its expiry they applied for a variation which was refused. Each appealed unsuccessfully to the First-tier Tribunal. Two of the appeals were heard while the appellants were still minors. All appealed to the Upper Tribunal, and their appeals were heard and dismissed after they had reached the age of 18. In each case the Upper Tribunal approached the assessment of risk on the basis of the facts at the time of the hearing before it, including the fact that the appellant had recently reached that age. They were given leave to appeal to the Court of Appeal on the grounds that the respondent had failed in her tracing duty and that, although they had now reached their majority, the illegality should be remedied by the grant of leave to remain as the necessary corrective action on the *Rashid* principle. In any event it was submitted that the Upper Tribunal was wrong to apply the general rule established by *Ravichandran*.

45. The judgment of the Court of Appeal was given by Maurice Kay LJ, with whom Hooper and Moore-Bick LJJ agreed. He accepted that on the evidence there was a systemic breach of the respondent's duty to endeavour to trace. He described

it as a complicated question whether this gave rise to the *Rashid* principle, about which he agreed with Carnwath LJ's analysis in *S*. It was not a simple matter of the systemic breach entitling the appellants to have their appeals allowed with remittal to the respondent to consider grants of leave to remain, but nor did the case admit of the simple analysis that the breach was irrelevant at the time of the hearings by the Upper Tribunal on the *Ravichandran* principle. The burden of proof was on the claimant to establish not only the failure to discharge the duty to endeavour to trace but also that he was entitled to the relief sought. There was, he said, a hypothetical spectrum. He continued (para 25):

> "At one end is a claimant who gives a credible and cooperative account of having no surviving family in Afghanistan or having lost touch with surviving family members and having failed, notwithstanding his best endeavours, to re-establish contact. It seems to me that, even if he has reached the age of 18 by the time his appeal is considered by the tribunal, he may, depending on the totality of the established facts, have the basis of a successful appeal by availing himself of the *Rashid/S* principle and/or section 55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. In such a case the *Ravichandran* principle would not be an insurmountable obstacle."

46. I do not find this easy to follow. If the applicant's account is accepted as credible, it is difficult to see why the fact that he has passed the milestone of his 18th birthday should result in his appeal failing in circumstances where it would have succeeded if he had been only 17 years 11½ months old. In that sense I see why the *Ravichandran* principle would not be an obstacle. But I do not see precisely how the *Rashid* principle would apply or what would be the evidential significance of the respondent's breach of duty.

47. Maurice Kay LJ went on:

> "At the other end of the spectrum is a claimant whose claim to have no surviving family in Afghanistan is disbelieved and in respect of whom it is found that he has been uncooperative so as to frustrate any attempt to trace his family. In such a case, again depending on the totality of established facts, he may have put himself beyond the bite of the protective and corrective principle. This would not be because the law seeks to punish him for his mendacity but because he has failed to prove the risk on return and because there would be no causative link between the Secretary of State's breach of duty and his claim to protection."

48. Again it is not easy to identify the necessary causative link between the breach of duty and the claim for protection, but it cannot be the absence of the result of family tracing in assessing the credibility of the claimant. What is clear in Maurice Kay LJ's analysis is that the assessment of the credibility of the claimant's account of not having available family protection must necessarily be made on the evidence available to the tribunal, without a presumption in the claimant's favour.

49. The court allowed one of the eight appeals, on other grounds, and gave directions in relation to the remaining seven appellants for them to lodge supplemental skeleton arguments setting out how their case was put in in the light of the way in which Maurice Kay LJ had mapped out the general principles.

50. The appeals came back before a differently constituted court (Maurice Kay VP, Jackson LJ and Sir Stanley Burnton). The second stage of their appeals is reported under the title *EU (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 32, [2013] Imm AR 496.

51. Sir Stanley Burnton gave the leading judgment, with which the other members of the court agreed. He was unsparing in his criticism of *Rashid* (para 6):

> "I have to say that, like the Court of Appeal in *S*, I have great difficulties with the judgments in *Rashid*. In cases that are concerned with claims for asylum, the purpose of the grant of leave is to grant protection to someone who would be at risk, or whose Convention rights would be infringed, if he or she was returned to the country of nationality. Of course, breaches of the duty of the Secretary of State in addressing a claim may lead to an independent justification for leave to remain, of which the paradigm is the article 8 claim of an asylum seeker whose claim has not been expeditiously determined, with the result that he has been in this country so long as to have established private and family life here. But to grant leave to remain to someone who has no risk on return, whose Convention rights will not be infringed by his return, and who has no other independent claim to remain here (such as a claim to be a skilled migrant), is to use the power to grant leave to remain for a purpose other than that for which it is conferred. In effect, it is to accede to a claim to remain here as an economic migrant. The principle in *Rashid* has been referred to as "the protective principle", but this is a misnomer: the person relying on this principle needs to do so only because he has been found not to be in need of protection. I do not think that the court should require or encourage the Secretary of State to grant leave in such circumstances either in order to mark the court's displeasure at her conduct, or as a sanction for her misconduct."

52. Sir Stanley Burnton acknowledged that the respondent's breach of her tracing duty could have evidential relevance, because in assessing the risk to a claimant on return to his or her country of nationality the lack of evidence from the respondent as to the availability of familial support was a relevant factor. The failure to endeavour to trace a claimant's family might also result in a claimant, who had lost contact with his family, putting down roots here and establishing an article 8 claim. But Sir Stanley Burnton emphasised the need for the claimant to establish some causative relevance of the respondent's breach to the protection claimed.

53. On this approach, it is not for the tribunal or the court, in considering a claim for asylum, to try to compensate the claimant for some past breach of duty which does not affect the question whether he is presently exposed to a risk entitling him to the protection of the Refugee Convention (or to humanitarian protection). The consequences of a breach of duty by the respondent may be a relevant factor in the assessment of present risk, because of the possible effect on the nature and quality of the available evidence. But that is different from exercising some form of remedial jurisdiction entitling the tribunal or court to order that the claimant should have indefinite leave to remain, on account of the respondent's breach of duty, in a case where the evidence does not establish the present existence of a right to refugee status or humanitarian protection.

54. Sir Stanley Burnton referred to two other points of general application. First, he added to the court's comments in *KA (Afghanistan) v Secretary of State for the Home Department* about the boundary line between minority and adulthood that in many cases the date of birth of 1 January (in a particular year) given to an applicant after an age assessment is notional. The fact that the true date of birth is unknown is an additional reason for not regarding the supposed date of majority as necessarily changing the assessment of risk.

55. Secondly, Sir Stanley Burnton saw force in a point made by the respondent that UASCs who arrive in this country from Afghanistan have done so as a result of someone, presumably their families, paying for their fare and/or for an agent to arrange their journey. The costs are likely to have been considerable, relative to the wealth of an average Afghan family. They are unlikely to want to cooperate with an agent of the respondent for the return of their child to Afghanistan.

56. The individual appeals were dismissed. *EU*'s case was typical. The immigration judge disbelieved his account of how and why he came to leave Afghanistan and his claim to have lost contact with his family. The Upper Tribunal treated the respondent's failure to endeavour to trace his family as irrelevant. The Court of Appeal held that it was right to do so in view of the immigration judge's rejection of his evidence about losing contact with his family.

57. In the present appeals by TN and MA, Maurice Kay V-P affirmed the general principle established in *Ravichandran* that an appellate tribunal considers an asylum case on the basis of the latest evidence and material, including any which postdates the original decision. He described *Ravichandran* as "not a one-way street" because the most recent material may enhance an applicant's case just as it may undermine it. It was "an even-handed principle, which ensures that, when asylum cases are considered on appeal, those currently at risk on return to their countries of origin are not returned and those who are not or are no longer at such risk are not accorded a status which they do not merit" (paras 25-26).

58. He recognised that "the concept of corrective relief which was considered in *KA* is an exception because it contemplates relief on the basis of a previous error or breach of obligation which has lost current significance because of the passage of time (for example, attaining majority) or a change of policy" (para 24).

59. He did not grapple with the conflict between a) the general principle by which an appellate tribunal looks even-handedly at the position at the date of review, and b) the exception by which the tribunal grants relief, to which the applicant is not otherwise entitled, by reason of an error which has lost current significance. Nor did he address the criteria for determining when the purported exception should apply, apart from referring in general terms to a hypothetical spectrum of cases. He said that in the case of MA, any assessment of his position on the *KA* hypothetical spectrum was bound to be conditioned by the reasoned rejection of his evidence about not having attempted to contact his family, and he described MA's difficulties in this respect as insurmountable. MA's appeal was therefore dismissed. He said nothing about TN's position in this regard, because his case had been remitted to the respondent.

60. In AA's case, the respondent's reasons for refusal letter stated:

> "82. In light of findings in DS efforts have been made to establish a method by which the Secretary of State can assist in locating the families of unaccompanied asylum seeking children in Afghanistan. Should you wish the UK Border Agency to make efforts to locate your family, please fill in and return the tracing pro-forma as soon and provide as much detail as possible in regards to all of your family in Afghanistan to allow this to be explored.
>
> 83. It should be noted that the UK Border Agency is currently unable to attempt to trace your family within Afghanistan. The Foreign and Commonwealth Office has confirmed that there is no presence in

Afghanistan that would currently be able to assist in conducting family tracing in Afghanistan."

61. In the Court of Appeal AA relied on a report by Mr Tim Foxley MBE, an expert on political and social conditions in Afghanistan, which was admitted as evidence without objection by the respondent. His overall conclusion was that a blanket assertion that UKBA could not trace families in Afghanistan was not sustainable. He recognised that there were significant security problems in Nangarhar district. However, the British Embassy in Kabul had extensive local contacts and for the purpose of family tracing it would be possible for embassy staff to tap into links with the Afghan national government (Ministry of Refugees and Repatriation), local government, the Afghan police or various NGOs operating in Afghanistan.

62. A witness statement on behalf of the respondent described the methods by which, in principle, the families of UASCs may be traced, and also the difficulties of doing so in Afghanistan on account of the security situation (other than by telephone or email, if the applicant provided the telephone number or email address).

63. Underhill LJ concluded that the respondent was in breach of the tracing duty in her handling of AA's case by a) not initiating the process earlier and b) not asking sufficiently searching questions aimed at eliciting ways in which his family might have been traced by "remote" means, that is, other than by trying to telephone or email them. The second criticism is puzzling because Underhill LJ himself noted that the effect of AA's answers in interview, confirmed in his own witness statement, was that he had given all the information that he could. In this court Mr Knafler realistically accepted that there was nothing more which the respondent could have hoped to glean from questioning AA, but he concentrated on the respondent's failure to pursue any of the avenues identified by Mr Foxley before reaching a decision whether to accept the asylum claim.

64. Underhill LJ accepted that the tracing process must be treated as part of the process of deciding the asylum claim and it was therefore right to consider what evidence might have been elicited if the duty had been properly performed. On the facts, he rejected the submission that if UKBA had asked the right questions from the start, and if the respondent had established an effective system of tracing in Afghanistan prior to 2012, there was a real prospect that information would have been obtained that would have supported AA's asylum claim. He concluded that whatever tracing procedures were in place, the information available to the respondent afforded no opportunity for remote tracing. Underhill LJ added that it was AA's own case that his family arranged for him to leave Afghanistan and come to the UK, no doubt at considerable cost. They were very unlikely to want him to be returned, and, even if it were possible to contact any member of his family, they

would have a strong incentive to support his account of persecution. Any corroboration from that source would therefore be of doubtful value.

65. Drawing the threads together, it was submitted in the present appeals on behalf of MA and AA that

i) the tracing duty was an integral part of the decision making process;

ii) the Court of Appeal was wrong to find in each case that the breach of duty was immaterial on the facts;

iii) the tribunal ought to have made a presumption of credibility in each appellant's favour;

iv) the tribunal and Court of Appeal ought not to have followed *Ravichandran* but, applying *Rashid*, ought to have held that each appellant was entitled to asylum or unconditional leave.

66. It was submitted on behalf of TN that the Upper Tribunal was right to allow his appeal, but should have gone further and held that he was entitled to asylum or unconditional leave, rather than remitting the matter to the respondent for a fresh decision.

67. In a written intervention in AA's case, the Office of the Children's Commissioner for England ("OCC") submitted that:

i) the respondent is under a duty to assess the child's best interests before seeking to discharge any of her obligations, including the tracing obligation;

ii) the methods used in fulfilling the tracing obligation must take into account the child's wishes and feelings and the need for the child to give informed consent to any family tracing process;

iii) no adverse credibility finding should be reached without an assessment of the child's ability to provide information or further information for the purposes of family tracing;

iv) the best interests assessment and the family tracing process should be regarded as a necessary part of the search for a durable solution for the child based on his or her own individual circumstances;

v) if an unaccompanied minor becomes 18 before a final decision on his or her appeal, the duty to trace is still a component of the search for a durable solution, that is, one which will last beyond their 18th birthday.

Analysis

68. I begin with section 55 of the 2009 Act and the statutory guidance issued in *Every Child Matters*. Officials who discharge the respondent's functions in relation to immigration and asylum must take into account the best interests of a child as a primary consideration when making decisions which affect them. Protection of the child's best interests provides the rationale for the respondent's tracing obligation, as regulation 6(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 explicitly recognises.

69. The OCC rightly emphasised that before any tracing process is embarked upon the child must be properly consulted about his or her wishes. This is a necessary part of considering the child's best interests. There may be all sorts of reasons why the child may not want any such process to be carried out, or may be concerned about the way in which it is carried out, because of potential consequences for the child, members of their family or others. Article 19.4 of the Reception Directive requires that those working with unaccompanied minors shall have had appropriate training.

70. I turn next to *Ravichandran* and *Rashid*. The principle in *Ravichandran* is sound. As Simon Brown, LJ said in that case, on an asylum appeal the subject matter is whether the appellant requires refugee protection. The function of the court is quite unlike its function when adjudicating, for example, on a private law claim for breach of contract or tort. A claimant who establishes that there has been a breach of contract or tort is entitled to be put, so far as the court is able to do so, in the same position as if the wrong had not been committed. In *Ravichandran* the court rightly held that on an asylum appeal the question is one of present status: does the appellant meet the criteria of the Refugee Convention or is he in need of humanitarian protection?

71. I agree with the criticisms made of *Rashid* by Carnwath LJ in *R(S) v Secretary of State for Home Department* and by Sir Stanley Burnton in *EU (Afghanistan) v Secretary of State for the Home Department*. In *Rashid* the sloppiness of procedures

in the Home Office resulted in the appellant being unfairly denied refugee status when he applied for it; but refugee status is not bound to endure for ever. By the time that his case reached the Court of Appeal the source of persecution in Iraq had been overthrown, and the effect of the court's decision was to give him a right which he did not need for his personal protection. Because the *Rashid* exception to *Ravichandran* lacks a satisfactory principle, it is also impossible to state its scope with any degree of clarity. In *KA (Afghanistan) v Secretary of State for the Home Department* Maurice Kay LJ (para 17) described it as a "complicated question" whether the facts of the cases under consideration gave rise to the *Rashid* principle, and the court struggled in its attempt to articulate what needed to be shown for the principle to apply.

72. I would hold that the *Ravichandran* principle applies on the hearing of asylum appeals without exception, and *Rashid* should no longer be followed. The question whether the appellant qualifies for asylum status is not a question of discretion. It is one which must be decided on the evidence before the tribunal or court, and there is no legal justification for approaching that question with a presumption that the appellant is credible arising from a failure of the respondent properly to discharge her obligation in relation to family tracing. Discretionary leave by definition involves a discretion, but it is a discretion which belongs to the respondent and not to the court. The respondent must of course exercise her discretion lawfully, with proper regard to any policy which she has established, but I agree with Sir Stanley Burnton that it is not proper for a court to require the respondent to grant unconditional leave to an appellant who would not be entitled to such relief under current policy (or have a current right to remain in the UK on other grounds, such as article 8), as a form of relief for an earlier error or breach of obligation.

73. There remains the question how the tribunal should approach an asylum appeal where the respondent has failed in her tracing obligation. If the appellant believes that he may have been prejudiced, it would be open to him to ask the respondent to attempt to carry out a tracing process and to ask the tribunal to adjourn the appeal for that to be done. There would be force in the argument that it should not make a difference whether the appellant has by then turned 18, since that would not remove an obligation which had arisen under the Reception Directive and the effects of which were intended to last beyond their minority (as the OCC has submitted). However, in deciding whether it accepts the appellant's account, the tribunal must act on the evidence which it has. In that respect I agree with what was said by Lloyd LJ in *DS (Afghanistan) v Secretary of State for the Home Department* (set out at para 43 above). If the appellant has identified people who might be able to confirm his account, but the respondent has not pursued that lead, the tribunal might fairly regard the appellant's willingness to identify possible sources of corroboration as a mark of credibility, but this would be an evidential assessment for the tribunal. There is no presumption of credibility.

74. In MA's case and AA's case the appellant's account was disbelieved by the Upper Tribunal. I agree with the Court of Appeal's rejection of the argument that the Upper Tribunal should have allowed the appeals by reason of the respondent's breach of her tracing obligation. The tribunal was right to assess the case on the evidence which it had. Neither of the appellants gave any information from which their family could be traced, and the tribunal's conclusion that their accounts lacked credibility was properly open to it. As explained at para 18 above, the outcome of TN's appeal leaves a decision still to be made in his case by the respondent, following the remission of his asylum claim by the Upper Tribunal.

75. I would dismiss the appeals.