Upper Tribunal
(Immigration and Asylum Chamber)

AZ (Asylum-'legacy' cases) Afghanistan [2013] UKUT 00270(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 March 2013	.....

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AZ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms G. Brown, Counsel instructed by Luqmani Thompson & Partners

For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

(i) Where an appellant in an asylum appeal had previously been informed that his case is being considered as a 'legacy case' but no decision under the process had been made, a subsequent immigration decision following a rejection by the Secretary of State of his asylum claim is not rendered unlawful by reason of the failure to make a decision under the legacy process.

(ii) There is no obligation on a Tribunal to adjourn an asylum appeal so as to allow for a decision to be made under the legacy process.

DETERMINATION AND REASONS

Introduction

1.
The appellant is a citizen of Afghanistan, born on 1 January 1994. He is said to have arrived in the UK in December 2006 as an unaccompanied minor aged 12. He claimed asylum on 22 January 2007. The application for asylum was refused on 29 April 2009 but he was granted discretionary leave until 1 July 2011.

2.
On 27 June 2011 he applied for further leave to remain. That application was also refused and at the same time a decision was made to remove him under section 47 of the Immigration, Asylum and Nationality Act 2006 (“the 2006 Act”), about which more is said below. His appeal, on asylum and human rights grounds, was dismissed by First-tier Tribunal Judge Talbot after a hearing on 6 August 2012. Permission to appeal having been granted, the appeal came before me.

3.
In summary, the appellant's claim was that there was a raid on the family home by the Taliban who wanted to recruit the appellant and his brothers. During the raid his father was killed and his mother was shot. Judge Talbot rejected the appellant's account of those events and did not accept that the appellant had to escape from his home or from Afghanistan.

4.
He was similarly not satisfied that the appellant had given a credible account of having lost contact with his family, or that his mother and siblings have been killed or are missing. He concluded that it was highly likely that the appellant was still in contact with his family. He found that he has family members who would be able to provide him with support on his return and that he would not be at risk for any reason in Afghanistan.

5.
In relation to the Secretary of State’s failure to undertake the ‘tracing’ duty, he concluded that the appellant had not suffered any prejudice. He rejected the argument based on what was said to be the Secretary of State’s failure to give consideration to the appellant's claim under the ‘legacy’ exercise of 2010.

6.
Before me Ms Brown relied on the grounds of appeal, amplified in submissions. She relied on the decisions in KA (Afghanistan) [2012] EWCA Civ 1014 and EU (Afghanistan) [2013] EWCA Civ 32. On the ‘legacy’ point I was referred to the decision in Hakemi [2012] EWHC 1967 (Admin) whereas in response Mr Tarlow relied on Mohammed [2012] EWHC 3091 (Admin). I have considered the appellant's skeleton argument.

My assessment

7.
Neither the initial grounds before the Upper Tribunal nor the renewed grounds as they are before me make any specific challenge to the judge's assessment of the credibility of the appellant's claim as to the events that took place in Afghanistan. What is suggested in the grounds (and in the skeleton argument) is that the judge was in error in terms of his findings as to contact with his family and their circumstances now. In submissions Ms Brown repeated those points but did not seek to widen the argument to include the judge's credibility findings generally.

8.
So far as contact with his family is concerned, the appellant said in his asylum interview in March 2009 at question 21 that since arriving in the UK he has had no contact with the uncle who helped him to leave Afghanistan. In evidence he said that he spoke to his mother in 2008, she having called from a public telephone and that in September 2011 he spoke to his maternal uncle who told him that his mother had died and that his two brothers were missing.

9.
At [25] Judge Talbot considered the question of contact with his family and concluded that he had only given a vague explanation of how his uncle was able to access his mobile phone in the UK, and that it was not plausible that he would not be aware of how that contact was arranged. Because the appellant had not explained how his uncle was able to contact him, he did not accept the account of his uncle having told him that his mother had died and his two brothers were missing. He also rejected the claim that his mobile phone was stolen in January 2012, he not having provided any evidence to support that claim. He also noted the lack of detail in the appellant's claim as to what information he is said to have given to the Red Cross.

10.
Ms Brown submitted that at the time of the telephone call in 2008 the appellant would have been only 14 years of age. She contended that no reasons, or no adequate reasons, had been given for the adverse credibility finding in relation to contact with his family and the family circumstances now. I am satisfied however, that the judge's reasons for his findings in this respect are entirely sustainable. The fact that the appellant was aged 14 in 2008 when he is said to have received the call from his uncle does not mean that he would not have been aware of how the uncle was able to get his mobile phone number. In addition, his account of contact as between his asylum interview in 2009 and his oral evidence was inconsistent and aspects of the account were vague. The judge's conclusions on this aspect of his account were open to him on the evidence.

11.
The ‘tracing’ duty arises from Article 19(3) of Directive 2004/83/EC as implemented by the Asylum Seekers (Reception Conditions) Regulations 2005 (“the Regulations”). Regulation 6 provides that in order 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. The duty is most aptly described as a duty to endeavour to trace, although nothing turns on that for present purposes. The Regulations came into force on 5 February 2005 and are expressly stated to apply to asylum applications after that date. The appellant made his claim for asylum on 22 January 2007.

12.
There is no indication from the Secretary of State’s decision letter dated 29 April 2009 refusing asylum that the duty was complied with. It does not appear that during the proceedings before the First-tier Tribunal there was any suggestion by the Secretary of State that the duty had been complied with, and such a suggestion was not advanced before me. I proceed on the assumption therefore, that there has been a failure by the Secretary of State to fulfil the tracing duty.

13.
A similar issue to that arising in the present case was considered by the Court of Appeal in EU . At [5] a passage from the judgment of Maurice Kay LJ in KA (Afghanistan) was cited, as follows:

“There is a hypothetical spectrum. At one end is an applicant who gives a credible and cooperative account of having no surviving family in Afghanistan or of 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 Ravichandran would not be an

insurmountable obstacle. At the other end of the spectrum is an applicant 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. Whereas, in the first case, the applicant may have lost the opportunity of corroborating his evidence about the absence of support in Afghanistan by reference to a negative result from the properly discharged duty to endeavour to trace, in the second case he can establish no such disadvantage."

14.
That passage, at least in terms of what is said about the "protective and corrective principle", needs to be read in the context of what is said in [6] of EU about the limits of the principle.

15.
Notwithstanding the failure of the Secretary of State to fulfil the obligation to endeavour to trace, Judge Talbot found that the appellant does have family in Afghanistan who would be able to provide him with support on his return.

16.
Ms Brown submitted that had the tracing duty been carried out the appellant's account might have been established and the difficulties in relocating within Afghanistan may also have been established. However, it is important to bear in mind what was said in this respect at [10] of EU as follows:

" Lastly, I should mention a point made by the Secretary of State which I consider to have substance. Unaccompanied children 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 a so-called agent to arrange their journey to this country. The costs incurred by the family will have been considerable, relative to the wealth of the average Afghan family. The motivation for their incurring that cost may be that their child faces risk if he or she remains with them in Afghanistan, or it may simply be that they believe that their child will have a better life in this country. Either way, they are unlikely to be happy to cooperate with an agent of the Secretary of State for the return of their child to Afghanistan, which would mean the waste of their investment in his or her journey here."

17.
Although every case is fact specific, in none of the appeals before the Court in EU was it concluded that the failure of the tracing duty resulted in any error by the Tribunal which determined their appeals, in terms of the credibility assessments made.

18.
Whilst there is no 'bright line' rule to be applied where an appellant reaches the age of 18 as explained in EU , the fact is that the appellant was 18 years of age at the time of his appeal to the First-tier Tribunal and is now 19 years of age. He has been found to be someone who could and would receive family support on return.

19.
Judge Talbot considered the Secretary of State's failure in terms of 'tracing' in the context of his Article 8 assessment. I am not satisfied that there is any error of law in his decision in relation to the Secretary of State's failure of her tracing duty, whether in the context of Article 8 or otherwise.

20.
In the light of the judge's credibility assessment and his conclusions in relation to the family support that the appellant could expect to receive on return to Afghanistan, there is no error of law in his assessment at [30] that the appellant would not be at risk on return generally or as a Pashtun, as contended in [4] of the grounds with reference to the decision in AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC).

21.
The ‘legacy’ argument arises in the following way. The appellant was informed on 29 July 2010 that his case was being considered as part of the legacy exercise. A copy of the letter is at page A58 of the appellant's bundle. It states that:

“Your case is in the backlog of older asylum applications that the UK Border Agency is in the process of concluding. The Case Resolution Directorate (CRD) are responsible for your case.

The Case Resolution Teams have been established specifically with the older asylum applications, such as yours, and their aim is to resolve these cases by either removing individuals from the United Kingdom or granting them leave to remain in accordance with the existing law and policy.”

22.
The letter gives the web address for details of how the claims are to be processed and as to what further information is required.

23.
At A56 is a letter to the UKBA from the appellant's solicitors dated 4 July 2011 stating that on 19 August 2010 the appellant's original Immigration Status Document and passport photographs were provided in response to the letter from the CRD. The letter noted that there have been no further developments, and asked for confirmation as to whether or not the appellant is still being considered within the CRD team. As a matter of interest, the letters at A56 and A58 are also in the respondent’s bundle.

24.
Prior to the solicitors’ chase-up letter of 4 July 2011 they had made the application for further leave to remain dated 27 June 2011. It appears that the next thing that happened was that the Secretary of State issued the refusal letter dated 2 April 2012. That letter does not refer to the legacy issue and there appears to have been no further communication on the matter from the Secretary of State after the letter dated 29 July 2010 informing the appellant that his was being considered as a legacy case. I note that the refusal letter dated 29 April 2009 in respect of the appellant's initial application for asylum was written by a person from “Legacy CRT-South 6, Case Resolution Directorate”. The refusal letter of April 2012 is described as coming from “Barnet/Enfield LIT”. ‘LIT’ would seem to mean Local Immigration Team.

25.
It is suggested in the appellant's grounds before the Upper Tribunal that the First-tier judge erred in failing to adjourn the hearing in order that the Secretary of State “might consider the appellant's case under the provisions of the legacy”. At [3] of the grounds it is said that the Secretary of State’s failure to grant the appellant leave to remain under the legacy process meant that her decision was not in accordance with the law and the First-tier judge should have so found. It is also said that the judge failed to give any or any adequate reasons for the conclusion in [44] that there was no error in the

Secretary of State’s decision by reason of the failure to consider the appellant's case under the legacy provisions. In the skeleton argument before me the matter is put in terms of legitimate expectation.

26.
That the appellant's case was, at least at one stage, a legacy case is clear from the letter dated 29 July 2010, as set out at [22] above. His application for asylum was made in January 2007 and the legacy cases are those where applications were made prior to 5 March 2007 (see [1] of Hakemi) and the House of Commons statement by Melanie Gower dated 10 August 2010, referred to at [40] of Mohammed .

27.
The appellant relies on [7], [10] and [13] of Hakemi to illustrate the period of residence that might qualify him for a grant of leave to remain as a legacy case, he having been resident in the UK for a period of five years and four months at the date of the decision to refuse to vary leave to remain, or four and a half years at the date of his application for further leave.

28.
However, I do not see that the decision of Burton J in Hakemi is authority for the proposition that where a case has been identified as a legacy case but where no decision has in fact been made under the terms of legacy cases, a subsequent immigration decision is not in accordance with the law by reason of the failure to decide it under the legacy process. Hakemi involved cases where decisions had been made under the legacy provisions. The challenge was to the legacy process on judicial review grounds and in terms of how it was applied to those individual applicants.

29.
Furthermore, if it is suggested that the fact that a case is being considered as a legacy case means that substantive consideration of the asylum claim is barred, that is a suggestion with which I cannot agree. The point of the legacy process is, in part, as set out in the House of Commons statement, to deal with unresolved claims. Where a claim can be resolved, as it was in this case by the refusal to vary leave to remain, surely that is a process that is to be encouraged not discouraged. After all, this appellant made an application for further leave to remain on 27 June 2011. True that his discretionary leave was due to expire shortly after that application and if there was to be an application it would need to be made before expiry of his existing leave. Nevertheless, having made the application, it needed to be decided.

30.
This view, it seems to me, is reinforced by what is said in the House of Commons statement where at section 4 it states as follows (with footnotes removed):

“What are the criteria for granting leave to remain?

When the CRD considers a legacy case, it does so using the ordinary criteria for deciding whether or not to recognise Refugee status or to grant another form of leave such as Humanitarian Protection or Discretionary Leave. The UKBA has been at pains to point out that this means the legacy programme is not an amnesty:

This is not an amnesty for individuals whose cases are unresolved. We will consider the cases in same way as new applications, using the same rules to decide whether applicants qualify for permission to stay in the United Kingdom or should be refused asylum and removed from the country. Human rights factors will be part of this assessment.

This distinguishes it from the “one-off exercise” to allow families who applied for asylum before 2 October 2000 to stay in the UK, regardless of the merits of their claim.”

31.
At [4] in Hakemi Burton J noted that the argument that the reference of a legacy case to the relevant legacy department amounted to an ‘amnesty’ the benefit of which the claimants had been deprived, was no longer pursued.

32.
I do not accept that the appellant had any legitimate expectation of being granted leave to remain under the legacy process. For so long as his claim remained unresolved it may be, and probably would be, arguable that he had a legitimate expectation of being dealt with under the terms of the legacy process. Whether that would have resulted in a grant of leave is not a matter that requires consideration here. His asylum claim was however, considered by the Secretary of State and rejected.

33.
The appellant relies in the skeleton argument and in submissions on the report entitled “An inspection of the UK Border Agency’s handling of legacy asylum and migration cases” dated March-July 2012 by the Independent Chief Inspector of Borders and Immigration, John Vine CBE QPM. In actual fact, the only passage relied on is in the Foreword where there is criticism of the policy change in July 2011 of granting “legacy asylum applicants” discretionary leave for three years where removal from the UK was not considered appropriate, rather than indefinite leave to remain as previously. This, the report states, adversely affected a number of applicants including former unaccompanied asylum seeking children whose cases should have been dealt with in a timely fashion and where the applicants were not at fault for the delays. The Chief Inspector concludes that those applicants had a reasonable expectation that their cases would have been resolved by July 2011 and that they thus would have been granted indefinite leave to remain.

34.
The report is highly critical of the handling of the legacy process. It does not however, help at all in informing my decision on the issues to be decided in the appeal before me.

35.
Mohammed was also a judicial review decision, by Mr Stephen Morris QC sitting as a Deputy High Court Judge. The grounds for judicial review are set out in summary at [59]. They were, first that the claimant was still awaiting a decision on consideration of her case under the legacy programme. The second related ground was that the case should be stayed pending consideration of her case by the Case Assurance and Audit Unit (“CAAU”), the successor to the Case Resolution Directorate (“CRD”). Third, it was said that the decision to refuse the claimant discretionary leave was Wednesbury unreasonable, or was otherwise unfair and should be quashed. The Court rejected the first two grounds but found for the claimant on the third, as to the approach that was taken in considering her case.

36.
Mr Tarlow relied on Mohammed , in particular at [69] and [70]. Those paragraphs relate to the judge's conclusions on the argument about what length of residence would or could result in a grant of leave under the legacy process. That issue is not relevant to this appellant’s case in the light of my conclusions on the relevance of the legacy process to the determination of his asylum claim.

37.

In the circumstances, the complaint in the grounds that the First-tier judge ought to have adjourned the hearing to allow for consideration by the Secretary of State of the appellant's case under the legacy process is without merit. Judge Talbot was informed that the CRD (legacy team) had been disbanded, not being informed that it was succeeded by the CAAU. Nevertheless, in the light of my conclusions, even had he been informed that there was still a legacy team in existence, there was no error in his failing to adjourn.

38.
There was no discrete challenge to the judge's Article 8 assessment beyond the limits of the challenges to the decision already referred to.

39.
In terms of the grounds advanced therefore, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal.

40.
It was however conceded on behalf of the respondent that the removal decision under section 47 of the 2006 Act was not in accordance with the law, it being made at the same time as, and in the same decision as, the refusal to vary leave to remain. It was decided in Ahmadi (s. 47 decision: validity; Sapkota) [2012] UKUT 00147 (IAC), now confirmed by the Court of Appeal ([2013] EWCA Civ 512) that a removal decision under s. 47 of the 2006 Act cannot be made at the same time as the variation of leave decision. (See also Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)). The First-tier judge did not deal with the question of the validity of the removal decision.

41.
There is thus an error of law on the part of the First-tier Tribunal in relation to the decision to remove the appellant under s. 47 of the 2006 Act and to that extent only the decision is set aside. The appeal in relation to s.47 is allowed to the limited extent that that decision (as distinct from the decision to refuse to vary leave to remain) is not in accordance with the law.

Decision

42.
The decision of the First-tier Tribunal did not involve the making of an error on a point of law in terms of the Secretary of State's decision to refuse to vary leave to remain. The decision of the First-tier Tribunal to dismiss the appeal on asylum, humanitarian protection and human rights grounds therefore stands.

43.
The decision of the First-tier Tribunal did involve the making of an error on a point of law in relation to the decision to remove the appellant under section 47 of the Immigration, Asylum and Nationality Act 2006. The decision in that respect is set aside and the appeal is allowed to the limited extent that the Secretary of State's decision is not in accordance with the law.

Anonymity

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

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) and consequently, this determination identifies the appellant by initials only.

Upper Tribunal Judge Kopieczek

/13