Upper Tribunal

(Immigration and Asylum Chamber)

SHL (Tracing obligation/Trafficking) Afghanistan [2013] UKUT 00312 (IAC)

the immigration Acts

		Determination Sent:
Heard at:	Field House	Re Promulgated:
On :	1 st May 2013	

Before

The Honourable Mr. Justice McCloskey

Upper Tribunal Judge Goldstein

Between

SHL	Appellant
And	
Secretary of State for the Home Department	Respondent

Representation

For the Appellant: Mr O'Ceallaigh, instructed by Hammersmith and Fulham Community Law Centre

For the Respondent: Mr Jarvis, Home Office Presenting Officer.

[1] Regulation 6(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 imposes on the Secretary of State a duty to endeavour to trace the members of a minor asylum applicant's family as soon as possible following submission of the asylum claim. A failure to discharge this duty may, depending on the facts found, give rise to a breach of the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009, as it may render the decision maker unable to assess the best interests of the child claimant. Where a Tribunal finds a breach of a duty owed under Regulation 6, it is necessary to address the consequences thereof. Such a breach does not per se vitiate the ensuing asylum decision. Rather, it is incumbent on the Tribunal to evaluate its effect and

consequences in the fact sensitive context under consideration. The onus remains on the Appellant to establish a proper foundation for the grant of relief.

[2] In the instant case, the Secretary of State failed to discharge its duty under Regulation 6. However the lack of evidence from the Secretary of State concerning the availability of otherwise of familial support to the Appellant in the event of returning to his country of origin neither established nor reinforced any of the grounds upon which the Appellant put forward his case for protection.

[3] There is no right of appeal to the Tribunal under the European Convention on Action Against Trafficking In Human Beings. This Convention, as an unincorporated international treaty, cannot be invoked as a freestanding source of rights, obligations and legal effects and consequences in domestic law.

[4] In any event, in so far as the Secretary of State was subject to a public duty to take the Convention into account, this was clearly done in the present case in making the separate trafficking decision.

DETERMINATION AND REASONS

Introduction

[1] This appeal has its origins in the Respondent's decision of 5 th April 2011 rejecting the Appellant's application for asylum. By the same decision the Respondent determined that the Appellant did not qualify for any form of relief by virtue of Articles 2, 3 or 8 ECHR or for the grant of humanitarian protection pursuant to paragraph 339C of the Immigration Rules.

[2] The Appellant challenged this decision and the history of the ensuing proceedings may be charted thus:

(a) On 6 th July 2011, the First-tier Tribunal dismissed his appeal.

(b) On 3 rd January 2012, the Upper Tribunal set aside the aforementioned decision and determined to re-make it.

(c)
On 1 st April 2012, a hearing scheduled to proceed in the Upper Tribunal was adjourned, to await the decision of the Court of Appeal in KA (Afghanistan) v Secretary of State for the Home Department **[** 2012 **]** EWCA Civ 1014.

(d)
On 18 th July 2012, there was another adjournment of the same species.

(e)
On 25 th July 2012, the decision in KA was promulgated.

(f)
On 18 th October 2012, the appeal was rescheduled for hearing in the Upper Tribunal. On this occasion, an adjournment materialised as a result of the Respondent belatedly introducing certain fresh evidence. This consisted of information emanating from Kent County Council Social Services Department, a "Eurodoc" fingerprint record originating in Greece and a Home Office record of interview of the Appellant. This new evidence was admitted by the Tribunal under rule 15 of the Tribunals Procedure (Upper Tribunal) Rules 2008. The adjournment was designed to enable the Appellant to consider the fresh evidence and take any further steps deemed appropriate.

(g)
Initially, it was proposed that the appeal hearing would be rescheduled on 10 th December 2012. In the event, this was revised to 28 th January 2013. On this occasion, the Appellant did not appear. The Tribunal granted an adjournment and a new hearing date of 1 st May 2013 was allocated.

In deciding, on 3 rd January 2012, to set aside the decision of the First-Tier Tribunal, this Tribunal (constituted only by Upper Tribunal Judge Goldstein) concluded that this decision was vitiated by errors of law in relation to the Secretary of State's duty under Regulation 6 under the Asylum Seekers (Reception of Conditions) Regulations 2005 and the duty owed under section 55 of the Borders, Citizenship and Immigration Act 2009, a further error of law on the issue of burden of proof and the making of certain findings which had no evidential foundation.

Appeal Hearing

[3] Prior to 28 th January 2013, the Appellant had attended all four previous listings of his case in the Upper Tribunal. His first non-appearance occurred on 28 th January 2013. At the rescheduled appeal hearing on 1 st May 2013 he failed to appear again. His counsel informed the Tribunal that there had been contact between the Appellant and his solicitors some days before the adjourned hearing in January and again by telephone in advance of the most recent hearing. Counsel further represented to the Tribunal that, in the circumstances, he and his instructing solicitors considered themselves to be without instructions from their client, with the result that they would no longer be representing him. In essence, this was a declaration that they were coming off the record on behalf of their client.

[**4]** As a result, a conventional hearing was not conducted on 1 st May 2013. In its ruling, the Tribunal stated that, notwithstanding his non-attendance, the Appellant was entitled to a determination of his appeal and that this would be undertaken as a paper exercise. The Tribunal noted that personal attendance is not required of any Appellant and that by non-attendance an Appellant does not forfeit his right to have the appeal determined. There is nothing in the legislation suggesting otherwise. Nor does non-attendance by an Appellant automatically qualify for an inference adverse to him. The Tribunal further ruled that as this was the Appellant's second successive failure to appear, there would be no further adjournment and no fresh hearing date would be allocated.

[5] This determination is prepared in the circumstances outlined immediately above. It has two particular features, each of them regrettable. The first is that the Tribunal has not had the opportunity to hear the Appellant's evidence at first hand. The second is that the Tribunal has been deprived of adversarial argument from the parties' respective representatives.

The evidence: the main features

[6] The Appellant arrived in the United Kingdom on 30 th August 2009, an unaccompanied teenager, aged almost 15 years. Having claimed asylum, he was registered by Kent County Council as an unaccompanied asylum seeking child and was treated accordingly. It was recorded that he went missing on 9 th October 2009 and remained so until 26 th November 2010.

[7] On 7 th March 2011 [then aged 16 years – [10], infra], the Appellant was interviewed by the Respondent in the presence of his solicitor, a social worker acting as responsible adult and an interpreter. Afghanistan was noted as his country of origin. His village, district and province were recorded. He asserted that the only remaining members of his family in Afghanistan were his sister, maternal uncle and grandfather. He had maintained contact with his family and had spoken by

telephone with his sister just three or four weeks previously. As regards his most recent history, he claimed to have been kidnapped by " the agent " who escorted him to Birmingham, where the Appellant worked for him in building operations. There he resided with the agent and other male Afghanis. The Appellant was forced to repay an alleged debt to his captor and when this was achieved he was released. He suffered no ill treatment during his captivity.

[8] With regard to his alleged vulnerability to persecution if repatriated in Afghanistan, he claimed that he would be killed by the Taliban, who were active in his area. He believed that –

" ….. they would give me explosive material or bomb to be on myself …. I would be killed …. They wanted me as well because they took my maternal uncle's son and wanted to use him as suicide bomber. He did not come home. My maternal uncle told me I would be taken also so he sent me here. "

His cousin, he claimed, had been taken away by Taliban members two days before the Appellant's departure from Afghanistan. They told his uncle that they wanted him also. The Appellant was elsewhere at this time. Upon returning home, this was recounted to him by his maternal uncle, who also told him that he would send the Appellant to a place where he would be safe. The Appellant left the following morning. His uncle told him that his cousin was exposed to deployment as a suicide bomber. The Appellant detailed the route and duration of his journey from Afghanistan to the United Kingdom. The countries in transit included Greece, where he spent about one month. He claimed that his father had been killed by the Taliban in an explosion when working with the police, when the Appellant was very young. He alleged that his mother had died from illness shortly after his departure from Afghanistan. He had been living with his maternal uncle previously. The Taliban had visited this house on two occasions. His cousin's removal had been reported by his uncle to the police. The Appellant had had no direct contact with Taliban members.

[9] Chronologically, the next material development was the Respondent's decision on whether the Appellant was a victim of trafficking under the Council of Europe Trafficking Convention This decision had two basic elements. The first consisted of a recognition that the Appellant may have been a victim of trafficking viz that he " ….. may have been trafficked from Afghanistan for the purposes of labour exploitation ". The second element of the decision is expressed in the following passage:

" …… It is not considered that there is any evidence that you were under the influence of traffickers at the point that you came to the attention of the UK authorities. You have stated that the man whose control you were under released you after you had worked off the debt you owed him for your journey to the UK and you have had no contact with him since …..

It is not considered that you are at present a victim of trafficking ….. "

Notably, this decision contains the following statement:

" No evidence has been gathered or submitted that would lead to your account being inconsistent or incredible ".

[10] On the same date, 5 th April 2011, the Respondent promulgated its decision rejecting the Appellant's claim for asylum. This decision had the following breakdown:

(a) The Appellant's asserted date of birth of 1 st January 1995 and his asserted Afghan nationality were accepted.

(b) His claim regarding his father's death was rejected as incredible.

(c) His claim regarding Taliban recruitment of his cousin as a suicide bomber was considered speculative and rejected accordingly.

(d)
Ditto the Appellant's claim that he was at risk of similar recruitment.

(e)
His assertion that his mother had died following his departure from Afghanistan was doubted.

(f)
His account of captivity in the United Kingdom was **apparently** believed.

(g)
While there was a possibility of Taliban recruitment of the Appellant if returned to Pakistan, the evidence did not demonstrate **a real risk** .

(h)
The Appellant did not belong to the particular social group of Afghan orphans and had not established that he would be at risk of any harm upon returning to his country of origin.

(i)
There would in any event be sufficient State protection available to the Appellant.

(j)
The Appellant is a person with no particular profile, political or otherwise and any possible Taliban recruitment would be merely random.

(k)
Internal relocation for the Appellant in Afghanistan would be possible in any event. Moreover, he would have the support of his living family members.

The Appellant having failed to establish a well founded fear of persecution, his claims for asylum and humanitarian protection were dismissed accordingly. The decision letter further recited that the Appellant's return to Afghanistan would not infringe his rights under Article 8 ECHR. Finally, the letter made brief reference to section 55 of the Borders, Citizenship and Immigration Act 2009 (" the 2009 Act "). In accordance with the extant policy concerning unaccompanied children seeking asylum, the Appellant was granted discretionary leave to remain in the United Kingdom until 1 st July 2012, when he would be aged 17 ½ years.

[11] In sequence, the next material item of evidence is a report compiled by the NSPCC, dated 21 st June 2011. Having regard to the chronology, it seems likely that this was commissioned on behalf of the Appellant in the wake of the Respondent's decision two months previously that, at that time, he could not be considered a victim of trafficking under the Council of Europe Convention (supra). The three main sources of information available to the author of the report were the documents provided to him, his interview of the Appellant (with an interpreter) and the Appellant's social worker. The Tribunal has considered this report in full and we highlight but some of its salient features. While repeating his claim that his cousin had been removed by the Taliban, he asserted that " he had witnessed some boys in his village being taken by the Taliban never to be seen again ". He further described that on one specific occasion –

" ……. The Taliban visited the house [where] he was staying with his family in the afternoon while he had gone swimming with other boys in a local pond. The Taliban told his uncle that they wanted SHL

to work for them ……. [and] …… that they would return the next day or at some point in the near future to collect him. ”

He asserted a fear of recruitment for deployment as a suicide bomber. In its essence this account harmonises with that provided by the Appellant during his earlier asylum interview. The author’s assessment was that the Appellant had been trafficked to the United Kingdom. He opined:

“ ……. children, such as SHL, who have experienced multiple traumatic events and have become victims of trafficking and exploitation as a result, are at high risk of being vulnerable to re-trafficking and exploitation on return. This risk can continue into adulthood unless the young person has appropriate support systems in place …….

In my professional opinion, SHL will need greater psycho-social support to enable him to recover from the impact of his physical and emotional abuse and loss. ”

It is evident that this report was designed to be deployed at the First-Tier Tribunal hearing scheduled for the following month.

[12] Sequentially, the next material item of evidence is the first of the Appellant’s two written witness statements, dated 28 th June 2011. In this he describes a significant Taliban presence and influence in his village and surrounding area. The key passage in this statement is the following:

“ I was forced to flee from Afghanistan as I was forcibly being recruited by the Taliban who came to our house on two occasions. My uncle then arranged for me to leave the country. ”

In this statement, he also responded to the refusal letter. Notably, in doing so, he made no mention of **his mother** when describing his family circle and circumstances in Afghanistan. While confirming post-departure communication with his sister, he claimed that he had lost the relevant telephone number, adding that he had requested his social worker to arrange an appointment to enlist the tracing services of the British Red Cross. The Appellant’s second witness statement was made on 30 th November 2012 (cf. the chronology in paragraph [2] above). In this he recounts receipt of a letter from the Red Cross disclosing their inability to locate his uncle. He reconfirmed a single occasion of communication with his uncle after departing Afghanistan. He expressed his fear in the following terms:

“ I am still in fear of being returned to Afghanistan. **I believe I would be killed by the Taliban if I was returned** .”

[Emphasis added.]

Annexed to this statement is a British Red Cross letter confirming the Appellant’s tracing assertion. While this letter clearly contemplated further tracing efforts, to be followed by further contact with the Appellant, there is no evidence of these matters.

Findings and Conclusions

[13] Notwithstanding the factors to which attention is drawn in [5] above, the Tribunal has had the benefit of the carefully constructed skeleton argument of Mr O’Ceallaigh (of counsel) and has derived assistance from this.

[14] To begin with, we shall address one discrete issue. It was submitted that the Tribunal should attribute no weight to the notes of the Appellant’s first encounter with immigration officials upon his arrival in the United Kingdom, relying on the decision of the Court of Appeal in AM and FA v

Secretary of State for the Home Department [2012] EWCA Civ 136. It is clear that this particular record was generated on the date when the Appellant entered the United Kingdom. We consider the present case to be a clear instance of one where evidence of this kind should attract no weight. We thus consider because the Appellant was aged only 14 years at the material time; he had just undergone a gruelling journey of some months duration; he found himself in an alien environment; and no responsible adult or legal or other representative was present. This situation contrasts sharply with that which prevailed at the time of the Appellant's asylum interview (supra). We disregard this evidence accordingly.

[15] While the Appellant claimed to have been born on 1 st January 1995, the assessment of Kent County Council is that his date of birth is 1 st September 1994. We shall proceed on the latter basis. We do not consider that this discrete factor per se weakens the Appellant's credibility. It follows that he was aged 16 ½ years when his asylum interview took place. We are mindful of the care to be exercised and latitude to be afforded in our evaluation of the Appellant's responses to the questions posed, given his age. Other relevant factors in this exercise include his intervening period of captivity, the duration of his period under the care of Kent County Council pre-interview (some three months), the way in which the interview was conducted (formulation of questions, breaks, duration et alia) and the presence of an interpreter, a responsible adult and the Appellant's legal representative.

[16] Based on the Appellant's asylum interview, we make the following specific findings:

(a) An agent was engaged by his family to bring him to the United Kingdom and this duly occurred.

(b)
The journey from Afghanistan to the United Kingdom was basically as described by the Appellant.

(c)
En route to the United Kingdom the Appellant was in temporary police detention in Greece when his fingerprints were taken.

(d)
Following his departure from Afghanistan, the Appellant had some initial contact by telephone with his family, both directly and via the agent, but not subsequently.

(e)
The Appellant was the victim of captivity and forced labour in the United Kingdom, perpetrated by the agent, from October 2009 to November 2010. This was for the purpose of paying the agent for his services.

[17] In its Notice of Decision, the Respondent stated that the meagre detail of his father's alleged death provided by the Appellant damaged his credibility. Secondly, the Appellant's claim that the Taliban had an interest in recruiting him was rejected and this was considered to weaken his credibility further. Thirdly, the Appellant's assertions about his mother's death were rejected. Having regard to all the circumstances of the Appellant's asylum interview, including in particular the factors highlighted in paragraph [15] above, we would have expected the Appellant to have provided rather greater detail about various family matters. Moreover, he volunteered v ery little indeed about his upbringing and, strikingly, said nothing about his mother – notably when asked a series of questions about his family (at the beginning of the interview) and when describing alleged events before his departure from Afghanistan. On his account, his mother played no role and did not feature at all in the crucial decision to send him to the United Kingdom. If true, one would have expected the Appellant to

state this and to explain it even briefly. In addition, he provided no substantial information about his sister's home circumstances or her upbringing. In addition, bearing in mind the date of the asylum interview and our finding of contact with family members, we would have expected the Appellant to have said something about the actual or suspected fate or whereabouts of his cousin or, as the case may be, the absence of any knowledge thereof.

[18] As the analysis immediately above, juxtaposed with the summary of the Appellant's various accounts (paragraph [7] - [8] and [11] – [12] above) demonstrates, there are certain imperfections and inconsistencies in the story provided by the Appellant from time to time. However, we must balance these with the factors of his age, the rigours of his difficult and protracted journey to the United Kingdom and the ordeal of his lengthy captivity in this country. We note further that, in its trafficking decision (paragraph [9] supra), the Respondent expressly acknowledged that the Appellant's account was neither inconsistent nor incredible. Furthermore, in its asylum refusal decision on the same date (paragraph [10] supra), the Respondent, presumably advisedly, criticised certain aspects of the Appellant's account as " speculative " rather than mendacious or exaggerated. Following a critical, but fair, review of all the evidence, we find that the essential core of the Appellant's story is worthy of belief. Thus we accept his explanation for leaving Afghanistan.

[19] In our view, the critical issue is whether the Appellant has demonstrated a well founded fear of persecution for a Convention reason in the event of being returned to Afghanistan. We remind ourselves that he bears the onus of proving a well-founded fear of persecution for a Refugee Convention reason and that the standard of proof is a reasonable degree of likelihood (per R v Secretary of State for the Home Department, ex parte Sivakumaran [1998] AC 958.) Reduced to its essentials, the key elements in the Appellant's story are the alleged visits by Taliban members to his maternal uncle's home on two occasions, the alleged forced recruitment of his cousin as a suicide bomber and his uncle's belief, now espoused by the Appellant, that he was, and remains, at risk of a similar fate. The written submission formulated by counsel was that the Appellant seeks asylum on the basis of his fear of persecution because of his imputed political opinion . It was further contended that he would be at risk of forced recruitment by the Taliban. While the Appellant's second witness statement asserted **a risk of being killed by the Taliban** (paragraph [12], supra), we shall interpret this as a fear/risk of death by suicide bombing (or something comparable) following forced recruitment.

[20] Acting on the findings rehearsed above, we turn to consider the question of whether the Appellant, if returned to Afghanistan, would have a profile exposing him to any particular risk of recruitment by the Taliban. On his own account, he at no time had any direct approach from or contact or connection with this organisation. However, based on our findings above, we accept that, indirectly, some interest had been expressed in him by the Taliban. In this context, we refer to the decision of the Upper Tribunal in AK (Afghanistan) v Secretary of State for the Home Department [2012] UKUT 00163 (IAC). This decision embodies the current country guidance on the applicability of Article 15(c) of the Refugee Qualification Directive to Afghanistan. It does not speak directly to the specific risk canvassed by the Appellant in the present case viz that of forced recruitment by the Taliban and, consequentially, possible death by suicide bombing. However, we consider that this discrete risk falls within the scope of the armed conflict and indiscriminate violence generally identified by the Upper Tribunal in AK . This is confirmed by the detailed description of the present conditions in Afghanistan in paragraph [1] of the Determination. The Tribunal held, inter alia

" [249] .....

(ii) Despite a risk in the number of civilian deaths and casualties and (particularly in the 2010 – 2011 period) an expansion of the geographical scope of the armed conflict in Afghanistan, the level of indiscriminate violence in that country taken as a whole is not at such a high level as to mean that, within the meaning of Article 15(c) of the Qualification Directive, a civilian, solely by being present in the country, faces a real risk which threatens his life or person .....

(iii) Nor is the level of indiscriminate violence, even in the provinces worst affected by the violence ..... at such a level. ”

Both this decision and that in AA (Unattended Children) Afghanistan [2012] UKUT 00016 featured in the recent decision of the European Court of Human Rights in H and B v United Kingdom [Applications numbers 70073/10 and 44539/11 – 9 th April 2013]. The domestic decisions were endorsed by the Strasbourg Court: see paragraphs [92] – [93]. The Court held that in the event of the removal of the Applicants to Afghanistan there would be no infringement of their rights under Article 3 ECHR.

[21] We consider, in light of our findings above, that in the event of being removed to Afghanistan the Appellant would be of no specific interest to the Taliban. If he were to attract such interest, this would be simply on account of his general profile constituted by his age (now 18) and his male gender. He would be under no compulsion to live where he did previously, having regard to the considerations that he has no living parents, his only sibling (his sister) is now married and he has lost contact with his maternal uncle. We consider that, as a matter of probability, the Appellant will choose to settle elsewhere, away from this area of high level Taliban activity and influence. It will be open to the Respondent to return him to Kabul (as in AK and H and B). In this respect, we note also the recent judgment of the Court of Appeal in EU (Afghanistan) and Others v Secretary of State for the Home Department [2013] EWCA Civ 32, paragraph [34] especially .

[22] We consider that the risk upon removal to Afghanistan asserted by the Appellant has no special or specific features personal to him. It is no different from the risk theoretically faced by the large numbers of other broadly comparable members of the Afghan population. Furthermore, the Appellant has failed to establish that he is a member of any discernible group. We specifically reject the suggestion that he is a member of a group whose common identifying characteristic is some unspecified political opinion. His claim for asylum must fail accordingly. Secondly, applying the decision in AK , he does not qualify for humanitarian protection. A real risk threatening his life or person has not been demonstrated. Thirdly, giving effect to the decision in H and B v United Kingdom , his claim under Articles 2 and 3 ECHR must fail. The findings of fact which we have made in this Determination are probably about as favourable to the Appellant as they could possibly be. However, we conclude that they fall well short of providing a basis for concluding that his removal from the United Kingdom to Afghanistan would contravene any of the governing legal standards.

The Tracing Issue

[23] Counsel’s skeleton argument canvassed two further issues. The first concerns the tracing duty imposed on the Respondent by Regulation 6(1) of the Asylum Seekers (Reception Conditions) Regulations 2005. This is an issue which seems to be arising with increasing frequency.

[24] The issue of tracing originates in a measure of EU law, Council Directive 2003/9/EC (27 th January 2003), the subject matter whereof is the prescription of certain minimum standards for the reception of asylum seekers. Article 19 addresses the discrete topic of unaccompanied minors. They must be afforded certain levels of protection and representation. 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 domestic transposing measure is the Asylum Seekers (Reception Conditions) Regulations 2005, Regulation 6(1) whereof 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. ”

In paragraph 68 of the UNCHR Guidelines on International Protection, a nexus is forged between tracing and “ family reunification with parents or other family members ”. This theme, and its interaction with reception arrangements in the country of destination, is reiterated in paragraph 8A of the UNCHR Aide-Memoire concerning special measures applicable to the return of unaccompanied and separated children to Afghanistan. This theme is also clearly apparent in the Respondent’s publication “Processing an Asylum Application from a Child”, in particular the passage in Chapter 15 which states that any tracing exercise must consider the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 –

“ …. to have regard to the need to safeguard or promote the welfare of children in the UK and whether it is in the childrens’ best interests to return them to their family or extended family, if reunification is possible ….. [the aim being] ….. to obtain information relevant to an assessment of whether there is a prospect of reuniting the child safely with their family in the event of return. ”

It is convenient here to interpose section 55 of the 2009 Act which, insofar as material, provides:

“ (i) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in subsection (ii) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …

(ii)
The functions referred to in (i) are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality…. “

It is also pertinent to highlight paragraph 80 of the commentary on the UN Convention on the Rights of the Child promulgated by the UN Committee on the Rights of the Child (September 2005):

“ Tracing is an essential component of any search for a durable solution and should be prioritised except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardise fundamental rights of those being traced. ”

[25] In the jurisprudence which has developed, it has not been disputed that Regulation 6(1) imposes on the Secretary of State a duty to endeavour to trace the members of a minor asylum applicant’s family as soon as possible following submission of the claim. This was described by Pill LJ in DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305 as “ a plain duty ”: [44]. His Lordship’s conclusion was that the case should be remitted to the Tribunal, to enable further

evidence to be considered, apparently with specific reference to the issue of reception services and facilities available in the proposed country of destination. It was common case that the Secretary of State had made no attempt to discharge the tracing obligation. In the second of the two major judgments delivered by the Court of Appeal, Lloyd LJ observed that the duty was an enduring one " ..... and steps ought now to be taken to comply with that obligation ": see [68]. His Lordship did not, however, link this failure to the grant of any relief to the Appellant. Rather, his clearly pronounced reason for concluding that the Tribunal's determination was wrong in law was that it had failed to give consideration to that to which regard must be had under section 55 of the 2009 Act, namely the need to safeguard and promote the welfare of the Appellant as a child in the United Kingdom. On this basis, he concurred with the proposed order, namely remittal of the case to the Tribunal: see paragraphs [80] – [83]. Rimer LJ, the third member of the Court, concurred with Lloyd LJ: see paragraph [88]. We consider the ratio of DS to be that the Appellant succeeded and a consequential order of remittal to the Tribunal was made because there had been a failure to conduct an assessment of the Appellant's best interests, contrary to section 55.

[26] The Secretary of State's duty to endeavour to trace was the subject of further consideration by the Court of Appeal in HK (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 315. Delivering the judgment of the Court, Elias LJ considered that the Regulation 6 duty is an integral aspect of the determination of the asylum application: [39]. It also fell within the ambit of the broad duty under section 55 of the 2009 Act: paragraph [40]. Concurring with the approach of Lloyd LJ in **DS** , Elias LJ continued:

" [46] .... In my view, he was thereby recognising that there may be cases where the Secretary of State or a Tribunal could make a determination on an asylum application in circumstances where Regulation 6 had not been complied with, but that would not necessarily compel the conclusion that asylum should be granted ....

The significance of an unjustified failure to trace is not that Regulation 6 has not been complied with, but rather that the decision maker is not in a position to assess the best interests of the child. "

This illustrates one potential consequence of a failure to discharge the Regulation 6 duty, namely a breach of the duty imposed by section 55. It also draws attention to the need to address the consequences of any breach of this duty in every case. The outcome of the appeal was the same as in DS viz an order remitting the case to the Upper Tribunal to facilitate the consideration of further evidence, to include such information (if any) " ... which the Secretary of State is obliged to try to obtain pursuant to her Regulation 6 obligations ": paragraph [52]. Notably, the appeal was allowed " on the grounds conceded by the Secretary of State ": [52]. This is clearly a reference to the concession that, in alignment with the decision in DS , the case should be remitted to the Upper Tribunal: see [32] and [33]. One tenable construction of this concession is that it included an acknowledgement by the Secretary of State that the duty to endeavour to trace would be performed (belatedly) post-remittal and in advance of the reconvened Upper Tribunal hearing. Alternatively, it may have been a subtly framed mandatory order. Irrespective, it was clearly envisaged that further material evidence would be adduced and duly considered by the Tribunal. Notably, this decision casts no doubt on the earlier decision of the Upper Tribunal in AA v Secretary of State for the Home Department [2012] UKUT 00016 (IAC) and in particular the following passage in paragraph [133]:

" We note ..... that the Respondent has not made any tracing enquiries ......

But as the Court of Appeal observed in DS ..... the appellant's claim has to be determined on its merits, whether or not any steps have been taken by the Respondent in discharge of that obligation. "

We are also mindful that in the same passage the Upper Tribunal stated further:

“ But the centrality of the question of whether a child would have the protection of his or her family on return serves to demonstrate the importance of the discharge by the Respondent of her duty to make tracing enquiries ”.

[27] The jurisprudence in this field was extended by the decision of the Court of Appeal in KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014. In that case, it was agreed that the only step taken by the Secretary of State in purported discharge of this duty had been to inform the Appellant of the availability of the Red Cross services. The Court was trenchant in its conclusion that this did not discharge the duty: see paragraph [14]. While this breach of the duty was clearly considered to be egregious, or “ systemic ”, its consequences were duly addressed by the court. These were formulated in cautious terms:

“ Having accepted that there was a systemic breach of the duty to endeavour to trace …. [it is] not simply a matter of the systemic breach entitling these appellants, without more ado, to the allowing of their appeals with remittal to the Secretary of State to consider grants of leave to remain, which is the primary relief sought. ”

Notably, this chimes with the statement of Lloyd LJ in DS that this failure “ …. is not, by itself, relevant to the determination of the appellant’s asylum application” : paragraph [68]. In KA , Morris Kay LJ fashioned three principles, in paragraph [24]:

“ (1) The duty to endeavour to trace is not discharged by merely informing a child of the facilities of the Red Cross.

(2)
A failure to discharge the duty may be relevant to judicial consideration of an asylum or humanitarian protection claim.

(3)
Such a failure may also be relevant to a consideration of the section 55 duty. ”

His Lordship emphasised that the application of these principles to individual cases would, inevitably, be fact sensitive: paragraph [25]. He added in paragraph [26]:

“ Whether one is considering asylum, humanitarian protection or corrective relief, there is a burden of proof on an applicant not just to establish the failure to discharge the duty to endeavour to trace but also that he is entitled to what he is seeking …..

Even in the context of a clear breach of the duty to endeavour to trace, a Tribunal will retain a certain robustness in assessing the evidence of a young person who has demonstrated a deep-rooted resistance to being returned to his country of origin ”.

[Emphasis added]

We consider the import of this statement clear – a breach of the tracing duty does not, without more, betoken an error of law by the Secretary of State giving rise to consequential relief for the claimant.

[28] In summary, we consider it clear that a failure by the Secretary of State to discharge the duty to endeavour to trace an asylum applicant’s family members does not per se either vitiate the Secretary of State’s determination of the asylum claim **or** any ensuing decision of the First-Tier Tribunal or the Upper Tribunal affirming such determination. Neither the relevant measure of EU law nor its

domestic transposing measure prescribes any sanction, remedy or consequence for such a failure. We consider that in cases where this discrete failure is canvassed and established, it is incumbent on the Tribunal concerned to undertake an evaluation of its effect and consequences, in the fact sensitive context under consideration. In performing this task, some guidance can be derived from the decision in KA :

“ [25] Although we are not yet in a position to deal with the cases of these individual appellants (save for SA), it is important to emphasise that, when the principles to which I have referred come to be applied to individual cases, much will turn on their specific facts. 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. At this stage, when we have not heard oral submissions on the facts of their cases, it is inappropriate to say where on the spectrum each of these Appellants lies. ”

It is further noteworthy that there is nothing in the jurisprudence of the Court of Appeal to suggest that the determination of appeals should be delayed by Tribunals to afford the Secretary of State the opportunity of belatedly discharging the obligation enshrined in regulation 6. This is unsurprising, given the apparent prevailing government policy. Nor, to our knowledge, have there been any applications for judicial review culminating in an order requiring the Secretary of State to discharge this duty in any particular case. Furthermore, there does not appear to have been any consideration yet of the impact, if any, of Article 4/3 TEU viz the duty to take appropriate measures to “... ensure fulfilment of the obligations ...” imposed by EU law which, of course, applies to courts as well as organs of the State. There may, therefore, be scope for further development of the jurisprudence in this sphere.

[29] We also draw attention to the most recent authoritative decision in this field, namely EU and Others (Afghanistan) v Secretary of State for the Home Department [2013] EWCA Civ 32. Arguably the most important feature of this decision is that it appears to give its quietus to the decision of a differently constituted Court of Appeal in Rashid v Secretary of State for the Home Department [2005] EWCA Civ 744 and [2005] INLR 550, which gave birth to the so-called “corrective” or “protective” principle. Signs of a retreat from Rashid had already been evident in KA (supra). The judgment in EU re-emphasises the need for the claimant to establish a proper foundation for the grant of one of the available forms of protection:

“ [6] …….. In cases that are concerned with claims for asylum, the purpose of the grant of leave to remain 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 ……..**

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. ”

[Emphasis added.]

Notably, the Court concurred with judgment of Lightman J in R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546 and [2007] INLR 450. Also notable is the Court’s suggestion that where a breach of the Secretary of State’s duty to trace is demonstrated, this:

“…….. may be relevant to her or the Tribunal’s decisions. Her failure may be relevant to the assessment of risk on return. The lack of evidence from the Secretary of State as to the availability or otherwise of familial support should be taken into account……

Similarly, the failure to endeavour to trace may result in a failed asylum seeker, who may in consequence lose contact with his family, putting down roots here and establishing a valid Article 8 claim. ” See [7].

Finally, it is clear from this decision that Tribunals should, in appropriate cases, take into account that the Afghan families of unaccompanied minor children who have travelled to the United Kingdom may be unwilling to co-operate with an agent of the Secretary of State engaged in tracing enquiries.

[30] We find that in the present case, the Respondent failed to discharge the duty to employ reasonable endeavours to trace the Appellant’s family in Afghanistan. It is settled that this duty is not discharged by simply steering the person concerned towards the services and facilities offered by the International Red Cross. However, we must take into account our findings above, which indicate that the Appellant has no subsisting settled family unit in Afghanistan. Since his departure from that country, his mother has died, his sister has married and his maternal uncle has left the village in question. Furthermore, we have found that the Appellant and his agent were able to make contact with the sister and uncle previously and we are sceptical about the claim that this is no longer feasible. Finally, our clear expectation is that the Appellant will seek to relocate, settling elsewhere than in the village where he was reared, distant from the malign Taliban influence there. Accordingly, we consider that the Secretary of State’s breach of the tracing duty in this case is of no moment. The lack of evidence from the Secretary of State concerning the availability or otherwise of familial support to the Appellant in the event of returning to Afghanistan neither establishes nor reinforces any of the grounds upon which he puts forward his case for protection.

The Trafficking Issue

[31] The second discrete issue canvassed concerned the Respondent's negative trafficking decision enshrined in the second of its letters dated 5 th April 2011. This focuses attention on an instrument of international law, the European Convention on Action Against Trafficking in Human Beings (" the Trafficking Convention "). This is a Council of Europe measure, signed by the United Kingdom Government in 2007 and ratified in 2008. It entered into force on 1 st February 2008, having received the necessary 10 ratifications. It has been ratified by the vast majority of the Council of Europe Member States. Article 10 provides:

" Each party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure ….. "

Where the relevant authority has identified a victim of trafficking, the person concerned may qualify for a residence permit under Article 14. The Convention is a comprehensive measure, focusing particularly on the protection of victims of trafficking and the safeguarding of their rights. It is also designed to prevent and deter trafficking and to prosecute the perpetrators thereof. It embraces all kinds of exploitation, sexual exploitation, forced labour and kindred abuses, whether national or transnational and irrespective of whether related to organised crime. It establishes an independent monitoring mechanism for the purpose of securing compliance with its provisions by the Parties.

[32] In the United Kingdom, the Respondent is the competent authority for the purposes of the Convention. By its decision of 27 th August 2010, the Respondent determined that there were no reasonable grounds for believing that the Appellant is a victim of trafficking. The decision was made by the Criminal Case Work Directorate (Liverpool) of the UK Border Agency. This decision was entirely independent of the impugned deportation decision. It was based on an assessment of (inter alia) the circumstances of the Appellant's journey to and entry into the United Kingdom, including the factors of age and sponsor. It is clear that an important ingredient of this decision was the rejection of the Appellant's assertions of slavery on the ground that they were not considered credible.

[33] Our evaluation of this argument is as follows. In the first place, there is no right of appeal to this Tribunal against the Respondent's trafficking decision: see Part V of the Nationality, Immigration and Asylum Act 2002. Secondly, the Trafficking Convention cannot be invoked as a freestanding source of rights, obligations and legal effects and consequences in domestic law, as it is an unincorporated international treaty. Thus the long established principle that treaties are not self-executing in municipal law applies. This principle was expressed unambiguously by Lord Phillips in Ahmed v HM Treasury [2010] 2 AC 534, at [109], in the following terms:

" Treaties entered into by the United Kingdom do not take direct effect. Treaties are entered into by the Government under the Royal Prerogative, but unless and until Parliament incorporates them into domestic law, they confer no powers upon the executive nor rights or duties upon the individual citizen "

This is frequently described as the principle in the International Tin Council case

([1990] 2 AC 418). A corollary of this principle is that a failure by a public authority to take into account the provisions of an unincorporated international treaty is not of itself a ground for impugning the exercise of a discretionary power: R v the Ministry of Defence, ex parte Smith [1996] QB 517, page 558 (Per Sir Thomas Bingham MR). It is, of course, established that unincorporated international instruments have a role in certain contexts, a paradigm example being the presumption

that Parliament does not intend to legislate contrary to the United Kingdom's international obligations: see most recently Assange v Swedish Prosecution Authority [2012] UKSC 22, [122] (Per Lord Dyson). Furthermore, a decision may be impugned where a public authority purports to apply an unincorporated international treaty provision but errs in doing so: R v Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839, page 867 (per Lord Hope) . However, none of these principles avails the Appellant in the instant case. Moreover, in the present context, the measure of international law in question was more than simply taken into account: it was the subject of a specific application by the Appellant and ensuing decision by the designated organ of the State. In passing, we observe that the Trafficking Convention is one of over 200 treaties adopted by the Council of Europe since its inception in 1949, the vast majority whereof belong exclusively to the domain of international law (the ECHR and some of its Protocols being the most notable exceptions in the United Kingdom).

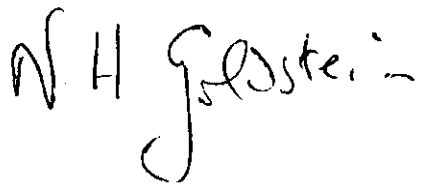
[34] Finally, we consider that it would have been open to the Appellant to challenge the Respondent's trafficking decision by an application for judicial review. The Tribunal was informed that such challenges have occurred. However, he did not pursue this remedy. We are of the opinion that backdoor challenges to trafficking decisions made by the Respondent under the Trafficking Convention are not permissible in appeals of the present kind. They lie outwith the competence of the First-tier and Upper Tribunals.

[35] It might be helpful to reiterate two of our findings of fact above viz the Appellant travelled voluntarily to the United Kingdom pursuant to an arrangement made by his family and, some time following arrival here, was in captivity for a period of approximately one year at the hands of his agent. Thereafter, there is no suggestion of any persisting trafficking of the Appellant, albeit there is a dearth of recent evidence concerning him. It will in any event be open to him to make his case afresh to the designated authority if he wishes.

[36] For the reasons elaborated in paragraphs [31] – [35] above, we consider the Appellant's argument on this discrete issue misconceived.

Decision

[37] The appeal is dismissed on all grounds for the reasons elaborated above.



Nathan Goldstein

Upper Tribunal Judge

pp

SIGNED: _ Bernard McCloskey

The Honourable Mr Justice McCloskey

High Court of Justice of Northern Ireland

Dated: 22 May 2013

Amended para [2] (**in bold**) and re-promulgated pursuant to Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Dated 25 June 2013