



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07203/2014

THE IMMIGRATION ACTS

Heard at Field House

On 26 May 2016

**Decision &
Promulgated
On 1 July 2016**

Reasons

Before

**Mr H J E LATTER
(DEPUTY UPPER TRIBUNAL JUDGE)**

Between

**FH
(ANONYMITY DIRECTION MADE)**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Ms K McCarthy, Counsel

For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge I M Scott) dismissing his appeal against the respondent's decision made on 20 June 2014 refusing him further leave and to remove him from the UK.

Background

2. The appellant is a citizen of Afghanistan born on July 1995. He made a clandestine entry into the UK on 11 February 2009, claiming asylum on arrival. His application was refused on 11 August 2009 but he was granted discretionary leave to remain until 1 July 2012 as an unaccompanied minor. On 15 June 2012 he applied for further leave to remain but his application was refused on 20 June 2014 on asylum, humanitarian protection and human rights grounds. His appeal was dismissed by the First-tier Tribunal following a hearing on 17 November 2014 but this decision was set aside by the Upper Tribunal following a hearing on 18 September 2015 and the appeal was remitted for a fresh hearing which took place before Judge Scott on 9 March 2016 and his decision was issued on 4 April 2016.
3. In brief outline the basis of the appellant's claim was that he was born in Laghman Province in Afghanistan where he worked on the family farm with his parents. The Taliban used to come to the village and forcibly recruit boys who had reached the age of 13. After the appellant reached that age the Taliban came to their house and spoke to his father to recruit him. As neither the appellant nor his father wanted him to join the Taliban his father paid an agent to take him out of Afghanistan. He travelled through various unknown countries before being put on a lorry along with five other Afghan boys which brought him to the United Kingdom.
4. The respondent did not accept the appellant's account. She noted that he claimed that he had left Afghanistan about four months before arriving in the UK on 11 February 2009 but on checking his fingerprints against the European Data Base, it was found that he had been fingerprinted on two previous occasions, once in Greece on 10 July 2008 and once at Calais on 7 January 2009. The earlier fingerprinting in Greece was regarded as clearly inconsistent with the appellant's story because it predated not only the time of his claimed departure from Afghanistan but also the time when the Taliban supposedly sought to recruit him. On the issue of family tracing it was noted that the appellant's family had not been traced. The respondent had advised the appellant to contact the Red Cross to locate any remaining family in Afghanistan. The respondent had not been able to do this through the Foreign and Commonwealth Office in Kabul because the appellant had not given his consent. In any event, as he was now an adult it was found that he would be able to return to Kabul even without family support in Afghanistan.

The Hearing before the First-tier Tribunal

5. The judge heard oral evidence from the appellant. He said that he had not been in contact with his family in Afghanistan. He had sought assistance from the Red Cross but was never given an appointment. He had received information from his cousin who also gave oral evidence at the hearing

that his parents had been killed by the Taliban and after that he did not pursue any attempt to trace them. He said that he was not able to trace his family himself and the respondent had simply proceeded to do it and he had never refused the Home Office permission to contact them [29].

6. The judge found that the appellant had maintained an essentially consistent and plausible account of his reasons for leaving Afghanistan. His account was supported by the evidence of his cousin ('M'). He was satisfied that the reasons the respondent had given for disbelieving the appellant's story were in fact due to his young age. He accepted that it was perfectly possible the appellant had left Afghanistan earlier than his estimate and before his fingerprints were taken in Greece but that in any event the appellant had turned 13 in January 2008 and it was his attainment of that age which drew him to the attention of the Taliban. Accordingly, he found the appellant's account to be credible.
7. The judge was satisfied on the evidence that the appellant would face a real risk of suffering persecution in his home area in Afghanistan, which was under the control of the Taliban, but he went on to find that he could safely relocate to Kabul. In [55] the judge said:

"I find, however, that the appellant could safely relocate to Kabul, which the Taliban do not control, and that it would not be unduly harsh to expect him to do so. There is nothing to suggest that the Taliban would have any continuing interest in him or that they would be concerned, or indeed able, to trace him. The appellant is now an adult in good general health and he speaks the language. He also has two cousins in Kabul who, potentially, could afford him some assistance. [M] indicated that the difficulty was not with providing financial support for the appellant but with offering him effective protection. On that matter, it is obvious that the situation in Kabul is far from perfect, but I find that there is a sufficiency of protection in the Horvath sense."

8. The judge also found that the appellant was not entitled to humanitarian protection, not being satisfied that the situation in Afghanistan, whilst deteriorating, had yet reached the position where article 15(c) was engaged. The appellant was unable to show that there would be very significant obstacles in relocating to Kabul under para 276ADE(1)(vi) and his claim failed under the Immigration Rules. The judge then dealt with the issue of family tracing at [*] as follows:

"The issue of family tracing and whether the appellant did, or did not, fail to cooperate properly with the Home Office has ceased to have any relevance. The appellant is now an adult and I accept [M's] evidence that he learned from a reliable source that the appellant's family were all killed by the Taliban in 2012."

The Grounds of Appeal and Submissions

9. In the grounds of appeal it was argued that the judge erred in law when considering the reasonableness of relocation to Kabul, by dismissing the

relevance of the failure to trace on the basis that the appellant was now over 18, by failing to consider the route to indefinite leave under the discretionary leave policy and when considering article 15(c). Permission to appeal was refused on the first, third, and fourth grounds but allowed on ground 2 in respect of the failure to trace for the following reasons:

“However, it is arguable, as submitted in the ground 2, that the judge having accepted the credibility of the appellant as the reasons why he fled Afghanistan, erred in failing to consider the guidance in *KA (Afghanistan)* [2012] EWCA Civ 1014 regarding the effect of a failure to trace by the respondent, even though the appellant was now over 18 years of age. There was no consideration of this issue within the decision.”

10. Ms McCarthy submitted that the judge had erred by taking the view that the tracing obligation had ceased to have any relevance. She submitted that it could continue to be relevant even after an appellant had turned 18. She referred in particular to *KA* and to the spectrum into which cases might fall set out at [23] of that judgment. The appellant was a young man whose account had been accepted by the First-tier Tribunal and, had the tracing obligation been complied with, the veracity of his claim could have been established at an earlier stage and accordingly the protective principle referred to in [24] - [25] in *KA* should have been considered and applied.
11. Mr Kandola submitted that the judge had not erred. He referred to *EU (Afghanistan)* [2013] EWCA Civ 32 and in particular to [6] where Sir Stanley Burnton said that he did not think that the court should require or encourage the Secretary of State to grant leave in circumstances where someone was found not to be in need of protection either to mark the court’s displeasure at her conduct or as a sanction for that misconduct.
12. In reply Ms McCarthy submitted that the appellant could have demonstrated a right to asylum if the respondent has carried out her obligation to trace and that the First-tier Tribunal should have considered whether indefinite or discretionary leave should have been granted.

Consideration of the Issues

13. In *KA* the Court of Appeal reviewed the implications arising from a failure to endeavour to trace the members of an unaccompanied minor’s family as soon as possible as required by the Reception Directive, article 19.3 transposed into domestic law by regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. The court held at [24] that certain principles emerged from the authorities as follows:

- “(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 failure may also be relevant to a consideration of the s.55 duty.”

14. At [25] the court referred to a hypothetical spectrum. At one end was an applicant who gave 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. If he had reached the age of 18 by the time his appeal was considered he might, 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 s.55 by reference to the failure of the Secretary of State to discharge the duty to endeavour to trace. At the other end of the spectrum would be an applicant whose claim to have no surviving family in Afghanistan was disbelieved and in respect of whom it was found that he had been uncooperative so as to frustrate any attempt to trace his family.
15. The court said that 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 could establish no such disadvantage. However at [26] the court emphasised that when considering asylum, humanitarian protection or corrective relief, there was a burden of proof on an applicant not just to establish the failure to discharge the duty to trace but also that he was entitled to what he was seeking.
16. In JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00586, the Upper Tribunal held that the failure of the respondent to endeavour to trace family members of a child asylum seeker was only relevant to an appeal after the appellant ceased to be a child where he was able to show a causal link between that failure and issues relevant to the outcome of the appeal.
17. Ms McCarthy submitted that if the respondent had carried out her tracing obligations, in all likelihood this would have revealed that the appellant's parents had been killed in 2012 and then he would either have been able to show that he was entitled to asylum or at least to discretionary leave under article 8. That argument is based on the Rashid [2005] EWCA Civ 744 line of cases analysed by the Court of Appeal in R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546 and SL (Vietnam) v Secretary of State for the Home Department [2010] EWCA Civ 225. In S the Court of Appeal made the point that it had no power to grant indefinite leave to remain nor on a conventional basis did it have the power to direct the Secretary of State to grant it or to exercise her discretion.
18. In EU the Court of Appeal again expressed great difficulties with the judgments in Rashid saying that 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 returned to the country of nationality. Breaches of

duty by the respondent in addressing a claim might lead to an independent justification for leave to remain. The paradigm was the article 8 claim but to grant leave to remain on asylum grounds to someone who had no risk on return and who had no other independent claim to remain would be to use the power to grant leave to remain for a purpose other than that for which it was conferred.

19. Permission to appeal was not granted in relation to the judge's assessment that it would not be unduly harsh for the appellant to relocate to Kabul or on whether the appellant could rely on article 15(c). It follows that the appellant failed to show that he was entitled to relief on asylum or humanitarian protection grounds.
20. It is argued that, had the respondent complied with her obligation to endeavour to trace, the appellant might have been able to show a need for protection whilst still a minor. However, the grant of discretionary leave when he was an unaccompanied minor provided the protection he needed at that time. Were the appellant now to be granted leave as someone entitled to protection when he is not so entitled, would, in the words of the Court of Appeal in EU, be to use the power to grant leave to remain for a purpose other than that for which it was conferred. The respondent's failure to trace has no causal connection with the issue of whether the appellant would now be at risk of serious harm on return to Afghanistan. In any event, the judgment in EU has been approved by the Supreme Court in TN and MA v Secretary of State [2015] UKSC 40 where it was held that the Ravichandran principle applies on the hearing of asylum appeals without exception and that Rashid should no longer be followed: para 72.
21. However, a failure to trace may be relevant to an assessment of whether the appellant has a claim under the Rules or under article 8.
22. The judge was not satisfied that the appellant was able to meet the requirements under para 276ADE(1)(vi) finding that whilst there would obviously be difficulties for the appellant on returning to Afghanistan and in relocating to Kabul they did not amount to "very significant obstacles". The judge took into account the fact that his immediate family had died but he had two other paternal cousins in Kabul and there was nothing to suggest that they would be unwilling or unable to help him secure accommodation and look for work. He also noted that there was a possibility of further financial assistance from them as M had said that the problem he could foresee in relation to the appellant's return to Kabul was not one of finance but of providing effective protection. The issue of family tracing had, in the event, no bearing on this assessment as the judge had found the appellant credible and was making his assessment on this basis.
23. Taking into account the judge's finding under para 276ADE(1)(vi) there is nothing to indicate any basis for a grant of leave under article 8 outside

the rules. The appeal had no realistic prospect of success under article 8. The respondent's failure to trace, again had no bearing on this assessment.

24. In these circumstances the judge was entitled to comment that the issue of family tracing had ceased to have any relevance. If he was stating that as a general principle, arguably that would have been an error of law at least so far as article 8 is concerned but I am satisfied that he was simply setting out his conclusion that the appellant had failed to show that the respondent's failure to trace in his circumstances had any bearing on the outcome of the appeal. Even if he did err as submitted, the judge would inevitably have come to the same conclusions for the reasons I have given.

Decision

25. I am not satisfied that the First-tier Tribunal erred in law such that the decision should be set aside. It follows that the decision of the First-tier Tribunal stands.
26. An anonymity order was made by the First-tier Tribunal. No application has been made to vary or discharge that order which remains in force.

H J E Latter

Signed

Date: 29 June 2016

Deputy Upper Tribunal Judge Latter