Upper Tribunal
(Immigration and Asylum Chamber)

JS (Former unaccompanied child – durable solution) Afghanistan [2013] UKUT 00568 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 14 March 2013 and 25 June 2013

Determination Promulgated

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Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE LATTER

Between

JS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee, instructed by Sutovic & Hartigan (14 March 2013)
Ms K Cronin, instructed by Sutovic & Hartigan (25 June 2013)

For the Respondent: Mr P Nath, Home Office Presenting Officer (14 March 2013)
Mr G Saunders, Home Office Presenting Officer (25 June 2013)

(1) A local authority's obligations to an appellant as an unaccompanied child and asylum seeker and his status as a former relevant child after he becomes 18 do not of themselves determine the outcome of a decision on an appellant's immigration status but may provide evidence relevant to those issues.

(2) *The failure of the Home Office to endeavour to trace family members of a child asylum seeker is only relevant to an immigration appeal after the appellant ceases to be a child , where he is able to show a causal link between that failure and issues relevant to the outcome of the appeal.*

(3) *For an unaccompanied asylum seeking child, the best durable solution is to be reunited with his own family unless there are good reasons to the contrary. Where reunification is not possible and there are no adequate reception facilities in the home country, an appropriate durable solution may be to grant discretionary leave during the remaining years of minority and then arrange a return to the country of origin. Where the child is of a young age on arrival, cannot be reunited with his family and will spend many years in the host state during his minority a durable solution may need to be found in the host state.*

(4) *Where the appellant is no longer a minor, the duty on the Secretary of State under s.55 of the Borders, Immigration and Citizenship Act 1999 no longer arises but when making the assessment of whether removal would lead to a breach of article 8 all relevant factors must be taken into account including age, background, length of residence in the UK, family and general circumstances including any particular vulnerability and whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs.*

(5) *In the context of Afghanistan it is also necessary to take into account the guidance in AA (Unattended children) Afghanistan CG [2012] UKUT 00016 (IAC) about the risks to unattached children in the light of the reminder in KA (Afghanistan) v Secretary of State for the Home Department [2012] EWCA Civ 1014 in the judgment of Maurice Kay LJ at [18] that there is no bright line across which the risks to and the needs of a child suddenly disappear.*

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a determination of the First-tier Tribunal issued on 22 November 2012 dismissing his appeal against the respondent's decision of 25 August 2012 refusing him further leave to remain following the refusal of his claim for asylum. On 14 March 2013 the Upper Tribunal found that the First-tier Tribunal had erred in law for the reasons set out at Annex 1 to this determination. At this stage the appellant was represented by Mr Lee of counsel. There was a re-hearing of the appeal on 25 June 2013 by a panel of the Upper Tribunal, the President presiding. At this stage Ms Cronin represented the appellant. This determination has been prepared by Judge Latter but both members of the panel have contributed to the reasons for re-making the decision and dismissing the appeal.

Background

2. The appellant is a citizen of Afghanistan whose age is in dispute. He claimed that his mother told him he was 13 in 2009 which would mean that he was

born in 1996 but this was not accepted by the respondent. There was an age assessment by Slough Borough Council in April 2009 when he was assessed as being 15 years old and was allocated a date of birth of 1 January 1994.

3. The appellant made a clandestine entry into the UK on 24 March 2009 and when apprehended he claimed asylum. His application was refused but he was granted discretionary leave until 30 June 2011. He then applied for further leave to remain but his application was refused and a decision was made to remove him.

The Hearing before the First-tier Tribunal

4. The appellant appealed and on 25 July 2012 the decision was found not to be in accordance with the law and remitted to the respondent for a further decision. A fresh decision was made for the reasons set out in the decision letter of 29 August 2012. The appeal against that decision was listed on 22 October 2012 but adjourned so that the appellant's foster mother who had been summoned for jury service could attend the hearing. However, on 6 November 2012 she did not attend because of unspecified family matters. No application was made for a further adjournment and the hearing proceeded.

5. The appellant's case was that he would be at risk of serious harm from the Taliban if he had to return to Afghanistan as his father had worked for American intelligence. He had only become aware of this about three weeks before his father was killed. The appellant was at home revising for his exams when the Taliban broke in and attacked his family. His parents and his brothers were together in another room. When he heard shooting he checked what had happened to his family and saw his parents lying on the floor but he did not see where his brothers were. He realised that his life was in danger and quickly left the house and went to hide in the forest.

6. The next day he started walking on the main road to Kabul to the house where his father's friend lived. When he arrived at the friend's home he told him what had happened to his parents and that he knew nothing about his brothers. The friend told him that for his own safety he must leave Afghanistan and he made arrangements accordingly. The appellant stayed with him for five days, then took a flight to Iran and travelled overland eventually arriving in France where he was able to board a lorry and travel to the UK.

7. The judge did not find the appellant to be a credible witness. The judge described the whole scenario as unrealistic [31] and found that the whole account had been made up to support his asylum claim. It was argued on the appellant's behalf that the respondent's failure to endeavour to trace his relatives in Afghanistan showed that it could not be demonstrated that it was safe for the appellant to return there, but the judge noted that the appellant had told two social workers during the age assessment interview that he did not know where his siblings were and did not wish them to be traced. The judge commented that in the light of this, it was difficult to see how the respondent

could be criticised for not conducting any sort of inquiry to trace the appellant's relatives.

8. The judge went on to consider the issue of humanitarian protection saying:

> "38. In so far as humanitarian protection issues are concerned I find to make a finding is premature at this stage. The respondent has only issued, to date, two relevant decisions, namely to refuse the appellant's application for asylum in the UK but granted him discretionary leave to remain in the UK until 30 June 2011. The second decision [15] to refuse to vary the appellant's leave to remain in the UK. There is no decision to remove the appellant back to Afghanistan. If and when that decision is made then, in my view, issues surrounding humanitarian protection arise. Consequently, I do not deal with humanitarian protection at this juncture."

9. The judge then turned to the issue of the appellant's age. He noted that he had asserted at the hearing that he was only 16 years of age on the basis of what his mother had told him before he left Afghanistan but the judge did not accept that he had told the truth in this regard. He said there was no cogent evidence to rebut or challenge the age assessment made by Slough Social Services despite an application made in June 2012 to obtain an independent report. At the hearing it was made clear that the appellant was not relying on any other report and the judge said that, in the light of his negative credibility findings and the total lack of any cogent evidence to challenge the age assessment by Slough Social Services, he gave little if any weight to the appellant's assertions that he was only 16. The appeal was dismissed on asylum and human rights grounds.

The Grounds and Directions

10. The grounds of appeal raised three issues. It was contended that:-
(i) The judge dealt cursorily and incorrectly with the submissions that the age assessment by Slough Social Services was inadequate and not compliant with the Merton [2003] EWHC 1689 (Admin) guidelines.
(ii) The judge failed to deal adequately with the issues arising under KA (Afghanistan) v Secretary of State [2012] EWCA Civ 1014, had wrongly declined to consider humanitarian protection because removal directions had not been set and had not engaged with the argument that the failure to trace was relevant to the proportionality decision under article 8.
(iii) The decision did not display anxious scrutiny in the light of the fact there were a large number of grammatical and syntactical errors such as to leave the appellant in real doubt as to whether his case had been understood and his appeal analysed correctly.

11. Judge Latter found that there were material errors of law with respect to the second of these grounds (see Annex 1 at [6] to [9]). In summary, the question of humanitarian protection should have been considered as well as asylum and the consequences of the respondent's failure to conduct a tracing inquiry

should have been considered both in respect of asylum/humanitarian protection and as an aspect of the article 8 claim.

Further Directions

12. The appeal was relisted to hear further submissions on the issue of humanitarian protection and article 8. The appeal was listed for hearing on 14 May 2013 but as the parties were not ready to proceed, further directions were given and in the light of the issues raised a direction given for it to be relisted before a panel. A substantial bundle of further documents, a supplemental subjective bundle indexed and paginated 1-85, was served on 21 June 2012, ten days later than the date specified in the directions given on 14 May 2013. The appellant also produced further background evidence including a report entitled Still Human Still Here 19 June 2013, a quarterly data report from Afghanistan NGO Safety Office for January to March 2012 and an extract from the Afghanistan COI Report 15 February 2013 re-issued on 8 May 2013.

13. Ms Cronin also produced extracts from the Children Act 1989 and 2004, DS v Secretary of State [2011] EWCA Civ 305, KA v Secretary of State, EU v Secretary of State [2013] EWCA Civ 32, the decision in R (M) v Hammersmith and Fulham London Borough Council [2008] UKHL 14, R (TS) v Secretary of State and Northamptonshire County Council [2010] EWHC 2614, the Upper Tribunal determination in AK (Article 15(c)) Afghanistan CG [2012] UKUT 00163 (IAC) and AA (Unattended children) Afghanistan CG [2012] UKUT 00016 (IAC). She also produced a number reports illustrating attack rates and the security position in provinces in Afghanistan. Following clarification of the issues being argued, Mr Saunders was content for the hearing to proceed despite the late service of the appellant's documents.

Further Submissions for the Appellant

14. Ms Cronin submitted that the outstanding issues of humanitarian protection and article 8 required consideration first, of the UK's obligations to the appellant as an unaccompanied child who had been in care as a looked after child and was now a former relevant child and the continuing relevance of the local authority's obligations towards him as a young adult; second, the continuing relevance of the respondent's failure during the appellant's minority to endeavour to trace his family and third, the significance to the respondent's decision of the appellant's current status as a former relevant child.

15. She submitted that the appellant had been a vulnerable child on entry as he was unaccompanied by his family or a guardian and was an asylum seeker. The Reception Directive required such children to be safeguarded and their welfare promoted. The appellant had become the responsibility of his local authority and the Children Acts 1989 and 2004 set out the duties which local authorities must undertake for such children. On entry he had been a child in need who the local authority was required to accommodate and to maintain in other respects. He was then a looked after child and at the age of 16 became an eligible child the local authority was looking after.

16. The appellant was now a former relevant child within s.23C of the Children Act 1989 which placed duties on local authorities to keep and stay in touch with him and to continue his personal mentoring and guidance so facilitating his transition to independence. These obligations are further set out in the Every Child Matters Guidance applying to former relevant children. This requires under s.23 and para 19B(2)b of Schedule 2 of the Children Act 1989 the preparation of a pathway plan which must be kept under review as part of the obligation to safeguard and promote his welfare to enable him to enter adulthood successfully.

17. Ms Cronin submitted that the evidence from the appellant's pathway plan and the personal evidence in the supplementary bundle showed that he had achieved functional levels in English, maths and IT and was in the first year of a four-year course which included work experience. His qualifications at present did not equip him for employment in this or any other skilled field. He had been moved to semi-independent accommodation when he finished school but he felt that he had lost his foster family at that stage and later he returned to live with them. The pathway plan noted the importance of his relationship with his foster mother and the fact that she kept in touch with his personal advisor. It also noted that the appellant was confident, well presented, always well dressed and polite. He was not living completely independently but in a supportive family setting where he was receiving exactly the support the Children Act anticipated he would need. She submitted that account had to be taken of the risks to children on return to Kabul and that there was no bright line which could be drawn when an appellant reached the age of 18.

18. She then dealt with the issue of tracing. She accepted that the appellant's credibility had some relevance when analysing the causative link between the respondent's failure to endeavour to trace and his application and appeal. The First-tier Tribunal Judge had disbelieved his evidence that his parents had been killed but had made no finding as to whether he had lost contact with his family. The pathway plan made it clear that he had had no contact with his family in Afghanistan and that he had asked for his family to be traced. It was a matter of concern that the appellant came from Nangarhar province which was in the top ten provinces producing internally displaced people. The professional assessments of the appellant's character, demeanour and engagement were positive and he had at all times been accepted as a young man who had lost his parents.

19. The purpose of the tracing obligation was directed, so Ms Cronin submitted, to finding a durable solution for separated children. She referred to the UN Committee on the Rights of the Child General Comment (No. 6) that tracing was an essential component of any search for a durable solution and should be prioritised except when the act of tracing or the way in which tracing was conducted would be contrary to the best interests of the child or jeopardise the fundamental rights of those being traced. She submitted that in the present case inquiries in the appellant's home village may have confirmed the fact that his parents had been killed and shown the fate of his brothers and that the failure to trace was not simply about lost benefits but the compromising of the

UK's continuing obligations to an unaccompanied child who was now a former relevant child.

20. A failure to endeavour to trace impacted on an immigration application by a young adult care leaver and was relevant to whether it was reasonable to refuse leave to remain and to proceed to removal where such action deprived him both of the care he was receiving and his attachments formed whilst in the UK. If the appellant had to relocate to Afghanistan, he would have to find after four years in which there had been no contact, relatives or friends who could assist and support him, travel to his home area, reintegrate into a community which would now be strange and unfamiliar to him, find employment, learn to be safe and avoid violent incidents. The respondent's failure to endeavour to trace had denied the appellant the best evidence of his asylum claim and left him vulnerable to a refusal of further leave and removal. It had also denied his personal advisor of the material needed for his pathway plan.

21. On the issue of humanitarian protection Ms Cronin submitted that the appellant was in an enhanced risk category and the availability of family support was unknown. It would be unreasonable to assume at the present time that circumstances were such that as a single young man he could safely relocate in Kabul.

22. She summarised her submissions on the issue of humanitarian protection under four heads: firstly, the appellant was someone who was vulnerable and in need of adult guidance and it was not shown that he would have it on return; secondly, there were strong echoes of the position in AA (Afghanistan) because he had been an unattended child; thirdly, the area where the appellant's family and neighbours lived was in Nangarhar, a very dangerous province where the level of danger remained high and fourthly, Kabul would not be an easy place for the appellant to relocate to. Whilst the Upper Tribunal had found in AK (Afghanistan) that the conditions in Kabul would not in general make return there unsafe or unreasonable, in the appellant's circumstances it would be unreasonable for him as a young, unattended adult.

23. She submitted that similar considerations applied to article 8. The appellant had a private and family life in the UK and, in particular, a strong and dependent attachment to his foster carer. He was in a loving, committed relationship with his girlfriend, a British citizen and they planned to marry. Ms Cronin explained that his girlfriend had not been able to attend because her father would not allow her out of the house as a sister had recently eloped. In addition to his family life the appellant had established a private life which had particular value as it was mandated in the provisions of the Children Act, the pathway plan allowing for his educational progress, oversight, contact and guidance.

Submissions for the Respondent

24. Mr Saunders relied on AK (Afghanistan) and in particular [243] on the situation in Kabul. He submitted that no particular vulnerability had been shown so far as the appellant was concerned. When the evidence was looked at as a whole, a picture emerged of quite a capable young man and there was no sufficient evidence to show that he would fall into the category of someone entitled to protection. The background evidence submitted in support of the humanitarian protection appeal was very generalised. He accepted that there continued to be problems in Afghanistan but there was no proper basis for departing from the conclusions reached in AK (Afghanistan). So far as article 8 was concerned, he accepted that the appellant had established private life and arguably also family life. Even so, there was nothing compelling in his circumstances which would make removal disproportionate. He submitted that the appeal should be dismissed.

Discussion

25. The issues before us are whether the appellant is entitled to a grant of humanitarian protection and whether returning him to Afghanistan would lead to a breach of article 8.

26. The requirements for the grant of humanitarian protection are set out in para 339C of HC 395 and the only matters in issue before us are whether the appellant is able to meet the requirements of sub-paras (iii) and (iv) of para 339C by showing that there are substantial grounds for believing that if returned to Afghanistan he would face a real risk of serious harm consisting of torture or inhuman or degrading treatment or punishment (sub-para (iii)), or serious and individual threat to his life or person by reason of indiscriminate violence in situations of international or internal armed conflict and is unable to or owing to such risk unable to avail himself of the protection of the Afghan authorities (sub-para (iv)). When considering article 8 we must take into account firstly, the provisions of the immigration rules as amended in July 2012 and then, the wider application of article 8 in addition to the provisions of the rules unless the rules and the general article 8 jurisprudence is in harmony: Green (Article 8 – new rules) [2013] UKUT 00254 (IAC).[1]

27. In Ms Cronin's submissions considerable weight was placed on the fact that the appellant had arrived in the UK as an unaccompanied child, had been in the care of the local authority as a looked after child and was now a former relevant child to whom obligations were owed under the Children Acts 1989 and 2004. These provisions, further detailed in the Care Leavers (England) Regulations 2010, include requirements to appoint a personal advisor, to carry out an assessment of his needs, to prepare a pathway plan to deal with his transition to life after being looked after and to keep that plan under regular review: para 19B of Schedule 2 to the Children Act 1989. It is common ground that the local authority owes these duties to a young person until he reaches the age of 21 or where their pathway plan includes a programme of full-time education/training until 25.

[1] See now MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192.

28. We were also referred to the Department of Health Children Act Guidelines, "Transition to Adulthood for Care Leavers" concerning looked after children and care leavers "who require additional specialist report". The following paragraphs are of particular importance:

> "6.20 Unaccompanied asylum seeking children (UASC) making the transition from care to adulthood have both a leaving care status and an immigration status in addition to their placement and accommodation, education, health, financial, religious and cultural needs. Planning transition to adulthood for UASC is a particularly complex process that needs to address the young people's care needs in the context of wider asylum and immigration legislation and how these needs change over time.
>
> 6.21 Pathway planning to support a UASC's transition to adulthood should cover all areas that would be addressed within all young people's plans as well as any additional needs arising from their specific immigration issues. Planning may initially have to be based around short term achievable goals whilst entitlement to remain in the UK is being determined.
>
> 6.22 Pathway planning for the majority of UASC who do not have permanent immigration status should initially take a dual or triple planning perspective, which, over time should be refined as the young person's immigration status is resolved.
>
> Planning may be based on:
>
> - A transitional plan during the period of uncertainty when the young person is in the United Kingdom without immigration status;
> - Longer term perspective plan in the United Kingdom should the young person be granted long term permission to stay (for example through the grant of refugee status); or
> - Return to their country of origin at any appropriate point or at the end of the immigration consideration progress, should that be necessary because the young person decides to leave the UK or is required to do so."

29. It was not argued on behalf of the appellant that the fact that he is a former relevant child receiving assistance from the local authority meant for that reason alone that he could not be removed. In our judgment any such a contention would be unsustainable. The resolution of the appellant's immigration status depends not on whether he is in receipt of care under the provision of the Children Acts but on whether he is able to show an entitlement to remain in accordance with the law or the immigration rules.

30. We are satisfied that the guidelines at 6.20 – 22 set out at [28] above accurately reflect the statutory duties on local authorities where a child is subject to immigration control. The purpose of pathway planning is to assist with the transition from the status of child to independent adulthood. However, the fact that an appellant is receiving support from a local authority does not without more determine his immigration status whether he is a child or a young adult.

31. We accept that the fact of local authority support or the adoption of a pathway plan may give rise to evidence that in his particular circumstances he is either able to meet the requirements of the immigration rules or establish a significant private life in the United Kingdom interference with which would be unjustified, and thus establish a lawful basis for remaining.

32. Ms Cronin emphasised and relied on the respondent's failure to carry out her duties under the Asylum Seekers (Reception Conditions) Regulations 2005 reg. 6 to endeavour to trace the members of the appellant's family as soon as possible after he made his claim for asylum. The issues arising from this failure have been considered comprehensively by the Court of Appeal in DS v Secretary of State, KA v Secretary of State and EU v Secretary of State , all of which have been recently reviewed by the Upper Tribunal in SHL (Tracing obligations/trafficking) Afghanistan [2013] UKUT 00317 (IAC). We have also noted the decision of Hickinbottom J in R (ota Hashemi) v Upper Tribunal [2013] EWHC Admin 2316. These decisions focus on the consequences and possible detriment to an appellant in the assessment of his immigration status by a failure to trace but, as Ms Cronin rightly points out, the importance of family tracing is also directed to finding a durable solution for separated children.

33. The UN Committee on the Rights of the Child General Comment (No. 6) entitled "Treatment of Unaccompanied and Separated Children outside Their Country of Origin" provides as follows:

> "79. The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and wherever possible leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analysing the possibility of family reunification.
>
> 80. 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. In any case, in conducting tracing activities, no reference should be made to the status of the child as an asylum seeker or refugee. Subject to all of these conditions such tracing efforts should also be continued during the asylum proceedings. For all children who remain in the territory of the host state, whether on the basis of asylum, complementary forms of protection or due to other legal or factual obstacles to removal, a durable solution must be sought."

34. Again we readily accept that for a child, the best durable solution is to be reunited with his own family unless there are good reasons to the contrary. In other cases particularly where there are no adequate reception facilities in the

home country, an appropriate durable solution will be to grant discretionary leave during the remaining years of minority and then arrange a return to the country of origin. There may be cases where the child's needs, his age on arrival and his future development will all suggest that a durable solution may need to be found in the host state.

35. However, the appellant is no longer a minor, and a distinct duty on the respondent under s.55 of Borders Citizenship and Immigration Act 1999 no longer applies. This Tribunal is not concerned with future planning for the welfare of children. As already indicated our concern is whether the appellant is entitled to humanitarian protection or whether returning him will be in breach of article 8, the First-tier Tribunal having resolved the issue of whether he would be at real risk of persecution or serious harm. In making that assessment we must take into account all relevant factors including his age, his background, his family and general circumstances including any particular vulnerability. We must consider whether an appellant will have family or other adult support on return to his home country appropriate to his particular needs, and in the context of Afghanistan to take into account the guidance in AA (Afghanistan) about the risks to unattached children in the light of the reminder in KA (Afghanistan) in the judgment of Maurice Kay LJ at [18] that there is no bright line across which the risks to and the needs of a child suddenly disappear.

36. To summarise, a local authority's obligations to an appellant as an unaccompanied child and asylum seeker and his status as a former relevant child after he becomes 18 do not of themselves determine the outcome of a decision on an appellant's immigration status but may provide evidence relevant to those issues. Similarly, the failure to endeavour to trace is only relevant if, as made clear in the authorities from the Court of Appeal, the appellant is able to show a causative link between that failure and issues relevant to the outcome of the appeal.

Conclusions

37. The first difficulty for the appellant is that the First-tier Tribunal Judge did not believe his evidence. He did not accept to the lower standard that his parents had been killed by the Taliban. This was both the core basis for his asylum claim and the primary piece of information as to his family ties in Afghanistan for the purpose of any tracing obligation.

38. The second difficulty is that if, as the judge has found, the appellant was giving false information about his family circumstances in Afghanistan, he would have every incentive not to co-operate with a tracing inquiry into family links. His evidence was that he did not know where his brothers were and the judge noted that the appellant had told two social workers during the age assessment interview that he did not wish them to be traced.

39. Accepting that the tracing duty on the respondent is not extinguished by the appellant's unwillingness to assist in the inquiry, it nevertheless results in very real difficulties in the respondent being able to make any useful inquiries at all.

The duty in the Reception Directive art.19 (3) is not an absolute one but "to endeavour to trace" and taking care that "the processing, and circulation of information concerning those persons is undertaken on a confidential basis" where the family life abroad is in regions of potential danger. International agencies such as the International Committee of the Red Cross or the International Organisation of Migration do not act as agents of the state but only at the request if the individual. In our judgment this means in practice, where the appellant has positively stated he does not want his family to be traced, has every incentive to mislead about his family history if advancing a false picture of events, and where in the absence of reliable data from the appellant the respondent would have no information with which to make tracing inquiries in Afghanistan, that it is improbable that a failure of the tracing duty is likely to be material.

40. As far as we are aware, to this day, despite the assistance of counsel highly experienced in this field of law, the appellant has not provided any information to the respondent as to which relatives could be contacted and how. In the circumstances we do not accept that the failure of the tracing duty has led to loss of relevant information on the asylum claim (where indeed it is for the appellant with the assistance of his advisers to advance his case in good faith) or has had any material impact on the development of his family life since his arrival in the United Kingdom in January 2009.

41. In the light of his rejection of his asylum claim, his claim for humanitarian protection would depend on him establishing that there was to a reasonable degree of likelihood "a serious threat to a civilian's life by reason of indiscriminate violence in situations of international armed conflict " (Council Directive 2004/83/EC art. 15(c)) and that there is no alternative to international protection by way of relocation to "a part of the country of origin where there is no real risk of suffering serious harm and (where) the applicant can reasonably be expected to stay" (ibid art. 8 (1).

42. Ms Cronin submits that the appellant's home province of Nangarhar was particularly volatile and the subject of above average violence and that it would unsafe and unreasonable to return him to Kabul as a dependent, unattended adult. The very limited further evidence produced about the security situation in Nangarhar does not satisfy us that there is any proper basis in the evidence for departing from the country guidance in AK (Afghanistan) where it was held at [215-226] that there was no province where the level of violence reached the article 15(c) threshold.

43. But, in any event, if and when removed from the United Kingdom, the appellant would be returned to Kabul. We are not satisfied that he is able to show that he would be at risk of serious harm on return there. The evidence tends to show that he is a relatively capable young man with no particular physical or psychological vulnerability. We do not accept that because he was classified as vulnerable in social services terms on arrival in the United Kingdom as an unaccompanied 15 year old, he does not have the ability to live in the capital of his own country without serious risk to his life or inhuman or degrading treatment; nor, on the hypothesis, that it would be unsafe for him to

live in Nangarhar that it would be unreasonable for him in Kabul. He is not of an age where he is vulnerable to sexual exploitation, he has no physical or mental impairment or any other characteristic that would take him out of the general guidance given in AK (Afghanistan).

44. In AK the UT found at paragraph 243

> 'As regards Kabul city, we have already discussed the situation in that city and we cannot see that for the purposes of deciding either refugee eligibility or subsidiary protection eligibility (and we are only formally tasked with deciding the latter) that conditions in that city make relocation there in general unreasonable, whether considered under Article 15(c) or under 15(b) or 15(a). We emphasise the words "in general" because it is plain from Article 8 (2) and our domestic case law on internal relocation (see AH (Sudan) in particular) that in every case there needs to be an inquiry into the applicant's individual circumstances; and what those circumstances are will very often depend on the nature of specific findings made about the credibility of an appellant in respect of such matters as whether they have family ties in Kabul. But here our premise concerns an appellant with no specific risk characteristics and someone found to have an uncle in Kabul: see above paras 3, 5, 154, 186 and below, paras 250-254). To summarise our conclusion, whilst when assessing a claim in which the respondent asserts that Kabul city would be a viable internal relocation alternative, it is necessary to take into account (both in assessing "safety" and reasonableness") not only the level of violence in that city but also the difficulties experienced by that city's poor and also the many IDPs living there, these considerations will not in general make return to Kabul unsafe or unreasonable, although it will still always be necessary to examine an applicant's individual circumstances'.

The further background evidence adduced in this appeal does not provide an adequate evidential foundation for not following that guidance.

45. Further, the appellant cannot show that he would have no relatives or family friends to turn to for support in Afghanistan. The judge did not accept his account that his parents were killed and he has not been forthcoming about the location of other relatives. He has referred in his most recent statement dated 19 June 2013 to his father's friend who on his account made the arrangements for him to leave Afghanistan and says that he cannot stay with him as word would get back to his own village as he lives nearby and this would put him at risk but in the light of the judge's findings of fact he would not be at such personal risk from the Taliban or anyone else in his home area and there is therefore no reason why he could not look to this friend for support. In these circumstances, he fails to show that he falls within the category of a young unattended adult.

46. It was also submitted that returning the appellant would be in breach of his human rights as reflected in article 8. He has been resident in the United Kingdom for four years from the age of 15 to 19. He cannot rely on any immigration rule or policy to suggest that residence of such length would require the grant of leave to remain, nor can he bring himself within the

category of exceptional circumstances justifying the grant of leave under the rules.

47. We do not limit our inquiry to the immigration rules, would accept that the period of residence means that he has established some private life here, and that his status as a former child with duties of care owed to him as such may be relevant to immigration decision making in respect of someone who has reached the age of 18. But there was simply no evidence before us or the judge below to suggest that he has developed such strong ties in so short a period as to make removal unjustifiable. He has never had any expectation of being allowed to remain permanently; was only given leave to remain for 27 months on arrival and his status has been under review since then. It is significant that despite adjournment requests specifically for this purpose, his foster carer did not attend to give any oral evidence to substantiate or develop what she had written by way of support. No doubt such a relationship is capable of producing strong ties, but the foster care was always intended as temporary and this would doubtless have been well known to both carer and the cared for. We are not persuaded that the appellant is in a committed relationship with his girlfriend and do not accept that her lack of obvious support by not attending the hearing was due to action taken by her father. In the light of the previous assessment of credibility, we would be slow to accept the appellant's unsupported account on issues favourable to his claim to remain on which he relies.

48. In the absence of particular features and strong ties formed during his residence here as a child, Ms Cronin really has to rely on a very bold submission that it is disproportionate to return any 19 year old male to Afghanistan after four years residence here as a child, unless there is satisfactory evidence of a family awaiting him there or similar satisfactory reception arrangements. Understandably she was reluctant to go that far, but stripped of the generalities arising from the social services background, that is in substance all she is left with. We not accept such a bold submission. As we noted at the hearing it would have very significant impact on the respondent's practice and successive policies in dealing with unaccompanied children by way of limited leave and assessing the circumstances after age 18.

49. We accordingly conclude that removing the appellant to Afghanistan would engage article 8(1). It would be lawful and for a legitimate aim. The issue is whether removal would be proportionate to that aim within article 8(2). The appellant has been unable to show that he is entitled to asylum or humanitarian protection. In all the circumstances we are satisfied that the requirements of immigration control outweigh the interference with his right to respect for his private and family life built up whilst in the UK.

Decision

50. The First-tier Tribunal erred in law and its decision was set aside in respect of the appeals on humanitarian protection and article 8 grounds. We re-make the decision dismissing the appeal on both grounds.

51. There has been no application to vary or discharge the anonymity order made by the First-tier Tribunal and that order therefore remains in force.

Signed Date: 23 August 2013

Upper Tribunal Judge Latter

ANNEX 1

Ruling on Error of Law

1. Mr Lee adopted the grounds of appeal. He referred by way of example to what he described as a confused direction on the burden and standard of proof in [12] and to the sentence in [13]: "He did not heard them screams which gunshots were heard." He conceded that there was not a wealth of evidence on the issue of the appellant's age but nonetheless he submitted that the judge's decision was not sufficiently reasoned. He argued that the judge had clearly erred on the issue of humanitarian protection. The appellant had been accepted as a minor, even if older than he had claimed to be when he arrived in this country, and the respondent's duty to endeavour to trace was not outweighed by the fact that the appellant had said that he did not want his siblings traced.

2. Mr Nath argued that the judge had not erred in law in his assessment of the appellant's age. There had been no further evidence from the appellant save his own oral evidence and the judge's findings were properly open to him. The failure to endeavour to trace would not have any material bearing on the outcome of the appeal as the appellant was unable to point to any link between the failure to carry out that duty and any detriment to him. He accepted that the judge's decision might have benefited from more careful proof reading before being issued but such faults as there were did not go to the heart of the claim. When the determination was read as a whole it was clear what view the judge had formed on credibility and in consequence his decision dismissing the appeal was properly open to him. On the basis of the judge's findings of fact an appeal had no prospects of success on humanitarian protection grounds.

Assessment of the Issues

3. The issue for me at this stage of the appeal is whether the judge erred in law such that his decision should be set aside. I accept that the judge's decision might have benefited from more careful proof reading before it was issued. Mr Lee points in particular to [12] dealing with the burden and standard of proof. The judge referred to the standard of proof as a low one with regard to asylum and related matters but otherwise that generally the standard of proof was a balance of probabilities. I am satisfied that this does indicate that the judge was fully aware of the appropriate standard of proof in relation to the asylum appeal. It is also correct that the sentence referred to in [13] does not on its face make sense but in the context of the summary of the appellant's case it is clear what is meant.

4. When assessing whether the judge has given sufficiently anxious scrutiny to the appeal the decision must be read as a whole and in particular the judge's analysis of the evidence at [19]-[39] on the asylum, humanitarian and age issues and at [40]–[46] on article 8. On this basis this is not a case where I am left with any real doubt about whether the appellant's case was properly understood. The judge summarised the basis of the claim and analysed the evidence. He

has explained why he did not believe the appellant's evidence. He pointed out contradictions in his evidence at [21]–[27] and was entitled to comment on the fact that the appellant had said in evidence that when he heard the gunshots none of his brothers screamed or were seen although he knew they were in the house. He had asserted that the Taliban wanted to kill him as he was his parents' oldest boy yet on his account he was in front of Taliban gunmen who had allegedly just shot his parents and he came into their view but none of them raised a gun to take aim at him, gave chase or took a shot at him when he was running away. In summary, I am satisfied that the judge's findings on the issue of credibility were properly open to him.

5. So far as the judge's finding on the appellant's age is concerned it is argued that the judge was wrong to attach weight to the age assessment by Slough Social Services as it was in breach of the Merton guidelines in that it failed to give adequate reasons for its decision. However, the position the judge faced was that the only evidence about the appellant's age was the appellant's own evidence and the evidence set out in the age assessment. I agree that very limited reasons were given in the age assessment report but the judge had to do his best on the available evidence. He was entitled to note that an application had been made on the appellant's behalf for an independent age assessment but no such report was relied on. In the light of his findings on the appellant's credibility, I am satisfied that the judge was entitled to find that the appellant was born in 1994 as opposed as to 1996.

6. However, I find that the judge erred in law by failing to deal with the humanitarian protection appeal having found that the appellant was not entitled to asylum. The fact that there were no removal directions did not mean that a decision should not be made on humanitarian protection grounds. Just as in an asylum case the appellant was entitled to have the humanitarian protection appeal assessed as at the date of hearing and not to have it deferred until a decision to remove. In any event the respondent's decision to refuse further leave to remain is prefaced on an intention to remove the appellant: see [71] and [72] of the decision letter.

7. I am also not satisfied that the judge dealt adequately with the issues arising from the failure to endeavour to trace the appellant's relatives set out in KA (Afghanistan). The fact that the appellant may have told the social workers that he did not know where his siblings were and did not wish them to be traced does not, without more, discharge the respondent from her duty under the relevant regulations.

8. The grounds argue that the judge did not engage with the appellant's arguments that the failure to trace was relevant to the proportionality decision under article 8. The skeleton argument before the First-tier Tribunal argued that the appellant's only viable private life was in the UK and was the closest thing he had to a family life. When analysing article 8 the judge said at [46] that in the absence of any cogent evidence to demonstrate the appellant had established rights under article 8, he did not find that the respondent's refusal to vary leave engaged article 8 and that mere assertions were insufficient. However, despite the rejection of the appellant's credibility on the issue on

relating to his asylum claim, the fact remains that he has been in the UK since March 2009, has been living with a foster family and attending college. A number of letters were written in support of his article 8 claim and these should have been considered when assessing whether article 8 was engaged.

9. In summary, I am not satisfied that the judge erred in law in his findings of fact in relation to the appellant's credibility about his age and events in Afghanistan or in his assessment of the asylum claim. However, he did err in law by failing to consider the humanitarian protection appeal and more generally in his assessment of article 8 and the implications of the respondent's failure to carry out his duty to endeavour to trace.

Signed: Upper Tribunal Judge Latter