Case No: C5/2012/2008

Neutral Citation Number: [2013] EWCA Civ 1189
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (IAC)
Deputy Upper Tribunal Judge Davey
IA/29161/2011
IA/29165/2011
IA/29182/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 11th October 2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BRIGGS

- -

Between :

AN (AFGHANISTAN) & ORS	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Sibghat Kadri QC and Rashid Ahmed (instructed by **R Legal**) for the **Appellants**
Robert Kellar (instructed by **the Treasury Solicitor**) for the **Respondent**

- -

Judgment

Lord Justice Underhill:

1. The first two Appellants, Abdul Hossain Noory and Zubida Khairzada (to whom I will refer as Mr and Mrs Noory) are a husband and wife. The third Appellant is their daughter, Masooma. Mr and Mrs Noory are aged 71 and 59 respectively. They were born in Afghanistan and are Afghan nationals, but thirty years ago or so they moved to Iran, and for many years Mr Noory worked as a cook in the Australian Embassy in Tehran. Masooma was born, in Iran, on 21 March 1995 and is accordingly now aged 18. She has lived in Iran all her life, although she has paid occasional visits, with her father or mother, to relatives in Afghanistan, most recently in 2010.

2. Mr and Mrs Noory have another son who works in Iran. They also have an older son, Abdul, who came to this country many years ago as a refugee and has leave to remain, and a daughter, Sadiqa, who has married a UK citizen and is also settled here. Abdul has a good job with RBS.

3. Mr Noory has visited his two children in this country on two occasions, in 2005 and 2007; on the second occasion Mrs Noory came too. In March 2011 they came again, with Masooma, then aged almost 16. Although they came on visitor visas, it was in fact Mr and Mrs Noory's intention, which they did not declare, to settle permanently in the UK. Mr Noory gave up his job at the embassy in Tehran and disposed of his interest in his house there. He also claims to have given away most of his other assets in Iran. On 7 July 2011, shortly before the expiry of their visas, they applied for indefinite leave to remain as dependants of Abdul, under para. 317 of the Immigration Rules.

4. Those applications were refused by the Secretary of State in September 2011. All three appealed to the Immigration and Asylum Chamber of the First Tier Tribunal. They put their case both under the Rules and on the basis that their removal would be in breach of their rights under article 8 of the European Convention of Human Rights. As regards the article 8 case, any removal would have to be to Afghanistan rather than Iran, and the Judge in the First Tier Tribunal summarised their case as follows:

> "The requirement from the respondent is that the appellants go to Afghanistan. That would, say the appellants, amount to a breach of their article 8 rights. The first and second appellants have been away from the country for almost 30 years. The third appellant had never lived in that country. There would be no employment prospects for him in Afghanistan. The first and second appellants both have their health problems. The third appellant had achieved well in her education in Iran. She would not be able to continue that education in Afghanistan."

5. At the hearing the Appellants were represented by Mr Rashid Ahmed of counsel. All three Appellants gave oral evidence, as did their son Abdul and their daughter Sadiqa. We have been shown witness statements from Mr Noory and Masooma. For the purposes of the issues on this appeal their evidence can be sufficiently summarised as follows:

   (1) Mr Noory's witness statement is fairly brief. It mostly deals with his circumstances in Iran and his case that he was financially dependent on Abdul.

(One oddity is that he appears to say that he had not in fact lived in Iran continuously for the last thirty years but had returned to Afghanistan at some point "for a few years"; but that is not the basis on which the Judge proceeded, and I need say no more about it.) He says that he has an enlarged prostate and problems with his knees – though as to that the Judge made a finding that neither he nor Mrs Noory had significant restricting medical conditions. He says nothing specific about his, or his wife's or Masooma's, life in the UK since their arrival, except that they are living with Abdul. As regards return to Afghanistan he says:

> "I do not have any property in Afghanistan and only distant relatives.
>
> Given my age [and] the situation there I do not know how I am going to obtain a living and provide for my wife and daughter. I would inevitably rely particularly on my son but also on my daughter to provide for us.
>
> Given the instability in Afghanistan I would fear for our welfare, particularly my daughter."

As already noted, the Judge in fact found that, contrary to the reference to having "only distant relatives" in Afghanistan, Mr Noory did have a brother in Kabul.

(2) Masooma in her witness statement dealt with her relations with her brother and sister. She said that she had been very successful at her school in Tehran and that since coming to this country she had undertaken a full-time English course. As regards the position if she and her father and mother were returned to Afghanistan she said this:

> "I do not know how I could continue with my studies in Afghanistan. I would be scared to attend any form of education there. I think that I could easily become a target, particularly if I excelled in my studies.
>
> I would feel very scared to go to college on a daily basis, looking over my shoulder would be the least of my problems.
>
> I think my parents at their age would be extremely anxious not only for their own welfare but also mine."

6. The Judge rejected the claim under the Rules essentially because, as he held, para. 317 did not apply in a case where an applicant had deliberately created the dependency on which he sought to rely; that was what, as he held, Mr Noory had done by giving up his job and his home in Iran and disposing of most of his assets. As regards the claim under article 8, his reasoning can be summarised as follows:

(1) At paras. 36-40 he set out relevant passages from the decisions of the House of Lords in *R (Razgar) v Secretary of State for the Home Department* [2004] 2

AC 368, *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 and *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115.

(2) At paras. 41-43, applying the approach prescribed in *Razgar*, he accepted that the proposed removal of the Appellants would engage their rights under article 8, since they had established a family life in the UK over the previous year while they had been living with Abdul, and that those rights would be interfered with by their removal; but he held that such removal would be in accordance with law and for a reason capable of constituting justification under article 8 (2). Accordingly the essential question was whether their removal would be proportionate. In that connection he said, at para 43:

> "The prospect under examination is of a 69 year old man, a 58 year old woman and their 16 year old daughter going to live in the extremely difficult circumstances that apply now in Afghanistan. A part of the evaluation is of course that the husband and wife have not lived there for almost 30 years and the daughter has never lived in that country. There is limited family support for them in that country. It is relevant to take into account that the second Appellant has chosen to visit Afghanistan in recent years and has chosen to take their young daughter with her."

He reminded himself at para. 44 that the relevant "family life interests" included those of the son and daughter in this country.

(3) Masooma being still a child, the Judge reminded himself, at para. 45, of the provisions of section 55 of the Borders Citizenship and Immigration Act 2009, which reads (so far as material):

> "*Duty regarding the welfare of children*
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) ...
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b)-(d) ...
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance

> given to the person by the Secretary of State for the purpose of subsection (1).
>
> (4)-(5) ...
>
> (6) In this section –
>
> "children" means persons who are under the age of 18;
>
> ...
>
> (7)-(8) ..."

He also referred, at para. 46, to the Guidance issued by the Secretary of State in relation to section 55. He quoted in particular the statement in the Guidance that:

> "The best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children."

He said that he had taken that Guidance into account.

(4) At paras. 47-48 he summarised the relevant considerations as regards the three Appellants as a family. Those paragraphs read as follows:

> "47. I take into account the medical conditions of the first and second appellants but, as I have noted above, I do not see that they suffer from substantially restricting conditions. I am satisfied that there is a close bond between the appellants and the family members who are settled in the UK. But I also take into account my assessment that, in my view, the appellants have not been open and reliable in the way that they have entered the United Kingdom. As I have said above I do not accept that when they entered in March 2011 they had the genuine intention of returning to Iran. I also note that the appellants have been in the UK since only March 2011. I take into account the proposal from the respondent is for the family unit of father, mother and daughter to go together to Afghanistan. This is the entire family unit that lived together in Iran.
>
> 48. The appellants would face real difficulty upon moving to Afghanistan. But there is some family support in that country. The first appellant still has, even on his own account, some financial resources available. I think it is likely that if he were facing the prospect of a move to Afghanistan he could get back some or all of the resources that he claims he previously gave away. I am satisfied that if the appellants were to go to Afghanistan

> they would have continuing financial support from the family members in the UK, in particular from the sponsor."

(5) At paras. 49-50 the Judge turned to consider the position specifically of Masooma. He said:

> "49. I find that it is important for the third appellant to remain living with her father and mother. Her best interests are served in that way. She has lived with them all her life. If her parents go to Afghanistan I cannot see any basis for her, within the immigration rules, to remain living with the sponsor.
>
> 50. If the interests of the third appellant were to be treated as a determinative factor then (bearing in mind an expected move to Afghanistan, where she has never lived) that would lead to a decision that she should stay in the UK and that her parents should stay with her. But the interests of the third appellant, whilst a primary consideration, are not the only factor. I have to give weight to all the other factors which include the substantial interest on the part of the respondent in seeing the application of a consistent immigration policy. In short the factors referred to in paragraph 16 of *Huang* recorded at paragraph 38 above."

(6) His final conclusion was expressed at para. 51 of the Determination as follows:

> "What clearly goes in favour of the appellants is their ages and the limited current connections they have with Afghanistan. But the first and second appellants lived the first half of their lives in that country. They have family living in Kabul. The second appellant chose to visit Afghanistan fairly recently accompanied by her daughter. I believe that the first appellant still has access to financial resources. The family would in any event be supported financially by the sponsor. The appellants are in reasonable health. They entered the UK, in my view, on a deceptive basis. They have not been here long. The family unit of three persons would go together to Afghanistan. The best interests of the third appellant are a primary consideration. The responsibility on the respondent to apply a consistent process is significant. Weighing all of the factors I am satisfied that each of the refusal decisions was proportionate and did not amount to a breach of the article 8 rights."

7. The Appellants appealed to the Upper Tribunal, again relying both on para. 317 of the Immigration Rules and on article 8. The appeal was dismissed by Deputy Upper

Tribunal Judge Davey under both heads. As regards article 8, he essentially upheld the reasoning of the First Tier Tribunal Judge. Para. 7 of his Determination reads as follows:

> "The Immigration Judge recited and assessed the factual circumstances on the evidence provided in respect of each Appellant. The Immigration Judge was entitled to take the view that in the circumstances of the case the third Appellant accompanying [her] parents could return to Afghanistan, the family unit remaining, and as such it was in the third Appellant's best interest to do so. There would be financial support from family members in the UK. The Appellants have, it is to be noted, been in the United Kingdom for a short time since March 2011. The evidence falls far short of showing that the effect of their removal would adversely affect the best interests of the third Appellant or other persons in the United Kingdom. The findings made by the Immigration Judge, at paragraphs 41 to 51 inclusive, show that the approach identified in *Razgar* had been followed and the Immigration Judge's assessment that the Respondent's decisions were proportionate and not a breach of Article 8 ECHR. The appeals do not disclose an error of law. Those matters are simply matters of judgment which unless they disclose an error of law are not to be interfered with because one might have reached a different decision."

I should say that the Deputy Upper Tribunal Judge's reference to Masooma's best interests not being "adversely affected" by her and her parents' removal does not properly reflect the decision of the First Tier Tribunal Judge, who at para. 50 of his Determination explicitly accepted that removal would not be the best outcome for her. But that error is immaterial since it is the reasoning of the First Tier Tribunal that matters.

8. The Appellants applied for permission to appeal to this Court. The Notice of Appeal is diffuse, but two grounds of appeal can be identified. The first focuses on the position of Mr and Mrs Noory. Although it is not very well expressed, the essential point appears to be that it would be a disproportionate interference with their article 8 rights for them to be returned to Afghanistan in circumstances where, it is said (though this is not quite an accurate summary of the evidence):

> "13. The 1st appellant is aged 69 and the 2nd appellant is aged 58, they have been absent from Afghanistan for 28 years; they have no house to return to; they have no other family members they can turn to in Afghanistan for financial support; they have a son and daughter who are in the UK, they now depend upon their son (daughter) in the UK. They have been wholly dependent financially upon their son in the UK since March 2011 and the 1st appellant is no longer at an age (69) where he would be able to find employment in a country where he has

> been absent from for over 28 years. They have come to a stage in their lives that prolonged separation from their son would seriously inhibit their ability to live full and fulfilling lives, their age, health and vulnerability requires them to be with their son and daughter in the UK."

The second ground focuses on the position of Masooma. Again, it is poorly pleaded. I will return later to how it was developed before us, but the essential point is that sufficient weight was not given to her best interests, as required by the case-law on section 55 and the guidance under it.

9. The application for permission to appeal was originally considered on the papers by Sir Richard Buxton. He refused permission. The application was renewed orally before Aikens LJ. He granted permission. He said:

> "It seems to me that it is reasonably arguable that there is a point of general importance that has arisen here and that that has a reasonable prospect of success. The point is that, given the finding of fact in paragraph 50 of the FTT Judge's decision and given the fact that, if removed, the minor would be returned to a country in which the minor has never lived and has (at least arguably) very little connection, and also given the statutory requirements of section 55 of the Borders Citizenship and Immigration Act 2009, then should the balance to be struck on consideration of the minor's Article 8 rights be more predominant than is suggested in the FTT Judge's judgment, which was upheld by the UT? This means that the question of the rights of the child would have to be dealt with first and then the question would arise as to how the rights of the parents of the child follow from that."

He said that the decision of HH Judge Thornton QC, sitting as a deputy High Court Judge, in *R (Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin) appeared to be in point.

10. Although Aikens LJ clearly focused on the position of Masooma his order did not limit the grounds of appeal, and Mr Sibghat Kadri QC, who appears before us for the Appellants, leading Mr Ahmed, has made it clear that both of the grounds identified in para. 8 above are pursued. I will take them in turn.

11. As regards the first ground, this is, with all respect, hopeless. It is not, and could not be, suggested by Mr Kadri that the Judge did not direct himself correctly. Rather, it is his case that the Judge's assessment of proportionality was wrong in view of the great difficulties which the Appellants would face on being returned to Afghanistan. Those difficulties are summarised at para. 13 of the Notice of Appeal which I have set out above. As expressed, they do not entirely correspond to the Judge's findings. In particular, the Judge found that Mr and Mrs Noory each had a brother in Kabul and that they could expect some family support; he did not find that they were "wholly dependent financially" on their son in the UK, since he found that Mr Noory retained some funds of his own and was likely to be able to recover some at least of what he said he had given away in Iran; and he found that they did not suffer from serious

health difficulties. However, that is not the real point. The Judge acknowledged, as do I, that life for the Appellants was likely to be difficult if they were returned to Afghanistan. But that fact is not by itself a sufficient reason for allowing them to move to this country, in circumstances where they had no right under the Rules, in order to be with their son here. Although of course life would be likely to be a good deal more comfortable than life in Afghanistan, the Appellants had no connection to the UK except the presence of their son and daughter, with whom their family life had for very many years been in the form of visits and telephone contact. And the Judge clearly did not believe that, despite the acknowledged difficulties, their life in Afghanistan would be intolerable: they had, as I have said, family there, and he found that they would have significant financial resources. This was not an asylum or article 3 case – although Mr Kadri's submissions at times strayed in that direction – and (subject to Masooma's evidence summarised at para. 5 (2) above) there was no evidence directed to any particular hardship that the Appellants might suffer by reason of conditions in Afghanistan. In those circumstances, the Judge was in my view entitled to regard the interference with the Appellants' article 8 rights as justified by the interests of maintaining a firm and fair system of immigration control. No basis has been shown for our overturning his assessment.

12. Before us, Mr Kadri developed a point which does not appear to have featured in the Tribunal at either level and was not raised in the Notice of Appeal or his skeleton argument. He said that even if the Appellants did not at the time of their initial application fall within the terms of para. 317 of the Immigration Rules because their claimed dependency on their son was self-induced, nevertheless if they were returned to Afghanistan a time would soon come at which such an application would indeed be legitimate. Mr Noory was 71, and even if he could not rely on his having given up his job in Tehran at the particular time, or in the particular circumstances, that he did, nevertheless he was at or near the age where retirement was legitimate, and it would not take long to exhaust such savings as he had. In those circumstances it would be disproportionate – as he put it, "an exercise in futility" – to require the Appellants to return to Afghanistan for the short time that would be necessary before they were able to reapply, with the virtual certainty of success, under para. 317. He referred to such cases as *Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR 1420. I do not accept this argument. Mr Kadri may well be right that in due course the Appellants could make a further and properly founded application under para. 317 and that at that stage their earlier attempt to jump the gun would and should not be held against them. But we are in no position to pre-judge the success of such an application, which would have to be judged when made and depending on the cogency of the evidence of dependency which they are at that point able to advance.

13. I turn to the second ground of appeal. This turns squarely on the position of Masooma and her status as a child. As I have said, it was this aspect which concerned Aikens LJ.

14. I need to consider first a preliminary point raised by Mr Kellar in his skeleton argument for the Secretary of State. Although Masooma was indeed a child at the time of the initial application and the hearings in both Tribunals, she turned 18 in March this year. Mr Kellar submits that even if this appeal were to succeed the only outcome could be a remittal to the FTT for a re-determination; but at that point the only arguable issue – namely the impact on her case of section 55 – would no longer

arise. The appeal was thus academic. He referred us to the decision of this Court in *LH (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 26. In that case a similar situation arose. The appeal was in fact dismissed on the substantive issues, but Davis LJ said, at para. 37 of his judgment, that the arguments put forward by counsel for the appellant involved "formidable legal, as well as practical, difficulties".

15. Mr Kadri in response referred us to *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 and *SL (Vietnam) v Secretary of State for the Home Department* [2010] EWCA Civ 225. In *AA* the claimant had entered the country as an unaccompanied minor. His asylum application was refused but both the Secretary of State and, on appeal, the adjudicator overlooked the fact that he was entitled to exceptional leave to remain until age 18 under the "Minors Policy". By the time his further appeal reached the AIT he had turned 18. The Secretary of State argued in this Court that that meant that his appeal was academic: he had in practice received the full protection to which he was entitled under the policy, i.e. to remain in this country until he was 18. That argument was rejected. The Court held that the Claimant had arguably suffered disadvantages from being denied ELR status in the intervening period. It directed that his application should be reconsidered by the Secretary of State on a basis which had regard to those disadvantages. In *SL* the claimant, another unaccompanied minor, likewise had his entitlement to ELR overlooked by the Secretary of State and the adjudicator. While an appeal to the IAT was pending he was convicted of an offence and a decision was made to deport him: by that time he had passed 18. This Court held – essentially as in *AA* – that the Secretary of State should have taken into account in taking the deportation decision the earlier failure to grant the claimant ELR; and the decision was remitted to him to reconsider on that basis. Mr Kadri submitted that the present case was essentially of the same character. It was admittedly not identical because there is no question of a relevant policy being simply overlooked; but Mr Kadri submitted that the failure of the Secretary of State and the Tribunals properly to apply section 55 of the 2009 Act was, equally, an error of law. His initial position was that we could correct that error by taking the decision for ourselves; but I understood his fallback position to be that the appeal was in any event not academic because if the case were remitted the Secretary of State would, as in *AA* and *SL*, be obliged to take into account the prejudice which Masooma had suffered by her failure to have regard to section 55 at the time of her original decision.

16. I do not find this point altogether straightforward, but I do not think it is necessary to grapple with it since I do not believe that there was in any event any error of law in the decision of the First Tier Tribunal. My reasons are as follows.

17. I start with the Judge's self-direction, based on the terms of the Secretary of State's guidance, that "the best interests of the child will be a primary consideration (though not necessarily the only consideration) …". He quoted no authorities by way of elaboration of that direction. In particular, he did not refer to the decision of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166. That is not best practice: although unnecessary citation of authority is to be deprecated, where there is a decision giving authoritative guidance on a potentially difficult point it is desirable that a Tribunal should confirm that it is aware of, and seeking to apply, that guidance. But the omission is not fatal if it is

sufficiently apparent that the Tribunal has directed itself appropriately. In fact, there has now been a certain amount of further authority on the application of section 55 of the 2009 Act – notably *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338; the decision in *Tinizaray* to which Aikens LJ referred; and the decision of this Court in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, which contains some important observations by Laws LJ on what is meant by the interests of the child being "a primary consideration" (see in particular at para. 44). I need not attempt to summarise the effect of those authorities. It is clear, whether one looks at *ZH* itself or the review of the more recent cases in SS, that there is nothing wrong in the Judge's self-direction. In particular, he was fully entitled to treat the best interests of Masooma as capable of being outweighed by other considerations, and in particular by the need to maintain a firm and fair system of immigration control. Mr Kadri did not really seek to suggest otherwise.

18. It also seems to me clear that the Judge applied his own self-direction. At para. 50 of the Determination he made an explicit finding that what would be best for Masooma would be to remain in the UK and for her parents to remain with her; and he said in terms that that must constitute a primary consideration. But he pointed out that it was not necessarily determinative; and, as we have seen, he went on to strike a balance with the other considerations identified.

19. So there is my view no error in the Judge's overall approach. The real thrust of Mr Kadri's submissions is simply that he struck the wrong balance and gave too little weight to Masooma's interests. That broad submission is reinforced by two more particular points. The first is that the issue was considered in insufficient depth. The Determination of the First Tier Tribunal contains, it is submitted, no examination either of the strength of Masooma's family life in this country or, more significantly, of the kind of life which she is likely to have to lead in Afghanistan, and specifically the concerns expressed in her witness statement about not being able to continue with her education. Mr Kadri says in his skeleton argument:

> "There was no assessment what the child's life would be in Afghanistan; whether the child would be able to continue with her education; the education system for minor females in Afghanistan, etc; consideration of this information was required by the Tribunal to enable a balanced view to be formed as to what was in the child's best interests."

He refers to the judgment in *Tinizaray*. The second point is that it is wrong to take into account as against Masooma the misconduct of her parents in bringing her to the UK on a false basis.

20. I do not accept those criticisms. There is no reason to suppose that the Judge underestimated the difficulties which Masooma would face if she were returned to Afghanistan; and indeed he twice referred, at paras. 43 and 50, to the fact that she had never lived there herself. Those difficulties were no doubt expressed only in general terms, but that reflects the state of the evidence before him. As to the educational opportunities that would be available to Masooma, her evidence was simply that she would be too scared to pursue any higher education. There is no reason to suppose that the Judge doubted the genuineness of those fears; but he was in no position on the evidence to assess how justified they were, and still less to predict whether, once she

was in Afghanistan, she would feel the same way. But what matters is that he will plainly have understood that Masooma's educational opportunities would be far poorer if she were returned to Afghanistan than if she remained in the UK: that is no doubt one of the main reasons for his finding that it was in her best interests to stay here. I doubt whether further detailed findings about the kind of education that she might have hoped to pursue here or about what was available in Aghanistan would have contributed much to the overall assessment that he had to make; but even if they might have done he had not been put in a position to make such findings.

21. It is at this stage of the argument that Mr Kadri invokes *Tinizaray*. That was a case in which a mother and daughter had entered the UK illegally from Ecuador in 2001; the daughter had herself given birth to a daughter shortly afterwards. They had not come to the attention of the authorities until 2008. At that point they applied for indefinite leave to remain and were refused. The Judge quashed the Secretary of State's decision on the basis that she had not had, and had not sought to acquire, sufficient information about the child in order properly to discharge her duty under section 55 of the 2009 Act. At para. 25 of his judgment he specified the detailed information which she would need, both about the child's life and education in England and about the life she would lead, including the educational opportunities that would be open to her, if she were returned to Ecuador. He also said that the child's views needed to be ascertained but that that could not satisfactorily be done via her mother and that a "third party source" might have to be commissioned to provide "an appropriate assessment or report". In the absence of such information the decision was held to be fatally flawed. Mr Kadri submitted that the Judge's decision in the present case was flawed in the same way.

22. In *SS (Nigeria)* (above) Laws LJ warned against treating HHJ Thornton's observations in *Tinizaray* as enunciating anything in the nature of general principle (see para. 55); and Mann J with the concurrence of Black LJ, observed at para. 62 that the circumstances in which a tribunal should require further inquiries to be made, or evidence obtained, in order to satisfy itself as to the best interests of the child would be "extremely rare", saying

> "In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned."

In *R (Toufighy) v Secretary of State for the Home Department* [2012] EWHC 3004 (Admin) Beatson J also emphasised that the approach in *Tinizaray* was peculiar to the facts of that case (see paras. 103-4).

23. I do not believe that the Tribunal in the present case was under an obligation to require information to be obtained, or inquiries made, of the kind identified in *Tinizaray*. I would make two points in particular:

(1) Masooma was aged 16 at the time of the impugned decision and the hearing before the First Tier Tribunal. She was well able to express her own views and did so to the Tribunal both in her witness statement and in her oral evidence. She was represented by solicitors and counsel. (She was not represented separately from her parents, but there was no conflict in their interests requiring separate

representation.) Her situation was thus quite different from that of the child in *Tinizaray*, who was aged between seven and nine at the relevant dates.

(2) Masooma's case under article 8 was inherently much less compelling than that of the child in *Tinizaray*, who had lived in this country all her life, and had never known anywhere else; she did not even speak Spanish. For her to be removed to Ecuador, at the age of nine, would have been a most drastic disruption of every aspect her life. Although I would not necessarily endorse every aspect of Judge Thornton's reasoning, it is not surprising that he should have taken the view that such a step ought not to be taken without very full information. But Masooma's connection with this country was slender. She had been here for barely a year and had little more connection with the UK than she had with Afghanistan (where she had family and had visited). The Judge had already found, in her favour, that it was in her interests to remain in the UK, not least because of the better educational opportunities; but in addressing what was the determinative question, namely whether those interests should prevail over those of firm and fair immigration control, I do not believe that he required the same kind of detailed information as may have been appropriate in the *Tinizaray*.

24. As for the submission that it is wrong to hold against Masooma the deception practised by her parents, that is of course right as far as it goes. But there is no sign that that is what the Judge did. The fact is that she had no entitlement to leave to remain under the Rules. That was itself a factor which the Judge was entitled to treat as weighing heavily in the balance, without affixing any culpability on her.

25. Standing back from the detail of the arguments, there seems to me nothing in the Judge's decision to suggest that he approached his task in the wrong way. It is easy to feel sympathy at least for Masooma, for whom life in Afghanistan – if indeed she does have to remain there in the longer term – will very likely entail more difficulties and fewer opportunities than if she were allowed to stay in this country. But the fact that life would (probably) be better for her here is not in itself a sufficient reason for sidestepping the Immigration Rules, even if she is still entitled to be treated as a child. Even where section 55 applies an assessment has to be made of all the relevant circumstances, and questions of degree arise. The finding that it would be in Masooma's best interests to remain in the UK did not necessarily mean that her return to Afghanistan would be ruinous to her life or prospects. She would be moving, with her parents, at the age of 17, to the country of which she was a national, which she had visited before and where she has family. She would not, on the Judge's findings, face destitution. She has the advantage of a good secondary education, even if her fears of being unable to proceed to higher education turn out to be justified; and she has the advantage of having now learnt English. The facts are nothing like those of, say, *ZH* or *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979. I have no difficulty in understanding why the Judge found that the balance favoured her return. The decision was for him to take, and I see no ground on which we should interfere.

Lord Justice Briggs:

26. I agree.

Lord Justice Laws:

27. I also agree.