Neutral Citation Number: [2007] EWCA Civ 12

Case No: C5/2005/2716

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
HX/58241/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2007

Before :

LORD JUSTICE WALLER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE KEENE
and
LORD JUSTICE CARNWATH

- -

Between :

AA (Afghanistan)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**
The Medical Foundation for the Care of Victims of Torture	**Intervening**

- -

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

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Manjit Gill QC and Amanda Jones (instructed by **Messrs Malik & Malik**) for the **Appellant**
John-Paul Waite (instructed by **Treasury Solicitors**) for the **Respondent**
Nadine Finch (instructed by **Medical Foundation)** for the **Intervener**
Hearing date: 1st November 2006

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Judgment

Lord Justice Keene:

1. This appeal concerns the law and policy relating to unaccompanied minors who arrive in the United Kingdom and seek asylum, but whose claim under both the Refugee Convention and the European Convention on Human Rights (ECHR) is rejected. The Immigration Rules (HC395) make specific provision about the handling of asylum claims made by unaccompanied children in paragraphs 350 to 352, but for present purposes it is enough to note that paragraph 349 defines a child for these purposes as

> "a person who is under 18 years of age or who, in the absence of documentary evidence, appears to be under that age."

2. The appellant arrived in the United Kingdom on 22 January 2003. He claimed to be a citizen of Afghanistan and to be under the age of 18. He was not accompanied by any adult responsible for him. He claimed to fear persecution in Afghanistan from the authorities there, because his father had been a military officer working for the Communist Party and had been killed. He himself had been captured by the Taliban in 2000, detained and beaten. His brother had subsequently been kidnapped when the Northern Alliance came to power.

3. The Secretary of State rejected virtually all of this factual account. He was not satisfied that the appellant was an Afghan. He did not accept the account of events given by the appellant but, even if it had been authentic, the appellant had remained in Kabul for 7 months after allegedly leaving his home in fear. This both indicated that he had no genuine subjective fear and also showed that he was of no significant interest to the authorities. His asylum claim was rejected. In the light of an assessment by social services, the Secretary of State did not accept that the appellant was a minor. He was therefore treated as an adult. His claims under the ECHR were also rejected.

4. His appeal to an adjudicator was determined by a decision promulgated on 6 January 2004. The adjudicator accepted some parts of the appellant's claim. In particular, he found that the appellant was a citizen of Afghanistan. Despite some conflict in the various statements as to the appellant's date of birth, the adjudicator also found that it was likely that the appellant was born on 25 October 1986, thus making him 17 at the date of determination. In addition, it was accepted that his father had been a colonel working for the Communist Party and had been killed in 1995. His mother and some siblings were alive and lived in Logar, some 45 minutes by bus from Kabul, where he had an uncle.

5. The adjudicator, however, found that the appellant was not at risk from members of the Northern Alliance or the Communist Party, and that if returned to Afghanistan it would be to Kabul where the authorities would be able and willing to give him effective protection. The adjudicator concluded that there was no real risk to the appellant of persecution for a Refugee Convention reason nor would his return to Afghanistan involve a breach of his human rights under the ECHR. So far as Article 8 of that Convention was concerned, it was noted that he had family in Afghanistan and that his return would not be disproportionate. Consequently both the asylum and the human rights appeals were dismissed.

6. In the course of the hearing before the adjudicator, the appellant's counsel had relied on a Home Office Operation Guidance Note about Afghanistan, dated February 2003, paragraph 7 of which states:

> "Unaccompanied asylum seeking children who have no claim to stay in the UK and who would, had they been adults have been refused outright, should continue to be dealt with under UASC policy and given ELR to age 18 or for four years for those under 14, unless there are adequate reception arrangements in place."

That paragraph is set out in full at paragraph 72 of the adjudicator's summary of the submissions on behalf of the appellant. ELR stands for Exceptional Leave to Remain and UASC stands for Unaccompanied Asylum-Seeking Children. Reliance was also placed on a passage from the Home Office CIPU Report on Afghanistan dated October 2003, which recited UNHCR advice that "persons in particularly vulnerable circumstances should not be required to return to Afghanistan" and these persons included unaccompanied minors.

7. Despite these references, the adjudicator in his determination did not deal with the policy position, now that he had found the appellant to be a minor. This apparent failure formed the basis of a grant of permission to appeal to the appellate tribunal, that grant being contained in a decision dated 3 April 2004 which made it clear that permission in relation to the dismissal of the asylum appeal was being refused. The Asylum and Immigration Tribunal ("the AIT") in a determination dated 17 October 2005 held that there had been no error of law in respect of Articles 3 and 8 of the ECHR. As for the failure of the adjudicator to address the unaccompanied minor policy points, the AIT while accepting that the adjudicator could be criticised for this concluded that there was no material error of law. This was because, looking at all the circumstances,

> "on return it was reasonably likely that his family members in Afghanistan would be in communication and would ensure that the appellant would be looked after by members of his extended family." (paragraph 11)

This conclusion was based upon such facts as his mother and siblings being in Logar, with her having written to him only 1½ months before the hearing; the presence of his uncle in Kabul, with whom the appellant had spent 7 months; and the fact that in the past the appellant's extended family had taken active steps to ensure his care in Kabul. Consequently the AIT dismissed the appeal.

8. The grounds of appeal to this court draw attention to the way in which the AIT expressed itself when dealing with the Secretary of State's policy on unaccompanied minors. At paragraph 9 of its decision the AIT said this:

> "As can be seen from the wording to that policy as recorded by the Adjudicator at paragraph 72, the policy does not apply where there are adequate reception arrangements in place. The policy is plainly confined to 'unaccompanied minors, not to minors who can reasonably be expected to be met and received

> by family members on return. (We note that this is made even clearer by the wording of at least some other Home Office policy statements on UASCs (Unaccompanied Asylum Seeking Children): which, as we understand it, more expressly confine their scope to minors who have no family to return to and where adequate reception arrangements cannot be established)."

The AIT likewise said in respect of the UNHCR advice, referred to earlier in this judgment, that the words "unaccompanied minor" could not sensibly mean someone who had adequate reception or family support arrangements on return.

9. It is submitted on behalf of the appellant that this misunderstood the term "unaccompanied minor", which does not reflect whether or not adequate reception arrangements exist in his or her home country. A child is still an unaccompanied minor, irrespective of such arrangements, if he or she arrives in the United Kingdom under the age of 18 unaccompanied by a responsible adult.

10. As matter of definition I agree. That is borne out by the detailed definition provided by Regulation 6(3)(a) of the *Asylum Seekers (Reception Conditions) Regulations 2005* ("the 2005 Regulations), which makes no reference to conditions in the country of origin. Nor is it contended on behalf of the Secretary of State that the definition of an unaccompanied minor in his asylum policy documents brings in such conditions. Mr Waite on behalf of the Secretary of State accepts that for policy purposes an unaccompanied minor is someone who is

> "● under eighteen years of age, or who in the absence of documentary evidence appears to be under that age, and who is
>
> ● applying for asylum in his own right; and is
>
> ● without adult family members or guardians to turn to in this country". (see Asylum Policy Instructions, March 2001, paragraph 3.1)

He or she is not deprived of that status by virtue of the fact that there are adequate arrangements in their country of origin for their reception and care upon return. But this does, in my judgment, not avail the appellant. First of all, although the AIT's phraseology is open to criticism, it seems to me that at paragraph 9, which I have quoted earlier, the AIT was really seeking to deal with the circumstances where the policy of non-return applied, namely where adequate arrangements were not in place, rather than with the definition of unaccompanied minors. Secondly, and in any event, being placed in the category of unaccompanied minor does not by itself lead to the non-return of the individual. Under the policy, that does turn on whether adequate reception arrangements are available in the country of origin. So, as Mr Waite submits, the end result is the same, whether or not the AIT erred on the matter of definition.

11. The main thrust of the appellant's case is different. It is that the AIT misinterpreted the Secretary of State's policy by asking merely whether it was "reasonably likely" that adequate reception arrangements would be made for the appellant in Afghanistan.

It is argued that that is the wrong test, and that a stricter test than one of "reasonable likelihood" is applicable. Mr Manjit Gill, QC, on behalf of the appellant draws attention to a statement of government policy on this topic originally made by a Home Office minister in 1997 which remains in force and which is set out before us in a draft Policy Framework Document of March 2005. It reads as follows:

> "…simple humanity demands that any immigration decision to remove an unaccompanied child involves consideration of whether safe and adequate reception arrangements for the child can be made. We would not send an unaccompanied child to another country, whether or not that child had claimed asylum, unless we were satisfied that such arrangements had been made."

Mr Gill emphasises the word "satisfied" and the use of the past tense in referring to the making of the arrangements.

12. There are other policy documents which are along similar lines. A document issued by the Immigration and Nationality Directorate "APU Notice 2/2003" refers to the policy as being one of not removing any unaccompanied child

> "without ensuring that adequate reception and accommodation arrangements are available on return."

Other documents refer to the Home Office having to be *"satisfied"* that such arrangements are in place, failing which the child should be granted Discretionary Leave to enter or to remain for 3 years or until his 18th birthday, whichever is the shorter period: see Instructions on Processing Applications from Children, paragraphs 13.3.2 and 13.4.1.

13. None of these documents were cited to the adjudicator or the AIT. But Mr Gill, in my view rightly, submits that there is a duty on the Secretary of State at such an appeal hearing to put relevant policy material before such a tribunal to avoid it being misled. Reference is also made by Mr Gill to a number of international documents which emphasise the best interests of the child as being the guiding principle in such cases: see the UNCHR Guidelines February 1997 and the EC Council Directive 2004/83/EC. The Medical Foundation for the Care of Victims of Torture, which has been permitted to intervene in this appeal by way of written submissions, makes somewhat similar points. It draws attention to Article 3.1 of the United Nations Convention on the Rights of the Child which states that in all such cases "the best interests of the child shall be a primary consideration." All this indicates, it is said, that the Secretary of State must be satisfied that adequate reception and care arrangements are in place in the country of origin before such a child is returned. Consequently the AIT erred in applying a less stringent test and the adjudicator erred in not dealing at all with the Secretary of State's policy on unaccompanied minors.

14. For my part, I saw some initial attraction in the point made by the AIT when refusing permission to appeal to this court, namely that at the time when the AIT is assessing risk, it could be premature to have regard to efforts to trace parents, etc., in the home country, because of the problems and risks involved in contacting the authorities in that country. Moreover, some of the policy documents do refer to steps being taken

so as to deal with detailed arrangements, after any in-country appeal has been finally determined. Nonetheless, the Guidance Note relied on before the adjudicator and the more recent Instructions on Processing Applications from Children are clearly dealing with the grant of leave to enter or remain stage. They indicate that the Secretary of State's policy was at the relevant date that Exceptional Leave to Remain (or since April 2003) Discretionary Leave to Remain should be granted unless the Secretary of State is satisfied that adequate reception and care facilities are available.

15. On this appeal the Secretary of State concedes that that is his policy and that it imposes a stricter test than that of "reasonable likelihood" used by the AIT. It follows that the AIT failed to interpret and apply correctly a relevant policy. That is also true of the adjudicator, who did not seek to apply the policy on unaccompanied children at all. As for the Secretary of State's decision, that had been based on a misapprehension of the facts.

16. The position is that the AIT should have found an error of law by the adjudicator. He for his part should have found that the Secretary of State's decision was not in accordance with the law and allowed the appeal under section 86(3)(a) of the Nationality, Immigration and Asylum Act, 2002 ("the 2002 Act"). This court has held more than once that for the Secretary of State to fail to take account of or give effect to his own published policy renders his decision not "in accordance with the law": see, for example, *Secretary of State for the Home Department v. Abdi* [1996] Imm. AR 148 at 157. Likewise the AIT should have concluded that the adjudicator had made an error of law.

17. But the Secretary of State nonetheless seeks to resist the allowing of this appeal and the quashing of those decisions. He does so on a ground not advanced below but now set out in a respondent's notice. In the case of *C.A. v. Secretary of State for the Home Department* [2004] EWCA Civ 1165; [2004] Imm. AR 640, this court held that, once a material error of law has been found by the Tribunal to have been made by an adjudicator, the Tribunal must then decide under the 2002 Act

> "what if any relief to grant in the light of the facts arising *at the time it is considering the case*." (paragraph 15, per Laws LJ, with whom the other members of the constitution agreed; emphasis added.)

The relevance of this approach is that by the time of the AIT's decision in the present case, the appellant had passed his 18th birthday. Indeed, he was almost 19 by the date the AIT's decision was promulgated. The Secretary of State now submits that by that stage his appeal under the policy relating to unaccompanied minors had become academic. He had enjoyed in practice the protection afforded by presence in this country up to and indeed beyond his 18th birthday, which was all that the Secretary of State's policy would have provided him with in terms of discretionary leave to remain. There is therefore no reason why the appeal should be allowed.

18. However, Mr Waite on behalf of the Secretary of State does accept that the appellant has suffered a disbenefit as a result of the adjudicator's error. Had the appeal been allowed in January 2004, when the appellant was aged 17 years 2 months, and the matter been remitted to the Secretary of State for him to apply his policy on unaccompanied minors, it might have led to the grant of discretionary leave to remain

until the age of 18. Indeed, it must have led to such a grant, unless the Secretary of State was *satisfied* as to adequate reception arrangements in Afghanistan. During the period of such leave to remain, it would have been open to the appellant to seek to vary such leave by an extension of the period to which it related, and if that variation were refused, there would have been an in-country right of appeal under section 82(2)(d) of the 2002 Act: see section 92(1) and (2) of that Act. That opportunity has been lost by the appellant because of the adjudicator's error, concedes Mr Waite. Without any existing leave to remain, the appellant was and is in the position where any application for leave to remain would have to be made from outside the United Kingdom, unless he can put forward an asylum or human rights claim which the Secretary of State decides amounts to a fresh claim.

19. As a matter of law, Mr Waite's concession seems to me to be right. Section 92(1) places a general prohibition on in-country appeals, with certain exceptions. Section 92(4)(a) creates an exception where the appellant has made an asylum or human rights claim while in the United Kingdom, but it is for the Secretary of State to decide (subject to judicial review) whether any further submissions by an appellant raising asylum or human rights issues amount to a fresh claim and such submissions will only amount to a fresh claim if they are significantly different from the material previously considered: see paragraph 353 of the Immigration Rules. Subject, therefore, to the limited scope of judicial review proceedings, it would be up to the Secretary of State to determine, in effect, whether the appellant could pursue an appeal from within this country. Procedurally the appellant's position is worse than it might have been but for the adjudicator's error.

20. Counsel for the Secretary of State submits that that is merely a technical disadvantage suffered by the appellant and that no substantive prejudice has resulted. Any application to vary leave to remain would have had to have set out the grounds on which leave to remain should be extended. The appellant had no basis under the Immigration Rules for such an extension, since he did not come into one of the categories (for example, a student or the spouse of a person settled here) recognised under those Rules as persons who may be entitled to leave to remain. So the basis of any such application could only have been a claim for asylum or a claim under the ECHR. But the latter would have been caught by the provision of paragraph 353 of the Immigration Rules, because the original asylum and human rights claims had already been validly determined by the adjudicator. The only error by the adjudicator had concerned neither the asylum nor the human rights claim but only the Secretary of State's policy about discretionary leave for unaccompanied minors in certain circumstances. The asylum and human rights claims had been validly disposed of. Consequently, argues Mr Waite, the appellant is not in reality in any different position now than he would have been, had leave to remain been granted until his 18th birthday by the Secretary of State. He might in the latter case have had the right to an in-country appeal against a refusal to vary his leave to remain but the appeal would have had no basis for success.

21. Mr Gill contends that the appellant has been denied the advantage of an in –country right of appeal on an application to vary leave and is in a more precarious position as a result. This is not a mere technicality. It means that the appellant would have had legal rights available to him which he has now lost. Moreover, there was some change in his circumstances, because there was evidence put before the AIT that in

June 2005 he became engaged to a British national, and this new factor and any other changes could have been put forward during such an appeal process.

22. I recognize the importance to be attached to the loss of the potential right to an in-country appeal against any refusal of variation of leave to remain. It is true that the chances of such an appeal eventually meeting with success may have been slim: on this I see the force of the points made by Mr Waite about the substantive merits of such an appeal. Nonetheless, it is to be borne in mind that such an appeal process would have afforded the applicant the advantage of an independent judicial consideration of those merits as they stood at the time. That is a significant advantage when compared with the arguments which could be put forward on a judicial review of a decision by the Secretary of State that no new asylum or human rights claim had been advanced. The appellant has lost that advantage because of the errors of law by the adjudicator and the AIT.

23. He cannot, of course, now be restored to the position he would have been in, had he been granted discretionary leave to remain until his 18th birthday. Mr Waite is right to emphasise that. But the loss which the appellant has suffered is a consideration which the Secretary of State should consider in the exercise of his discretion as to whether the appellant should now be granted any further leave to remain and, if so, for how long.

24. The same seems to me to be true of another disbenefit suffered by the appellant as a result of the errors of law. In written submissions accepted by the court after the close of oral argument, the intervener has made the point that if the appellant had enjoyed discretionary leave to remain until his 18th birthday, any application by him made before that leave expired to extend it would have resulted in an automatic extension of leave until the application (and any consequential appeal) had been decided or withdrawn. That is the consequence of section 3(C) of the Immigration Act 1971. Moreover, while lawfully in this country because of such an automatic extension of leave, he would have been entitled to work and to obtain various forms of assistance under the Children Act 1989. Neither of those benefits is available to an overstayer.

25. Legally the propositions seem to me to be sound. Once again, the appellant cannot now obtain these benefits as of right: as is said on behalf of the Secretary of State, this court cannot put the appellant into the position in which he would have been, had discretionary leave been granted. But, again, there can be no doubt that he has suffered a disbenefit as a result of the legal errors made in this case, and that is something which the Secretary of State ought now to take into account. I accept that the conferring of the benefits relied on by the intervener (and adopted on behalf of the appellant by Mr Gill) may not be the purpose of a grant of discretionary leave – in that Mr Waite seems to be right. But such a grant nonetheless has those potential consequences and they cannot be ignored

26. There is a further point advanced by Mr Gill about the adjudicator's decision. It is argued that the adjudicator erred in law by arriving at his finding as to the appellant's general credibility by referring to answers given by the appellant in interview. As a matter of the Secretary of State's policy, as it stood in March 2003 when the interview took place, an unaccompanied minor seeking asylum should not have been interviewed, other than in exceptional circumstances, and even then only by a

specially trained officer and in the presence of a responsible adult. That is accepted by Mr Waite on behalf of the Secretary of State.

27. Consequently, submits Mr Gill, since no-one suggests that there were exceptional circumstances here, the asylum interview should not have taken place and the adjudicator when assessing credibility should not have taken account of the answers given by the appellant at it. The attention of the adjudicator should have been drawn by the Secretary of State's representative to the policy on interviewing unaccompanied minors, so as to avoid him being misled: see *R v. Special Adjudicator, ex parte Kerrouche*[1997] Imm. AR 610.

28. As a matter of law, that is right. The Secretary of State should draw relevant parts of his policy to the adjudicator's attention. Merely because those policy documents are publicly available in print or on a website is not enough: where issues of risk of persecution are involved, a decision to return a person or not to his country of origin should not depend on the diligence of that person's representatives. Of course, at the hearing before the adjudicator the Secretary of State's presenting officer was contending that the appellant was not a minor. But he was aware that the contrary was being asserted by the appellant and therefore that the adjudicator might make such a finding. Issues of risk of persecution might therefore have to be dealt with on that factual basis.

29. To all this, Mr Waite has two responses. First, he submits that the adjudicator did not rely, when reaching his finding on general credibility adverse to the appellant, on what the latter had said in interview. The adjudicator noted a number of inconsistencies in the account given by the appellant and these accounts were principally contained in the appellant's witness statement and his oral evidence. Secondly, and in any event, the adjudicator took into account the age of the appellant when considering credibility. At paragraph 88 of his determination, the adjudicator said:

> "I have borne in mind that he is still young (whatever date of birth is correct) and may well at times have been confused or muddled."

Therefore there has been no substantial prejudice to the appellant arising from the fact that the asylum interview was before the adjudicator.

30. I take that second argument first. I do not find it persuasive. The adjudicator was certainly taking into account, in a very general way, the age of the appellant, though not specifically his age at interview, rather his age generally. At interview it was in fact 16. But the reference in the passage relied on by the Secretary of State to "whatever date of birth is correct" indicates that the adjudicator did not approach his assessment of conflicts between evidence and answers at interview specifically on the footing that the appellant had been a minor at the time. Moreover, the adjudicator seems to have been quite unaware, understandably, that a responsible adult should have been present, and that the interview should have been conducted by a specially trained officer, and unaware also of the detailed considerations which underlay the Secretary of State's policy on not interviewing unaccompanied minors. The Immigration Rules themselves require an interviewer, if an interview takes place, to

> "have particular regard to the possibility that a child will feel inhibited or alarmed. The child should be allowed to express himself in his own way and at his own speed." (paragraph 352)

One notes that, shortly after this adjudicator's decision, the then Chief Adjudicator issued a Guidance Note for adjudicators about the conduct of appeal hearings by adjudicators where the appellant was an unaccompanied minor seeking asylum: Guidance Note No. 8, April 2004. That reflects the range of considerations which need to be borne in mind.

31. For my part, therefore, I cannot accept that the very brief and general reference by the adjudicator to the age of the appellant, "whatever date of birth is correct", amounted to a sufficient recognition of the inherent dangers in relying on an interview with a 16 year unaccompanied asylum seeker. His apparent unawareness of the general prohibition on such interviews because of those dangers is not remedied by such a brief reference, which did not take adequate account of those dangers.

32. I therefore turn to the other argument advanced on this by Mr Waite, namely that the adjudicator did not rely on the interview. In order to consider this argument, I have been back and looked in detail at the adjudicator's reasoning. His finding about credibility was undoubtedly based on certain inconsistencies in the appellant's accounts. At paragraph 96 the adjudicator identifies six factual matters where inconsistencies existed. He does not identify in each instance the documents or oral evidence which form the source of such inconsistencies, and therefore one can only assume that he was accepting the submissions on this from the Secretary of State's representative. Those submissions can be found at paragraph 56 to 58 of the determination.

33. I do not propose to go through them in detail, but the overall position is this: two out of the six inconsistencies do not involve reference to the asylum interview (whether he was the oldest child and whether he had family in Afghanistan). In the other cases, there is reference to his answers in interview, which are said to conflict with his oral evidence at the hearing. In three of those four cases, the conflict is both with his interview answers and with his witness statement. In the fourth, dealing with how long he had spent in Kabul before leaving Afghanistan, his oral evidence is contrasted with his asylum interview: see paragraph 58(4), final sentence.

34. So the overall position is that the inconsistencies found by the adjudicator derived partly but not entirely from answers given in interview. The problem to which that gives rise is that it is impossible to know what finding the adjudicator would have made on credibility, had he either ignored or treated with great caution the interview material. Clearly that material had been relied on by the Secretary of State's representative and it must have had some influence on the adjudicator's assessment of credibility.

35. It seems to me that one cannot be sure that the adjudicator would have made the same finding, had he been aware of the policy on such interviews. If that is so, the point had the potential to affect the lawfulness of the adjudicator's decision on the asylum and human rights claims, and not just the issue of the discretionary leave to remain. There are, however, problems about those claims. The decision on the asylum claim was not before the AIT on appeal: permission to appeal that decision to the AIT had

been expressly refused and the refusal was never challenged. Consequently the AIT had no jurisdiction to deal with any appeal against the asylum claim. That follows from Rule 62(7) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. The human rights appeal in respect of Articles 3 and 8 was before the AIT, although it is right to say that no-one even at that stage appears to have been aware of the Secretary of State's policy on interviewing unaccompanied minors. Once again, it is the Secretary of State's representative who is in the better position to make sure that the AIT is aware of a policy relevant to its decision.

36. This line of argument about the breach of policy in interviewing this unaccompanied minor was not a point taken before the adjudicator or the AIT. Is it open to the appellant to take it now before this court? It has been held in this court (in a decision to which I was party) that the predecessor of the AIT, the Immigration and Asylum Tribunal, only had jurisdiction to consider those points of law to be found in the actual or amended grounds of appeal which were before it: *Miftari v. Secretary of State for the Home Department* [2005] EWCA Civ 481, paragraphs 23 and 24. That was subject to an exception in respect of obvious points of law under the principle in *Robinson* [1998] QB 929. I can see no reason why that proposition does not remain good in respect of appeals, such as this one, to the AIT, governed by the transitional provisions in the *Asylum and Immigration (Treatment of Claimants etc) Act 2004*. This court can only deal with an appeal on points of law arising from the AIT's decision: see *section 103B(1)* of the 2002 Act and *Miftari*, paragraph 28. Consequently, it would seem that this court can only allow an appeal on points of law in respect of which the AIT had jurisdiction, either because the point was raised before it in the grounds or because it was an obvious 'Robinson' point.

37. However, that is not a complete obstacle to the appellant raising this argument about the interview before this court. Even though "out of an abundance of caution" Mr Gill has sought leave to amend his grounds of appeal to us, he does not in my view need to do so. He has already established errors of law by the AIT, and indeed by the adjudicator, on grounds properly taken before the AIT. This present additional argument arises in response to a Respondent's Notice from the Secretary of State in which the respondent seeks to uphold the AIT's decision on a ground which *he* does not seem to have raised before the AIT and which certainly formed no part of that body's reasoning for its decision, namely that the appellant was by then past his 18th birthday. That is raised in relation to whether relief should be granted. Mr Gill's point really is a reply to that, and both sides' arguments relate not to whether the AIT erred in law, which it patently did, but to whether this court should now grant relief to the appellant. It is not therefore a jurisdictional issue. Mr Gill is entitled to argue that, if the matter now goes back to the Secretary of State, the end result will not inevitably be the same, because the appellant's credibility will need to be re-assessed, bearing in mind the problems about the earlier interview.

38. In my view, this point about the interview of the appellant as a minor, insofar as it affects our discretion, does not require a formal amendment to the grounds of appeal, though if it did, I would grant leave for it. It is true that the point was raised by the appellant only in a supplementary skeleton argument produced the day before this appeal hearing. On the other hand, the point was taken by the Medical Foundation for the Care of Victims of Torture in its submissions dated 12 June 2006, over four months ago, and so the Secretary of State should not have been taken by surprise by

the argument, which Mr Gill has in effect adopted. It is an argument which, as I have indicated, has in my judgment some merit.

39. Once this deficiency in the adjudicator's approach is added to the deprivation of the appellant of his potential right to an in-country appeal as someone with discretionary leave to remain, then it seems to me that the AIT's decision cannot stand. The AIT should have found that the adjudicator's error of law was material. I was initially of the view that this would mean that the human rights appeal should be allowed and that the matter should be remitted to the Secretary of State on that aspect, as well as on that of the exercise of his power to grant discretionary leave to remain. However, having read Carnwath LJ's judgment in draft, I am persuaded that my initial view was wrong. The AIT did not have jurisdiction to allow the human rights appeal on this new point about the interview of the appellant, because it was not raised before them in the grounds of appeal: see *Miftari*. As a result, this court cannot allow the human rights appeal on this ground, which is only relevant to the exercise of the court's discretion as to the granting of relief because of the error of law referred to in paragraphs 15 and 16 of this judgment.

40. For that reason, which is more fully developed in Carnwath LJ's judgment, I would allow the appeal on the grounds that the decision of the AIT was not in accordance with the law, and direct the Secretary of State to reconsider whether discretionary leave to remain should now be granted. In considering that issue, the Secretary of State will need to take into account the apparent breach of his policy on interviewing minors when he decides what weight (if any) he can properly attach to the appellant's answers in interview and to some of the adjudicator's findings of fact. That aspect will be relevant, therefore, to his consideration of whether such leave to remain should be granted. Moreover, were there to be further representations submitted to him raising asylum or human rights issues, he would have to decide whether they amounted to a fresh claim under paragraph 353 of the Immigration Rules, and in considering whether the representations were significantly different from the material previously considered, he would need to bear in mind the problems about the appellant's interview to which I have referred. That, however, does not affect the order this court should make.

41. For the reasons given I would allow the appeal and make the order indicated by Carnwath LJ.

Lord Justice Carnwath :

42. I gratefully adopt Keene LJ's exposition of the legal and factual background.

43. On the issue on which permission to appeal was granted, it is now clear that the AIT erred in the interpretation of the policy relating to unaccompanied children, for the reasons given by Keene LJ. The live question is what consequences that error should have, given that by the time of the AIT's decision the claimant was over 18, and therefore the policy no longer applied to him. This question was not considered by the AIT, since they dismissed the appeal on other grounds, but it has been raised by the Secretary of State by a respondent's notice. At first sight the answer seems obvious: why send the case back to the Secretary of State for reconsideration under a policy which no longer applies?

44. Two points are made by the appellants in answer: (i) that the claimant has lost procedural and possibly substantive advantages which would have been his had the case been remitted to the Secretary of State by the Adjudicator; (ii) that the Adjudicator and the AIT erred in any event in failing to take account of the restrictions on interviews of children, and that remittal would give an opportunity for this failure now to be rectified.

45. The first point only emerged with any clarity during the course of the hearing before us. This was unfortunate, since I am not convinced that its implications have yet been fully explored, even after the exchange of written submissions permitted following the hearing. However, since it is concerned solely with the form of remedy, and arises out of the respondent's notice, it is a point properly open to the appellant. We must therefore deal with it as best we can on the basis of the arguments at the hearing, supplemented by the more recent written exchanges.

46. The claimed procedural advantage has been explained by Keene LJ. The premise is that, if his case had been considered properly by the Adjudicator, the claimant would have had at least the possibility of obtaining discretionary leave to remain until his 18th birthday, and of applying during that time for a "variation" to extend it, subject to a statutory right of appeal on the merits. As things are, the claimant's only potential avenue to advance his case is a "fresh claim" under Rule 353 of the Immigration Rules, a refusal of which would only be challengeable on the more limited grounds available on judicial review.

47. Having taken hurried instructions during the hearing, Mr Waite was willing to concede the premise. As I understand it, that remains his position in the more recent exchanges. He points out, however, that even the procedural advantage may be somewhat illusory, in view of the Secretary of State's power to restrict any appeal right under the certification provisions contained in ss 94 and 96 of the 2002 Act (2002 Act ss 94-96). It is clear, in any event, that by the time the matter came before the AIT (September 2005), the policy had ceased to be applicable. As I think Mr Gill accepts, the AIT could not have directed the Secretary of State to redetermine the case under *that* policy. His argument is that the Secretary of State might be persuaded to treat the loss of that procedural advantage, along with any other relevant changes in circumstances, as a factor to be taken into account in deciding whether now to grant exceptional leave.

48. Put in that way, as it was at the hearing before us, I did not find the argument persuasive. The purpose of the policy was to provide protection for minors, not procedural advantages for those of full age. Consistently with that purpose, I can see no reason for the Secretary of State to regard the loss of this purely procedural advantage as a material factor. If there are new factors of potential significance to the human rights claim, they can be advanced under rule 353. If there are no such new factors, the Secretary of State should not be expected to reconsider the case, simply for the purpose of providing a platform for a further appeal, which on this assumption would be doomed to failure.

49. However, as Keene LJ has explained, the exchanges since the hearing suggest that we may need to look at the point in a new light. It now appears that the advantage may not have been purely procedural. The further submissions of the Medical Foundation, as intervener, have provided examples of how the grant of exceptional leave would

have carried with it practical advantages during the claimant's minority, and the possibility of prolonging them after he had become an adult. The other members of the court are, I understand, satisfied that these points are sufficient to raise at least an arguable case that the claimant has lost benefits of real substance, and that the loss of those possible benefits is a matter which could be material to the Secretary of State's decision whether to grant exceptional leave. Although I do not feel confident that we have been able to examine the basis of those submissions in sufficient detail, I do not propose to dissent from that conclusion.

50. The other main question, relating to the original interview, raises quite different considerations in my view. It is not relevant simply to the form of remedy, or as a response to the point taken in the respondent's notice. It involves a belated attack on the foundation of the Adjudicator's decision on the substance of the claim.

51. I accept of course that the policy governing interviews of minors is of great importance. If the tribunal becomes aware that an interview has been carried out in breach of those guidelines, that fact should clearly be taken into account in considering its weight, possibly by excluding it altogether. That may not always be the right response, since in some circumstances the claimant may wish himself to rely on it, for example to show consistency. Failure by the tribunal to take account of the breach may be an error of law justifying the setting aside of the decision. But that depends on the point being taken in a manner, and at a time, which the law allows.

52. I agree with Keene LJ's analysis of the limited but potentially significant role which the interview played in the Adjudicator's decision. His review of the case-law demonstrates: first, how the point could have been taken by way of appeal on law; but, secondly, why the claimant's failure to do so meant that neither the AIT nor this court had power to consider it as a substantive objection to the Adjudicator's decision.

53. It is the next stage of the claimant's argument which I find more difficult. The suggestion is that, once the AIT's decision has been shown to be erroneous in law, the issue is not the validity of the original decision, but the nature of the relief which should have been granted by the AIT, and for this purpose the Secretary of State may be directed to review the overall merits.

54. I cannot accept this approach. Having found an error of law under section 86 of the 2002 Act, the AIT may give a "direction for the purpose of giving effect to its decision" (s 87). I accept that the discretion so conferred is not necessarily confined by the strict limits of the grounds of appeal to the AIT. Sometimes, the finding of an error on a limited point may require the reopening of the whole decision, if there is a significant risk that the error affected the overall result. For example, I accept that if the interview point had been taken as a ground of appeal, the fact that there were other possible reasons for not accepting the claimant's account would not have saved the decision. However, the purpose of the discretion is to ensure that there is an effective remedy for the errors of law which have been established, not for errors which could have been asserted but were not.

55. The error of law which we have found related solely to the circumstances in which a minor can be removed from the country. It had no bearing on the substance of the claim, whether under the refugee convention or the Human Rights Act, insofar as it was based on the claimant's alleged experiences in Afghanistan. If the matter has to

be reconsidered by the Secretary of State, he would be entitled, if not bound, to do so against the background that those claims had been conclusively rejected. I accept that, in assessing the claimant's credibility for the purposes of a current request for exceptional leave, he would not be bound by those decisions, and he would no doubt be wise not to give any weight to the original interview. But that is not the same as permitting the claimant to reargue his original claim on grounds which he failed to take at the appropriate time. In my view, an order for that purpose would not have been an option properly open to the AIT, as a remedy for the limited error of law which has now been established.

56. I find it unnecessary to decide whether a formal amendment was needed to the notice of appeal. There can be no doubt in my view that good practice requires formal notice of such a point to be given in some way as soon as it arises. In this case no satisfactory explanation has been given for the lateness of the application to amend. The point was noted in the Medical Foundation's submissions in June, but not adopted formally by the appellant. Even in the supplementary skeleton argument signed by Mr Gill and Miss Jones on 24th October, a few days before the hearing, it was only mentioned by way of a footnote without any indication that it was to be raised as a separate issue in the appeal.

57. The principle of "anxious scrutiny" may justify a "more relaxed approach" to procedural failures in this area of the law (see *Kerrouche* [1997] EWCA Civ 2263, per Lord Woolf MR). However, the discipline of pleadings remains important. Issues of this kind need to be clearly formulated, in time for those advising the Secretary of State to consider them and respond, and for the respective arguments to be deployed before the court in an orderly way. Otherwise there is a serious risk that an issue will not be properly digested or understood, and a decision may be reached which seems to do justice in a particular case, but has unforeseen complications for the development of the law more generally.

58. In conclusion, with less confidence than my colleagues, I agree that the appeal should succeed. I agree generally with Mr Waite's submissions as to the appropriate form of order in those circumstances, in particular that, rather than "remit" to the Secretary of State, our power is to give a "direction" under section 87 of the 2002 Act. I would accordingly direct the Secretary of State to consider whether, in the light of the judgment of the court, and of any further representations made by the claimant within 21 days of the order (or such further time as the respondent may allow), a period of leave to remain should now be granted, and if so how long.

Lord Justice Waller:

59. For the reasons given by Keene LJ, I agree that the court should declare that the AIT erred in law and that the Secretary of State should be required to reconsider the matter, in accordance with the form of order proposed by Carnwath LJ.

60. On those limited issues on which there is a difference between the other members of the court, I respectfully prefer the approach of Keene LJ. In my view where there is an error of law of the kind identified in this case, relating to the age of an appellant when his case fell originally to be considered, the court should be cautious in accepting that, since at the appeal stage the appellant is now over the required age, the original error is not material. It may well be that the appellant cannot be put back precisely into the

position that he was entitled to be in, but advantages that he would have had if the error had not occurred albeit described as procedural should not in my view be dismissed lightly. I would therefore agree with Keene LJ that the loss of such potential advantages (procedural or substantive) is a factor which should be taken into account by the Secretary of State.

61. As regards the interviews and the policy relating thereto, I am clear that the appellant was entitled to rely on the fact that on any reconsideration, the Secretary of State would have to abide by his own policy and place no reliance on the interviews. As a response to a point taken by the respondent to the appeal, I do not think that strictly any amendment to the grounds of appeal was called for. But Carnwath LJ's point on clarifying issues remains an important one, and even if amendment was not strictly called for once the respondent had raised the "not material point", a clear identification of the points to rebut that argument was called for at least in a skeleton.

62. I would thus agree that an error of law has been established and that the appellant has established a right to have the question whether leave to remain should be considered by the Secretary of State. He should do so in the light of our judgments and in the light of the appellant's current circumstances.